Nos. 14-2174(L) & 14-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHILLIP BACA, *et al.*,
Plaintiffs/Cross-Appellees,

v.

RICHARD J. BERRY,
in his official capacity as Mayor of Albuquerque,
Defendant-Appellee/Cross-Appellant,

LUIS ROBERTO VERA, *et al.*,
Attorneys-Appellants/Cross-Appellees.

On Appeal From The United States District Court
For The District of New Mexico
Honorable William P. Johnson, No. CV 13-76 WJ/WPL

REPLY IN SUPPORT OF MOTION FOR SANCTIONS

The response filed by the city and its attorneys fails to engage meaningfully with the bulk of Plaintiffs' arguments. This reply puts the rhetoric aside and focuses on the relevant facts and law.

The city and its attorneys primarily argue that because they ultimately abandoned the cross-appeal, they complied with the requirements of Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1927. At times, it seems that the city

and its attorneys are responding to a motion they thought Plaintiffs would file—one seeking sanctions *because of* the Eleventh Hour abandonment of the cross-appeal—rather than the sanctions motion Plaintiffs actually filed, which argues that the cross-appeal was clearly frivolous from the outset and filed in bad faith, so the ultimate concession was too little, too late.[1]

In any event, the explanation offered by the city and its attorneys for their Eleventh Hour abandonment of the cross-appeal strains credulity. According to the response, Mr. Stelzner read the room, realized that Attorneys-Appellants' appeal was going nowhere and worried that the Court might view the city's cross-appeal less than favorably. City's Response 2–3; Stelzner Decl. 5. But questioning of counsel for Attorneys-Appellants hardly left the overwhelming impression that the main appeal was doomed. Moreover, Plaintiffs' counsel was asked only one question, which provided little insight into how favorably the questioning judge viewed the cross-appeal. Nor could Mr. Stelzner have evaluated the judges' reactions to his arguments, as he abandoned the cross-appeal before

[1] To take another example of the city and its attorneys responding to a different motion than the one Plaintiffs actually filed, the city and its attorneys mock Plaintiffs for purportedly calling the city's briefs "rambling." The word "rambling," however, appears only once in the motion—in a parenthetical quotation in a footnote.

fielding a single question.[2] Plaintiffs thus doubt Mr. Stelzner's assertion that he realized only at oral argument that the cross-appeal was unlikely to prevail. *See Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1224 (10th Cir. 2006) (explaining that § 1927 is an "incentive for attorneys to regularly re-evaluate the merits of their claims and to avoid prolonging meritless claims").

In addition to emphasizing their ultimate abandonment of the cross-appeal, the city and its attorneys insist both that the city presented adequate argument to satisfy the abuse of discretion standard of review and that the city and its attorneys pursued the cross-appeal in good faith. They also argue that Plaintiffs' counsels' requested rates and hours are excessive. None of these arguments is convincing.[3]

As for whether the city addressed the abuse of discretion standard of review adequately, the city and its attorneys insist that Mr. Stelzner's concession was "not a reflection of the merits of the cross-appeal." City's Response 2. But Mr. Stelzner in fact admitted at oral argument that "it is difficult for us to argue that [the district court's decision] was an abuse of discretion," so "the cross-appeal has to be out of the case." Oral Arg. Rec. 16:15–:35. Attempting to walk back this

[2] It is also worth pointing out that, contrary to the city's suggestion, the response from the bench to Mr. Stelzner's concession was not uniformly "favorable." City's Response 2.

[3] The city and its attorneys also insist that the appeal must not have been frivolous or filed in bad faith because the city's Claims Review Board approved it. The only thing this argument confirms is that Plaintiffs appropriately seek sanctions against both counsel and client.

concession, the city and its attorneys now emphasize three points. First, they observe that this Court also applies an abuse of discretion standard of review to Attorneys-Appellants' appeal. But unlike the city, Attorneys-Appellants explained *why* the district court's decision was an abuse of discretion. Second, the city and its attorneys take issue with Plaintiffs' characterization of their brief as arguing that fees are automatic every time *Christiansburg* is satisfied. But whether or not the city *acknowledged* that it must show both frivolousness and abuse of discretion, the city never came close to *showing* abuse of discretion.[4] Third, the city and its attorneys present a new argument about Plaintiffs' background. If the city wanted to rely on this argument to show abuse of discretion, it should have raised the

[4] For the record, the city did argue that it should automatically receive fees because Plaintiffs' claims were frivolous. The city and its attorneys rely on an excerpt from the city's opening cross-appeal brief that actually proves Plaintiffs' point. In the excerpt, the city first states that Plaintiffs' claims are frivolous, unreasonable and without foundation and then insists that "in these circumstances"—*i.e.*, because the claims satisfy the *Christiansburg* threshold—"the Court should have awarded Mayor Berry fees under §§ 1988 and 1973*1*." City's Response 7 (quoting City's Opening Br. 51). The word "discretion" appears nowhere. Perhaps, giving the city the benefit of the doubt, it meant to argue that Plaintiffs' claims were *so* frivolous, unreasonable and foundationless that the district court necessarily abused its discretion by refusing to award fees. Considering that Plaintiffs' claims are quite unlike those that typically qualify as frivolous, unreasonable and foundationless under *Christiansburg*, *see* Response/Reply 20–22—let alone those that are so abusive as to necessitate awarding attorneys' fees to prevailing defendants—such an argument would be no less frivolous than arguing that district courts should always award fees when claims satisfy the *Christiansburg* threshold.

argument in its opening brief, not in a response to a motion for sanctions.[5] *See United States v. Bowling*, 619 F.3d 1175, 1181 n.1 (10th Cir. 2010) (noting that a party waives all arguments not "raise[d] . . . on appeal in his opening brief").

As for whether the cross-appeal was filed and pursued in bad faith, the city and its attorneys, relying on Federal Rule of Evidence 408, assert that Plaintiffs improperly refer to "confidential settlement negotiations." But Rule 408 allows admission of such evidence for any purpose other than "prov[ing] or disprov[ing] the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Fed. R. Evid. 408. Plaintiffs introduce settlement communications for none of those purposes, so their reliance on such evidence is proper.[6] Other than making this baseless accusation, the city and its attorneys fail to challenge the bulk of what Plaintiffs allege, though they do misrepresent various facts. For instance, they suggest that Mr. Stelzner merely raised a possible conflict and left it to Plaintiffs, Attorneys-Appellants and their counsel to decide how best

[5] Even had the city raised this argument in a timely fashion, it would have been unavailing. The district court was well aware of Mr. Baca's professional background and took it into account when determining that Mr. Baca and the other Plaintiffs, none of whom are trained lawyers, reasonably relied on advice of counsel. A-535, A-572–73.

[6] Plaintiffs suspect that the city and its attorneys make this argument in order to manufacture an opportunity to impugn the conduct of Plaintiffs' former attorneys. *See* City's Response 10 n.8.

to proceed. City's Response 11.[7] But according to Mr. Urias (at this point an unbiased observer), Mr. Stelzner issued an ultimatum: unless Mr. Urias abandoned his representation or Attorneys-Appellants dropped their appeal, the city would seek to have Mr. Urias disqualified as counsel. Motion for Sanctions 3; Urias Decl. 1.[8] Moreover, the city and its attorneys admit that one motivation for filing the cross-appeal was "holding plaintiffs accountable for pursuing wholly meritless claims." City's Response 13.[9] But Plaintiffs' claims were far from the sort of fantastic, self-refuting, "wholly meritless" accusations that jurisdictions might justifiably hold plaintiffs accountable for filing. *See* Response/Reply 20–22. By seeking to punish these Plaintiffs for bringing this case, which challenged a highly controversial redistricting map, the city has undermined civil rights advocacy.[10]

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[7] In his declaration, Mr. Stelzner states that he spoke with someone named Santiago Juarez. Stelzner Decl. 3. Mr. Juarez has never served as an attorney or party in this case and is not an Attorney/Appellant. Plaintiffs assume Mr. Stelzner means to refer to Luis Vera.

