No. 17-13073

In the United States Court of Appeals for the Eleventh Circuit

JENNIFER JENKINS,

Plaintiff-Appellant,

v.

S. DAVID ANTON, P.A. and S. DAVID ANTON,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:15-cv-283, Hon. James S. Moody, Jr.

REPLY BRIEF OF JENNIFER JENKINS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Anton, S. David – Defendant-Appellee and trial counsel for Defendants-Appellees;
2. Burns, P.A. – Appellate counsel for Plaintiff-Appellant;
3. Burns, Thomas A. – Appellate counsel for Plaintiff-Appellant;
4. Everhart, Yvette Denise – Trial counsel for Plaintiff-Appellant;
5. Hopkinson, Kathryn C. – Counsel for Defendants-Appellees;
6. Jenkins, Jennifer – Plaintiff-Appellant;
7. Law Offices of Phyllis J. Towzey – Trial counsel for Plaintiff-Appellant;
8. Moody, Jr., Hon. James S. – United States District Judge;
9. Porcelli, Hon. Anthony E. – United States Magistrate Judge;
10. S. David Anton, P.A. d/b/a Anton Legal Group – Defendant-Appellee and trial counsel for Defendants-Appellees;
11. Sass Law Firm – Trial counsel for Plaintiff-Appellant;
12. Sass, Cynthia N. – Trial counsel for Plaintiff-Appellant;
13. Thompson Legal Center, LLC – Counsel for Defendants-Appellees;
14. Thompson, James M. – Counsel for Defendants-Appellees;
15. Towzey, Phyllis J. – Trial counsel for Plaintiff-Appellant.

No publicly traded company or corporation has an interest in the outcome of this appeal.

March 16, 2018

/s/ Thomas Burns
Thomas A. Burns

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ARGUMENT AND CITATIONS OF AUTHORITY

Throughout the answer brief, S. David Anton, P.A. and S. David Anton (collectively, "Anton Legal Group") restructure the issues,[1] discuss extra-record facts,[2] and rely on unpublished decisions that cannot serve as binding precedent.[3] These tactics are misguided and obscure the reality of the situation, which is that this Court must reverse or vacate the judgment and remand for further proceedings.

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[1] Ms. Jenkins posited three issues for appeal, which corresponded with three discrete rulings: (1) the denial of a post-judgment motion; (2) the failure to *sua sponte* recuse; and (3) the result of the bench trial itself. *See* Jenkins Br. 1. Instead of following that simple framework, Anton Legal Group posits five issues for appeal. *See* Answer Br. 1. Because that framework is more confusing, Ms. Jenkins will proceed with her framework, but cross-reference the answer brief's issues.

[2] At several points, Anton Legal Group discusses extra-record facts pertaining to (1) supposed communications between it and Ms. Jenkins's trial counsel and (2) who proposed what. *See* Answer Br. 2, 17. The record does not support those assertions. Instead of wasting judicial resources by filing a motion to strike the brief, Ms. Jenkins trusts that the Court will disregard those extra-record references. *See, e.g.*, *United States* v. *Bosby*, 675 F.2d 1174, 1181 (11th Cir. 1982) ("we consider the affidavit not properly before us and disregard the contents").

[3] Specifically, Anton Legal Group repeatedly relies on cases such as *United States* v. *Disch*, 347 Fed. App'x 421, 422 (11th Cir. 2009), *United States* v. *Williams*, 705 Fed. App'x 869, 875 (11th Cir. 2017), *Daker* v. *Robinson*, 694 Fed. App'x 768, 770 (11th Cir. 2017), *Estrada* v. *FTS USA, LLC*, 688 Fed. App'x 830, 831 (11th Cir. 2017), and *Fla. Airmotive, Inc.* v. *Perry*, 321 Fed. App'x 815, 816 (11th Cir. 2009). But Anton Legal Group did not disclose that those cases are unpublished. *See* Answer Br. 4, 9, 12, 17, 18, 19, 20. Because those cases are unpublished, they cannot serve as binding precedent here. *See* 11th Cir. R. 36-2.

I. The District Court abused its discretion when it denied the motion to amend or alter the judgment or for new trial (Anton Legal Group's issues one, two, and three)

It was an abuse of discretion to deny the motion to amend or alter the judgment or for new trial. The trial court should have convened evidentiary hearings about Mr. Anton's potential perjury and the newly discovered email. And aside from that, it was a manifest error of law or fact to miscalculate the workweek and disregard Ms. Anton's working lunches during the APP trial.

A. Before denying a new trial, the District Court should have held an evidentiary hearing about Mr. Anton's potential perjury (Anton Legal Group's issue one)

Anton Legal Group contends Ms. Jenkins is asking this Court to "ignore black letter law" regarding new trials by supposedly conflating impeachment evidence with perjury evidence. Answer Br. 9. To that end, Anton Legal Group relies (Answer Br. 10-11) on this Court's unpublished decision in *United States* v. *Williams*, 705 Fed. App'x 869, 875 (11th Cir. 2017), the Fifth Circuit's decision in *Diaz* v. *Methodist Hosp.*, 46 F.3d 492, 496-97 (5th Cir. 1995), and the Sixth Circuit's 85-year-old decision in *Old Dominion Stages* v. *Cates*, 65 F.2d 258, 259 (6th Cir. 1933). Its argument is incorrect, and its reliance is misplaced.

