183

George, P.S. 4/5/78:

While waiting to be stuck and then for the technicians to be sure I'd stopped bleeding I read the Order and the Smith decision, which also is enclosed. These are not the best conditions for a non-lawyer to try to figure out legal questions but I have a belief I'll be consulting im about - merely for my own understanding.

The Order ducks the question we posed. The Act requires the courts to handle FOIA cases as expeditiously as possible. But rather than consider "new evidence," which I believe is not unprecedented, the appeals panel pretended we wanted a remand without argument before the appeals court and without directives to the district court from it. It used the language of the Smith decision, which is not an identical situation.

It is also possible to interpret this Order as a slap at A. Robinson and a kind of challenge to him. The record that is before appeals and is not contradicted is that after promising me he would hear witnesses - his words were fill his witness room - when I asked ~~t~~this as an end to months of official stonewalling he ruled on an incomplete record and cut discovery off before Wigmore's machine could start up that engine.

This resulted in delays, opposed to the Act's intention, and a needless clutter of the courts. The appeals court has in effect ruled for us because we did seek to be able to present evidence and Robinson, in what I take to be his way, cut us off, very abruptly. It leaves to Robinson the decision of a trial and it is careful to reserve all its own options, which include entertaining the new evidence I gave it and it has neither accepted nor rejected. Maybe I'm reading too much into this but I see a situation in which appeals is telling Robinson that the matter is relevant and that he should have acted otherwise. I can conjecture that it may also be addressed to other district judges who are too anxious to unload the FOIA cases and unwilling to confront official misbehavior in them.

Also enclosed, I hope in legible form after my wife copies a bad copy, is a pair of Memphis stories I received today.

I cannot fault my old adversary John Carlisle (he blinked). His ridicule and sarcasm are more than justified. If the assassins committee had been at all serious and had been conducting what could decently be called an investigation it would have known that the green stamps that were Ray's were all traced as soon as the car was examined. This was about a week after the assassination. It would also know that all possible sources of the stamps were sought out and interviewed.

I found the reported turnover in the committee King staff interesting, perhaps provocative. If they were for real it could be a problem to them.

On the Ray positive identification of a picture I have doubts, regardless of which version I consider. One is that the picture originated with the com ittee, the other, in this story, represents an other than committee source. I also find it hard to believe that after refusing to finger another for so long Ray would now change. In any event, if the origin is the committee, keep the initials C.M. in mind. It will be fun if I have made a wild guess that is accurate. it is a farout hunch.

Identifying "Raoul" is tantamount to fingering, if Ray cannot connect him to the actual crime.

HW

insured regarding past history of treatment for the very sickness out of which the claim subsequently arose. It was provided in the application that the falsity of any answer therein would act as a bar to recovery if made with intent to deceive or if it materially affected the acceptance of the risk assumed. The appellee insured contends, however, that the rider precludes any defense after twenty-four months, based upon the time of the commencement of the sickness, even a defense that the insured spoke falsely concerning that time on his application. In effect the contention is that the quoted clause is a limited incontestability clause, i. e., limited to the one subject mentioned. We agree with the court below in giving the rider this effect. Its judgment is accordingly.

Affirmed.

WEST KEY NUMBER SYSTEM

SMITH et al. v. POLLIN et al.
No. 11198.
United States Court of Appeals
District of Columbia Circuit.
Argued Jan. 24, 1952.
Decided Jan. 29, 1952.

Action between Joan C. Smith and others and Morris Pollin and others. Judgment was entered and Joan C. Smith and others appealed. The appellants filed motion for leave to file in the United States District Court a motion to vacate the final judgment of that court entered February 8, 1951. The Court of Appeals, Per Curiam, held that in substance the motion was a motion for leave to file a motion for new trial on ground of newly discovered evidence.

Motion denied.

1. Criminal Law ⇐950, 1181

When a new trial is sought in a criminal case because of newly discovered evidence in a case pending in appellate court, motion for new trial is made in District Court, and District Court may then deny motion or indicate that it will grant motion, and if that court indicates that it is inclined to grant the motion, a motion for remand is made in the appellate court. Fed.Rules Crim.Proc. rule 33, 18 U.S.C.A.

2. Courts ⇐405(15)

Jurisdiction of case is in Court of Appeals while appeal is pending, and District Court cannot grant a motion for a new trial in a case which is pending in the Court of Appeals upon appeal.

3. Courts ⇐405(15)

When an appellant in a civil case wishes to make motion for new trial on ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court, and if that court indicates that it will grant the motion the appellant should then make a motion in the Court of Appeals for a remand of the case in order that the District Court may grant motion for new trial. Fed.Rules Civ.Proc. rule 60(a, b), 28 U.S.C.A.

