

Case No. 06-1418

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN HARRINGTON,)
Plaintiff – Appellant,)
)
v.)
)
MADELINE WILSON, et al.,)
Defendants – Appellees.)

On Appeal from the United States District Court for the District of Colorado

D.C. No. 05-CV-01858-EWN-MJW

District Court Judge Edward W. Nottingham

**APPELLEES’ JOINT RESPONSE TO KENNETH L. SMITH’S MOTION FOR
LEAVE TO FILE BRIEF AMICUS CURIAE**

Appellees Madeline Wilson and the Law Office of Madeline Wilson, Christy Ryan, Laura Arcilese, Louise Culberson-Smith, John Gleason, Wendell Pryor, Robert Evans, Jefferson County Combined Court and Colorado Attorney General Johns Suthers, respectfully respond to Kenneth L. Smith’s Motion for Leave to File Brief Amicus Curiae as follows:

INTRODUCTION

On behalf of the collective Appellees listed above, the undersigned counsel is authorized to file this Response on their behalf.

The Appellees object to Mr. Smith's proposed filing of an amicus curiae brief and request the Court to deny Mr. Smith leave to file said brief. Mr. Smith's motion should be denied for a number of reasons, including, but not limited to: (1) the proposed amicus curiae brief violates the length restrictions pursuant to Fed. R. App. P. 29(d); (2) Mr. Smith's brief does not aid the Court in deciding this appeal; and (3) Mr. Smith is not situated in a position in which to advise the Court in this matter.

DISCUSSION

The filing of an amicus curiae brief is governed by Fed. R. App. P. 29. Pursuant to Rule 29, an amicus curiae brief may be filed by Mr. Smith only upon leave of court. Moreover, the motion for leave must state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. "Amicus curiae," for purposes of an amicus brief means, literally, friend of the court, serving for the benefit of the court and for purposes of assisting the court in cases of general public interest. United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991). "Since an amicus is not a party to the litigation, but participates only to assist the court, the extent to which, if at all, an amicus should be permitted to participate lies solely within the discretion of the court." Id. In exercising its discretion in this

instance, the Seventh Circuit has held that whether to allow the filing of an amicus curiae brief is a matter of "judicial grace." National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000). The judges of this court will therefore not grant rote permission to file such a brief, and in particular they will deny permission to file an amicus brief that essentially duplicates a party's brief. Id. at 617. The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process. Id. at 616.

The criterion for deciding whether to permit the filing of an amicus brief is whether the brief will assist judges by presenting ideas, arguments, theories, insights, or facts that are not to be found in the parties' briefs. Voices for Choices v. Illinois Bell Telephone, 339 F.3d 542 (7th Cir. 2003).

A. Mr. Smith's Amicus Curiae Brief Violates Length Restrictions.

Pursuant to Fed. R. App. 29(d), "Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. . ." "A principal brief may not exceed 30 pages. . ." Fed. R. App. P. 32(a)(7). Therefore, an amicus brief may not exceed 15 pages.

Mr. Smith's amicus curiae brief is twenty-eight (28) pages in length. His brief violates Rule 29 and it should be denied on procedural grounds alone. Moreover, this Court undoubtedly has a heavy caseload and, as a matter of judicial economy, the Court should exercise its discretion in refusing Mr. Smith's brief to minimize the extraneous reading in this case. Both Appellant and Mr. Smith have demonstrated a penchant for rambling, prolixity and irrelevance, which only serve to burden the Court and counsel.

B. Mr. Smith's Brief Does Not Assist the Court.

The criterion for deciding whether to permit the filing of an amicus brief is whether the brief will assist judges in determining issues before the Court. Mr. Smith's brief offers absolutely no assistance to the Court with respect to relevant issues that must be decided in this case. Since it offers no assistance to the Court or counsel, Mr. Smith's amicus brief should be rejected.

