IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 05-14538-JJ

GELFAND & ARPE, P.A. AND MARY C. ARPE,

Plaintiff's Counsel/Appellants,

v.

HOME QUALITY MANAGEMENT, INC.,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
HONORABLE K. MICHAEL MOORE
(01-9016-CIV)

BRIEF AMICUS CURIAE OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING APPELLANTS, FAVORING REVERSAL

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Case No. 05-14538-JJ
Gefland & Arpe, P.A. v. Home Quality Management, Inc.

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Amicus National Employment Lawyers Association, pursuant to FRAP 26.1 and 11th Cir. R. 26.1-1, 26.1-2 and 26.1-3, hereby files its Certificate of Interested Persons and Corporate Disclosure Statement:

1. Arpe, Mary C.
2. Christine D. Hanley & Associates, P.A., counsel for Appellee
3. Cline, Garland
4. Gelfand, Michael J.
5. Gelfand & Arpe, P.A.
6. Home Quality Management, Inc.
7. Johnson, Richard E., Amicus Counsel, NELA
8. Magolnick, Joel S. (Moscowitz Moscowitz & Magolnick, P.A.)
9. Martinez, Farah J. (Moscowitz Moscowitz & Magolnick, P.A.)
10. Moore, K. Michael, U.S. District Court Judge
11. Moscowitz Moscowitz & Magolnick, P.A., counsel for Appellant
12. National Employment Lawyers Association, Amicus Curiae
13. O'Sullivan, John, U.S. Magistrate Judge

14. Smith, D. Culver, III

15. Still, Sally (Christine D. Hanley & Associates, P.A.)

16. Tirona, Marissa M., Amicus Counsel, NELA

CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Rules 32(a)(5)(A), 32(a)(6) and 32-4 of the Rules of this Court, the Court is advised that the brief Amicus Curiae of the National Employment Lawyers Association (NELA) has been produced by the proportionally spaced standard typing process in 14 point Times New Roman.

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STATUTORY AND OTHER AUTHORITY

IDENTITY AND INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

For the reasons set forth herein, NELA is concerned about a trend in federal courts in Florida whereby use of sanctions motions and the threat of those motions is becoming a routine practice, rather than one reserved for extraordinary cases, and a standard fee-shifting device.

STATEMENT OF THE ISSUES

A. Whether use of 28 U.S.C. § 1927 to do the work of Rule 11 or the work of statutory fee-shifting creates dislocations throughout the judicial system by abetting the rise of a new sanctions industry in the profession.

B. Whether sanctions motions should be reserved for extraordinary

circumstances, not for routine use as substitutes for prevailing-party fee statutes.

C. Whether a defendant affirmatively using a false factual premise as a basis for a central defense may be awarded attorney fees against a plaintiff relying upon that same factual error.

SUMMARY OF THE ARGUMENT

The decision to impose sanctions rests upon a factual error -- that the employee testified at deposition that it did not appear to him that he participated in any benefit plan of the employer. By imposing sanctions under § 1927 and under inherent power, the court below escaped the formal requirement of making detailed factual findings that would have applied under Rule 11. Such findings would have exposed the error and prevented sanctions from being entered.

Recent scholarship documents an unfortunate tendency to use § 1927 and inherent power to fill the gap left by the 1993 amendments to Rule 11 -- amendments requiring findings, setting a safe-harbor period, limiting monetary sanctions and *sua sponte* sanctions. Rule 1 was supposed to fill that gap and so was amended along with Rule 11 to move toward a preventive approach rather than a punitive one.

Trial court orders come on appeal with a presumption of correctness. But that presumption rests upon another -- that the appellee correctly informed the court below

of the facts and law. Where, as here, the order below was procured through misrepresentation, this court should suspend the normal presumption of correctness.

The employer should not be rewarded for using the ERISA claim to preempt an alternative common law claim while declaring the ERISA claim frivolous for lack of an ERISA plan. If there was no ERISA plan, there was no ERISA preemption, so the employer was at least as culpable as the employee of grounding a claim or defense on a factual misrepresentation. Indeed, the employer was in a better position to know for sure whether there was a plan or not. But the employer sought to have it both ways, evading production of the definitive evidence and using the resulting uncertainty to imply that the plan existed for preemption purposes and did not exist for purposes of having the employee's claims under the plan deemed frivolous.

