No. 12-3671

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

UNITED STATES OF AMERICA, and STATE OF WISCONSIN,
Plaintiffs, and

TOBY T. WATSON,
Plaintiff-Appellant

v.

JENNIFER KING-VASSEL,
Defendant – Appellee

Appeal from The U.S. District Court
for The Eastern District Of Wisconsin, Milwaukee Division
Case No. 11-CV-236-JPS
The Honorable J.P. Stadtmueller Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT TOBY T. WATSON

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A. Summary

The District Court dismissed this action on summary judgment, but this is not the typical situation where the question is whether the non-moving party failed to provide sufficient evidence to defeat summary judgment. Instead, in a single decision, the District Court held in a case of first impression that (1) expert testimony was required, (2) since Plaintiff-Appellant Dr. Watson, had failed to name any expert(s) in discovery he could not prevail at trial, and (3) therefore the case should be dismissed on summary judgment.

In her Summary, Defendant-Appellee Dr. King-Vassel, asserts Dr. Watson must meet two elements: (1) that there was a false claim, and (2) that Dr. King knowingly caused the claim. Dr. Watson agrees. The questions on appeal are whether the District Court was correct in holding expert testimony is required to do so, and if so, whether Dr. Watson should have been given the opportunity to name such expert(s) and proceed once the District Court had determined expert testimony was required.

With respect to (1) that there was a false claim, Dr. King-Vassel asserts Dr. Watson did not present any evidence that Medicaid would be responsible for

paying for N.B.'s medications. Dr. Watson did far more than that. He presented evidence that Medicaid had, in fact, paid for such medications.[1]

The District Court, however, held that Dr. Watson was required to present expert testimony to explain a mysterious "black-box" like process involved whereby Dr. King's prescription to someone she knew was a Medicaid patient led to Medicaid paying for the prescription.[2] This is erroneous because normal jurors know that when a prescription is written for a Medicaid recipient, the prescription is going to be taken to a pharmacy to be filled, and Medicaid will be billed. It doesn't take an expert to explain that Dr. King-Vassel's prescriptions to her Medicaid patient caused claims to be made to Medicaid.

There is similarly no real question but that Dr. *knowingly* caused these claims to be made because Dr. Watson also presented evidence that Dr. King-Vassel was herself paid by Medicaid,[3] and checked to make sure that N.B. was taking the drugs as prescribed.[4] Frankly, if Dr. King-Vassel were to deny that she intended the prescriptions to be filled and paid by Medicaid, such testimony would not be credible.

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[1] Watson Short Appendix pp. 24-39.

[2] Watson Short Appendix p. 5.

[3] Watson Short Appendix pp. 40-41.

[4] Watson Short Appendix p. 41.

The District Court also held that an expert was required to establish that these prescriptions were false claims.[5] As the District Court held:

> A "false or fraudulent claim" occurs when Medicaid pays for drugs that are not used for an indication that is either approved by the Food, Drug, and Cosmetic Act (FDCA) or supported by a drug compendia.[6]

Dr. Watson's Opening Brief discusses and it will be addressed further below in response to Dr. King-Vassel's argument, that this is a simple matter of comparing the indications approved under the Food, Drug and Cosmetics Act, 21 U.S.C. § 301 *et seq* (FDCA), or supported by a Compendia with the diagnosis for which they were prescribed. If a prescription is not prescribed for an indication approved under the FDCA, it is commonly known as "off-label." Dr. King-Vassel inherently argues that the widespread practice of prescribing such drugs "off-label" is grounds for flouting Medicaid's statutory limitation of coverage for off-label prescriptions to those that are "supported" by one of the compendia.

Dr. Watson believes determining whether the off-label prescriptions in this case were supported by any of the Compendia is not beyond the ability of a jury and therefore expert testimony is not required. However, if expert testimony is required, it was fundamentally unfair to decide that expert testimony was required

[5] Watson Short Appendix p. 6.

[6] Watson Short Appendix p. 4.

and then dismiss the case at the same time without giving Dr. Watson an opportunity to name an expert and proceed.

