ORIGINAL

20-5098

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MIKHAIL S. TSUKERMAN - PETITIONER

v.

WESTERN COMMUNITY UNIT SCHOOL DISTRICT NO. 12 ET AL. - RESPONDENTS

On Petition for A Writ of Certiorari to the United States District Court of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS **PRESENTED FOR REVIEW**

1. Whether the Court should resolve the following question for which the Courts of Appeals are split (including the United States Court of Appeals for the Seventh Circuit of last resort in this case): should the courts effectively protect plaintiffs from paying defendants' expenses from previously dismissed action so refiled cases can be decided on merits rather than technicalities, in view of *Herring v. City of Whitehall*, 804 F.2d 464 (8th Cir. 1986) precedent.

2. Whether the Court should determine the priorities in the case of potential conflict between two (or more) Federal Rules of Civil Procedure, in this case FRCP 60(b), specifically FRCP 60(b)(1)-(3) and FRCP 41(b).

3. Whether the Court should enforce the desired uniformity of opinion by setting guidelines which would eliminate occurrences when the opinion of the lower court or even an individual judge seemingly contradicts their own from similar unrelated case.

B. LIST OF PARTIES AND RELATED CASES

[ ] All parties appear in the caption of the case on the cover page.

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

Mikhail S. Tsukerman – Petitioner;

Western Community Unit School District #12,

Connie Thomas, Western High School Principal,

Law Firm of Becker, Hoerner & Ysursa,

Thomas J. Hunter, Attorney-at-Law – Respondents.

RELATED CASES

Tsukerman v. Western Community Unit School District #12 et al., 3:16-cv-03214-SEM-TSH, Central District of Illinois – Springfield Division; judgment of dismissal with prejudice entered September 30, 2019.

Tsukerman v. Western Community Unit School District #12 et al., No. 19-3075, United States Court of Appeals for the Seventh Circuit; judgment affirmed March 5, 2020, petition for rehearing denied April 13, 2020.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ___ to the petition and is

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

The opinion of the United States district court appears at Appendix ___ to the petition and is

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

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix_ to the petition and is

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

The opinion of the_____ court appears at Appendix _ to the petition and is

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

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

INDEX TO APPENDICES.

2. TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other

The Petitioner, MIKHAIL S. TSUKERMAN, requests that the Court issue its writ of certiorari review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case March 5, 2020 (opinion denying rehearing entered on April 13, 2020).

D. RELATED CASES

Tsukerman v. Western Community Unit School District #12 et al., 3:16-cv-03214-SEM-TSH, Central District of Illinois – Springfield Division; judgment of dismissal with prejudice entered September 30, 2019.

Tsukerman v. Western Community Unit School District #12 et al., No. 19-3075, United States Court of Appeals for the Seventh Circuit; judgment affirmed March 5, 2020, petition for rehearing denied April 13, 2020.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the United States Court of Appeals for the Seventh Circuit.

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 5, 2020.

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

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 13, 2020, and a copy of the Order denying rehearing appears at Appendix C.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____ .
A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____ , and a copy of the order denying rehearing appears at Appendix _____.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

F. CONSTITUTIONAL PROVISIONS AND LEGAL PRINCIPLES INVOLVED

The Seventh Amendment to the Constitution guarantees "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved". U.S. Const. amend. VII.

The Eighth Amendment to the Constitution prohibits "excessive fines imposed." U.S. Const. amend. VIII.

The Ninth Amendment to the Constitution states "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

G. STATEMENT OF THE CASE

The Petitioner Mikhail S. Tsukerman, a naturalized US citizen originally from former Soviet Union (now Ukraine) and of Jewish heritage, was employed by Respondent Western Community Unit School District #12 ("Western"), a rural district in central Illinois for two school years, from August 2012 to May 2014 as a high school math teacher. Since the previous candidate backed out right before the beginning of the school year, Petitioner was hired at the last moment and rented a house from Western, making it his landlord in addition to his employer. It was done because no other rental places were available at the time. The house in question was in "as-is" condition.

Petitioner's two years of employment were very different. During the first year Petitioner received stellar job evaluations and his employment was renewed for another year. He also actively and successfully participated in a summer pilot program run by Western in cooperation with local community college.

The second year was completely opposite to the first. When the incoming freshman class, called "class from hell" by high school principal Connie Thomas ("Thomas"), started school year, the schoolwide discipline significantly decreased. At the same time, Petitioner's treatment by Thomas soured for no apparent reason. Petitioner did not advertise his Jewish heritage either explicitly or implicitly, being a secular person with prior knowledge of anti-Semitic sentiment's existence in many rural areas. However, he has a strong reason to believe that his heritage was discovered by Western's employees who frequently came to the house for repairs and apparently saw obviously Jewish-themed literature and food items at that residence. As the second school year progressed, Petitioner was subjected to numerous anti-Semitic statements masqueraded as jokes and becoming more frequent and vicious. Then in February 2014 with an interval of couple of days, two swastikas were carved into Petitioner's then-classroom wall. Despite his request, no investigation was done by Western and the swastikas were not removed for more than three weeks after their appearance. Since Western refused to even acknowledge swastikas as a problem, Petitioner himself made a short video of them as a proof, which was later introduced during the discovery process. In the same time frame one of his students marched Nazi-style in Petitioner's classroom. The disciplining of that student was unusually lenient. At the same time Thomas gave Petitioner bad job evaluations in stark contrast with first year's ones, also done by her. Petitioner was given low marks for performance areas across the board, including areas clearly outside of his area of expertise. He was also blamed for swastikas, referred in the evaluations as "drawings on the walls". Petitioner was able to finish out the school year only by being heavily medicated to relieve stress, since he is a direct descendant of both Holocaust survivors and Holocaust victims. His teaching contract at the end of the school year was not renewed, only one such teacher at the high school level. He was in his late 40s at the time.

