3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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A TRIBUTE TO THE HONORABLE DOLORES K. SLOVITER

Nancy Winkelman
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Thirty years ago, I met a judge. A judge who would come to be my life-long mentor, and, today may I even say – my friend.

As Judge Dolores Korman Sloviter now takes inactive senior status, I am most touched and honored to write this brief tribute.

In 1986, I was a part-time law student at Western New England College School of Law in Springfield, Massachusetts. I was also the mother of a two-month old. Through a constellation of various factors, I was lucky enough to land an interview with Judge Sloviter – an interview that I had to cut short so I could get back on a plane to Springfield to nurse my baby. Hardly federal appellate clerk material. Yet Judge Sloviter must have seen something in me. She gave me a chance.

Judge Dolores K. Sloviter (left) with Nancy Winkelman – later the founding President of the Third Circuit Bar Association – at Nancy's law school graduation, 1987.

In the ensuing thirty years, I have been so grateful to work with and come to know this most extraordinary jurist: a brilliant intellect, with an extraordinary work ethic; a courage, strength, and independence born of upbringing, character, and necessity; a drive always for the best in herself and everyone around her; a deep commitment to justice and to the judicial system; and that unique and most precious combination of grit and heart.

And, just as Judge Sloviter saw something in me that others may not have seen thirty years ago, so she has given me the opportunity to see something in her. Like many brilliant women of her generation who would come to succeed in a male profession, circumstances required Judge Sloviter to develop a tough exterior. She is of the small cadre of women who were the first in their fields; who were the only women in the room for far too long; who were always surrounded by men who, even when they had good intentions (and many did not), could not possibly have left their prejudices and stereotypes at the door.

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A TRIBUTE TO THE HONORABLE DOLORES K. SLOVITER

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We have all heard the stories of this generation of women. I fully appreciate the tough exteriors that necessarily developed. Without that, most of these women would not have managed to stay in the room for very long at all. And without them, we – this next generation of professional women – would have had to struggle and fight even harder than we have, and ourselves develop tougher exteriors than perhaps our natures countenanced.

Yet, I am so fortunate to know Judge Sloviter beyond that. She is a caring, supportive, loving mother and grandmother. To this day, what brings the biggest smile to her face and joy to her eyes are mention of her beloved Vikki and Vikki's four children, her grandchildren. She is so very proud of them. To this day, her first questions to me are always about my own children. The coalescence of Judge Sloviter's toughness and softness is perhaps well-illustrated by her one inviolate chambers rule: no matter how much work we had on our desks, and no matter how much she wanted to get that opinion out – chambers lights out at 6:30 p.m., and no working at night or on weekends. She wanted to be sure that we, like she, always had dinner with our families.

And this is all before we even get to "the facts."

A life-long Philadelphian, Judge Sloviter is the only child of Jewish immigrants from Poland. Her parents spoke Yiddish in her home, and she herself spoke Yiddish before she spoke English. Judge Sloviter worked throughout high school, at such jobs as a summer camp counselor, a typist, and a secretary. She paid much of her own freight for college and law school, the rest covered by scholarships. She attended Philadelphia's public schools, including Girls' High, before proceeding to Temple University for her undergraduate degree and then to the University of Pennsylvania for law school. Judge Sloviter decided to go to law school after reading a biography on Clarence Darrow, and, in her own words: "[O]nce it entered my mind, there was nothing else there." (Such quintessential Judge Sloviter!)

Although Judge Sloviter graduated at the top of her class at Penn, she was initially offered jobs only as a law librarian. Yet she persevered. Ultimately, she joined the firm then known as Dilworth, Paxson, Kalish, Kohn & Levy and became its first woman partner, practicing primarily antitrust litigation. She then moved on to teach at Temple Law School, focusing on antitrust and civil procedure. At Temple, Judge Sloviter came to see that law firms were still not accepting women or granting them jobs to the extent the firms were hiring male students. So she took matters in her own hands, and worked to draft a proposal that Temple Law School would not allow any law firm that discriminated against women to conduct interviews on Temple's campus.