If the plan does not exist, early summary judgment could have been easily accomplished. Likewise, early voluntary dismissal could have been accomplished by presenting the evidence to the employee along with a Rule 11 warning to dismiss in 21 days. Instead, the employer kept the ERISA claim alive, milking it for sanctions-based hours to cash in at the end of the case.

This case illustrates the birth of a new litigation industry -- a sanctions enterprise that capitalizes on unworthy employment claims brought *pro se* or by inexperienced counsel. Judicial frustration and resentment at these meritless cases

is such that normal court vigilance is relaxed to such an extent that the sanctions entrepreneurs can keep bad claims alive to squeeze compensation out of them through sanctions motions at the end of the case.

This circumvents the policies behind the applicable laws and rules of procedure.

ARGUMENT

I. This Court Should Require Detailed Findings For Imposition of Sanctions

A. The Principal Error Below Flowed From Inattention To the Record

The District Court awarded fees to the employer and against the employee's counsel under 28 U.S.C. § 1927 and under its inherent power on the employee's ERISA claim. The court imposed fees on both the employee, Garland Cline, and his attorney, Mary Arpe. Cline suffered a fee award under the ERISA statute itself, 29 U.S.C. § 1132(g). As to Arpe, the court considered and rejected fees under the prevailing party provision of the ERISA statute and under Fed.R.Civ.P. 11.

The principal presupposition of the decision below rests upon what turns out to be an incorrect representation of the record. Therein lies a judicial policy concern of no small significance.

The District Court relied upon the employer's claim that the employee testified at his deposition that it did not appear to him that he participated in any benefit plan

of the employer HQM. However, as shown in great detail in Appellant's Initial Brief at 15-20, the employee's deposition testimony was quite the contrary. It is only by cherry-picking a highly ambiguous two-word answer out of extensive deposition testimony on the subject that it could be argued that the employee or his counsel had a belief that the employee had no benefit plan with the employer. The court below cites no record passage for its conclusion, relying, apparently, on a claim by the employer on summary judgment as to the deposition testimony. As is too often so in such a circumstance, the claim was not a fair representation of the facts.

As shown in the Committee Notes to the 1993 amendments to Fed.R.Civ.P. 11, one of the main reforms of the 1993 amendments was to require detailed factual and legal findings before awarding attorney's fees for allegedly frivolous pleadings. In this case, Rule 11 would have actually been the more appropriate vehicle for sanctioning an alleged offense involving a frivolous pleading. Had the court imposed sanctions under Rule 11, the court would probably have followed a regimen of fact-finding that would have exposed the erroneous record representation and prevented any award of fees to the employer on the ERISA claim. By traveling instead under § 1927 and the court's inherent power to sanction, the court avoided the technical need for such detailed findings and so never learned what the employee had actually stated at his deposition..

In Rule 11 practice, the part of the 1993 amendments requiring detailed findings has had a major and salutary effect. *See, e.g., Sakon v. Andreo*, 119 F.3d 109, 113 (2d Cir. 1997) (requiring findings to explain imposition of sanctions). *See also Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 58 (2d Cir. 2000); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294 (3d Cir. 1996); *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 711 (7th Cir. 2001) (requiring the district court on remand to "state explicitly the evidence that it relies upon to determine the appropriateness, and, if necessary, the amount of the sanctions"); *see also* Fed. R. Civ. P. 11(c)(3).

Recent scholarship has documented a trend in civil rights cases whereby employers use § 1927 and the court's inherent power to circumvent the reforms in the 1993 amendments to Rule 11, particularly the "safe-harbor" provision, the requirement of detailed factual findings and legal conclusions, the limits on a court's power to award fees on its own motion, and the preference for non-monetary sanctions. Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-vis 28 U.S.C. § 1927 And The Court's Inherent Power*, 37 Loy. L.A. L. Rev. 645 (Winter 2004). As shown below, this creates dislocations that burden courts and taxpayers as well as plaintiffs in civil rights cases.