Petitioner submitted job discrimination claim to EEOC. After investigating, EEOC issued him right-to-sue letter. He sued Western on grounds of religious and age discrimination and retaliation. He was first represented by Joshua Pierson from law firm of Sowers Wolf LLC. Then Mr. Pierson backed out without explanation just two weeks before filing deadline. After frantic search, Petitioner found a replacement – Albert Watkins ("Watkins") from the law firm of Kodner Watkins LLC. Western hired not one but two law firms to defend it – Respondent Becker, Hoerner & Ysursa ("BHY") from Belleville, Illinois and Schmiedeskamp, Robertson, Neu & Mitchell from Quincy, Illinois, with BHY being primary counsel. After completing discovery both sides' counsels got engaged in settlement talks, encouraged by then-judge at the United States District Court for the Central District of Illinois – Springfield Division (from here on referred to as "District Court"). Petitioner met with Watkins on October 31, 2017 to discuss settlement talk strategy. However, the following day Respondent Thomas J. Hunter from BHY ("Hunter") filed motion for summary judgment on behalf of Western. Despite being timely given sufficient information by Petitioner to refute summary judgment motion, Watkins responded at the last moment, barely allowing Petitioner to avoid fate of *Pierce v. Ill. Dept. of Human Serv.*, 355 Fed. Appx 28 (7th Cir. 2009). His response was inadequate even in the view of Petitioner who is not a lawyer. Accordingly, Respondents' motion for summary judgment, despite being frivolous and meritless, would have been granted on technicality since Watkins' response failed to conform to Local Rule 7.1(D), based on case of *Waldridge v. American Hoechst Corp.*, 24 F.3d 918 (7th Cir. 1994). Later, in January 2018 Watkins got in legal trouble stemming from unrelated case. His behavior in that case jeopardized the integrity of upcoming trial, as it did in Petitioner's case. (Appendix D). As Petitioner's court date, scheduled for May 2018, approached, Watkins, apparently preoccupied with own legal troubles, wanted to dispose of Petitioner's case.

He did exactly that, without Petitioner's consent and against his wishes asking for voluntary dismissal without prejudice. After the fact, Watkins notified Petitioner that by asking for the dismissal, he did Petitioner a favor since summary judgment motion would likely be granted. Petitioner now knows that would be true due to reasons stated earlier in this paragraph. The dismissal was granted on April 20, 2018. Afterwards, Watkins gave case files to Petitioner in total disarray, with many documents claimed to be sent by Respondents nowhere to be found. Later, he sent Petitioner a letter dated May 2, 2018 stating his withdrawal from the case and telling Petitioner that he had one year to refile, at the same time discouraging him from doing so. That letter also lacked any legal advice, leaving Petitioner to piece the case together on his own.

Upon reviewing case files, Petitioner discovered numerous violations by opposition, (Appendix E) occurring in the following order:

On June 13, 2017, Garrett Hoerner from BHY, who at the time was representing the original Respondent Western, sent Defendant's Disclosures to Watkins, admitting possession of the entire Petitioner's personnel file, since words "excerpts" or similar were never used.

On September 14, 2017 while conducting Plaintiff's deposition, Respondent Hunter who took over the case from Garrett Hoerner, tampered with evidence, presenting shortened version of Petitioner's rebuttal of his negative job evaluation. He did so despite having possession of correct version, as mentioned in previous paragraph. His denials of tampering are ludicrous since someone as detail-oriented as Hunter could not possibly miss the fact that the pages in the altered document are not logical continuation of each other.

On October 3, 2017 Hunter took over questioning of Thomas during her deposition and led her into perjury by alleging drawings of penises in Petitioner's classroom despite absence of any physical proof to support such allegations, unlike swastikas' video. Hunter never asked

Petitioner about alleged penises drawings during his deposition, depriving him opportunity to deny those allegations.

On October 6, 2017 Hunter sent Defendant's Third Set of Disclosures to Watkins, listing as a witness Curt Simonson, Western's ex-superintendent as "having knowledge of Plaintiff's reputation as employee". Since Mr. Simonson never worked at Western simultaneously with Petitioner, such "knowledge" is hearsay at best, perjury at worst. He also listed Teresa Schultz, Western bookkeeper, whose job never included duties listed, referring to her as "he" in process. Finally, he listed Jason Bryant and Steve Hayden to "confirm" false claims of penis drawings for which no physical proof had ever existed nor any attempt to prove it made other than offered testimony presented by Respondents.

On November 1, 2017 in the middle of settlement negotiations Hunter filed frivolous and meritless motion for summary judgment. His prior illegal actions apparently intimidated Watkins into nonaction.

On June 24, 2019 Hunter, after being reported by Petitioner to Illinois Attorney Registration and Disciplinary Commission wrote explanation letter, claiming to "gather numerous additional documents" after Petitioner's deposition, without presenting any proof of his alleged actions, contrary to having the mentioned documents in his possession all along. He also falsely accused Petitioner of illegal threats, which is a libel and should be viewed as such.

In the time frame described Hunter repeatedly refused to disclose to Petitioner relevant documents, including after the appeal which reactivated the case, thus making Hunter's actions an obstruction of justice since he violated FRCP 26 and 37.

After learning such information and numerous unsuccessful attempts to secure another counsel, Petitioner refiled his case *pro se* on April 16, 2019, within one year time frame provided

to him by Watkins. He also amended it, adding BHY and Hunter as additional defendants since all the actions by Hunter described above took him out of category of counsel and into category of accomplices, thus warranting his inclusion as defendant, along with BHY, on which behalf he committed them, and Thomas due to her perjury.