[8] Other misrepresentations include the suggestion that "the dilemma [Plaintiffs'] attorneys faced [after Plaintiffs became unrepresented] confirms that the conflict was real," City's Response 12, and the suggestion that Plaintiffs "had no problem securing separate counsel on a *pro bono* basis," *id.* at 13. The dilemma was a product of the city's threat, not any underlying conflict, and the Plaintiffs nearly failed to find adequate *pro bono* counsel.

[9] Incidentally, this may be why the city and its attorneys continued to pursue the case even after their scheme to undermine Attorneys-Appellants' appeal was scuttled. *Contra* Response 13 (suggesting incorrectly that Plaintiffs argued that the cross-appeal was intended "solely" to undermine the main appeal).

[10] The city and its attorneys also question whether the individual Plaintiffs would have actually had to pay attorneys' fees awarded against them. Plaintiffs' counsel has no knowledge of any contractual fee-shifting agreement between Plaintiffs and

As for whether Plaintiffs' counsels' requested hours and rates are reasonable,[11] the city and its attorneys complain that Plaintiffs' counsel spent as much time on the cross-appeal as the city's counsel spent on both appeals.[12] Even assuming the city's counsel spent a reasonable amount of time on the cross-appeal,[13] it is hardly surprising that counsel who came into this fact-bound case at the appellate stage needed to spend a significant amount of time getting up to speed.[14] The city and its attorneys also argue at length that New Mexico rates should apply, but they fail to address Plaintiffs' arguments explaining why

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their former attorneys and doubt that such an agreement exists. In any event, courts have an obligation to impose the sanction "where the fault lies," *In re Baker*, 744 F.2d at 1440, so any contractual agreement would be irrelevant. Moreover, the fact that the city and its attorneys think such an agreement might exist undermines their speculative argument that they pursued the cross-appeal because it is easier to recover fees from clients than from counsel.

[11] To clarify, Plaintiffs seek reimbursement only for 183.6 hours, not 230.8.

[12] The city and its attorneys also complain that Plaintiffs sent two attorneys to Denver for oral argument. Partially in an effort to reduce overall costs, Plaintiffs' counsel decided that a junior attorney whose hours were significantly less costly would take the lead on this case. But because this junior attorney had never before handled an appellate argument, Plaintiffs' counsel thought it reasonable and appropriate for a more senior attorney to accompany him to Denver. Moreover, the senior attorney exercised sound billing judgment and did not charge for nearly a third of his time on the appeal.

[13] The city suggests that its inadequate briefing should have saved Plaintiffs' counsel time. But Plaintiffs' counsel felt obligated to fully brief the threshold issue under *Christiansburg—i.e.*, whether Plaintiffs' claims were frivolous—even though the city failed to argue seriously that the district court abused its discretion.

[14] According to invoices submitted to the district court, the city's counsel spent a huge amount of time working on this supposedly frivolous case at the trial level. A-214–66.

Plaintiffs were forced to retain out-of-state counsel, except to suggest (incorrectly) that the voting rights issues in this case were "quite simple." City's Response 18.

In sum, the city and its attorneys have come nowhere close to showing that the cross-appeal was non-frivolous and filed in good faith. Nor have they convincingly argued that Plaintiffs' counsel seek an unreasonable amount of attorneys' fees. This Court should therefore sanction the city and its attorneys under Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1927 and order them to pay Plaintiffs' counsel the full amount requested.

Dated: June 18, 2015

Respectfully submitted,

/s/ J. Gerald Hebert

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ECF CERTIFICATION

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies:

1. This reply requires no privacy redactions;
2. Any paper copies of the foregoing reply required to be submitted to the Clerk's office will be exact copies of the version submitted electronically; and
3. The reply filed via ECF was scanned for viruses using the most recent version of McAfee Security Scan Plus and is free of viruses.

Dated: June 18, 2015

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CERTIFICATE OF SERVICE

I, J. Gerald Hebert, hereby certify that a copy of the foregoing Reply in Support of Motion for Sanctions was furnished through the Court's electronic filing service (ECF) to the following on this 18th day of June, 2015:

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