No. 20- 22-1141

IN THE

Supreme Court of the United States

GARY PISNER,

Petitioner,

v

MARLA RUBINSTEIN, ET AL

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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3/17/2023

QUESTIONS PRESENTED

1. Fed. R. Evid. Rule 201 and caselaw gives the parties the ability to enter documentary evidence through judicial notice; under what conditions can a party, without identifying the purpose of the documents, the material in the documents to be recognized, the grounds for taking judicial notice, with the court, ignoring the requested judicial notice process of Fed, R. Evid. 201(e), take judicial notice of documents?

2. If a trial court rejects a party's preliminary motions, such as a motion to dismiss, of that party, but both the trial court and the appellate court of that jurisdiction decides, based on the moving party's submitted documents, that the case, to be efficiently dealt with, should be refiled in another jurisdiction and thereafter, the case is dismissed pursuant to the forum non conveniens doctrine. If, pursuant to orders from both the trial court and appellate court, the same case was refiled in the court mandated new jurisdiction, would there be Cross Jurisdictional Forum Non Conveniens Preclusion bars that prohibited the rehearing of decided preliminary motions in the new jurisdiction?

3. Are out of court disparaging communications made by a defendant, at an earlier time, to a beneficiary's trustee/administrator, who is later in litigation with his beneficiary and there are also communications between a defendant and third parties not in litigation, exempt from a defamation suit against the present defendant via litigation privilege?

I. PARTIES TO THE PROCEEDINGS

Petitioner:

Gary Pisner was plaintiff in the district court and appellant in the court of appeals and is petitioner in this Court.

Respondents:

The Marla Rubinstein and her Marla Pisner 2011 Trust were defendants in their individual capacities in the district court and appellees in the Court of appeals, and are respondents in this Court:

II. CORPORATE DISCLOSURE STATEMENT

The petitioner has no corporate affiliations.

III. RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

• Gary Pisner v. Marla Rubinstein Appeal # 19-CV-652, District of Columbia Court of Appeals 2/25/2021 Memorandum opinion and Judgement; order denying Petition for rehearing denied 6/02/2021.

• Gary Pisner v. Marla Rubinstein Case No. 2019 CA 000229 B 8/7/ 2019 "Plaintiff's Motion for Reconsideration and for Leave to Amend" District of Columbia Superior

Court. The Appellate Court's ruling has given the D.C. Superior Court a continuing limited jurisdiction over the case.

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IV. PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Pisner (hereinafter "Pisner"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case, as explained further below.

V. OPINIONS BELOW

The Motion to Dismiss Opinion for which review is sought is Pisner v. Rubinstein, No. 22-1294 (August 25, 2022). The fourth Circuit Court of Appeals denied Applicant's Petitions for Rehearing on October 18, 2022. The opinion of the Court of Appeals is unpublished.

The appealed Maryland Federal District Court's order and memorandum Case No.: 'TOC-21-0020 entered February 1, 2022). dismissing the case pursuant to the defendant's Motion to dismiss, is unreported.

VI. JURISDICTION

The order of the 4th Circuit Court of Appeals was entered on August 25, 2022. On January 16, 2022, the Court of Appeals issued an order on a Petition to Rehear. The Court extended the time within which to file any Petition for a writ of certiorari due by January 16, 2023, to 150 days. That order extended the deadline for filing this petition to March 17, 2023 (application 22A484). The district of this Court is invoked under 28

U.S.C. § 1254(1). The Petition was first filed on March 17. Court ordered corrections were then made.

VII. CONSTITUTIONAL AND FEDERAL RULE PROVISIONS INVOLVED

A. Rules

Fed. R. Evid. Rule 201:

b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information...

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes

judicial notice before notifying a party, the party, on request, is still entitled to be heard.

B. Constitutional Provisions

United States Constitution, Amendment V:

"No person shall ... be deprived of life, liberty, or property, without due process of law."

