No. 14-3006

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SECURITY NATIONAL BANK OF SIOUX CITY, IA,
AS CONSERVATOR FOR JMK, A MINOR,

Appellee,

v.

JONES DAY AND JUNE K. GHEZZI,

Appellants,

v.

ABBOTT LABORATORIES

Appeal from U.S. District Court for the Northern District of Iowa – Sioux City
(5:11-cv-04017-MWB)

BRIEF OF STEPHEN D. SUSMAN AND THOMAS M. MELSHEIMER AS *AMICUS CURIAE* IN SUPPORT OF THE HONORABLE MARK W. BENNETT'S MEMORANDUM OPINION AND ORDER REGARDING SANCTIONS

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INTEREST OF THE AMICUS CURIAE[1]

Stephen D. Susman is the Founding Partner of Susman Godfrey L.L.P. Thomas M. Melsheimer is the Managing Principal of the Dallas office of Fish & Richardson, P.C. As trial lawyers with a nationwide practice who have written and spoken extensively about improving litigation conduct, Mr. Susman and Mr. Melsheimer have a significant interest in (1) ensuring that the litigation process, particularly the jury system, is an efficient and preferred tool for conflict resolution and (2) promoting the effectiveness of a jury trial by embracing a process known as "trial by agreement."[2]

SUMMARY OF ARGUMENT

The district court fully possessed the authority to issue sanctions. This authority arises from the Federal Rules of Civil Procedure and applicable case law. The sanction selected by the district court squarely pinpoints the solution to the systematic inefficiencies that all too frequently occur in litigation. Lawyers must not simply be told that their conduct was *wrong*, but must also be told how to *correct* their misconduct.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The views expressed in this brief are solely those of the authors and do not necessarily represent the views of Fish & Richardson P.C. or Susman Godfrey L.L.P.

Too many attorneys maintain a misconceived notion that every issue throughout litigation must be fought tooth and nail. Instead of effectively advocating for their client, attorneys, by unnecessarily engaging in obstructionist tactics, drive up the price of litigation and burden the docket with unnecessary motion practice. This conduct has the ultimate effect of undermining the public's confidence in the judicial process, including the jury system. By avoiding an obstructionist mindset throughout the discovery process and by pursuing a "trial by agreement" approach, trial lawyers can agree to practices that will lead to more engaged and informed juries, more efficient trials, and outcomes that clients on both sides will be more likely to accept. For these reasons, the district court's Memorandum Opinion and Order Regarding Sanctions should be affirmed.

ARGUMENT

I. Introduction

The district court issued sanctions to correct excessive speaking objections, unfounded objections, and coaching of witnesses. Specifically, the district court imposed a sanction requiring Appellants to write and produce a training video explaining the district court's decision and setting forth specific steps lawyers should take to ensure that they comply with the decision reached by the district court in its opinion. The video must be approved by the district court and then distributed to each lawyer of Appellants' firm.

The district court's sanctions were appropriate.[3] The civil justice system is rife with this sort of deposition conduct.[4] After litigating a wide array of cases and handling many clients, the authors of this brief have sought to conduct trials under a concept known as "trial by agreement."[5] "Trial by agreement" seeks to streamline litigation and avoid the type of conduct at issue here. The district court's sanction order is consistent with these goals. Not only was the district court's decision to sanction Appellants clearly within its purview, but the sanction is also a step in the right direction for encouraging all trial lawyers to eliminate obstructionist tactics during discovery and throughout the remaining portions of litigation and trial.

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[3] The authors emphasize that a district court's decision to sanction is intensely fact dependent, and a different circumstance might justify a different result.

[4] *See Verinata Health Inc. v. Ariosa Diagnostics Inc.*, 3:12-cv-5501 (N.D. Cal. Sept. 16, 2014) (stating that the transcripts of depositions in a patent case were full of "instances of obduracy and intransigence, whose cumulative effect was to thwart discovery" and that counsel for the defendant "added fuel to the fire, interposing objections which at times appeared to be made for no reason other than to signal to the witness to become more obstructive"; warning both parties that "the use of tactics which have the intent to cause undue delay and expense will not be tolerated"); *see also MAG Aerospace Indus., Inc. v. B/E Aerospace Inc.*, 2:13-cv-6089 (Cent. D. Cal. Aug. 22, 2014) (ordering attorney's fees and limiting the types of objections available during a new deposition in a patent case; stating that "[t]he witness and his counsel may have taken some temporary pleasure in frustrating plaintiff's counsel's ability to obtain any information from the witness, but the judicial process and the public's perception of it suffers").

[5] *See generally* Stephen D. Susman, *About Pretrial Agreements*, TRIAL BY AGREEMENT, http://trialbyagreement.com/about/about-pretrial-agreements (last visited Nov. 7, 2014).

II. Analysis

a. The Problem

Federal Rule of Civil Procedure 1 provides that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Unfortunately, "speedy and inexpensive" often is the exception, not the rule, in modern litigation. Fortunately, the Rules of Civil Procedure and inherent powers give federal courts the tools they need to rein in discovery abuses and to make litigation speedier and more efficient.

