20-1538

No. 21-

In the Supreme Court of the United States

ANGELA W. DEBOSE, PETITIONER

v.

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Rule 60(d) Independent Action to Attack a Final Judgment is a continuation or re-litigation of the prior case, barred by the doctrine of res judicata.

2. Whether a blameless party must show that she has been denied a full and fair opportunity to present her case by "clear and convincing evidence," as the Third, Fifth, Seventh, Eighth, and Eleventh Circuits; or show "substantial interference" in the presentation of her case, as the Ninth and Tenth Circuits have held; or does the burden on this issue shift under certain circumstances to the party opposing a Rule 60(b)(3)/60(d)(3) motion; or must the movant show "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985).

PARTIES TO THE PROCEEDING

Petitioner Angela DeBose was the plaintiff-appellant below.

Respondent University of South Florida Board of Trustees ("USFBOT") was the defendant-appellee below.

Greenberg Traurig, P.A. ("Greenberg") and USFBOT were defendants below in Case No. 8:19-cv-01132-JSM-AEP and were served process but did not file notices of appearance. Following Dismissal Without Prejudice, the district court ordered Petitioner to file a Rule 60(b) motion in the case requesting Certiorari review. The District Court rejected Petitioner's pleadings to join Greenberg as a party. Therefore, Greenberg is not a party to the instant petition.

Ellucian, L.P. ("Ellucian") was a defendant-appellee below. However, plaintiff and Ellucian jointly moved the Eleventh Circuit Court for a stipulation of dismissal against Ellucian as a party, which was granted. Therefore, Ellucian is not a party to the instant petition.

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PETITION FOR A WRIT OF CERTIORARI

Angela W. DeBose petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is in the Appendix (App. A-1, 1a-10a) and the published opinion (App. A-2 11a-14a). The court of appeals order denying petitions for rehearing and rehearing en banc is (App. A-3 15a). The unpublished order of the district court denying Petitioner's Motion for Relief from Judgment and Independent Action is (App. A-5 19a-29a); the published order is (A-6 30a-33a). The district court's endorsed Order denying as moot Petitioner's Motion for Reassignment or Recusal is (A-7 34a). The district court's unpublished order denying Petitioner's Motion for Reconsideration is (A-8 35a-39a); the published order is (A-9 40a-41a). The order of dismissing Without Prejudice of Petitioner's Independent Action as filed in a separate district court for refiling in the original action as a Rule 60(b)(3) motion is (A-10 42a-43a).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The decision of the court of appeals was entered on January 21, 2021. The court of appeals denied Petitioner's petition for rehearing and petition for rehearing *en banc* on March 2, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Jurisdiction was proper in the District Court pursuant to 28 U.S.C. § 1331, and jurisdiction in the appellate court was proper pursuant to 28 U.S.C. §§ 1291 and 1294(1).

STATUTORY PROVISION AT ISSUE

The relevant portion of Federal Rule of Civil Procedure Rule 60 provides:

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a

party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

STATEMENT OF THE CASE AND FACTS

1. The Case

On May 19, 2019, Petitioner, Angela DeBose ("Ms. DeBose") filed a Complaint and Rule 60(d) Independent Action, based on new evidence and fraud by USFBOT, Greenberg Traurig, P.A. ("Greenberg"), and their legal representatives. The case style, *Angela DeBose v. University of South Florida Board of Trustees and Greenberg Traurig, P.A.*[1], was filed in the Middle District Court of Florida under Case No. 8:19-cv-01132-JSM-AEP. Federal Rule of Civil Procedure 60(b) "allows six avenues through which the court may vacate a judgment. Rule 60(b)(3) provides relief from judgment for fraud, misrepresentation, or misconduct by an opposing party. Petitioner sought relief on the basis of new evidence that USFBOT, as a party, and its counsel committed intrinsic and extrinsic fraud. USFBOT's counsel presented false and misleading information on an issue to be tried (i.e. Petitioner's contract claims) that USFBOT stopped using written employment contracts in 2005, thus making it appear a factual impossibility that Ms. DeBose was under any employment contract at the time of her termination, when in fact she was under contract and that Ms. DeBose's pay during her separation would have fulfilled any obligation it had, if such contracts existed. Additionally, USFBOT's and its counsel's conduct prevented Petitioner from trying the issue (i.e. Ms. DeBose's contract claims) because of the ordered destruction of Petitioner's personnel files containing her copies of her employment contracts and their concealment that the contracts once existed.

On May 16, 2019, the court issued an Order, (A-10, pg. 42a-43a), dismissing the case *without* prejudice, directing the Clerk of the Court to close the case as "moot," and terminating all pending motions. The referring court directed Petitioner in an order to file the action as a Rule 60(b)(3) motion in the original subject matter case, subsequently renumbered Case No. 8:15-cv-02787-VMC-AEP.

