There'll Always Be Posner: Double-header

Monday, December 05, 2011

A great Chicagoan, Ernie Banks, was famous for saying “Let’s play two” – an expression of pure joy about the game of baseball. Another great Chicagoan, Judge Richard Posner, recently came out with a pair of opinions that brought us some joy and reminded us of what good legal reasoning and writing looks like. In both decisions, Judge Posner was on a panel with Chief Judge Easterbrook, so the intellectual lineup behind the opinions was as strong and fearsome as Billy Williams batting after Banks.

Let’s start with *United States v. Muoghalu*, 2011 WL 5866568 (7th Cir. Nov. 21, 2011), where a pharmacy director appealed from his conviction for extracting kickbacks from a pharmacy company. The basis for the appeal was the government’s failure to produce *Brady* (exculpatory) material until after trial. The pharmacy company paid Muoghalu $32,000 for 16 speeches he never gave. Muoghalu admitted he had never given such speeches, but claimed they were informal talks. Sadly, he had no documentation or corroboration of any sort. He was the only defense witness at trial. Posner makes it clear that this appeal is going nowhere: “[Muoghalu’s] guilt is so plain that we might stop here; none of the alleged trial errors could have affected the result of the trial, assuming, as courts do when assessing trial error, that the jury was reasonable (no one could predict what an unreasonable jury would do). But we’ll trudge on.” 2011 WL 5865658 at *1.

Posner says “trudge” but it’s really more of a glide. What was the alleged Brady material? The Department of Health and Human Services had prepared a memo summarizing an investigation of the pharmacy company for paying kickbacks. The prosecutor did not have the memo until after sentencing, so it did not withhold it. Moreover, the memo is not exculpatory. The memo fingered Muoghalu, among others. How is that exculpatory? The memo connected a pharmacy company employee – the recipient of the kickbacks – with off-label promotion that resulted in patient deaths. How is that exculpatory? According to Muoghalu, the memo frightened the pharmacy employee with the prospect of a homicide prosecution, so that employee had a strong incentive to cooperate and testify against Muoghalu. But if the pharmacy employee was connected to the deaths, so was Muoghalu.

It's hard to believe that any sane defense lawyer would place the connection in front of the jury, just to secure whatever slight incremental impeachment value suggested by the memo. As Posner says, "Had Muoghalu's lawyer told the judge and jury about the risk that his client had endangered lives, Muoghalu would now be arguing for a new trial on the ground of ineffective assistance of counsel." Id. At *3. To assess whether evidence really falls within Brady – i.re., whether it would likely have increased the chance of acquittal – "the court has to determine the likely *net* impact of the evidence, with realistic awareness of prejudice as well as probativeness." *Id.* at *4 (emphasis in original). The defense lawyer can make all sorts of creative, imaginative arguments on appeal about how a certain piece of evidence might have changed the outcome, but the court does not have to ignore reality. Here, reality resulted in an affirmance of the conviction.

The opinion in *Gonzalez-Servin v. Ford Motor Co*., 2011 WL 5924441 (7th Cir. Nov. 23, 2011), is about a lawyer who ignored reality – or, to be more specific, ignored controlling precedent. The opinion has gotten really famous really quick, so we'll try to be quick in covering it. The issue is forum non conveniens in multidistrict litigation. The appeal is really two appeals: one from an order transferring to Mexico claims that tires installed on Ford vehicles in Latin America had caused vehicular accidents, the other from an order transferring to Israel claims that hemophiliacs in Israel were injured by blood products contaminated with HIV. After the appellants' briefs were filed a couple of Seventh Circuit decisions came down – *Abad v. Bayer Corp*., 563 F.3d 663 (7th Cir. 2009), and *Chang v. Baxter Healthcare Corp*., 599 F.3d 728 (7th Cir. 2010) – that ordered FNC transfer under circumstances virtually identical to the case at issue. Understandably, the appellees discussed those cases in detail. Not so understandably, the appellants' reply briefs completely ignored *Chang* and mentioned *Abad* in passing – and incorrectly, at that.

This is no way to impress Judge Posner, the Seventh Circuit, or any judge, for that matter. Needless to say, the transfers are affirmed and the appellants lose. But they do not merely lose; they are ridiculed. Judge Posner tells the appellants that their "advocacy is unacceptable" and that the "'ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless'" (quoting a case quoting another case). And then Posner administers the *coup de grace*: he attaches pictures of both an ostrich sticking its head in the ground (though Posner emphasizes that the "noble

animal" does not really do that), along with a picture of a man sticking his head in the ground. It is a beat-down with visual aids.

Posner is having fun, and what's wrong with that? Granted, the losing lawyer took little delight in this exercise, and has even gone so far as to suggest that it is Posner who is the ostrich. (Er, good luck on your next visit to the Seventh Circuit.) Another blogger has pointed out that this is not the first time that Posner has taken pains to point out that no ostrich really buries its head in the ground. This is also certainly not the first time that Posner has turned bad lawyering into a source of judicial mirth.

And we're also sure it's not the last time.