

**In The
Supreme Court of the United States**

JOAN CAROL LIPIN,

Petitioner,

v.

WISEHART SPRINGS INN, INC., ARTHUR D. WISEHART,
IN HIS INDIVIDUAL CAPACITY, AND IN HIS CAPACITY AS
PRESIDENT AND “ALTER-EGO” OF WISEHART SPRINGS INN, INC.,
MARK APELMAN, DEBBIE GRIFFITH,
IN HER OFFICIAL CAPACITY AS DELTA COUNTY ASSESSOR,
REBECCA W. GEYER, ELLEN E. WISEHART,
RICHARD HUNTER KREYCIK, AND ERIN M. JAMESON,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Lipin I* (*Lipin v. Wisehart*, 760 F. App'x 626 (10th Cir. 2019) (per curiam)), petitioner claimed ownership of real property identified as 39508 Pitkin Road and 39540 Pitkin Road, located in Paonia, Delta County, Colorado (“the Property”). The district court determined petitioner was not the owner of the Property, which was affirmed by the Tenth Circuit Court of Appeals.

Dissatisfied with this outcome, petitioner initiated the present action, the underlying purpose of which was to again contest ownership of the Property. In a thinly disguised effort at a legal do-over, petitioner renewed her claim of ownership by asserting different legal claims and adding new parties. The district court and the Tenth Circuit Court of Appeals rejected petitioner's effort.

The question presented is:

Whether petitioner substantiated by clear and convincing evidence that respondents perpetrated a fraud on the court which vitiates the Tenth Circuit Court of Appeals' decision to uphold the lower court's order of dismissal which, based on collateral estoppel, precluded petitioner's repetitive attempt to claim ownership of the Property which had previously been decided against her in *Lipin I*.

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INTRODUCTION

Petitioner, Joan Carol Lipin, at both the trial court and appellate levels, previously litigated and lost her claim to ownership of the Property. Petitioner, following her well-worn litigation strategy even though sanctions and filing restrictions have repeatedly been imposed against her based on her abusive tactics¹, attempted to revive the ownership issue by adding new defendants (including respondent, Debbie Griffith, in her official capacity as Delta County Assessor (“Griffith”)) and reclassifying her claims.

However, the underlying predicate for petitioner’s claims was the same as which underlay her previous claims that had been decided against her – who owns the Property. The district court’s conclusion that petitioner’s claims were barred by collateral estoppel (aka issue preclusion) was well supported both factually and legally, as was the Tenth Circuit Court of Appeals’ decision to affirm dismissal and reject petitioner’s argument that the dismissal had been wrongly decided due to respondents perpetrating a fraud on the court.

Petitioner did not present compelling reasons which warrant this Court’s review. The petition should be denied.

STATEMENT OF THE CASE

This case was an improper attempt to relitigate issues which had been

¹ See January 3, 2020 Order on Motions to Dismiss, Pet. App. 21a-41a.

decided in prior federal and state cases involving petitioner and some of the same respondents/defendants while introducing, as additional defendants: Mark Apelman, the attorney who represented several of the defendants in two of the prior cases; Rebecca Geyer, an expert witness in one of the prior cases; and, Debbie Griffith who, as the Delta County Assessor, maintains certain official records in accordance with Colorado Revised Statutes §§ 39-5-101 and 39-5-102, who was not involved in any of the prior cases.

At issue in the present matter, as was at issue in each of the prior cases, was the ownership of real property located in Delta County, Colorado. In each instance petitioner claimed to own the Property, whereas the opposition parties claimed that the Property was owned by the Dorothy R. Wisehart Trust (“the Trust”).

In each of the prior cases, *Joan C. Lipin v. Arthur Dodson Wisehart, et al.*, 2018 WL 7141424 (D. Colo.); *Joan C. Lipin v. Arthur Dodson Wisehart, et al.*, Case Nos. 18-1060 and 18-1176 (10th Cir.); and *Arthur Dodson Wisehart v. Arthur McKee Wisehart, et al.*, Delta County District Court, Colorado, Case No. 2016-cv-030032, in contradiction to petitioner’s allegations it was determined that the Property was owned by the Trust.²

² The same ownership issues regarding the Property were also raised by petitioner in *Arthur McKee Wisehart v. Arthur Dodson Wisehart, et al.*, D. Colo., Case No. 18-cv-0021-MSK-NYW.

Because the issue regarding ownership of the Property was the factual underpinning for all of petitioner's claims in the present matter, and this issue had been litigated by petitioner several times in several courts and had been decided against petitioner in every instance – in particular *Lipin I*, petitioner's claims in the present matter were precluded under the doctrine of collateral estoppel.