Finally, Dr. King-Vassel's alternative basis for affirmance under what is known as the Public Disclosure Bar under 31 U.S.C. § 3730 (e)(4) is misplaced. Dr. King-Vassel argues that because the widespread problem of the off-label prescribing psychotropic drugs to children and youth is publicly known, this case should be barred. However, as the District Court held below, this case falls squarely within the holding of *United States ex rel. Baltazar v. Warden*, 635 F.3d 866 (7th Cir. 2011), because Dr. Watson placed Dr. King among the perpetrators and thus "performed the service for which the False Claims Act extends the prospect of reward" 635 F.3d at 867. Dr. King-Vassel also argues that Dr. Watson is barred because he is not an original source, but the original source rule only applies if it has been determined that the suit is based upon publicly disclosed information. *Id*.

B. Dr. Watson Did Not Need to Provide Evidence of Knowledge of the Medicaid Reimbursement System.

In § I.B. of her Argument Dr. King-Vassel asserts that Dr. Watson's opening brief is devoid of any discussion of the knowledge prong of a claim under the False Claims Act. This is untrue.[7] The question is whether Dr. Watson had to present

[7] Dr. Watson's Opening Brief, pp. 10-13.

expert testimony regarding the Medicaid reimbursement system. Contrary to Dr. King-Vassel's assertion, Dr. Watson is not required to establish that Dr. King-Vassel had any knowledge of how to submit a fraudulent Medicaid reimbursement claim. All Dr. Watson is required to establish is that Dr. King-Vassel "knowingly caused" such a claim under 31 U.S.C. § 3729(b).[8]

It is not even credible Dr. King-Vassel did not know that when she prescribed these drugs to N.B., who she knew was a Medicaid recipient, and for whom she billed Medicaid for prescribing the drugs, that the prescriptions were going to be paid by Medicaid. In fact, Dr. Watson presented evidence that Dr. King-Vassel checked to make sure that N.B. had taken the drugs she had prescribed.[9] It is respectfully suggested the District Court's holding that expert testimony was required to explain the Medicaid reimbursement system is in error. The mechanics of the Medicaid reimbursement system is not the issue, but whether Dr. King-Vassel knew, within the broad definition of 31 U.S.C. § 3729(b), that the prescriptions she issued were going to be presented to Medicaid for payment.

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[8] In the first of her many misleading misstatements, at page 2, Dr. King-Vassel states, "Dr Watson contends that Dr. King fraudulently induced" the government to pay for medications . . . " That is not the standard. The standard is whether, within the broad definition of "knowingly" in 31 U.S.C. § 3729(b), Dr. King-Vassel knowingly caused, the presentment of false claims.

[9] Watson Short Appendix p. 41.

C. Dr. Watson Established that Dr. King-Vassel Caused the Prescriptions to Be Paid By Medicaid

In Section I.C. Dr. King-Vassel asserts that Dr. Watson failed to establish the cause prong of the knowingly caused element of Medicaid fraud. This is incorrect because Dr. Watson presented evidence that Dr. King-Vassel wrote prescriptions that were filled at WalMart and paid by Medicaid, as well as that Dr. King-Vassel billed Medicaid and was paid for prescribing the drugs in question.[10] The question presented in this appeal is whether the District Court's holding that expert testimony was required to establish cause in spite of this direct evidence of cause is erroneous. It is respectfully suggested the submitted proof that the prescriptions were in fact written by Dr. King-Vassel, and these prescriptions were paid by Medicaid establish that expert testimony was not required to establish that the prescriptions caused the payment by Medicaid.

Again, it is simply not credible, and Dr. King-Vassel has never asserted, that she did not intend these prescriptions to be filled and paid by Medicaid. In fact, Dr. King-Vassel documents that she checked to make sure the prescriptions had been filled by noting "medication compliant."[11] Contrary to Dr. King-Vassel's assertion and the District Court 's holding, there is simply no "grand mystery between the time of the prescription and the claim being made to Medicaid."

[10] Watson Short Appendix pp. 25-40.

[11] Watson Short Appendix p. 41.

Dr. King-Vassel also asserts the Walmart and Wisconsin Medicaid records showing that the identified prescriptions written by Dr. King-Vassel were, in fact, paid by Medicaid do not show that her issuing the prescriptions caused the claims. Dr. Watson begs to differ. This argument is pure sophistry. But for the prescriptions the claims to Medicaid would not have been made.

