

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7050

September Term, 2018

FILED ON: NOVEMBER 27, 2018

SPANSKI ENTERPRISES, INC.,
APPELLEE

v.

TELEWIZJA POLSKA, S.A.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-957)

Before: GARLAND, *Chief Judge*, MILLETT, *Circuit Judge*, and WILLIAMS, *Senior
Circuit Judge*.

J U D G M E N T

The court considered this appeal on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. The court has given the issues full consideration and has determined that they do not warrant a published opinion. See D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the decision of the district court is **AFFIRMED**.

Telewizja Polska (“TVP”), Poland’s national public television broadcaster, appeals an award of \$794,203.42 in attorney’s fees and \$58,761.71 in costs to Spanski Enterprises, Inc. (“SEI”), a Canadian corporation, on the heels of litigation under the Copyright Act. See *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 278 F. Supp. 3d 210 (D.D.C. 2017) (“Fee Decision”); Joint Appendix (“J.A.”) 1537. In the underlying suit, the district court determined that TVP had willfully infringed SEI’s copyright in 51 episodes of *TVP Polonia* programming by making them available for online viewing in the United States where SEI had exclusive distribution rights for that programming. *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 222 F. Supp. 3d 95 (D.D.C. 2016) (“Merits Decision”), *aff’d*, 883 F.3d 904 (D.C. Cir. 2018). The court awarded SEI \$3,060,000 in statutory damages, *Spanski Enterprises, Inc. v. Telewizja Polska S.A.*, No. 12-cv-957, 2017 WL 598465 (D.D.C. Feb. 14, 2017), and, later, costs and attorney’s fees. We now review the latter award, having previously denied SEI’s request for costs and fees for the

appellate portion only of the underlying suit. *Spanski Enterprises, Inc. v. Telewizja Polska S.A.*, No. 17–7051 (Aug. 9, 2018) (per curiam).

* * *

Section 505 of the Copyright Act provides, in relevant part, that a court “in its discretion may allow the recovery of full costs” as well as “a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505. While courts may not award attorney’s fees “as a matter of course” and must treat prevailing plaintiffs and defendants alike, courts enjoy “broad leeway” and “wide latitude” in making determinations under Section 505. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016). In deciding whether to award fees, courts may consider “several nonexclusive factors” identified in *Fogerty v. Fantasy*, 510 U.S. 517, 534 n.19 (1994), and reaffirmed in *Kirtsaeng*. Those factors include “frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence.” *Kirtsaeng*, 136 S. Ct. at 1985 (quoting *Fogerty*, 510 U.S. at 534 n.19).

Having reviewed the district court’s decision in light of the latitude afforded by *Kirtsaeng* and the *Fogerty* factors, as well as the failure of TVP to preserve its arguments challenging the award, we conclude the district court did not abuse its discretion in awarding attorney’s fees and costs in this case.

TVP now argues that the district court erroneously failed to limit its award to those fees SEI would not have incurred but for TVP’s misconduct. But TVP forfeited this argument by failing to raise it with the district court. “It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.” *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); see also *Prime Time Int’l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010) (“This court has repeatedly recognized that issues and legal theories not asserted in the district court ‘ordinarily will not be heard on appeal.’” (citations omitted)). In its twenty-three page memorandum opposing SEI’s request for fees and costs, J.A. 1454–84, TVP entered a battery of objections relating to the *Fogerty* factors and SEI’s hourly rates and billing. But nowhere did it articulate its objection to the alleged absence of an adequate causal link between its misconduct and the fees awarded. Ordinarily, then, such an objection is forfeited on appeal—no matter how vigorously it is pressed to this court, see TVP Br. 24–32.

TVP asks us to exercise our discretion and take up its objection nevertheless. Having considered the request, we conclude that the factors permitting discretionary review of otherwise forfeited arguments under our precedent militate against taking up TVP’s causation argument.