Petitioner, knowing importance of timeliness in judicial system, filed all his paperwork timely. However, since he is not a lawyer, following the timelines negatively affected his case research. Unaware of importance of citing precedents, he did not cite any at the District Court phase. Plus, Hunter immediately filed combined motion to dismiss or to strike or for summary judgment in which he demanded Petitioner to pay Western's expenses and attorney fees. The judge denied attorney's fees but stayed the case pending payment of Respondents' expenses. Petitioner filed Motion to Waive Payment citing his indigence due to Respondents' actions and attaching his latest tax return as proof. The motion was denied without explanation, not considering that **Petitioner's indigent status is a direct result of Respondents' actions**. Not knowing what to do next, Petitioner did nothing for about three months. Then he received District Court's order to file status report showing why the case should not be dismissed for want of prosecution. Not knowing what to do, Petitioner filed status report to the best of his ability, restating, among others, his indigence and the fact that said expenses were used by Hunter to commit illegal and possibly criminal actions. Then, on September 30, 2019 the case was dismissed with prejudice for want of prosecution "since Plaintiff neither expressed willingness to pay Defendants' expenses nor presented convincing argument as to why he should not pay", followed by identical order on October 2, 2019.

Petitioner timely filed his intention to appeal and filed timely appeal to the United States Court of Appeals for the Seventh Circuit (from here on referred to as "Seventh Circuit"). In both

courts since filing *pro se*, he was granted the leave to proceed *in forma pauperis*. On appeal, guided by the rules, he cited multiple precedents, including ones described in next sections. Petitioner asked to reverse and remand the District Court's decision. However, on March 5, 2020 that decision was affirmed by 3-judge panel, based on two cited precedents. The first one, *Gay v. Chandra,* 682 F.3d 590, 594 (7th Cir. 2012) was actually reversed and remanded. One of Petitioner's case panel members, Judge Hamilton, was a panel member in *Gay* as well. It means that Judge Hamilton made a decision directly contrary to his own in previous case cited by him in Petitioner case's decision. The other one, *Esposito v. Piatrowski*, 223 F.3d 497, 498 (7th Cir. 2000) cited by Defendants *ad nauseam*, was thoroughly debunked by Petitioner as inappropriate for his case but used by the panel nevertheless. The panel review was too narrow, concentrating on payment only and missing numerous points and precedents Petitioner presented. The panel also freely interchanged words "expenses" and "costs" (meaning court costs) throughout its nonprecedential decision. The panel apparently sided with Respondents. This inference can be made by noticing that Respondents' language was incorporated into the decision, including the fact that Petitioner's condition, correctly called "indigence" in *Gay*, was named "indigency", exactly as written by Respondent Hunter. Petition for Panel Rehearing/Rehearing En Banc that followed, citing those facts, was denied without explanation. This Petition follows.

Petitioner submits this Petition for Writ of Certiorari because the panel decision (Appendix A) conflicts with earlier decisions of the Seventh Circuit in numerous cases spanning multiple issues, including but not limited to: showing judicial restraint; assuring that the side using dishonorable means to prevail would not be allowed to do so; assessing the entire situation regarding the expenses incurred by defendant and allowing Plaintiff to withdraw voluntary dismissal if conditions for refiling are onerous, and reconsideration was

therefore necessary to secure and maintain uniformity of the Court's decisions. Additionally the proceeding involves questions of exceptional importance, because it involves issues on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issues, including relieving plaintiffs from paying excessive for them defendant's expenses regardless of whether prior dismissal resulted from own mistakes or substandard representation by ex-counsel and raised by Plaintiff but never mentioned in panel's decision issue of application of FRCP 60(b)(1)-(3) due to opposition's misconduct. Petitioner did not see any of the points he made in his Appellant's Reply Brief – Amended (from here on referred to as "ARBA"), submitted to the Seventh Circuit on February 13, 2020 and their respective merits discussed in the Order, leading him to believe that the panel has overlooked or misapprehended the points in question since the decision is made as if the Appellees' Brief was not rebutted at all, despite Petitioner's effort to debunk Appellees' Brief as thoroughly false.

H. REASONS FOR GRANTING THE WRIT

1. Whether the Court should resolve the following question for which the Courts of Appeals are split (including the United States Court of Appeals for the Seventh Circuit of last resort in this case): should the courts effectively protect plaintiffs from paying defendants' expenses from previously dismissed action so refiled cases can be decided on merits rather than technicalities, in view of *Herring v. City of Whitehall*, 804 F.2d 464 (8th Cir. 1986) precedent.

Even when issues of application of FRCP 60(b)(1)-(3) and/or opposition misconduct are not involved, Seventh Circuit's approach to question of defendants' expenses from previously dismissed action conflicts with its sister Circuits.

This Court already reversed Seventh Circuit on *Hughes v. Rowe*, 449 U.S. 5 (1980) by ruling that non-payment of defendants' expenses cannot be used to involuntarily dismiss a meritorious case. Furthermore, Respondents' previous citation of *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) is deliberately misleading since in *Link* plaintiff never faced an issue of

defendants' expenses brought on him by his lawyer, nor did he use FRCP 60(b) as a way to get a redress. Additionally, *Link* applies to both parties and as such, original Respondent Western is bound by well-documented Hunter's misconduct.

Since **no case in the US judicial system is an exact carbon copy of another one, both at federal and state levels**, Petitioner finds the attempt to equate his case with a single previous one offensive. Petitioner presented variety of precedents where dismissals with prejudice were reversed and remanded, including plaintiffs incarcerated and non-incarcerated, indigent and non-indigent, *pro se* and counsel-represented. In this case Petitioner is disabled as a result of anti-Semitic actions at Western, but his disability application is still pending. It means that Petitioner has to support himself for basic needs, including but not limited to food, shelter and medical care. While supporting himself in honest way, Petitioner is also paying taxes, some of which are used to support inmates, including those similar to *Esposito*, whose case is unfairly compared to his. In cases where plaintiffs are not incarcerated, the standard of review is even more lenient. Since these plaintiffs take care of their everyday needs themselves, they don't even have to prove indigence. They only need to prove that the defendants' expenses are excessive and paying them would put an undue hardship on plaintiff. Since establishment of *Hughes* numerous Courts of Appeals created precedents relieving plaintiffs from paying defendants' expenses from previously dismissed action and more. Such cases were cited by Petitioner, including *Herring v. City of Whitehall*, 804 F.2d 464, 466 n. 2 (8th Cir. 1986), *Andrews v. America's Living Centers, LLC et al.*, 827 F.3d 306, 310 (4th Cir. 2016), *Duffy v. Ford Motor Company*, 218 F.3d 623 (6th Cir. 2000) and *Rumbough v. Equifax Information Services, LLC et al.*, Case No. 10-14605 (11th Cir., decided March 9, 2012), all presented in this Petition.

