No. 07-121

In the Supreme Court of the United States

LESLIE VALERIE MATLAW,
Petitioner,

v.

CAROL HUG, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT BRIEF IN OPPOSITION

PAIGE C. DONALDSON
SANCHEZ, DANIELS & HOFFMAN
333 W. WACKER DRIVE
SUITE 500
CHICAGO, IL 60606
(312) 641-1555
FAX (312) 641-3004

Counsel below for Respondents Cendant Mobility Services Corporation, Curtis Castle and Carol Castle

MARK D. HOWARD
LAW OFFICE OF MARK D. HOWARD
134 NORTH LASALLE STREET
SUITE 1810
CHICAGO, IL 60602
(312) 201-8001
FAX (312) 803-2130

Counsel of Record for Respondents Carol Hug, Roger Hug, Patricia Brown-Wyrick, H&H Realty, Inc. d/b/a Remax Team 2000, Cendant Mobility Services Corporation, Curtis Castle and Carol Castle

August 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

RULE 29.6 STATEMENT

H&H Realty, Inc. has no parent corporations, and no publicly held corporation owns more than 10% of its stock.

Cendant Mobility Services Corporation is now known as Cartus Corporation. Cartus Corporation is 100% owned by Realogy Services Group LLC. Realogy Services Group LLC is not a publicly traded company.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Rules

SUMMARY OF THE ARGUMENT

Defendants[1] assert that issuance of a writ of certiorari is inappropriate in this case. Three reasons suggest this conclusion.

The first is jurisdictional. The Petitioner did not identify the November 2005 opinions in her notice of appeal. Even if her notice could be construed to encompass the November 2005 opinions, it was untimely. An appeal of the alleged sanctions in the November 2005 opinions needed to be filed within 30 days thereof. Matlaw did not file her notice of appeal until May 2006. Jurisdiction for the issues raised in Matlaw's petition is lacking.

Secondly, the issue presented is not sufficiently important to the public to warrant this Court's consideration. The split among the circuit courts does not "so embarrass the operation of the judiciary as to require resolution," and an adequate remedy exists for Petitioner in the form of mandamus. Matlaw makes no coherent argument that granting the right of direct appeal would provide any broader relief than is already available by mandamus in the Seventh Circuit. Absent such a showing, Matlaw is unable to credibly argue that that the question presented is important to *her*, much less to the public at large.

Lastly, Petitioner admits an attempt to manufacture jurisdiction below at the expense of her client, co-counsel,

---

[1] All original defendants join in this Brief in Opposition. Because Matlaw has designated Magistrate Judge Cole as the only "true" Respondent in her Petition, defendants make self-references as "Defendants."

defendants and the judiciary, merely to perpetuate the litigation relating to her renewed claim for fees. Consequently, even if the *issue* presented is of sufficient "public importance" for review, this *case* is not worthy of presenting it. The "conflict" that is the centerpiece of Petitioner's argument is a false and manufactured one, and is insufficient to justify review.

ARGUMENT

I. Matlaw did not timely file a notice of appeal from the November 2005 Orders.

Petitioner claims that she should be allowed to appeal from unflattering statements contained in the memorandum opinions issued by the magistrate in November 2005. However, she did not file a timely notice of appeal from those opinions, did not identify the November 2005 orders in her notice of appeal, and has failed to establish appellate jurisdiction.

Petitioner filed her notice of appeal on May 26, 2006.[2] The notice was filed more than six months following the issuance of the November 2005 opinions. Matlaw fails to appreciate that the finality of a sanctioning order is unrelated to the finality of the underlying case. Because of this, even if a request for review of the November 2005 orders could be fairly inferred from the notice of appeal that *was* filed, Matlaw failed to timely file that notice.

It is clear that an attorney sanction order is treated differently for jurisdictional purposes than the underlying case

---

[2] Document No. 104 in the district court.

between the parties. A post judgment motion for attorneys' fees, for example, does not change the finality of an order in the underlying case. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Dunn v. Truck World, Inc.*, 929 F.2d 311 (7th Cir. 1991).

