No. _____

In the
Supreme Court of the United States

ANNA BARAN,
Petitioner,
v.

ASRC FEDERAL MISSION SOLUTIONS, ROSE WELLS, FRANCES MCKENNA, SUE GOLDBERG, AND ABC BUSINESS ENTITIES 1-100,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT L. SIRIANNI, JR.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(407) 388-1900
robertsirianni@brownstonelaw.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals Erred in Affirming the District Court's Order Dismissing Ms. Baran's Defamation Claim on the Grounds that it was Time-Barred.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

Anna Baran, Petitioner.

ASRC Federal Mission Solutions, Rose Wells, Frances McKenna, Sue Goldberg, and ABC Business Entities 1-100, Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Anna Baran has no parent corporations and no publicly held company that owns 10% or more of any entity.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN VICINAGE Civil No. 17-7425(RMB/JS) ANNA BARAN v. ASRC FEDERAL MISSION SOLUTIONS, ROSE WELLS, FRANCES McKENNA, SUE GOLDBERG, and ABC BUSINESS ENTITIES 1-100. Order dated 6/20/2018 Petitioner's Motion to Remand DENIED. *Baran v. ASRC Fed. Mission Sols.*, 2018 U.S. Dist. LEXIS 103046 (D.N.J. June 20, 2018).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY Civil No. 17-7425 (RMB/JS) ANNA BARAN v. ASRC FEDERAL, MISSION SOLUTIONS, ROSE WELLS, FRANCIS MCKENNA, and SUSAN GOLDBERG. Judgment dated 7/9/2019 Defendant's Renewed Motion for Judgment as a Matter of Law GRANTED. *Baran v. ASRC Fed.*, 401 F. Supp. 3d 471 (D.N.J. July 9, 2019).

THIRD CIRCUIT COURT OF APPEALS Case No. 19-2807 ANNA BARAN v. ASRC/MSE and ROSE WELLS Judgment dated 5/20/2020 District Court's Order AFFIRMED. *Baran v. ASRC/MSE*, 2020 U.S. App. LEXIS 16092 (3d Cir. N.J. May 20, 2020).

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review the United States District Court for the District of New Jersey's decision vacating the jury's $3.5 Million verdict in her favor and dismissing her defamation claim, and the Third Circuit Court of Appeal's, decision affirming the District Court's decision.

OPINIONS BELOW

The May 20, 2020 decision from the Third Circuit Court of Appeals can be found at *Baran v. ASRC/MSE*, No. 19-2807, 2020 U.S. App. LEXIS 16092 (3d Cir. May 20, 2020) and is reproduced in the Appendix at Pet. App. 1-9.

The July 9, 2019 decision from the United States District Court for the District of New Jersey can be found at *Baran v. ASRC Fed.*, 401 F. Supp. 3d 471 (D.N.J. 2019) and is reproduced in the Appendix at Pet. App. 10-42.

The June 20, 2018 decision from the United States District Court for the District of New Jersey, Camden Vicinage can be found at *Baran v. ASRC Fed. Mission Sols.,* No. 17-7425(RMB/JS), 2018 U.S. Dist. LEXIS 103046 (D.N.J. June 20, 2018). This decision is reproduced in the Appendix at Pet. App. 46-64.

BASIS FOR JURISDICTION IN THIS COURT

The Third Circuit Court of Appeals affirmed the decision of the United States District Court for the District of New Jersey on May 20, 2020. (Pet. App. 2).

This Court has jurisdiction pursuant to statutory provisions 28 U.S.C. § 1254(1) to review on writ of certiorari the decision of the United States Court of Appeals for the Third Circuit. This matter brings questions of law that are unsettled.

In *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg*, 545 U.S. 308 (2005), this Court articulated a standard for federal question jurisdiction. The federal issue must be "actually disputed and substantial," and it must be one that the federal courts can entertain without disturbing the balance between federal and state judicial responsibility. *Id.* at 314. Here, that question is whether Third Circuit erred in determining that Ms. Baran's defamation claim was properly time-barred.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1442

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the

> apprehension or punishment of criminals or the collection of the revenue.
>
> (2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> (3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;
>
> (4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

N.J. Stat. Ann. § 2A:14-3

> Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander.

