

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3322

ROSEMARY POSEY BOYETT, ET AL.,

Plaintiffs,

VERSUS

LYKES BROS. STEAMSHIP, ET AL.,

Defendants.

KEENE CORPORATION, ET AL.,

Respondents-Appellants,

VERSUS

ROSEMARY POSEY BOYETT, ET AL.,

Movants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(MC 91 4377 E)

(June 10, 1993)

Before POLITZ, Chief Judge, and DUHÉ, Circuit Judge, and MAHON,
District Judge.¹

DUHÉ, Circuit Judge:²

¹ Senior District Judge of the Northern District of Texas,
sitting by designation.

² Local Rule 47.5 provides: "The publication of opinions
that have no precedential value and merely decide particular cases
on the basis of well-settled principles of law imposes needless
expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion
should not be published.

This appeal arises from a miscellaneous proceeding in which Keene Corporation and its attorneys, Walter Watkins and John Cosmich, were sanctioned pursuant the court's inherent powers and 28 U.S.C. § 1927. When the district court determined that the Judicial Panel for Multidistrict Litigation ("MDL Panel") had not formally remanded the underlying case, Boyett v. Keene Corporation, Civil Action No. 90-2965, it declared a mistrial. After the mistrial, the district court conducted this miscellaneous proceeding in which it held that Keene and its attorneys had engaged in a course of conduct which resulted in needless delay of the proceedings thereby increasing the cost of litigation to the parties and had acted in bad faith and unnecessarily delayed the litigation. We affirm.

Background

This proceeding arose out of the aborted jury trial of an asbestos death case by the heirs of a person who was alleged to have died from Mesothelioma caused by exposure to asbestos. The action also included cross-claims for indemnity by certain co-defendant shipowners against Keene Corporation. The trial began on December 2, 1991, but ended in a mistrial the next day when counsel for Keene claimed the court lacked jurisdiction and refused to waive delays.

The Boyett case was part of the consolidated asbestosis cases known in the Eastern District of Louisiana as John Hannon v. Waterman Steamship Corp., et.al, Civil Action 80-1175, Flight 31.

It was later consolidated with all federal asbestos cases under the Rules of Procedure on Multidistrict Litigation in the Eastern District of Pennsylvania before Judge Charles Weiner. After several telephone settlement conferences in early October, 1991, attended by Judge Weiner, Magistrate Judge Wynne of the Eastern District of Louisiana,³ and the attorneys for the parties, Judge Weiner expressed his intention to remand the case back to Louisiana for trial before Magistrate Judge Wynne. Keene Corp. objected to the remand of the shipowner's indemnity claim, but never indicated any objection to the remand of the plaintiffs' death claim to Louisiana for trial.

The parties, as in numerous of the Hannon cases before, orally consented to trial before Magistrate Judge Wynne, and she set the trial for December 2, 1991. On October 14 and November 12, 1991, Boyett's counsel wrote to Judge Weiner requesting him to sign a remand order noting that the parties had consented to trial before the Magistrate Judge and that a trial date had been set. On November 14, Keene's counsel also wrote Judge Weiner requesting that the shipowner's claim not be remanded with Boyett's death claim. Keene's counsel never indicated in any way that Keene would object to remand of the death claim. Up to the day of trial, however, no remand order had been received by any of the parties.⁴

³ Magistrate Judge Wynne had been assigned the responsibility of the Hannon cases in the Eastern District of the Louisiana since 1981. She had tried approximately 400-500 cases involving these and other parties.

⁴ Consistent with his stated intent, Judge Weiner entered a suggestion of remand to the MDL Panel on November 25, 1991. The

Despite a December 2 trial date, it was not until November 15 that Keene sent to plaintiff's counsel the report of its expert, Dr. Harry Demopoulos. Plaintiff's counsel immediately requested that Dr. Demopoulos be made available for deposition. Dr. Demopoulos was not made available for deposition until November 26, and this was only after the court ordered that his testimony be excluded if he were not produced within 24 hours.

Approximately two weeks before trial, during the pretrial conference, Keene informed Magistrate Judge Wynne that it was "considering" withdrawing its consent to have the Magistrate Judge preside over the trial.⁵ This surprised the Magistrate Judge

formal remand order from the MDL Panel, however, had not been filed with the clerk in the Eastern District of Louisiana prior to the beginning of trial. Rule 14(f) provides for a 15 day waiting period before remand orders are entered as follows:

(f) Conditional Remand Orders.

