TABLE OF CASES

* Pickford v. Talbott, 225 U.S.
* Goland v. Central Intelligence Agency, 607 F.2d (D.C. Circ. 1978)
* 27 Am Jr. 2d, pp. 517, 673-4
* Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206
* Transit Casualty Co. v. Security Trust Co., 441 F.2d (5th Cir. 1971)
* Bulloch v. United States, 721 F.2d (10th Cir. 1983)
* Hazel-Atlas Co. v. Hartford-Empire Co.., 322 U.S. 238 (1944)
* Lockwood v. Bowles, 46 F.R.D.
* Citations also from Moore, Federal Practice, and Miller and Wright, Federal Practice and Procedure, which include case law on Rules 59 and 60(b)

Pro se appellant is not a lawyer and thus cannot make the requested evaluations. He therefore places an asterisk before each case.

ISSUES PRESENTED

In a Rule 60(b) case, can a court properly ignore undisputed claims to pertinence of its last three clauses, particularly inequitability, and state that there is an "ironclad" time limit of one year under all six clauses of that rule?

Is there an "ironclad" time limit of one year to all six clauses?

Are there exceptions to the one-year limit to the first three clauses?

When a court has only ex parte attestations and statements by counsel before it from one party, when these are undeniedly perjurious, fraudulent and misrepresentative, and when there are material facts in dispute involving integrity, can a court properly refuse the taking of oral testimony and cross-examination?

In the absence of oral testimony and cross-examination, particularly when a court twice refuses this, does intrinsic fraud, especially when fraud is undenied, constitute fraud upon the court?

When one party presents nothing but undenied perjury, fraud and misrepresentation to obtain an order, can a court properly claim it was not defrauded?

When there is undenied perjury, fraud and misrepresentation, can the party presenting this to a court be entitled to benefit from it and do the rules and case law permit this?

Can a court which is aware of them properly ignore Supreme Court decisons addressing these questions?

Can a court whose Order describes a proceeding as "oral arguments" properly claim that proceeding was a hearing, suggesting

the taking of "extensive" testimony?

Can a court which lacks the most basic knowledge of what is before it, does not know who is being sued or for what and, in FOIA litigation, what is produced, properly claim to have made repeated and "exhaustive" review of the case record?

When an order has been procured by undenied perjury, fraud and misrepresentation, when a court refuses the taking of oral testimony and cross-examination, and when a court manifests a lack of knowledge of the case before it extending to who is being sued and for what, can it be said that the judicial machinery performed in the usual manner its task of adjudicating the matter that was presented to it for adjudication?

When the government, in FOIA litigation, is the sole possessor of information that proves it obtained a money judgment by means of undenied perjury, fraud and misrepresentation, and it withholds that information until after the case record before the district court is closed, claim that the other party may not properly use it after remand because one year has passed?

Is the foregoing kind of situation appropriate to claim for relief under Rule 60(b)(6), "any other reason" or "excusable neglect," especially when the other party is pro se and a nonlawyer who is aging, seriously ill and handicapped and has no access to any law library?

Is it acceptable or culpable for a government affiant in FOIA litigation to attest to a claimed need for discovery while having and withholding documents establishing beyond question that his attestations were not truthful; and is it acceptable or cul-

pable when, after this new evidence is used, for the government and its representatives not to withdraw their false representations or apologize for them and insist upon enforcing a money judgment based exclusively on this undenied misconduct?

When a party seeking relief from a judgment on the claim that enforcing it is no longer equitable; when this is not disputed by the party in whose favor the judgment was ordered; when the court so completely ignores the equitability argument that its Order and attached Memorandum make no reference to it; when the party seeking relief also claims to be entitled to it under clause (6), "any other reason," and again is not disputed by the party in whose favor the judgment was ordered and again the court completely ignores this argument and makes no mention at all of it; and when that court states that there is an "ironclad" one-year time limit to all of Rule 60(b) when that limit does not apply and is intended not to apply to its last three clauses, can it be said that the court intended fairness and impartiality, intended that justice be done?

Do the foregoing issues justify the granting of the relief from judgment sought?

Is it a "substantial substantive" change to amend a judgment on remand to remove from it a lawyer against whom a judgment had been assessed because his client refused to take his advice and because he pursued his client's lawful and proper desire to appeal?

This case was previously before this court under the same names as Nos. 84-5058, 84-5201, 84-5054 and 84-5202.

CERTIFICATE OF SERVICE

Appellant Harold Weisberg certifies that on this ____ day of November 1986 he served a copy of this brief and appendix upon Ms. Renee Wohlenhaus, Civil Division, Department of Justice, Washington, D.C. 20530.

HAROLD WEISBERG

SUMMARY OF ARGUMENT

The district court, displaying bias and prejudice and abusing discretion in these and other ways, boasted of repeated reviews of the case record ("exhaustive") while knowing so little that it does not know and misstates who is being sued or for what or what was disclosed; proclaimed that its concern for appellant's pro se status prompted an "extensive" hearing that was no more than brief oral argument; ignored, indeed, rewarded appellees' undenied perjury, fraud and misrepresentation; denied appellant an evidentiary hearing and a trial when the very authorities it cites state that allegations of fraud are to be resolved through "adversary proceedings" and that there should be oral testimony and cross-examination when the court is confronted with material facts in dispute, especially with credibility involved; took clauses and sentences out of context from the cases it cites and altered quotations from them; ignored that supports appellant in these cases; made a "substantial substantive" change involving precedent in the judgment, pretending to the contrary, and thus claimed that appellant's time had run under all of Rule 60(b), which is not true; pretended appellant did not claim inequitability and ignored that entirely undisputed argument; and even when confronted with diametrically opposite attestations to what is material refused to act as a trier of facts to determine truth and whether crimes were committed before it, as by one party or the other they were.