Dr. King-Vassel also asserts the Affidavit of N.B.'s mother stating that Dr. King-Vassel knew N.B. was a Medicaid recipient should be disregarded by this Court as speculation even though the District Court never so held. Paragraph 4 of N.B.'s affidavit states in pertinent part:

> N.B. was treated by Dr. King from 2004 through 2008. Dr. King knew that N.B. was on Medicaid and knew that his care was being paid for by Medicaid. I provided to Dr. King N.B.'s medicaid information, and never paid out of my pocket for his visits with her.[12]

It is not speculation that Dr. King knew N.B. was a Medicid recipient because N.B.'s mother so informed her. Moreover, Dr. King-Vassel's own records demonstrate she knew N.B. was a Medicaid recipient because she billed Medicaid for prescribing drugs to N.B.[13]

The Walmart and Medicaid records do not lack foundation. The Walmart records are certified business records. The Medicaid records were also

[12] Watson Short Appendix p. 24.

[13] Watson Short Appendix pp. 40-41.

authenticated by Dr. Watson's trial counsel.[14] Dr. King-Vassel's attorney presented evidence in the same manner.[15] If this is not acceptable all of Dr. King-Vassel's evidence regarding the Public Disclosure Bar must be disregarded. With respect to the prescriptions being submitted to Medicaid, however, even without the records authenticated by Dr. Watson's trial counsel, the Walmart records are authenticated by Walmart and sufficient to establish the prescriptions were, in fact, presented to and paid by Medicaid.

Contrary to Dr. King-Vassel's argument, Dr. Watson presented more than enough evidence that the identified prescriptions caused payment by Medicaid.

D. Dr. Watson's Testimony Does Not Disprove His Allegations

Through 42 U.S.C. §§ 1396r-8(g)(1)(B)(i), (k)(2), (3) & (6), Congress restricted payment of outpatient drug prescriptions to those for indications approved under the FDCA or that have "support" in at least one of the Compendia, defining such prescriptions as being for a "medically accepted indication." In other words, Congress determined to pay for off-label prescriptions only if there is scientific support for the off-label use as documented in one of the Compendia. This makes total sense in both protecting patients and the public purse.

[14] Document 46, p. 2.

[15] *See*, e.g., Document 31.

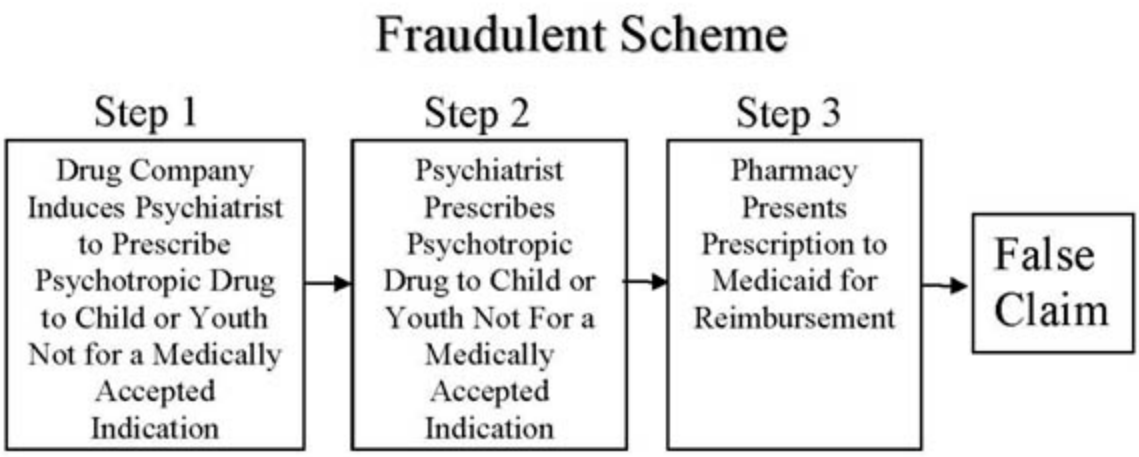
In Section II.B., Dr. King-Vassel asserts that because Dr. Watson acknowledged off-label prescribing was widespread, this defeats his claim that the specified drug prescriptions did not cause false claims. The conclusion simply does not follow from the premise. Some, but not all, off-label prescriptions are covered under Medicaid because their use is "supported" by one of the Compendia.

