
No. 24-2021

In the
United States Court of Appeals
for the **Seventh Circuit**

IN RE: JACQUELINE M. STERLING,

Debtor-Appellant,

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division, No. 2:23-cv-003499-PPS.
The Honorable Philip P. Simon, Judge Presiding.

REPLY BRIEF OF APPELLANT
JACQUELINE M. STERLING

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INTRODUCTION

Sterling, the plaintiff, has filed an appeal of the Bankruptcy court's final decision which was affirmed by the District Court sitting as an appellate court. In support of that appeal, Sterling filed her brief. Southlake, the defendant, has now filed their response brief. Sterling here in this Reply brief attempts to answer the Response and provide a logical basis for her positions.

SUMMARY OF THE ARGUMENT

The Bankruptcy court failed to comply with the 7th Circuit remand in not awarding costs, and further, "applying" a client's alleged 'contributory negligence' to the award of Fees to a party that prevailed in all respects is an error of law. Southlake, the defendant, has presented its primary defense as an affirmative defense essentially of contributory negligence. The Southlake brief continues to argue for contributory negligence of one-hundred percent but the Bankruptcy Court below rejected this argument and Southlake did not appeal.

Contributory negligence is not proven by violation of a procedural rule but by actual facts that the violation of the procedural rule was material. Southlake has no evidence and did not meet its burden of proof to show the violation of a procedural rule was factual material in this case.

Finally, the damages awarded to Sterling are so small and inconsequential that they fail to recompense Sterling for what actually happened to her and the Court below abused its discretion and a conclusion should be made that "a definite and firm conviction a mistake has been made" by the Bankruptcy court below. That

a debtor spent three plus days in jail due to Southlake's violation of the Automatic Stay and Discharge Order is a very unusual situation that calls for a stern remedy.

I. DEFENDANT SOUTHLAKE NAUTILUS DID NOT APPEAL THE BANKRUPTCY JUDGMENT

Although Southlake's brief seems to argue that they have or had an absolute defense to the judgment for contempt by way of their affirmative defense of violation of Local Rule B-4002 Southlake did not appeal the Bankruptcy Court's judgment for contempt. They argue "the judgment is correct and should be confirmed" (page 25). Thus, the Southlake brief is logically inconsistent. They argue they were entitled to reduce the award one hundred percent for contributory negligence, but then at the same time argue the Judgment below should be affirmed when the Judgment below rejected one hundred percent reduction for contributory negligence.

In contrast, Sterling's brief is consistent. Sterling argued in Bankruptcy Court that contributory negligence is defendant's burden, that it wasn't proven, that it does not apply and that the reduction below for contributory negligence is in error. Also, Sterling argued consistently below that one can't "apply" contributory negligence of the prevailing party (Sterling) to reduce her attorney fees to Shelist. Because Sterling and Shelist disagreed with the determination below, this appeal was filed. Sterling and Shelist arguments here in the 7th Circuit are completely consistently to their position throughout this case.

II. CONTRIBUTORY OR COMPARATIVE NEGLIGENCE IS AN AFFIRMATIVE DEFENSE AND DEFENDANT HAS THE BURDEN TO PROVE ITS FACTUAL IMPACT

The entire basis of Southlake's legal and factual defense Local Rule B-4002, i.e., that Sterling's bankruptcy lawyer did not send notice of the bankruptcy to the clerk of the Lake Superior Court, where Southlake was collecting on their judgment. Southlake argues in the Response Brief that the lack of notice to the clerk of the Lake Superior Court "had an important impact on the outcome of the case" (page 13). Southlake says there is no dispute that Sterling's prior bankruptcy lawyer failed to provide notice to the clerk and thereby "there was no need for Southlake to prove that Sterling failed to provide the notice" (page 16). At the same time, Southlake's Brief argues in the brief that the lack of notice to the clerk was "negligent" and "played a role" in what occurred (page 25).

This analysis is not consistent with how one evaluates a fact-based affirmative defense of contributory negligence. *That said negligence 'existed' is not proof of the affirmative defense without facts proving the negligence was factually material in this scenario.*

When a defendant argues contributory or comparative negligence seeking to reduce an award of damages, the defendant has the burden of proof. In re *Spangler v Byrne*, 653 B.R.573,583 (ND Illinois 2023). The only logical way to evaluate the lack of notice to the Lake Superior clerk is by way of contributory negligence. Proving that there was 'negligence' in not sending the notice does not translate into

an affirmative defense that is proven unless that contributory negligence factually affected the outcome of the case.