The authors of this brief have previously noted that "lawyers have driven up the cost of litigation by unnecessary motion practice, unneeded discovery, and a failure to seek cost-saving agreements and protocols." *See* Stephen D. Susman and Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 Rev. Litig. 431, 434 (2013). These practices make the prospect of case resolution by a jury more expensive, more remote in time, and, therefore, less likely to occur. *See id.* As a result, improper conduct is a leading cause of the disappearance of the jury trial.[6] Never-ending

[6] *See* Patrick E. Higginbotham, *The Disappearing Trial and Why We Should Care,* Rand Review (2004), *available at* http://www.rand.org/publications/randreview/issues/summer2004/28.html (last visited Nov. 7, 2014) ("Because judges and lawyers are increasingly unskilled and inexperienced in the mechanics of a trial, the measure of what is relevant in discovery itself has become blurred at best.").

disagreements, objections, and strategic contests prevent the parties from ever reaching the merits of the case. This leads to a greater distrust of lawyers and the civil justice system.

Furthermore, litigation inefficiencies are not made harmless if a case actually makes it in front of a jury. *See* Susman & Melsheimer, *Trial by Agreement*, at 434. The same inefficiencies "will manifest themselves in an excessive use of exhibits, unnecessarily lengthy deposition testimony, and a bloated interrogation process that, in our experience, leads to the single most repeated comment by jurors after a trial has concluded: 'There was too much repetition.'" *Id*. The style of advocacy and the overall approach brought to the discovery process set the tone for the remainder of the litigation.

Experienced trial lawyers know that the vast majority of things that happen in discovery never make their way into court, which is another way of saying that most of what happens in discovery is not important to the outcome of the case. *Id*. at 438. Yet way too much effort is dedicated, too many hours are labored, and too much money is spent on discovery.

Many lawyers have a tendency to live by the assumption: "If the other side likes it, I don't." *See id*. Litigation is slow and expensive because lawyers spend so much time fighting. Not only does unnecessary fighting drain clients' pocketbooks, but it also imposes a strain on courts which sometimes do not have time to sort out

all of the disputes that are generated by pre-trial posturing. The best way to solve these problems is to have more attorneys with substantial trial experience. But trials are rarer these days, in part because the parties exhaust themselves with all of the pre-trial wrangling.

b. The Solution

The authors of this brief have advocated for a renewed commitment to civility and efficiency. We call this approach "trial by agreement." Our website, www.trialbyagreement.com, outlines a variety of agreements which lawyers can reach at the outset of a matter in order to have a more efficient discovery process and a faster, less expensive path to trial. The "trial by agreement" approach aims to supplement the Federal Rules of Civil Procedure by agreements which will reduce the amount of pre-trial wrangling that gums up the litigation process.[7]

We advocate for many pre-trial agreements, such as (1) limiting the number and length of depositions (beyond the limits already found in the Federal Rules of Civil Procedure), (2) requiring discovery disputes to be resolved on the phone by the lead trial lawyers, instead of (as often happens) by a letter-writing campaign between junior lawyers, (3) streamlining document production by having each side pick a limited number of witnesses from which a broad document production will be made,

[7] A significant amount of the analysis in this brief is set out more extensively in the authors' article "Trial By Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases," 32 REV. LITIG. 431 (2013).

(4) encouraging quick entry of a protective order covering confidential information and documents, and (5) agreeing to forgo expensive privilege reviews and abusively broad privilege claims by agreeing to a liberal snap-back of inadvertently-produced privileged documents and automatic, but limited, court review *in camera* of questionable privilege log entries.

In addition to engaging in the "trial by agreement" approach during depositions and throughout the discovery stage of litigation, the authors of this brief also advocate for the use of several other practices that can lower the costs of litigation, lead to a more efficient and effective communication of information, and thus allow the benefits of the jury system to be fully realized. The entire concept of "trial by agreement" is based on the principle of allowing a jury to evaluate the case *on its merits* without the interruption of petty disagreements and ungrounded objections.

By considering these additional practices, attorneys will aid in improving the overall litigation process. For example, the authors have identified the following practices that should be considered for use in every trial: (1) trial time limits; (2) juror questions; (3) interim arguments; (4) preliminary substantive jury instructions; (5) juror discussion of evidence before the conclusion of trial; and (6) juror questionnaires. *See generally* Susman & Melsheimer, *Trial by Agreement*

(addressing the benefits and hurdles of each practice in detail). Each of these practices allows a jury to decide a case more intelligently and efficiently.

By engaging in a "trial by agreement" approach, both parties will (1) allow their case to be effectively understood by the jury (and the judge); (2) save court resources by avoiding useless and time-consuming disputes; and (3) reduce the expenditure of fees and costs by both sides.

In contrast, improper deposition conduct, such as coaching witnesses and interrupting questioning, undermines these goals by prolonging depositions, by frustrating questioning, and by requiring the trial judge and counsel to wade through baseless objections and lawyer colloquy when addressing deposition designations for trial. This is precisely why the district court's chosen sanction is particularly appropriate and preferred. All trial lawyers should further advance their commitment to civility and professionalism.[8] The sanction at issue in this appeal instructs young lawyers defending depositions how to conduct themselves in depositions so as to make the discovery process speedier and more efficient.

