IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13031
D.C. Docket No. 1:14-CV-02926-ELR

RYAN PERRY,

Plaintiff-Appellant,

versus

CABLE NEWS NETWORK, INC., a Delaware corporation, and
CNN INTERACTIVE GROUP, INC., a Delaware corporation,

Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Georgia

MOTION FOR SANCTIONS UNDER 11TH CIR. R. 27-4

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Plaintiff-Appellant certifies that the following parties have an interest in the outcome of this appeal:

1. Ryan D. Andrews (attorney for Plaintiff-Appellant)
2. Alan W. Bakowski (attorney for Defendants-Appellees)
3. Rafey S. Balabanian (attorney for Plaintiff-Appellant)

4. Courtney C. Booth (attorney for the Plaintiff-Appellant)
5. Cable News Network, Inc. (Defendant-Appellee)
6. Clinton E. Cameron (attorney for Defendant-Appellee)
7. CNN Interactive Group, Inc. (Defendant-Appellee) (wholly owned subsidiary of Cable News Network, Inc.)
8. Historic TW Inc. (parent company of Turner Broadcasting System, Inc.)
9. Jay Edelson (attorney for Plaintiff-Appellant)
10. Jonathan S. Frankel (attorney for Defendants-Appellees)
11. Jennifer Auer Jordon (attorney for Plaintiff-Appellant)
12. Jeffrey G. Landis (attorney for Defendants-Appellees)
13. James A. Lamberth (attorney for Defendants-Appellees)
14. James D. Larry (attorney for Plaintiff-Appellant)
15. J. Aaron Lawson (attorney for Plaintiff-Appellant)
16. Roger Perlstadt (attorney for Plaintiff-Appellant)
17. Benjamin H. Richman (attorney for Plaintiff-Appellant)
18. Hon. Eleanor L. Ross (presiding district court judge)
19. Jacob A. Sommer (attorney for Defendants-Appellees)

20. Time Warner, Inc. (NYSE:TWX) (parent company of Historic TX Inc.)

21. Turner Broadcasting System, Inc. (parent company of Defendants-Appellees)

22. Marc J. Zwillinger (attorney for Defendants-Appellees)

No person or entity holds more than 10% of Time Warner Inc.'s (NYSE:TWX) outstanding common stock.

Dated: July 8, 2016

Respectfully submitted,

RYAN PERRY,

By: s/ J. Aaron Lawson
One of Plaintiff-Appellant's Attorneys

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Appellees Cable News Network, Inc. and CNN Interactive Group, Inc. (collectively "CNN") have moved to dismiss this appeal. But CNN does not question this Court's appellate jurisdiction; rather it seeks only to defend the judgment on the ground that Appellant Ryan Perry lacks standing to sue in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), a case that was decided before Mr. Perry even noticed his appeal in this case. CNN also asks the Court to create a direct circuit split with the Third Circuit on the issue of standing to sue under the Video Privacy Protection Act, 18 U.S.C. § 2710. (Mot. at 16-17 n.4.) And CNN persists in pursuing its "motion" even though a panel of this Court already has rejected the same argument about the import of *Spokeo* advanced by CNN. *See Church v. Accretive Health, Inc.*, --- F. App'x ---, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (per curiam). The proper place for CNN's arguments is its brief on the merits, not a motion asserting that this Court lacks appellate jurisdiction. CNN should be sanctioned for filing a frivolous and improper motion. *See* 11th Cir. R. 27-4. The Court should either (1) construe the "motion" as CNN's principal brief, (2) reduce the word limit available to CNN in its principal brief, or (3) strike the motion.

Mr. Perry will separately respond to the substance of CNN's filing, but provides a brief preview to explain why sanctions are warranted. CNN's motion, whether through misunderstanding or intent to willfully mislead, confuses original and appellate jurisdiction. But the distinction between original and appellate jurisdiction is so central to the operation of the federal courts that it formed part of the basis of the holding of no less than *Marbury v. Madison*, 5 U.S. 137, 173-74 (1803). In short, CNN asks this Court to dismiss Mr. Perry's appeal, but provides no reason to question the jurisdiction of this Court over the appeal. Instead, CNN's motion focuses exclusively on whether the district court erred in concluding that it had original jurisdiction to adjudicate this case.

But only a lack of appellate jurisdiction warrants dismissing an appeal, the relief sought by CNN. *See* 28 U.S.C. § 2106. Whether or not the district court lacked jurisdiction to adjudicate this case has nothing to do with the competence of this Court to review the district court's judgment. *See United States v. Corrick*, 298 U.S. 435, 440 (1936) ("While the district court lacked jurisdiction, we have jurisdiction on appeal."). A defect in original jurisdiction (due to, for instance, a lack of standing to sue) would merely prevent this Court from reaching the

merits of Mr. Perry's claim. Only a lack of appellate jurisdiction would prevent the Court from reviewing the judgment of the district court in the first place. *See United States v. One 1987 Mercedes Benz*, 2 F.3d 241, 242 n.1 (7th Cir. 1993) ("JPM Industries, Inc., argues that this Court is without jurisdiction because the district court lacked jurisdiction. However, we certainly possess jurisdiction to determine whether the district court correctly held that it was without jurisdiction.").