Under Rule 60(b) appellant is entitled to the relief he seeks, according to the authorities cited by the court itself, because

the newly discovered evidence, which establishes appellees' serious misconduct, was known to exist and was withheld by appellees, who alone possessed it (one of two bases for "excusable neglect") when it established their untruthfulness to procure the judgment; because enforcing the judgment undeniedly is not equitable; because undeniedly appellees committed serious violations to procure the judgment; and because the Supreme Court says that one may not be the beneficiary of his own misdeeds; that "the material questions of fact raised by the charges of fraud could (not) be finally determined on ex parte affidavits without examination and cross-examination of witnesses" and thus this is one of those "situations which demand equitable intervention ... to accord all the relief necessary to correct the particular injustices involved."

CONCLUSION

It is not easy to believe that the district court intended justice. The record reflects its bias and prejudice and its adamant refusal to consider what Weisberg filed even when that is undisputed, like his undisputed Rule 60(b)(5) argument that enforcing the judgment is not equitable, which it pretends he did not make. While boasting of its diligence in repeatedly reviewing the case record ("exhaustive"), it does not know such basic things as who was sued, for what and what was disclosed, all misstated in its Memorandu(m). Confronted with undenied and documented charges of appellees' perjury, fraud and misrepresentation, allegations appellees neither attempted to refute or even deny, it twice refused to take the required testimony and permit cross-examination, even though the most material facts were in dispute, along with the most substantial involvement of credibility. The court even disputes itself, claiming in its Memorandum to having held an "extensive hearing" when it not only did not, it even states in its Order that it held only "oral arguments," and a brief one at that in which it would not permit the aging, ill and enfeebled nonlawyer pro se plaintiff to read the 20-minute statement he had prepared to be able to say what he wanted to say.

The district court misrepresents the rule and the cases it cites, with the research appellees did not even bother to do. It states that there is an "ironclad" one-year limit to all of Rule 60(b), which is not true. It altered some of its short quotations from cited cases, even within quotation marks, and omits all the considerable amount of what supports appellant Weisberg in those

very cases. It thus pretends that what supports Weisberg is not in that case law and doctrine. Earlier it ordered a judgment against Weisberg's former counsel, in the face of all the evidence (appellees produced no evidence), to make lawyers subject to sanctions if their clients do not take their advice. It then pretends that, when directed to consider this on remand, it withdrew the sanctions against counsel, that major change is insubstantial and without substance. Without amending the judgment on remand there would have been absolute chaos in the legal community. This misrepresentation of its own action is indispensable to the court's misrepresentation of the rule, attributing that nonexisting "ironclad" one-year limit to all of it.

The judgment is based entirely on the discovery order that undeniedly as obtained only by means of perjury, fraud and misrepresentation because appellees presented nothing else on which the court could act.

Faced with diametrically opposite attestations the court refused Weisberg both an evidentiary hearing and a trial. In this it failed to meet its obligations and the responsibilities imposed upon it by the very authorities it cites. It became a partisan, not a dispenser of justice.

Appellees do not dispute that they have engaged in a long campaign against Weisberg who, without contradiction, documented this before the court, including their widely distributed, evil fabrication to defame him, stating that an annual religious gathering at a farm he then owned was celebration of the Russian revolution. Appellees' long history of stonewalling and misrepre-

senting Weisberg's FOIA requests is in the case record and is not refuted, but the court, on the basis of no contrary evidence at all, says it isn't so.

In order to procure the discovery order which is basic to the judgment and without which there would be no judgment, appellees knowingly and deliberately - and they do not even bother to deny this - attested falsely and misrepresented in other material ways, with even counsel attesting to a deceptive and misrepresentative filing relating to the judgment. While appellees' major affiant in this litigation was attesting to the nonexistence of information sought, he was simultaneously disclosing to another requester the FBI's own records that give the lie to all his attestations. (This is the new evidence.) To this day appellees and this affiant are unrepentant, unapologetic and without the common decency of withdrawing their proven knowingly false representations to the courts. It is without question that all involved knew when uttering that with which they prevailed that they were untruthful and it is without question that the new evidence was solely in their possession, withheld from Weisberg, who had requested it years earlier. It thus is without question that appellees intended the fraud against both Weisberg and the court, which had nothing else from them before it on which it could act.

The case law cited by both the court and Weisberg supports Weisberg's claims to relief under the rules and to the pertinence of the first three clauses of Rule 60(b) as well as the last three which he did invoke and the court represents that he did not.

Appellees charge Weisberg with violating Rule 11. The exact

opposite is true. There is nothing frivolous in documenting undenied felonies to the court to defraud it and Weisberg. It is not frivolous to seek justice and the protection of judicial integrity, even if the district court displays no such concerns. To describe undenied official felonies as merely frivolous is to praise them. It is appellees who persist in violation of Rule 11.

It is a settled principle, a basic tenet, of American law and justice, that one may not benefit from his own misdeeds. The wrongdoing appellees, who are so untroubled by their serious misconduct and what that means that they do not bother to make even pro forma denial, ought not be permitted to benefit from what they charge as crimes when done by others. Weisberg is entitled to relief from the judgment he seeks, and if this requires a remand, the remand should include instructions to the court that it recuse itself.

Respectfully submitted,

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