In the second to last paragraph of this section, Dr. King-Vassel asserts Dr. Watson's claim fails because Dr. Watson, "testified that the off-label prescription of medication is an almost universal practice employed by reasonable physicians in Wisconsin and the entire country." First, Dr. King-Vassel mischaracterizes Dr. Watson's deposition testimony. While Dr. Watson agreed off-label prescribing is often done and almost customary, he disagreed with the statement that it was not unreasonable.[16] He also testified that psychotropic prescriptions in such cases were often not for the benefit of the patient.[17] Fundamentally, Dr. King-Vassel's argument is she should not be held accountable because so many people are doing it.

The following graphic illustrates how the practice has become widespread:

[16] Document 48, p. 13 (deposition page 52).

[17] *Id.*



There have a number of extremely large False Claims Act recoveries at Step 1,[18] and if drug companies are liable under the False Claims Act for causing false claims by inducing doctors to write prescriptions for psychotropic drugs to children and youth that are not for medically accepted indications, then it has to also be true that doctors writing such prescriptions are also causing false claims.

Dr. King-Vassel states the District Court used the term "recognized medical indication," at Document 59, p. 14,[19] but that is not true. The District Court used the statutorily defined term "medically accepted indication." Dr. King-Vassel's use of this incorrect term suggests that the question is the medical industry's practices,

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[18] *See,* e.g., *Justice Department Announces Largest Health Care Fraud Settlement in Its History: Pfizer to Pay $2.3 Billion for Fraudulent Marketing*, Department of Justice, September 2, 2009, http://www.justice.gov/opa/pr/2009/September/09-civ-900.html, accessed March 30, 2013:

> Pfizer has agreed to pay $1 billion to resolve allegations under the civil False Claims Act that the company . . . caused false claims to be submitted to government health care programs for uses that were not medically accepted indications and therefore not covered by those programs.

[19] Watson Short Appendix p. 6.

rather than the statutory limitation of drug coverage to "medically accepted indications," defined as indications approved under the FDCA or supported by any of the Compendia.

In the last sentence of section II.B. Dr. King seems to also assert that because Dr. Watson acknowledges some off-label prescriptions could be for medically accepted indications,[20] that the specified drug prescriptions must also have been.[21] This makes no sense. Just because some off-label prescriptions are supported by one of the Compendia and therefore covered under Medicaid, doesn't mean that Medicaid covers all off-label prescriptions.

Deliberately or not, Dr. King-Vassel consistently mischaracterizes this case as one involving the medical profession's determination of what the medical profession would find acceptable, rather than Congress' restriction of off-label drug coverage to those that have scientific support as documented in one of the Compendia. In other words, Dr. King-Vassel attempts to convert this case into one about the "standard of care," which normally requires expert testimony, rather than

[20] Dr. King-Vassel actually uses the term "medically indicated," rather than the statutory term, "medically accepted indication," which just like misquoting the District Court as using the term, "recognized medical indication," makes it appear that the question is one to be defined by the medical profession rather than the Medicaid statute.

[21] The sentence is very hard to understand, but counsel thinks this is what Dr. King-Vassel is asserting.

the question of Medicaid coverage, which is a statutory interpretation issue, and which normally does not.

E. Dr. Watson Does Not Intend to Present Expert Testimony

Relying on the District Court's observation that "medical documents typically are not readily understandable by the general public and would require an expert to explain their application to a particular set of circumstances," in Section II.C. Dr. King-Vassel asserts Dr. Watson is prohibited from testifying about medical indications as that would in effect be testifying as an expert. This is not the case, because, unlike testifying to the standard of care, whether or not Dr. King-Vassel caused a false claim by writing off-label prescriptions to N.B., is a simple question of comparing the indication (diagnosis) for which the drug was prescribed with indications approved under the FDCA or supported by one of the Compendia.

No opinion is required, expert or lay, in this case.[22] Contrary to Dr. King-Vassel's assertion, testimony presented by the plaintiff would not be "about the application of statutes and drug compendia to the practice of medicine," but the application of statutes and drug compendia to Medicaid coverage for drug prescriptions written for specific diagnoses.

