RECORD NO: 14-1678

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Doris Holt, et al.,

Plaintiffs-Appellants

v.

Horry County, South Carolina, et al.,

Defendants-Appellees

APPELLANTS REPLY TO DOCUMENT NO: 115

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Respectfully Submitted: September 15, 2015

APPELLANTS REPLY TO DOCUMENT NO: 115

In accordance with Federal Rule of Appellate Procedure 27, Appellants Rodney Lail, Irene Santacroce and the Estate of Doris Holt (collectively "Appellants") through the undersigned, respond to Appellees Horry County Sheriff's Department, Allen, Thompson, Caldwell, McClendon, Brantley, and Christensen (hereafter "Appellees").

APPELLEES' POSITION ON THE NEWLY DISCOVERED EVIDENCE[1]

The Appellees position on the newly discovered evidence as stated was that, "The only "new" claim that the Appellants make in the current motion involves some notes that allegedly were obtained from SLED that the Appellants claim show that SLED may have forwarded the original videotapes from the two Horry County police vehicles to the FBI in October 2004 rather than in December 2004. The Appellants claims that this is evidence of "willful and intentional defiance" of a court order which amounts to "criminal contempt of court" by officials with SLED. While such allegations are absurd, they have no real bearing on this case or the issues before this Court on appeal. SLED is not a party to this case. This appeal involves whether the district court was correct in refusing to set aside the settlement reached by the

[1] Doc. 115, p. 4, beginning line 6.

parties on the first day of trial in May 2007. Whether SLED did or did not send the videotapes to the FBI in October 2004 has no bearing on the issue on appeal."[2]

THE RESPONSE OF APPELLANTS

The Appellants disagree with Appellees as it is the same as saying *"the ends justify the means"* and that fraud on the court is not relevant as long as it leads to a settlement, be it disputed or not. The United States Supreme Court disagrees with the Appellees and has long held fraud of this magnitude, involving officers of the court, is such that relief will be granted irrespective of the term of entry.

> "Under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." **Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 239, 64 S.Ct. 997, 998 (1944)**

The newly discovered evidence provides a window which when held up to the light clearly indicates that the Appellees' counsels, the Appellees and their colleagues participated in such extensive fraud on the Court, as described in Document 110-1, that the concept of fraud upon the court has reached boundaries the undersigned never thought was possible and beyond those anticipated by the standards set forth in **Hazel-Atlas Glass Co. v. Hartford-Empire Co.**

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[2] Doc. 115, p. 4 second paragraph.

The newly discovered evidence clearly details in written notes the events that occurred between October 13, 2004 and October 15, 2004 **(See Doc. 110-2, page 121-123)** and shows how Mark Keel, Esquire and Captain Caldwell of SLED conspired to violate Federal Court Order #109 to undermine the South Carolina Federal District Court proceeding by making the single most important piece of evidence disappear while under Court Order #109 to turn it over to Appellants forensic expert. To date this key evidence has never reappeared. Every alleged act of fraud after that falls into place. The fabricated postal receipts are explained because Court Order #109 was violated months earlier so these postal receipts had to be fabricated and submitted because they no longer had the police videotapes and they needed to make it look like they were shipped in December to carry on the fraud.

Appellees' counsel, Robert E. Lee, flew out to Wisconsin to present the police videotapes to the Plaintiffs' forensic expert under Court Order # 109, but he suddenly flew back and took the tapes with him at the end of October 2004 and the Plaintiffs forensic expert never was allowed to even begin to examine them. Every action up to and including the purported evidentiary hearing on May 8, 2007, was nothing but a series of fraudulent acts meant to bring the case to an end that was determined in October of 2004, when the sought after police videotapes

disappeared. The detailed listing of the fraud on the court by the Appellees and Appellees' counsel is not addressed at all by the Appellees in regard to the new evidence in Doc. # 115. They try to wish it away rather than trying to explain the carefully detailed acts by using the magic word "duplicative."

OUTLANDISH FRAUD AND ARROGANCE

The Appellants made discovery request after discovery request asking for such evidence for over fourteen years. The Appellants knew there had to be a reason why the Government Agencies would turn their backs on these law abiding citizens. Just one page of notes leaked out from SLED after fourteen years. Every move to gain discovery has been blocked by the Government and the Appellees. The Appellants finally were able to put the pieces of this puzzle of fraud together and realized they had become unknowing victims of the desire for the various agencies to keep the lid on the dismantling of the ***al Qaeda*** funding operations out of Venezuela pre 9/11. This Honorable Court must allow the remand so the Appellants can regain what is left of their lives that were wrongly taken from them. The Justice Department paid for expert witnesses for the Appellees and produced forged documents to undermine the case. The Appellants need the answers that they deserve as law abiding Americans.

