

ORIGINAL

No. 19-6475

IN THE

FILED
OCT 28 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

BURTON MAURICE KAHN-PETITIONER

(Your Name)

vs.

ROBERT RIPLEY - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT.

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BURTON MAURICE KAHN

(your Name)

1706 ALPINE CIRCLE
(Address)

SAN ANTONIO, TEXAS, 78248

(City, State, Zip Code)

(210)-408-9199

(Phone Number)

1

QUESTION(S) PRESENTED

1. If in the initial trial, the Court refused to hear litigation of the merits, should future Courts apply **res judicata** or **collateral estoppel** to the initial **judgment** when the initial trial did not have a full and fair opportunity to litigate the issue of merits?
2. Can a Court claim **res judicata** when the defendant did not plead an affirmative defense per Federal Rules of Civil Procedure, Rule 8, without a cite from any authority?

LIST OF PARTIES

[X] All parties appear in *the* caption of the case on *the* cover page.
 [] All parties **do not** appear in the caption of *the* case on the cover page. A. list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

A. Kahn v. Ripley 18-50554 United States Circuit Court of Appeals for the Fifth District. Judgment entered dated June 18, 2019,

B Kahn v. Ripley, 5:17-CV-784-OLG , United States District Court Western District Of Texas, San Antonio Division . Judgments entered April 06 ,2018 ,June 14,2018, & August 03,2018,

C. Helvetia Asset Recovery Inc. v. Burton Maurice Kahn ,2013 CI 18355, Bexar County, Texas. Partial Judgment on Motion for Sanctions filed April 1, 2014, Texas Partial Transcript of Jury Trial on May 12, 2014

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner *respectfully* prays that a writ of certiorari issue to review the judgment below.

OPINIONS *BELow*

[X] For cases from *federal courts*:

The opinion of the United States Court Of Appeals Appears For The Fifth Circuit ("FIFTH CIRCUIT") At Appendix A Of The Petition And Is

[] reported at _____; or.
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B, Appendix C &, Appendix D of , the petitions and are

[1 reported are
[I has been designated for publication but is not yet reported; or,
[X] is unpublished.
[I reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from *federal courts*:

The date on which the United States Court of Appeals for the Fifth Circuit *decided* my case was June 18,2019

[] No petition for rehearing was timely filed in my case.

[X] A timely petition for *rehearing* was denied by the United States Court of Appeals on the following date: August 28, 2019 and a copy of the order denying rehearing appears at Appendix E

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No.

The jurisdiction of this Court is invoked under 28 U S. C. § 1254,

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Declaration of Independence (July 4, 1776)

14th Amendment To The United States Constitution

28 U.S.C. § 1254

28 U.S.C. § 1738

Chapter 51 of the Texas Government Code

STATEMENT OF THE CASE

This is a contract dispute case between Burton Kahn ("Kahn") and Robert Ripley ("Ripley") of who owns the shares of a corporation named Helvetia Asset Recovery Inc. ("Helvetia"). Both Kahn and Ripley filed Ex-Parte Cases under Chapter 51 of the Texas Government Code. Both orders stated "The Court makes no finding as to any underlying claims of the parties and expressly limits its finding of facts and conclusion of law to the ministerial act." A Motion for Sanctions was heard on March 3 and 4, 2014. Kahn was sanctioned for a fictitious filing for \$253,416. for disregard of a unauthorized Rule 11 agreement by Kahn's Attorney Jay Petterson, who filed the Case 2013-CI-18394. Kahn in

the Sanction hearing objected to the issue of who owns the stock of Helvetia. The Court refused to hear issue of ownership of shares of corporation by stating, "Well, that's a subject of a different type of motion that is before me right now." APPENDIX G Yet the judgment states on paragraph 6, "Helvetia was incorporated by Puerto Verde in August 2007. Puerto Verde is a Bahamian corporation and is owned by Robert Ripley". APPENDIX F The statement of Helvetia a Texas corporation was formed by Ripley was never litigated because the Sanction Hearing Judge refused to hear anything about ownership.. Terry George, Kahn's attorney formed Helvetia. APPENDIX J. The jury trial Judge using Res Judicata or Collateral Estoppel made definitions for the jury . The trial court definitions to the jury was "You are instructed to use the following definitions when the defined words appear in specific questions or instructions,

"Helvetia" refers to the Plaintiff Helvetia Asset Recovery, Inc. 'Puerto Verde" refers to Helvetia's sole shareholder, which is in turn wholly owned by Robert Ripley." APPENDIX H

This definition was a copy of the Sanction Judgment that the jury trial judge declared as res judicata and included in the granted Motion for Limine. On June 11, 2014 a jury found against Kahn for \$2,034,166

based on res judicata of the Sanction Order. After the jury trial several appeals occurred all courts used the jury trial not the initial Sanction Order as basis for res judicata,. Ripley did not plead res judicata or collateral yet the District Court on page 4 of Appendix D claimed preclusion without reviewing :Federal Rules of Civil Procedure Rule 8. (c); the Sanction order and transcript of the Sanction hearing. .

