Bar Association for the Third Federal Circuit

On Appeal

November 2013
Volume VII, Number 4

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THIRD CIRCUIT ELUCIDATES WAIVER STANDARDS

United States v. Joseph, No. 12-3808, --- F.3d --- (3d Cir. Sept. 19, 2013)

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Waiver can make or break a case. Skilled practitioners will avoid waiver at trial and invoke waiver as an offensive tool on appeal. It is thus noteworthy that the Third Circuit, in *United States v. Joseph*, recently clarified standards and terminology with respect to preservation and waiver. In a unanimous precedential opinion authored by Judge Smith (and joined by Judges Rendell and Shwartz), the Court ruled that the degree of particularity required to preserve an argument is exacting. In order to preserve an argument for appeal, a party must have raised the same argument—that is, an argument based on the same facts and the same legal rule—in the District Court. Merely raising an issue in the District Court that encompasses the argument asserted on appeal is not enough.

In *Joseph*, a gentleman's club patron, Akeem Joseph, was stopped by police after the club's security officer reported that Joseph had attempted to pass several counterfeit $100 bills. The police examined one of the bills and discovered a discrepancy in its security features. Officers then arrested Joseph, searched him, and discovered additional counterfeit bills. After Joseph waived his *Miranda* rights, he confessed and turned over incriminating text messages. He was later indicted for passing and possessing counterfeit bills in violation of 18 U.S.C. § 472.

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THE NEW "STATEMENT OF THE CASE" UNDER REVISED RULE 28

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One of the most significant amendments to the Federal Rules of Appellate Procedure in many years will go into effect on December 1, 2013. The Rules have been revised to redefine the requirement that each brief contain a "statement of the case." A 1998 amendment to the Rules created an often confusing distinction between the "Statement of the Case," which was more of a procedural history, and the "Statement of Facts." That distinction has been eliminated. Now each brief is simply to contain a "concise" and combined "Statement of the Case," newly defined. The amendment emerged from the Advisory Committee on Appellate Rules. The Supreme Court gave its final approval and promulgated this revision in April.

The new, consolidated Statement of the Case applies to appellants (revised Fed. R. App. P. 28(a)(6)), appellees (revised Rule 28(b)(3)), and parties to cross-appeals (revised Rule 28.1(c)). The "concise statement of the case" must contain "the facts relevant to the issues submitted for review," "the relevant procedural history," and "the rulings presented for review," all "with appropriate references to the record (see Rule 28(e))." The requirement for specific citations to the rulings presented for review is new so far as the Statement is concerned, although most thoughtful appellate practitioners have, no doubt, long followed that practice.

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BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

U.S. BANKRUPTCY JUDGESHIP VACANCY

District of New Jersey

Theodore A. McKee, Chief Judge

Chief Judge Theodore A. McKee of the United States Court of Appeals for the Third Circuit announces the application process for a bankruptcy judgeship in the District of New Jersey, seated in Camden. A bankruptcy judge is appointed to a 14-year term pursuant to 28 U.S.C. §152.

To be qualified for appointment an applicant must:

(a) Be a member in good standing of the bar of the highest court of at least one state, the District of Columbia, or the Commonwealth of Puerto Rico and a member in good standing of every other bar of which they are members.

(b) (1) Possess, and have a reputation for, integrity and good character; (2) possess, and have demonstrated, a commitment to equal justice under the law; (3) possess, and have demonstrated, outstanding legal ability and competence; (4) indicate by demeanor, character, and personality that the applicant would exhibit judicial temperament if appointed; and (5) be of sound physical and mental health sufficient to perform the essential duties of the office.

(c) Not be related by blood or marriage to (1) a judge of the United States Court of Appeals for the Third Circuit; (2) a member of the Judicial Council of the Third Circuit; or (3) a judge of the district court to be served, within the degrees specified in 28 U.S.C. § 458, at the time of the initial appointment.

(d) Have been engaged in the active practice of law for a period of at least five years. The Judicial Council may consider other suitable legal experience as a substitute for the active practice of law.

The selection process will be confidential and competitive. The current annual salary is $160,080. Persons shall be considered without regard to race, color, age, gender, religion, national origin, disability, or religious affiliation. The name of the candidate selected for the position will be published for public comment prior to appointment. The name of the person selected will also be submitted to the Director of the Administrative Office, who shall request background reports by the Federal Bureau of Investigation (FBI) and the Internal Revenue Service (IRS).

The application process is entirely automated. No paper applications will be accepted. Applications must be submitted electronically by ***noon on Friday, November 22, 2013***. Applications must be submitted only by the potential nominee personally. To apply, go to www.ca3.uscourts.gov for more information or call the Circuit Executive's Office at 215-597-0718.