This Court's jurisdiction, as relevant here, is conferred by 28 U.S.C. § 1291, and the Court retains the power to review the final judgment of the district court even if that court was wrong about its power to hear the case in the first place. CNN invokes no exception to the final-judgment rule, nor cites to *any* case establishing that dismissing this appeal is an appropriate course of action.[1] *See* 15A

[1] Relatedly, and equally perplexing, CNN suggests that *Spokeo* renders this case moot. (Mot. at 9-10.) But even if CNN were correct about what *Spokeo* held (and it is not), the case is not moot. CNN invokes the rule that events subsequent to the filing of the complaint may deprive the plaintiff of a cognizable stake in the case. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). Yet if CNN is correct about the meaning of *Spokeo*, then Mr. Perry *never* had standing. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94-97 (1993). *Spokeo* is not the kind of post-filing legislative enactment that can moot a case.

Wright & Miller, Fed. Prac. & Proc. *Jurisdiction* § 3901 ("The rule that appellate courts have jurisdiction to decide that a case is beyond the subject-matter jurisdiction of federal courts … is so well established that it is commonly followed without comment.").

An illustration makes the point. Imagine that the district court *had* granted CNN's motion to dismiss this case for want of a cognizable injury-in-fact. Had Mr. Perry appealed that decision, the proper course for CNN would not have been to move to dismiss the appeal, but simply to defend the lower court's judgment in its merits briefing, as happens in countless cases. (Including the appeal in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014).) Any reasonable appellate practitioner should be aware of this. *See In re Pittsburgh & L. E. R. Co. Securities & Antitrust Litig.*, 543 F.2d 1058, 1064 (3d Cir. 1976) ("A party denied standing to sue, or to intervene, or to object, may obviously appeal such a determination. The question of standing does not go to whether or not the appeal should be heard, but rather to its merits.").

The Federal Rules of Appellate Procedure provide CNN a means to contest Mr. Perry's standing to sue in this case: A brief. Not surprisingly, CNN's "motion" is, in substance, a principal brief, and is

full of contentions that should be included in CNN's merits brief. The "motion's" primary purpose is to defend the district court's judgment. And the "motion" chronicles the history of the case, and provides a complete factual recitation of Mr. Perry's claims. Perhaps most egregiously CNN's "motion" asks this Court, in a footnote that consumes an entire page's worth of single-spaced text, to create a circuit split regarding standing under the Video Privacy Protection Act. (Mot. at 16-17 n.4.) *See In re Nickelodeon Consumer Privacy Litig.*, __ F.3d __; 2016 WL 3513782, at *7-*8 (3d Cir. June 27, 2016) (concluding that allegations that a defendant disclosed information protected by the VPPA caused a concrete injury-in-fact under *Spokeo*). Further, CNN's "motion" in effect urges the panel to depart from the persuasive reasoning of another panel of this Court. *See Church*, 2016 WL 3611543, at *3 (concluding that invasion of a substantive statutorily created right constituted a concrete injury-in-fact). By Appellant's count the "motion" runs to 4,853 words, more than one-third the space allotted to a principal brief. CNN plainly seeks nothing more than the to exceed the word limits established by Appellate Rule 32, and to gain the opening word in the dispute despite prevailing in the court below.

As the Seventh Circuit has explained, when a motion simply covers ground that should be covered in a brief—as CNN's "motion" clearly does—it is sanctionable as frivolous and vexatious. *See Redwood v. Dobson*, 476 F.3d 462, 471 (7th Cir. 2007). Filing such motion is a clear attempt to evade the limits of the Federal Rules, and "does nothing except increase the amount of reading the merits panel must do" and "aggravate the opponent." *Id.* These are "improper purpose[s]." 11th Cir. R. 27-4(c); *see Redwood*, 476 F.3d at 471.

Despite the sequence in which it was filed, because CNN's "motion" simply presents CNN's defense of the district court's judgment, the "motion" should be construed as CNN's brief on the merits, and Mr. Perry permitted to respond in the normal course.

In the alternative, the word limit for CNN's principal brief should be reduced. Judge Easterbrook has reasoned that reducing the word limit by twice the number of words in the improper filing is a sensible sanction. *See Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 728 (7th Cir. 2006) (Easterbrook, J., in chambers) (deducting 2,400 words from brief limit as sanction for a similar "absurd, time-wasting

motion" that was 1,200 words long). Because CNN's motion runs to 4,853 words, its principal brief should be limited to 4,294 words.

If the Court is not inclined to impose such a sanction, it should simply strike the motion, and invite CNN to include its argument in its merits brief. Ultimately, if CNN believes that its arguments are worthy of this Court's time, it should include them in that brief.

Dated: July 8, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, J. Aaron Lawson, an attorney, hereby certify that I served the foregoing ***Plaintiffs' Motion for Sanctions under 11th Cir. R. 27-4***, by causing true and accurate copies of such paper to be transmitted to all counsel of record via the Court's CM/ECF electronic filing system on July 8, 2016.

/s/ J. Aaron Lawson