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 REHEARING

Matthew E. Jackson, Jr.
Velma L. Jackson
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QUESTION PRESENTED FOR REVIEW

Whether the failure of the 11th Circuit Court of Appeals to maintain fundamental due process standards requires this court to exercise its supervisory powers?

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.

TABLE OF CONTENTS

EXHIBITS

TABLE OF AUTHORITES

RULES

TREATISES

OPINION BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Eleventh Circuit, dated April 16, 2018, is included in the Appendix.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

STATUTES

REASONS FOR REHEARING REQUEST

Petitioners Matthew and Velma respectfully request that the Court grant a rehearing of their petition for a writ of certiorari which was denied on March 18, 2019. Petitioners submit the following substantial grounds not previously presented:

During the only appearance Matthew had before Bankruptcy Judge Bonapfel, there was a conversation about the court taking judicial notice of the litigation between the parties in Pennsylvania.

From reading his first final judgment, it is clear that Bankruptcy Judge Bonapfel completely misunderstood the limitations of judicial notice. App. 113-191.

Under Rule 201 of the *Federal Rules of Evidence,* courts may consider facts subject to judicial notice in ruling on a motion for summary judgment. If a matter in another case was adjudicated such that the doctrine of issue or claim preclusion would apply, then the court can take notice of the adjudication in applying the doctrine. But, a court cannot take judicial notice of the factual findings of another court. Otherwise the doctrine of collateral estoppel would be superfluous. *Taylor vs. Charter Med. Corp.*, 162 F. 3d 827 (5th Cir. 1998).

Although a court can take judicial notice that a pleading, or that certain allegations were made in that proceeding, the court cannot take judicial notice of the truth of the allegations or findings. *Litigation Trial Evidence, Summary Judgment Evidence 101*, Trial Evidence Committee, ABA Section of Litigation, by James A. King, June 19, 2013.

The danger of judicial notice is that, if abused, it can deprive the fact-finder of the opportunity to decide a contestable fact in a case. *Walker v. Halliburton Services*, 654 So. 2d 365 (La. App. 1995).

Rule 201(e) of the *Federal Rules of Evidence* gives parties the right to respond to the noticed information. "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."

Taking judicial notice is different than conducting an independent investigation because a judge is expected to disclose on the record when he or she is taking judicial notice of a fact, and the parties may contest the propriety of taking judicial notice and the nature of the fact to be noticed.

In an independent investigation, by definition, a judge will feel free to inquire into any fact using any source, while a judge can only take judicial notice of a fact "that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 201, *Federal Rules of Evidence.*

Bankruptcy Judge Bonapfel did not disclose on the record what information in the Pennsylvania record he was reviewing or give Petitioners the opportunity to contest the propriety of the information or the nature of the facts to be judicially noticed. He did not present any of this evidence on the record or in open court. He did not make the information he considered available to Petitioners. Bankruptcy Judge Bonapfel

revealed this information for the first time in his "First Final Judgment." Id.

Bankruptcy Judge Bonapfel's independent factual inquiry undertook to fill gaps in Respondent's evidence with statements intended to benefit Respondent over Petitioners. Respondent did not mention the story advanced by Bankruptcy Judge Bonapfel at any time during the adversary proceeding. Id.

Bankruptcy Judge Bonapfel did not address Petitioners' written motions. He did not address any of the facts, statutes or case law Petitioners presented to the court. Instead, he substituted distorted, exaggerated, or misrepresented versions of Petitioners' arguments. Id.

Bankruptcy Judge Bonapfel decided the parties' credibility and motives, without any input from the parties—ostensibly based on his review of the facts in the Pennsylvania litigation. He criticized Petitioners on the basis of perceived personal characteristics with statements that are not relevant to any issue before the court. The opinion contains degrading and sarcastic remarks. He sarcastically misstates a fraud count in the Pennsylvania complaint, which he has apparently never read and the parties never argued or briefed in the Pennsylvania litigation, as an excuse to ridicule Petitioners and to collaterally attack the unrelated constructive trust imposed by the Pennsylvania court in favor of Petitioners. Id.

