No. _____

In The
Supreme Court of the United States

JAMES MICHAEL MURPHY, MD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Marianne Dugan, Attorney at Law
Counsel of Record
259 East 5th Avenue, Ste 200D
Eugene, Oregon 97401
(541) 338-7072
fax (866) 650-5213
mdugan@mdugan.com

QUESTION PRESENTED

Is a second defamation lawsuit precluded by *res judicata* after dismissal of the first lawsuit, where key information about additional, later, widespread defamatory statements is withheld from the plaintiff during the first lawsuit?

LIST OF PARTIES

The name of the Petitioner is:

James Michael Murphy, MD.

The names of the respondent is:

United States of America.

CORPORATE DISCLOSURE STATEMENT

No party is a corporation.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner, James Michael Murphy, MD, petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Ninth Circuit (entered December 3, 2018), affirming the District Court's Order and Judgment in favor of Respondent United States of America.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (Fernandez and Ikuta, Circuit Judges, and William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation) is not reported, and is set forth in the Appendix at App. 1a through App. 4a. The Findings and Recommendations recommending granting Respondent/Defendant's Motion for Summary Judgment and dismissing Petitioner/Plaintiff's case with prejudice, are not reported, and are set forth in the Appendix at App. 5a through App. 19a. The District Court's (Michael Mosman, J.) Opinion and Order granting Respondent's Motion for Summary Judgment and dismissing Petitioner's case with prejudice, is not reported, and is set forth in the Appendix at App. 20a through App. 22a. The District Court's Judgment is not reported and is set forth in the Appendix at App. 23a through App. 24a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 3, 2018. App. 1a-4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This is a civil action for defamation that was initially filed in Oregon state court, then removed to federal court, with the United States substituted as the sole defendant, pursuant to 28 U.S.C. § 2679(d)(2), after the United States filed a certification asserting that the defamer was acting within the course and scope of her employment with the U.S. Air Force at the time of the alleged incidents.

28 U.S.C. § 2679(d)(2) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the

provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

STATEMENT OF THE CASE

This is a defamation case initially filed *pro se* in state court, against Petitioner's former coworker, Jolene Mosebach, while both he and she were in the Air Force. The case was removed to federal court by the United States, with the defendant name changed to United States pursuant to 28 U.S.C. § 2679(d)(2), after the United States filed a certification asserting that Mosebach was acting within the course and scope of her employment with the United States Air Force at the time of the alleged incidents.

The United States filed a motion to dismiss for lack of jurisdiction, based, in relevant part, on the doctrine of *res judicata*, because Petitioner's prior defamation claim against Mosebach had been dismissed.

After obtaining legal counsel, Petitioner conceded that some allegations were barred by *res judicata, but* argued that the suit should proceed regarding additional, newly-discovered defamatory statements.

The district court granted summary judgment to defendant. The Ninth Circuit upheld the dismissal, in a very short Memorandum Opinion.

The Panel erred in holding that Petitioner's claims were barred by claim preclusion. *Res judicata* does not apply, because the present case and Petitioner's prior lawsuit do not arise out of the same transactional nucleus of facts.

REASONS FOR GRANTING THE WRIT

Supreme Court review is appropriate because this case involves the Ninth Circuit panel's failure to properly apply this Court's precedent, specifically, *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328, 75 S. Ct. 865 (1955). In *Lawlor*, this Court held that *res judicata* does not bar a suit, even if it involves the same course of wrongful conduct as alleged earlier, if the second lawsuit alleges new facts or a worsening of the earlier conditions, as is true in the instant case.

ARGUMENT

THE PANEL ERRED IN UPHOLDING DISMISSAL OF CLAIMS REGARDING DEFAMATORY STATEMENTS THAT WERE SEPARATE FROM, AND LATER THAN, THOSE THAT WERE THE SUBJECT OF THE FIRST LAWSUIT

The Ninth Circuit erred by holding that Petitioner's claims were barred by the doctrine of *res judicata*. *Res judicata* does not apply, because the present case and Petitioner's prior lawsuit do not arise out of the same transactional nucleus of facts.

A. Factual Background

Petitioner at all relevant times was a medical doctor. This is a defamation case initially filed *pro se* in Oregon state court, against Petitioner's former coworker, Mosebach, while both he and she were in the Air Force.