On May 12, 2020, Petitioner refiled a Motion for Relief and Independent Action in originating Case No. 8:15-cv-02787-VMC-AEP. Petitioner incorporated the docket and filings of Case No. 8:19-cv-01132-JSM-AEP into her refiled Motion to preserve the filing itself, the filing date, and her objections and challenges filed to the court's perceived committed errors. On June 23, 2020, the

[1] The district court refused to issue the summons to serve process on Greenberg Traurig, P.A. .

District Court denied the Motion for Relief from Judgment and Independent Action, (A-5, pgs. 19a-29a), and motions for other miscellaneous relief. The District Court treated the Petitioner's refiled 60(b)(3) motion as untimely, disregarding the referring court's dismissal order requiring Petitioner to refile a Rule 60(b)(3) motion, the legal doctrine of equitable tolling, and the "relates back" principle under Rule 15. The new District Court Judge claimed "*exhaustion*" from relitigating old matters, failing to review the Motion as one for relief under the proper standard. On June 26, 2020, Petitioner filed a motion for reconsideration, pursuant to Rule 59(e), to correct clear legal error, and/or Rule 60(b)(1), on the grounds of mistake, surprise, and to prevent manifest injustice. The District Court denied the motion, stating "*DeBose has not pointed to any new evidence, arguably attached to the independent action, in support of her Motion,*" (A-8, pg. 38a). Notably, Petitioner's new evidence was attached to her Independent Action in Case No. 8:19-cv-01132-JSM-AEP, which was both refiled attached to the Motion, [ECF Doc. 588, attachment #s 1-7] and incorporated, [ECF Doc. 591], in accordance with Rule 60(b)(2).

On July 22, 2020, in Case No. 8:19-cv-01132-JSM-AEP, Petitioner filed a Motion for Certification of the Order Dismissing the Independent Action Without Prejudice, as a Final and Appealable interlocutory order. On July 24, 2020, the referring court denied the motion for certification, stating as grounds that it did not consider the merits of DeBose's Rule 60(b) motion and dismissed her action without prejudice to file the motion in "*DeBose I*", [ECF Doc. 12, Case No. 8:19-cv-01132-JSM-AEP].

2. The Facts

Petitioner filed the new evidence referenced below and moved for an Evidentiary Hearing, *denied*:

A. New Evidence that USFBOT as a Party and USFBOT's Counsel Willfully Misrepresented and Put on False Evidence About the Destruction of Petitioner's Personnel Files.

Petitioner sued the University of South Florida Board of Trustees ("USFBOT") for Title VII violations and related claims. USFBOT was on notice to preserve Ms. DeBose's evidence for her anticipated case in chief but nevertheless destroyed Petitioner's

files.[2] Denying that any destruction of Ms. DeBose's documents occurred, USFBOT's counsel subsequently admitted to the destruction, after a period of 15 months. USFBOT's counsel conceded that USFBOT used a third-party shredding company to destroy Ms. DeBose's documents. USFBOT's counsel identified a later timeline for the destruction and argued the "first-time" destruction was ordinary, and not retaliatory or related to Ms. DeBose's protected activity. The reviewing magistrate stipulated for the record that (1) there was a duty to preserve, (2) the defendant (USFBOT) was on notice, and (3) there was a destruction of documents that may have been relevant to the litigation. (Appendix A-11, pgs. 96a-98a; 99a-104a). The magistrate declined to find "bad faith" but stated it would be significant if it was shown that Ms. Lois Palmer ("Ms. Palmer"), the employee that USFBOT's counsel identified as ordering the destruction of Ms. DeBose's files, could not have done so, (Appendix A-11, pg. 103a), as another witness, Ms. Delonjie Tyson ("Ms. Tyson") alleged, (Appendix A-11, Tyson's Affidavit pgs. 65a-66a; Tyson's Deposition pgs. 71a-95a).

New Evidence: Petitioner obtained new evidence from two new witnesses who testified that the destruction had already occurred *before* Ms. Palmer was hired, (Appendix A-11 pgs. 44a-48a). Additionally, the new evidence showed that the order to put Ms. DeBose's files in the shredding bins for destruction was given by senior leaders, Drs. Paul Dosal ("Dr. Dosal") and Ralph Wilcox ("Dr. Wilcox"), against whom Petitioner filed EEOC race discrimination and retaliation charges, (See A-11 pg. 44a-46a). The new and existing evidence filed by Petitioner overwhelmingly showed that USFBOT, as a party, and its legal counsel willfully put on false evidence to deflect attention to Ms. Palmer and away from Drs. Dosal and Wilcox. USFBOT's counsel argued that Ms. Palmer was negligent or grossly negligent to detract from Dr. Dosal's and Dr. Wilcox's retaliatory motive. The new evidence is result-changing because if USFBOT's counsel had not made false misrepresentations about the destruction (i.e. the timing, who ordered it, that it was not routine, and that employees were not notified in advance), the District Court may have been inclined to give an adverse inference jury instruction that would have sustained the unanimous jury verdict in favor of Ms. DeBose. The verdict would have also been sustained against USFBOT's post-verdict JMOL. The denials and false evidence put on by USFBOT's counsel concerning the destruction evinces that

[2] Notice was triggered by a formal communication and actual litigation in Federal District Court for injunctive relief and a Florida public records state court action.