The "sanction" orders at issue have more "separation" from the underlying case than an example where attorneys' fees are awarded to a party. When a sanction is payable to the court or when, as here, there are no monetary sanctions at all, the original parties have no conceivable interest in the outcome. A non-monetary sanction order only affects the reputation of the sanctioned attorney and not the interests of any client. The right of appeal of a sanctioning order is not dependent on when the parties' underlying case becomes subject to a final order. Indeed, a sanctioning order is immediately appealable and its finality does not await the conclusion of the underlying case.

In *Hill v. St. Louis University*, 123 F.3d 1114 (8th Cir. 1997), the court stated as follows:

> a "sanction[s order] against present counsel to a party [is] immediately appealable as a final decision under [28 U.S.C.] § 1291 and under the Cohen collateral order doctrine." *Crookham v. Crookham*, 914 F.2d 1027, 1029 n. 4 (8th Cir.1990) (internal quotations and citations omitted). Thus, as a general matter, a notice of appeal from a sanctions order must be filed within 30 days from the entry of the order. See Fed. R. App. P. 4(a)(1). "Timely filing is not merely a procedural requirement, but is mandatory and jurisdictional." *United States v. Fitzgerald*, 109 F.3d 1339, 1342 (8th Cir.1997) (internal quotations omitted).

In the present case, as Matlaw's petition indicates, the attorneys' fee issues were *immediately* settled after the November 9, 2005 hearing before the magistrate. Consequently, the perceived sanctions were limited to the statements in the magistrate's November 2005 opinions. There was nothing left to be resolved since there was no fee award to be entered by the court. All matters had been settled between the parties and the attorneys.[3]

What Matlaw characterizes as sanction orders were final and appealable no later than November 9, 2005. Yet Matlaw's notice of appeal was not filed until six months later – more than five months after her right to appeal the perceived sanctions expired. There was no jurisdiction in the Seventh Circuit and there is no jurisdiction here.

---

[3] A question that remains unresolved – and one which the Defendants' were willing to leave unresolved in favor of achieving the goal of a *final* settlement - is the level of involvement of Donna Seymour, the original plaintiff, in the post settlement activity focused on disrupting the settlement. On July 13, 2006, months after the final settlement order was entered in this case, and after she had been paid the settlement funds, Seymour signed an affidavit that Matlaw was still her counsel in this action but that Seymour claimed she was not involved in the appeal because of the risks it would cause her. (Page 19 of Document #119 available on Pacer/Racer at the Northern District of Illinois, Eastern Division's website in Case 04-2041). Seymour's affidavit suggests that Seymour has acquiesced and encouraged Matlaw's appeal. There is a disquieting undercurrent to these actions. Matlaw and Seymour seek to rehabilitate their reputations and put some money back in their pockets as well. The fact that this conduct is in violation of the releases signed years ago seems to be of no concern to either of them.

Another defect exists in the designations Matlaw made in the notice of appeal. Petitioner made no reference to the orders she now wants reviewed which is fatal to her present cause. It has been held: "[W]here the order or judgment upon which the appellant seeks review is neither directly nor indirectly referred to in the notice of appeal, then the issue is not fairly raised and the Court of Appeals does not acquire jurisdiction." *United States v. Rivera Construction Co.*, 863 F.2d 293, 298 (3d Cir. 1988).

Even if Matlaw's notice of appeal could be considered timely, her notice is insufficient to imply an appeal of the November 2005 orders. The notice of appeal referenced *only* (1) the April 2006 order memorializing the voluntary settlement agreement of the parties and 2) the May 2006 order of the Article III judge denying relief because he had no jurisdiction to hear matters in a consent case.

It cannot be fairly inferred from these designations that Matlaw was seeking review of the magistrate's November 2005 opinions. To preserve her right to appeal the perceived sanctions, Matlaw was required to file a notice of appeal within 30 days of November 9, 2005. She was also required to designate the orders she wanted to appeal. She failed in both respects.