In a prior lawsuit, "*Murphy I*", Dr. Murphy brought claims for defamation against Mosebach for her complaint and written statement to her superiors in the Oregon Air National Guard ("ORANG"), falsely alleging Dr. Murphy performed an unchaperoned and medically unnecessary Pap smear and gynecological examination.

The United States appeared and removed *Murphy I* to federal court, substituted itself as the sole defendant pursuant to 28 U.S.C. § 2679(d)(2), and filed a motion to dismiss for lack of jurisdiction. Twenty six days later, the court ordered Dr. Murphy to show cause for failing to respond to the motion to dismiss. Dr. Murphy filed a *pro se* response arguing, *inter alia*, that removal to federal court was improper and against application of the Westfall Act, and that Mosebach's allegedly false statements were not made within the scope of her employment within ORANG. Stating that Dr. Murphy had "failed to come forward with any justification for his lack of prosecution," the court dismissed *Murphy I* in May 2015. Dr. Murphy appealed to the Ninth Circuit, but did not pursue the appeal, and it was dismissed.

Dr. Murphy was *pro se* throughout *Murphy I*.

In the fall of 2015, months after *Murphy I* was

dismissed, Dr. Murphy received a copy of a Letter of Reprimand (LOR) that had been issued to Mosebach, which revealed *additional* defamatory statements by Mosebach; revealed she had made these disclosures outside of her chain of command and/or "need to know"; and listed categories of people to whom Mosebach had repeated her defamatory statements about Dr. Murphy. Although he was aware she had been reprimanded, he did not have the LOR and was unaware of its contents.

It was only after receiving the LOR that Dr. Murphy learned Mosebach had repeated her defamatory statements to a CPTF (Comptroller Flight) member; and to a "Senior NCO in the Operations Group, . . . which resulted in [that Non-Commissioned Officer] reporting this up the chain of command, ultimately to the Wing Commander."

The LOR also noted that Mosebach had "*continue[d]* to reveal details to those who do not have a need to know," which for the first time made clear that her tortious acts were outside of the scope of her employment, and had *continued*. (Emph. added).

It was only then that Dr. Murphy knew of these defamatory statements, to the Operations Group that includes the fighter pilots (squadron) he was assigned to care for. Any damage to that team's trust in Dr. Murphy risked compromising the missions they were assigned to as a team.

Dr. Murphy later obtained emails that make clear that the LOR was intentionally withheld from him

while *Murphy I* was pending. Just prior to the May 2015 administrative hearing Dr. Murphy's assigned attorney communicated via email with Mosebach's assigned attorney, Carlisle; a "prosecutor"; and a "legal advisor"/ ALJ. These emails were not shared with Dr. Murphy until October 2015, long after the first lawsuit was dismissed. In the emails, Dr. Murphy's attorney agreed with Mosebach's attorney that she would not share the contents of the LOR with Dr. Murphy, and the ALJ allowed the document to be withheld from him.[1]

In addition, it was not until twelve days before the dismissal of *Murphy I*, that Mosebach testified to the USAF Separation Board in an administrative proceeding. Only then did Dr. Murphy learn Mosebach had re-published the defamatory statements to "at least fifty people" (in her words); and that she had re-published the defamatory statements in order to make herself "feel better" (in her words), rather than for a potentially privileged purpose.

Because *Murphy I* was filed prior to Dr. Murphy

---

[1] Even Carlisle did not receive a copy of the LOR until some time in late April 2015 – long after *Murphy I* was filed, and just a few weeks before it was dismissed. And, as a JAG officer, it was not in the scope of Carlisle's limited USAF-related work to advise him on his rights to sue Mosebach for defamation. Dr. Murphy also later learned that Carlisle stated prior to the hearing that she had been ordered by her superiors to not question or attack the accuser in any way, and she therefore chose not to address the accuser's inconsistencies in official military documents and the accuser's use of mind-altering medications which are known to cause hallucinations.

learning of these *additional* defamatory statements, it of course did not include those events.

In February 2016, within one year of learning of those statements, Dr. Murphy (again proceeding *pro se*) filed the current complaint, attaching the LOR and alleging what he had learned from the LOR about the additional defamatory statements. This second case, "*Murphy II,*" was filed in Oregon state court asserting claims for defamation and malicious prosecution.