The district court's dismissal of petitioner's claims was legally and factually well supported. Petitioner failed to substantiate that the district court's decision was incorrectly rendered as a result of a fraud on the court perpetrated by respondents or that it was error for the Tenth Circuit Court of Appeals to affirm dismissal. Petitioner's petition seeking rehearing en banc was denied by the Tenth Circuit as no member of the panel and no judge in regular active service on the court requested that the court be polled.

REASONS FOR DENYING THE PETITION

I. THERE ARE NO COMPELLING REASONS WARRANTING THIS COURT'S REVIEW.

Petitioner did not present a compelling reason which warrants the Court reviewing petitioner's claims. The petition should be denied.

A. The Character Of The Reasons Identified In U.S. Sup. Ct. Rule 10 For Granting Certiorari Are Not Demonstrated.

Petitioner has not demonstrated that the character of the reasons for granting certiorari enumerated under U.S. Sup. Ct. Rule 10 are implicated

here.

Petitioner did not identify any decisions of other United States court of appeals on the same important matter which is in conflict with the Tenth Circuit Court of Appeals' decision. There is not a conflict among the circuits as to what generally constitutes a fraud on the court or the elements of collateral estoppel.

The Tenth Circuit Court of Appeals did not decide an important federal question in a way that conflicts with a decision by a state court of last resort. While petitioner unsuccessfully litigated ownership of the Property in Colorado state court in addition to federal court, neither the present matter nor *Lipin I* involved a Colorado supreme court decision, which is the court of last resort in Colorado. *Colorado Constitution, Art. VI, Section 1; C.R.S. § 13-1-111(1)*.

The Tenth Circuit Court of Appeals' January 15, 2021 Order and Judgment did not so far depart from the accepted and usual course of judicial proceedings or sanction such a departure by a lower court as to call for an exercise of this Court's supervisory power. The determination of ownership of the Property was a factual determination made by the district court in *Lipin I*. The Tenth Circuit Court of Appeals in *Lipin I*, and the district court and Tenth Circuit Court of Appeals in the present matter, applied well-settled law to the specific facts of the case. No clear and convincing showing has

been made that the factual decisions were not supported by the record, that the district court misapplied the applicable law to those facts, or that the Tenth Circuit Court of Appeals erred by upholding the lower court's dismissal.

The Tenth Circuit Court of Appeals did not decide an important question of federal law that has not been, but should be, settled by this Court. What does or does not comprise a fraud on the court or collateral estoppel is not unsettled law. There is not a disparity among the various circuits as to the meaning or application of this settled authority. The present matter does not raise a newly undecided aspect on this issue, rather, the present matter simply involves petitioner's disgruntlement with factual determinations having been decided against her which petitioner repeatedly attempts to relitigate over and over again.

Lastly, the Tenth Circuit Court of Appeals did not decide an important federal question in a way that conflicts with relevant decisions of this Court. Resolution of ownership of the Property and the fact that petitioner had previously litigated and lost that dispute does not entail an important federal question, much less a decision that conflicts with other relevant decisions of this Court.

II. THE DECISIONS BELOW WERE CORRECT.

Review is unwarranted because the district court's dismissal of the case

and the Tenth Circuit's carefully reasoned decision affirming dismissal are consistent with the doctrines of fraud on the court and issue preclusion.

A. Standard Of Review.

Appellate courts review disposition of an action for a fraud upon the court under the abuse-of-discretion standard. *Switzer v. Coan*, 261 F.3d 985, 988 (10th Cir. 2001). To prevail on her argument that the decisions below should be overturned based on a fraud upon the court, petitioner must substantiate such fraud by clear and convincing evidence and all doubts must be resolved in favor of the finality of the judgment. *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985).

B. The Underlying Claim In The Present Lawsuit Was A Dispute About Ownership Of The Property.

As the Delta County Assessor, Debbie Griffith maintains certain official records in accordance with Colorado statutory requirements (C.R.S. §§ 39-5-101 and 39-5-102). Griffith is statutorily obligated to list all taxable real property located within Delta County, Colorado and ascertain ownership from the records of the county clerk and recorder. *Id.*

Petitioner asserted a variety of claims, including violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 42 U.S.C. § 1983 civil rights, and state law fraud and deceit, all of which were intended to

effectively overturn the results obtained in prior litigation between petitioner and some of the other respondents in this action (*Lipin I*).

With the new lawsuit, petitioner's real purpose had not changed – she still sought the restoration of ownership of the Property to plaintiff as the legal title owner, in fee-simple absolute, and the ejectment of certain of the respondents who are now in possession of the Property. (Tenth Circuit Court of Appeals' January 15, 2021 Order and Judgment, Background, Pet. App. 6a-8a.)

And, while petitioner newly alleged the existence of a vast criminal conspiracy somehow influencing the result obtained in prior litigation between petitioner and some of the other respondents, the prior litigation -- which litigation afforded petitioner a full and fair opportunity to litigate the issues decided therein -- clearly concluded that petitioner did not own the real property in question, which was then and still is owned by the Dorothy R. Wisheart Trust. (Tenth Circuit Court of Appeals' January 15, 2021 Order and Judgment, Background, Pet. App. 6a-8a; also see "*Lipin I*")

C. The Amended Complaint Was Not A Fed. R. Civ. P. 60(d)(1) Action.

A Fed. R. Civ. P. 60(d)(1) motion is an independent action that has a narrow avenue and "should be available only to prevent a grave miscarriage of justice." *United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir. 2002)

(quoting *United States v. Beggerly*, 524 U.S. 38, 47 141 L. Ed. 2d 32, 118 S. Ct. 1862 (1998)).

Petitioner’s argument (Questions Presented No. III, p.i) that this matter involved a Fed. R. Civ. P. 60(d)(1) action is simply a figment of petitioner’s imagination. A plain reading of the amended complaint evidenced that petitioner did not allege the action was brought to relieve petitioner from the judgment in *Lipin I*. (See January 15, 2021 Order and Judgment: “But Lipin’s amended complaint did not ask the district court to set aside the judgment that we affirmed in *Lipin I*; instead, she recast substantially all of the substantive allegations made in the first action and added new defendants.” Pet. App. 11a.)

Nonetheless, regardless of whether petitioner’s case could be properly styled as a Rule 60(d)(1) action, no grave miscarriage of justice occurred here because the determination of ownership of the Property was not the result of a fraud on the court.

D. A Fraud On The Court Did Not Occur.

Petitioner did not allege in the amended complaint that she was seeking Fed. R. Civ. P. 60(d)(3) relief based on a fraud on the court either. To the extent the amended complaint could be construed as seeking such relief, the fraud alleged did not rise to the level of a fraud on the court and so

dismissal of petitioner's claims was not error. (January 15, 2021 Order and Judgment, Pet. App. 11a-13a)

Fraud on the court "is not fraud between the parties or fraudulent documents, false statements or perjury." *Bulloch*, 763 F.2d at 1118.

"[N]ondisclosure of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." *Id.* Fraud on the court "requires a showing that one has acted with an intent to deceive or defraud the court[,] . . . a showing of conscious wrongdoing . . . a deliberate scheme to defraud" *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995).

"It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function - - thus where the impartial functions of the court have been directly corrupted." *Bulloch*, 763 F.2d at 1118 (relying on *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S. Ct. 997 (1944)).

Fraud on the court is directed to the judicial machinery itself. *Buck*, 281 F.3d at 1342.

Petitioner set forth extravagant statements of fraud on the court which are not borne out by the record. (See Part II.F. below.)

E. Petitioner's Claims Were Barred By Issue Preclusion.

Petitioner did not dispute the district court's conclusion that each of her

claims depended on a finding that she has an ownership interest in the Property. (January 15, 2021 Order and Judgment, Pet. App. 9a.) In her petition for a writ of certiorari, petitioner still does not dispute that conclusion.

Because ownership of the Property was the factual underpinning for all of petitioner's claims in the present matter, and that issue had been litigated by petitioner several times in several courts and had been decided against petitioner in each instance, particularly in *Lipin I*, petitioner's claims in the present matter likewise failed. In the case at hand, issue preclusion was based on the district court's summary judgment ruling in *Lipin I*, which decision was affirmed on appeal to the Tenth Circuit Court of Appeals.

"Collateral estoppel, or issue preclusion, is designed to prevent needless relitigation and bring about some finality to litigation." *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009). "Collateral estoppel bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." *Id.*, *Melnor, Inc. v. Corey (In re Corey)*, 583 F.3d 1249, 1251 (10th Cir. 2009).

Although Griffith was not a party to the prior action (*Lipin I*), "if a litigant has had an opportunity to fully and fairly litigate an issue and lost, then third parties unrelated to the original action can bar the litigant from

relitigating that same issue in subsequent suit.” *Austin v. Downs, Rachlin & Martin*, 270 Fed. Appx. 52, 54 (2d Cir. 2008) (unpublished); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (“The doctrine of non-mutual defensive collateral estoppel ‘precludes a plaintiff from relitigating identical issues by merely switching adversaries.’”)