USFBOT's JMOL was not supported by an unimpeached, uncontradicted record but rather attorney misconduct. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000). As such, USFBOT's JMOL would have been denied.

B. New Evidence that USFBOT as a Party and USFBOT's Counsel Willfully Misrepresented and Put on False Evidence that USFBOT Stopped Issuing Employment Contracts in 2005.

Pursuant to a contract that extended Ms. DeBose's employment to June 30, 2020, Petitioner filed a common law breach of contract action and 42 U.S.C. 1981 claim in the original case. USFBOT employee, Dr. Dosal admitted in the proceedings that he offered Ms. DeBose such an extended contract, similar to his own and Dr. Wilcox's. Ms. DeBose argued during all relevant times that she accepted Dr. Dosal's contract offer. Petitioner requested a written copy of her contract from USFBOT because Ms. DeBose's copy of her contract was in the personnel files USFBOT sent out for destruction. Petitioner also made a request for copies of Dr. Dosal's, and Dr. Wilcox's extended contracts, which USFBOT refused to provide to Ms. DeBose during all relevant times. USFBOT's counsel alleged that Ms. DeBose was not covered under a written employment contract of any kind at the time of her termination in 2015 because allegedly, USFBOT stopped issuing contracts in 2005.

New Evidence: Petitioner obtained new evidence through a third party of the 2019-20 written contract extensions of Drs. Dosal and Wilcox. (A-11 pgs. 62a-64a). The written contracts evince that USFBOT as a party and USFBOT's counsel willfully put on false evidence that USFBOT stopped issuing written contracts in 2005 to obtain a favorable decision. USFBOT's counsel argued that Petitioner's 2019-20 contract extension and other contract-related claims were a factual "impossibility". The deception by USFBOT and its counsel is result- changing because the District Court dismissed *all* of Ms. DeBose's contract claims and denied sanctions and other miscellaneous relief because of this misrepresentation by USFBOT and its counsel to procure favorable judgments. If USFBOT's counsel either produced the contracts or failed to put on false evidence, Ms. DeBose's breach of contract claims would have been maintained.

C. New Evidence that USFBOT continued its retaliation after DeBose's termination.

The District Court reversed the jury, allegedly on the basis that Petitioner did not prove "but for" causation of unlawful retaliation through direct evidence or circumstantial evidence sufficiently close in proximity. Petitioner introduced evidence that showed continuous, consecutive adverse actions taken against her, including after her termination—e.g. negative reference to ruin Ms. DeBose's business opportunity, etc.[3]

New Evidence: Petitioner introduced new evidence to show that USFBOT continued its retaliation against Ms. DeBose and its discriminatory practices after Ms. DeBose's termination. Petitioner received an unsolicited discrimination complaint filed internally at USFBOT by one of its employees. The new evidence showed that USFBOT targeted black/African American employees hired by or that served under Ms. DeBose during her tenure, (A-11 pgs. 49a-61a). Additionally, it showed that USFBOT treated blacks/African American of darker complexion more adversely than those of lighter complexion and made blacks/African Americans sing or dance in a degrading, humiliating manner in order to leave work reasonably on-time. This evidence is result-changing as it indicates that USFBOT used intimidation and reprisal tactically, against Ms. DeBose's potential witnesses. The type of conduct that USFBOT engaged in is subject to Title VII regulation and 42 U.S.C. § 1983.

3. The Appeal

On July 21, 2020, Petitioner filed notice of appeal, (A-4 pgs. 16a-18a). The Eleventh Circuit affirmed the District Court, holding, "We agree with the district court that [DeBose] failed to produce any evidence that the University destroyed evidence or that she had an employment contract. On the contrary, the record evidence showed that the University had not used employment contracts since 2005. We therefore affirm the denial of sanctions." The Eleventh Circuit panel opinion conflicts with finding of the court in DeBose's case in chief (i.e. consolidated appeals No. 18-14637 / 19-10865), (App. A-12 pgs. 105a-124a), and additionally exacerbates the Circuit conflicts over the showing a party must

[3] The District Court's pretrial order barred Petitioner from mentioning the destruction of her files and employment contracts, the vandalism of her car, the withholding of public records, etc.