The United States appeared and removed to federal court, with defendant name changed to United States pursuant to 28 U.S.C. § 2679(d)(2), based upon the United States' certification asserting Mosebach was acting within the course and scope of her employment with the USAF at the time of the alleged incidents.

The United States filed a motion to dismiss for lack of jurisdiction based, in relevant part, on *res judicata*. Petitioner, filed a *pro se* combined motion to remand and response to motion to dismiss. Petitioner then obtained legal counsel, who immediately filed a brief clarifying the motion to remand. The magistrate allowed supplemental briefing. After attorney research, Petitioner conceded the malicious prosecution claim did not state a claim because he was not charged with a crime; and that the claim for some of the defamatory statements was barred by issue preclusion. However, Petitioner argued the lawsuit should be allowed to proceed regarding the newly-discovered *additional* defamatory statements.

The magistrate issued Findings and Recommendations, recommending dismissal of the complaint on summary judgment. The district court, without further analysis, adopted the Findings and Recommendations, and entered summary judgment against Petitioner. The Ninth Circuit upheld the dismissal, in a very short Memorandum Opinion.

After filing the current lawsuit Dr. Murphy obtained a copy of the District Attorney's analysis finding a lack of necessary elements for sex abuse or unlawful sexual penetration, bolstering the evidence that Mosebach's statements were false.

B. *Res Judicata* Standard

In raising *res judicata* as an affirmative defense, defendant bears the burden of showing that Petitioner could have raised this claim in the first action. *Shapley v. Nevada Board of State Prison Commissioners*, 766 F.2d 404, 407 (9th Cir. 1984). Respondent failed to demonstrate that the claims regarding the *later* defamatory statements could have been raised in *Murphy I*. Respondent also failed to demonstrate that there is an identity of claims between the present suit and the prior lawsuit.

Because Petitioner's claims arise under Oregon state law, Oregon *res judicata* law applies. *See Semtek Int'l Inc. v. Lockheed Martin Corp*, 531 U.S. 497, 508 (2001). Under Oregon law, "a subsequent claim is barred by a prior judgment if the earlier litigation proceeded to final judgment, involved the same parties, and concerned a

claim arising out of the same transaction or series of related transactions." *Lucas v. Lake Cty*, 253 Or. App. 39, 53 (2012).

As the Ninth Circuit has noted, *res judicata* should not be applied "so rigidly as to defeat the ends of justice." *Weekes v. Atlantic National Ins. Co.*, 370 F.2d 264, 272 (9th Cir. 1966). Given that Petitioner was *pro se* and did not have the information about later disclosures at the time of the dismissal of the first lawsuit, Petitioner has not had a fair, reasonable opportunity to have his defamation claim addressed in court. "Only a hypertechnical application of a judicially created doctrine would deny [Petitioner his] day in court." *Moitie v. Federated Dept. Stores, Inc.*, 611 F.2d 1267, 1270 (9th Cir. 1980).

C. The Panel Erred in Upholding the Dismissal, Because the Two Cases Do Not Arise out of the Same Transaction or Series of Related Transactions

The Ninth Circuit Panel, in a very brief Memorandum, stated:

> The district court's ruling was correct. The sweep of the defamation claim alleged in Murphy's first lawsuit is broad enough to encompass the claims made in Murphy's current lawsuit. The underlying conduct at issue in both of these suits is the same: they both concern defamatory statements surrounding the November 2011 medical procedures. Murphy argues that the second lawsuit relies on

> new defamatory statements that happened later and are completely separate from those alleged in the first lawsuit. However, Murphy discovered these "new" statements through reading the employee's Letter of Reprimand, which was referenced in Murphy's first complaint. Thus, Murphy was aware of the document and could have taken steps to procure it and litigate these "new" defamatory statements in his first action. Accordingly, Murphy's current lawsuit is barred under claim preclusion.

App 3a to 4a.

1. The two lawsuits do not arise out of the same transactional nucleus of facts

Dr. Murphy's two cases do not "arise out of the same transactional nucleus of facts." The instant case involves a completely new set of facts arising from events that are entirely separate from the subject of the initial lawsuit.

When new and separate utterances of the same defamatory statement occur, each publication is a discrete tort and the statute of limitations runs separately for each. *Kraemer v. Harding*, 159 Or. App. 90, 103-04, 976 P.2d 1160 (1999); Restatement (Second) of Torts § 577A, comment d (1977).

