Chicago Daily Law Bulletin
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April 30, 2014

Abortion-case expense resolved 28 years later

By Jack Silverstein
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After 28 years of litigation and three trips to the U.S. Supreme Court, the 7th U.S. Circuit Court of Appeals ruled Tuesday that an anti-abortion group is entitled to about $63,000 in costs that it spent to defend a lawsuit over its actions outside clinics.

One key issue in the dispute is whether the costs should be paid, in light of the fact that the trial judge originally handling the matter retired before ruling on the financial request.

Joseph M. Scheidler, the national director of the Pro-Life Action League, and his co-defendants filed the bill of costs in 2007 following the conclusion of their case against the National Organization for Women Inc. (NOW).

NOW tried to bring extortion claims against Scheidler and other anti-abortion activists under the Racketeer Influenced and Corrupt Organizations Act (RICO) for their actions to halt abortions at various clinics that allegedly included violent acts.


Ariel Lavinbuk


Laura Kleinman

In 2006, the nation's high court reversed previous rulings that the defendants' actions could be the basis of liability under RICO, leading to then-U.S. District Judge David H. Coar ruling in 2007 in the defendants' favor.

After the defendants requested costs, Coar asked both sides to suggest the amount. The defendants asked for $71,933.

NOW contended that the defendants were not entitled to any costs but recommended no more than $9,747.

Coar retired before ruling on the matter.

Last year, U.S. District Judge Charles R. Norgle awarded $63,391 to the defense. NOW appealed.

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In Tuesday's opinion, Judge Frank H. Easterbrook wrote that Coar was "undoubtedly best suited to tackle (the bill of costs request)" and "should have done so in fall 2007 rather than letting the matter slide."

But, Easterbrook continued, "judicial delay does not wipe out a litigant's rights."

The appeals panel considered the fact that, after Coar retired, the defendants invoked Local Rule 78.5 to bring the matter of the unpaid costs to Norgle's attention. Easterbrook noted that NOW believed that the defendants purposefully waited for Coar's retirement to push the request for costs, believing that Coar would rule against them.

"So what?" Easterbrook wrote. "No statute, rule or decision of which we are aware requires litigants to pester judges for rulings on pain of forfeiture."

In addition, Easterbrook pointed out that the plaintiffs could have also used Local Rule 78.5 with Coar had they believed that he would have ruled in their favor. Easterbrook wrote that Coar's impending retirement was "public knowledge."

"The two sides had equal information and were equally passive," he wrote. "Neither should gain from silence, or judicial delay, at the expense of the other."

The $63,000 covers costs such as deposition transcription, copies of transcriptions, witness transportation, docket fees and other miscellaneous costs.

The appeals panel was not swayed by NOW's other two arguments to deny the payment of costs — that the defendants took too long to request costs and that they "did not establish that the transcripts and copies were 'necessarily obtained for use in the case' as Section 1920 requires," the ruling says.

On the matter of the necessity of copies, Easterbrook wrote: "No sensible legal system requires parties to waste $60 of lawyers' time to explain spending $6 on making a copy of something."

NOW's attorney — Laura Kleinman of Robinson, Curley & Clayton P.C. — expressed disappointment in the ruling but said that she believes "we fought the good fight."

She also stated that "most importantly," the litigation inspired the passage of the Freedom of Access to Clinic Entrances Act in 1994, an act that prevents people from blocking access to abortion clinics. Ensuring such rights for anyone obtaining or providing abortions was, Kleinman said, "the goal all along."

Both Kleinman and her opposing counsel — Ariel Lavinbuk of Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP in Washington, D.C. — said they have no reason to believe that the payment will be delayed.

As for the chances of a fourth Supreme Court appearance, Lavinbuk said: "Our view is that it has lasted far too long. It is over and it should be over."

That was also the conclusion of the panel, which included concurrence from Judges William J. Bauer and David F. Hamilton.

to Hawaii to see him

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As Easterbrook wrote:

“At oral argument, plaintiffs’ lawyer candidly admitted that she did not know of any decision, by any court, creating a badger-the-judge-or-forfeit-the-motion requirement; our search did not turn one up. We will not be the first. The obligation to render timely rulings rests on the judiciary, not the parties.

“This litigation has lasted far too long. At last it is over.”

The case is *National Organization for Women, Inc., et. al. v. Joseph M. Scheidler, et al.,* No. 13-2197.