Bankruptcy Judge Bonapfel's decision reached conclusions on issues that are inconsistent with the decision of the Pennsylvania court. He did not cite any Pennsylvania law in his entire 61-page opinion.

His statements show a lack of research of constructive trust law and a lack of an understanding of the issues in that litigation. Everyone just has to take his word for his conclusions without any citation to legal authority to show that the judge's statements are correct. Id

One point of the good faith principle is that an attorney must have a legal basis for offering evidence. The attorney must be able to point to a rule of evidence that plausibly supports an item's admissibility. To offer inadmissible evidence is therefore unethical. See Model Rule 3.4(c).

The fact that the inadmissible evidence is submitted by a judge is even more difficult to justify. A judge has a duty to remain impartial, as opposed to a lawyer, whose job is to act as an advocate.

As a corollary to the prohibition on ex parte communications, the code of judicial conduct prohibits judges from "investigat[ing] facts in a matter independently" and requires that they "consider only the evidence presented and any facts that may properly be judicially noticed." Rule 2.9(C) of the 2007 *American Bar Association Code of Judicial Conduct.*

Like the rule prohibiting ex parte communications, the rule prohibiting independent investigations ensures that cases are tried in the courtroom and judicial decisions are based on evidence in the record where the parties can contest its accuracy, reliability, and credibility and appellate courts can review it.

ABA Formal Opinion 478 cites Model Rule 2.9(C) of the Model Code which states: "A judge shall not investigate facts in a matter independently and shall

consider only the evidence presented and any facts that may properly be judicially noticed."

Judges' decisions must be based on evidence presented on the record or in open court and that is available to all parties. In an adversarial system, judges should not combine the role of advocate, witness and judge. ABA Formal Opinion 478.

The roles of the various participants in the judicial process are well defined by the judicial canons and the attorney's rules of professional responsibility. A judge simply cannot be both a judge and a prosecutor searching out facts favorable to the state without abandoning his or her judicial neutrality. *State v. McCrary,* 676 N.W. 2d 116 (South Dakota 2004).

In *Albert v. Rogers*, 57 So. 3d 233 (Fla Dist. Court of Appeal 2011), the appellate court reversed the trial judge, noting that "the cold neutrality of an impartial judge" to which every litigant is entitled "is destroyed when the judge himself becomes part of the fact-gathering process." The court concluded that the judge's independent investigation constituted a due process violation.

In *NYC Medical and Neurodiagnostic, PXC v. Republic Western Insurance Co.*, 798 NYS 2d 309 (New York Supreme Court, Appellate Term 2004), the appellate court reversed a trial judge, concluding that, in conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties of an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality.

Judges have been disciplined for independently investigating facts or reviewing documents not in evidence. See e.g. *Inquiry Concerning Baker*, 813 So. 2d 36 (Florida 2002). *In re Hutchinson, Decision* (Washington State Commission on Judicial Conduct February 3, 1995.). (The commission also found that the judge's moral pronouncements and demeaning statements deprived the petitioner of an impartial and unbiased forum.)

"The various rules surrounding judicial notice were . . . designed to control the types of fact-finding judges could do outside the normal process of proof." *The Review of Litigation,* Independent Judicial Research, [Fall 2008], p. 157.

"[T]he decision maker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (citations omitted).

Against Bankruptcy Judge Bonapfel's unsupported rhetoric, there is the actual August 15, 2014 Memorandum Order and Opinion of the Pennsylvania federal court that he failed to judicially notice. App. 201-203.

The purpose of the Pennsylvania court order is to assure that the intent of the document is clearly set forth and that its language is understood. Even though those who have to implement the order entered by the Pennsylvania court must do what it says, Bankruptcy Judge Bonapfel expressly decided that what he imagined to be the thinking of Petitioners is more important than what the Pennsylvania court order requires even though he has no knowledge of what Petitioners think and,

therefore, no evidence to support his opinion of Petitioners. App. 113-191.

It is a violation of the Full Faith and Credit Clause for a bankruptcy court judge to presume that he can render a more reliable determination than the Pennsylvania federal court.

28 USC 1738-39 pertains to the recognition by state courts of the records and judicial proceedings of courts of sister states as well as recognition by "every court within the United States, . . ." *CRS Annotated Constitution.* The federal courts are bound by the Full Faith and Credit Clause. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982).