The subsequent notice of appeal filed after the conclusion of the underlying case – which did not mention the November 2005 opinions of the magistrate – did not renew appellate jurisdiction that had long since expired for the relief Matlaw desires in this Court. There is no jurisdiction to entertain this petition.

II. The question presented is not of substantial importance.

Certiorari is not lightly granted, and is generally related to important public issues rather than the parochial concerns of individual petitioners. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955), this Court stated:

> Certiorari should not be granted except in cases involving principles the settlement of which is of importance to public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeals.

Defendants submit that the question presented here clearly does not meet the standard of "public importance." As argued in Section III of the argument in this Brief in Opposition, the question presented may not even be important to Matlaw – regardless of whether she realizes it or not.

Further, though Defendants admit the existence of a conflict among the circuit courts of appeal, that conflict hardly rises to the status of being an "embarrassing" conflict. Matlaw also makes a Due Process argument. Her argument is that "Due Process requires that reputational injuries to attorneys be adjudicated under the same standard, regardless of where they may practice." There is of course no authority cited for this proposition as none exists.[4] There is no

---

[4] Matlaw does not raise in this Court an additional Due Process argument she had raised below. In Footnote 33 of her petition, Matlaw mentions that she argued below that her Due Process rights

requirement that all circuit courts deal with all issues identically. Defendants submit that the question of whether review of non-monetary sanctions should be addressed by direct appeal rather than mandamus is insignificant as a matter of public importance.

In any event, Matlaw had a remedy. The *Bolte* court has held that a writ of mandamus may be sought for the relief Matlaw seeks.[5] Mandamus provides a sufficient check on perceived judicial abuses based on alleged attorney

---

were violated because the district court did not provide a hearing regarding the purported sanctions. If Matlaw were entitled to a hearing below and was not granted one, she would have had a ripe opportunity to argue the need for a writ of mandamus given the lack of right to direct appeal in the Seventh Circuit. But Matlaw does not advance the "lack of a hearing below" Due Process argument here. Perhaps this is because she realizes the argument is absolutely false. In the court of origin, Plaintiff 's counsel and the Defendants submitted cross motions for summary judgment to enforce a settlement that all parties agreed existed – though they differed on the terms that had been agreed to. The magistrate was expected to rule on the motions. Matlaw never requested a hearing before issuance of the November 8, 2005 Order. After she filed her Motion to Reconsider on November 9, 2005 there was hearing running to 57 pages of transcript on the issues she did raise. She was present for the hearing and was the principal advocate on her motion. One issue that she *never raised* in the district court was that she had been denied a hearing before issuance of the November 2005 orders.

[5] "If there is any remedy for the wrong that the appellants allege, it is to seek a writ of mandamus against the district judge under 28 U.S.C. § 1651." *Bolte v. Home Ins. Co.*, 744 F.2d at 573 (7th Cir. 1984).

misconduct. If Matlaw was unable to take a direct appeal in the Seventh Circuit she could have pursued the alternate remedy. A mandamus action would not have needlessly required the original parties to remain involved and would not have created the perceived conflict of interest that Matlaw fabricates in her Petition.

Matlaw has made absolutely no showing that mandamus is an insufficient remedy for the relief she seeks. She engages in no discussion of the relative merits of direct appeal as compared and contrasted with mandamus. She makes no effort to explain how choosing one remedy or another would make any difference in her case at all.

She does not like the adverse facts as found by Magistrate Cole in his thorough and well considered opinions.[6] However, neither this Court nor the Seventh Circuit will review those factual findings *de novo*. If jurisdiction had been found on appeal, all factual findings below would have been reviewed under the "clearly erroneous" standard.[7] In the context here, one wonders whether that standard would be so much easier for the Petitioner to overcome than the "abuse of discretion"

---

[6] The Novenber 8, 2005 order is reproduced in Petitioner's Appendix at pages 46- 86. The November 9, 2005 opinion on the Motion to Reconsider is reproduced in Petitioner's Appendix at pages 88-94.