One precedent involving relieving plaintiffs from paying defendants' expenses is

Herring, a reversed and remanded case involving indigent plaintiffs, which their ex-counsel ruined due to reasons outside of the case. Upon refiling, plaintiffs found defendants' expenses amount, comparable to Petitioner's in today's dollars, prohibitively excessive.

Herring was used to decide *Duffy*, another reversed and remanded case giving precedent of plaintiffs not having to pay defendants' expenses from previously dismissed action. Decided during the same time frame as inappropriate for this case *Esposito*, *Duffy* deals with plaintiffs who had to dismiss their case due to ex-counsel's ineptness that ruined the original case. Their stipulation regarding refiling was even stricter than Petitioner's, explicitly spelling out that they **would have to, not could**, pay defendant's expenses from previous action upon refiling. Yet in rendering its decision the court declared that the primary fault lies with plaintiffs' ex-counsel rather than plaintiffs, relieved plaintiffs from payment and reversed lower court's dismissal with prejudice, remanding the case. It was done despite acknowledging that such decision is prejudicial against the defendants. In *Duffy* plaintiffs dismissed their case themselves, albeit under duress. By contrast, in present case the dismissal was done against Petitioner's wishes by his ex-counsel, **not** by Petitioner through his counsel, as the Order states. Also, Watkins notified Petitioner about consequences **after** the dismissal, not before, leading Petitioner to question on whose side Watkins was. Petitioner also presented proof on the record that at the time Watkins was in personal legal trouble stemming from an unrelated to his, namely involving Missouri's then-Governor case. (Appendix D). Also, unlike *Duffy*, the denial of Respondents' expenses would not be prejudicial against them since those expenses were used to facilitate illegal and possibly criminal actions, as mentioned before.

In deciding *Duffy* the court specified that the decision to reverse and remand was based not on the principle of excessiveness of defendant's expenses in general, but rather on

excessiveness of those expenses **to plaintiff** in citing *Herring*.

The fact that *Esposito* **is not standard-altering case** is illustrated by post-*Esposito* cases relieving plaintiffs from paying defendants' expenses. One such precedent is *Andrews*, cited in detail by Petitioner because of multiple similarities with his case, including (i) both plaintiffs are *pro se* litigants who refiled action against defendants after prior "voluntary" dismissal; (ii) both cases deal with unlawful actions of employers, putting them in area of employment law; (iii) in both cases, plaintiffs explicitly raised the issue of excessiveness of defendants' expenses. Plus, *Andrews* ruling was made after explicitly applying Seventh Circuit's established standards of review, the fact Petitioner specifically mentioned. *Esposito* was considered, but its approach rejected in deciding *Andrews*, now cited in multiple cases nationwide denying defendants' motions for costs, including *Garza v. Citigroup, Inc.*, 881 F.3d 277, 281 (3rd Cir. 2018), itself a precedential case. However, neither *Andrews* nor *Garza* was even mentioned in the Order.

Andrews explicitly debunks Respondents' claim that "it has long been recognized that the staying of suits pending the payment of costs incurred in prior actions involving the same parties and the same (or similar subject matter) is now universal."

More general principle of not preventing plaintiffs' access to judicial relief by imposed prohibitively excessive costs being reversed is illustrated by *Rumbough*, another precedent not to pay defendants' expenses. There, the plaintiff, a frequent *pro se* filer, was relieved from payment despite defendants not being responsible for his inability to pay, unlike Petitioner's case.

In deciding *Rumbough*, the court stated, citing earlier case of *Miller v. Donald,* 541 F.3d 1091, 1096-97 (11th Cir. 2008) and echoing Seventh Circuit's own *Schilling v. Walworth County Park*, 805 F.2d 272 (7th Cir. 1986):

> "A court's exercise of its inherent powers sometimes collides with a litigant's right of access to the courts, which is unquestionably a right of considerable constitutional significance. That right of access, however, is neither absolute nor unconditional. Courts may impose conditions on access, but **they also must ensure that indigent litigants are not completely prohibited from seeking judicial relief.**"

Rumbough deals with serial abuser of judicial system, similar to *Gay*, except that the plaintiff is not incarcerated. Yet in both cases the dismissal with prejudice was reversed and remanded. Also, both cases cited *Aggarwal v. Ponce School of Medicine,* 745 F.2d 723, 727-28 (1st Cir. 1984) in rendering decision. Since Petitioner is neither a serial abuser nor was he accused of being such, both cases should provide precedent for rehearing, reversing and remanding his case.

Aggarwal offers a test similar to the one cited by Petitioner in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980) in his appeal to Seventh Circuit. Petitioner believes that if test from either *Aggarwal* or *Hummell* were applied, he would be relieved from paying Defendants' expenses. Plus, *Aggarwal* instructs against courts being prejudiced towards plaintiffs residing outside the court's jurisdiction, like Petitioner. Defendants tried to discredit Petitioner's citation of *Hummell* and distorted it in process. Petitioner merely suggested that the 5-part test used in *Hummell* could be useful to decide merits of the issues in question as there is no mention that such test should be strictly limited to *Hummell*-like cases.

The expenses in question were voluntarily incurred by Respondents who never address issues of original Respondent Western rejecting arbitration/mediation and hiring two law firms to defend their actions.

Petitioner provides both argument and precedent that could guide District Court to deny Respondents' expenses while remaining fully within its discretion. District Court should have considered prohibitive excessiveness of Respondents' expenses, issue brought up by Petitioner.

2. Whether the Court should determine the priorities in the case of potential conflict between two (or more) Federal Rules of Civil Procedure, in this case FRCP 60(b), specifically FRCP 60(b)(1)-(3) and FRCP 41(b).

The scope of the Seventh Circuit panel's review was too narrow. Even the District Court wrote in its order while dismissing the case with prejudice that Petitioner "neither paid Defendants' expenses nor presented convincing argument as to why he should not pay". On appeal Petitioner both presented arguments with related precedents why he should not pay and raised the issue of District Court not giving guidelines of what convincing argument should be like. Petitioner believes that the Seventh Circuit overlooked these issues since they were not mentioned in the Order, which concentrated on payment only.

Additionally, affirmation of district court's ruling goes against the Seventh Circuit's long accepted doctrine of judicial restraint, especially involving *pro se* litigants, as mentioned in multiple cases, many of which were cited in ARBA. Dismissal with prejudice is considered extremely harsh measure, reserved only for exceptional cases, with courts preferring less drastic measures instead. In *Palmer v. City of Decatur, Illinois*, 814 F.2d 426 (7th Cir. 1987), the court stated regarding involuntary dismissal with prejudice, which was reversed and remanded:

> "At the time this action was first dismissed, plaintiff was ... acting *pro se*; therefore **his case is governed by a less stringent standard than litigants represented by lawyers**."

Furthermore, in deciding *Palmer*, *Schilling* was cited, stating, also as basis to reverse and remand:

> "This case presents the not uncommon conflict between the district courts' need and ability to control their dockets ... and **the fundamental tenet of justice favoring the resolution of cases on their merits**", *Schilling*, 805 F.2d at 272.

Schilling greatly resembles Petitioner's case, where plaintiff, a naturalized American citizen, spent rather short time period with his employer, a fact expressed in Order against the

Petitioner ("lasted only two years", while in *Schilling* plaintiff's employment lasted less than six months), was discriminated against and ultimately involuntarily terminated as the result of the discrimination. Using *Schilling* as precedent, Petitioner case's dismissal with prejudice should have been reversed and remanded. Petitioner, not just "a Jewish man in his fifties", as Order states, but also a direct descendant of Holocaust survivors and victims (issue raised on the record) believes that his non-payment to those responsible for his reliving of painful history and who later used those expenses trying to prevail by dishonorable means does not make exceptional case deserving dismissal with prejudice nor its affirmation. The Order never addressed issues brought by Petitioner that his case was not an isolated incident, but rather a pattern of toxic environment at Western, including but not limited to widespread bullying, numerous thefts and involuntary terminations of employees deemed undesirable by administration, particularly Thomas, for various reasons including high salaries, criticism of administration, Jewish-sounding names and getting pregnant out of wedlock. One such incident, initiated by Thomas, involved a fabricated case against tenured employee with 20+ years of service with Western. The Order also misconstrues Petitioner's employment at Western, never discussing issue raised by Petitioner that his relatively short tenure there actually exceeded the ones of other employees with Jewish-sounding names by a whole year, so the bad evaluations in question were directly contrary to his stellar first year's evaluations, giving validity to inference that such evaluations were made because of Petitioner's Jewish heritage rather than his job performance. Petitioner was never placed on performance improvement plan, remedial plan or anything similar by any other name. Petitioner still disputes validity of his second-year evaluations and contends that his job performance was not substandard. Appellate review procedures dictate that this statement should be considered true.

A dismissal for want of prosecution is still considered an exceptionally harsh measure and should be reversed, as it was done in numerous cases within Seventh Circuit's jurisdiction since *Palmer* and *Schilling. See Smolinski v. Allmerica Financial Alliance Insurance Co.,* No. 2014 IL App (1st) 132029-U (a decision where plaintiff missed court appearances); *BankFinancial, FSB v. Tandon,* 2013 IL App (1st) 113152 (addressing *res judicata* effect of a voluntary dismissal under Illinois law); *Gabriel v. Hamlin,* 514 F.3d 734 (7th Cir. 2008).

The Seventh Circuit also did not address raised by Petitioner issue that Respondents' ongoing actions in order to deny Petitioner opportunity to have his case heard in court directly violate Petitioner's rights afforded to him under Seventh, Eighth and Ninth Amendments to the U.S. Constitution. Petitioner's pointing out that affirmation of District Court's decision would create dangerous precedent by encouraging future defendants to gain advantage by any means necessary, including illegal and possibly criminal ones, was addressed by listing the decision as non-precedential, leading Petitioner to infer that the decision to affirm District Court's decision was made by making exception to accepted judicial doctrines and precedents, rather than following them. Respondents did everything by any means necessary to prevent Petitioner from having his opportunity to present merits of his case in court, in order not to let him expose their illegal and possibly criminal actions. Seventh Circuit's affirmation of District Court's dismissal with prejudice actually helps Respondents to prevent justice from being served and to avoid responsibility for their illegal and possibly criminal actions.

In demanding upfront payment from Petitioner, Respondents brazenly cited the language of FRCP 41(d), which actually says:

"(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) **may** order the plaintiff to pay all or part of the costs of that previous action; and

(2) **may** stay the proceedings until the plaintiff has complied."

In citing it *ad nauseam*, Respondents freely interchanged words "may" and "will"; "could" and "would" as it fits their agenda.