(i) When the Panel has been advised by the transferee district judge, or otherwise has reason to believe . . . that remand of the action or actions is otherwise appropriate, an order may be entered by the Clerk of the Panel remanding the action or actions to the transferor district court. The Clerk of the Panel shall serve this order on each party to the litigation but, in order to afford all parties the opportunity to oppose the remand, shall not send the order to the clerk of the transferee district court for fifteen days from the entry thereof.

(ii) Any party opposing the remand shall file a notice of opposition with the Clerk of the Panel within the fifteen-day period

⁵ Keene contends that Magistrate Judge Wynne harbored a personal bias against them and that she intended to act on that bias.

because this was the first case in nine years over which Keene had refused to allow her to preside. Judge Wynne immediately contacted District Judge Livaudias who agreed to preside over the case on the original December 2 trial date.

In the signed pretrial order, Keene made no objection to the remand of the case. Given the procedural leeway that is the hallmark of the Hannon litigation, the absence of a written order confirming a remand that had been given orally was not deemed significant enough by the court or either party to require mention in the pretrial order. On December 2, witnesses were sworn, a jury was impaneled, and the court proceeded with a full day of trial. At the end of testimony that day, as the judge was leaving the bench, Keene's counsel advised the court's law clerk that a problem might exist because a written order of remand had not been entered in the case.

The next morning, the trial judge asked whether any party objected to jurisdiction. Walter Watkins, co-counsel for Keene, stated that he did. Watkins informed the court that even if Judge Weiner were to sign an order of remand and fax it to the court for filing, the Rules of Multidistrict Litigation imposed a 15-day waiting period to accommodate the filing of objections. Watkins also stated that Keene would object to remand of the case and would insist on the 15-day waiting period. The court declared a mistrial.

That afternoon, the court held a hearing to determine whether sanctions should be imposed upon Keene and its counsel. Judge

Weiner, who attended the hearing by telephone, advised that Keene's counsel had never indicated that they would insist on a formal suggestion of remand or that they would object to the remand. The court concluded that Keene and its counsel had acted in bad faith and that sanctions were appropriate.

Discussion

The Court assessed sanctions against Mr. Cosmich and Mr. Watkins pursuant to 28 U.S.C. § 1927, which provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." An award under § 1927 must be supported by "evidence of recklessness, bad faith, or improper motive." Hogue v. Royse City, 939 F.2d 1249, 1256 (5th Cir. 1991). Awards under § 1927 are penal in nature and § 1927 requires strict construction so that the legitimate zeal of an attorney in representing his client is not dampened. Monk v. Roadway Express, Inc., 599 F.2d 1378, 1382 (5th Cir. 1979), aff'd Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). Pursuant to its inherent power, the district court imposed sanctions against Keene Corp. for acting in bad faith for the purpose of oppressively delaying litigation. See Chambers v. NASCO, Inc., --U.S.--, 111 S.Ct. 2123, 2133 (1991). An award of sanctions under either 28 U.S.C. § 1927 or the court's inherent power is reviewed for an "abuse of discretion." Chambers, 111 S.Ct. at 2138; Browning v. Kramer, 931 F.2d 340, 344 (5th Cir. 1991).

Keene and its counsel argue on appeal that the imposition of sanctions was a clear abuse of discretion. Keene attacks each incident of conduct which the district court included in the "course of conduct" leading to the imposition of sanctions. What Keene and its counsel fail to recognize, however, is that while a single incident alone might not have provoked sanctions, all of Appellants' actions, taken as a whole, demonstrated bad faith on their part. This conduct resulted in a breach of the trust that had allowed for the expeditious resolution of the Hannon litigation. Additionally, while this Court in the same situation might not have imposed sanctions, our review is limited to determining whether the trial court abused its discretion. Given the limited nature of our review, we find that the court did not abuse its discretion.

Appellants contend that their objection to the court's jurisdiction was not unreasonable or in bad faith, and in fact was meritorious.⁶ In regard to the timing of their objection, they argue that the undisputed evidence shows that they did not know of the jurisdictional defect until the first day of trial.⁷ Sanctions, however, were not based on the raising of this issue, but on the manner in which it was raised. Neither Keene nor any other party may have been aware of the jurisdictional defect, but

⁶ We need not determine whether the district court in fact had jurisdiction to decide the merits of this case, and we leave that issue until it is directly challenged.

⁷ Apparently, this evidence consists of counsel's own testimony and the fact that they never mentioned the jurisdictional problem until the second day of trial.