[7] Under the "clear error" standard for reviewing a trial court's fact findings, an appellate court will not reverse simply because it would have decided the case differently; rather, the reviewing court must ask whether, on the entire evidence, it is left with definite and firm conviction that a mistake has been committed. *Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452 (2001).

standard that attends an application for mandamus?[8] And even if it were, is the difference a matter of substantial public importance?[9] Certainly, Matlaw has offered no coherent argument or compelling reason why mandamus would be insufficient in the circumstances presented here.

---

[8] As this Court has held:

> "exceptional circumstances amounting to a judicial 'usurpation of power,' ... or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383, 74 S. Ct. 145, 98 L. Ed. 106 (1953), "will justify the invocation of this extraordinary remedy," *Will,* 389 U.S., at 95, 88 S. Ct. 269."

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380, 124 S. Ct. 2576, 2587 (2004).

[9] *See Morales v. Yeutter*, 952 F.2d 954, 958 (7th Cir. 1991), where it was observed: "There is a division within this court over whether we must or even can establish fine gradations of judicial review. (See the opinions in *United States v. McKinney,* 919 F.2d 405 (7th Cir.1991); also *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 916-17 (7th Cir.1991).) One school of thought holds that the verbal differences in standards of judicial review (arbitrary and capricious, clearly erroneous, substantial evidence, abuse of discretion, substantial basis, etc.) mark real differences in the degree of deference that the reviewing court should give the findings and rulings of the tribunal being reviewed. The other school holds that the verbal differences are for the most part merely semantic, that there are really only two standards of review-plenary and deferential-and that differences in deference in a particular case depend on factors specific to the case, such as the nature of the issue, and the evidence, rather than on differences in the stated standard of review.

Matlaw observes in her Petition that this Court has previously denied certiorari on the issue she has presented. The issue is no more important now that it was at the time of the previous denials. This Petition should be denied.

III. If there is substantial public importance attached to answering the question presented, the record strongly suggests that the question is not worthy of presentment by Matlaw's petition.

Matlaw suggests that the issue presented by her Petition creates a victim-rich environment. She portrays herself as the self- sacrificing hero on the altar of her client's interests. She has scripted a high-drama play about the destruction of the justice system as a whole when attorneys are unable to directly appeal non-monetary sanctions as a matter of right. According to her fictitious script, the inability to appeal non-monetary sanctions in the Seventh Circuit leads to client mistrust and involuntary unethical behavior on the part of the attorney who cannot appeal. This is nonsense.

The Petition provides us with insight into how Matlaw decided to resolve her imaginary conflict. She pretended to go along with the settlement until all payments had been made. She then tried to recoup her economic "losses" from the defendants by advancing bad faith arguments. But Matlaw refuses to acknowledge that there was in fact no conflict other than the one created by the parochial interest recovering her losses in contravention of the settlement.

The parties had settled the underlying case. If all Matlaw wanted was review of the statements she perceives as objectionable, Matlaw could have made a timely direct appeal or sought a writ of mandamus. What right would the original parties have to object? Why would any defendant need to

remain involved in those proceedings? Defendants would have been done with the case and would have had no interest in a dispute between Matlaw and the magistrate.

But mere review of the statements in the magistrate's opinion that called her conduct misleading has never been Matlaw's only goal.[10] Matlaw discloses in footnote 10 of her Petition that she intentionally manipulated appellate jurisdiction in the Seventh Circuit. Matlaw claims that she only raised her "economic injury" – directly involving the defendants in her sham and forcing a continuation of the litigation in spite of the admitted settlement – in order to create jurisdiction to obtain review of the "discrediting sanctions" under her analysis of the Seventh Circuit's jurisdictional views.