Watkins filed for voluntary dismissal that was entered on stipulation which Petitioner would have never agreed to since Defendants did not waive any rights expressed under Federal Rule of Civil Procedure 41(d). Respondents also *ad nauseam* bring up the issue of Watkins telling (only after the fact) Petitioner that if the matter was refiled "the litigation has the potential to be stayed at the request of the Defendant pursuant to FRCP 41(d) (permitting the court to order plaintiff to pay all or part of the costs of a previous action and stay the proceeding until plaintiff has complied if a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant)" despite Petitioner being steadily opposed to the idea of dismissal. Furthermore, since Respondents never held sway over Petitioner's decisions, their bringing up the issue of Petitioner's ex-counsel advising against refiling is irrelevant and purposely misleading.

The language of Rule 41(d) gave District Court a choice whether to enter an order requiring payment of expenses when Petitioner refiled the action despite Respondents showing bad faith which should have been incorporated into decision.

Seventh Circuit has interpreted Rule 41(d) as giving district courts the discretion to choose whether to require payment of costs upon refiling. In other words, the language of the Rule 41(d) **permits** the court to order the payment of costs, not requires.

Petitioner brought up another important issue that was never mentioned in Order, namely

application of FRCP 60(b)(1)-(3), an accepted standard to reverse and remand, and which would render FRCP 41(d) moot. *See Anderson v. Cryovac, Inc.,* 862 F.2d 910, 928-930 (1st Cir. 1988), *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1339 (5th Cir. 1978), considered a standard-setting case, and Seventh Circuit's own *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1995). Petitioner satisfied time and application requirements of FRCP 60(b)(1)-(3) in refiling of his case.

In *Anderson* the court in rendering decision specifically states:

> "Misconduct does not demand proof of nefarious intent or purpose as a prerequisite to redress. ... Another well-sculpted marker points out that misconduct need not be result-altering in order to merit Rule 60(b)(3) redress. ... (when information withheld in discovery, aggrieved party need not establish that outcome would have been different). "

Petitioner only had to prove his case's merit, misconduct of opposing party and the fact that such misconduct foreclosed full and fair preparation of his case, which he did. He also pointed out that such actions by BHY and Hunter took them out of category of counsel and into category of accomplices, thus warranting their addition as defendants even though they were not respondents in EEOC complaint. Same is true regarding Thomas due to her committing perjury.

Furthermore, judicial integrity doctrine and Seventh Circuit's own precedents of *Malin v. Hospira, Inc.,* 762 F.3d 552 (7th Cir. 2014) and *Waldon v. Wal-Mart Stores, Inc., Store No. 1655,* 943 F.3d 818, 822 (7th Cir. 2019) preclude a party from prevailing if they attempted to prevail by dishonorable means, regardless of whether such party is a plaintiff (*Waldon*) or defendant (*Malin*) even if the FRCP 60(b) or similar was not invoked. In both *Malin* and *Waldon* Seventh Circuit took the offending lawyers to task in order to strictly preserve integrity of justice.

3. Whether the Court should enforce the desired uniformity of opinion by setting guidelines which would eliminate occurrences when the opinion of the lower court or even an individual judge seemingly contradicts their own from similar unrelated case.

Despite not relieving plaintiffs from paying defendants' expenses, as many of its sister Circuits do, Seventh Circuit still has in place procedures established to protect plaintiff's access

to judicial relief, none of which was afforded to Petitioner. In addition to previously cited *Palmer* and *Schilling*, whose issues brought up by Petitioner are still applicable currently, another such reversed and remanded case is *Marlow v. Winston Strawn,* 19 F.3d 300, 305 (7th Cir. 1994).

Petitioner's ex-counsel squandered opportunities and tools available to investigate the case. During the course of discovery, Watkins ignored Petitioner's information regarding Hunter's tampering with evidence and did not share with Petitioner instances of Respondents' perjury. He also never suggested that Petitioner would take over the case himself or that an appeal was available, thus depriving Petitioner of those opportunities and saddling him with a dismissal that clearly benefitted Respondents, not Petitioner. Watkins' belated informing Petitioner about possible consequences of dismissal against Petitioner's wishes and best interest did nothing to rectify the situation for Petitioner. That's another reason for Petitioner not to pay, since he was never given a chance to withdraw the counsel-initiated voluntary dismissal after finding the conditions of refiling onerous, as was done in *Marlow* (citing, e.g. precedent of *Lau v. Glendora Unified School Dist.*, 792 F.2d 929 (9th Cir. 1986)).

When the District Court entered an order requiring Petitioner to show cause why the case should not be dismissed for want of prosecution, it did not consider explicitly raised issue of prohibitive excessiveness of those expenses to Petitioner, making *Marlow* relevant.

Additionally, cases of *Del Carmen v. Emerson Electric Co.*, 908 F.2d 158 (7th Cir. 1990) (involves FRCP 60(b)), *Lowe v. City of East Chicago*, 897 F.2d 272 (7th Cir. 1990), and *Webber v. Eye Corp.*, 721 F.2d 1067 (7th Cir. 1983) warrant reversing and remanding Petitioner's case.

An alternate available procedure not afforded to Petitioner stems from *Mother & Father v. Cassidy,* 338 F.3d 704, 708 (7th Cir. 2003), another case involving indigent plaintiffs. There, parents of a minor suspected of heinous crime ran up defendants' expenses before dismissing the

case for tactical reasons. Seventh Circuit stated, in denying defendants' demand of upfront expenses' payment:

> "We have recognized only two situations in which the denial of costs might be warranted: the first involves misconduct of the party seeking costs, and the second involves a pragmatic exercise of discretion to deny or reduce a costs order if the losing party is indigent."

In Petitioner's case both conditions are present, as he already mentioned. Also, unlike *Mother Father*, Petitioner is **not** the losing side, thus his case should be viewed more leniently, including, unlike in *Mother Father*, consideration that Respondents rather than Petitioner were running up own expenses, thus their brazen upfront payment demand should have been denied.