The Appellees then claim, "That is particularly true because it would be absolutely unprecedented for this Court to remand a case to the district court before the Court even considers the merits of the appeal. The merits of an appeal are not to be decided on a motion."[3]

The Appellants strongly disagree with this contention. It is not unprecedented and the 4th Circuit often employs remand when needed to complete the court record. Without a complete record and with contradictory statements as to when the case was purportedly settled the court cannot make a reasoned decision. Was Court Order # 127 a *"shepherding order,"* or an unconstitutional order. How did the default judgment against Appellees Garvin and Smith get dismissed? Judge Harwell has one version on the court record and the other officers of the court have other versions. Who brought forensic expert Noel Herold into the case? The record is replete with inconsistencies. This new evidence opens up a completely different view of what happened and why and given this new information discovery must be conducted to determine the extent of the fraud. The 4th Circuit remands cases back when the record is incomplete to conserve the court's resources. As an example, In re Patriot's Point Assocs., the Fourth Circuit held:

"In the absence of a complete record, remand to the district court is the proper remedy to enable the appellate court to review the decision properly. In re

[3] Doc. 115, p. 4, last paragraph.

Thompson, 788 F.2d 560 (9th Cir. 1986); Braniff Airways, Inc. v. Exxon Co., U.S.A., 814 F.2d 1030 (5th Cir. 1987). Accordingly, the Court remands this issue to the district court to make further findings of fact and set forth conclusions of law."

In re Patriot's Point Assocs., 1990 U.S. App. LEXIS 26964, *27-28 (4th Cir. S.C. May 2, 1990)

DISCUSSION

Appellees, in their return, open by contending the Appellants first attempt to remand to complete the Court record Doc. #78 and the subject before the Court, Doc. #110, are duplicative attempts to delay and avoid the Court's briefing order. The Appellees falsely claim both motions contain the same arguments regarding National Security Issues and then in their return the Appellees "pick and choose" words and phrases out of context to avoid the very real and important issues first raised and/or clarified by the newly discovered evidence in Doc. # 110. These issues can only be addressed through remand and discovery so that a complete record can be developed of exactly what happened. Unfortunately, the Appellees seem to be afraid of the facts.

Appellants will now list "issues" the Appellees both raise and address by either employing misdirection or providing non-answers to the issue.

APPELLEES' PREMISE AND APPELLANTS' RESPONSE

Appellees' claim: *"They continue to argue that initials on Herold's report were forged despite the fact that Herold testified under examination at deposition by the Appellant's own lawyer that the report was his and contained his findings."*[4]

Appellants' response: **ECF #753** clearly documents the forgery of Noel Herold's required handwritten confirmation on a Rule 26 expert's report. Noel Herold admitted in sworn testimony **(ECF #401, p.34, lines 9-17)** that:

> "As a matter of fact, the report that you submitted, which is part of the package No. 23, it's called your report of the examination, Ms. Senn just referred to it. **Answer:** ***Yes.*** That report is not signed, and it actually wasn't sent to the judge, it was sent to SLED; is that not correct? **Answer:** ***That's true.***

Appellees do not address any of the pertinent issues. Ignoring the fabricated postal receipts and continually changing statements on the record that need to be addressed.

Appellees' claim: *"He [Appellants' counsel] has repeatedly attacked the undersigned counsel for committing "extensive fraud on the court" without making the first showing of such conduct. (Dkt. #110-1, p.2 of 35). Yet, it is Appellants' counsel who has mischaracterized the very district court order that is at the heart*

[4] Doc. #115, p.3, last two lines.

of his alleged "conspiracy" and "fraud." The Appellants present Court Order #127 (entered December 10, 2004) as Exhibit "K" to this current motion and insists that Appellees' counsel "drafted" and "orchestrated the misuse" of that order which required the original videotapes from the two Horry County police vehicles to be delivered to the FBI for an analysis. (The undersigned counsel was not even involved in the case in 2004).[5]