Article IV of the United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of each other State." *U.S. Const. art. IV*, #1.

The Supreme Court has held that the Full Faith and Credit Clause demands rigorous obedience. *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908). If a court in one state renders a final judgment in a case over which it possesses both personal and subject matter jurisdiction, its judgment is entitled to full faith and credit in another state even if that judgment is based on a mistake of fact or law. *Restatement (Second) of Conflict of Laws* #106 (1969).

If the losing litigant wants to correct the error, the litigant must do so in the original state's courts, either on appeal or through some other type of direct attack. See *Federal Rule of Civil Procedure* 60(b). Once judgment is final according to the law of the original state, however, the Full Faith and Credit

Clause prohibits collateral attack in another state. *Fauntleroy v. Lum*, supra. 28 USC 1738-39; *CRS Annotated Constitution.*

It is a sad commentary on the legal system that Bankruptcy Judge Bonapfel's opinion lowers itself to "gas-lighting" and personal attacks instead of a professional legal analysis of the facts and the law that one should expect in a legal opinion. App. 113-191

Although Petitioners feel that such personal attacks are totally inappropriate in a judicial opinion, Petitioners had a difficult time deciding whether such personal attacks merit or justify a response.

After literally years of unsuccessfully trying to re-direct the appellate judges to the merits and the admissible evidence in the bankruptcy court record, Petitioners feel compelled at least briefly to respond.

Nothing justifies Bankruptcy Judge Bonapfel's behavior in deprecating Petitioner's motives, his ridiculing of Petitioners based on his perceptions or his prejudging of Petitioners' case.

Questions as to the truth or falsity of Respondent's statements should have been remedied in the courtroom and not by a judge's sua sponte summary judgment.

At the summary judgment stage, the only question for the court is whether a genuine issue of material fact exists. *Federal Rule of Civil Procedure* 56.

In almost every situation where important decisions turn on questions of fact, due process

requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, supra at 267-68.

One of the reasons the Bankruptcy Code assigns great value to honesty in bankruptcy filings is the impact of those filings on others who are affected by the bankruptcy. Falsehoods allow the debtor to cheat or harm creditors and violate the letter and spirit of the Bankruptcy Code.

Since the element of falsity is basic to bankruptcy jurisdiction, it is imperative that it be dealt with strictly so that jurisdiction can be honestly established.

Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny." *Green v. McElroy*, 360 U.S. 474, 496-97 (1959).

Judges have significantly more power than the litigants who appear before them. A significant problem for attorneys and litigants is that telling truths that are uncomfortable for judges leads to retaliation.

In the adversary complaint, Petitioners alleged that Respondent engaged in improper ex parte private discussions with a magistrate judge. In

making this revelation, Petitioners became the subject of retaliation and intimidation.

From the beginning of the adversary proceeding, the bankruptcy judge engaged in intimidation of Petitioners for attempting to learn the truth—a truth the Respondent and her counsel had a duty to disclose and that Petitioners have a constitutional right to know.

Bankruptcy Judge Bonapfel did not address Petitioners' written motions. He did not require Respondent to address any issue Petitioners raised in the adversary proceeding. He did not require Respondent to present any evidence or face cross examination. He prevented Petitioners from conducting any discovery.

Bankruptcy Judge Bonapfel controlled the narrative of the adversary proceeding. He ignored the issues Petitioners raised in the adversary complaint and manipulated the case in order to collaterally attack the portion of the judgment of the Pennsylvania court that imposed a constructive trust in favor of Petitioners. He handled the case in such a way that Petitioners were doomed to failure regardless of the evidence or the law applicable to the case.

Bankruptcy Judge Bonapfel had a practice of stating, for the record, or implying that Petitioners had waived their rights to an Article III adjudicator without obtaining Petitioners consent or waiver of such right and ignoring Petitioners specific objection to any such waiver.

Bankruptcy Judge Bonapfel created an untenable situation as he and Respondent's attorney openly

engaged in harassment and intimidation of Petitioners without any restraints, whatsoever.