United States Constitution. Amendment XIV§1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

[1] Equal Protection Clause itself applies only to state and local governments, the Supreme Court held in Bolling v. Sharpe 347 U.S.497 (1954) that the Due Process Clause of the Fifth Amendment nonetheless imposes various equal protection requirements on the federal government via reverse incorporation.

VIII. STATEMENT OF THE CASE

A. The origins of this case.

This matter had its origins at a trust and estate attorney's office on December 12, 2008.

In attendance at a meeting were Marion Pisner, the mother of the Petitioner (hereinafter "Pisner") and Respondent Marla Rubinstein (hereinafter "Rubinstein"), the trust and estates attorney, and his assistant.

The Purpose of the meeting was to complete the trust document for the Marion E. Pisner Trust.

There was a sense of urgency; Marion Pisner had cancer, and it was terminal: she would be dead in a few weeks.

Rubinstein was against the trust; she specifically demanded her money at once, and she announced that the trust was a sham and legal nonsense and that she would challenge it.

Marion Pisner did not take Rubinstein's comments well and to deal with Rubinstein's threats to challenge the trust, Marion Pisner requested that the trust attorney immediately add the following language:

> P6 (e) If any beneficiary contests any provision of this Trust regarding the equal distribution of assets to the Grantor's children or as to the right of both children to serve as CoTrustees,

such beneficiary shall forfeit any and all interest he or she may otherwise have under this Agreement.

In 2016, Rubinstein, who was, at that time, a CoTrustee of the Trust, demanded that certain assets should be turned over to her; she refused to execute any documents until that was done.

This resulted in serious financial problems for the Trust and the remaining estate, so it was agreed that CoTrustees would file a Declaration of Rights seeking guidance from the Montgomery County Maryland Circuit Court, which would be binding.[2]

At some point Rubinstein, changed her mind and she decided she did not want to be bound by the court's decision, so she, without serving Pisner, sent a document to the court demanding that the court appoint a new trustee and that certain trust assets should be transferred to her.

During the first hearing, the Judge informed her that, given the assets were in the District of Columbia it would not be possible for the court to transfer D.C. property to her.

Rubinstein seemed to have forgotten the language in P6 (e) of the Trust Document (see above); once she realized her mistake, she tried to retract her request in a new filing where she withdrew most of her accusations, nevertheless the Court

[2] Md. Code, Cts. & Jud. Proc. § 3-408 "Persons entitled to a declaration of rights or legal relations in respect to the trust or estates of decedent."

appointed an attorney, who was the default Court-Appointed Attorney Trustee for that court: The record showed that there was little due process in the court's decision. Pisner did not even see a copy of Rubinstein's initial filing.

Apparently, Rubinstein met with the Court-Appointed Trustee and she decided that the best way to get around the language in the trust agreement was to fabricate a story, directed to the new Court-Appointed Trustee that Pisner had embezzled hundreds of thousands of dollars and that the reason Pisner did not want the Court-Appointed Trustee was that he was hiding his embezzlement and that language in the trust agreement, legally requiring that the trustee remove her as beneficiary should not be executed.

Apparently, the Court-Appointed Trustee bought off on her story- besides, if the Court-Appointed Trustee complied with the language in the trust agreement, he would not get paid, so at the outset the Court-Appointed Trustee had a conflict of interest; moreover, Rubinstein had promised the Court-Appointed Trustee that he would be well compensated.

Rubinstein also convinced the Court-Appointed Trustee that any access, by Pisner, to the records of the trust or communications with Pisner would pander to Pisner.

Apparently, Rubinstein was cherry-picking documents, fabricating documents, and she was making defamatory accusations to the Court-Appointed Trustee.

In furtherance of her fraud and when that was insufficient, Rubinstein claimed, paradoxically, that Pisner was hiding the evidence of his embezzlement because there was no evidence to support her: None of this was true, but she needed to do

something because, if she did nothing, it would leave her with nothing and for the Court-Appointed Trustee, if he did not support her he would also get nothing.