“[U]nder well-established law, a party forfeits a claim by failing to raise it below when the party ‘knew, or should have known[,]’ that the claim could be raised.” *Keepseagle v. Perdue*, 856 F.3d 1039, 1054 (D.C. Cir. 2017) (quoting *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1091 (D.C. Cir. 1984)). TVP falls squarely within this description. To begin with, TVP cites in its appellate brief Second Circuit case law endorsing a but-for standard for fee-shifting in cases of

misconduct that had long been decided when it submitted its post-hearing memorandum in March 2017. TVP Br. 28; see *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 240 F.3d 116, 126 (2d Cir. 2001) (“[A]ny fees [a court] awards should be related to costs or expenses incurred as a direct result of bad faith conduct.”); *Viva Video, Inc. v. Cabrera*, 9 F. App’x 77, 80 (2d Cir. 2001) (“[Appellants] should recover an award of fees for the totality of the work that resulted from the forged affidavit.”); see also Oral Argument at 3:50 (Court: “So the issue about causation wasn’t known at the time [of the memorandum’s submission]?” Counsel for TVP: “It had been addressed in the Second Circuit’s *Matthew Bender* decision but the Supreme Court had, I believe, at the time of briefing not yet ruled on the issue.”).

Putting aside TVP’s opportunity—and failure—to cite Second Circuit case law to the district court, counsel at oral argument maintained that TVP should not be faulted for failing to raise its objection before the district court because the case on which it heavily relies, *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017), was handed down only after it submitted its memorandum. But although the memorandum is dated March 17, 2017, *Goodyear* was handed down on April 18, 2017, and TVP could have filed a supplemental brief immediately thereafter or otherwise alerted the district court to this intervening precedent. It could also have noted in its memorandum that *Goodyear* was pending or sought a time extension pending the decision. That counsel may have been unaware of *Goodyear* is no excuse. See Oral Argument at 27:55 (Court: “Why didn’t you file [after *Goodyear* was handed down]? Counsel for TVP: “I don’t think we were aware of it at the time, Your Honor.” Court: “[A] Supreme Court decision on the very issue in front of you?” Counsel for TVP: “We were not aware of it, Your Honor.”). In short, given that the Second Circuit cases were available as persuasive authority and that *Goodyear* was pending at the time of briefing and decided soon thereafter, TVP “knew or should have known” about its causation objection at the time of briefing. *Keepseagle v. Perdue*, 856 F.3d at 1054.

We may also review otherwise forfeited arguments in “exceptional cases or particular circumstances,” including where a forfeited argument presents “a novel, important, and recurring question of federal law,” or where “the new argument relates to a threshold question such as the clear inapplicability of a statute.” *Liff v. Office of Inspector Gen. for U.S. Dep’t of Labor*, 881 F.3d 912, 919 (D.C. Cir. 2018) (quotation marks and citations omitted); see also *Flynn v. Comm’r Internal Revenue Serv.*, 269 F.3d 1064, 1069 (D.C. Cir. 2001) (“We generally exercise that discretion . . . only in exceptional circumstances, as, for example, in cases involving uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice.” (citation omitted)). Admittedly, TVP tees up an important question about whether and how *Goodyear*’s rationale extends to Section 505 cases. The issue, moreover, is likely to recur. But this case is not, as TVP’s counsel asserts, a “good vehicle” to take up the matter. See Oral Argument at 28:30. Most important, the presence of multiple *Fogerty* factors in this case raises complex questions about how to integrate a but-for analysis centered on misconduct with other potential grounds for fee-shifting. Nor is the issue of whether *Goodyear*’s rationale extends to Section 505 a question for which “the proper resolution is beyond any doubt.” *Singleton*, 428 U.S. at 121. *Goodyear* was a case in which fees were sought under a federal court’s “inherent

powers,’ not conferred by rule or statute.” 137 S. Ct. at 1186 (citation omitted). Indeed, the *Goodyear* opinion did not cite or discuss either *Fogerty* or *Kirtsaeng*. Both of these factors therefore counsel against discretionary review. (We note in passing the obvious tension between some of the factors at play here—for example, if an issue’s proper resolution were truly “beyond any doubt” it seems improbable that the issue would also be one posing a novel or uncertain question. This tension suggests that our precedent is more a loose collection of factors rather than one cohesive multi-factor test.)