Anton Legal Group cites *Williams* for the proposition that impeachment evidence is "evidence that goes to the credibility of a witness as opposed to evidence of liability." Answer Br. 9. But even under that definition, the evidence Ms. Jenkins sought to obtain from Yvette Rodriguez qualified because it would have *directly* established Anton Legal Group's liability by proving it had regularly paid its paralegals overtime before it hired Ms. Jenkins.

Similarly, Anton Legal Group cites *Diaz* for the proposition that Rule 60(b)(3) does not correct factually incorrect outcomes, but rather protects against parties prevailing by unfair means. Answer Br. 10. Here, however, if Mr. Anton perjured himself, it deprived Ms. Jenkins of the ability to fully present her case. A critical part of Ms. Jenkins's theory of the case was her factual narrative. *See* Jenkins Br. 29-30. As part of that narrative, Ms. Jenkins sought to convince the District Court that Mr. Anton had eliminated his two-paralegal business model in favor of a one-paralegal business model. *See* Jenkins Br. 29. But that led to a backlog, which required Ms. Jenkins's predecessor and Ms. Jenkins herself to work substantial overtime. *See* Jenkins Br. 29.

Finally, Anton Legal Group cites *Old Dominion Stages* for the proposition that it is within a district court's discretion to deny a new trial, despite a witness's actual perjury, if that evidence was cumulative. Answer Br. 11. That case involved a defendant who claimed a witness (who was not a party) had perjured herself when she denied authoring and signing a report. 65 F.2d at 259. On appeal, the Sixth Circuit affirmed the denial of a motion for new trial based on newly discovered evidence because "we are of the opinion that the credibility of the witness was *so seriously attacked* as not to make it an abuse of discretion for the District Judge to deny a new trial sought by the defendant upon the ground stated." *Id.* (emphasis added). Here, however, there is no indication that Mr. Anton's credibility was as "seriously attacked" as the non-party witness in *Old Dominion Stages*.

B. Before denying a new trial, the District Court should have held an evidentiary hearing about the newly discovered email (Anton Legal Group's issue two)

Anton Legal Group tries to distinguish *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978), and *Nat'l Labor Relations Bd.* v. *Jacob E.*

Decker & Sons, 569 F.2d 357 (5th Cir. 1978).[4] *See* Answer Br. 13. Its attempts are misguided. Like the defendant in *Rozier*, Anton Legal Group asserts it is entitled to the benefit of a speculative calculation as to the extent of the wrong it inflicted on Ms. Jenkins. *See* 573 F.2d at 1346. But that is precisely the proposition *Rozier* rejected. And Anton Legal Group's efforts to distinguish *National Labor Relations Board* are difficult to understand, because Ms. Jenkins relied on that case only to establish that newly discovered perjury evidence is qualitatively different from newly discovered impeachment evidence. *See* Jenkins Br. 16 n.7.

C. The District Court committed a manifest error of law or fact when it found the workweek ran Monday to Sunday and lunches during the APP trial were not work (Anton Legal Group's issue three)

Without citation to authority, Anton Legal Group asserts, "There is no preference for any days of the week." Answer Br. 14. To the contrary, until set or altered by the employer, the regulations indicate that the calendar week (Sunday to Saturday) is the default presumption. *See*

[4] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

29 C.F.R. § 778.105 (clarifying that workweek "need not coincide with the calendar week" so long as the employer establishes it).

Additionally, Anton Legal Group contends "the only evidence points to a work week beginning on Mondays," but it declines to provide any record citations. As Ms. Jenkins previously explained, however, that is not what the record indicates. *See* Jenkins Br. 22.

Finally, Anton Legal Group complains that Ms. Jenkins's interrogatory responses calculated her overtime hours based on a Monday-to-Sunday workweek. Answer Br. 15. Of course, those interrogatory responses were filed two months after she had filed the complaint (*compare* Doc. 8 (responses), *with* Doc. 1 (complaint)) and before she had received discovery responses from Anton Legal Group.

With respect to lunches, Anton Legal Group flips the burden. *See* Answer Br. 15-16. Its argument disregards 29 C.F.R. § 785.15 and § 785.19(a) by requiring proof that the employee was working rather than proof that the employee was completely removed from duty during the meal. *See* Jenkins Br. 24. To the contrary, the standard is whether the employee is "completely relieved from duty" during the meal. 29 C.F.R. § 785.19(a). In applying that standard, an employee is "is not re-

lieved if [s]he is required to perform any duties, whether active or inactive while eating." *Id.*

Put otherwise, Ms. Jenkins's lunches during the APP trial counted as work because she was "unable to use the time effectively for [her] own purposes." 29 C.F.R. § 785.15; *see also Kohlheim* v. *Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990) ("firefighters were not relieved from duty during their mealtimes, so the FLSA re- quires that the county provide compensation for such periods"). Instead, Ms. Jenkins, Mr. Anton, and the expert discussed the trial proceedings "the entire time" during lunch. Doc. 130 at 55. Under the regulations and the case law, those lunches count toward overtime.

