NO. 18-399

In the Supreme Court of the United States

In re John W. Fink

JOHN W. FINK, Petitioner,

v.

J. PHILIP KIRCHNER & FLASTER/GREENBERG, PC, Respondents.

PETITION FOR REHEARING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John W. Fink, LTjg
Pro Se
6812 Yellowstone Blvd.
Apt. 2V
Forest Hills, NY 11375
718-459-3541

LEGAL PRINTERS LLC • Washington, DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

Does a court of appeals, in reviewing a summary judgment decision, commit a fraud on the court when it fails to execute its judicial function of conducting a plenary hearing by relying *exclusively* on the lower court's decision *and* by ignoring the appellant's brief?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

PETITION FOR REHEARING

On December 3, 2018, this court denied my petition for a writ of certiorari which addressed whether I had been improperly deprived of my right to trial because (i) the court of appeals abdicate its responsibility to conduct a plenary review as evidenced by the court of appeal decision when it affirmed the lower court's decision for some of the same reasons put forth by the lower court, but those reasons had rested on numerous, fundamental and pervasive errors and omissions committed by the lower court, and/or (ii) both lower courts had relied on numerous, fundamental and pervasive errors and omissions when rendering their decisions.

I respectfully submit this petition for rehearing so as to address a ground not previous presented: whether a court of appeals, in reviewing a summary judgment decision, commits a fraud on the court when it fails to execute its judicial function of conducting a plenary hearing by relying *exclusively* on the lower court's decision *and* by ignoring the appellant's brief?

A rehearing in this instance will greatly benefit the entire judicial system by significantly reducing the unnecessary time it would have to expend when I alternatively commence one or more separate actions to address the decisions rendered by the lower courts. This is especially true if a decision by this court could be rendered solely on the papers, which seems to be warranted given the Respondents'

opposition brief to my petition and given my subsequent reply.

The Constitutional provisions involved remains the same: violation of the right to trial per the Seventh Amendment of the U.S. Constitution.

THE COURT OF APPEALS CASE ANALYSIS.

A. Incorrect Citations in the Court of Appeals Opinion.

In reviewing my appeal of the district court's December 20, 2016 decision, the court of appeals stated it "exercise[ed] plenary review over the District Court's grant of summary judgment." (Petition App., p. 7a.)

The findings of fact and grounds in the court of appeals opinion consist of *only* a single, three-sentence paragraph totaling 212 words. 77% of these words consist solely of quotes with each sentence commencing with either the phase "the District Court explained" or "the District Court determined." Each sentence is followed by a citation which indicates my appeal brief as the source, even though none of the quotes appear anywhere within my appeal brief. Conversely, the district court opinion contained *all* of these quotes.

The three-judge court of appeals included these quotes in its *unanimous* opinion without any criticism of them and did not include any other facts or grounds to support its decision. (Petition, App., p. 3a-4a (lists three judges; a per curiam opinion), 8a-

9a (analysis section.) Then, immediately after the three sentences containing quotes from the district court opinion, the court of appeals opinion states that "[f]or substantially the reasons provided by the District Court, we agree with its resolution of this case." (Petition App., p. 9a.)

Therefore, *if these quotes are problematic in light of my appeal brief*, the court of appeals failed to perform its function of performing a plenary review of a summary judgment decision by failing to consider my appeal brief. After all, it is simply inconceivable that each of these three judges of the court of appeals could have used the same flawed facts and grounds to arrive at the same conclusion as the district court if my appeal brief had correctly pointed out serious flaws concerning the quotes. As I will now show, *all of these* quotes are fatally flawed (i.e., contradicting evidence or grounds exist to preclude summary judgment upon them).

B. First Sentence with Quotations.

First sentence reads:

> As the District Court explained, Fink's claims principally revolved around the following: (1) "Kirchner's alleged lie to Fink that the judge presiding over Fink's state court suit to enforce the settlement agreement with ALSI told the parties to go to arbitration instead of litigating in court"; (2) "Kirchner's alleged alteration to an email presented to the arbitrator and [Kirchner's] alleged lies about his involvement"; and (3) "these two lies

> caused Fink to lose his claims against ALSI, thwart another settlement with ALSI, and were intended to milk Fink for unnecessary and exorbitant attorney's fees."[1]
> (Petition App., p. 8a-9a.)

These three quotes come from one *continuous* phrase in the district court opinion with superfluous quotation marks inserted by the court of appeals to break up the continuous phrase for no apparent reason. Also, the phrase preceding the quotation replaces almost identical language – "Fink's claims against Kirchner center on three events." – from the district court opinion. (Petition App., p. 26a.) Clearly, the court expended an effort to needlessly alter the sentence while those alterations provide no material benefit to the reader. The purpose for the separation of the single sentence from the district court opinion into three distinct quotes seems to be for no reason other than to imply they came from disparate parts of my appeal brief when they did not.

As to the contents of this first sentence, my appeal brief includes more than these three numbered "events" (the district court's characterization of these three items): (i) the Respondents' flipflopping statements as to whether Kirchner advised to me proceed to arbitration; (ii) Kirchner *coercing* me into accepting arbitration; (iii) Kirchner sabotaging my arbitration case; (iv) Kirchner engineering the P-86 incident which sabotaged the February 2008 settlement; (v) Kirchner's filing of overlapping legal

[1] The court of appeals inserted the word "Kirchner".

actions; and (vi) the Respondents' spoliation efforts in this matter. (Appeal Brief, p. 32-48.) Importantly, the court of appeals did not offer any reason why it had omitted/rejected these excluded "events" (i.e., facts and grounds).

As detailed in the next two sections, the court of appeals addressed these three "events" via its next two opinion sentences.

C. Second Sentence with Quotations.

Second sentence reads:

> The District Court determined that, even if one were to assume that "Kirchner lied about the judge's suggestion that Fink should arbitrate his claims," and that "Kirchner submitted an altered document to the arbitrator," Fink had failed to show "how those actions caused him to pay more legal fees than he otherwise would have incurred, or caused his settlement with ALSI to fall through."
> (Petition App., p. 9a.)

Once again, the court of appeals took a single sentence from the district court opinion and broke it up into three separate quotes, plus *unnecessarily* substituted certain words/phrases with synonyms/similar phrases (e.g., replaced "Fink had failed to show" with "Fink has not shown"). Again, the court expended an effort to alter the sentence while those alterations provide no material benefit to the reader. Again, the breakdown of the multiple quotes only seem to have done so as to imply they

came from disparate parts of my appeal when they actually came from a single sentence from the district court opinion.

As to the first allegation of this sentence, my appeal brief contradicts it. For example, citing from my opposition brief, my appeal brief states that Kirchner sabotaged my arbitration case, which I then lost, and that arbitration had "cost me more than $150,000." (Appeal Brief, p. 10, 43.)

As to the second allegation, my appeal brief shows what "caused [my February 2008] settlement with ALSI to fall through." My brief included a section titled (and in bold letters) "The P-86 Incident Derailed My Settlement with the ALSI Defendants." (*Id.*, p. 18.) Citing from my opposition brief to the motions for summary judgment, I provided my following eyewitness statement:

> After Kirchner had informed the ALSI Defendants that P-86 was an altered document, Stanzione [the ALSI representative] reneged on our deal, citing the altered P-86 as the reason. At my deposition in this matter, I testified that "[Kirchner] undermined my negotiations with ALSI at the time he presented that document" which "killed negotiations that I had in essence completed."
> (*Id.*, p. 19 (citation omitted).)

As part of a subsequent section in my appeal brief, I again address these facts for a different reason:

> Kirchner's innocence or guilt as to creating P-86 constitutes a disputed material fact since I also maintain that the P-86 incident terminated my February 2008 settlement with the ALSI Defendants. Stanzione, speaking as ALSI, stated [to me] that he reneged on the deal because of the incident. Except for the P-86 incident, I would have had a $10 million settlement, with a $4 million upfront payment, and could have avoided needless subsequent litigation fees and expenses.
> (Appeal Brief, p. 40.)

D. Third Sentence with Quotations.

Third sentence reads:

> The District Court explained that "there are numerous unknown variables as to why Fink's settlement talks with ALSI stalled," and that "[i]t is unknown how costly Fink's state court proceeding could have become had he declined Kirchner's advice [to go to arbitration]."[2]
> (Petition App., p. 9a.)

These two quotes come from two sequential paragraphs, with one sentence ending one paragraph and the other sentence starting the next paragraph. However, the order of the quoted sections has been reversed with no apparent resulting improvement in the information communicated to the reader.

---

[2] The court of appeals inserted all the bracketed entries.

As noted above, in my appeal brief I provided a specific reason as to why the February 2008 "settlement talks with ALSI stalled": the ALSI Defendants had reneged on that settlement because of the P-86 incident engineered by Kirchner. (Appeal Brief, p. 18-19, 40.) Therefore, the alleged fact – independently produced by the district court – that "there are numerous unknown variables" constitutes a meaningless phrase that I did not need to address in my appeal brief.[3]

This causal link between Kirchner's illegal action and the resulting damages inflicted upon me – which also refutes the second sentence of quotes – serves as the basis for at least one of my claims: Respondents' breach of fiduciary duty.

As for the quote about whether "[i]t is unknown how costly Fink's state court proceeding could have become had he declined Kirchner's advice [to go to arbitration]," it is misleading. The real issue far exceeds any concern about whether one type of court

---

[3] The district court opinion also offers its own contradictory explanation, ignored by the court of appeals. The district court alleged that the February 2008 settlement "fail[ed] for the same reason as the settlement talks during the state court proceedings." (Petition App., p. 30a.) However, either ALSI reneged on the February 2008 settlement for "unknown variables" or for "the same reason as the settlement talks during the state court proceedings settlement." These two statements are mutually exclusive. Nevertheless, both are disputed by my eyewitness testimony that ALSI reneged on the February 2008 settlement because of the P-86 incident.

proceeding is more expensive than another. Here, a lawyer worked against the interest of his own client in both proceedings; e.g., Kirchner lied to me in the plenary hearing as part of a coercion scheme to terminate the plenary hearing so I would have to start litigating fresh with the arbitration (losing for me all I paid his firm for the related plenary hearing) and then sabotaged my arbitration case (which, by itself, cost me more than $150,000). (Appeal Brief, p. 32-38, 42-43.) These damages are easy to measure, as is Kirchner's sabotage of my February 2008 settlement during the arbitration.

E. Other Facts and Grounds Not Addressed in the Court of Appeals Opinion.

Notably absent from the court of appeals decision is any discussion about Respondents inability to present only undisputed facts, which reflects the same absence from the district court opinion. For instance, Respondents' flip-flopping stories as to whether Kirchner advised arbitration was not address. (Appeal Brief, p. 8, 33-35.) Then there are all the lies Kirchner told about supposed May 17, 2007 events at the plenary hearing. (Appeal Brief, p. 6-7, 35-36.)

Also, absent from the one paragraph summarizing the court of appeals findings of fact is any mention of the facts supporting my spoliation claim which I

included in my appeal brief.[4] (Appeal Brief, p. 8, 23-25.)

Separately, Respondents did not argue that the February 2008 settlement "stalled" for "numerous unknown variables." Rather, Respondents alleged in their motions for summary judgment that a set of February 2008 emails show I "rejected [my] own settlement offer," to which I respond that "a plain reading of those e-mails does not support the Defendants' misinterpretation of these e-mails." (Appeal Brief, p. 44.) This argument was not addressed by the court of appeals even though Respondents did not challenge my rebuttal of their allegation (i.e., it is a disputed fact). (Petition App., Exhibit B; Appeal Reply Brief, p. 7.)

REASON FOR REHEARING.

The Tenth Circuit stated the following as to fraud upon the court:

> Fraud upon the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. ... It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or *where the judge has not performed his judicial function* —

[4] In New Jersey, a spoliation claim is invoked as a claim for fraudulent concealment. (Petition App., p. 8a, Footnote 5; 27a, Footnote 6.)

> thus where the impartial functions of the court have been directly corrupted. [Emphasis Added.] (*Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985).)

When a court decides a Federal Rule of Civil Procedure 56 summary judgment, "all justifiable inferences are to be drawn in [the non-moving party's] favor" and the court may not weigh evidence. *Marino v. Industrial Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) *(citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255*)*.

In this instance, the court of appeals failed to execute its judicial function of conducting a plenary review of the district court decision. I am the non-moving party and the court stated it had conducted a plenary review of the summary judgment decision. However, the court of appeals (i) relied *exclusively* on the district court's opinion and (ii) ignored significant evidence (i.e., impermissibly weighed) and arguments which I presented in my appeal brief (much less viewed that evidence in a light most favorable to me as it should have).

As shown above, my appeal brief showed all the quotes from the district court opinion to be either disputed or obviously meaningless. My counter proof included (i) Kirchner sabotaging of my arbitration case, resulting in damages of more than $150,000 and (ii) the P-86 incident engineered by Kirchner which caused ALSI to renege on the February 2008 which cost me millions of dollars in damages.

Further, the court of appeals did not list any other findings of fact or arguments of its own. Rather, the court of appeals affirmed the district court's decision "[f]or substantially the reasons provided by the District Court."

In addition, the district court independently introduced five facts and grounds without notification. (Petition p. 24-33.) Thus, the court of appeals committed the same Rule 56(f) violation by accepting the independently introduced alleged fact about "unknown variables" that is embedded in one in the third sentence of quotes (*see* above section on "Third Sentence").

Finally, three judges sat on the court of appeals. The three-judge court, as opposed to the one-judge district court, should have precluded the possibility of ignored facts and grounds contained in my appeal brief, especially those that disputed the quotes selected by the court of appeals for use in its opinion. At least one of the three should have noticed them if the court had conducted a true plenary hearing. Therefore, in this instance, the three judges of the court of appeals, by unanimously and *exclusively* relying on the fatally flawed findings of fact and grounds as articulated in the district court opinion and ignoring my appeal brief, committed a fraud on the court.

CONCLUSION

For the above reasons, Petitioner respectfully request this court to grant my petition for rehearing.

Respectfully submitted,
John W. Fink, LTjg
Pro Se
Petitioner

CERTIFICATE OF GOOD FAITH

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court of the U.S. Rule 44.2 – substantial grounds not previously presented.

Respectfully submitted,

John W. Fink, LTjg
Pro Se
Petitioner