No. 18-867

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW E. JACKSON, JR. and
VELMA L. JACKSON,
Petitioners.
vs.

FRANCES EDITH JACKSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Matthew E. Jackson, Jr.
Velma L. Jackson
339 Little Street
Sewickley, Pennsylvania
15143
(412) 741-4287

QUESTION PRESENTED FOR REVIEW

Whether the failure of a court to comply with the jurisdictional limitations, procedural and due process protections, evidentiary standards, the precedent set by the Eleventh Circuit Court of Appeals and the precedent set by this Court for the issuance of either civil and criminal sanctions followed by the imposition of sanctions in amounts far in excess of and unrelated to the matters alleged to be the basis for sanctions is a violation of due process and equal protection of the law?

PARTIES TO THE PROCEEDINGS

Frances Edith Jackson

Matthew E. Jackson, Jr.

Velma L. Jackson

CORPORATE DISCLOSURE STATEMENT

Petitioners affirm that they have no subsidiaries, conglomerates, affiliates, parent corporations, or publicly held corporations owning 10% of more of stock or other identifiable legal entities related to Petitioners.

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The unpublished memorandum opinion of the United States Court of Appeals for the Eleventh Circuit, dated April 16, 2018, is included herein in the Appendix.

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. 1254(1). The Eleventh Circuit's Memorandum Opinion was filed on April 16, 2018 and Petitioners' Petition for Rehearing En Banc was denied on June 14, 2018.

STATEMENT OF THE CASE

Pennsylvania Background.

On June 2, 2013, Matthew and Velma sued Frances in the United States District Court for the Western District of Pennsylvania at No. 13-0746. See Docket entry 1, paragraph 3. The lawsuit sought to impose a constructive trust on property Frances obtained title to from the parties' mother. There were ten counts in that lawsuit, some related to the equity action while the other counts were actions at law. See Docket entry 1, para. 3.

A federal district court judge reviewed the magistrate-judge's report and recommendation and, on August 15, 2014, issued a *Memorandum Order*. The Memorandum Order entered summary judgment on Count II, imposing a constructive trust on the Pennsylvania property in favor of Matthew and Velma. The Memorandum Order entered summary judgment in favor of Frances, dismissing the other nine counts of the complaint.

The federal district court judge adopted the magistrate-judge's report and recommendation as the opinion of the court. The federal district court judge ordered an accounting to determine the scope of expenditures made in connection with the property and the tax status of the property.

On November 13, 2014, Frances filed a bankruptcy petition in the United States Bankruptcy Court for the Northern District of Georgia at No. 14-72501.

Adversary Complaint

The *Adversary Complaint* alleges that Frances did not accurately describe the judgment entered by the Pennsylvania court in a statement she made under oath on her bankruptcy schedule.

Frances' bankruptcy schedule does not mention the August 15, 2014 memorandum order imposing a pre-petition constructive trust on the property in favor of Matthew and Velma but alludes to an unspecified court order that contradicts the August 15, 2014 *Memorandum Order and Opinion.*

The adversary complaint raises three issues: (1) whether Frances violated 727(a)(4)(A), by making a false statement on her bankruptcy schedule; (2) whether the property is "property of the bankruptcy estate;" 11 U.S.C. 541(a) and (3) whether Frances committed defalcation while acting in a fiduciary capacity in violation of 11 U.S.C. 523(a)(4).

Threat of Sanctions.

Matthew's and Velma's only contact with Bankruptcy Judge Bonapfel occurred in July 2015 when Matthew appeared before the court for Frances' *Motion to Dismiss* and Matthew's and Velma's *Motion for a Protective Order.*

During that appearance, Bankruptcy Judge Bonapfel told Frances' attorney, Schuyler Elliott that he would have sanctioned Matthew and Velma if Schuyler Elliott had met the 21 day notice requirement of *Federal Rule of Civil Procedure* 11. Rule 11 provieds:

> *(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision . . .*

Schuyler Elliott did not file a separate motion for Rule 11 sanctions. Schuyler Elliott did not file a motion for Rule 11 sanctions.

Therefore, it is assumed that Bankruptcy Judge Bonapfel was referring to a paragraph in the *Answer*

to the Adversary Complaint, asking for Rule 11 sanctions.

Bankruptcy Judge Bonapfel did not dismiss the adversary complaint or the count of the complaint alleging that Frances made a false statement on her bankruptcy schedule in violation of section 727(a)(4).

Schuyler Elliott's Motions for Sanctions.

Following that incident, Matthew filed a *Motion to Disqualify Bankruptcy Judge Bonapfel* because of bias and prejudice. Bankruptcy Judge Bonapfel denied the existence of bias and Schuyler Elliott filed a motion for Bankruptcy Judge Bonapfel to sanction Matthew for filing the *Motion to Disqualify Bankruptcy Judge Bonapfel.*

Schuyler Elliott's *Motion for Sanctions* does not allege how Matthew and Velma violated Rule 11 by filing a *Motion to Disqualify Bankruptcy Judge Bonapfel.* Schuyler Elliott requested a $45,000.00 lien on the Pennsylvania property as a sanction.

This *Motion for Sanctions* is the first of the two motions for sanctions Schuyler Elliott filed in the adversary proceeding.