Application of FRCP 60(b)(1)-(3) due to opposition misconduct uniformly results in reversal and remanding of cases similar to Petitioner's by various Courts of Appeal, so does opposition misconduct even if FRCP 60(b)(1)-(3) was not invoked. Further research shows complete arbitrariness in Seventh Circuit's decisions regarding reviews of dismissals with prejudice by lower courts when the above factors are not involved. In the case of *Williams v. Adams,* 660 F.3d 263 (7th Cir. 2011), similar to Petitioner's, dismissal with prejudice was reversed and remanded. Furthermore, in deciding it Seventh Circuit suggested subtracting defendants' expenses from either judgment in plaintiff's favor or settlement amount. The same suggestion was made in *Mother Father*. In other words, Respondents' demand of upfront payment made the situation unacceptable for Petitioner, similar to *Penny v. Shansky*, 884 F.2d 329 (7th Cir. 1989).

In case of *Rice v. City of Chicago*, 333 F.3d 780 (7th Cir. 2003) while displeased with plaintiff's behavior, Seventh Circuit considered defendants' misconduct, "stonewalling the case". Petitioner explicitly raised issue of Defendants' misconduct, but it was not addressed.

Petitioner is confused by *Gay*, cited in the Order since in that case lower court's

decision was reversed and remanded. Almost the entire *Gay* decision supports Petitioner's arguments about reversing and remanding his case. Furthermore, Judge Hamilton was a panel member in both *Gay* and this case and Petitioner's case's decision seemingly contradicts *Gay*. Petitioner is judged much harsher than one in *Gay*, who is acknowledged as abuser of judicial system while Petitioner was never accused by the courts of such actions. These inferences are made by Order's shortened version of citation, while full version says:

> "By contrast, courts can bar *future* suits as a sanction **to punish a refusal to pay past court costs and sanctions** even if the litigant is indigent." *Gay,* 682 F.3d at 594.

Such reasoning does not apply to Petitioner, who is reviving old suit ruined by his ex-counsel rather than initiate a new one. Also, court costs imply trial taking place, resulting in prevailing side. Since due to Respondents' despicable actions no trial took place, they are **not** prevailing side, thus their expenses do not qualify as court costs. Plus, punishing Petitioner simply for expressing indignation at the order to pay those who not only made Petitioner relive painful history, but also used said expenses to facilitate illegal and possibly criminal actions goes against established doctrine of judicial restraint.

Additionally, in deciding *Gay, Aggarwal* was cited, as mentioned above.

Similarly, District Court's order of dismissal with prejudice conflicts with its own reasoning in case of *O'Shaughnessey v. HSHS Med. Grp., Inc.,* Case No. 3:17-cv-3311 (C. D. Ill. – Springfield Division, May 1, 2019)(citing *Kasalo v. Harris & Harris, Ltd.,* 656 F.3d 557 (7th Cir. 2011)).

Other cases cited by Petitioner are *Gabriel v. Hamlin,* 514 F.3d 734 (7th Cir. 2008) and *Evans v. Griffin,* Case No. 17-1957 (7th Cir., decided August 7, 2019). In *Gabriel*, like in this case, defendants tried to deny plaintiff his opportunity to present his case in court by any means necessary. *Evans* specifically deals with uncooperative plaintiff. In deciding both

cases, Seventh Circuit urges the mentioned above judicial restraint. In both cases dismissal with prejudice was reversed and remanded, directly contrary to one-size-fits-all application of *Esposito*, inappropriate for this case but shamelessly pushed by Respondents nevertheless.

Cases of *Johnson v. Chi. Bd. Of Educ.*, 718 F.3d 731 (7th Cir. 2013) and *Sroga v. Huberman,* 722 F.3d 980 (7th Cir. 2013), both involving public schools' employees, also warrant reversing and remanding Petitioner's case.

Esposito, cited by Respondents *ad nauseam*, is not applicable to Petitioner's case for several important reasons, as follows: (i) in *Esposito*, plaintiff made numerous questionable choices, including breaking the law which led to his incarceration, as well as missing deadlines despite court's reminders; (ii) Seventh Circuit's decision in *Esposito* was based partly on the fact that the plaintiff never raised the issue of excessiveness of defendants' court costs, just their award, as Respondents admitted in Appellees' Brief:

> "Esposito does not deny that the current action includes allegations brought in the previously-dismissed case, **nor does he argue that the costs themselves are excessive**. Rather, he argues that the order directing the payment of costs and the stay of proceedings unfairly denied him access to the courts because he is unable to pay the costs." *Esposito,* 223 F.3d at 502.

On contrary, in the present case Petitioner explicitly raised the issue of prohibitively excessive award of Respondents' expenses in both his Motion to Waive Payment and Appeal to the Seventh Circuit; (iii) in *Esposito* plaintiff personally dismissed his original lawsuit. In the present case, Petitioner contends that the original dismissal was done by his ex-counsel **against Petitioner's wishes** while failing to timely (before doing that dismissal) inform Petitioner of possible consequences, in line with Watkins' pattern of failing to represent Petitioner's best interest in the case; (iv) in *Esposito* plaintiff added extra defendants arbitrarily while in present case Petitioner added extra defendants for specific spelled out purposes and (v) finally and most

importantly, in *Esposito* defendants were not responsible for the plaintiff's indigence, which was, again, the result of his own questionable choices. On contrary, in this case Respondents BHY and Hunter's illegal and possibly criminal actions are directly responsible and liable for Petitioner's indigence. Moreover, BHY and Hunter used those expenses to facilitate said actions, thus paying them would be rewarding such illegal and possibly criminal actions. Petitioner presented these reasons in detail, but Seventh Circuit's panel used *Esposito* nevertheless, without mentioning Petitioner's arguments about its inappropriateness. Plus, because of Respondents' illegal actions all their cited cases including *Esposito* are moot and inapplicable as such.