Bankruptcy Judge Bonapfel used his own parody of Petitioners as an excuse to continuously harass and enter malicious and unwarranted sanctions against Petitioners. App. 198-200

What is a lawyer or litigant to do when burdened with a judicial bully who prejudicially injects himself into the litigation?

When dealing with an incompetent judge, one is powerless to do anything about it. Filing motions and briefs documenting your legal position and the relevant facts should educate judges and enhance the record for appeal. Maintaining a calm demeanor and being professional in expressing your position should be better than reacting out of anger and outrage.

It is well-established that an appellate court may consider only the record as it was made before the district court. Thus, the basic rule is that an issue or argument not briefed and argued cannot be entertained for the first time on appeal. *Boone v. Chiles*, 35 U.S. 177, 208 (1836).

Attached hereto and marked as Exhibits A and B are the Tables of Contents for the two briefs Petitioners filed in the appeals before the 11th Circuit Court of Appeals, at No. 17-10536 and Nos. 17-11241 and 17-11936. The brief at No. 17-10536 contains 114 citations and the brief at No. 17-11242 and 17-11936 contains 128 citations to legal authority.

A review the opinion of the 11th Circuit Court of Appeals will disclose that the court ignored every issue Petitioners raised in each appeal. The opinion

also ignored the record Petitioners submitted in support of the appeals. App. 1-15.

The 11th Circuit Court of Appeals did not follow its own precedent or the precedent set by this Court. The appellate court issued an automatic, unquestioning decision in which it only mentioned the bankruptcy judge's conclusions which should have been stricken as inadmissible in a court of law.

The court failed to recognize that evidence must conform to the rules and an official record must be the basis for the court's decision.

The appellate court abused its authority in using sanctions to intimidate, retaliate and detract from the lack of any basis for the decision—all of which violates numerous statutes and judicial canons. App. 16-20.

The most notable aspect of all of the opinions is the collective tendency to avoid traditional modes of judicial analysis. Each opinion is lacking in citations to judicial decisions or statutes or constitutional provisions. Each opinion fails to address any fact or legal citation argued by Petitioners. App. 1-15; 25-65; 72-104.

The judges' citation practices indicate the lack of concern for the law as applied to this situation but also an attitude that they themselves are the law.

Parties are entitled to a reasonable assessment of the merits of the issues raised in appeals. Judges are expected to review the evidence and the law. Facts and law require interpretation. Parties should be told why the law has been applied in a different way in one case and not in another.

In law, cases 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.

Respectfully submitted,

_____

Matthew E. Jackson, Jr.

_____

Velma L. Jackson

EXHIBIT A
TO PETITION FOR REHEARING

TABLE OF CONTENTS FOR NO. 17-10536

II. Whether when it clearly appears that the bankruptcy court lacked jurisdiction, the jurisdiction, the district court had the authority to reach the merits or merely had the authority to correct the error of the bankruptcy court judge in entering the void judgment? 22

III. Whether the bankruptcy judge's arbitrary, sua sponte Rule 54(b) certification improperly separated matters that are not causes of ction from the merits, circumvented established procedural safeguards and jurisdictional requirements for collateral matters and improperly entered a void judgment against Appellants, creating a procedural and jurisdictional quagmire requiring two appeals? 25

IV. Whether the judgment for "attorney's fees" is void because the debtor effectively waived any right to "attorney's fees" by failing to file and serve a properly supported application within 14 days of entry of judgment, or at any other time, or to meet any of the requirements for an award of attorney's fees as set forth in Federal Rule of Civil Procedure 54(d) and there is no federal statute or cause of action entitling Frances to attorney's fees and the judgment was entered in violation of the rules

EXHIBIT B
TO PETITION FOR REHEARING

TABLE OF CONTENTS FOR
NOS. 17-11241 and 17-11936

TABLE OF CONTENTS

NO. 18-867

IN THE

SUPREME COURT OF THE UNITED STATES

CERTIFICATE OF GOOD FAITH

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

FRANCES EDITH JACKSON,
Respondent.

As required by Supreme Court Rule 44, Petitioners hereby certify that the petition for a rehearing is being presented in good faith and not for delay.

Executed on May 1, 2019

Matthew E. Jackson, Jr.

Velma L. Jackson

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