STATEMENT OF THE CASE

A. Bringing the Claims to Federal Court.

Petitioner initially filed her claims in the Superior Court of New Jersey, Burlington County, on January 6, 2015, where they remained pending for almost three years. (Pet. App. 48-49). On September 25, 2017, Respondent ASRC Federal, Mission Solutions, LLC removed the case to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1442, the "Federal Officer Removal Statute." (Pet. App. 48). Petitioner timely filed a request for remand on November 8, 2017. (Pet. App. 53). On June 20, 2018, the United States District Court for the District of New

Jersey, Camden Vicinage denied Petitioner's motion to remand. (Pet. App. 65-66).

B. Concise Statement of Facts Pertinent to the Questions Presented.

Petitioner, Anna Baran ("Petitioner" or "Ms. Baran") is a former Senior Quality Assurance Engineer for ASRC Mission Solutions, LLC ("ASRC/MSE" or "Respondent"). (Pet. App. 12). ASRC/MSE is a military defense contractor that works for the United States federal government providing services including software engineering, integration services, and products. (Pet. App. 2). Ms. Baran's former position required a security clearance, as do the majority of jobs in the defense contracting industry. (Pet. App. 2).

Prior to the initiation of this action, Ms. Baran had long complained about suffering workplace harassment from one of her supervisors, Susan Goldberg ("Ms. Goldberg"). (Pet. App. 2, 13). On January 7, 2013, Ms. Baran's coworker falsely reported that Ms. Baran had verbally expressed her desire to shoot several ASRC/MSE employees. (Pet. App. 3). Ms. Wells reported the comments to the resident security officer Francis McKenna ("Mr. McKenna"), and based on the false unsubstantiated reports of threats, Ms. Baran was subsequently suspended pending the results of an internal investigation. (Pet. App. 3). Ms. Baran has repeatedly denied making any threats. (Pet. App. 3).

Despite her protestations, Ms. Baran was arrested and charged with making terroristic threats on January 9, 2013. (Pet. App. 3). On January 14, 2013, she was fired. The next day, Mr. McKenna updated Ms.

Baran's incident history in the Joint Personnel Adjudication System ("JPAS") server to include the circumstances surrounding Ms. Baran's dismissal. (Pet. App. 3). The JPAS is the primary database used by the Department of Defense ("DoD") to vet potential new hires for security clearance processing. (Pet. App. 3). It is a secure database which contains information only accessible to certain government or government contractor's employees. The National Industrial Security Program Operating Manual ("NISPOM") mandates that employers submit to the JPAS database any "adverse information about a cleared employee that would indicate that [her] ability to protect classified [information] might be compromised." Reports based on rumor or innuendo should not be made." National Industrial Security Program Operating Manual ("NISPOM"), Section 1-302.(Pet. App. 3).

Eventually, Ms. Baran succeeded in expunging her record and clearing herself of the criminal charges against her. (Pet. App. 3). However, the JPAS report was not updated to reflect this information despite Mr. McKenna's knowledge of the dismissal and expungement of the criminal charges. (Pet. App. 3). The false information Mr. McKenna added to her JPAS file has prevented Ms. Baran from obtaining permanent employment in the defense contracting industry and a loss of her high level security clearance. (Pet. App. 4). However, Ms. Baran was not aware of the JPAS report until August 2014, when a job previously offered to her was rescinded after she failed to obtain the necessary security clearance. (Pet. App. 4).

C. Procedural History

On January 6, 2015, Ms. Baran brought suit against ASRC/MSE in the Superior Court of New Jersey on a variety of claims including defamation and retaliation. (Pet. App. 4). On August 12, 2015, the Court ordered ASRC/MSE's HR Department to issue Plaintiff a "neutral employment reference," provide neutral information if contacted about Ms. Baran's future attempts to obtain a security clearance and provide Ms. Baran with a copy of her personnel file. (Pet. App. 16). However, litigation continued between the parties for almost three more years. (Pet. App. 48). Eventually, a date was set for trial on Ms. Baran's claims. (Pet. App. 21).

Despite trial approaching, ASRC/MSE removed the case to the United States District Court for the District of New Jersey on September 25, 2017. (Pet. App. 21). Ms. Baran moved to have the case remanded to the Superior Court of New Jersey, arguing that the "Federal Officer Statute" did not apply to ASRC/MSE. (Pet. App. 22). On June 20, 2018, the District Court denied Ms. Baran's motion to remand, allowing the litigation to proceed in federal court. (Pet. App. 65-66).

