

DAN'S RATHER EXCITING BRIEF

✖ As you may recall, Dan Rather is in litigation against CBS, Viacom and executives Les Moonves and Andrew Heyward over his treatment after the Bush Texas Air National Guard story on 60 Minutes II. The complaint stakes out a number of claims alleging that not only was Rather improperly treated over the TANG story but but also over the abu Ghraib story on the infamous torture pictures.

The holy grail of the Rather litigation, however, has always been Dan, and thus us the public, getting substantive discovery on his case – depositions, requests for production and requests for admissions. Over a year ago the New York State trial court ordered initial limited discovery. Since then, however, the case has been hamstrung by a series of motions to dismiss and, after the core of Rather's complaint survived, appeals (initiated by the defendants).

A critical point was reached Monday afternoon with the filing of Rather's appellate brief (pdf file) by his attorneys. The brief is long, but provides a superb background, factual description, statement of procedural posture and detail of legal arguments being made on Dan Rather's behalf. It is well worth a read if you are interested and so inclined.

First the good news. The positioning and quality of Dan Rather's response to the points appealed by the trial court defendants appear strong and, at first blush anyway, would appear sufficient to fend off the attack. Bottom line, it looks very likely that Rather's case will continue to survive and head back to the trial court for that all important and fun filled discovery.

Now the better news. It would appear that Rather has some very decent arguments for reinstating counts and defendants that the trial court has preliminarily dismissed. You see, that is one of

the things about filing an appeal – sometimes the other party cross-appeals, and that is exactly what Rather has done here. So, while CBS et. al have gotten greedy wanting to have the whole case dismissed, Dan Rather has answered back "No, and I want the gains you had obtained returned to me". Of the five questions Rather has cross-appealed on, these two appear to hold the most promise to be decided by the appellate court in Rather's favor:

4. Are fraud damages adequately pleaded if an employee alleges the fraud led to lesser compensation than the market would have provided? Supreme Court held that fraud damages were insufficiently pleaded solely because the specific amount plaintiff actually received was not alleged.

5. May corporate officers and executives who, acting on behalf of their corporations, directed and participated in fraud be held personally liable? Supreme Court did not explicitly decide this issue, but in dismissing the fraud claim on other grounds, entered judgment in favor of the individuals.

Should he get just those two questions he has cross-appealed on decided in his favor, and hold serve on the issues the defendants have appealed on, he will have not only his case intact for discovery and trial, but will have multiple defendants to play off of each other. Bonus.

The defendants to Dan Rather's claim must be terrified that any part of the case will get to active and full discovery, much less to open court—and they clearly will try to drag this out indefinitely hoping that Rather dies of old age before he can testify. That is literally the morbid defense these mopes appear to be playing here.

Here is to Dan Rather, his health, longevity and continued dogged persistence; may the force be

with him.