Appointed to the Third Circuit Court of Appeals by President Carter in 1979, Judge Sloviter was the first woman ever to serve as a judge on that Court. She was the first (and so far only) female Chief Judge of the Third Circuit. In fact, she is only the fourth woman in the entire country ever to serve as a Circuit Chief Judge at all. Judge Sloviter authored an astounding 808 precedential opinions in her almost 40-year tenure on the Court of Appeals, shaping the law in numerous areas, including antitrust and the First Amendment.

A fierce advocate for diversity and inclusiveness, as Chief Judge (a position she held from 1991 to 1998), Judge Sloviter created the ground-breaking Task Force on Equal Treatment in the Courts to examine racial and gender bias for the Third Circuit. She opened the Third Circuit Conference to all lawyers for the first time ever (a tradition that continues to this day). And she supported women and work-life balance in numerous ways, including offering part-time law clerk positions to working mothers.

Judge Sloviter is active in civic affairs, and is an ardent supporter of the Philadelphia arts. She also is a lifelong passionate Philadelphia sports fan – in particular her beloved Temple Owls. Anyone who has had the chance to accompany Judge Sloviter to a Temple Owls game can attest to that!

Thirty years ago, I met a judge. A judge who would change my life and the lives of so many around her; who would shape the jurisprudence of the Third Circuit for centuries to come; whose grit and heart would inspire so many. A remarkable woman.

THIRD CIRCUIT HOLDS THAT STIPULATION OF DISMISSAL AS TO REMAINING DEFENDANTS BEGINS 30-DAY CLOCK TO APPEAL FOR ALL PARTIES

State National Insurance Co. v. City of Camden, 824 F.3d 399 (3d Cir. May 24, 2016)

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The U.S. Court of Appeals for the Third Circuit recently reminded appellate practitioners that it is crucial to identify when the clock starts to run on a party's ability to file an appeal. In *State National Insurance Co. v. City of Camden*, the Court held that when a plaintiff stipulates to dismiss the last remaining defendant in a case, the stipulation is a final judgment that begins the 30-day clock for filing an appeal, even if a motion to reinstate another defendant in the case is pending at the time of the stipulation.

Underlying Litigation

The litigation stemmed from a lawsuit filed against the County of Camden in New Jersey by a man who sustained serious injuries after crashing his car into a guardrail that was maintained by the County. A jury found the County negligent and awarded the plaintiff over $31 million in damages. After the verdict, State National, the County's insurer, filed suit seeking a declaration that it was not obligated to cover the jury award. State National named the County's in-house lawyer, Donna Whiteside, as a defendant and alleged that she committed legal malpractice by failing to adequately defend the County at trial. The district court dismissed State National's claims against Whiteside and State National continued to pursue its claims against the County.

Several years after dismissal of State National's claims against Whiteside, State National filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure seeking to reinstate those claims. Before the district court ruled on State National's motion, however, the County and State National reached a settlement, and a stipulation of dismissal was entered. Two months after the stipulation was entered, the district court denied State National's motion seeking to reinstate its claims against Whiteside, and ordered the clerk to close the case. Less than two weeks later, State National filed a notice of appeal.

On Appeal

In an opinion authored by Judge Fisher and joined by Judge Chagares, the Third Circuit determined that it lacked jurisdiction to hear State National's appeal because it was filed more than 30 days after entry of the stipulation of dismissal. The Court held that the stipulation of dismissal was a final order, which divested the district court of jurisdiction. And because the stipulation was a final order, the clock started to run on State National's time to file an appeal upon entry of the stipulation.

In reaching its decision, the Court relied on two decisions from other circuits—*Versata Software, Inc. v. Callidus Software, Inc.*, 780 F.3d 1134 (Fed. Cir. 2015), and *Meinecke v. H&R Block of Houston*, 66 F.3d 77 (5th Cir. 1995)—which recognized that, once a stipulation of dismissal is entered, no further action of the district court is required. Although the district court ruled on State National's Rule 60(b) motion after the stipulation of dismissal was entered, this was improper because the district court no longer retained jurisdiction over the matter.

The Court acknowledged that, under Federal Rule of Appellate Procedure 4(a)(4)(A)(vi), a Rule 60(b) motion "filed no later than 28 days after the judgment is entered," tolls the time to file an appeal, but held that State National did not file a proper Rule 60(b) motion because Rule 60(b) grants the district court the power to relieve a party from a "*final* judgment, order or proceeding," and the order dismissing Whiteside was interlocutory and not immediately appealable.