Approximately, eighteen months later, a trial ensued. At the close of Plaintiff's case, ASRC/MSE raised it's statute of limitations defense for the first time since the case had been removed to the District Court. The District Court did not rule on the issue, instead allowing the trial to proceed. After a four-day trial, the jury found that the JPAS report entered by Mr. McKenna was defamatory. (Pet. App. 23). The jury ordered ASRC/MSE to pay Ms. Baran $3.5 million

dollars in compensatory damages for filing a report which falsely alleged that she had threatened violence against her co-workers. (Pet. App. 23). Post-verdict, ASRC/MSE renewed its motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b) on the grounds that Baran's defamation claims were barred by the statute of limitations. (Pet. App. 23-24). The District Court granted ASRC/MSE's motion on July 9, 2019 and dismissed Ms. Baran's claims. (Pet. App. 43-45).

Ms. Baran appealed the District Court's decision to the Third Circuit Court of Appeals. (Pet. App. 1). Arguing that ASRC/MSE forfeited its statute of limitations defense by failing to include it in their answer or the joint final pretrial order, Ms. Baran also argued that her petition should not be considered time-barred and should be heard by the court. (Pet. App. 4). On May 20, 2020, the Third Circuit Court of Appeals affirmed the lower court's decision. (Pet. App. 2).

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. The Third Circuit Court of Appeals Erred In Affirming the Order of the District Court When They Held That Petitioner's Defamation Claim was Time-Barred and not Fit to be Heard by the Court.

This Court should find that Ms. Baran's Defamation claim against ASRC/MSE is subject to tolling and allow it to be heard in spite of the statute of limitations found in New Jersey Statute 2A. *See* N.J. Stat. Ann. § 2A:14-3 ("Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander"). The Third Circuit Court of Appeals erred in finding that Ms. Baran's defamation claim was time-barred and therefore ineligible for review.

The discovery rule, one of several methods of tolling the statute of limitations, states that the statute of limitations begins to run at the time when the injured party discovers the damages, not necessarily when those damages occur. The Supreme Court of New Jersey has used the following language to describe the discovery doctrine as applied within the State of New Jersey;

> Because it is "inequitable that an injured person, unaware that he has a cause of action, should be denied his day in court solely because of his ignorance, if he is otherwise blameless," New Jersey courts long have employed the equitable principle of the discovery rule to avoid the potentially harsh effects of the "mechanical

> application" of statutes of limitations. The discovery rule delays accrual of a cause of action "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered[,] that [he or she] may have a basis for an actionable claim."

Guichardo v. Rubinfeld, 177 N.J. 45, 51 (N.J. July 16, 2003) (citing *Lopez v. Swyer*, 62 N.J. 267, 272-74, 300 A.2d 563 (1973), *Vispisiano v. Ashland Chem. Co.*, 107 N.J. 416, 426, 527 A.2d 66 (1987)).

A. The United States District Court for the District of New Jersey Failed to Apply the Precedent that it Articulated in *Sivells* and Consider Whether Ms. Baran is Eligible for Equitable Tolling.

In Finding that Ms. Baran's petition was time-barred by the statute of limitations, the United States District Court failed to abide by the precedent previously articulated by that Court in *Sivells*. While entertaining the possibility that the discovery rule may not apply to defamation cases in the state of New Jersey, the District Court in *Sivells* nevertheless continued to consider other methods of tolling the statute of limitations. The Court stated that "[in] New Jersey, the statute of limitations may be tolled by statute, by the discovery rule, or pursuant to equitable tolling principles." *Sivells v. Sam's Club*, 2017 U.S. Dist. LEXIS 116199 at *20 n. 12 (D.N.J. July 25, 2017) (citing N.J. Stat. Ann., § 2A:14-21, *Guichardo*, 177 N.J. at 51, *Polkampally v. Countrywide Home Loans Inc.*, No. 13-174 (RBK/JS), 2013 U.S. Dist. LEXIS 158672, at *26 (D.N.J. Nov. 6, 2013), *Villalobos v. Fava*, 342 N.J.

Super. 38, 50, (App. Div. 2001), *Freeman v. State*, 347 N.J. Super. 11, 31 (App. Div. 2002)).

When determining whether the plaintiff ("Sivells") was eligible for statutory, discovery rule, or equitable tolling, the District Court conducted the following analysis;

> As to statutory tolling, the listed bases are absent. As to the discovery rule, it may not apply to defamation claims at all. In any case, there are no facts suggesting that Sivells did not know, or could not have discovered through the exercise of reasonable diligence, the allegedly defamatory or slanderous statements of which she complains. There is likewise no indication that Sivells was "induced or tricked by [her] adversary's misconduct into allowing the filing deadline to pass," was prevented "in some extraordinary way" from asserting her rights, or "timely asserted [her] rights mistakenly by either defective pleading or in the wrong forum."

Sivells, 2017 U.S. Dist. LEXIS at *20 n. 12 (citing *Nuwave Inv. Corp. v. Hyman Beck & Co.*, 221 N.J. 495, 500-01, 114 A.3d 738 (2015), *Guichardo*, 177 N.J. at 51, *Polkampally*, 2013 U.S. Dist. LEXIS 158672, at *26).

In its analysis, the District Court in *Sivells* looked at several different ways in which the statute of limitations could be tolled rather than simply "mechanically applying" the statute. While acknowledging that the discovery rule may be inapplicable in that scenario, the Court did not stop their discussion there. In the process, the Court

endorsed the test for equitable tolling found in *Guichardo*, i.e. that the petitioner did not know of the defamatory statement and could not have discovered them through reasonable diligence. *See Guichardo*, 177 N.J. at 51.

This is a test that Ms. Baran quite easily passes. The information reported by Mr. McKenna was submitted to JPAS, a confidential database used to determine the eligibility of applicants for a security clearance. (Pet. App. 3). The information stored on JPAS is not available to the public. (Pet. App. 3). Ms. Baran did not learn of the details added to her JPAS file until August 2014, when she had a job offer rescinded by a potential employer. (Pet. App. 4). There was no way Ms. Baran could have learned this information at an earlier date.

The District Court failed to consider any alternative ways in which Ms. Baran could have tolled the statute of limitations. Instead, it merely "mechanically applied" the statute, a practice that often leads to injustice. *See Guichardo*, 177 N.J. 45 at 51, *Vispisiano*, 107 N.J. 416 at 426. Considering the extraordinary circumstances in which ASRC/MSE's statute of limitations defense was raised (the jury had already rendered a verdict), this "mechanical application" will almost inevitably result in injustice. To avoid that unfair outcome, this Court should grant Ms. Baran's petition.

B. The Third Circuit Court of Appeals Erred When It Held that the Government's Introduction of its Statute of Limitations Defense After the Jury had Delivered its Verdict was not Unduly Prejudicial.

This Court should find that the Third Circuit Court of Appeals erred in admitting ASRC/MSE's affirmative "statute of limitations" defense. This Court has previously held that "[in] deciding whether to apply the discovery rule, we also must consider whether [the Petitioner] has been 'unfairly prejudiced'" by the delay. *Guichardo*, 177 N.J. at 51, 55 (citing *Mancuso v. Neckles*, 163 N.J. 26, 36, 747 A.2d 255 (2000), *Lopez*, 62 N.J. at 276, 300 A.2d 563)). The Third Circuit has stated that "parties should generally assert affirmative defenses early in litigation, so they may be ruled upon, prejudice may be avoided, and judicial resources may be conserved." *Robinson v. Johnson*, 313 F.3d 128, 134 (3d Cir. 2002).

The Third Circuit erred when it held that the Defendant's statute of limitations argument was not unduly prejudicial despite being introduced for the first time during trial without decision of the court and reasserted after the jury had already delivered a verdict. In its opinion upholding the District Court's ruling, the Third Circuit held that; "Indeed, 'affirmative defenses can be raised by motion, at any time (even after trial), if plaintiffs suffer no prejudice' . . . Baran suffered no undue prejudice because she 'knew of [ASRC/MSE's] statute of limitations objection for almost two years before trial.'" *Baran*, 2020 U.S. App. LEXIS at *6-7 (citing *Cetel v.*

Kirwan Fin. Grp., Inc., 460 F.3d 494, 506 (3d Cir. 2006), *Baran,* 401 F. Supp. 3d at 483) (Pet. App. 7, 32)).