On contrary to *Mother Father* and *Williams*, in deciding *Tango Music, LLC v. DeadQuick Music, Inc.*, 348 F.3d 244, 247 (7th Cir. 2003), Seventh Circuit stated:

> "Tango's principal argument is that the lawyer's depression was a good excuse for his neglecting his responsibilities. We may assume that it was. But that is not the issue. The issue is whether Tango had a good excuse for failing to prosecute its case. It did not. **It is a business firm, not a hapless individual, and it has to take responsibility for the actions of its agents, including the lawyers whom it hires.**"

Using the reasoning of *Tango*, Petitioner's case as well as cases of *Easley v. Kirmsee*, 382 F.3d 693 (7th Cir. 2004) and *Martinez v. Chicago,* 499 F.3d 721 (7th Cir. 2007) should have been reversed and remanded, yet all of them were affirmed. Specifically, while affirming *Martinez*, Seventh Circuit acknowledged that:

> "It is unfortunate for Martinez that her attorney's neglect resulted in the dismissal of **what may have been a meritorious action**. The result here may seem harsh, but when a lawyer's inattentiveness becomes as serious as it was here, it imposes costs on everyone: the client, the opponent, and the court system. LaPonte was Martinez's agent, and Martinez is thus bound by his actions. ... The proper remedy, **if she is to have one at all**, is a malpractice action against the attorney."

In affirming *Martinez*, *Tango* was cited despite the fact that plaintiff in *Martinez* would qualify as "hapless individual", similar to both *Williams* and Petitioner. Furthermore, *Martinez*

contradicts the precedent of *Bolt v. Loy*, 227 F.3d 854 (7th Cir. 2000), a reversed and remanded case in which the Seventh Circuit stated:

> "It also was not his error but his lawyer's, and it is ordinary preferable ... to sanction the lawyer for the lawyer's mistake than, by dismissing the suit, to precipitate a second suit – a suit against the lawyer for malpractice. The courts have more than enough legal business as it is."

Overall, Petitioner's case was treated extremely harsh. The merits of the case were never considered, unlike Seventh Circuit's own *Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999), a case where one isolated but severe incident sufficed for reversal and remand of summary judgment and *Ayissi-Etoh v. Fannie Mae,* 712 F.3d 572 (D.C. Cir. 2013), another reversed and remanded case similar to his. Opposition' misconduct was never addressed, contrary to *Anderson*, *Rozier*, *Lonsdorf*, *Malin* and *Waldon*. Plaintiff was not afforded less stringent standards of review for *pro se* litigants, contrary to *Palmer* and *Schilling*. He was not allowed to withdraw counsel-initiated voluntary dismissal due to onerous conditions upon refiling, contrary to *Marlow*. He was neither relieved from paying excessive for him defendants' expenses contrary to *Herring*, *Duffy*, *Andrews* and *Garza* nor afforded an opportunity to deduct those expenses from monetary award by jury or settlement amount contrary to *Williams* and *Mother Father*. Instead, the courts did nothing to protect him from Respondents' extortionist demand to pay said expenses upfront despite being advised and well knowing that those expenses were prohibitively excessive. His case was decided on one-and-done basis after he expressed indignation at such brazen demand, not being afforded any second chances contrary to *Palmer* and *Schilling* and unlike *Tango*, *Easley*, *Martinez* and *Esposito*, in each of which the courts were exasperated by ongoing pattern of misconduct by plaintiffs or their attorneys and which was not the case here. After refiling, the case never was even active, being stayed almost immediately following Respondents'

extortionist demands for payment of expenses. As such, any delays after the case being in limbo are due to Respondents' actions, not Petitioner's. Finally, the case being designated as non-precedential implies that the decision was based not on established doctrines and precedents but contrary to them. This contradicts yet another doctrine that such cases should be viewed more leniently, as in *Rumbough*, not harsher.

Respondents falsely claimed that "Plaintiff's prior counsel informed him that the matter would be stayed and he would be required to pay costs upon refiling" while also admitting that the said letter said "could", not "would". Then, Respondents mock Petitioner by claiming that "the District Court gave ample opportunity to pay the expenses". Petitioner explicitly mentioned that those expenses were prohibitively excessive. It's like a flyweight boxer, given even unlimited time to prepare, still would have no chance against a heavyweight. Such comparison is true for this case considering that original Defendant Western is a public, meaning taxpayer-funded entity with little to none oversight from stakeholders, namely taxpayers.

Respondents' actions in this case are the perfect illustration of the fact that many ordinary people cannot get access to justice because they cannot afford it, as *Aggarwal*, among others, specifically states, recently reiterated by the Honorable US Supreme Court Justice Neil Gorsuch. Respondents' actions, in addition to violating principles of American judicial system, also violate Judeo-Christian principles on which it is based. Namely, these principles call "do not purposely put an obstacle in blind man's path", which Respondents do, trying to abuse relative ignorance of Petitioner, who is not a lawyer neither by schooling nor by trade and learns as he goes.

Overall, all the precedents cited in this Petition's Table of Authorities involving reversed and remanded cases (encompassing in time ones established before, parallel to and after inappropriate for this case *Esposito*) as well as universally accepted doctrines of courts'

accessibility for litigants and judicial restraint, discouraging courts' harsh judgments, favor Petitioner's case proceeding without paying Respondents' voluntarily incurred expenses which were also used to unfairly and illegally gain advantage over Petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mikhail S. Tsukerman

By: /s/ *Mikhail S. Tsukerman*

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CERTIFICATE OF COMPLIANCE WITH
FRAP RULE 32(a)(7), FRAP RULE 32(g) AND CR 32(c)

The undersigned Petitioner, Mikhail S. Tsukerman, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this Petition conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a petition produced with a proportionally spaced font.

The length of this petition is 8510 words.

Dated: July 9, 2020.

Mikhail S. Tsukerman

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PROOF OF SERVICE

The undersigned Petitioner, Mikhail S Tsukerman, hereby certifies that Respondents were promptly notified upon filing this Petition for Writ of Certiorari with the Court.

Dated: July 9, 2020.

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