Dissent

In a dissenting opinion, Judge Jordan opined that the majority ruling "throws into confusion what constitutes a final decision in a multiclaim, multiparty case where some claims are resolved by voluntary dismissal." Judge Jordan disputed the notion that when a stipulation resolves certain claims it somehow quashes ongoing litigation of separate claims. According to Judge Jordan, the cases relied upon by the majority—*Versata* and *Meinecke*—stood only for the limited proposition that when a plaintiff and a defendant resolve their dispute through a Rule 41 stipulation of dismissal, that dispute ends and the district court loses jurisdiction. The majority, however, disagreed with the dissent, concluding that the cases focused on the broader finality concerns that were relevant to the case at hand.

Conclusion

The Third Circuit's holding demonstrates that practitioners must pay careful attention to when a multiparty lawsuit is fully resolved with respect to all parties and all claims. In particular, practitioners should note that a stipulation of dismissal as to the remaining defendants in a case constitutes a final judgment that starts the 30-day clock for all parties to file a notice of appeal and that a Rule 60(b) motion will toll the 30-day clock pursuant to Federal Rule of Appellate Procedure 4(a)(4) only if the motion seeks relief from a final judgment.

THIRD CIRCUIT BUILDS UPON RULE 10 JURISPRUDENCE

Roberts v. Ferman, No. 15-2909, --- F.3d --- (3d Cir. June 17, 2016)

Devin Misour
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For the second time in so many years, the United States Court of Appeals for the Third Circuit has weighed in on the appropriate remedy for failures to comply with Federal Rule of Appellate Procedure 10, which concerns the composition of the record on appeal. In its most recent case addressing the Rule, *Roberts v. Ferman*, the Circuit held that a district court may properly deny a party's post-trial motion for lack of prosecution where the movant failed to adhere to the district court's order to recreate the trial record pursuant to Rule 10(c).

Appellant Roberts sued his former employer, Montgomery County, Pennsylvania, on various theories of municipal liability, including 42 U.S.C. § 1983 and Title VII. Following extensive pretrial motions practice, a jury found for the County on all of Roberts' surviving claims. Roberts then sought a new trial or, in the alternative, a judgment notwithstanding the verdict. It was soon discovered, however, that transcripts for four of the six days of trial had been lost, and the district court ordered Roberts to recreate the trial record pursuant to Rule 10(c).

But Roberts refused to comply with the court's order, insisting that the parties would not be able to agree to the contents of a Rule 10(c) statement. After waiting more than nine months, the district court ultimately dismissed Roberts' post-trial motion for failure to prosecute based upon his unwillingness to recreate the record. Roberts appealed, challenging the dismissal, as well as an earlier grant of summary judgment in the County's favor.

On appeal, the Third Circuit initially rejected Appellees' argument that Roberts had forfeited all of his claims because he failed to provide even the available portions of the trial court record. That argument was based upon the Court's recent decision in *Lehman Brothers Holdings, Inc. v. Gateway Funding Diversified Mortgage Services, L.P.*, 785 F.3d 96 (3d Cir. 2015), which held that the appellant violated Rule 10 and forfeited a particular argument by falsely stating that no transcript of a particular hearing existed. In *Roberts*, the Third Circuit clarified its holding in *Lehman Brothers* and emphasized that the appellant in that case had, at best, failed to obtain a transcript of the hearing in question, and, at worst, intentionally mislead the Court on appeal. The Court stressed that in *Lehman Brothers*, it had not "cavalierly" held that *any failure* to comply with Rule 10 was sufficient to forfeit an argument on appeal; rather, the Court set forth several factors to be considered before imposing forfeiture, and ultimately rejected the appellant's argument on the merits as well. Because Roberts did not engage in conduct as egregious as that in *Lehman Brothers*, the Court did not find that he had forfeited his claims on appeal.

Turning to the facts of *Roberts*, the Third Circuit held that a party's willful refusal to prosecute or blatant failure to comply with a district court order are proper grounds for dismissal. The Court specifically found that the district court did not abuse its discretion in dismissing Roberts' motion for lack of prosecution because Roberts adamantly refused to recreate the record for more than nine months.