Schuyler Elliott filed a *Motion for Sanctions* against Matthew and Velma because Matthew and Velma filed a *Motion for Abstention and Remand.* Schuyler Elliott's *Motion for Sanctions* does not allege how Matthew and Velma violated Rule 11 by filing a *Motion for Abstention and Remand.* Schuyler Elliott requested a $75,000.00 lien on the Pennsylvania property as a sanction.

This *Motion for Sanctions* is the second of the two motions for sanctions Schuyler Elliott filed in the adversary proceeding.

Motion and Cross Motion for Summary Judgment.

Following that court appearance, Bankruptcy Judge Bonspfel entered an order, drafted by Schuyler

Elliott, prohibiting discovery while sua sponte ordering Matthew and Velma to respond to a summary judgment motion that alleged nothing.

Federal Rule of Civil Procedure 56, made applicable in adversary proceedings by *Bankruptcy Rules* 7056 and 9014, governs motions for summary judgment.

It is appropriate to grant summary judgment if the pleadings, discovery materials, and any affidavits before the court show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Federal Rule of Civil Procedure* 56(a).

A party can obtain summary judgment when its opponent has no evidence to support an element of the opponent's case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

11 U.S.C. 727(a)(4)(A) provides: (a) The court shall grant the debtor a discharge, unless ...(4) the debtor knowingly and fraudulently, in connection with the case - - (A) made a false oath or account.

A false oath under Section 727(a)(4) can involve a false oath statement or omission in the debtor's schedules. *In re Khalil*, 379 B.R. 163, 172 (B.A.P. 9th Cir. 2007); *Matter of Beaybouef*, 966 F.2d 174, 178 (5th Cir. 1992).

11 U.S.C. 727(a)(4) requires that discharge will be denied where the debtor made a false oath in connection with the bankruptcy case; the oath related to a material fact; the oath was made knowingly; and the oath was made fraudulently. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010). See also *In re Wills*, 243 B.R. at 63 (citing Lawrence P. King et al., *Collier on Bankruptcy* 727.04[1][b] (`5th ed. Rev. 1998)); *In re Bernard,* 96 F.3d 1279, 1281-1282 (9th Cir. 1996).

Matthew and Velma filed a *Cross Motion for Summary Judgment.* The evidence showing that Frances made a false statement on her bankruptcy schedule is the August 15, 2014 *Memorandum Order and Opinion* of the Pennsylvania court, entering a summary judgment imposing a constructive trust on the property[1] in question in favor of Matthew and Velma.

The August 15, 2014 Memorandum Order, adopting the report and recommendation of the magistrate-judge, concluded:

> *Therefore, consistent with the Magistrate Judge's Report and Recommendation (Docs 37), it is hereby ORDERED that: Plaintiff's Motion for Summary Judgment (Doc. 25) is GRANTED IN PART and DENIED IN PART. Plaintiffs are granted summary judgment on their claim for an imposition of a constructive trust, and an accounting shall be completed to determine the scope of expenditures made in connection with the property and the tax status of the property. The parties shall participate in a settlement conference with Magistrate Judge Mitchell prior to the completion of an accounting. Plaintiffs are denied summary judgment as to all other counts.*
>
> *IT IS FURTHER ORDERED that : Defendant is granted summary judgment sua sponte on Counts 1, 3, 4, 5, 6, 7, 8, 9 and 10. The Report and Recommendation of Magistrate Judge Mitchell, dated June 4, 2014 is hereby adopted as the opinion of the District Court.* See App. 201

Matthew and Velma included, in the summary judgment material, the part of the Pennsylvania court's opinion that explains why the court limited the constructive trust to Matthew and Velma:

> *. . . It is specifically recommended that Plaintiffs be granted summary judgment to their claim for an imposition of a constructive trust . . .* Pa. Docket entry 5, pages 1 and 26.
>
> *Here, it is undisputed that Plaintiffs have been in continuous possession of the property during the time in question. Therefore, laches does not bar the imposition of a constructive trust in this case.* [Footnote 6].
>
> Footnote (6), referenced above, states:
>
> *It must be noted that there are a total of five children in the family. However, only Matthew and Velma Jackson are named Plaintiffs in the suit. One of the two unnamed siblings has since passed away and is survived by one minor child. None of these unnamed parties in interest have asserted any claim in this litigation. The Court notes that any claims regarding the imposition of a constructive trust would be barred by the statute of limitations and likewise barred under the doctrine of laches, as none of the other siblings or parties in interest has been in possession of the property in question during the applicable period which would bar the application of the doctrine of laches. See* App. 220-223

Under the decision in *Celotex*, a party moving for summary judgment on the ground that the opponent has no evidence for an element of its claim need not submit evidence negating the opponent's claim. Pointing to the deficiency is enough to trigger the opponent's duty to present evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In her bankruptcy filings, Schedule D—*Creditors Holding Secured Claims*, Frances made the following statement:

> *. . . It is specifically recommended that Plaintiffs be granted summary judgment to their claim for an imposition of a constructive trust . . .* Pa. Docket entry 5, pages 1 and 26.
>
> *Here, it is undisputed that Plaintiffs have been in continuous possession of the property during the time in question. Therefore, laches does not bar the imposition of a constructive trust in this case.* [Footnote 6].

Footnote (6), referenced above, states:

> *It must be noted that there are a total of five children in the family. However, only Matthew and Velma Jackson are named Plaintiffs in the suit. One of the two unnamed siblings has since passed away and is survived by one minor child. None of these unnamed parties in interest have asserted any claim in this litigation. The Court notes that any claims regarding the imposition of a constructive trust would be barred by the statute of limitations and likewise barred under the doctrine of laches, as none of the other siblings or parties in interest has been in possession of the property in question during the applicable period which would bar the application of the doctrine of laches.*

Under the decision in *Celotex*, a party moving for summary judgment on the ground that the opponent has no evidence for an element of its claim need not submit evidence negating the opponent's claim. Pointing to the deficiency is enough to trigger the opponent's duty to present evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In her bankruptcy filings, Schedule D—*Creditors Holding Secured Claims*, Frances made the following statement:

. . . Ordered by Judge to be split 5 ways between siblings & Ordered accounting, all siblings living in property.

In his memorandum in support of Frances motion to dismiss, Frances' counsel, Schuyler Elliott attached the August 15, 2014 Pennsylvania court order and the June 4, 2014 report and recommendation and assured the bankruptcy court that the exhibits show that the Pennsylvania court "specifically ruled that the Plaintiffs, Defendant and other siblings hold the property under the theory of a constructive trust." Docket entry 5, p. 8.

Schuyler Elliott also assured the bankruptcy court that his exhibits show that the Pennsylvania court "specifically disclosed that the Property is to be split amongst the siblings." Docket entry 5, p. 8.

Schuyler Elliott did not cite anything in his exhibits to support his or his client's statements or address the laches bar to Frances' claim.

In response to Matthew's and Velma's *Cross Motion for Summary Judgment,* Frances refused to present any evidence, establishing the truth of her statement on the bankruptcy schedule or her counsel's representations in the brief he filed to support the *Motion to Dismiss.*

Frances' attorney, Schuyler Elliott, argued that the issue is "moot," without citing any law.

Motion to Strike.

On November 2, 2015, Matthew and Velma' filed a motion to dismiss and strike Frances' Rule 9011 motion, pursuant to *Federal Rules of Civil Procedure* 7(b) and 12(b)(6) and (f). Docket Entry 31.

Federal Rule of Civil Procedure 11 (c) Sanctions, *(2) Motion for Sanctions* provides. *A motion for sanctions . . . must describe the specific conduct that allegedly violates Rule 11(b) . . .*

When a Rule 11 motion is served on an adversary, it must contain all supporting documents before it can be filed. That gives the opposing side three weeks to review the facts and the law that the opposing side claims were made in violation of Rule 11.

Schuyler Elliott's Rule 11 motions provide no information as to the violation of Rule 11 or law to back up his position. In order to respond to a Rule 11 motion, it is necessary for the attorney presenting the motion to comply with the strict procedural requirements of Rule 11. The Rule 11 motion must actually state a violation of Rule 11.

Matthew's and Velma's Motion for Sanctions.

Matthew and Velma filed a *Motion for Sanctions,* alleging that Schuyler Elliott violated 28 U.S.C. 1927 and that he and Frances violated Rule 11.

The motion alleged that Schuyler Elliott, as legal counsel for Frances had a duty to investigate the facts his client submitted to the bankruptcy court. Each time Matthew and Velma filed a paper in court, Schuyler Elliott sent a harassing communication to Matthew and Velma. Schuyler Elliott failed to serve documents or to respond to correspondence seeking a copy of documents he failed to serve upon Matthew and Velma. Schuyler Elliott repeatedly filed motions seeking sanctions without specifying the conduct that violates Federal Rule of Civil Procedure 11.

Schuyler Elliott's submissions to the court attached lengthy exhibits that were recycled from earlier submissions. These exhibits are misleading because they do not support the statements in the motions to which they are attached.

Motion for Summary Judgment on 11 U.S.C. 523(a)(4) Objection

Schuyler Elliott's second motion for summary judgment sought a summary judgment on a "fraud" count of the Pennsylvania litigation that has nothing to do with Matthew's and Velma claim that Frances committed defalcation while acting in a fiduciary capacity.

First Final Judgment

On April 11, 2016, Bankruptcy Judge Bonapfel entered his (first) final judgment. In his lengthy opinion, Bankruptcy Judge Bonapfel entered summary judgment against Matthew and Velma on all claims raised in the adversary proceeding.

First Appeal at No. 16-1232

On April 14, 2016, Matthew and Velma filed a *Notice of Appeal* of the April 11, 2016 first final judgment to the United States District Court for the Northern District of Georgia at No. 16-1232. Docket entry 43.

Federal Rule of Civil Procedure 54(b) Certification for Separate Judgment

On April 11, 2016, Bankruptcy Judge Bonapfel also entered an order, certifying the following matters for a separate final judgment, pursuant to *Federal Rule of Civil Procedure* 54(b).

1. The request of the debtor for attorney's fees in her Answer (Doc. 6, 60-64);

2. Debtor's Motion for Sanctions (Doc. 24);

3. Debtor's Motion Pursuant to Bankruptcy Rule 9011 (Doc. 25);

4. Plaintiffs' Motion to Strike Defendant's Rule 11 Motion [Doc 31]; and

5. Plaintiffs' Motion for Sanctions [Doc. 36].

Docket entry 39.

