UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Record Nos. 05-1144, 05-1399

RICHARD GOLDSTEIN,

Appellant,

v.

HARRY MOATS, *et al.*,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Virginia

BRIEF OF *AMICUS CURIAE* AMERICAN CVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF APPELLANT RICHARD GOLDSTEIN

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INTEREST OF *AMICUS CURIAE*

The ACLU of Virginia is the Virginia affiliate of the American Civil Liberties Union, a nonprofit, nonpartisan corporation with over 300,000 members nationwide. Founded in 1920, the ACLU is dedicated to maintaining and advancing civil liberties in the United States. The ACLU of Virginia has about 5,000 members who are residents of the Commonwealth of Virginia. It has appeared frequently, both as direct counsel and as *amicus*, in the state and federal courts of the Commonwealth, and has a long record of defending constitutional rights of Virginians under the United States and Virginia Constitutions.

The ACLU of Virginia has a strong interest in ensuring that individuals with meritorious claims under the Constitution or the civil rights statutes are able to obtain redress through the courts. Federal statutes allowing attorney's fees to prevailing plaintiffs are key to this process. The ACLU of Virginia has vast experience with these statutes because the great majority of its cases are brought under civil rights statutes covered by fee-shifting provisions.

In this Brief, *amicus* confines itself to the narrow issue of whether defendants can avoid attorney's fees by a last minute mooting of a case. A motion for leave to file this Brief is submitted herewith.

FACTS

Amicus adopts the statement of facts presented in the Appellant's Brief, and recites here only those facts essential to understanding this Brief:

1. Appellant Richard Goldstein filed the present case against the United States Patent and Trademark Office (PTO) on November 26, 2002, challenging, on due process grounds, the PTO's use of "Requests for Information" (RFIs) to extract information from attorneys under threat of disciplinary sanctions.

2. The District Court dismissed Goldstein's case on grounds of absolute immunity.

3. On appeal, this Court reversed the dismissal. *Goldstein v. Moatz*, 364 F.3d 205 (2004). In the course of its opinion, the Court stated that "[t]he importance of denying absolute immunity to the Defendants in this proceeding is underscored by the utter lack of procedural safeguards protecting Goldstein's rights and his clients' secrets." *Id.* at 217. The Court further noted that "the denial of any avenue for challenge [of the RFIs], and the threats of charges for non-compliance, are indicative of a system lacking in procedural safeguards," *Id.*, and concluded that "[a]n attorney should not be compelled to subject himself to disciplinary charges, and the adverse consequences that may flow therefrom, in order to protect his client's confidences or to challenge unduly burdensome discovery." *Id.* at 218.

4. Upon remand, the parties embarked upon discovery.

5. Plaintiff's counsel repeatedly attempted to engage defense counsel in settlement negotiations, to no avail.

6. Several days before the close of discovery, PTO announced that it would voluntarily provide virtually all the relief requested by Goldstein, and filed a motion to dismiss the case based on mootness. The defendant expressly stated that its reason for acquiescing to Goldstein's requests was "to render fully moot the relief requested by the Amended Complaint."

7. Goldstein responded with a motion for summary judgment, asking that the court not dismiss the case without also granting declaratory or injunctive relief to ensure the enforceability of PTO's voluntary concessions.

7. The district court granted PTO's motion to dismiss, and denied Goldstein's request for declaratory or injunctive relief. The district court subsequently denied Goldstein's petition for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

ARGUMENT

This case provides a classic example of civil rights defendants who dodge attorney's fees by an eleventh hour capitulation to the plaintiff's demands that moots the case and deprives the plaintiff of judicially imposed relief.[1]

[1] *Amicus* addresses only the issue of attorney's fees, and does not discuss whether the district court correctly found the case moot. However, *amicus* notes that in contrast to cases such as *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), where state legislation rendered the case moot,

Attorney's fees statutes such as the EAJA should not be read to permit this kind of "tactical mooting" to deprive plaintiffs of attorney's fees. Such a reading of those statutes is contrary to Congress's intent to encourage civil rights litigation. Moreover, the Supreme Court's *Buckhannon* case does not require this Court to allow tactical mooting of this sort.

I. TACTICAL MOOTING SUBVERTS THE WILL OF CONGRESS

Congress passed fee-shifting statutes such as the Equal Access to Justice Act and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, in order to encourage private litigants to enforce important civil rights laws by bringing lawsuits. Congress recognized that these statutes could not be fully enforced by the government alone, but rather depended on civil actions by private individuals. "If [a plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). But, as Congress understood, most victims of civil rights violations would not have the financial wherewithal to bring these lawsuits:

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the plaintiff here has only the defendants' assurances that the unlawful conduct will not be resumed.

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. 94-1001, 1976 U.S.C.A.A.N. 5908, 5910 (1976) (Senate Judiciary Report on Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988). Thus, "fee awards are essential if the Federal statutes to which [§ 1988] applies are to be fully enforced." *Id.* at 5913. The Senate report concluded, "If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." *Id.*

These Congressional purposes simply cannot be accomplished if defendants are allowed to avoid attorney's fees with the kind of "tactical mooting" at issue in this case. Notably, the defendants here did not take steps to comply voluntarily with the plaintiff's requests until the closing days of discovery. Thus, the defendant's acquiescence did not serve to save the expense of litigating a "nuisance suit"; most of the expenses had already accrued. The only possible reason for the defendants' sudden agreement to give the plaintiff everything he asked for – after fighting these same requests for over two years – was

to avoid attorney's fees. By that time, plaintiff's fees and costs had run to some $85,000.