However, the Third Circuit ignored the fact that Ms. Baran's vague awareness of ASRC/MSE's statute of limitations objection is not equivocal to an undisputed legal awareness under the law. In any given case, one party may be vaguely aware of concerns that the other party has in regard to the litigation; this does not change the fact that Ms. Baran was "blindsided" after the jury verdict with an affirmative defense not included in ASRC/MSE's amended answer or the joint final pretrial order. By waiting to introduce this affirmative defense until the jury had already delivered a decisive verdict against them, ASRC/MSE unduly prejudiced Ms. Baran. Had ASRC/MSE introduced their argument prior to trial, Ms. Baran would have had time to draft an affidavit or prepare testimony showing that, among other things, ASRC/MSE prevented her from discovering Mr. McKenna's defamatory statements at an earlier date. As a result, this Court should grant this petition so that justice can be served.

II. In the Alternative, This Court Should Find That, in the Interest of Justice, the Discovery Rule Should Be Applied in Defamation Cases When the Allegedly Defamatory Statement is Classified and Could Not Reasonably Be Discovered by the Plaintiff During the Limitations Period

Ms. Baran is asking this Court in good faith to hold that the Discovery Rule should be universally applied in defamation cases when the defamatory statements are classified and could not reasonably have been discovered by the defamed party within the limitations period. To hold otherwise would allow a manifest injustice to occur, both now and potentially in future cases.

A mechanical interpretation of New Jersey Statute § 2A:14-3 has required the Third Circuit to find that a strict one-year statute of limitations applies in New Jersey defamation cases. This interpretation does not leave room for the discovery rule, an important exception for those who have suffered delayed damages. The Third Circuit held as much in *Nuwave*, when the Court decided to follow the guidelines provided in New Jersey Statute § 2A:14-3 but invited the New Jersey legislature to change the statute in question. *See Nuwave Inv. Corp. v. Hyman Beck & Co., Inc.*, 221 N.J. 495, 5-6 (2015).

Ms. Baran asks that this Court apply the standard used by the Seventh Circuit Court of Appeals, where In the Seventh Circuit, "courts seem to apply the discovery rule in situations where the defamatory material is published in a manner likely to be

concealed from the plaintiff, such as credit reports or confidential memoranda. In these situations, the injustice that results from the expiration of the limitations period before discovery of the plaintiff's injury is more likely to occur." *Schweihs v. Burdick*, 96 F.3d 917, 921 (7th Cir 1996) (citations omitted). In *Hukic*, the Seventh Circuit held that "[under] certain circumstances, namely when a publication was 'hidden, inherently undiscoverable, or inherently unknowable,' Illinois courts apply the 'discovery rule' such that the statute of limitations does not accrue until the plaintiff knew or should have known of the defamatory report." *Hukic v. Aurora Loan Services*, 588 F. 3d 420, 435 (7th Cir. 2009) (citing *Blair v. Nev. Landing P'ship*, 369 Ill.App.3d 318, 307 Ill.Dec. 511, 859 N.E.2d 1188, 1195 (2006); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 334 N.E.2d 160, 164 (1975) (cause of action against credit reporting agency that prohibited distribution of reports to non-subscribers did not accrue until plaintiff knew of allegedly defamatory report))."

To allow the District Court to disregard the jury's verdict and deny Ms. Baran her chance to be made whole would constitute a manifest injustice. Ms. Baran was not made aware of Mr. McKenna's defamatory statements until after the statutorily mandated tolling period had already closed. (Pet. App. 4). In fact, Ms. Baran only learned that she had been defamed when she had a job offer from a separate employer rescinded after Ms. Baran failed to obtain a security clearance. (Pet. App. 4). Ms. Baran has suffered greatly as a result of this defamation and is now forced to work in the retail sector for $10 an hour—in stark contrast to

her previous $90,000 a year salary—through no fault of her own.

Furthermore, little doubt exists that Mr. McKenna's JPAS report constituted defamation. The District Court jury held that Ms. Baran was indeed defamed, to her great detriment. (Pet. App. 23). The jury awarded Ms. Baran $3.5 million dollars in compensatory damages to offset her financial losses and the damage done to her reputation. (Pet. App. 23). An unfair application of the discovery rule should not be sufficient to rob Ms. Baran or any other petitioner of justice. As a result, this Court should recognize a narrow exception to the statute of limitations and find that when defamatory information is classified and therefore undiscoverable, the Discovery Rule should be universally applied.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. SIRIANNI, JR., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(407)388-1900
robertsirianni@brownstonelaw.com

Counsel for Petitioner

Dated: September 15, 2020