Appellants' response: The fact is that Judge Harwell himself characterized Court Order #127 as a *"shepherding order,"* and Appellees Counsels, including Mr. Lindemann, put their agreement on the record on May 4, 2007 that Order # 127 was nothing more than a *"shepherding order,"* issued only to make sure the police videotapes were transported to the Plaintiffs' forensic expert after the FBI and SLED were finished with their investigation and the order was nothing more than that. Judge Harwell maintained that *SLED* brought Noel Herold into the case as part of a criminal investigation that SLED was already conducting and that Court Order #127 had nothing to do with Noel Herold being brought into the case. The Appellees/Defendants' counsels, in unison with Judge Harwell at the May 4, 2007 hearing, agreed that the purpose of Court Order #127 was not to order an investigation

[5] Doc. #115, p.3, footnote 1.

by the FBI. *"**The Court:** "You would agree with me that was not the intent? (Mr. Lindemann's Co- Counsel) **Mr. Saleeby**: Absolutely, Your Honor."*[6]

The Appellants did refer to evidence that indicated Mr. Lindemann's involvement in fraud on the court was committed not just on the District Court level but also at the 4th Circuit Appellate Court. Mr. Lindemann submitted to the 4th Circuit as evidence the examination report with the forged signature, a signature required for an Expert Witness Report under Rule 26 of the FRCP, to both the District Court and the 4th Circuit Court of Appeals. ECF #170 in South Carolina Federal District Court Case No. 4:02-cv-01859-RBH and the appeal of that motion to the 4th Circuit Court of Appeals in Case No. 05-1824. As a signatory to the Documents in both cases Mr. Lindemann was attesting to the validity of the submission. Mr. Lindemann, in that regard, appears to have a vested interest in Judge Harwell's refusal to hold a hearing on the documented forgery and alleged fraud on the court contained in ECF #753. Judge Harwell refused to review ECF #753 based on the untruthful and baseless claim he dismissed the forensic expert Durward Matheny from the case. This documentation of fraud was neglected to be mentioned by the counsel for the Appellees as shown herein. The conflicting views

[6] See ECF #543, page 75, lines 17-19

of the facts represent another reason that this matter needs to be remanded so that a proper record of what happened can be developed.

Additionally, at no time has the undersigned ever suggested that the "heart of the conspiracy was Court Order #127", nor did the undersigned suggest Mr. Lindemann was involved in the drafting of Court Order #127 as he was not part of the Appellees legal team when Appellees' counsels drafted Court Order #127. These admonishments were apparently added by the Appellees to try to discredit the Appellants position of taking the high road.

Appellees' claim *"The Appellants' counsel not only fails to advise this Court that Court Order #127 was a Consent Order that was actually signed and agreed to by the Appellants' own counsel at the time, Michael Goldberg, but counsel also fails to provide this Court with the entire order. Exhibit "K" includes only the first three pages of the Order and conveniently leaves off the signature pages for the attorneys -- including Mr. Goldberg -- which are prefaced with the words "we consent." The Court is urged to review the entirety of Court Order #127, which clearly demonstrates that it is as Judge Harwell described it, a consent order where the very bad acts complained of – the delivery of the videotapes to the FBI for an analysis and a report – were agreed to by the Appellants' own*

lawyer. The Appellants cannot reasonably claim a fraud on the court when the court order and the procedures set forth therein were agreed to by all the parties."[7]

Appellants' response: The Appellees statements here further show the need for the case to be remanded for discovery. On May 4, 2007, the Appellees and Judge Harwell claim Order # 127 was a *"shepherding order,"* to make sure the police video tapes got back to the Appellants forensic videotape expert. Now Mr. Lindemann is contending that Order #127 in fact ordered the FBI into the case. Appellants do not care if it was a Consent Order or not. There is no agreement on what Court Order #127's purpose was. If it indeed was meant to Order the FBI into this private litigation then it was unconstitutional and unenforceable under the doctrine of separate of powers. These changing stories by the Appellees do nothing more than point out to this Honorable Court the need for remand for discovery to find out what happened since the record is totally unclear as to what the Appellees now claim is the "heart of the conspiracy."

ARGUMENT

Despite the Appellees claim Doc. # 110 is a duplicative motion it clearly is not. The Appellants are aware of the fact a remand is an extraordinary measure, but given the action of law enforcement tied to the Appellees and the fact the records

[7] Ibid.

have been tampered with by the Government Entities and this deals with the funding of terrorism the evidentiary value is obvious on its face. The belated appearance of this telltale document was through no fault of the Appellants.