Bankruptcy Judge Bonapfel scheduled an evidentiary hearing on the above matters for June 23, 2016. Docket entries 38 and 39.

Federal Rule of Civil Procedure 54(b)

An appellate court generally has jurisdiction to hear an appeal only if it arises from a final order. 28 U.S.C. 1291. Bankruptcy Judge Bonapfel's April 11, 2016 order used an exception to the final judgment rule that is found in *Federal Rule of Civil Procedure* 54(b) which provides:

> *When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.*

The matters Bankruptcy Judge Bonapfel certified for a separate final judgment are not causes of action, counterclaims, third party claims or cross-claims as required for a *Federal Rule of Civil Procedure* 54(b) certification. *Federal Rule of Civil Procedure* 54(b) applies to lawsuits involving multiple claims or multiple parties.

The first items on the list are paragraphs from the Answer to Adversary Complaint requesting attorney fees and sanctions under Rule 11 and 28 U.S.C. 1927. Doc. 6, para. 60-64. Rule 11 does not create a substantive cause of action. *Port Drum Co. v. Umphrey*, 852 F.2d 148 (5th Cir. 1988).

The second item on the list is Schuyler Elliott's *Motions for Sanctions* against Matthew and Velma's, pursuant to *Federal Rule of Civil Procedure* 11, for filing a *Motion to Disqualify Bankruptcy Judge Bonapfel.* Doc. 24;

The third item on the list is Schuyler Elliott's *Motions for Sanctions* against Matthew and Velma, pursuant to *Federal Rule of Civil Procedure* 11, for filing a *Motion for Abstention and Remand.* Doc. 25.

The fourth item on the list is Matthew's and Velma's *Motion to Strike* Schuyler Elliott's Motion to Sanctions pursuant to *Federal Rules of Civil Procedure* 7(b) and 12(b)(6) and (f). Docket Entry 31.

The last item on the list is Matthew's and Velma's *Motion for Sanctions* against Schuyler Elliott and Frances, pursuant to *Federal Rule of Civil Procedure* 11 and 28 U.S.C. 1927. Doc. 36.

Petition for a Writ of Mandamus and Prohibition at No. 16-1232

On June 23, 2016, shortly after Matthew and Velma received a letter from Schuyler Elliott demanding that they pay his attorney's fees before the evidentiary hearing. Matthew and Velma filed a *Petition for a Writ of Mandamus and Prohibition.* Docket entry 7 at No. 16-1232.

The petition, inter alia, challenged Bankruptcy Judge Bonapfel's jurisdiction to consider attorney's fees.

Matthew's and Velma's *Notice of Appeal* vested exclusive jurisdiction in the district court at No. 16-1232. *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982).

Bankruptcy Judge Bonapfel entered a judgment on the merits on April 11, 2016. No motion for costs and attorney fees was filed in the case.

The time limits established by *Federal Rule of Appellate Procedure* 4 are mandatory and jurisdictional. *Browder v. Director, Department of Corrections,* 434 U.S. 257, 264 (1978).

Federal Rule of Appellate Procedure 4(a) provides for a tolling and restarting of the time for appeal where a party makes certain motions. A motion for costs and attorney fees must be filed no later than 14 days from entry of judgment.

Bankruptcy Judge Bonapfel cannot circumvent the failure to file a tolling motion, by certifying collateral matters for a separate final judgment pursuant to *Federal Rule of Civil Procedure* 54(b).

District Court Judge Evans did not address Matthew's and Velma's *Petition for a Writ of Mandamus and Prohibition* until February 22, 2017, i.e. eight months later.

Second Final Judgment

In the interim, on June 23, 2016, Bankruptcy Judge Bonapfel entered a second final judgment against Matthew and Velma.

Bankruptcy Judge Bonapfel denied Matthew's and Velma's motions and granted Frances's motions. He entered a judgment against Matthew and Velma jointly and severally for Frances' attorney fees in the amount of $18,437.50, attorney's expenses of $593.70 and additional expenses that Frances incurred in connection with the payment of attorney's fees of $3.190.00 in the total amount of $22,221.20 with post-judgment interest at the rate of 0.53 percent. Docket Entry 53.

Federal Rule of Civil Procedure 11 provides: *(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.*

Bankruptcy Judge Bonapfel's order does not provide any information about the conduct of Matthew and Velma that violated *Federal Rule Civil Procedure* 11, by filing a *Motion to Disqualify Bankruptcy Judge Bonapfel* [Doc. 24] or the conduct that violated the rule for filing a *Motion for Abstention and Remand.* [Doc. 25] Bankruptcy Judge Bonapfel does not provide any information as to why he denied Matthew's and Velma's *Motion to Strike*

[Doc. 31] Bankruptcy Judge Bonapfel's Order does not offer any explanation for denying Matthew's and Velma's *Motion for Sanctions* against Schuyler Elliott and Frances [Doc. 36].

Bankruptcy Judge Bonapfel's Order does not explain the basis for the sanction imposed.

Second Appeal at No. 16-2276

On June 27, 2016, Matthew and Velma filed a second *Notice of Appeal*, docketed at No. 16-2276 in the United States District Court for the Northern District of Georgia. Docket Entry 54.

The district court originally assigned the appeal to District Court Judge Evans who declined to hear this appeal. The district court re-assigned the case to District Court Judge May.

