Nos. 06-56717, 06-56732, 07-55709

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

H. RAY LAHR,

Plaintiff-Cross-Appellant/Appellee,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, ET AL.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DEFENDANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

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Defendants' Response to Petition for Rehearing En Banc

Introduction

Fed. R. App. P. 35(a) makes clear that "[a]n en banc hearing or rehearing is not favored," and will not be ordered unless the petitioner satisfies certain compelling conditions. Plaintiff has failed to do so here. The panel's decision is not in conflict with any decision of the United States Supreme Court, this Court, or any decision of any other circuit court. Moreover, the panel's thorough and thoughtful opinion

applied settled precedent to the particular facts of this case, and is correct. Further review is unwarranted.

Statement

This is a Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552, et seq., case related to the tragic crash of TWA Flight 800 in 1996. After an extensive investigation, the government concluded that the crash was caused by accident, an explosion in the plane's center-wing fuel tank. Plaintiff disputes this conclusion, claims that the crash was due to a strike from an errant missile launched by the United States military, and asserts that the government acted improperly and/or negligently in conducting its investigation. Plaintiff filed one hundred-forty five FOIA requests with the National Transportation Safety Board ("NTSB"), and one hundred-five requests with the Central Intelligence Agency ("CIA"). The government provided responsive records to plaintiff, withholding or redacting certain material under several FOIA exemptions. Dissatisfied with the government's response, plaintiff filed this lawsuit.

On the government's motions for summary judgment, the district court held that the names of eyewitnesses and FBI agents were not protected from disclosure under FOIA Exemptions 6 and 7(C) which protect personal privacy. Lahr v. Nat'l Transp. Safety Bd., 524 F. Supp.2d 1153 (C.D. Cal. 2006). See 5 U.S.C. §§ 552(b)(6)

& 7(C). The court also held that four documents were properly withheld under Exemption 5's deliberative process privilege. Id. See 5 U.S.C. § 552(b)(5). The government appealed the court's Exemption 6 and 7(C) ruling and plaintiff filed a cross-appeal with regard to the Exemption 5 records.

On June 22, 2009, a panel of this Court (Wardlaw, Berzon, Miner (sitting by designation)) reversed the lower court's Exemption 6 and 7(C) ruling and held that the names of eyewitnesses and FBI agents were protected from disclosure under the FOIA. Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964 (9th Cir. 2009). The panel also affirmed the lower's court's Exemption 5 ruling. Id. Plaintiff has now filed a petition for rehearing en banc.

Argument

1. The standards for granting an en banc proceeding are demandingly high: Rehearing en banc "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." *See* Fed. R. App. P. 35(a). In other words, a petition must state that the panel decision conflicts with a decision of the Supreme Court, this Court, or a decision of another court of appeals. *See* Fed. R. App. P. 35(b)(1)(A), (B).

"Under this rule, it is well-understood that it is only in the rarest of circumstances when a case should be reheard en banc." Bartlett on Behalf of Neuman v. Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J. concurring in denials of rehearing en banc), cert. denied, 485 U.S. 940 (1988). See id. at 1242 ("[t]he decision to grant en banc consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances"). See also Newdow v. U.S. Congress, 328 F.3d 466, 470 (9th Cir. 2003) (Reinhardt, J., concurring in denial of rehearing en banc) ("To rehear a case en banc simply on the basis that it involves an important issue would undermine the three-judge panel system and create an impractical and crushing burden on what otherwise should be, as Rule 35(a) suggests, an exceptional occurrence"). Plaintiff has failed to satisfy the stringent requisites for en banc review in this case.

2. With regard to the panel's Exemption 6 and 7(C) ruling, its holding is entirely consistent with Supreme Court precedent, including its most recent ruling in Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004), as well as the most recent ruling of this Court in this area of the law, Forest Service Employees for

Environmental Ethics v. U.S. Forest Service, 524 F.3d 1021 (9th Cir. 2008). Indeed the panel corrected stated that it was "compelled by precedent," especially the recent Forest Service case, an opinion issued after the district court's decision, to reverse the lower court's Exemption 6 and 7(C) holding. See Slip Op. at 7363.

Over the past quarter century, and in six of its last six decisions in this area of the law, the Supreme Court has protected privacy interests such are at stake in this case.[1] Its latest decision in Favish - - where the Court once again favored privacy in the face of unsubstantiated allegations of government misconduct - - is dispositive of this case. The Favish Court made clear that where, as here, "the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the request must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." See 541 U.S. at 174. The Court recognized in language especially applicable here that "allegations of misconduct are

[1] See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004); Bibles v. Oregon Natural Desert Association, 519 U.S. 355 (1997); Department of Defense v. FLRA, 510 U.S. 487 (1994); Dept. of State v. Ray, 502 U.S. 164 (1991); Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989); Dept. of State v. Washington Post Co., 456 U.S. 595, 600 (1982).

'easy to allege and hard to disprove'" and that courts therefore must require a "meaningful evidentiary showing" by the FOIA requester. See id. at 175 (citation omitted). Thus, after Favish, a requester who asserts government misconduct as the public interest is held to a higher standard and must make a "meaningful evidentiary showing" in order to provide a public interest "counterweight" to the privacy interest. Id. at 172-74. Plaintiff failed to meet the threshold evidentiary requirement described in Favish.[2]

Plaintiff states that the panel's Exemption 6 and 7(C) ruling "directly conflicts with the Supreme Court's holding" in Favish. See Pet. at 4. It does nothing of the kind. In the lower court, plaintiff asserted, and the court credited, certain allegations of government impropriety and/or negligence in the overall investigation into the crash of Flight 800, including that "evidence was removed from the reconstruction hangar," "the government misrepresented radar data," and underwater videotapes of the debris from the plane "appear" to have been altered. However, for purposes of the present appeal, these general claims are irrelevant since plaintiff did not assert and

[2] Since Favish was issued, numerous courts of appeals have applied its heightened standard to allegations of government misconduct and found plaintiff failed to meet the requisite evidence required by Favish. See, e.g., Carpenter v. Dept. of Justice, 470 F.3d 434, 442 (1st Cir. 2006); Wood v. FBI, 432 F.3d 78, 89 (2d Cir. 2005); Horowitz v. Peace Corps, 428 F.3d 271, 278 (D.C. Cir. 2005), cert. denied, 126 S.Ct. 1627 (2006); Oguaju v. United States, 378 F.3d 1115, 1117 (D.C. Cir. 2004), cert. denied, 544 U.S. 983 (2005).

the court did not find that they had any bearing on the names of eyewitnesses or FBI agents which are the subject of the appeal.

In Favish, the Supreme Court emphasized the "nexus required between the requested documents and the purported public interest served by disclosure." Favish, 541 U.S. at 174 (emphasis added). As applied to this case, the requisite nexus does not focus on the issue of general interest in the crash of Flight 800, but rather must address the specific alleged government conduct in relation to the requested documents. See Senate of the Commonwealth of Puerto Rico v. Department of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (requestor must show that there is a public interest in the "specific information being withheld"). This Court, likewise, has stressed the requisite "nexus" between the asserted public interest and the specific records being withheld. See Minnis v. Dept. of Agriculture, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985) (recognizing a valid public interest in questioning the fairness of an agency lottery system that awarded permits to raft down a river, but finding that the release of the names and addresses of the applicants would not further that interest).

In this case, plaintiff failed to establish any nexus between his claims of alleged government impropriety and the records that are the subject of this appeal. The names of eyewitnesses have nothing to do with plaintiff's allegation that the government

"removed" evidence from the reconstruction hanger or the existence vel non of a missile debris field nor would disclosing these names shed any light on these matters. In his petition, plaintiff asserts that the panel's decision "allows the government to withhold the identities of eyewitnesses whose accounts the government has indisputably falsified." Pet. at 4. However, in the court below, plaintiff offered no evidence that the government had "falsified" eyewitness reports and the district court made no such finding. Plaintiff's only allegation below with regard to eyewitnesses was that"many eyewitnesses vehemently disagree with the conclusions of the CIA expressed in the video animation" (see ER at 551 & n. 16). This claim does not support a finding of government impropriety so as to satisfy the Favish threshold.