[22] Should plaintiff's testimony stray into expert territory, the District Court would presumably sustain an objection.

The diagnoses for which the drugs in question were prescribed are facts reflected in N.B.'s medical records.[23] Whether the drug(s) prescribed for off-label indications is supported by one of the Compendia is a matter of law *in this case* because the off-label indications for which the drugs were prescribed to N.B. are not even mentioned in the Compendia.

Dr. King-Vassel's out of context quotation of one sentence in footnote 29 of Dr. Watson's Opening Brief is misleading. The quoted sentence is, "While what 'support' means under meaning of 42 U.S.C. § 1396R-8(k)(3) is primarily one of statutory interpretation, an expert may be helpful, or even required, for that inquiry." "That inquiry," refers specifically to the situation where an indication carries a IIb recommendation, which means, "The given test, or treatment may be useful, and is indicated in some, but not most, cases." It is because that situation does not occur in this case that Dr. Watson believes expert testimony is not required.

F. The Court May Take Judicial Notice of the Medically Accepted Indications Chart.

In Section II.D. Dr. King-Vassel asserts this Court cannot take judicial notice of the Medically Accepted Indications Chart under Fed. R. Evid. 201 because Dr. Watson is attempting to have this Court accept that the Medically

[23] Dr. King-Vassel could attempt to controvert her own records at trial, but that wouldn't convert the question from one of fact.

Accepted Indications Chart establishes the medically accepted indications for various psychotropic drugs as a fact. As set forth in Footnote 28 of Dr. Watson's brief, however, the only use Dr. Watson makes of the Medically Accepted Indications Chart is to illustrate why expert testimony is not required to establish that the identified prescriptions are not for a medically accepted indication. Dr. Watson is not asking this Court to accept that the indications listed in the Medically Accepted Indications Chart are the only medically accepted indications. Dr. Watson makes use of it only to illustrate the principle that, except in the IIb situation, whether a prescription is for a medically accepted indication is a simple matter of comparing the patient's diagnosis with the indications approved under the FDCA or supported by any of the Compendia. Since it has been filed in another case, this Court, should it so choose, may take judicial notice of it under *Green v. Warden*, 699 F.2d 364, 369 (7th Cir. 1983).

G. Granting Summary Judgment For Failure to Name an Expert Witness Was Error

In Section III Dr. King-Vassel argues that it was proper for the District Court to hold, in a single decision, in a question of first impression, that (1) expert testimony was required, (2) since Dr. Watson, had failed to name any expert(s) in

discovery[24] he could not prevail at trial, and (3) therefore the case should be dismissed on summary judgment.

Dr. King cites *Hal Commodity Cycle Management Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987), for the proposition that "A district court is not required to fire a warning shot," but in that case the defendant had been given many warnings, the last one being that if Kirsh did not appear at the reset final pretrial hearing, default would be entered against her. 825 F.2d at 1137. In *Kirsh*, this Court also reiterated,

> "[T]this circuit has stated many times ... that defaults should be entered only when absolutely necessary, such as where less drastic sanctions have proven unavailing."

825 F.2d at 1138.

Dr. King-Vassel cites *Chicago Title Land Trust Co. v. Potash Corp. of Saskatchewan Sales Ltd.*, 664 F.3d 1075, 1081 (7th Cir. 2011), for the proposition that Dr. Watson took the risk of summary dismissal when he did not name an expert in discovery. However, this case is not analogous to the application of *res judicata*, which this Court held was a risk inherent in *Chicago Title Land Trust's*

[24] Dr. King-Vassel asserts that by specifying a deadline for naming experts under Civil Rule 26, Dr. Watson had agreed he would name such an expert(s). However, Civil Rule 26(a)(2)(D) provides for a deadline for naming experts in all cases, whether experts are going to be used or not. The Proposed Discovery Plan, Document 20, and the Scheduling Order, Document 24, merely reflect this. Dr. Watson understood both to mean that he must name any expert(s) by April 11, 2012, only if he intended to present expert testimony. It is believed this is the common understanding.

claim splitting strategy. The application of *res judicata* in the *Chicago Title Land Trust* situation was very well established before *Chicago Title Land Trust*. Here, Dr. Watson did not believe expert testimony was required, and the District Court, in a question of first impression, held expert testimony was required and then dismissed for failure to name an expert. This is fundamentally unfair. For the reasons set forth in his Opening Brief and above, Dr. Watson believes no expert testimony is required in this case and hopes this Court will agree. However, if this Court holds expert testimony is required, it is respectfully suggested Dr. Watson should be allowed to name an expert and proceed.