Challenge to Jurisdiction

Courts are required to review de novo a lower court's determination of subject matter jurisdiction. See e.g. *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1007 (4th Cir. 2014).

In their brief, Matthew and Velma challenged the jurisdiction of the district court to consider the merits of the second final judgment, when the bankruptcy court lacked subject matter jurisdiction.

Matthew and Velma raised the issue of exclusive appellate jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). District Court Judge May ruled that she did not know if both appeals involve the same issues.

Matthew and Velma challenged the bankruptcy court misapplication of *Federal Rule of Civil Procedure* 54(b), in entering a second final judgment on matters that do not qualify for a separate judgment.

Matthew and Velma challenged the bankruptcy court's jurisdiction to rule on attorney fees, without a

tolling motion, as required by *Federal Rule of Civil Procedure* 54(d) and *Federal Rule of Appellate Procedure* 4(a). App. __, p. __.

Matthew and Velma challenged the jurisdiction of the bankruptcy court to consider sanctions without a motion or rule to show cause alleging the basis for and the nature of Matthew's and Velma's violation of 28 U.S.C. 1927 which makes 'counsel' liable for excessive costs for multiplying proceedings. *Federal Rule of Civil Procedure* 7, 54(E); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

Matthew and Velma challenged the statutory authority of a bankruptcy judge to enter a judgment for attorney's fees or sanctions pursuant to 28 U.S.C. 1927.

On November 21, 2016, District Court Judge May affirmed the June 23, 2016 judgment of the bankruptcy court. Docket Entry 9 at No. 2276.

District Court Judge May ruled that the basis for the award of attorney's fees is 28 U.S.C. 1927.

On December 5, 2016, Matthew and Velma filed a *Motion for Rehearing*, bringing the record to the attention of the district court judge. Docket Entry 11 at No. 2276.

On January 3, 2017, the district court judge denied Matthew and Velma's Motion for Rehearing. Docket Entry 12 at No. 2276.

Notice of Appeal of the Judgment at No. 16-2276

On January 30, 2017, Matthew and Velma filed a *Notice of Appeal*, at No. 16-2276. Docket Entry 13. This appeal is docketed in the 11th Circuit Court of Appeals at No. 17-10536.

Before Matthew and Velma filed their main brief in the appeal at No. 17-10536, Schuyler Elliott filed a *Motion for Sanctions* pursuant to Rule 38, alleging that Matthew and Velma should be sanctioned for

appealing the district court's affirmance of the bankruptcy court's June 23, 2016 "second final judgment."

Notice of Appeal of the Judgment at No. 16-1232

In their briefs in support of this appeal, Matthew and Velma again challenged the bankruptcy court's jurisdiction to enter a second final judgment, to rule on attorney fees, without a tolling motion, or to consider sanctions without a motion or rule to show cause.

During the course of the appeal of the April 11, 2016 first final judgment to the district court at No. 16-1232, Schuyler Elliott filed a *Motion for Sanctions* against Matthew and Velma under *Federal Rule Civil Procedure* 11. His motion alleged that Matthew's and Velma's appeal lacked merit.

After responding to Schuyler Elliott's motion for sanctions, Matthew and Velma filed a *Rule to Show Cause* as to why Schuyler Elliott should not be sanctioned, under *Federal Rule Appellate Procedure* 38. Matthew and Velma asserted that Schuyler Elliott violated his duty of candor, by failing to address the issue of the court's jurisdiction to enter the June 23, 2016 judgment for $22,221.20 against Matthew and Velma.

On February 22, 2017, District Court Judge Evans, at No. 16-1232, entered an order denying mandamus, granting motion for sanctions [13], denying motion for rule to show cause [15] and affirming Bankruptcy Judge Bonapfel's April 11, 2016 "first final judgment.

District Court Judge Evans granted Schuyler Elliott's Motion for Rule 11 Sanctions and denied Matthew's and Velma's Motion for a Rule to Show Cause .

Notice of Appeal of the Judgment at No. 16-1232

On March 24, 2017, Matthew and Velma filed a *Notice of Appeal* of the February 22, 2017 judgment at No. 16-1232 to the 11th Circuit Court of Appeals.

The 11th Circuit Court of Appeals docketed the appeal at No. 17-11341.

Notice of Appeal of Another Judgment at No. 16-1232

On March 29, 2017, after Matthew and Velma appealed the decision, District Court Judge Evans entered a judgment against Matthew and Velma, in the amount of $11,077.12 in attorney fees and costs as a sanction for filing the appeal at No. 16-1232.

Schuyler Elliott and District Court Judge Evans determined the amount of sanctions without allowing Matthew and Velma to review the records they used to establish the amount of sanctions.

Consolidation of Appeals at Nos. 17-10536, 17-11341 and 17-11936.

Schuyler Elliott filed a *Motion to Consolidate* Matthew's and Velma appeals at No. 17-10536, 17-11341 and 17-11936.

Matthew and Velma objected to a consolidation out of a concern that it would confuse the jurisdiction and merits issues. Matthew and Velma had already filed their brief in the appeal at No. 17-10536.

On June 8, 2017, the 11th Circuit Court of Appeals consolidated the appeals at No. 11341 and 17-11936 for briefing purposes and consolidated the appeal at 17-10536, 17-11341 and 17-11936 for merits disposition purposes.

