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PETITION FOR REHEARING AND SUGGESTION OF
REHEARING EN BANC OF OPINION ISSUED JUNE 4, 1985

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229

HAROLD WEISBERG,

Appellant/Cross-Appellee

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant

AND CONSOLIDATED NOS. 82-1274,
82-1722 and 83-1764

On Appeal from the United States District Court
for the District of Columbia

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229 (and consolidated cases)

HAROLD WEISBERG,

Appellant/Cross-Appellee

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant

PETITION FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF REHEARING EN BANC OF OPINION ISSUED JUNE 4, 1985

Harold Weisberg ("Weisberg"), Appellant and Cross-Appellee, petitions for rehearing, and suggests rehearing en banc of the opinion issued by the panel on June 4, 1985.

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

On June 4, 1985, this Court denied Weisberg's petition for rehearing and suggestion of rehearing en banc of the panel's October 5, 1985 opinion. The same day the panel issued a new per curiam decision (Judge Bork dissenting) on jurisdictional issues it had raised sua sponte while considering Weisberg's petition for rehearing.

The fundamental issue raised by the latter opinion is whether this Court can give effect to a notice of appeal that is a nullity. Ignoring the express language of Fed. R. App. P. 4(a)(4), and ruling in direct contravention of the Supreme Court's holding in Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982), the panel held that it can.

This ruling is also in direct conflict with the law in other Circuits and with the prior law of this Circuit, which holds that a timely motion for new trial or alteration of the judgment, or even one treatable as such, "destroy[s] the finality of the judgment . . . for purposes of immediate appellate review and render[s] the appeal a nullity." Alley v. Dodge Hotel, 179 U.S.App.D.C. 256, 259, 551 F.2d 442 (1977).

A court's competency to render judgment is basic to our jurisprudence. Federal Rule of Civil Procedure 12(h)(3) provides that: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (Emphasis added.) Because federal courts are courts of limited jurisdiction under Article III, Section 3 of the Constitution, they are obligated to consider their own jurisdiction regardless of what the parties say. Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379 (1884). The United States Supreme Court itself will dismiss a case on jurisdictional grounds even when the parties themselves have not questioned it. Louisville & Nashville R.R. v. Mottly, 211 U.S. 149

(1908)("Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded.) The panel attempted to fulfill its obligation by ordering, sua sponte, that the parties brief the question of the effects, if any, of the Federal Courts Improvement Act of 1982 ("FCIA"), Pub. L. No. 97-164, 96 Stat. 25 (1982). For the reasons set forth in Judge Bork's dissent and in this petition, it is suggested that the full Court should now examine the jurisdictional issue.

In addition to the question of whether this Court properly assumed jurisdiction to decide this case, it is important that the full Court resolve the meaning of "notice of appeal" as used in the FCIA because (1) it affects the proper administration of the FCIA, and (2) the per curiam majority's outre definition of a term with a settled legal meaning may well cloud its meaning in other legislation.

ARGUMENT

The FCIA provides that the Court of Appeals for the Federal Circuit shall have exclusive jurisdiction over any appeal "from a final decision of a district court . . . if the jurisdiction of that court was based, in whole or in part, on [the Tucker Act]." Section 403(e) of the FCIA provides: "Any case in which a notice

of appeal has been filed in a district court of the United States prior to the effective date of this Act shall be decided by the court of appeals to which the appeal was taken." Pub. L. No. 97-164, §403(e), 96 Stat. 25, 58 (1982).

Each party filed an appeal before October 1, 1982, the effective date of the FOIA. However, there was a pending Rule 59(e) motion when these appeals were taken. This motion tolled the time for taking an appeal under Fed. R. App. P. 4(a)(4), which provides that "[a] notice of appeal filed before the disposition of [such motion] shall have no effect." As a result, these appeals were nullities. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982)(per curiam); Alley v. Dodge Hotel, 179 U.S.App.D.C. 256, 259, 551 F.2d 442 (1977).

In violation of the Supreme Court's holding in Griggs and Rule 4(a)(4)'s inflexible command that such appeals "shall have no effect," the panel majority has given effect to these nullities, making them responsible for the retention of this case by this Court rather than requiring its transfer to the Court of Appeals for the Federal Circuit.