Yet another factor that can tilt in favor of discretionary review is a case that “involves a straightforward legal question, and both parties have fully addressed the issue on appeal.” *Liff*, 881 F.3d at 919 (quoting *Prime Time Int’l*, 599 F.3d at 686); see *Lesesne v. Doe*, 712 F.3d 584, 588 (D.C. Cir. 2013). Taking the second point first, we would have benefitted from more adversarial briefing on *Goodyear*’s application in the copyright context and the role of but-for causation when multiple *Fogerty* factors are implicated. As to the first point, it is true we do not lack a developed factual record. But unlike in *Lesesne v. Doe*, 712 F.3d at 588, where the forfeited argument we addressed was “dispositive,” here we cannot know without delving into the merits whether TVP’s but-for theory would be dispositive in a mixed-rationale Section 505 case. And even if TVP were correct that the causation issue is fully teed up for our review, the other factors counseling against deciding this issue in the first instance on appeal would outweigh it.

Though we could take up TVP’s causation argument without more factual development, a resolution in TVP’s favor would almost inevitably require a remand. A remand, in turn, would stand in tension with another factor for exercising discretion—a case “where ‘injustice might otherwise result.’” *Singleton*, 428 U.S. at 121 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)). Given TVP’s ample opportunity to press its objection to the district court, determining the probability of any injustice requires weighing the additional expense and time that would be required of the district court and SEI for further proceedings against any possible loss to TVP. Reviewing the case as a whole, we do not find that TVP would suffer an injustice if we hold that it forfeited its causation objection.

In sum, the disparate factors governing our decision whether to consider an otherwise forfeited argument tell against doing so.

* * *

TVP also faults the district court for tabulating SEI’s attorney’s fees using unduly high hourly rates. We reject this argument, as well. We review a district court’s fee award for abuse of discretion and will not “upset its hourly rate determination ‘absent clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence.’” *Eley v. Dist. of Columbia*, 793 F.3d 97, 103–04 (D.C. Cir. 2015) (quoting *Kattan ex rel. Thomas v. Dist. of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993), as amended (June 30, 1993)).

TVP contests the district court’s use of the LSI *Laffey* Matrix to assess the reasonableness of SEI’s hourly rates, urging that it should have relied on the less generous United States

Attorney's Office Matrix. See TVP Br. 37–44. But TVP itself advocated use of the American Intellectual Property Law Association (“AIPLA”) report matrix, see J.A. 1486–89; see also Memorandum at 17–18, J.A. 1476–77. And, in fact, the district court found that the rates SEI requested fell within the range indicated by the AIPLA matrix. *Fee Decision* at 219. Given its assessment that SEI's counsel had “a reputation and a level of skill and experience that go beyond that of the median partner,” the court did not find it “unreasonable that Plaintiff's counsel's proposed rates would fall—as they do—in the upper quartile of the rates surveyed in the AIPLA report.” *Id.* It likewise observed that SEI's “reduced rates remain below the most expensive 10% of intellectual property partners as recorded in that report.” *Id.*

TVP's briefs mention neither the AIPLA matrix nor the district court's above-quoted reasoning. TVP has offered no argument on appeal explaining how the district court's reliance on a rate schedule it had proposed could be an abuse of discretion. Accordingly, we conclude that the district court did not abuse its discretion in setting attorney's fee rates in line with the AIPLA matrix submitted by TVP, taking due account of SEI's counsel's qualifications.

* * *

We hold that the district court neither abused its discretion in deciding to award SEI attorney's fees and costs nor in choosing rates it found to comport with the AIPLA matrix.

Pursuant to D.C. CIR. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk