No. 20-1538

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

REPLY BRIEF OF PETITIONER

ANGELA W. DEBOSE
Petitioner Pro Se
1107 West Kirby Street
Tampa, FL 33604
(813) 230-3023
awdebose@aol.com

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND RULES **PAGE**

REPLY BRIEF OF PETITIONER

The sole question before this Court is whether a Rule 60(d) motion is a continuation or re-litigation of the prior case and foreclosed under the doctrine of *res judicata*. The Eleventh Circuit incorrectly concluded that the Rule 60(d) motion was an improper attempt to relitigate issues that were presented to the district court. 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). The district court erroneously considered Petitioner's action as a continuation or re-litigation of the prior case, in holding the action was foreclosed under the doctrine of *res judicata*. However, the action is neither precluded by federal nor Florida law. 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). 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 action was not a continuation, but arguably if it was, it was a continuation of the Complaint and Independent Action[1] that was improperly dismissed without prejudice and ordered to be refiled. Because the refiled action was erroneously treated as a continuation of the prior case, the district court improperly converted the Respondent's 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment or Rule 12(c) motion for judgment on the pleadings, without notice to Ms. DeBose of its conversion. Although the defense may be resolved through a motion for summary judgment, a court may only grant a Rule 56 or 12(c) motion "when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Horsley v. Rivera,* 292 F.3d 695. 700 (11th Cir. 2002). The district court accepted material beyond the pleadings and failed to give Ms. DeBose notice of its conversion. The notice requirement is strictly

[1] Filed in district court, Case No. 8:19-cv-01132-JSM-AEP.

applied. *Carter v. Stanton,* 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972). The district court further erred in not according Ms. DeBose an evidentiary hearing and discovery. *Jones v. City of Columbus,* 120 F.3d 248, 253 (11th Cir. 1997). The fact is, considering Respondent's admitted destruction of Petitioner's evidence, the Eleventh Circuit misapprehended or overlooked that Ms. DeBose never had a full or fair opportunity to meaningfully litigate her case due to the serious misconduct of Respondent's counsels.

I. THE DOCTRINE OF RES JUDICATA WAS UNMISTAKABLY APPLIED IN ERROR TO BAR PETITIONER'S INDEPENDENT ACTION

Contrary to the order and opinion itself, Respondent states that the Eleventh Circuit did not affirm the District Court on the doctrine of *res judicata.* This is simply a misstatement of the record. The district court went beyond taking judicial notice of the prior court's orders; it considered the veracity of the Respondent's allegations and accepted the truth of facts that were subject to reasonable dispute. In order for a fact to be judicially noticed under Rule 201(b), indisputability is a prerequisite. 21 C. Wright K. Graham, *Federal Practice and Procedure: Evidence* § 5104 at 485 (1977 Supp. 1994). It is not permissible for a court to take judicial notice of a fact merely because it has been found to be true in some other action. *Id.* Moreover, to deprive a party of the right to go to the jury with her evidence where the fact was not indisputable would violate the constitutional guarantee of trial by jury. *Accord United States v. Aluminum Co. of America,* 148 F.2d 416, 446 (2d Cir. 1945) (L. Hand, J.). Therefore, "[a] court may take judicial notice of (an)other court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." *United States v. Jones,* 29 F.3d 1549, 1553 (11th Cir. 1994) (quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.,* 969 F.2d 1384, 1388 (2d Cir. 1992)). A "court may ... `not [take judicial notice] for the truth of the matters asserted in the other litigation...'" *Liberty Mut. Ins. Co.,* at 1388 (citation omitted).

The Eleventh Circuit overlooked the unresolved factual disputes entirely, violating the established precedent in *Herron v. Beck,* 693 F.2d 125 (11th Cir. 1982) by converting USFBOT's opposition motion to a motion for summary judgment, without

notice to DeBose. *Id.* at 127-128. The law provides that a court should be particularly careful to ensure proper notice to a *pro se* litigant. *Davis v. Zahradnick,* 600 F.2d 458, 460 (4th Cir. 1979) (holding the . . . notice must be sufficiently clear to be understood by a *pro se* litigant and calculated to apprise h[er] of what is required under Rule 56").

Thus, despite the Respondent's argument, it was error to apply *res judicata* as a bar to Ms. DeBose's Rule 60(d) Complaint and Independent Action. The "doctrine of res judicata, or claim preclusion, bars the filing of claims which were raised or could have been raised in an earlier proceeding." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990). Rule 60 plainly allows DeBose to attack or challenge prior judgments, without a res judicata effect. "The Supreme Court has made clear that such independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1359 (11th Cir. 2014) (quoting *United States v. Beggerly*, 524 U.S. 38, 46 (1998)) (internal quotations and citation omitted). The Eleventh Circuit presumed the case was heavily litigated because of interlocutory appeals Ms. DeBose filed to preserve objection to certain orders. The interlocutory appeals were not reviewed on the merits because of jurisdictional challenges, given that the District Court declined Rule 54(b) certification to allow the appeals to move forward.

The fact is that no prior court of competent jurisdiction ruled on the claims in Petitioner's Complaint and Independent Action. The Eleventh Circuit affirmed the District Court's conclusion that there were no extraordinary circumstances that warranted relief under Rule 60(d). The usual rule of the Extraordinary Circumstances doctrine is that a movant for Rule 60(b)(6) relief must show extraordinary circumstances for that relief. *Klapprott v. United States*, 335 U.S. 601 (1949); *Ackermann v. United States*, 340 U.S. 193 (1950); see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988) (Rule 60(b)(6) "should only be applied in 'extraordinary circumstances'"). On the other hand, Rule 60(d) is an equitable one; therefore, the proponent must show a meritorious claim or defense and that the judgment should not, in equity and good conscious, be enforced. *Travelers*

Indem. Co. v. Gore, 761 F.2d 1549, 1151 (11th Cir. 1985); *United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir. 2002). While Rule 60(d) provides extraordinary relief, it does not expressly require extraordinary circumstances. See *Fox v. Brewer*, 620 F.2d 177, 180 (8th Cir. 1980) (noting that Rule 60(d) "provides for extraordinary relief on a showing of exceptional circumstances"). If "extraordinary" and "exceptional" circumstances are interchangeable, extraordinary circumstances can be found to require a court to reopen a judgment, *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014); recall a mandate, *Calderon v. Thompson*, 523 U.S. 538, 549-5059 (1998); or grant a new trial, *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1288 (11th Cir. 2000). Additionally, the Eleventh Circuit has found extraordinary circumstances to be present when, after entry of judgment, "events not contemplated by the moving party render enforcement of the judgment inequitable." See *Reynolds v. Mclnnes*, 338 F.3d 1221 (11th Cir. 2003); *Citibank, N.A. v. Citibanc Grp., Inc.*, 724 F.2d 1540, 1544 (11th Cir. 1984) (requiring "false, material statement by the plaintiff of a fact that would have constituted grounds ... "). See also *United States v. Beggerly*, 524 U.S. 38, 46 (1998)(Relief is required in order to prevent a grave miscarriage of justice). A "Herodian" fraud litigation scheme of destruction, fabrication, fraudulent concealment, and retaliatory action to deprive a plaintiff of her personnel records and employment documents as evidence for trial, qualifies. Ignorance, negligence, and even gross negligence cannot excuse such misconduct—especially when notice and the duty to preserve had already been triggered.

Respondent argues two leanings concerning finality, in insisting that the district and appellate courts were correct to pursue finality, on the basis of the sanctions' orders. Impliedly, there is the inference that the sanctions order barred Petitioner's Complaint and Independent Action. Notably, this is in conflict with established federal authority. The federal test for finality is whether the order "ends the litigation on the merits." *Cunningham v. Hamilton County*, Ohio, 527 U.S. 198, 203-04 (1999). Sanctions are intended to prevent unfair prejudice to litigants and to ensure the integrity of the judicial process. *See Gratton v. Great American Communications*, 178 F.3d 1373, 1374 (11th Cir. 1999). Sanction orders are not final and not immediately appealable prior to the entry of final judgment ending the litigation in the trial court. *See Mahone v. Ray*, 326 F.3d 1176, 1180-81 (11th Cir. 2003) (citing *Cooter Gell v.*

Hartmarx Corp., 496 U.S. 384 (1990); *Baker v. Alderman*, 158 F.3d 516, 523 (11th Cir. 1998). The other inference is that finality should trump fairness and thus trumps justice.

> **Were we writing on a blank slate, we might argue against the majority's elevation of finality over fairness, as did our dissenting brothers in the 8th and 11th Circuits in indistinguishable cases, arguing that finality must not trump justice where a court must correct a[n] ... enhancement that all agree was imposed in error. *Rozier v. United States*, 701 F.3d 681, 689–91 (11th Cir.2012) (Hill, J., dissenting); *Meirovitz v. United States*, 688 F.3d 369, 373 (8th Cir.2012) (Bright, J., dissenting) ("without finality there can be no justice ... [i]t is equally true that, without justice, finality is nothing more than a bureaucratic achievement.") petition for cert. filed, (U.S. Nov. 20, 2012) (No. 12–7461).**

This case represents text-book manifest injustice. [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). See also *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1942) (Frankfurter, J.) ("public conscience must be satisfied that fairness dominates the administration of justice").

II. THE CONFLICT AMONG THE CIRCUITS HAS UNNECESSARILY CONFUSED AND IMPROPERLY CONFLATED THE ULTIMATE BURDEN OF PROOF WITH THE PLEADING STANDARD.

Some federal courts have "unnecessarily confused" independent actions for fraud on the court and the doctrine of fraud on the court. Moore, supra, at § 60.81[1][b][v]. Although fraud on the court can be raised in a Rule 60(b)(3) motion, in an independent action, or sua sponte by a court, "it is a separate concept from the idea of an independent action in equity for relief from a judgment." Moore, supra, at §

60.81[1][b][v]. This confusion also appears to be a source of the inconsistencies that currently exist.

The Eleventh Circuit affirmed the district court "improperly conflating the ultimate burden of proof with the pleading standard." There is authority suggesting that a Rule 60(d)(1) independent action may not proceed where a Rule 60(b)(3) motion is available—i.e., the two are mutually exclusive. See *United States v. Beggerly*, 524 U.S. 38, 46 (1998); *Turner v. Pleasant*, 663 F.3d 770, 778 (5th Cir. 2011). The Eleventh Circuit did not address the issue of how the district court should have analyzed Respondent's Rule 12(b)(6) motion under the circumstances.

Because Rule 60(b) allows relief more broad than an independent action for fraud upon the court, and determinations based on Rule 60(b) are reviewed only for abuse of discretion, see *Pridgen v. Shannon*, 380 F.3d 721, 725 (3d Cir. 2004), an independent action for fraud upon the court should be reviewed at least as deferentially. Fundamentally, this argument confuses standard of review with burden of proof. We are quite capable of taking full account of the narrow criteria for relief present in an independent action for fraud upon the court without altering the Federal Rules of Civil Procedure. Under the normal *de novo* review that applies to a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Eleventh Circuit should have determined whether Ms. DeBose alleged facts which, if true, provided a basis for relief under the very demanding legal standard for fraud upon the court. In such review, the court extends to the Appellant the full reach of case law that prescribe required elements of "fraud upon the court." The doctrine of *res judicata* would not have rendered Ms. DeBose's Independent Action implausible under the, plausibility standard. The Eleventh Circuit, in considering whether or not Ms. DeBose had an opportunity to fully and fairly litigate her case, did not take into account that Ms. DeBose was a blameless party who was not required to predict Respondent's fraud. Had a proper review been conducted of these issues, it would not have led to the same result reached by the district court. The Eleventh Circuit's Judgment cannot be affirmed.

CONCLUSION

The Court should decline to entertain the Respondent's suggestion pulled from thin air that Petitioner is seeking an advisory opinion or that the issues are not sufficiently compelling. The Court should vacate and remand for the courts below to apply the proper standard of review on the merits and the proper burden of proof.

Submitted June **15th**, 2021

Respectfully,

Angela DeBose

Angela DeBose, Plaintiff
1107 W. Kirby St.,
Tampa, FL 33604
(813) 932-6959
awdebose@aol.com