make to receive Rule 60(b)(3) relief. The Eleventh Circuit acknowledged that the destruction of Petitioner's records occurred—whether or not the destruction was done by Appellee's counsels in bad faith, (App. A-1, pg. 3a). This finding, while correct, conflicts with the prior decision in 18-14637 wherein the panel stated, in contradiction to the factual record, that Petitioner did *not* produce any evidence that the University destroyed evidence or that DeBose had an employment contract, (App. A-12 pgs. 105a-124a). The panel was comprised of two of the same judges that ruled in Appeal No. 18-14637. The Eleventh Circuit decision does not explain or resolve this conflict with the prior opinion and omits discussion of the hearing transcripts altogether. In the appeal under review, the Eleventh Circuit again affirmed the District Court in contradiction to the factual record, that Petitioner has not introduced any new evidence of fraud that is not duplicative or that could have been previously submitted, (App. A-1 pg. 7a). The panel has either misapprehended the appellate record that it would be *significant* if it was shown that Ms. Palmer would not have participated in the shredding of Ms. DeBose's documents and was not the registrar at the time, (App. A-11 pg. 104a 14-21), or that *bad faith* would be implicated if the employees were not notified in advance of the destruction. (App. A-11, pgs. 101a 8-16; 16:22-25; 103a 1-5). The panel also overlooked evidence that the destruction of DeBose's employment records and contracts was ordered by DeBose's supervisors that she charged with unlawful discrimination and retaliation, (App. A-1 pgs. 44a-46a). The new evidence could not have been presented earlier in the original case because (1) the magistrate declined to enforce the court-issued subpoena for witness, Marquisha Wilson's testimony, or allow oral testimony from Petitioner's other witnesses at hearing; (2) repeatedly declined Petitioner's requests to order an evidentiary hearing instead of conducting a review "by affidavit"; and (3) Wilson would not testify or provide a statement for fear of losing her job and did so only after leaving her employment as a manager with the University.

Consequently, the panel discussion as to whether Petitioner's appeal is "frivolous", (App. A-1 pgs. 1a-10a) is completely misaligned and bears very little or no relationship to the factual record or to the truth at hand. The crux of the issue is whether the destruction of Petitioner's employment records and contracts deprived Ms. DeBose of the opportunity to fully and fairly present her claims at critical phases of the case; whether the ordered destruction by the Respondent was willful, retaliatory misconduct

meriting 60(b)(3) relief; and whether USFBOT's counsel committed misconduct by putting on false evidence. Against this backdrop is the fact that Petitioner was not accorded any opportunity to present her new evidence. This fact demonstrates DeBose did not have an opportunity to fully and fairly litigate her claim(s). The panel opinion skirts past this fact and the core issue that Petitioner was never provided a meaningful opportunity to examine, cross-examine, or impeach Ms. Palmer to show that USFBOT's lawyers willfully scripted and put on the fraudulent representations to steer attention away from the "higher ups". The panel opinion ignored these issues. Petitioner indisputably did not have an opportunity to "fully litigate her case", satisfying the Eleventh Circuit standard for a Rule 60(b)(3) action and raising more than a colorable entitlement to relief under Rule 60(d).

REASONS FOR GRANTING THE PETITION

Rule 60(b) states: *On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:* . . . Petitioner seeks Certiorari Review from the Supreme Court of the United States. Certiorari review will provide an opportunity to resolve the above Eleventh Circuit panel conflicts and circuit conflicts. The case also illustrates the need for greater clarity in this area of the law because decisions and reasoning are watered down and do not apply existing laws or precedent to a meaningful analysis of the facts. Review will instill public confidence that is dependent on a full and fair opportunity, beyond consideration of the number or length of actions required in pursuit of justice, but whether or not a party was afforded meaningful access to the courts, evidence and witnesses to prove its claims. The public expects and demands such reviews to yield greater confidence and respect in the finality of judgments.

1. Whether a Rule 60(d) Independent Action to Attack a Final Judgment is a continuation or re-litigation of the prior case, barred by the doctrine of res judicata.

The Eleventh Circuit affirmed the District Court's conclusion that Petitioner's Independent action was a continuation or re-litigation of the prior case and foreclosed under the doctrine of *res*

judicata. Neither federal nor Florida law precludes an Independent Action. In *Pruitt v. Brock*, 437 So. 2d 768 (Fla. Dist. Ct. App. 1983), the court expressly held, "Where relief is sought by independent action... however, "[t]he action is not a continuation of the action in which the judgment . . . under attack was entered. A new complaint is filed, service of process is made and the new action follows the same procedure as other civil actions." Trawick, *Florida Practice and Procedure* § 26.8 (1982). [T]he rules should be construed in such a manner as to "further justice, not to frustrate it." Id; *Singletary v. State,* 322 So.2d 551, 555 (Fla. 1975). Under federal law, Rule 60(d) was designed to provide a party "with a convenient and orderly method for attacking a final judgment, even after the time for appeal had expired." *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); *Vandervoort, Sams, Anderson, v. Vandervoort*, 529 F.2d 424 (5th Cir. 1976). Only by applying the preferred construction to rules of procedure, is the intended purpose behind the rules' adoption: that a case be determined on its merits.

