

The Risk of Conceding Issues for Purposes of Appeal: Seventh Circuit Finds Waiver

AUTHOR: JOSHUA RAKOFF

CONTRIBUTOR: MICHAEL LECINSKI, TIMOTHY SANSONE

In *Bradley v. Village of University Park*, 59 F.4th 887 (7th Cir. 2023), the Seventh Circuit found that the defendants waived an issue by conceding it in a prior appeal. In so finding, the court clarified the difference between conceding an issue for purposes of an appeal and waiving the issue outright so that it could not be disputed on remand.

The *Bradley* Case: Appeal #1

The *Bradley* case arose when the plaintiff, a former police chief, was terminated summarily without notice or an opportunity to be heard. He filed suit against the village that had employed him and its mayor, alleging that the defendants had deprived him of a constitutionally protected property interest—his job as chief of police—without due process of law, violating the Fourteenth Amendment.

The district court ruled for the defendants, and plaintiff appealed. The Seventh Circuit reversed the dismissal and remanded the case for further proceedings, finding that the defendants had conceded that the plaintiff had a property interest in his job as chief of police for “this case,” without limiting that concession or reserving their ability to dispute the issue later if the appeal was lost.

The Second *Bradley* Appeal

On remand, the defendants argued that the plaintiff did not have a property interest in his job. The district court considered this argument and ruled in favor of the defendants again. Plaintiff appealed a second time.

In the second appeal, the Seventh Circuit held that the defendants had explicitly waived the property interest at issue in the first appeal, such that the issue was not within the scope of the Seventh Circuit’s remand. Thus, the defendants could not argue that the plaintiff had no property interest in his job.

The Court’s Analysis: An Introduction to Appellate Waivers

A waiver is the intentional relinquishment or abandonment of a known right. In *Bradley*, the Seventh Circuit first distinguished between conceding issues for purposes of an appeal and waiving issues on appeal.

A concession for purposes of appeal essentially assumes something for the sake of argument—the litigant does not concede the issue definitively. But litigants can also waive issues, which prevents those litigants from contesting the issues in future proceedings after a remand.

The Seventh Circuit went on to explain that a waiver can differ for appellants and appellees. Appellants may waive a non-jurisdictional issue or argument in many ways, such as by (1) failing to raise the issue or argument in the district court—either at all or in a timely fashion; (2) failing to raise the issue at all in the party's opening appellate brief; (3) failing to present a developed argument on appeal that engages with the reasoning of the district court; or (4) failing to respond in a reply brief to a new argument raised by an appellee.

As for appellees, they can waive arguments by (1) not raising them in a timely way in the district court; (2) failing to respond to an appellant's arguments; or (3) failing to offer a coherent, supported argument, among other grounds.

However, a waiver is not entirely the same for appellees and appellants. A significant difference is that appellees do not waive issues or arguments by failing to argue alternative grounds for affirmance. An appellee's failure to raise all possible alternative grounds for affirming the district court's original decision—unlike an appellant's failure to raise all possible grounds for reversal—should not operate as a waiver, because arguing alternative grounds for affirmance is a privilege rather than a duty. Accordingly, an appellee may concede specific issues for an appeal when an appellant appeals a loss on other grounds.

The Waiver in *Bradley*

The Seventh Circuit concluded that the defendants waived any issue regarding a property interest in the first appeal. The property interest issue was presented in the plaintiff's opening brief in that appeal, and the defendants did not dispute that the plaintiff had a protected property interest in his employment.

Going further, the Seventh Circuit found that the defendants could have signaled that they were conceding the property interest only “for purposes of appeal.” If they had done so, they would have left the door open to dispute that element in the event of a remand. The problem for them was that they gave no sign they were leaving the door open, and their failure to do so amounted to an explicit waiver of their right to challenge that element of plaintiff's due process claim.

The defendants noted that they used the phrase “in this case,” but the Seventh Circuit found this argument unavailing because there is a significant difference between the two. The defendants' use of the phrase “in this case,” rather than expressing a limited concession, conveyed an expansive and total waiver because there was no caveat or limitation.

Takeaway

Bradley serves as a warning that any concession made for purposes of an appellate argument must be explained clearly to the court. Without a clear explanation, the concession may operate as a total waiver.