THE NEW "STATEMENT OF THE CASE" UNDER REVISED RULE 28

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Notably, there is no longer any requirement for a separate statement of the facts giving rise to the court case, as described at trial or in the pleadings, that is, the "real world" story underlying the court action. The "relevant facts" are simply to be included in the Statement of the Case, as they were until the 1998 amendments to the Rules; nevertheless, they remain critical. It is hard to imagine an effective appellate brief that would not include the party's version of that story, at least in its essential outline. And of course whenever an issue requires reference to the facts presented in evidence at trial, at a hearing, or in summary judgment papers—such as when it is being argued that the proof of some essential fact is insufficient, that a finding is clearly erroneous, that a material fact was in dispute, or even that a certain error was prejudicial in light of the record as a whole—a more detailed presentation of facts is not only essential to a persuasive brief, but also necessary to comply with the requirement that all "relevant" matters be included.

Rule 28(a)(6)'s reference to the "relevant" facts can be seen as a warning to omit whatever is not essential as well as a reminder to include all that is needed to ensure understanding. The revised Rule also now calls for only the "relevant" procedural history to be described, although experienced appellate practitioners have generally understood that to be the intent even before the current amendment. The insertion of the word "concise" to describe the overall Statement of the Case further emphasizes the importance of eliminating unnecessary points.

The revised Rule might be read as suggesting that the Statement of the Case be kept to a birds-eye view, shorter on average than the procedural and factual statements have often been in the past. We can only await guidance on this from the Clerk and the judges. On this interpretation, it should be possible for evidentiary details necessary to advance (or refute) a party's view of a question presented on appeal to be included only in the Argument, insofar as necessary to articulate an issue and explain why it warrants reversal or affirmance. Extensive repetition of facts, first in the Statement of the Case and then again in the Argument, is often unnecessary.

As for the procedural-history portion of the Statement, while Rule 28 as amended no longer makes express reference to stating in every brief "the nature of the case, the course of proceedings, and the disposition below," it is difficult to imagine a competent appellate brief that would not cover those points (without wasting words on immaterial proceedings). What the revised Rule allows, however, is an exercise of the advocate's professional judgment and discretion about where to include important background. Gone is the head-scratching, artificial line between "procedural history" and "facts." And as noted above, there may now be greater flexibility to discuss specifics in the Statement of the Case, the Argument, or even the Statement of Jurisdiction.

The new Statement of the Case rule originated in a study undertaken ten years ago, when then-Judge Alito was chair of the Appellate Rules Advisory Committee. He tasked his committee with finding ways to make the appellate rules clearer and more efficient. This year's change – proposed for public comment in the summer of 2011 – is a result.

THIRD CIRCUIT CLARIFIES FEDERAL COURT JURISDICTION SURROUNDING REMAND TO STATE COURT

Agostini v. Piper Aircraft Corp., No. 12-2098, --- F.3d --- (3d Cir. Sept. 5, 2013)

Paige H. Forster, Reed Smith LLP, Pittsburgh

The Third Circuit recently clarified the limits of its own jurisdiction, and that of the district court, in connection with orders remanding cases to state court. The Court ruled that just as it has no jurisdiction to review a remand order, it also has no jurisdiction to review a denial of a motion to reconsider a remand order.

In *Agostini*, the estates of individuals killed in an airplane crash sued various defendants, including the aircraft manufacturer, in state court in Philadelphia. One of the defendants removed to the U.S. District Court for the Eastern District of Pennsylvania on the basis of diversity jurisdiction. The plaintiffs moved to remand, arguing that there was not complete diversity. The District Court agreed and remanded. The defendant filed a motion for reconsideration, which the District Court denied, and the defendant appealed from that denial of reconsideration.

As an initial point of interest, the *Agostini* opinion was not written after full merits briefing on the subject matter of the appeal. Instead, *Agostini* is that rarer breed: a published federal appellate court opinion disposing of a motion. After the defendants appealed, the plaintiffs filed a motion in the Third Circuit to dismiss the appeal. In accordance with Federal Rule of Appellate Procedure 27(c), which provides that a judge may act alone on a motion, but "may not dismiss or otherwise determine an appeal," the motion was adjudicated by a three-judge panel (Judges Smith, Chagares, and Scirica).

Agostini required the Court to delve into the intricacies of 27 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" (with limited exceptions that did not apply in *Agostini*). The purpose of Section 1447(d), as the Court explained, is to prevent parties from using removal as a delay tactic. Without its limit on reviewability, a party could remove a state case to federal court and then, upon remand, "request reconsideration of remand, appeal, request rehearing, and then file a petition for writ of certiorari, all before being forced to return to state court several years later." Slip Op. at 10 (quoting *Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 156-57 (3d Cir. 1998)).