The Congressional provisions for attorney's fees will become nearly meaningless if defendants can engage in such tactics. Attorneys – especially those in solo practices or small firms – simply cannot take a large number of civil rights cases without an expectation that they will be paid for at least *some* of them. *See* J.A. 216-218, 260, 264-65. In deciding to accept such a case, an attorney must evaluate the merits of a case and determine the likelihood of being a prevailing party. If the attorney knows that the defendant always has the option of mooting the case at the eleventh hour, this likelihood diminishes precipitously. Indeed, the likely return on such a case could well be *less* than zero, since the hundreds of hours the attorney spends on the case, as well as the opportunity costs of turning down other, possibly paying, clients, will simply evaporate, uncompensated. Under these circumstances, there is very little incentive for attorneys to take on civil rights cases for indigent clients.

Moreover, the stronger the plaintiff's claim is, the more likely defendants are to engage in this sort of gamesmanship. Thus, in addition to running the risk of losing the case, an attorney must calculate "the risk that their evaluation of the merits of the case was precisely correct, and, as a result, the defendant chooses, prior to resolution by the court, to provide the relief requested."

Daniel Steuer, *Another Brick in the Wall: Attorney's Fees for the Civil Rights Litigant After Buckhannon*, 11 Geo. J. on Poverty L. & Pol'y 53, 80 (2004). Defendants are most likely moot a case for these reasons when the plaintiff is likely to win, "leading to the paradoxical result that plaintiffs with the strongest cases are the most likely to be denied attorney's fees." *Id.*

Finally, the defendant's power to use tactical mooting to avoid paying fees is at its strongest when only declaratory and injunctive relief is sought, and, in particular, whenever the defendant's are protected by sovereign immunity or qualified immunity. This is quite frequently the case in civil rights cases, which are often brought against governments or governmental officials. It is especially true in groundbreaking cases that lead to new principles of law, since officials are entitled to qualified immunity whenever the law is not "clearly established." *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603 (1999). Thus, the cases in which defendants are best able to use tactical mooting are precisely those in which an attorney cannot use other means – specifically, a contingency fee agreement – to ensure that his fees are covered.

For these reasons, to allow defendants to avoid fees through strategic mooting imposes a strong disincentive for attorneys to accept civil rights cases, even those with considerable merit. It is important to bear in mind that the primary loser in this scenario is not the attorney, who

may be able to find other clients who can pay him out of pocket, but the victim of a civil rights violation who cannot find anyone to represent him. These plaintiffs are likely to be poor and underrepresented. This result is precisely contrary to Congress's intention to encourage enforcement of the civil rights statutes by "private attorneys general."

II. BUCKHANNON DOES NOT PRECLUDE ATTORNEY'S FEES WHEN THE DEFENDANT STRATEGICALLY MOOTS A CASE

In *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court rejected the "catalyst theory," under which plaintiffs could recover attorney's fees if their lawsuit precipitated the defendant's voluntary cessation of the unlawful conduct. However, the *Buckhannon* decision should not be read to apply to circumstances like those at issue here, where the defendants litigate *almost* to final judgment, all the while driving up the plaintiff's fees and costs, then throw in the towel just soon enough to moot the case rather than lose it.

The *Buckhannon* Court declared itself "skeptical" of the possibility that defendants would "unilaterally moot[] an action before judgment in an effort to avoid an award of attorney's fees, noting that the "fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." 532 U.S. at 608-09. But the present case is

precisely the kind in which mischievous defendants can and do materialize, since only equitable relief was sought on the plaintiff's civil rights claims.[2]

Moreover, the policy concerns involved in *Buckhannon*'s rejection of the catalyst theory have no role in a case like this, where the deliberate mooting of the case takes place after years of litigation, after a court of appeals has made pronouncements on the merits in the plaintiff's favor, after discovery is nearly closed, and after fees and costs have been run up dramatically on both sides. For example, the Court indicated that the catalyst theory may pose a "disincentive" on "a defendant's decision to voluntarily change conduct, conduct that may not be illegal," due to fear of attorney's fees. 532 U.S. at 608. Certainly, there is some sense in providing incentives for a defendant to change it's behavior voluntarily early on, saving judicial resources and costs to both sides. However, when last-minute tactical mooting is allowed, the incentives become oddly skewed. Then, it is not necessarily in defendants' interest to settle early, but rather to settle whenever they determine that they are unlikely to win – which may be after months of expensive discovery and on the eve of trial.

In his concurring opinion, Justice Scalia rejected the dissent's suggestion that the Court had "approve[d] the

[2] Although the plaintiff's original complaint sought money damages, the amended complaint filed after remand dropped all claims for damages except for statutory damages under the Privacy Act.

practice of denying attorney's fees to a plaintiff with a proven claim of discrimination simply because the very *merit* of his claim led the defendant to capitulate before judgment." 532 U.S. at 616 (emphasis in original). Rather, he said, the Court simply rejected the dissent's "far less reasonable" call for:

> an award of attorney's fees when the merits of the plaintiff's case remain unresolved – when, for all one knows the defendant only abandoned the fray because the cost of litigation – either financial or in terms of public relations – would be too great. . . . I doubt it was greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merits*, that Congress intended to reward.

Id. at 217 (citation omitted and internal quotation marks omitted) (emphasis in original). In this case, the defendants "abandoned the fray," not because of the costs of litigation, but because of the plaintiff's strength on the merits. This is apparent because the defendant did not capitulate until after the most significant litigation expenses had already accrued, and made no attempt to settle before the costs started piling up. Moreover, this Court had already indicated the strength of plaintiff's case on the merits by noting "the utter lack of procedural safeguards" in the defendant's use of RFIs. *Goldstein*, 364 F.3d at 217. *Buckhannon* simply does not reach so far as to deny attorney's fees to the plaintiff under such circumstances.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2005, I served 2 true and correct copies of the foregoing brief by United States mail, postage prepaid, addressed as follows:

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