The Eleventh Circuit overlooked that Petitioner's Independent Action with new evidence should have proceeded independently without burdening the Petitioner to refile in the original case. The Independent Action was filed within one year of the final judgment.[4] Therefore, Petitioner's filing was timely for both a Rule 60(b)(3) action that must be filed within one year of the judgment and for a Rule 60(d) Independent Action, which can be filed beyond one year after the judgment. The Independent Action could be maintained in a separate court or the same court as the original action. Under Rule 60(d), two different procedures are distinguished: **(1)** A motion in the court that rendered the judgment or **(2)** An independent action to set the judgment aside brought in the same court or a different court. See *United States v. Throckmorton*, 98 U.S. 61 (1878). In *Sayers v. Burkhardt,* 4 Cir., 85 F. 246, 248 (4th Cir. 1898), the Court said: 'An independent suit, the object of which is to set aside a decree because of conspiracy and fraud resorted to and practiced in procuring the same, is not necessarily required to be brought in the court where said decree was rendered, but may be instituted in any court of competent jurisdiction.' And see *Hadden v. Rumsey Product, Inc.*, 96 F. Supp. 988 (W.D.N.Y. 1951); *United States v. Hartford-Empire Co., D.C.*, 73 F. Supp. 979, 982 (D. Del. 1947);

[4] Final Judgment (10/2/2018); Amended Judgment (10/5/2018); and Second Amended Judgment (2/14/2019).

Simon v. Southern Railway Co., 236 U.S. 115 (1915); *Logan v. Patrick*, 9 U.S. 288 (1809).

Petitioner preserved her original filing with her evidence attached and her timely filing date for her Independent Action, by fully incorporating the docket and orders. Additionally, the filing date and errors committed by the District Court were preserved under Rule 15's relation back" principle. The incorporated orders were referenced in Petitioner's Notice of Appeal ("NOA") and were included in the transmitted appellate record and Appendix. Accordingly, the Eleventh Circuit had jurisdiction to review the non-final dismissal order and other appealed orders in the NOA. USFBOT's counsel did not file an appearance in the case. However, the record discloses that the District Court communicated with USFBOT's counsel outside of Petitioner's hearing and forwarded the filings made by Ms. DeBose. USFBOT's counsel made no objection to Petitioner's incorporation of the case under Rule 4's filing, summons, and service of process and Rule 15's "relation back" principles. Therefore, the Eleventh Circuit panel erred not to discuss and consider the totality of the circumstances and reverse the rulings of the District Court that were solely based on "mere technicalities"—e.g. whether the evidence was attached to the motion (as clearly shown by the record that it was) or whether the Notice of Appeal included the dismissal order without prejudice (as the NOA certainly includes and refers to the order at length), (App. A-4 pgs. 16a-18a)[5]. Notably, Rule 2 gives courts of appeals the power, for "good cause shown," to forgive technical oversights or omissions. It was therefore within the Eleventh Circuit's jurisdiction to interpret Petitioner's filings as "the functional equivalent of what the rule requires," in conveying the information required by Rule 3(c). *See Smith v. Barry*, 502 U.S. 244, 248 (1992).

The Eleventh Circuit conducted an improper review. The District Court in which Petitioner's Independent Action was initially filed, understood that dismissal of a complaint, without prejudice, does not allow a later complaint to be filed outside the statute of limitations. *Bost v. Fed. Express Corp.* , 372 F.3d 1233, 1242 (11th Cir. 2004). The statute of limitations is not automatically tolled in such a situation, absent some additional reason. *Justice v. United States* , 6 F.3d 1474, 1479–80 (11th Cir. 1993). The court disregarded that under equitable tolling, a Rule

[5] The orders attached to and included with the filed NOA are not included in the Appendix to avoid duplication.

60(b)(3) motion in the original action was not time-barred here because of the "relation back" under Rule 15 to the original filing date of Petitioner's 60(d) Independent Action Complaint, and additionally because the refiling was in compliance with a federal district court order. *See* FED. R. CIV. P. 15(c). Additionally, the Eleventh Circuit disregarded that Petitioner filed motions to affect a *transfer* under 28 U.SC. § 1404(c), which provides that a transfer may be made in pertinent part: **(a)** *in the interest of justice*; **(b)** *upon motion*; or **(c)** *order of the court.* The district court in which the Independent Action was initially filed, required Petitioner to refile the action herself, so that it would be an untimely 60(b) motion. A simple transfer, even to the originating case, would have saved Petitioner's Rule 60 "saving's clause" action. Furthermore, the district court was on notice of Ms. DeBose's concern for a fair proceeding. Thus, the transfer could have been made in the interest of justice.[6] The failure to transfer shows that while the district court stated it did not review the matter on the merits, it nonetheless made certain factual determinations that were not ministerial in nature that prejudiced Ms. DeBose in the refiled action and on appeal. The Eleventh Circuit ruling failed to review or discuss the District Court's errors and its failure to conduct a proper review on the merits, rather than mere technicalities. The District Court erroneously concluded that Petitioner filed the Independent Action only after the Eleventh Circuit made its panel ruling, when in fact Petitioner's action was filed prior to the decision, (A-5 pg. 20a).