She does not rely on the economic injury argument here. Matlaw claims that she only wants to present to this Court an issue that is of "substantial importance." This is disingenuous. After admitting her attempt to manufacture jurisdiction for an

---

[10] Defendants remain involved because Matlaw has not given up her claim that defendants should pay her something even though the case is settled. Further evidence of this fact has developed since this Petition was filed. Upon receipt of the Petition, counsel for the Realtor Defendants wrote to Matlaw and suggested that if in fact all she is interested in is expunging certain statements without seeking to upset the settlement of all issues below, Matlaw could provide releases to the Defendants and Defendants would file a statement that they have no interest in her Petition. Matlaw's response was silence. For this reason, Defendants are compelled to remain involved and oppose the Petition, in hopes of ending this litigation. Such hopes by Defendants for ending a settled piece of litigation have proved unjustified for more than two years. Perhaps those hopes can be *finally* realized with a denial of this Petition.

appeal in footnote 10, Matlaw states that her economic losses are "preserved below." Given the history of this litigation, one could easily conclude that Ms. Matlaw in fact wants to further proceed on her economic loss claims against Defendants independently from any question of a review of the supposed sanctions. Perhaps she does not raise her economic injury here simply because she does not want this Court to delve into the post settlement arguments made below, as these arguments have already been found by Magistrate Cole to be in the utmost bad faith and warranting the sanction of substantial attorneys' fees if Matlaw continues to advance them. (Petitioner's Appendix, p. 12).

However, Matlaw's comments about preserving her economic loss arguments in proceedings below are nonsense, too. No such issues are "preserved" below. The Seventh Circuit has opined that the issue of Matlaw's economic loss is solely between Matlaw and her client and that the exercise of federal jurisdiction is unwarranted. The Seventh Circuit also held that the final settlement order, memorializing the parties' global settlement agreement, imposed no obligations on Matlaw and required no payments or waiver of fees by her. What can Matlaw possibly think is still "preserved below?"

Matlaw admits to manipulating jurisdiction in the Seventh Circuit. She continues her manipulation in this Court and merely casts it in different terms for this new audience. The time has come for "more than enough" and "far too much" to *finally* be "enough." The opinion of the Seventh Circuit expressed the view that this case should be over. Defendants concur. The Petition should be denied.

CONCLUSION

Supreme Court Rule 14.4 indicates that the failure to present a question with brevity, accuracy and clarity is sufficient reason to deny a petition. The matters discussed in this Brief in Opposition show that clarity and accuracy are missing from the Petition. Petitioner wastes this Court's time with a scattershot discussion that never addresses the central question - namely whether an application for mandamus under the facts of Matlaw's case would result in an unjust limitation on relief compared to what could be provided if a direct appeal were allowed. The Petition should be denied for this reason alone.

However, in the event this Court reaches the merits, this Petition is not one that should be granted by this Court. Jurisdictionally, Matlaw did not file a timely notice of appeal and never designated the orders from which she now seeks to appeal. Further, the question presented is not of substantial importance to the public and concerns only Matlaw's parochial interests. Matlaw had the remedy of mandamus, but she did not choose that option.

Even if the issue presented here could be construed as one that involves a substantial public interest, one could hardly imagine a set of facts less worthy of presenting it. Consequently, for all the reasons discussed, Defendants request that this Court deny the Petition and bring this case to the end that was anticipated when all matters were originally settled by the parties in early 2005.

Respectfully submitted,

Mark D. Howard
Law Office of Mark D. Howard
134 North LaSalle Street, Suite 1810
Chicago, Illinois 60602
Telephone (312) 201-8001
Facsimile (312) 803-2130

Counsel of Record on this Petition for Defendants Carol Hug, Roger Hug, Patricia Brown-Wyrick, H&H Realty, Inc. d/b/a Remax Team 2000, Cendant Mobility Services Corporation, Curtis Castle and Carol Castle

Paige C. Donaldson
Sanchez, Daniels & Hoffman
333 W. Wacker Drive, Suite 500
Chicago, IL, 60606
Telephone (312) 641-1555
Facsimile (312) 641-3004

Counsel below for Defendants Cendant Mobility Services Corporation, Curtis Castle and Carol Castle