But we know that the Lake Superior Clerk testified clearly had the notice been sent that the file would not have been pulled and nothing would have happened. But we need not speculate on how the Lake Superior Court could have or would have worked if some notice had been sent originally. This is because the Record contains a concrete example. After Sterling was arrested, and after ‘notice’ was sent, nothing happened. Sterling did not get released that morning and the Lake Superior Court did nothing. In order to obtain a release, Sterling’s lawyer had to go into court with an emergency Motion to get her released. Proving that an “event” (i.e., the lack of notice) took place is not proof of contributory negligence. That “event” has to have a concrete impact on events.

It is not sufficient to opine that “there is a chance” that the arrest would not have occurred had notice been sent to the clerk. It is not sufficient to opine that the situation “may have been avoided” had notice been sent to the clerk. There must be concrete evidence to negligent lack of notice factually mattered.

After plaintiff Sterling rested its case-in-chief in the original Trial, defendants Southlake and Austgen made a motion for a directed verdict. The then-bankruptcy court took this under advisement and ordered defendant to put on their case. They put on a one-witness case. They called a lawyer to the stand who attempted to testify to prove-up the defense. But in concert with Southlake’s argument in their Brief, all he could do is say ‘the bankruptcy lawyer ought to have

sent the notice’. But he was unable at any point to prove the lack of notice factually or actually or practically made any difference.

One thinks of the example of a DUI driver. After the accident, the DUI driver is tested and if over the limit. The DUI driver is stopped. The other driver hits the DUI driver’s vehicle. The other driver is negligent for hitting a stopped vehicle. The other driver raises the fact that the driver stopped was DUI as an affirmative defense. What affirmative defense is proven? Nothing is proven. The fact that the stopped driver was DUI proves nothing and is not a negation of the negligence of the party who hit him.

In concert with this lack of logic, the Bankruptcy court below tried to use another example. The Court – solely by speculation since there is nothing to support it in the Record – presumed or supposed that if notice had been sent *before* the Writ of Arrest had been issued that the Lake Superior clerk would have pulled the file, given it to the Lake Superior judge, and the judge would not have issued the writ. The problem is this is simply speculation: there is *no evidence in the Record* that a notice to the clerk would have caused the Lake Superior clerk to have done anything *whether the notice came before the writ was issued or after*. The Bankruptcy judge made clear that he did not like this criticism of the Lake Superior Court and that when he sat in State Court this ‘would not have occurred’. But when these events occurred – long ago and prior to omnipresent email – that is not how the process worked. How it would have occurred had Judge Ahler sat in Lake Superior court is of no possible moment. That the Court below was

uncomfortable with criticism of the Indiana state courts where he served should be of no moment.

Defendant's affirmative defense is premised on how the "system *ought* to have worked". *How things "ought to have worked" is not proof of facts making an affirmative defense.* The "negligence" in not sending the notice must be evaluated as with any affirmative defense of contributory negligence, i.e., by proof of facts that the contributory negligence was actually material to these events that occurred. Violation of a local rule is not "per se" contributory negligence without a proof of facts that violation was material and proximately caused the damages.

The ball started rolling when Southlake undoubtedly received both the Automatic Stay and the Discharge and did nothing to close its file and nothing to pull back their authorized agents, the Austgen firm. The proximate cause of the arrest was Southlake issuing the Writ of Arrest despite the notice of Automatic Stay and Discharge. Had the notice been sent to the Lake Superior clerk, Southlake argues these events might not have occurred but there is no evidence to prove this up.

III. THERE BEING NO EVIDENCE TO FACTUALLY SUPPORT CONTRIBUTORY NEGLIGENCE ACTUALLY BEING MATERIAL SOUTHLAKE FAILS AND THE COURT ERRED AS A MATTER OF LAW

The Bankruptcy court never mentioned that this (plead and argued) affirmative defense was an affirmative defense that Southlake had to prove-up. The Southlake response Brief opines that the Bankruptcy court should be upheld as being within its discretion.