The Court also held that, even if the district court had erred, Roberts' failure to comply with Rule 10(c) prevented appellate review because an appellant cannot seek a new trial based solely on a missing record when he or she failed to provide a complete record in the first place. The Court clarified that, in cases where an appellant attempts to comply with Rule 10(c) but ultimately recreates an incomplete record on appeal, the appellant may seek appropriate relief by showing prejudice due to the loss of part or all of the record below.

The Third Circuit's recent attention to Rule 10 is noteworthy for all appellate practitioners and could signal a shift toward procedural deficiencies playing a prominent role in limiting appellate jurisdiction. While the Court has taken pains up to this point to strictly limit its holdings in this area, the pitfalls associated with dismissal and forfeiture are clear, and litigants are well-advised to ensure compliance with Rule 10 and any associated court order.

PRESIDENT'S NOTE

Peter Goldberger
President, Third Circuit Bar Association

You will find in this issue of the Third Circuit Bar Association newsletter another excellent collection of articles and bulletins designed to enhance the appellate side of your practice. Reginald Sainvil (of Reed Smith, in Pittsburgh) and Devin Misour (of Farrell & Reisinger, also in Pittsburgh) have written up this issue's "cases of note." In each of those recent decisions the Third Circuit addressed an important and difficult aspect of appellate procedure that we all need to be conscious of – how to calculate the time to file a notice of appeal in a complex case, and how to ensure that the "record on appeal" contains everything needed for the briefing and decision of the case. Each case teaches a valuable lesson.

3CBA co-founder Nancy Winkelman, of the Schnader firm in Philadelphia, has written an informative and affectionate tribute to her mentor, Senior U.S. Circuit Judge Dolores K. Sloviter, on the occasion of her assuming inactive status. Former Chief Judge Sloviter was a member of our Bar Association's original judicial advisory group and a stalwart supporter through our early years, including acting as official liaison between the Third Circuit Bar Association and the Court of Appeals. The entire Board of Governors joins in wishing her well, and in hoping we will continue to see her at Bar and Court functions.

I also want to note the recent passing of Senior Circuit Judge Franklin S. Van Antwerpen. Our tribute to him will be in the next issue, but speaking for myself I can say that I always found Judge Van Antwerpen to be a kind, humane and thoughtful jurist. I will miss him a great deal.

As most of you already know, the biennial open session of the Third Circuit's Judicial Conference has been announced for April of 2017, at a location in Lancaster, Pennsylvania. For those who have not attended in the past, this event operates as a sort of Bench-Bar Conference. The Third Circuit Bar Association expects to be actively involved, as we always have been, contributing practitioners' perspectives in the planning process and during the Conference itself. The save-the-date notice is part of this newsletter issue.

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Have an important criminal law issue in the Circuit? Consider seeking amicus support from the National Association of Criminal Defense Lawyers.

The National Association of Criminal Defense Lawyers ("NACDL") is widely recognized as the voice of the criminal defense bar. Founded more than fifty years ago, NACDL has more than ninety state, local and international affiliates that permit it to speak for some 35,000 defenders in private and public practice, as well as academics and jurists.

NACDL has appeared as amicus curiae in numerous landmark cases in this Circuit and others. It is among the most active amici in the U.S. Supreme Court, and an independent analysis declared it "the most effective amicus" there.

If you have a case presenting an issue of importance to criminal defendants, criminal defense lawyers, and/or the criminal justice system as a whole, NACDL's Amicus Committee vice-chairs for the Third Circuit would like to hear from you. Although NACDL cannot provide assistance in every case, we value your inquiries and invite you to reach out as early as possible in the process. Our contact information is:

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For more information about NACDL's amicus policy, visit www.nacdl.org/Amicus.

SAVE THE DATE

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73rd Judicial Conference of the Third Circuit

April 19 - 21, 2017
Lancaster, PA

Up to 12 CLE, including 2 Ethics, pending approval

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PRESIDENT'S NOTE

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Let me remind you that the latest revision of the Association's indispensible Practice Guide will be out prior to the December 1 effective date of the newest changes in the Rules of Procedure. Meanwhile, start practicing writing briefs that stay within a 13,000 word limit! As always, the Board and Officers thank you for your continued membership and your support for the Court and for our Bar Association.

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