As a counterweight to the downgrading of Rule 11 as a major weapon against

litigation abuse, the 1993 amendments to the Federal Rules of Civil Procedure gave new emphasis to Rule 1, which since the initial adoption of the Rules has called on courts to construe the Rules to seek the "just, speedy and inexpensive" determination of every action. By amending Rule 1, the revisers recognized its role as the cornerstone of the entire procedure structure, as befits its position at the beginning of the Rules. In addition, the amended Rule 1 states that all of the Rules are to be "administered" as well as "construed" to promote the objectives defined. The mandate to administer all of the Rules as dictated by Rule 1 emphasizes the availability of means other than sanctions to deter abusive litigation, such as prompt dismissal or use of summary judgment. *Mareno v. Jet Aviation of America, Inc*., 155 F.R.D. 74 (S.D. N.Y. 1994).

Thus moving more toward § 1927 and the court's inherent power to sanction in response to the reform of Rule 11 contravenes the public policy of moving more in the direction of Rule 1. Stretching the role of § 1927 and the court's inherent power to sanction to fill the void left by the 1993 amendments to Rule 11 can become an evasive device to circumvent those 1993 amendments. This is especially so where, as here, the issue turns upon allegedly frivolous representations in pleadings -- something that is at the very center of Rule 11.

B. This Court Should Suspend the Normal Presumption of Correctness Accorded To Decisions on Appeal

After a long and contentious course of litigation that divided Florida judges and lawyers, the Florida Supreme Court recently resolved a central issue in a fashion that should inform this court's consideration of this case. The resolution was that an appellee cannot hide behind the "presumption of correctness" of an order that the appellee itself procured by misrepresenting the law or the facts. The presumption of correctness is necessarily based on another presumption: that the appellee correctly informed the trial court of the facts and applicable law.

> Busy judges managing overloaded motion calendars often depend on the attorneys appearing before them to provide them with accurate information about the issues involved, the facts relevant to those issues, and the law applicable to those facts. When it becomes apparent that counsel misrepresented this information, counsel cannot later hide behind the presumption of correctness . . . .

Boca Burger, Inc. v. Forum, __ So.2d __, 30 Fla. L. Weekly S539, 2005 WL 1574249, *8, 2005 LEXIS 1449 (Fla. July 7, 2005) *rehearing denied*, 2005 Fla. LEXIS 1916 (Fla., Sept. 29, 2005). The situation in this appeal appears to be that a busy court accepted a misrepresentation of the record and built a sanctions award around it. The employee and his counsel may have lacked diligence or effectiveness in countering the misrepresentation, but that is really beside the point. The law is that federal courts will not reward a misrepresentation made "in hopes that the opposing party will fail

or be unable to meet its burden in responding." *Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988). There is no applicable theory of waiver here.

The Florida Supreme Court grounded its exception to the presumption of correctness in the Rules of Professional Conduct as promulgated by the American Bar Association and adopted (with modifications not pertinent here) by the Florida Supreme Court. This court has adopted those same rules and should likewise spurn the presumption of correctness of the order appealed in this case.

II. This Court Should Not Reward Failure To Bring An Allegedly Frivolous Claim To an Early End

A. This Was A Simple Issue Capable of Early Resolution

The employer has claimed, on the one hand, that the ERISA count in this case was patently frivolous from the outset. The employer has claimed, on the other hand, entitlement to fees of a substantial amount earned over a long course of litigation said to have been necessary to defeat that ERISA count.

The operative fact of whether the employer had an ERISA plan that covered the employee in this case is one of easy determination. A review of all the company's ERISA plans, if any, and all the employee's benefit accounts, if any, should reveal the answer quickly. An affidavit from the pertinent corporate official or plan administrator should clean up any additional details needed. This could have ended

that part of the litigation early in either of two ways, as shown below.

The employer instead kept the ERISA claim alive and used it for preemption of a claim of fraud in the inducement, all the while keeping an argument for the frivolity of that claim in a back pocket to cash in for fees at the end. Surely the employer was in at least as good a position as the employee's counsel to know whether there was an applicable ERISA plan. And surely there is no rational way to conclude that using a non-existent ERISA plan to preempt a state-law claim is one whit less frivolous than suing to enforce a non-existent ERISA plan.