Dr. King-Vassel also argues that Dr. Watson should have filed a motion for reconsideration or for relief from judgment under Civil Rule 60(b) and requested the opportunity to name an expert witness after judgment had already been entered and the time for appeal had begun to run. Neither a motion for reconsideration nor for relief from judgment under Civil Rule 60(b) tolls the time to appeal. This Court's unpublished order in *Lipsey v. United Parcel Service, Inc.*, 418 Fed.Appx. 544 (7th Cir. 2011),[25] while not precedent, illustrates the point; In that case this Court did not consider an appeal of the summary judgment because it was made more than 30 days after summary judgment was entered. Also, as this Court held in *Stoller v. Pure Fishing Inc.*, 528 F.3d 478, 480 (7th Cir. 2008), "A Rule 60(b)

[25] Reproduced at the end of this brief.

motion is not a substitute for appeal." Moreover, as this Court held in *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000), "The ground for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal."

Since neither a motion for reconsideration nor a 60(b) motion would have preserved his rights, Dr. Watson respectfully suggests Dr. King-Vassel's assertion that Dr. Watson should have filed them inherently supports Dr. Watson's argument that the District Court should have allowed Dr. Watson to name an expert and proceed.

Again, it is fundamentally unfair to hold in a single decision, in a question of first impression, that (1) expert testimony was required, (2) since Dr. Watson failed to name any expert(s) in discovery he could not prevail at trial, and (3) therefore the case should be dismissed on summary judgment.

H. The Public Disclosure Bar Was Not Triggered.

In Section IV Dr. King-Vassel requests the Court affirm summary judgment on the alternative ground that this action is barred under 31 U.S.C. § 3730 (e)(4), commonly known as the Public Disclosure Bar. The Public Disclosure Bar, as it existed prior to the 2010 amendments,[26] provides:

[26] At footnote 6, Dr. King-Vassel notes that under *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U. S. 280, n.1 (2010), the prior version applies to this action, but her Addendum sets forth the current version.

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

In Section IV.A. Dr. King-Vassel reverses the order of inquiry by starting with the question of whether Dr. Watson was an "original source" under 31 U.S.C. § 3730 (e)(4)(B). However, that question is never reached because, as the District Court correctly held, there has been no public disclosure within the meaning of 31 U.S.C. § 3730 (e)(4)(A).[27]

In *Baltazar*, 635 F.3d at 867, this Court described the analysis as follows:

> Section 3730(e)(4)(A) poses three questions: (i) are "disclosures of allegations or transactions" revealing the fraud in the public domain?; (ii) is the suit "based upon" those disclosures?; and (iii) if so, is the *relator* nonetheless "an original source of the information"?

This Court then went on to explain that if the *relator*, in this case Dr. Watson, prevails on any of the three questions, the Public Disclosure Bar does not apply.

[27] Watson Short Appendix pp. 3-4.

Most importantly, as the District Court found, this case is "almost precisely analogous to that in *Baltazar*."[28] In *Baltazar*, this Court held that public disclosure that over half the chiropractors' claims were false was insufficient to trigger the Public Disclosure Bar because the public disclosure didn't identify any particular defendant. In so holding, this Court stated:

> [N]one of the materials on which defendants rely mentions Lillian Warden or Advanced Healthcare Associates (or, indeed, any other provider). A statement such as "half of all chiropractors' claims are bogus" does not reveal which half and therefore does not permit suit against any particular medical provider. It takes a provider-by-provider investigation to locate the wrongdoers. Baltazar contends in this suit that defendants are among the providers who have submitted intentionally false claims. That allegation is not based on public reports; it is based on Baltazar's knowledge about defendants' practices. *By placing defendants among the perpetrators of fraud, Baltazar performed the service for which the False Claims Act extends the prospect of reward* (if the allegations are correct).