II. The District Court abused its discretion when it failed to *sua sponte* recuse (Anton Legal Group's issue four)

It is unnecessary to further discuss the parties' disagreement as to the substantive merits of the recusal issue. *Compare* Jenkins Br. 24-26, *with* Answer Br. 16-19. Put simply, the parties disagree. But it is necessary to discuss the parties' different perspectives about what should be the standard of review. *Compare* Jenkins Br. 12 (abuse of discretion), *with* Answer Br. 4 (plain error).

Specifically, relying on this Court's unpublished decision in *United States* v. *Disch*, 347 Fed. App'x 421, 422 (11th Cir. 2009), Anton Legal Group asserts the standard of review for the recusal issue is plain error, not abuse of discretion. *See* Answer Br. 4, 17. It is mistaken.

To the contrary, *Disch* is both unpublished[5] and distinguishable. It involved a criminal defendant who "expressly waived" his right to file a recusal motion. *Disch*, 347 Fed. App'x at 422. As such, unlike Ms. Jenkins who filed a notice of disclosure (Doc. 69), the defendant in *Disch* had "clearly invited the error." *Id.* at 423 n.1.

Moreover, even if *Disch* were published, binding precedent in this Court, *see* 11th Cir. R. 36-2, it was decided in 2009—which is two decades *after* this Court had held in *United States* v. *Kelly* that 28 U.S.C. § 455 imposes "an affirmative, self-enforcing obligation" upon a district judge "to recuse himself *sua sponte* whenever the proper grounds exist" and "requires judges to resolve any doubts they may have in favor of

[5] *See Bonilla* v. *Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) ("[u]npublished opinions ... are persuasive only insofar as their legal analysis warrants"); *Twin City Fire Ins. Co.* v. *Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260 n.3 (11th Cir. 2007) (an unpublished opinion is persuasive "only to the extent that a subsequent panel finds the rationale expressed in that opinion to be persuasive after an independent consideration of the legal issue").

disqualification." 888 F.2d 732, 744 (11th Cir. 1989). Under the prior-panel-precedent rule, *see Smith* v. *GTE Corp.*, 236 F.3d 1292, 1302-03 & n.11 (11th Cir. 2001), this Court would have to apply *Kelly*, not *Disch*.[6]

In short, to the extent *Disch* suggests the standard of review here should be plain error, it is unpublished, distinguishable, inconsistent with the prior-panel-precedent rule, and wrong. Anton Legal Group misplaces its reliance on it.

III. The District Court committed clear error and misinterpreted the law when it rendered findings of fact and conclusions of law in Anton Legal Group's favor (Anton Legal Group's issue five)

Anton Legal Group again misunderstands Ms. Jenkins's argument when it contends she should have been awarded damages based on her testimony alone "whether it was supported by the evidence or not." Answer Br. 19. That is not Ms. Jenkins's argument. Rather, her argument is that the District Court failed to apply the burden-shifting scheme of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which infect-

[6] Indeed, *Kelly*'s holding derives from over four decades of this Court's precedent. *See Davis* v. *Bd. of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975) (§ 455 is "self-enforcing on the part of the judge" and "may also be asserted by a party by motion in the trial court, through assignment of error on appeal, by interlocutory appeal, as here, or by mandamus" (citations omitted)). *Disch* does not control because it was a quarter century late to the party.

ed its factual findings. *See* Jenkins Br. 27-30. That failure now requires this Court to vacate the judgment and remand for the District Court to perform the correct *Anderson* analysis in the first instance. *See* Jenkins Br. 27-30. And that is why her brief requested that precise appellate remedy. *See* Jenkins Br. 30.

At any rate, Anton Legal Group relies on *Estrada* v. *FTS USA, LLC*, 688 Fed. App'x 830, 830-31 (11th Cir. 2017), to defend the District Court's ruling. *See* Answer Br. 19-20. But *Estrada* was merely a summary judgment case in which the employee "ha[d] not created a genuine issue of material fact about whether he performed work for which he was not paid." *Id.* at 831. Here, however, notwithstanding Anton Legal Group's failure to maintain time records, Ms. Jenkins presented an extensive case about her overtime. *See* Jenkins Br. 27-30.

Additionally, Anton Legal Group contends Ms. Jenkins is mistakenly asking this Court to perform a de novo review of the District Court's factual findings. *See* Answer Br. 20. The concern is misplaced. The legal issue to be reviewed here de novo involves misapplication of *Anderson*, and although the factual findings are reviewed for clear error, they cannot be divorced from the misapplication of *Anderson*.

CONCLUSION

The Court should reverse the judgment or vacate it and remand for further proceedings.[7]

Respectfully submitted,

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[7] Anton Legal Group does not quarrel with the proposition that if the Court reverses or vacates the judgment, it should also vacate the taxation of costs (Doc. 117). *See* Answer Br. 1-22.

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 2,323 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

March 16, 2018

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 16th day of March, 2018, to:

David J. Smith, Clerk of Court
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 16th day of March, 2018, to:

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March 16, 2018

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