It is however Sterling's argument that the court below erred in not assigning Southlake the burden of proof. Further, it is Sterling's argument that the Bankruptcy court by its own admission speculated what "might" have occurred had notice been sent. This is the wrong standard. The proper standard of law is to evaluate the evidence and determine whether the party asserting an affirmative defense has made a factual case making true the defense. Southlake opines in their Brief that this is just a difference of opinion between Southlake and Sterling. Sterling disagrees. What this is about is an erroneous view that an affirmative defense is proved-up without any facts in the Record to support it.

IV. THE COSTS ISSUE IS RELEVANT AS DEMONSTRATING THE FAILURE OF THE BANKRUPTCY COURT TO ADHERE TO THE REMAND

This Court, the 7th circuit, remanded for judgment plus costs. The Bankruptcy court's failure to comply is not acceptable. Southlake's brief makes arguments unsupported by precedent.

In the original Adversary complaint Sterling prayed for a judgment along with costs and attorney fees. After the trial the then-Bankruptcy court issued an order finding in favor of defendants Southlake and the Austgen firm. Since at that point Sterling was not the "prevailing party" Sterling could obvious not seek costs. However, once the 7th Circuit ruled in favor of Sterling, the order automatically said 'plus costs'. At that point, Sterling hadn't "itemized" costs or even filed a motion for costs.

Once the case was remanded back, the Bankruptcy court held a series of hearings, and the Adversary never altered from seeking costs. Judge Ahler eventually issued a judgment order which (unlike the 7th circuit Remand) did not say “plus costs”. Had the Order said (as required) “plus costs” Sterling would have had the opportunity to bring a motion to itemize the extensive costs. Since the case was immediately appealed, it was not sensible to bring a motion to reconsider on costs (or any issue) before Judge Ahler. Moreover, despite the reasoning of the District Court, the award by the 7th circuit ‘plus costs’ occurred when Sterling had not (yet) itemized costs. To argue Sterling should have itemized costs has it backward. The judgment should have said “plus costs” and thereafter when finalized Sterling could file a motion to itemize costs.

Rule 54(d)(1) provides: “Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs....” Fed.R.Civ.P. 54(d)(1). Judge Ahler did in any way explain why his judgment did not say “plus costs” when the Remand to him said “plus costs” as a matter or normal course.

When this case is decided in the 7th Circuit, Sterling urges upon this court as prevailing party that Sterling be awarded “plus costs”. At that time, when the Bankruptcy court concludes after the remand (whatever the outcome in the 7th Circuit) Sterling can follow the Judgment order “plus costs” with a petition to itemize costs.

It should be emphasized in Sterling's view the Bankruptcy court not entering a judgment to include costs under these circumstances undermines the entire basis of this case: to give recompense to Sterling for Southlake's contempt. Without such an award, Sterling even if the award is sustained receives almost *nothing*. This is not a just result.

V. AS PREVAILING PARTY, STERLING IS ENTITLED TO ATTORNEY FEES AND ATTORNEY FEES SHOULD NOT BE REDUCED BY CONTRIBUTORY NEGLIGENCE

The sole issue in the decision on Sterling's attorney fees is simple: *what fees are reasonable under* these circumstances in terms of Hourly rate, in terms of Time spent, and in terms of the Legal work done. That is the *only* question for the Bankruptcy court to have considered.

The bankruptcy court made a decision on the Hourly rate. The bankruptcy court made a decision on the Time spent. The Bankruptcy court made a decision on the complexity and importance of the Legal work done. But the Bankruptcy court then took its decision on reasonable fees and "applied" Sterling's alleged contributory negligence to reduce attorney fees. There is no justification or logic to this decision.

In the Response brief, Southlake cites *In re Lamar*, 2013 WL 5726956 (Bankr. S.D. George 2013). But in that case, fees were reduced because of attorney malfeasance. Southlake cites *in re Rodriguez*, 2020 WL 1672773 (Bankr. N.D. Cal. 2020). But in that case, for a "minor violation" of the automatic stay that could have been solved by a telephone call, the attorney fees were not reasonable or

proportionate to the events. Southlake cites *In re Haimil Realty Corp.*, 579 B.I.R. 19 (Bankr. S.D.N.Y. 2017) but in that case the attorney over-worked litigation in the face of good offers and misevaluated his or her chances of prevailing. These cases have zero to do with the Sterling case.