The fact that "many" eyewitnesses disagree with the CIA's animation does not support any allegation of government impropriety. Rather, the claim amounts to nothing more than that the government considered all the evidence, including the accounts of eyewitnesses, and came up with its own conclusions regarding the crash of TWA Flight 800, as expressed in part in the CIA animation. As plaintiff concedes in his petition, "the source of controversy is the government's conclusion." Pet. at 11. The fact that the government's ultimate conclusions might differ from the account of any particular eyewitness or is different from plaintiff's own theory of the

cause of the accident is not evidence of government impropriety to meet the threshold requirement under Favish.

3. Not only is the panel's Exemption 6 and 7(C) holding consistent with Supreme Court precedent, but it is also "compelled" by circuit precedent. See Slip Op. at 7363. In Forest Service, a decision not available to the district court, this Court held that government employees cooperating as witnesses in a disaster investigation had a substantial privacy interest that outweighed any cognizable public interest in disclosure of their names. See 524 F.3d at 1025-27. Balancing the privacy and public interests in that case, the Court stated that "the only 'additional public benefit' the release of the employees' personal information would provide" - - the ability to contact witnesses to obtain information not contained in the report - - "was 'inextricably intertwined' with the invasion of the employees' privacy. See 524 F.3d at 1028 (citation omitted). The panel correctly stated that "[t]he situation presented here is for all relevant purposes identical to that in Forest Service" (see Slip Op. at 7371) and that the Forest Service decision "dictates the result in this case" (see id. at 7366).

4. In his cross-appeal, plaintiff argued that the district court erred in granting summary judgment to the government regarding four documents on the grounds that they are protected from disclosure under the deliberative process privilege of

Exemption 5. Plaintiff contended that the privilege does not apply here in the face of alleged government "fraud" or "illegality" or "misconduct."

The panel correctly held that plaintiff waived any argument that a "fraud/illegality/misconduct" exception vitiates the deliberative process privilege under Exemption 5 by failing to raise this issue below. See Slip Op. at 7373. The panel's decision in this regard does not warrant en banc review.

It is well-settled that "since plaintiff did not make this argument in the district court * * *it is therefore waived." Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1130-31 (9th Cir.1998), cert. denied, 526 U.S. 1111 (1999). When the government raised Exemption 5's deliberative process privilege as an exemption from disclosure in moving for summary judgment, plaintiff did not argue that the government's alleged fraud or crime vitiated the privilege. See Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 912 (9th Cir.1995) (plaintiff's failure to raise this issue in opposition to summary judgment has resulted in waiver on appeal). See also Ritchie v. United States, 451 F.3d 1019, 1026 & n. 12 (9th Cir.2006), cert. denied, 127 S. Ct. 1337 (2007) (concluding that failure to raise an issue before district court resulted in waiver on appeal, particularly where the issue involved district court's broad discretion and district court "might have been able to address the problem" if raised).

Nor do any of the exceptions to this recognized waiver rule apply here. See Bolker v. C.I.R., 760 F.2d 1039, 1042 (9th Cir. 1985) (recognizing exceptions (1) if there are "exceptional circumstances" why the issue was not raised in the trial court; (2) "the new issue arises while the appeal is pending because of a change in the law," or (3) the issue presented is "purely one of law" and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court). Because there are no "exceptional circumstances," nor is this a "new issue," and it raises issues of fact, not law, plaintiff has waived this argument by raising it for the first time in this Court.

Further, even assuming arguendo that plaintiff has not waived this argument, it is without merit. As plaintiff himself concedes, "'[t]he so-called misconduct exception to the deliberative process privilege * * * has never been applied in a holding at the Circuit level [under FOIA], nor has the scope of 'misconduct' been clearly defined.'" Pet. at 18 (quoting ICM Registry, LLC v. U.S. Dept. Of Commerce, 538 F. Supp.2d 130, 133 (D.D.C. 2008). Thus, no conflict exists that would warrant en banc review. Rather, on rehearing en banc, plaintiff would have this Court be the first circuit court to apply this exception in a case where the issue was not even raised in the district court. Rehearing en banc is plainly not intended to accomplish such an extraordinary task.

CONCLUSION

For the foregoing reasons, plaintiff's petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rules 35-4 and 40-1, I hereby certify that the foregoing uses a proportionally spaced font (Times New Roman), has a typeface of 14 point, and contains 2,514 words, according to the word processing system used to produce the text.

/s/
Steve Frank
Counsel for Defendants/Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2009, I electronically filed the foregoing with the Clerk of the Court 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/
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