Petitioner’s amended complaint made clear that each of her claims relied on her ownership of the Property. Although petitioner tried to disguise the fact that she was attempting to relitigate identical issues previously ruled upon by interjecting RICO, civil rights and common law fraud allegations, and by including new defendants, those tactics could not overcome the fact that the determinative issue remained the same as was litigated and resolved against petitioner in her previous case.

Petitioner argued that issue preclusion should not apply in this case because the result in the prior litigation was procured by fraud and deceit. This argument was only supported by petitioner’s fanciful allegations of misconduct during the prior litigation. No fraud or deceit among the defendants was found to have existed in the prior litigation, including on appeal, much less a fraud on the court, and thus petitioner’s arguments provide no basis for blocking application of collateral estoppel and dismissal of this action.

Issue preclusion requires that (1) the issue previously decided is identical to the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Murdock v. Ute Indian Tribe of Uintah & Ouray Resv.*, 975 F.2d 683, 687 (10th Cir. 1992). The district court's and the Tenth Circuit Court of Appeals' determinations that Griffith satisfied all four elements of collateral estoppel was well supported.

1. The Issue Previously Decided Is Identical To The One Raised In The Present Action.

The issue previously decided -- ownership of the Property -- is identical with the foundational issue presented in this action. As stated above, the district court and Tenth Circuit Court of Appeals had already determined and held that the Trust and the Appointment of Co-Trustees were valid instruments, and that the Property is owned by the Dorothy R. Wisehart Trust. Petitioner has never owned the Property, does not now own the Property, and could not relitigate whether she does.

2. The Prior Action Had Been Finally Adjudicated On The Merits.

As to the second element, "[a]djudication on the merits requires that the adjudication be necessary to the judgment." *Murdock*, 975 F.2d at 687.

“[A] judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded.”

Block v. Commissioners, 99 U.S. 686, 693 (1878).

Summary judgment entered in the prior case decided issues of both fact and law and was an adjudication necessary to the judgment. This final judgment was subsequently affirmed on appeal by the Tenth Circuit Court of Appeals. (See *Lipin I*.) The prior action was fully adjudicated on the merits and a final judgment was entered by the district court which was affirmed on appeal by the Tenth Circuit.

3. The Party Against Whom The Doctrine Is Invoked Was A Party To The Prior Adjudication.

There is no question that petitioner, against whom the doctrine of issue preclusion was invoked, was a party (plaintiff) to the prior litigation and so the third element was satisfied.

4. The Party Against Whom The Doctrine Is Raised Had A Full And Fair Opportunity To Litigate The Issue In The Prior Action.

As to “whether a party had a full and fair opportunity to litigate an issue . . . [we] focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.” *Murdock*, 975 F.2d at 689.

Petitioner did not identify any significant procedural limitations in the prior proceeding. Petitioner's disagreement with the outcome does not denote a significant procedural limitation in the prior district court action.

Petitioner had the same incentive to fully litigate the ownership of the Property in the prior action as she did in this action since ownership was the key issue in both lawsuits.

Nor was petitioner's ability to effectively litigate the prior action limited by the nature of the opposing parties and her relationship to them. If anything, the personal nature and familial relationship of some of the other parties appears to have incentivized petitioner to fully litigate the matter. Consequently, petitioner had a full and fair opportunity to litigate the ownership issue in the prior action, both at the trial court level as well as at the appellate level, and so the fourth element of issue preclusion was satisfied as well.

When, as here, all elements of collateral estopped were satisfied, dismissal of the action pursuant to a Fed. R. Civ. P. 12(b)(6) motion to dismiss, and upholding that dismissal on appeal, was appropriate. *Jarad v. Std. Parking Local Union*, 455, 753 Fed. Appx. 558 (10th Cir. 2018); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

F. Petitioner's Specific Allegations Of Fraud On The Court Against Griffith Are Unsupported.

Petitioner's grievance with Griffith specifically is illusory. There is no factual or legal basis for petitioner's claim that Griffith perpetrated a fraud on the court.

1. The Allegations Are Factually Unsupported.

In her petition, petitioner argues that respondents in *Lipin I* and *Lipin II* (*Joan Carol Lipin v. Wisheart Springs Inn, Inc., et al.*, USCA 10 No. 20-1007) concealed from the district court that the assessor's office showed petitioner as the sole owner of the Property. (Pet. 13-14.) Griffith was not a party or witness in *Lipin I* and therefore could not have concealed evidence or committed a fraud on the court in that case. With Griffith having no involvement in *Lipin I*, and *Lipin II* being decided solely on the basis of the outcome of *Lipin I*, support for petitioner's argument that Griffith concealed evidence in *Lipin II* is nonexistent.

