CARLTON FIELDS

Welcome to the Party, Pal: Supreme Court Invokes Party Presentation Principle

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On May 7, 2020, the U.S. Supreme Court unanimously vacated an opinion of the Ninth Circuit Court of Appeals based on the so-called principle of party presentation. That is, the Supreme Court concluded that the Ninth Circuit decided this case on a point that the parties did not raise. "We therefore vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel." The lawsuit started routinely enough. Evelyn Sineneng-Smith was an immigration consultant in California. She presumptively attempted to assist her clients in applying for a "labor certification" that (at a time in the past) would permit certain aliens in the United States to obtain the status of lawful permanent residents. Here, however, Sineneng-Smith charged her clients for advice that would necessarily be ineffectual: she "knew her clients did not meet the application-filing deadline; hence, their applications could not put them on a path to lawful residence." Notwithstanding, she collected $3.3 million from her clients for these untoward services. In turn, she was charged with violating 8 U.S.C. § 1324, which makes it illegal to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." The penalty is enhanced if the crime is "done for the purpose of commercial advantage or private financial gain." She was convicted. Sineneng-Smith's defense involved arguments that her conduct was not covered by 8 U.S.C. § 1324 and, if it was, those code provisions violated the petition and free speech clauses of the First Amendment as applied. She did not, however, argue that the code provisions were overbroad under the First Amendment in the district court, in her original Ninth Circuit briefing, or at the first oral argument. After oral argument, though, the Ninth Circuit panel "named three *amici* and invited them to brief and argue issues framed by the panel, including a question never raised by Sineneng-Smith: Whether the statute is overbroad under the First Amendment." The Ninth Circuit held another oral argument and then reversed the conviction under 8 U.S.C. § 1324(a)(1)(A)(4), finding that the federal statute was violative of the overbreadth doctrine. The government filed a petition for writ of certiorari in the Supreme Court, which was granted. Although the briefing in the Supreme Court was directed to the merits of

the Ninth Circuit's overbreadth decision, the Supreme Court decided the case on the basis of the principle of party presentation, an issue that was not raised as an appellate point and that was hardly mentioned at all in the briefs (the government's initial brief on the merits noted, in passing, that the Ninth Circuit deviated from the "the normal course of party-driven litigation"). Justice Ginsburg wrote for a unanimous court that the Ninth Circuit abused its discretion in injecting the overbreadth issue into this case. The gist of the court's decision is crystallized as follows:

> In short: "[C]ourts are essentially passive instruments of government." They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties."

The court concluded that "a court is not hidebound by the precise arguments of counsel, but the Ninth Circuit's radical transformation of this case goes well beyond the pale" and remanded "for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties." This case sheds some new light on an age-old tension in appellate practice. More than half a century ago, Professor Allan Vestal juxtaposed the following two views of the proper role of an appellate court (both taken from contemporary appellate decisions of the time) to highlight this tension:

> "An appellate court decides only the issues presented by the parties." . . . . "To say that appellate courts must decide between two constructions proffered by the parties ... would be to render automatons of judges, forcing them merely to register their reactions to the arguments of counsel at the trial level."

The principle of party presentation embraced by the Supreme Court in the *Sineneng-Smith* opinion is consistent with the idea that litigants should be responsible for framing the issues in their legal disputes generally and their appeals specifically. It can be frustrating to attorneys and lower courts for an appellate court to introduce arguments and issues beyond those that have been preserved and framed by the parties. Attorneys may feel that they are litigating against a phantom advocate that is raising issues from out of the blue. Lower courts may be puzzled by appellate opinions that bear little resemblance to the cases they decided. As the Eleventh Circuit Court of Appeals has recognized, "'Too often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them.'" *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004) (quoting *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998)). On the other hand, in some appeals the parties overlook a critical issue or the big picture. In those instances, if the appellate court were to decide the case as framed by the parties, the written opinion could become a strange outlier, confusing practitioners in the future by not addressing an obvious line of relevant cases or by avoiding an overarching concept that the parties missed. Ignoring the elephant in the room upsets the development of the law. Getting it right and maintaining consistency in the law are important considerations, even if the briefing is poor. Moreover, courts often raise their own jurisdiction, sua sponte, even when the litigants do not question it. And amicus curiae briefs are

occasionally known to introduce policy considerations and social science facts that are not part of the case briefed by the parties. It also is well accepted that appellate courts often affirm, sua sponte, for reasons supported by the record but not addressed by the trial court or the litigants. *See, e.g.*, *Home Depot U.S.A. Co. v. Taylor*, 676 So. 2d 479, 480 (Fla. 5th DCA 1996) (explaining that Florida's version of the right-for-any-reason practice is called the "tipsy coachman" doctrine, which derives from Oliver Goldsmith's 1774 poem "Retaliation": "The pupil of impulse, it forc'd him along, / His conduct still right, with his argument wrong; / Still aiming at honour, yet fearing to roam, / The coachman was tipsy, the chariot drove home."). No single rule captures the variety of circumstances that arise in modern appellate practice in this regard. The *Sineneng-Smith* court decided that the Ninth Circuit panel went too far afield from the appeal presented to it by the parties. But the Supreme Court likewise observed that the "party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate." Indeed, the court attached a handy addendum to its opinion that "list[s] cases in which this Court has called for supplemental briefing or appointed *amicus curiae* in recent years. None of them bear any resemblance to the redirection ordered by the Ninth Circuit panel in this case."

Tips:

Appellate practitioners should carefully and comprehensively frame the issues on appeal. They should not assume that an appellate court will save them from unpreserved arguments or unfortunate oversights. At the same time, appellate practitioners should remain cognizant that their cases exist within a larger legal universe and that factors outside their framing of the issues may impact the ultimate outcome in their appeals.

Authored By

Joseph H. Lang Jr.

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