B. Early Summary Judgment Possibilities

The employer in this case maintains that the ERISA count was frivolous from the outset, entitling the company to fees for all efforts related to the substantial work on that count. But this court, in reversing a fee award in a similar context, recently observed that a frivolous case can ordinarily be knocked out on summary judgment early in the litigation. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1188 (11th Cir. 2005). In that case, an employer's failure to seek a quick conclusion by summary judgment for an allegedly frivolous claim supported a reversal of the fee award to that employer. The same policy concerns apply here.

> Allowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution

> of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system.

Id.

C. Early Rule 11 Possibilities

The amended version of Rule 11 could have been used to good effect in this case. At the start of the litigation, the company could have given the 21-day-Rule 11 notice with the evidence that there was no ERISA plan and hence no ERISA claim. The employee could have evaluated the evidence and withdrawn the claim. The employer did not provide that evidence. Instead, the employer fueled belief in the existence of an ERISA plan, arguing ERISA preemption in opposition to an alternative count for fraud in the inducement. The employer thus kept the allegedly frivolous ERISA claim alive and milked it through the course of litigation before seeking sanctions for it.

By opting for the sanctions regimen of § 1927 instead of that of Rule 11, the employer opted for a punitive approach rather than a preventive one. This is contrary to federal judicial policy. *Blue v. United States Dep't of the Army* (4th Cir. 1990) 914 F.2d 525, 535, *cert. denied sub nom., Chambers v. United States Dep't of the Army* 499 U.S. 959 (1991) ("Claims that are plainly meritless should be disposed of early in the course of litigation through summary judgment or other pretrial motions ... As

a general matter, dismissal of a frivolous ... case on the merits should be a first option, whereas imposition of sanctions should be a matter of last resort.").

In its current form, Rule 11 seeks early prevention rather than late retribution. It could have served that function here.

D. Sanctions Litigation Is Disfavored As A Standard Practice

Imposition of sanctions should be the exception rather than the rule. *Martin v. Brown*, 151 F.R.D. 580, 585 (W.D. Pa. 1993) (and authorities cited therein). All the foregoing shows a consensus on the proposition that prevention is better than punishment and that the system and the litigants are all better served by early termination of unworthy claims. Where the prevailing party squanders the opportunity for an early end to an unworthy claim, courts should deny § 1927 fees and inherent-power fees to discourage an emerging entrepreneurial enterprise of keeping an opponent's meritless case alive for the sake of milking it for hours to be compensated through sanctions-based fees at the end.

Federal employment cases are especially vulnerable to this sort of enterprise. Too many cases are filed, many *pro se* or with inexperienced counsel. Many claims are infirm. Busy district judges and magistrate judges are frustrated and even resentful at the volume and poor quality of many of these cases. Sanctions entrepreneurs are learning to play that judicial frustration and resentment like a harpsichord.

Sometimes, as here, the courts awarding § 1927 fees are enthusiastic enough about the practice to abjure the fact-finding necessary to support the award.

The irony is that feeding the sanctions entrepreneurs encourages them to keep bad claims alive for the sake of eventual sanctions-based fees. This increases the time and money spent on frivolous claims at the expense of all others in the system.

CONCLUSION

The error below is an injury not only to the Appellant but to the judicial system. This court has recently made a good beginning in addressing and correcting the dislocations and deformities wrought by recent practices in sanctions law. That work should be continued with a reversal in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with FRAP 32(a)(7)(C) that this brief complies with the type-volume limitation specified in Rule 32(a)(7)(B). Specifically, it contains 2931 words within the pertinent sections.

_____
Richard E. Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by first class mail this 11th day of October, 2005, to Sally Still, Esq., Christine D. Hanley & Associates, P.A., 1000 Southern Boulevard, Second Floor, West Palm Beach, Florida 33405, and to Joel S. Magolnick, Esq., Moscowitz Moscowitz & Magolnick, P.A., 1111 Brickell Avenue, Suite 2050, Miami, FL 33131.

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