This document and others like them have been sought for more than a decade by every legal means possible by the Appellants. Now the document for whatever reason has come out. The Appellees just want to wish it away. However, the Appellants seek a remand on the other information supporting its arguments of withheld documents, including other SLED and Justice Department Documents. This critical document warrants raising the matter through discovery at the District Court. The Appellants had specifically sought this document because it would give the lower court the concrete proof that it demanded of the Appellees withholding material evidence. Moreover, since this appeal was delayed for years under the unjustified Doctrine of National Security and evidence was withheld from the Appellants, the Appellants have a right to see what they have been deprived of seeing by the respective agencies (in which the majority of content documents were wrongly claimed to be classified to undermine the Appellants case and keep covered their knowledge of ***al Qaeda*** funding. The remand is further warranted when the serious questions of contempt, misrepresentation, or perjury are raised.

CONCLUSION

This newly discovered evidence is one document out of the many documents that has been concealed from the Appellants despite subpoenas and discovery requests. This Honorable Court must allow the record to be completed and true discovery be conducted without the imposition of National Security to prevent the proper litigation of this case that does not involve National Security.

Not allowing the proper deposition of Rule 26 experts by invoking national security is not acceptable in this case and obviously is a part of the orchestrated fraud on the court. All the documents and notes need to be released and the Government agencies and personnel need to be removed from the shadows so that the Appellants can pursue justice as anticipated by the justice system this country was founded on. It all starts with remanding the case back so that proper discovery can be conducted and the rest of the documents hidden for over a decade and be discovered and proper litigation can be conducted.

By:

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CERTIFICATE OF SERVICE

I, Michael Sribnick, MD, JD do hereby certify that the foregoing **APPELLANTS REPLY TO DOCUMENT NO: 115,** This day September 15, 2015 was served on the following person(s) by either mail, fax or electronic transfer a true and correct copy, as follows:

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Doyet A. Early III, Circuit Court Judge
Case No. 2008-CP-40-6656
Appellate Case No. 2014-002029

John R. Rakowsky, Respondent,

v.

Law Offices of Adrian L. Falgione, LLC, James Spencer, Estate of Doris Holt, Nick Williamson On behalf of RSC, Irene Santacroce, Rodney Keith Lail, Marguerite Stephens, Ricky Stephens, Michael Hartness, Horry County, SC, Eugene Chewning and Glenn W. Harrison, Defendants.

Of whom:

Irene Santacroce, Rodney Keith Lail and Estate Of Doris Holt are, Appellants.

CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with the Ballard & Watson, Attorneys at Law, do hereby certify that on September 17, 2015, I served a copy of **Exhibit F to the Return in Opposition to Joint Motion to Extend Time due to Newly Discovered Evidence** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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September 17, 2015
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September 17, 2015

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *John Rakowsky vs. Adrian Falgione, et al.*
Appellate Case No.: 2014-002029

Dear Ms. Kitchings:

Enclosed for filing with your office, please find the original and seven (7) copies of Exhibit **F to the Return in Opposition to Joint Motion to Extend Time due to Newly Discovered Evidence** which was filed on September 4, 2015 in the above-referenced matter. This additional exhibit was filed with the Fourth Circuit Court of Appeals yesterday. I would appreciate you submitting this additional exhibit to the Court along with the motion and return for the Court's consideration. Please have your office file the original and return the stamped filed copy via our self-addressed, stamped envelope that is provided.

By copy of this letter, I am serving the same upon the *pro se* Defendant and all the parties of record. If you have any questions please do not hesitate to call. With warm personal regards, I am,

Sincerely yours,

Beth Cogan

Beth Cogan, Paralegal

cc: (all via U.S. mail)
The Honorable Doyet A. Early, III
Andrew Lindemann, Esquire
Benjamin Bruner, Esquire
Michael Sribnick, Esquire
James Spencer
Marguerite Stephens
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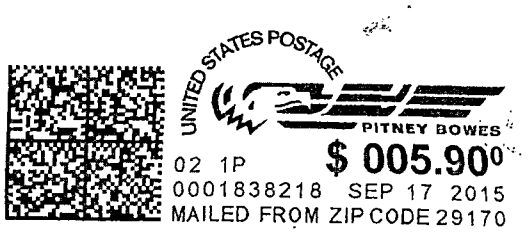

Law Offices of Desa Ballard

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TO:

Honorable Jenny Abbott Kitchings
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