A careful reading of Mr. Smith's brief shows that it is little more than a 28-page manifesto of attacks upon the judicial system and the lower court judge. Clearly, he is unhappy with the outcome of a case that he had before Judge Nottingham and he is using this forum to vent his frustrations. For the most part, Smith's brief is vitriolic, irrelevant, and misleading. For example, the basis of Smith's brief, which is found in the very first paragraph, is that Judge Nottingham fabricates facts, willfully ignores circuit precedent, and that an entire class of citizens, those who cannot afford representation by Holland and Hart, are placed beyond the protection of the law. First, there has been no showing

that Mr. Harrington cannot afford counsel. Just the opposite is true. He has hired counsel to represent him with his divorce case. The simple reason that he does not have counsel in this case is that his case is vexatious and frivolous and a rational attorney would not put himself or herself at risk under C.R.C.P. 11 of bringing this case.

Mr. Smith further misleads this Court, stating that “In adopting the magistrate’s 41-page recommendations without independent findings of fact or comment, the Court dismissed Mr. Harrington’s complaint *sua sponte*, not bothering to wait for his response, as was required by law”. (Amicus Brief, p. 2.) A review of the record shows that the magistrate judge’s Recommendations were based on a long and tedious consideration of Mr. Harrington’s complaint, motions to dismiss by the defendants, and Harrington’s responses. Judge Nottingham then adopted the magistrate judge’s Recommendations. Therefore, the trial court did not dismiss *sua sponte* Harrington’s complaint as Mr. Smith stated. Moreover, the record shows that Judge Nottingham considered Mr. Harrington’s objections to the Recommendations, and after such consideration, adopted the Recommendations. Judge Nottingham clearly considered Mr. Harrington’s objections. Again, the record contradicts Mr. Smith’s bald assertions.

The proposed amicus curiae brief does nothing to assist this Court with determining the relevant issues before it. Instead, it is merely a vitriolic ranting that insults the underlying trial court and the judicial system in general. Therefore, Smith’s motion for leave to file his brief should be denied.

C. Mr. Smith Is Not Particularly Situated To Advise The Court.

Mr. Smith is not a licensed attorney with the State of Colorado and he is probably not even admitted to practice before this Court. Although he graduated from the Denver College of Law in 1995, when he applied for admission to the Colorado Bar, the Board of Law Examiners had serious questions about his mental, moral and ethical qualifications.

Exhibit A. They determined that there was probable cause to believe that he “lacked mental stability” and his application for admission was denied. He requested a formal hearing and the Board required him to submit to a mental status examination. Smith refused and his application was denied. Ultimately, Smith sued all of the Colorado Supreme Court justices in his attempts to gain admission to the bar, but his case was dismissed on jurisdictional grounds and he lost on appeal. Id.

Under these circumstances, Mr. Smith is not particularly situated to advise this Court with respect to this case. Accepting his angry and irrelevant brief would only increase the costs of this litigation and burden the Court. As such, his proposed amicus brief should be rejected, so that counsel and Court can direct their attention to the relevant issues involved in this appeal.

WHEREFORE, Appellees respectfully request the Court to deny Kenneth L. Smith’s Motion for Leave to File Brief Amicus Curiae.

s/Brett N. Huff

Brett N. Huff

White and Steele, P.C.

950 Seventeenth Street, Suite 2100

Denver, Colorado 80202

(303) 296-2828

bhuff@wsteele.com

Attorneys for Defendants-Appellees

Madeline Wilson and the Law Office

Of Madeline Wilson

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2007, the above and foregoing Appellees' Joint Response to Kenneth L. Smith's Motion for Leave to File Brief Amicus Curiae, was filed via electronic means and a true and correct copy was placed in the U.S. mail, postage prepaid, addressed to the following:

Sean Harrington

197m Boston Post Road, West #151

Marlborough, MA 0152

esoxlucios@msn.com

Randolph S. Dement

Randolph Stephen Dement, Attorney at Law

7720 East Belleview Avenue, #350

Greenwood Village, CO 80111

rdement@dementlaw.com

David H. Yun

Jaudon & Avery, LLP

1660 Wynkoop Street, #1010

Denver, CO 80202

dyun@jalegal.com

Amy Christine Colony
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
amy.colony@state.co.us

Kenneth L. Smith
23636 Genesee Village Road
Golden, CO 80401

s/Charlene Falk _____
For WHITE AND STEELE, P.C.