David F. Smith, Washington, D. C., for appellants.

David A. Hart, Washington, D. C., for appellees Charles M. Plunkert, C. M. Plunkert & Company, Plunkert & Maddock, Inc. and Mary E. Spinks.

Joseph A. Cantrel, Washington, D. C., for appellee Charles W. Bucy.

Thomas F. Burke, Washington, D. C., for appellee Henrietta K. Evans.

Louis Ottenberg, Washington, D. C., for appellees Morris Pollin and Riggs Park Land Co.

H. Max Ammerman, Washington, D. C., for appellee Sidney Z. Mensh.

Edmund D. Campbell and Grant W. Wiprud, Washington, D. C., for appellees Riggs Park Land Co., Inc., Lawyers Title Insurance Corporation, Frank W. Marsalek, Perpetual Building Ass'n, and Junior F. Crowell and Samuel Scrivener, Jr., trustees.

M. M. Doyle, Washington, D. C., for appellees Emilie K. Bucy and Henrietta K. Evans.

Before EDGERTON, PRETTYMAN and WASHINGTON, Circuit Judges.

PER CURIAM.

Appellants' motion is for leave to file in the District Court a motion to vacate the judgment of that court dated February 8, 1951. The text of the motion shows that in substance it is a motion for leave to file a motion for a new trial on the ground of newly discovered evidence. The motion raises a question as to proper procedure in such cases.

[1] In criminal cases the procedure upon a motion such as this is now settled. The old rule, Rule II(3), 292 U.S. 662, was

that "the trial court may entertain the motion only on remand of the case by the appellate court for that purpose". When the new Federal Rules of Criminal Procedure were adopted, the word "entertain" was changed to "grant"; so that the present Rule 33 of the Criminal Rules, 18 U.S.C.A., provides, as to motions for new trial based on the ground of newly discovered evidence: "* * * but if an appeal is pending the court may grant the motion only on remand of the case." The Advisory Committee explained in its notes that "Under the proposed rule a motion for a new trial could be made without securing a remand. If, however, the trial court decides to grant the motion then, prior to the entry of the order granting it, a remand will have to be obtained. This course will eliminate the need of a remand in those cases in which the trial court determines to deny a motion for a new trial." [1] In criminal cases, therefore, the procedure is that, when a new trial is sought because of newly discovered evidence in a case pending in the appellate court, a motion for the new trial is made in the District Court, and the District Court may then deny the motion or indicate that it will grant the motion. If that court indicates that it is inclined to grant the motion, a motion for remand is made in the appellate court. See the order of this court in a similar motion in No. 10339, Coplon v. United States, March 29, 1950; see also Rakes v. United States, 4 Cir. 1947, 163 F. 2d 771.

The procedure in civil cases is not so clearly established as it is in criminal cases. The Rules of Civil Procedure make no specific reference to the point. Those Rules, Rule 60(a), 28 U.S.C.A., provide for the correction of clerical mistakes while an appeal is pending, but Rule 60(b), which treats of motions for new trials, upon newly discovered evidence among other things, makes no reference to such motions when appeal is pending. The Circuit Courts seem to have different views on the subject. See Harper Bros. v. Klaw, 2 Cir. 1921, 272 F. 894; Baruch v. Beech Aircraft Corporation, 10 Cir. 1949, 172 F.2d 445.

[2] It is clear that the District Court could not grant a motion for a new trial in a case which is pending in this court upon appeal. Jurisdiction of the case is in this court while the appeal is pending. So the rule of law applicable to civil cases is exactly the same as the specific statement in Criminal Rule 33. That being so, we think that the procedure already established for criminal cases can be established for civil cases also.

[3] We are of opinion, therefore, that, when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in this court for a remand of the case in order that the District Court may grant the motion for new trial.

Upon the foregoing basis, we are, by order entered simultaneously herewith, denying the motion in this case.

1. Fed.R.Crim.P., p. 131 (2d Prelim.Draft).

BRINKER et al. v. HUMPHRIES et al.

No. 11047.

United States Court of Appeals
District of Columbia Circuit.

Argued Dec. 12, 1951.

Decided Jan. 31, 1952.

Action between Betty McKee Brinker and others and Howard F. Humphries and others to determine whether next of kin of testatrix or legatees should take proceeds of sale of realty under will. The District Court for the District of Columbia entered judgment for the next of kin, and Betty McKee Brinker and others appealed. The Court of Appeals, Bazelon, Circuit Judge, held that proceeds from sale should go to legatees.

Reversed.