If allowed to stand, the Eleventh Circuit decision would obliterate the important doctrines of relation back, equitable tolling, and the statutory right to bring an Independent Action to set aside a judgment. Petitioner found no case on point to show that attacking a judgment in the same action or a different action is barred by res judicata. Petitioner was forced out of one court to refile in another court to support such an argument and fashion such an outcome.

2. Whether a blameless party must show that she has been denied a full and fair opportunity to present her case by "clear and convincing evidence," as the Third, Fifth, Seventh, Eighth, and Eleventh Circuits; or show "substantial interference" in the

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[6] A 28 U.S.C. § 144 affidavit has been sufficient to effect a transfer of the case to another judge on a firm showing in the affidavit that the judge does have a personal bias or prejudice to a party. *In re Martinez-Catala,* 129 F.3d 213, 218 (1st Cir. 1997).

presentation of her case, as the Ninth and Tenth Circuits have held; or does the burden on this issue shift under certain circumstances to the party opposing a Rule 60(b)(3)/60(d)(3) motion; or must the movant show "only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985).

Rule 60(b)(3) of the Federal Rules of Civil Procedure gives district courts the authority to relieve a party from an adverse judgment, even after it is final, based on a showing of "fraud . . . , misrepresentation, or misconduct by the opposing party." Although this rule has been in effect since 1948, the federal circuits have adopted conflicting approaches – reflecting "major area[s] of controversy in Rule 60(b)(3) jurisprudence." The circuits' standards for relief under Rule 60(b)(3) reflect such a focus by entailing an inquiry into the probable effect of misconduct on presenting one's "case" or proceeding at trial. See, e.g., *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir.2004) ("To prevail on a Rule 60(b)(3) motion, a movant 'must show that the conduct complained of prevented the moving party from fully and fairly presenting his case.' " (citation omitted)); *Venson v. Altamirano*, 749 F.3d 641, 651 (7th Cir.2014) ("The party seeking relief pursuant to Rule 60(b)(3) must show that he had a meritorious claim that he could not fully and fairly present at trial due to his opponent's fraud, misrepresentation, or misconduct."); *Zurich N. Am. v. Matrix Serv.*, Inc., 426 F.3d 1281, 1290 (10th Cir.2005) ("[T]he challenged behavior must substantially have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial." (citation omitted)); *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir.2007) ("[T]he moving party must show that the conduct prevented the losing party from fully and fairly presenting his case or defense." (brackets and citation omitted)); *In re Hope 7 Monroe St. Ltd. P'ship*, 743 F.3d 867, 875 (D.C.Cir.2014) ("[T]he movant must show the misconduct was prejudicial, foreclosing the 'full and fair preparation or presentation of its case.' " (citation omitted)). Nowhere in the Federal Rules of Civil Procedure is Rule 60(b)(3) limited in applicability to judgments on a case's merits. Thus, it may apply to situations in which a party alleges that the misconduct prevented her from fully and fairly presenting its

"claims" of entitlement (e.g. at summary judgment) to proceed to trial or have the claims decided by a jury. Cf. Black's Law Dictionary 301 (10th ed. 2014) (defining a "claim" as "[t]he assertion of an existing right"). These conflicts involve: (1) the quantum of evidence necessary for proving that the alleged fraud or misconduct denied a party a full and fair opportunity to litigate;[7] (2) what constitutes "misconduct"—(e.g. whether "misrepresentations . . . of an opposing party" under Fed. R. Civ. P. 60(b)(3) include misrepresentations by a witness, known to the party and its counsel to be a false/fraudulent admission, can be attributed to the complicity of the party and/or its counsel; (3) whether "misconduct" includes self-serving omissions or willful nondisclosure to the tribunal; and (4) Whether "misconduct" under Fed. R. Civ. P. 60(b)(3) could include the destruction, concealment, or omission of evidence in the course of discovery, even if it is purely accidental and unintentional, as the First, Fifth, and Eleventh circuits have held, or requires a showing of improper or wrongful behavior, as the Sixth Circuit has held.

A. The Third, Fifth, Seventh, Eighth and Eleventh Circuits require a movant to show by "clear and convincing evidence" that it was denied a full and fair opportunity to litigate its case.