635 F.3d at 867-8, emphasis added.

There was no public disclosure of Dr. King-Vassel, nor of any of the specific false claims identified by Dr. Watson in this action. In the words of this Court in *Baltazar*, by placing Dr. King-Vassel among the perpetrators of fraud, Dr. Watson performed the service for which the False Claims Act extends the prospect of reward (if the allegations are correct). *Id*.

[28] Watson Short Appendix p. 4.

Finally, that Dr. Watson obtained the information through an independent investigation that included newspaper advertising, doesn't change the result. There is nothing wrong with Dr. Watson conducting an independent investigation, funded by himself, to root out these false claims.[29]

IV. CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Toby T. Watson, requests that the District Court's determination that expert testimony was required in this case be **reversed**, the Order granting summary judgment and related judgment be **vacated**, and this case be **remanded**. In the alternative, the grant of summary judgment and related judgment should be vacated and this case remanded in order to allow Dr. Watson to name an expert or experts and proceed.

RESPECTFULLY SUBMITTED this 3rd day of April, 2013.

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[29] In a transparent effort to prejudice this Court against him, Dr. King-Vassel also complains about Dr. Watson's inadvertent use of a release that indicated N.B.'s records were being sought for clinical purposes. The District Court sanctioned Dr. Watson and his attorney for this, but concluded that did not change that the Public Disclosure Bar was not triggered. Watson Short Appendix p. 1, footnote 1.

V. FRAP 32 CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b)(ii) because it contains 4,565 words, including the 49 words in the Fraudulent Scheme graphic, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, Times New Roman, 14 point font for text and 13 point font for footnotes, using Microsoft Word 2007.

By: /s/ James B. Gottstein
James B. Gottstein (COUNSEL OF RECORD

VI. CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF

Participants

I hereby certify that on April 3, 2013, I electronically filed the foregoing Brief and Required Short Appendix of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ James B. Gottstein
James B. Gottstein (COUNSEL OF RECORD

VII. LIPSEY V. UNITED PARCEL SERVICE, INC., 418 FED.APPX. 544 (7TH CIR. 2011)

418 Fed.Appx. 544
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Seventh Circuit Rule 32.1. (Find CTA7 Rule 32.1)
United States Court of Appeals, Seventh Circuit.

Kenneth LIPSEY, Plaintiff–Appellant,
v.
UNITED PARCEL SERVICE, INC. and Teamsters Local 705, Defendants–Appellees.

No. 10–2825.

After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* FED. R.APP. P. 34(a)(2)(C).

| Submitted April 13, 2011.*

| Decided April 18, 2011.

Synopsis

Background: Following entry of summary judgment in favor of employer and union in wrongful termination action, 618 F.Supp.2d 903, terminated employee moved to vacate judgment. The United States District Court for the Northern District of Illinois, Ruben Castillo, J., denied motion, and terminated employee appealed.

Holdings: The Court of Appeals held that:

[1] appeal of order granting summary judgment was required to be filed within 30 days of date summary judgment was entered, and

[2] district court did not abuse its discretion in declining to recruit fifth attorney for employee.

Affirmed.

West Headnotes (2)

1] **Federal Courts**
Time for filing in general

170BFederal Courts
170BVIIICourts of Appeals
170BVIII(E)Proceedings for Transfer of Case
170Bk665Notice, Writ of Error or Citation
170Bk668Time for filing in general

Appeal of order granting summary judgment in wrongful termination case was required to be filed within 30 days of date summary judgment was entered. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2] **Federal Civil Procedure**
Appointment of counsel

170AFederal Civil Procedure
170AXVTrial
170AXV(A)In General
170Ak1951.27Counsel
170Ak1951.29Appointment of counsel

District court did not abuse its discretion when it declined to recruit fifth attorney for discharged employee during discovery in wrongful termination case, since employee had no right to court-appointed counsel in civil suit, court recruited four attorneys for employee throughout proceedings, and employee squandered his opportunity for recruited counsel by causing his fourth attorney to withdraw.

***544** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 07 C 2584. Ruben Castillo, Judge.

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Before MICHAEL S. KANNE, Circuit Judge, DIANE S. SYKES, Circuit Judge, JOHN DANIEL TINDER, Circuit Judge.