But, even assuming this argument is true, it still does not denote a fraud on the court, which is necessary to sustain a Fed. R. Civ. P. 60(d)(3) motion. Rather, petitioner's argument would simply denote fraud between the respondents, false statements, or perjury by respondents, none of which is a fraud on the court, i.e., fraud which is directed to the judicial machinery itself. (Tenth Circuit Court of Appeals' January 15, 2021 Order and

Judgment, Pet. App. 12a); *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985).

As to the appointment of Co-Trustees of the Trust, petitioner argues that Griffith relied on fabricated intent conjured up by respondents Geyer and Apelman as to the appointment of trustees and concealed a pertinent companion letter drafted by a New York attorney (Mertens) in reference to that appointment. (Pet. 15.) Petitioner does not articulate how Griffith's reliance on fabricated intent conjured up by other parties is a perpetration of fraud by Griffith. Again, petitioner has at worst demonstrated fraud between the respondents, not a fraud on the court.

Next, petitioner argues that certified deeds of conveyance to petitioner were lawfully recorded in 2015, and that record cards of ownership were maintained by Griffith in the Assessor's Office prior to the deliberate spoliation of said cards by Griffith and respondent Apelman. (Pet. 16.) The last mention of Griffith in the petition further elaborates on petitioner's spoliation argument. (Pet. 23.)

By her own argument, petitioner had public records (lawfully recorded certified deeds of conveyance in 2015) that petitioner could have provided to the court for support of her position, regardless of whether ownership cards in the Assessor's Office were spoiled. Indeed, it is the lawfully recorded deeds of conveyance that determine ownership, not assessor's notations on record

cards. *Lagae v. Lackner*, 996 P.2d 1281 (Colo. 2000). Again, petitioner's argument does not evidence a fraud on the court by Griffith.

Petitioner also made a conclusory statement that she asserted claims against Griffith under 42 U.S.C. § 1983. (Pet. 23.) This statement does not touch upon the substance of petitioner's certiorari argument nor the decisions of the district court and the Tenth Circuit Court of Appeals in this matter.

2. The Allegations Are Legally Unsupported.

In addition to not having any factual support for her position, petitioner likewise did not present legal support either. The principal cases relied on by petitioner are irrelevant and unhelpful. (Pet. 17.)

In *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (Apr. 22, 2021), the issue decided was whether an equitable monetary award based on a finding of deceptive payday lending practices in violation of the Federal Trade Commission Act was authorized. The specific question resolved was “whether Congress, by enacting § 13(b) [of the Act] and using the words ‘permanent injunction,’ granted the Commission authority to obtain monetary relief directly from courts and effectively bypass the requirements of the administrative process.” *Id.* at 1343.

Unlike *AMG Capital Mgmt., LLC*, the present matter does not involve the Federal Trade Commission Act specifically, much less the interplay between administrative and judicial processes generally. *AMG Capital*

Mgmt., LLC did not involve at all claims for fraud on the court, or the distinction between fraud on the court and fraudulent conduct among various parties. *AMG Capital Mgmt., LLC* provides no guidance for the issues at hand and does not support granting certiorari.

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), also relied on by petitioner, is similarly irrelevant and unhelpful. *McGirt* involved determination of a state's jurisdiction to prosecute Indians for crimes committed on an Indian reservation of which the suspect was a member. *McGirt* likewise did not involve claims for fraud on the court or fraudulent conduct among parties and the judicial relief afforded for such claims.

Petitioner also relied on *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). *Jennings* pertains to application of immigration law, detention of aliens and bond hearings, and analysis of the constitutional-avoidance canon. Once again, petitioner relied on legal authority that has no relevance or guidance to the claims asserted and dismissal of those claims.

CONCLUSION

Petitioner failed her burden to substantiate by clear and convincing evidence that the Tenth Circuit Court of Appeals erred in affirming the district court's dismissal of the case based on collateral estoppel. A party cannot simply keep relitigating the same matter over and over again with the goal that they will at some point find a court somewhere to provide the

hoped-for relief. Legal finality occurred with the conclusion of *Lipin I* and petitioner was not legally entitled to a do-over in the present matter.

At worst, petitioner only demonstrated erroneous factual findings or misapplication of the law as to the ownership of the Property in *Lipin I*. The misconduct alleged against respondents, particularly Griffith, does not denote a fraud on the court. No valid reason exists which warrants the Court's review. The petition should be denied.

Respectfully submitted,

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JULY 30, 2021