The "clear and convincing" evidence standard is a "high" bar, *see e.g., Commil USA, LLC v. Cisco Systems Inc.*, 135 S. Ct. 1920, 1929 (2015). That standard derives from the Supreme Court's holding, prior to the enactment of Rule 60(b)(3), that "to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense." *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421 (1923). In *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1995), the Seventh Circuit applied the clear and convincing standard to grant relief under Rule 60(b)(3). The plaintiff had moved to set the judgment aside in light of the discovery of defendant's fraudulent alteration of a training schedule, which the defendant had successfully used at trial to show his actions were not sexual harassment but in fact part of a pre-approved training program. Applying this standard,

[7] The Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held "clear and convincing evidence" is required whereas the Ninth and Tenth Circuits have held the movant must show "substantial interference" in the presentation of her case. The First and Sixth Circuits have held the burden-shifts to the opposing party of a Rule 60(b)(3) motion or Rule 60(d) independent action under certain circumstances.

the court found "ample prejudice in the use of the fraudulent evidence" at trial "to demonstrate that [the plaintiff] mistakenly viewed training exercises as sexual harassment." *Id.* at 896-97.

The panel decision also conflicts with Eleventh Circuit and other circuit decisions holding that false testimony by a witness or a party is more serious under Rule 60(b)(3). Courts have long recognized that misconduct by a party is more serious, and deserving of greater sanction, than misconduct by a witness. In its leading decision on fraud on the court, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), this Court drew that distinction sharply: "This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here . . . we find a deliberately planned and carefully executed scheme [by a party] to defraud ... the Circuit Court of Appeals." Rule 60(b)(3) permits relief from a final judgment only upon the proof of "fraud . . ., misrepresentation, or misconduct *by an opposing party*." (emphasis added). The panel opinion did not consider the more serious acts of party misconduct/fraud. The court of appeals has held that false testimony by a [corporate] witness may, without more, be imputed to the party that called the witness. The court offered no explanation why Ms. Palmer's party admission about the destruction and Dr. Wilcox's false testimony about stopping contracts in 2005 was not considered a "misrepresentation by an opposing party." Under Fed. R. Civ. P. 60(b)(3), to merit relief, the false testimony must be "traced to the adverse party." Here, it was.

The panel did not apply the Eleventh Circuit's Rule 60(b)(3) standard. If applying the same reasoning by the Eleventh Circuit and the other four circuits above—particularly the Seventh Circuit in *Lonsdorf v. Seefeldt*, the panel could have found ample evidence of fraud. USFBOT and its counsel prevented Petitioner from trying her contract claims in bad faith by having Ms. DeBose's personnel files containing her copies of her contracts and other evidence destroyed. USFBOT and its counsel concealed the destruction, denied that it occurred, and only admitted to the destruction when Petitioner presented irrefutable proof. Unexpectedly caught, USFBOT scripted an affidavit for Ms. Palmer in which she falsely admitted that she gave the order but not because it was true; instead, it was to deflect attention away from the actual parties giving the order, Dr. Dosal and Dr. Wilcox, accused of race discrimination and retaliation. The evidence and surrounding factors are compelling and demonstrate that the destruction of Petitioner's files was not done through

disclosure. *Id.* at 993-94. *See also Zurich N. Am. v. Matrix Serv. Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005) ("[T]he challenged behavior must substantially have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial." (quotation marks omitted)).

Petitioner's 60(b)(3) action is unlike *Woodworker's Supply, Inc.* because she availed herself by various motions to cure the prejudice arising from USFBOT counsel's misrepresentation that USFBOT stopped using written employment contracts after 2005. In *Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990), the Ninth Circuit explained the Rule 60(b)(3) relief is required when a movant shows that fraud, misrepresentation or misconduct "may have substantially interfered with [her] ability to fully and fairly present her case." *Id.* at 879. The Eleventh Circuit has used variants of the "substantial interference" test under Rule 60(b)(3), requiring a movant to demonstrate actual prejudice such that the misconduct affected the substantial rights of the movant. The misconduct was prejudicial to Petitioner, foreclosing the full and fair preparation or presentation of her employment contract claims. See D.C. Circuit cases *Summer v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004); *Hope 7 Monroe St. L.P. v. Riaso, LLC*, 743 F.3d 867, 875 (D.C. Cir. 2014).