Even where two cases stem from the same set of facts, the courts have generally held that *res judicata* does not apply where there has been a subsequent action by the defendant after the resolution of the first

case. *See, e.g.*, *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000) (*res judicata* did not apply to a lawsuit challenging defendant airline's new weight policy for flight attendants, even though a similar weight policy had been challenged in a prior lawsuit). In *Frank*, the court noted that:

> A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim. *See Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328, 99 L.Ed. 1122, 75 S. Ct. 865 (1955) ("While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.")

Frank, 216 F.3d at 851.

Similarly, in *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1399 (9th Cir. 1992), the court held that *res judicata* did not apply to a lawsuit challenging a 1990 Environmental Assessment for a bison management plan in Yellowstone National Park. Using the criteria listed above, the court found that the actions did not stem from the same set of facts, because a 1985 action involved "different governmental action." *Id.*

The Panel's decision conflicts with this Court's unanimous decision in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S. Ct. 865 (1955). As this Court explained more than 50 years ago in *Lawlor*, *res*

judicata does not bar a suit, even if it involves the same course of wrongful conduct as alleged earlier, if the second lawsuit alleges new facts or a worsening of the earlier conditions. That is precisely the case here.

In *Lawlor*, the plaintiffs brought an antitrust suit that was dismissed with prejudice. 349 U.S. at 324. Seven years later, the plaintiffs brought a second antitrust suit against many of the same defendants, alleging the same course of wrongful conduct, which had worsened. *Id.* at 328. The lower courts applied *res judicata* to bar the second suit. *Id.*

This Court held that although "both suits involved essentially the same course of wrongful conduct, *res judicata* did not apply." *Id.* at 327. The Court noted that "such a course of conduct – for example, an abatable nuisance – may frequently give rise to more than a single cause of action." *Id.* at 327-28. The Court held that the plaintiffs' claims in the second suit survived to the extent they alleged worsening of the earlier wrongful conduct. *Id.* "Under these circumstances," the Court explained, "whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the [earlier] judgment does not constitute a bar to the instant suit." *Id.*

Lawlor stands for the proposition that being sued once does not protect the defendant from a later lawsuit alleging a continuation, repeat, or worsening of the prior behavior. The lower courts' rulings in this case fail to acknowledge that precedent.

2. The two lawsuits could not have been conveniently tried together

Closely tied to the question of whether the two actions arise from the same transactional nucleus of fact is the question of whether the two suits could "conveniently be tried together." *Western Systems, Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992).

Even assuming Mosebach's May 2015 testimony is deemed to have revealed the additional torts, Petitioner – proceeding *pro se* – would have had to 1) digest the information he had just received; 2) make a motion to amend the complaint; 3) have the motion granted in the face of the court's intent to dismiss for lack of prosecution; and 4) amend the complaint – all within twelve days. But it was not until he received the LOR months later that it was even clear to whom the new defamatory statements had been made – the heart of the new torts the Panel deemed him to be on notice of.

Even if Dr. Murphy could be deemed *able* to amend the complaint in twelve days, Petitioner was not *obliged* to amend to add claims arising from distinct events that occurred after the filing of the complaint. *See* 18 Charles Alan Wright et al., Federal Practice and Procedure § 4409 (2d ed. 2012) ("Most cases rule that an action need include only the portions of the claim due at the time of commencing that action, frequently observing that the opportunity to file a supplemental complaint is not an obligation.")

"Ignorance of a party does not . . . avoid the bar of

res judicata unless the ignorance was caused by the misrepresentation or concealment of the opposing party." *Western Sys., Inc.*, 958 F.2d at 871-72 (citing Restatement (Second) of Judgments § 24, cmt f (1982)). Petitioner did demonstrate concealment – the LOR was kept from him until months after *Murphy I* was dismissed. He did not know how wide a net Mosebach had cast with her spurious allegations, to "at least fifty people," to make herself "feel better." Only when he received the LOR did he learn who had heard the defamatory statements, including those who relied upon Dr. Murphy for care in their USAF missions.

The approach to *res judicata* in this case improperly allows someone who is sued once for defamation to continue defaming his or her victim in perpetuity without recourse.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARIANNE DUGAN, Attorney at Law
Counsel of Record
259 East 5th Avenue, Suite 200-D
Eugene, OR 97401
(541) 338-7072
mdugan@mdugan.com