[8] *See generally* The Honorable Mark W. Bennett, *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I Am a Litigator,"* 33 REV. LITIG. 1 (Winter 2014) (setting forth the eight necessary traits to combat the "dying trial lawyer" including: "(1) unsurpassed storytelling skills; (2) gritty determination to become a great trial lawyer; (3) virtuoso cross-examination skills; (4) slavish preparation; (5) unfailing courtesy; (6) refined listening skills; (7) unsurpassed judgment; and (8) reasonableness").

c. The district court possessed the authority to issue sanctions *sua sponte*.

i. Federal Rule of Civil Procedure 30(d)(2) grants the district court the power to impose appropriate sanctions.

Although we advocate for agreements which supplement the federal rules, we recognize that the rules themselves give courts the ability to regulate litigation so as to effectuate the "just, speedy, and inexpensive determination of every action and proceeding," as provided by Federal Rule of Civil Procedure 1.

The federal rules expressly prohibit speaking objections and witness coaching: "An objection must be stated concisely in a ***nonargumentative*** and ***nonsuggestive*** manner." Fed. R. Civ. P. 30(c)(2).

The rules expressly give the trial court the authority to sanction conduct such as speaking objections and witness coaching: "The court may impose an appropriate sanction – including the reasonable expenses and attorney's fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2).

The advisory committee note for Rule 30 further amplifies this authority to sanction: "The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g)."

In the trial court, the appellants argued that (1) the trial court lacked the power to issue sanctions *sua sponte*, and (2) the conduct at issue must not have been sanctionable because opposing counsel did not complain about it. The court ably addressed its power to sanction *sua sponte*. *Security Nat'l Bank of Sioux City, Iowa v. Abbott Labs.*, 299 F.R.D. 595, 599 (N.D. Iowa July 28, 2014). For example, the court pointed to the reference to Rule 26(g) in the advisory committee note to Rule 30. Rule 26(g) addresses the signing of disclosures, discovery requests, responses, and objections. It states that "if a certification violates this rule without substantial justification, the court, *on motion or on its own*, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed. R. Civ. P. 26(g) (emphasis added).

The court also addressed the reasons that opposing counsel may have chosen not to raise a fuss about the deposition tactics. *Security Nat'l Bank*, 299 F.R.D. at 599 n.9. We would like to add to the court's comments that when a counsel seeks quick, efficient resolution of a case, he or she often cannot complain to the court about every instance of improper conduct. From the perspective of opposing counsel representing a client in a particular case, this type of conduct sometimes is best left ignored. But from the perspective of a trial court judge, who has the broader interest of the civil justice system at heart and who is trying "to secure the just, speedy, and inexpensive determination of every action and proceeding," Rule 30(c)(2) should be

strictly enforced. Any judge who wants to smooth out and shorten the path to trial should not be precluded from doing so, especially when his intent is to make sure testimony is elicited that will be comprehensible to the jury.

ii. The district court had the inherent power to impose an appropriate sanction.

In addition to the power granted under the rules, the district court possessed the discretion to issue the type of sanction that it decided to impose. This Court has held that a district court's "inherent power includes the discretionary 'ability to fashion an appropriate sanction for conduct which abuses the judicial process.'" *Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004) (citing *Chambers v. NASCO Inc.*, 501 U.S. 32 (1991)). This inherent authority does not require a finding of bad faith. *Id*. (citation omitted).

Here, the sanction was imposed *after* the jury reached its verdict, which was in favor of the sanctioned party. The imposed sanction does not prejudice either party nor does it affect the outcome of the case. The district court did not impose a severe sanction that involved attorney's fees, a fine, or one that would affect the merits of the case.[9] Instead, Appellants must simply create a video explaining the

[9] *See Chrysler Corp. v. Carey*, 186 F.3d 1016 (8th Cir. 1999) (affirming the district court's decision to (1) strike the pleadings of the defendants; (2) enter judgment against the defendants on the issue of liability; and (3) submit the case to the jury to determine damages due to repeated discovery abuses by the defendants); *see also Keefer v. Provident Life and Accident Ins. Co.*, 238 F.3d 937 (8th Cir. 2000)

productive deposition practices that the district court advocated in its opinion. Not only does this sanction pose a minimal burden, it has the benefit of teaching attorneys efficient and effective ways for conducting depositions.

III. Conclusion

The district court possessed clear authority to impose the sanction at issue. The district court should be commended for its efforts not only to encourage but to *require* attorneys to engage in a truth-seeking mission, rather than an obstructionist battle, when they engage in the litigation process. Therefore, the district court's Memorandum Opinion and Order Regarding Sanctions should be affirmed.

Dated: November 7, 2014

Respectfully submitted,

/s/ Thomas M. Melsheimer

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AMICUS CURIAE

(affirming the district court's dismissal of the action as a sanction for discovery abuses).

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