C. The First and Sixth Circuits employ a burden-shifting framework.

The First and Sixth Circuits do not place the Rule 60(b)(3) burden solely on the movant. Rather, these courts employ a burden-shifting test. If the movant establishes that the misconduct was intentional, these circuits shift the burden to the opposing party to prove by clear and convincing evidence that the misconduct did not result in prejudice to the movant's ability to fully and fairly litigate its case. In *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1998), the court determined: "Verdicts ought not lightly to be disturbed, so it makes very good sense to require complainants to demonstrate convincingly that they have been victimized by an adversary's misconduct. . . . [T]he error, to warrant relief, must have been harmful – it must have 'affect[ed] the substantial rights' of the movant." *Id.* at 924 (citing Rule 61). If a movant shows an opponent's misconduct by clear and convincing evidence and also shows that the misconduct was "knowing and deliberate," *id.* at 930 n.15, the First Circuit applies a rebuttable presumption that the misconduct substantially

interfered with the movant's ability to litigate. The burden then shifts to the opposing party, which can overcome the presumption "by a clear and convincing demonstration that the consequences of the misconduct were nugacious." *Id.* at 926. The Sixth Circuit holds that once the moving party has shown by clear and convincing evidence that misbehavior by an opposing party had occurred, prejudice to the moving party would be assumed unless the non-moving party shows by clear and convincing evidence that the misbehavior had no prejudicial effect on the litigation.

Neither the Eleventh Circuit nor the District Court conducted a review under a burden-shifting framework. USFBOT's counsel was not asked by the District Court to explain its fraud, misrepresentations, or misconduct or actions that were taken that prevented Petitioner from trying her case or the issues.

D. The Circuits Are Also In Conflict Over Whether "Misconduct" Under Rule 60(b)(3) Can Include An Inadvertent, Negligent, or Intentional Omissions.

The Sixth Circuit rejected the interpretations of Rule 60(b)(3) by the First, Fifth, and Eleventh Circuits . . . [as] not squar[ing] with the plain meaning of the rule" concerning whether an inadvertent error by a party can constitute "misconduct" under the Rule. Considering both the plain meaning of the word "misconduct" and its placement in a rule addressed to fraud and misrepresentation, the court concluded "the primary connotation of each of the words in Rule 60(b)(3) suggests a requirement of some odious behavior on the part of the non-moving party. To interpret one of these words as permitting the moving party merely to demonstrate that the non-moving party made a non-reckless mistake is to ignore the text and context of the rule. Thus, the court held in *Info-Hold, Inc. v. Sound Merchandising, Inc.*, 538 F.3d 448, 455 (6th Cir. 2008)(citing *Jordan v. Paccar, Inc.*, No. 95-3478, 1996 U.S. App. LEXIS 25358, 1996 WL 528950, at *6 (6th Cir. Sept. 17, 1996)), "the moving party under the rule must show that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding." *Id.*

The panel expressed that Petitioner did not prove a deliberate act, deploying the interpretation of the Sixth Circuit. The panel opinion does not acknowledge that even an accidental, inadvertent or negligent omission or misrepresentation by USFBOT or its counsel would have qualified as misconduct under

Rule 60(b)(3). *See United States v. One (1) Douglas A–26B Aircraft,* 662 F.2d 1372, 1375 n. 6 (11th Cir.1981), holding that fraud, misconduct, or misrepresentation under Rule 60(b)(3) may encompass conduct that is not purposeful. Furthermore, Rule 60(b)(3) "does not require that the information withheld be of such nature as to alter the result in the case." *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir.1978) (citing *Seaboldt v. Pennsylvania RR. Co.,* 290 F.2d 296, 299–300 (3d Cir.1961)).

E. The panel overlooked that Rule 60(d)(3) actions have set aside judgments for fraud upon the court to prevent a grave miscarriage of justice; the fabrication of evidence by a party where an attorney is implicated; or perjury where an attorney is involved.

Rule 60(b) states that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud upon the court."[8] Notably, "an independent action should be available only to prevent a grave miscarriage of justice." *See United States v. Beggerly,* 524 U.S. 38, 47, 118 S. Ct. 1862, 1868, 141 L.Ed.2d 32 (1998). In *Zurich North America v. Matrix Serv., Inc.,* 426 F.3d 1281 (10th Cir. 2005), the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. *Id.* Fabrication includes false, falsified, forged, or tainted evidence. Additionally, perjury in which an attorney participates may be considered fraud on the court sufficient to relieve a party from a prior judgment, cf. *Hazel Atlas Co. v. Hartford Empire Co.,* 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed. 1250 (1944).

CONCLUSION

There is substantial evidence within the record and new evidence submitted to make a strong showing of bad faith and grounds for other relief requested, particularly an evidentiary hearing. The district court's order denying Petitioner's motion for relief from judgment and independent action should be vacated.

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[8] This clause is commonly referred to as the "savings clause." See, e.g., *In Re Lawrence,* 3 293 F.3d 615, 622 n.5 (2d Cir. 2002).

Respectfully, this Court should grant this petition for a writ of certiorari.

Submitted April 20, 2021

/s/ Angela DeBose
Angela DeBose, Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **20th** day of April, 2021, the above and foregoing was sent via mail for filing with the Clerk, which will email Richard McCrea, 101 E. Kennedy Blvd, Suite 1900, Tampa, FL 33602 at (mccrear@gtlaw.com) and was sent via the U.S. mails.

Respectfully submitted,

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