Keene did know that it would object to the remand if the district court acted sooner than 15 days following remand. It is the act of choosing not to reveal a known objection until the second day of trial that caused the multiple proceedings whether the objection itself was valid or not.

In addition to Keene's actions surrounding the jurisdictional problem with the case, several other incidents occurred which the trial court included in the "course of conduct" prompting sanctions. First, by way of background, in conducting the Hannon consolidated asbestos litigation, Magistrate Judge Wynne had afforded the attorneys considerable leeway in the rules and followed informal procedures. These parties had been involved in asbestos litigation for nine years and had worked under this informal set of rules which were designed to reduce the costs of litigation and facilitate the efficient resolution of claims. Examples of these include: not insisting on formal, signed pretrial orders, extending discovery cutoffs to the last minute, allowing counsel for Keene, who is located in Jackson, Mississippi, to attend many conferences by telephone, not requiring formal consent to proceed before a magistrate judge and permitting orders to be signed on the morning of trial.⁸

⁸ The fact that Judge Weiner did not enter the remand order until 8 days before trial, although he was aware of the 15-day waiting period, is consistent with the procedural leeway followed in these cases. Additionally, had Judge Weiner known that Keene was going to object to the remand, he would not have remanded the matter the way he did. In his December 3, 1991 conversation with counsel, Judge Livaudias, and Magistrate Judge Wynne, Judge Weiner asked Mr. Cosmich for his explanation of what was said during the October 1, 1991 settlement conference:

During the pre-trial proceedings in the Boyett case, however, Keene Corporation and its counsel decided they would no longer follow the informal procedure. For example, Keene and its counsel were aware during the entire pre-trial history of this case that the Magistrate Judge believed that all parties would consent to trial before her, and she had even set the trial date. Very shortly before trial, Keene's counsel notified the Magistrate Judge that they were withdrawing their consent. Next, Keene and its counsel represented to the Magistrate Judge repeatedly before trial that its expert witness, Dr. Demopoulis, was unavailable for deposition, first because he was in trial, then because he was traveling. Five days before trial, the court ordered his testimony excluded unless he was produced for deposition by noon the next day. He was immediately available for deposition while vacationing

MR. COSMICH: What I understand, what he [Watkins] just told you is what we did at the last conversation. I still objected to the remand and the indemnity claim with this claim --

JUDGE WEINER: You certainly would have fooled me that you were objecting to it. I never, never would send it back if I had understood you objected; I would have asked you to file the papers and I would have ruled on the thing --and the only thing Keene said they were not going to settle, and that's when it went back, and the information I had, they were not going to pay any more than the matrix. You have no right to do that. No one objected to that, but if you would have told me that you absolutely were objecting to being remanded, I certainly would have settled it. It would be here and I would take it from there.

in the Caribbean. Additionally, prior to trial, Keene refused to agree for trial purposes that it was the successor corporation to the original manufacturer of the asbestos products in question. At trial, however, after the plaintiff and the shipowners had gathered the requisite evidence, Keene admitted that no real issue existed and agreed for purposes of trial that it was the successor corporation.

These actions along with Keene's refusal to waive the fifteen day delay on the second day of trial constituted the basis for the sanctions imposed by the trial court. Therefore, we conclude that based on the evidence in the record before us, the district court did not abuse its discretion by sanctioning Keene and its counsel.

Appellants also argue that even if sanctions were appropriate, the award was not. They contend that the costs and expenses could only have been based on a finding that they knew of the jurisdictional defect before trial and failed to disclose it. They further argue that this conclusion is unreasonable because it is undisputed that they did not know of the jurisdictional defect until the first day of trial. Therefore, they conclude, the incremental costs and expenses of trial could not be assessed against them. In other words, they argue that sanctions were inappropriate because there was no sanctionable conduct. This argument is meritless.

The trial court found that all counsel were neglectful in not having read the MDL rules governing remand, but that Keene and its counsel also exhibited an element of bad faith along with its

neglect. As a result, the judge only awarded the costs and expenses attendant to the preparation for trial and jury costs. He specifically declined to award attorneys fees or sums to cover the cost of trial preparation by counsels' paralegals and secretaries. The costs and expenses awarded as sanctions were costs for travel and lodging of expert witnesses, witness fees, and other documented expenses. Since those costs, along with the cost for jury expenses, would not have been incurred had Keene made known its jurisdictional opposition prior to trial, the court did not abuse its discretion in making the award.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.