Challenges to Jurisdiction at No. 17-10536

In the appeal of the second final judgment, Matthew and Velma again challenged the jurisdiction of the bankruptcy judge to certify collateral matters for a separate final judgment, pursuant to *Federal Rule of Civil Procedure* 54(b).

In identifying the importance of juridical concerns, the Supreme Court explained the role of a court of appeals in reviewing a *Federal Rule of Civil Procedure* 54(b) certification:

> *The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay."*

Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10 (1980) (citations omitted).

Appellate courts review de novo the "juridical concerns" determination, first asking whether the certified order is sufficiently divisible from the other claims such that the "case would [not] inevitably come back to this court on the same set of facts." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005); See also *Tubos de Acera de Mexico, S.A. v. Am. Int'l Inv. Corp.*, 292 F.3d 471, 485 (5th Cir. 2002).

Lack of Motion for Attorney's Fees

There is misleading language in the panel's opinion, to the effect that motions have been filed when, in fact, no such motions have ever been filed. App. ___, pp. 10-14.

Matthew and Velma argued that Bankruptcy Judge Bonapfel's June 23, 2016 evidentiary hearing was a sham proceeding, because the court did not rule on the motions he scheduled for the evidentiary hearing but issued an order that encompasses matters of which no notice was provided to Matthew and Velma.

Matthew and Velma again challenged the bankruptcy court's jurisdiction to rule on attorney fees, without a tolling motion, as required by *Federal Rule of Civil Procedure* 54(d) and *Federal Rule of Appellate Procedure* 4(a).

Matthew and Velma challenged the jurisdiction of the bankruptcy court to consider sanctions without a motion or rule to show cause alleging the basis for and the nature of the violation of 28 U.S.C. 1927. *Federal Rule of Civil Procedure* 7, 54(E); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

Matthew and Velma challenged the authority of a bankruptcy judge to enter a judgment for attorney's fees or sanctions pursuant to 28 U.S.C. 1927.

The 11th Circuit, in W*ortley v Bakst,* No. 15-11923 (11th Cir. 2017), ruled that a circuit court of appeals does not have jurisdiction to consider the merits of a bankruptcy court order entered without consent in a related non-core proceeding unless it has been first reviewed by the district court as a report with proposed findings of fact and conclusions of law. The Court determined that attorney fees and statutory sanctions are non-core matters.

In *Wortley v Bakst,* No. 15-11923 (11th Cir. 2017), the Eleventh Circuit reiterated the requirement of "express consent" to a bankruptcy judge exercising Article III powers over non-core matters.

Under the decision in *Roell v. Withrow,* 538 U.S. 580 (2003), the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator." Id at 590. *Wellness International Network v. Sharif,* 135 S. Ct. 1932, 1948 (2015) extended *Roell's* holding that consent must be "knowing and voluntary."

Throughout the adversary proceeding, Matthew and Velma expressed their lack of consent, in writing, to the authority of the bankruptcy judge to decide non-core matters.

The Appeal at No. 17-11341

With regard to Matthew's and Velma's allegation that Frances violated 11 U.S.C. 727(a)(4), the Eleven Circuit wrote:

> *First, there is no evidence that Frances provided false and fraudulent information in her bankruptcy disclosures about the Property. Frances statement appeared to be an accurate account of the Property and the Jackson I proceedings. But even assuming her statements were incorrect, Matthew and Velma provided no evidence that Frances intentionally misrepresented the Jackson I proceedings or her ownership of the property. Instead, Frances disclosures appropriately put creditors on notice of the potential right her bankruptcy estate had in the Property. App. __, p. 9.*

The court declined to consider the second issue of whether the constructive property is "property of the bankruptcy estate," because the trustee abandoned the Property. On the third objection, under 11 U.S.C. 523(a)(4) the court ruled that a constructive trust is not a "technical trust" and therefore does not fall within the definition of "fiduciary" for purposes of the statute. App. __, p. 10.

Matthew and Velma challenged the district court judge's decision, in the appeal of the first final judgment, to issue sanctions pursuant to *Federal Rule of Civil Procedure* 11 and denying Matthew's and Velma's Motion for a Rule to Show Cause.

Matthew and Velma argued that Bankruptcy Rule 9011 does not apply to bankruptcy appeals to the

district court. In *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990), the Supreme Court suggested that appellate conduct is controlled only by *Federal Rule of Appellate Procedure* 38.

In *Partington v. Gedan*, 923 F. 2d 686, 688 (9th Cir. 1991) (en banc) the Ninth Circuit overruled a line of earlier cases insofar as those cases authorized Rule 11 sanctions on appeal.

The Eleventh Circuit did not address this issue.

Appeal at No. 17-11936

In the appeal of the district court's entry of a judgment for $11,077.12 in attorney's fees and costs as a sanction after Matthew and Velma appealed to sanction's order, Matthew and Velma argued that the district court judge did not have jurisdiction to determine the amount of sanctions while the order imposing the sanctions is on appeal.

An appeal to the court of appeals pursuant to 28 U.S.C. 158(d)(1) from a final judgment of a district court exercising appellate jurisdiction pursuant to 28 U.S.C. 158(a) is taken as any other civil appeal (with some variations in procedure), as provided by *Federal Rule of Appellate Procedure* 6(b).