The Court of Appeals, in a unanimous opinion authored by Judge Chagares, rejected the defendant's argument that an order denying reconsideration of remand is distinct from a remand order, and that only the latter is unreviewable under Section 1447(d). Although courts may decide "collateral" issues after remand, such as motions for costs or attorneys' fees, a denial of reconsideration of a remand order does not involve a collateral issue.

The Court of Appeals also found that the District Court had jurisdiction to entertain the reconsideration motion in the first instance. To make that determination, the Court had to consider when jurisdiction had been transferred from federal back to state court. Relying on its own precedent, the Court determined that the "jurisdiction-transferring event" was the mailing of the certified copy of the remand order from the district court clerk to the state court. The Court concluded that the District Court had jurisdiction to entertain the reconsideration motion because at the time when it did so, the certified copy of the remand order had not yet been mailed to the state court. (There is a circuit split on this issue, as the Court noted in a footnote: the Second Circuit has ruled the same way as the Third Circuit in *Agostini*, while the Fourth Circuit has ruled that once the remand order is entered, the district court may not reconsider it.) For future reference, the Court cautioned district courts that once the remand order is mailed, it may not be reconsidered.

Agostini holds a firm line on the unreviewability of remand orders under Section 1447(d), reinforcing the conventional wisdom that the time to fight most motions to remand is in the opposition to the motion itself, not in a likely-to-be barred appeal. After a remand order has been entered, the district court's ability to reconsider turns on whether the certified copy of the order has been mailed to the state court, a factor outside the litigants' control.

THIRD CIRCUIT ELUCIDATES WAIVER STANDARDS

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Joseph moved to suppress the counterfeit bills, text messages, and his confession in the District Court. He argued that the search was unlawful on two grounds. First, he claimed it was an illegal *Terry* stop. Second, he argued that the police lacked probable cause for the arrest because no one at the scene had sufficient expertise in counterfeiting to know whether the bills were in fact counterfeit (the "actus reus argument"). The District Court denied Joseph's motion, and the case proceeded to trial, which resulted in a guilty verdict. On appeal, Joseph argued for the first time that probable cause to arrest was absent because the police had insufficient evidence to establish his intent at the time he passed and possessed the counterfeit bills (the "mens rea argument"). The Court of Appeals held that Joseph waived the mens rea argument because he did not raise that same argument in the District Court.

The Court of Appeals recognized initially that many of its precedential opinions contained inconsistent terminology pertaining to preservation and waiver. In defining what exactly is preserved and waived, the Court began by accounting for each of the terms it had used in its opinions. It explained that the synonymous terms "question" and "issue" are broader in scope than the synonymous terms "argument," "contention," "theory," "ground," or "basis," in that the former can encompass more than one of the latter. The Court then reframed the waiver question before it to be whether raising an issue before the District Court is sufficient to preserve any argument encompassed within that issue. The Court concluded that it is not. A party must make the same argument in the District Court that it makes on appeal.

The Court went on to provide a two-step framework for analyzing whether an argument has been preserved. The first step is to differentiate between issues and arguments. While an issue involves multiple avenues for relief, an argument is a single point of contention that cannot be distilled into separate lines of legal analysis. Once arguments have been identified, the second step is to determine whether they are the same argument. An argument may be considered on appeal if it depends on the same legal rule and the same facts as an argument presented in the District Court.

The Court of Appeals then applied its framework to Joseph's contention that he had preserved his mens rea argument because he had asserted in the District Court that the officers lacked probable cause to arrest. The Court first determined that probable cause was an *issue*, rather than an *argument*, because it could be distilled into more particular arguments. The Court then compared Joseph's actus reus probable cause argument with his mens rea probable cause argument to determine if they were the same argument. It concluded that they were not the same because, while the two arguments were both encompassed within the issue of probable cause, they depended on different legal rules and facts. The Court thus held that Joseph failed to preserve his mens rea argument for appeal.

The Court of Appeals' exacting waiver standard restricts a party's ability to raise arguments on appeal. However, as the Court emphasized, the standard enunciated in *Joseph* does not change parties' ability to control how they present and support their preserved arguments. Parties are free, for example, to place greater emphasis on (and more fully explain) an argument on appeal than they did in the District Court. Parties may even reframe an argument within the bounds of reason as long as they do not alter its substance.

Because the waiver issue in *Joseph* involved suppression of evidence and was controlled by Federal Rule of Criminal Procedure 12, the Court noted that it did not have the occasion to officially consider whether its newly clarified framework would apply in civil cases. However, nothing on the face of the Court's reasoning would render it inapplicable to civil appeals, and there is little to suggest that the Court will not extend its new framework beyond suppression arguments. Therefore, familiarity with the new standard will benefit every Third Circuit practitioner.

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