The Fifth Circuit also used the jury trial judgment as res judicata, stating on Page 1 “ Defendant Robert Ripley is the owner of the Bahamian corporation that is the sole shareholder of Helvetia” This statement was not litigated in the Sanction order which is the earliest judgment for a claim of res judicata. The prior court proceedings all stem from the Sanction Order. Partial transcript of preliminary proceedings noting the sanction order for limine. APPENDIX I

The Fifth Circuit notes that the criminal charges were dropped by the District Attorney (“DA”) on February 6,2017. A minimum of 3 ADAs and over 4,000 Bates recorded documents and over 3 years of investigation which would appear that the DA could not prove that Robert Ripley owned the stock. The DA re-indicted Kahn on April 26, 2017. Facing a Motion to Dismiss AGAIN DISMISSED the case on October 2, 2019.

Accordingly, the Fifth Circuit did not review the Sanction Hearing & Order and destroying the principals of res judicata.

REASONS FOR GRANTING THE PETITION**A. The Sanction Hearing Judge refused to hear the merits of the case, but the Fifth Circuit called the findings, Res Judicata.**

This decision is an important legal question in a way that has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the Circuit court, as to call for an exercise of this Court's supervisory power.

The concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case *Allen v. McCurry*, 449 U.S. 90 (1980),

The Supreme Court should demand that Courts who would invoke Res Judicata or Collateral Estoppel, should review the case de novo to ensure that the party against whom the earlier decision has had a 'full and fair opportunity' to litigate that issue in the earlier case.

The preclusive effect of prior state court proceedings on federal proceedings is determined by the treatment those state court proceedings would receive in the courts of the state court *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) , 28 U.S.C. § 1738.

The Fifth Circuit has entered a decision EXHIBIT A in conflict with the decision of other United States court of appeals including its own on the same important matter. In *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 500 (5th Cir. 2004)

"Under the law of this circuit, "[c]laim preclusion, or 'pure' *res judicata*, is the 'venerable legal canon' that insures the finality of judgments and thereby conserves judicial resources and protects litigants from multiple lawsuits." *United States v. Shanbaum*, 10 F.3d 305 (5th Cir. 1994). *Res judicata* applies where "(1) the parties to both actions are identical (or at least in privity); (2) the judgment in the first action is rendered by a court of competent jurisdiction; (3) THE FIRST ACTION CONCLUDED WITH A FINAL JUDGMENT ON THE MERITS; and (4) the same claim or cause of action is involved in both suits." *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937 (5th Cir. 2000). If these conditions are satisfied, all claims or defenses arising from a "common nucleus of operative facts" are merged or extinguished. *Agrilectric Power Partners, Ltd. v. Gen. Elec. Co.* 20 F.3d 663 (5th Cir. 1994).

In *Kenedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002) is the Texas definition:

"A party seeking to assert the bar of collateral estoppel must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action"

(citing *Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334 (5th Cir. 1996)

In *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425, 429 (1st Cir. 2005)

The requirements for the application of claim preclusion do not exist here: "(1) a final judgment on the merits in [THE] earlier proceeding."

B. The Defendant did not plead Res Judicata or Collateral Estoppel

Rule 8. (c) AFFIRMATIVE DEFENSES.(1) states "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: Estoppel and res judicata. In

Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116 (9th Cir. 2003).

"Claim preclusion is an affirmative defense which may be deemed waived if not raised in the pleadings. Moreover, the failure of the defendant to object to the prosecution of dual proceedings while both proceedings are pending also constitutes waiver." *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 328 (9th Cir.1995);

The requirement from many sources for the application of res judicata or collateral estoppel requires a full and fair opportunity to adjudicate the merits of the initial judgment. Because of this error of the Fifth Circuit, I request that this Court should an exercise of this Court's supervisory power.

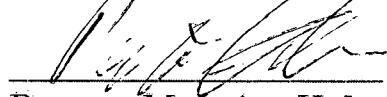
CONCLUSION

Its very difficult to be a pauper and a Pro-se.

You must tell the world that you are broke and living on social security. The study and work of a Pro-se is insurmountable. The readers of this document are well educated and are knowledge of the law. I am a structural Engineer, doing legal work because of necessity. Imagine if you, the reader needed to design and build a suspension bridge for your necessity?

In the Declaration of Independence (July 4, 1776) our forefathers appealed to the" Supreme Judge of the World for the rectitude of our intentions." I also appeal to Supreme Judge and also appeal to the Supreme Judges of the World(The United States Supreme Court) to Right the wrong for justice , that the petition for a writ of certiorari should he granted and the case be remanded to the Western District Court of Texas.

Respectfully submitted,



Burton Maurice Kahn, Pro-se

Date

Oct 28, 2009