Eleventh Circuit Order for Sanctions

Federal Rule of Appellate Procedure 38 states that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

The Eleventh Circuit granted Schuyler Elliott's Motions for Sanctions under *Federal Rule of Appellate Procedure* 38 in the appeal at No. 17-10536, based upon the motion for sanctions Schuyler Elliott filed before Matthew and Velma filed their brief at No. 17-10536..

The Eleventh Circuit gave Schuyler Elliott 30 days to submit his itemization of attorney's fees and it gave Matthew and Velma 14 days to file objections to the bill.

Schuyler Elliott submitted a bill for the appeals at Nos. 17-10536, 17-11341 and 17-11936 in the amount of $16,000.00, for "research" and out of pocket expenses, without explanation. .

Matthew and Velma objected to counsel's failure to comply with the rules and to counsel's inflated bill and to the fact that the bill went far beyond the scope of the prospective motion filed at No. 17-10536 to include the appeals filed at 17-1`1341 and 17-11936.

The court gave Schuyler Elliott an additional 30 days to submit contemporaneous records supporting the bill and to submit a bill for costs in accordance with the court rules.

The court and Schuyler Elliott, apparently, submitted documents to the court but none of these documents were provided to Matthew and Velma for review.

The court issued a judgment for $12,____ against Matthew and Velma, without explanation, for Schuyler Elliott's attorney's fees. The court indicated that Schuyler Elliott waived the costs associated with the appeal.

REASONS FOR GRANTING THE WRIT

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Court approved the use of its inherent power to impose monetary sanctions on trial counsel in appropriate circumstances. In doing so, the Court relied in part on an earlier decision in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

In *Roadway*, the Court did not hold that notice and a hearing are always required. The Court apparently has taken the position that no hearing is

constitutionally compelled in certain circumstances when established rules are transgressed. See e.g. *Link*, supra at 632; *In re Oliver*, 333 U.S. 257 (1948)

The difficulty is in determining the meaning of the term "established rules."

The 11th Circuit's opinion suggests, without basis in fact or law, that Matthew and Velma initiated the adversary proceeding in complete bad faith. Therefore, motions' practice, procedural protections, evidentiary standards and lack of jurisdiction can be disregarded. While the court throws around the term "bad faith," it never describes any bad faith conduct on Matthew's and Velma's part.

The court, on page 13, of its opinion wrote:

> *The bankruptcy court also detailed the basis for sanctioning Matthew and Velma at the sanctions' hearing. it addressed the nature of their claims, and why they had no basis in law or fact—because there was no evidence that Frances fraudulently described the Pennsylvania proceedings in her bankruptcy filings. The court noted that Matthew and Velma declined to seek relief from the automatic stay and continued to prosecute the adversary claim despite its warning that they were frivolous. It also concluded that Matthew and Velma's most likely goal was to convince it to rule that the Jackson I order did not include Frances as a beneficiary of the constructive trust, because they were concerned that the Pennsylvania court would ultimately order that she was. . . . App. __, p.13.*

The comment to *Federal Rule of Civil Procedure* 11 states:

> *[t]he provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and*

decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally, Risinger, Honesty in Pleading and Enforcement: Some "Striking" Problems with Fed. R. Civ. P. 11, 61 Minn. L. Rev. 1, 1976. Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. (case citations and authorities omitted).

If the court believed that the adversary complaint was without merit, it should have dismissed the complaint. The bankruptcy court has managed to tie up property in Pennsylvania for almost four years. The bankruptcy court should have listed the automatic stay, sua sponte, if it deemed it necessary to conclude the case. Adding to the confusion is the court's treatment of the constructive trust property as property of the estate.

In the 11th Circuit, it is well-settled that "this section [Rule 38] is not a catch all provision for sanctioning objectionable conduct by counsel. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003).

Section 1927 requires the touchstone of bad faith, which is more than mere negligence or lack of merit. The 11th Circuit has held that an attorney who "knowingly or recklessly pursues a frivolous claim" acts in bad faith. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225-1226 (11th Cir. 2003).

For sanctions to be appropriate, counsel must have engaged in unreasonable and vexatious conduct; this conduct must have multiplied the proceedings, and the amount of the sanction cannot exceed the costs resulting from the conduct. *McMahan v. Tata*, 256 F.3d 1120, 1128 (11th Cir. 2001), amended, on other grounds, on rehearing 311 F.3d 1077 (11th Cir, 2002).

Sanctions are not warranted simply because counsel's general performance or particular decision making did not rise to the highest standards of the profession. *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir. 1997).

The district court, in *Haeger v. Goodyear*, 906 F. Supp. 2d 938, 973 (2012), in considering "bad faith" wrote: [A] comprehensive definition of "bad faith" or conduct "tantamount to bad faith" is not possible, but the type of conduct at issue "delaying or disrupting the litigation or hampering enforcement of a court order," *Primus v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). In addition, "willful disobedience of a court's order," actions constituting a "fraud" upon the court, or actions that defile the "very temple of justice" are sufficient to support a bad faith finding. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991). And, "recklessness when combined with an additional factor such as friviolousness, harassment, or an improper purpose" is sufficient. *Fink*, 239 F. 3d at 994. Therefore, "reckless misstatements of law and fact, when coupled with an improper purpose" can establish bad faith. Id; see also *B.K.B. v. Miami Police Dept.,* 276 F. 3d 1091, 1108 (9th Cir. 2002) (same); *Malhiot v. S. Cal. Retail Clerks Union,* 735 F.2d 1133, 1138 (9th Cir. 1984) (knowing false statements of fact or law establish bad faith). it is of particular importance to note that it is "permissible to infer bad faith from [a party's] action[s] plus the surrounding circumstances." *Miller v. City of Los Angeles*, 661 F. 3d 1024, 1029 (9th Cir 2011). . . .