In the face of an obdurate defendant, offering nothing, fighting each step of the litigation below without quarter, Shelist prevailed in the 7th circuit. Even upon remand, Southlake refused to budge an inch. The cases cited by Southlake reduced fees upon the simple principles Sterling argues at the beginning of this section: are fees reasonable under the circumstances? Judge Ahler didn't reduce fees by 50% because Shelist presented unreasonable fees. Instead, the Bankruptcy court reduced fees by 50% *to apply* the client's alleged contributory negligence upon the fees. This has nothing to do with "reasonableness" of Shelist fees. Shelist fees are a function of defendant's affirmative defense even if Sterling's award was to be reduced (which is never should have been).

The Bankruptcy court acknowledged the intensity and complexity of the litigation and that Shelist led his client's case to be the prevailing party on all points. The reasonable fees should have been awarded and the 50% reduction has no legal basis.

Further, as prayed in Sterling's opening papers, Plaintiff prays this Court *also* award *all of* Shelist's fees for the lengthily litigation that followed in the prove-up, the District Court appeal, and this Appeal to the 7th Circuit. Anything less would reward Southlake for their scorched each tactics.

VI. LOSS OF REPUTATION IS A KEY ELEMENT OF DAMAGES IGNORED BY THE BANKRUPTCY COURT

In their Response Brief, Southlake argues that the evidence adduced during the prove-up hearing was not admissible or proper. In fact, the Bankruptcy court admitted that the facts showing Sterling still had to hire counsel to obtain a gaming license in Colorado because of the arrest record a decade after these events was devastating evidence. More urgently, the Bankruptcy court held that the questions asked by Southlake counsel opened the door to this evidence and thus over-ruled any complaints. Southlake does not contest that Sterling had to hire counsel to obtain a gaming license in Colorado a decade post-these events. But the picture is bigger than that.

When one is arrested, unfortunately in our society particularly an African American person, it is an implication of criminal conduct. The person ‘must have done something wrong or she wouldn’t have been arrested’. Job applications (including gaming licenses) ask about prior arrests. Prior arrest are searchable on the internet. Defendant Southlake seems to accept (without critical inquiry) the Bankruptcy court’s view that ‘all is OK’ because Sterling moved on in her life and got her job at Horseshoe Casino back and eventually got her gaming license in Colorado. All is not ‘OK’.

For the Court below to not consider as damages the *per se* loss of reputation that comes from the imputation of criminal conduct is unacceptable. Loss of reputation for *per se* implication of criminal acts need not be proven by actual loss of a job

because that is the point of a *per se* rule. Loss of reputation is a more than proper method of evaluating the effects of Southlake's viscous contempt.

Sterling stands on the other points made in the brief concerning damages, including that the award is so tawdry (particularly with no costs) as to be an insult and unconscionable. A grave injustice was done and must be reversed.

CONCLUSION

Defendant's Response Brief argues Sterling is trying to "sway this Court to substitute an award for Sterling different than that awarded by the Bankruptcy court" (page 18). This is true. Plaintiff Sterling is arguing that the award does not fairly compensate Sterling for her actual damages and the consequences of Southlake's refusal to take responsibility for those damages. Thus, Sterling argues the award below should be reversed in part, the case assigned to a judge other than Judge Ahler, and a new Bankruptcy court to hold a hearing and determine damages afresh.

The issues of fees and costs are, of course, important also to Shelist. But they are illustrative of the narrow and cramped view of the court below. The sanctity of a Bankruptcy court's orders being followed and making those that don't comply pay the price is not enriched by the decision below. Unconscionability is a simple concept that an appeals court knows when it sees it. This is such a case. One must not over intellectualize to understand or appreciate that what Sterling has gone through was an assault on her dignity as a person and that the compensation provided is woefully inadequate.

Sterling prays this Court *reverse* the reduction in fees, *award costs*, also award *all* attorney fees of the litigation on appeal, and remand with clear instructions that all consequent damages, *including loss of reputation, emotional distress, and wrongful detention be awarded.*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 3,167 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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Dated: November 19, 2024

/s/ Samuel A. Shelist _____

Samuel A. Shelist

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2024, the Reply Brief of Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Samuel A. Shelist

Samuel A. Shelist