The district court did not behave as if it had been divested of jurisdiction, the necessary consequence of an appeal, but continued actively to assert its jurisdiction long after these "appeals" were filed. As Judge Bork's carefully reasoned dissent points out:

> It is clear from reviewing the procedural history of this dispute that the district

> court retained jurisdiction over the case until the third round of appeals were filed in the summer of 1983. In its memorandum opinions filed on January 20, 1983 and on April 29, 1983, the district court vacated its initial orders and changed its position on the consultancy fee issue. The January 20 opinion resolved the attorneys' fee claim which was one of the more significant legal issues in the case. Accordingly, the district court was clearly exercising jurisdiction over this case until well after October 1, 1982 and indeed resolved major legal questions after that date.

Dissenting opinion at 3. Thus, "[t]he essential act of transferring jurisdiction from the district court to the Court of Appeals occurred well after October 1, 1982. Id.

The panel majority asserts that section 403(e) "does not require an effective notice of appeal." Maj. op. at 4, n.*. Attempting to bolster its case for disregarding Griggs, the majority opinion notes that ". . . Griggs was decided after the passage of the Federal Courts Improvement Act, and thus Congress could not, of course, be charged with an awareness of Griggs' teaching in fashioning its bright line notice-of-appeal test in section 403." Id.

Congress can, of course, be charged with an awareness of the 1979 amendments to Fed. R. App. P. 4(a)(4), which provided that a premature notice of appeal "shall have no effect." In Behring Intern., Inc. v. Imperial Iranian Air Force, 699 F.2d 657, 666 (3rd Cir. 1983), the Third Circuit applied Griggs retroactively because "[t]he plain language of Fed.R.App.P. 4(a)(4) placed defendants on notice that an appeal filed while a Rule 59 motion was pending would be given 'no effect'."

Judge Bork correctly characterizes the panel majority's reading of section 403(e) as "an overly literal reading of section 403(e) which is at odds with the Federal Rules of Appellate Procedure and with Supreme Court precedent. Dis. Op. at 2. As he points out, the majority claims that section 403(e) should apply even to notices of appeal that are clearly invalid under Fed. R. App. P. 4(a)(4) and Griggs. Dis. Op. at 3 n.1. "Thus, the majority would presumably invoke §403(e) if a document purporting to be a "notice of appeal" had been filed before October 1, 1982 from an interlocutory order, a discovery order, or even a complaint." Id.

It makes no sense at all to ascribe to Congress an intent to require the courts to give effect to "appeals" which they were required to treat as nullities under Fed. R. App. P. 4(a)(4)'s strict prohibition. Additionally, it must be pointed out that the legislative history of the FCIA reveals that Congress was very concerned about manipulation of a court's jurisdiction. One purpose of the FCIA was "to alleviate the serious problems of forums shopping among the regional courts of appeals on patent claims by investing exclusive jurisdiction in one court of appeals. It is not intended to create forum shopping opportunities between the Federal Circuit and the regional courts of appeals on other claims." S.Rep. No. 97-275, 97th Cong., 2nd. Sess. at 19-20. Yet the meaning of "appeal" which the majority ascribes to section 403(e) would enable any litigant to manipulate jurisdiction and avoid transfer

to the Federal Circuit simply by filing a "notice of appeal," whether valid or not, prior to the effective date of the Act. It is inconceivable that Congress intended to employ a test which could facilitate the very forum-shopping it was attempting to rectify through enactment of the FCIA.

As Judge Bork aptly summarizes the issue, "the majority's reading [that] the transition provisions of §403(e) are triggered by any piece of paper that is labelled a notice of appeal--no matter how invalid * * *"

> ignores the fact that the statutory term "notice of appeal" is a term of art with a settled legal meaning. The majority errs in presuming that the authors of §403(e) would have us attach legal significance to documents that are labelled "notices of appeal" but are invalid under Rule 4(a)(4).

Dis. Op. at 3-4, n.1.

CONCLUSION

The panel majority's holding departs from the settled legal meaning of the term "notice of appeal," violates Federal Rule of Appellate Procedure 4(a)(4), and defies the Supreme Court's decision in Griggs. In light of the arguments advanced above and those presented in Judge Bork's dissent, the panel should rehear this matter, or, failing that, the full Court should do so.

Respectfully submitted,

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Counsel for Weisberg

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U.S. DEPARTMENT OF JUSTICE,	:	(and consolidated Nos.
	:	82-1274, 82-1722, and
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CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of July, 1985, mailed two copies of Appellant/Cross-Appellee's Petition for Rehearing and Suggestion of Rehearing En Banc of Opinion Issued June 4, 1985 to John S. Koppel, Attorney, Appellate Staff, Civil Division, Room 3617, Department of Justice, Washington, D.C. 20530.

JAMES H. LESAR