Opinion

ORDER

Kenneth Lipsey appeals the denial of his second motion under Federal Rule of Civil Procedure 60(b) to vacate a judgment in favor of his employer, United Parcel Service, and his union, Teamsters Local 705. Because the district court did not abuse its discretion in denying the motion, we affirm.

After UPS fired Lipsey because of a verbal altercation with a supervisor, he sued UPS for wrongful termination and Local 705 for breaching its duty of fair ***545** representation. The district court granted summary judgment for the defendants in May 2009 after determining that the union's actions were reasonable and that Lipsey therefore could not sustain any claim against UPS.

Lipsey then pursued a variety of measures for postjudgment relief. First, nearly a month after entry of judgment, Lipsey filed a motion to reconsider, which the district court denied. He then appealed the grant of summary judgment, and we dismissed his appeal as untimely. *Lipsey v. United Parcel Serv., Inc.*, No. 09–3053 (7th Cir. Oct. 22, 2009).

In May 2010 Lipsey moved to vacate the judgment under Rule 60(b)(1), maintaining that the district court abused its discretion when it declined to recruit a fifth attorney for him during discovery. (His first two attorneys recused themselves because of a conflict of interest, Lipsey instructed his third to withdraw, and his fourth attorney withdrew because Lipsey had "rendered it unreasonably difficult" to continue representation.) The court denied the motion as meritless.

Rather than appealing that decision, Lipsey filed with the district court a second motion under Rule 60(b), seeking reconsideration of the court's denial of his motion to vacate. This time Lipsey sought relief under Rule 60(b)(6), which permits courts to relieve parties of judgments for "any other reason that justifies relief." Lipsey reiterated that the court's refusal to recruit a fifth attorney for him warranted relief. The court denied the motion.

[1] Lipsey then appealed that order and the order granting summary judgment. We limited Lipsey's appeal to review of his second motion under Rule 60(b) because he filed the appeal more than 30 days after summary judgment was entered. *Lipsey v. United Parcel Serv., Inc.*, No. 10–2825 (7th Cir. Nov. 4, 2011). Despite our instructions, Lipsey devotes most of his brief on appeal to contesting the merits of the grant of summary judgment. But we will not consider these arguments, which, again, are untimely, and furthermore a motion under Rule 60(b) does not substitute for a direct appeal. *Stoller v. Pure Fishing Inc.*, 528 F.3d 478, 480 (7th Cir.2008); *see Karraker v. Rent–A–Ctr., Inc.*, 411 F.3d 831, 837 (7th Cir.2005).

[2] Lipsey also argues that the district court abused its discretion when it declined to recruit a fifth attorney for him during discovery. He maintains that he was prejudiced by the court's decision because he lacked the skills to depose a witness effectively. As an initial matter, Lipsey had no right to court-appointed counsel in his civil suit. *Romanelli v. Suliene*, 615 F.3d 847, 851 (7th Cir.2010). Moreover, the court recruited four attorneys for him throughout the proceedings, and Lipsey "squander[ed]" his opportunity for recruited counsel by causing his fourth attorney to withdraw; under these circumstances, he had "no entitlement" to a fifth. *Otis v. City of Chicago*, 29 F.3d 1159, 1168–69 (7th Cir.1994) (en banc). In any event, Lipsey fell far short of demonstrating the "extraordinary circumstances" necessary to justify relief under Rule 60(b)(6). *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 n. 11, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); *Lal v. California*, 610 F.3d 518, 524 (9th Cir.2010); *Lowe v. McGraw–Hill Cos.*, 361 F.3d 335, 342 (7th Cir.2004).

Lipsey makes several other undeveloped arguments concerning the district court's actions during discovery. We have reviewed these contentions, but none has merit.

Finally, in light of Lipsey's pattern of repeated and redundant filings, we warn him that any further frivolous litigation ***546** will subject him to monetary fines and a possible bar pursuant to *Support Systems Int'l. Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir.1995), forbidding him from filing any further legal papers in any federal court within this circuit except for criminal cases or applications for writs of habeas corpus.

Accordingly, we AFFIRM the judgment.