In his *Motion for Sanctions* against Matthew and Velma for filing a *Motion to Disqualify Bankruptcy Judge Bonapfel,* Schuyler Elliott requested a $45,000.00 lien on the constructive trust property in

Pennsylvania, as a Rule 11 sanction. Then, in his *Motion for Sanctions* because Matthew and Velma filed a *Motion for Abstention and Remand*, he asked for a $75,000.00 lien on the constructive trust property as a sanction. Both motions are frivolous, since they do not allege any conduct that violates Federal Rule of Civil Procedure 11.

The bankruptcy judge did not require Schuyler Elliott to specify the nature of the Rule 11 violations, scheduled an "evidentiary hearing" on the two motions and then entered a judgment for $22, 221.50, without addressing the two motions alleged to be the basis for the motions, without any explanation in the order imposing the sanctions and then justifies the sanctions based on matters raised for the first time at the evidentiary hearing.

The court suggests that the order may be based on the judge's inherent powers, but there is no rule to show cause to support the judge's exercise of his inherent powers. The order is issued as a judgment for Frances, though an order based on a rule to show cause cannot be entered on behalf of a party. The order suggests that it is based upon a motion for counsel fees, though there is no such motion.

The court appears to decide that it does not matter if Matthew and Velma were afforded procedural due process or whether the amount of the judgment has any relationship whatsoever to a uniformly applied standard of "bad faith." Then, the court ruled that it is frivolous for Matthew and Velma to expect the courts to follow the required procedures or to act within their jurisdictions and they entered more sanctions. On three occasions, judges in the Eleventh Circuit have determined the amount of sanctions without allowing Matthew and Velma to review the

records they used to determine the amount of sanctions.

What appears to be the goal of these sanctions judgments is to come up with an amount sufficient to nullify the Pennsylvania court order, imposing a constructive trust on the property in favor of Matthew and Velma. Thus far, the courts of the Eleventh Circuit managed to come up with $45,958.32 in sanctions against Matthew and Velma, without observing any procedural, jurisdictional or due process protections. This amount is remarkably close to Schuyler Elliott's request in his first Motion for Sanctions because Matthew filed a Motion to Disqualify Bankruptcy Judge Bonapfel, one of the motions used as a pretext to impose sanctions for entirely different reasons. That is a lot of money for filing the two motions that provided the excuse for the sanctions.

The Supreme Court has made clear that such a sanction, when imposed pursuant to civil procedure, must be compensatory rather than punitive in nature. See *Mine Workers v. Bagwell,* 512 U.S. 821, 826-830 (1994) (distinguishing compensatory from punitive sanctions and specifying the procedures needed to impose in each kind. In other words, the fee award may go no further than to redress the wronged party "for losses sustained"; it may not impose an additional amount as punishment for the sanctioned behavior. Id at 829 (quotation omitted). To level that kind of separate penalty, a court would need to provide procedural guarantees applicable in criminal cases, such as beyond a reasonable doubt standard of proof. . . that means, pretty much by definition, that the court can shift only those attorney's fees incurred because of the misconduct at

issue. *Goodyear Tire & Rubber Co. v. Haegger*, slip opinion No. 1406 at 6.

Matthew and Velma voluntarily agreed to submit their lawsuit to the Pennsylvania court for the purpose of obtaining an impartial review of the dispute. If, for whatever reason, Matthew and Velma preferred an arbitrary decision, they would not have submitted their case to the court in Pennsylvania.

As a party to the bankruptcy case, Matthew and Velma did not consent to the adjudication by the bankruptcy court in a meaningful way. The involuntariness of this participation does not, however, diminish the requirement that judges impartially review Matthew's and Velma's contentions in the bankruptcy court. To the contrary, the fact that Matthew and Velma had no choice but to submit to adjudication by the bankruptcy system greatly strenghtens the demand for impartiality.

As unwilling participants in the bankruptcy system, Matthew and Velma have even more reason to complain when they are treated arbitrarily. The imposition of arbitrary decisions by a bankruptcy judge and his colleagues assigned to correct his errors is a form of oppression. This fact cannot be overstated.

In the legal domain, the orders and judgments that follow from adjudicative proceedings are backed by the coercive power of the government. The threat of brute force by arbitrary judicial decisions is present in every occasion when a judge invokes his or her legal authority.

In this case, the judges made decisions that reach beyond the dispute Matthew and Velma initiated in Pennsylvania. In law, cases or controversies arising from the same or similar circumstances are usually governed by precedent. Therefore, there is a

reasonable basis for expecting judges to act in a manner that is consistent with the prior decisions and precedents set by the courts.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certorari should be granted. The Court may wish to consider summary reversal of the Eleventh Circuit Court of Appeals and vacating judgments entered without jurisdiction.

Respectfully submitted,

_____

Matthew E. Jackson, Jr.

_____

Velma L. Jackson