B. The Court-Appointed Trustee: How he protected his court appointment.

Given the language of the trust document (see above) which disenfranchised Rubinstein and made the Court-Appointed Trustee irrelevant, the Court-Appointed Trustee quickly transferred the trust's assets to Rubinstein because she supported his compensation.

Any attempts to challenge his removal was met with unattested filings having false information, erroneous legal theories and personal threats: This became more pronounced, once the trust assets had been transferred, unbeknownst to Pisner, to Rubinstein; moreover, one can find a plethora of inconsistent orders based on motions that legally and factually contradicted themselves. Some of the Court-Appointed Trustee's filings were responded to by Pisner and some were not known until a judge issued orders or Pisner stumbled on them; motions were filed by the Court-Appointed Trustee and withdrawn; there were meeting between judges and the Court-Appointed Trustee that Pisner was not aware of, where substantive issues were discussed.

C. Rubinstein Disappears.

It is important to remember that both the Court-Appointed Trustee and Pisner agreed on the record that Rubinstein was no longer a party to these proceedings. Pisner had no real understanding of what had happened to Rubinstein, but it was clear that the Court -Appointed Trustee was not following trust laws, refusing to grant Pisner access to his files, and refusing to talk to Pisner. This was the

primary driving force, and the litigation was between Pisner and the Court-Appointed Trustee. The Court-Appointed Trustee's behavior was very opaque. The object of the exercise was to remove or replace the Court-Appointed Attorney. Moreover, based on the Standard of Review for a Motion to Dismiss, which requires all facts to be construed in favor of the non-moving party, it is a fact that after October 11, 2017, that Rubinstein was neither a CoTrustee, nor a Beneficiary; therefore, she was no longer a party, and the only remaining parties were the Court-Appointed Trustee and Pisner the beneficiary, so for the Motion to Dismiss, there were two parties, the Court-Appointed Attorney-the Trustee and the Beneficiary Pisner.

D. The Trust Assets disappear.

In the 12th of September 2018, order by the Maryland Court of Special Appeals (see Exhibits I (62A) and J (66A), the Maryland Court of Special Appeals concluded that the Trust assets were no longer under the control of the Trustee and that the matters related to the Trust and Estate were moot and given that a trust literally only exists to handle the disposition and management of assets, the Court-Appointed Trustee's appointment along with the Trust was implicitly ended. Pursuant to the Court- Appointed Trustee's own motion, the trust assets were gone as of August 2018 (see Exhibit I (62A)). [3] Because the Maryland Court of Special Appeals dismissed Pisner's appeal (see Exhibit J (66A)).

[3] The appointed trustee's exact admission was "Further, the trust has already sold the real properties and they are no longer under the control of Robert M. McCarthy as successor personal representative or successor trustee and this appeal is now moot."

At that point there was nothing of significance, except the real properties, which were all in the District of Columbia, the trust assets, excluding the fees paid to the Court-Appointed Trustee, had been transferred to Rubinstein and with the once Court- Appointed Trustee refusing to communicate with Pisner or to give access to Pisner's files, based on the order of the court (See Exhibit J (66A)), Maryland was irrelevant. [4]

E. Filing in the District of Columbia.

Given the 12th of September 2018 order issued by the Maryland Court of Special Appeals and an affidavit showing that the Trust and Estate assets were disposed, Pisner filed a complaint in the District of Columbia on January 14, 2019 (see Appendix Exhibit F (40A)) where the real property had been and the assets of the trust had been deeded to Rubinstein in exchange for money paid to the Court-Appointed Trustee (Rubinstein would claim, in court, that she had purchased Pisner's assets at an auction). There was also a contract breach by Rubinstein of a contract that was consummated in the District of Columbia Superior Court, which related to the District of Columbia properties.

Given that Pisner had lent the Trust $18,000 to bail it out, and given that Pisner, having received nothing, he was out of $18,0000 and he was the beneficiary: He has still not received any of the nearly one million dollars in the remaining assets that had existed in 2016.

F. Rubinstein's Motion to Dismiss and the April 12, 2019, order.

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[4] The Motion - Exhibit J- was never served on Pisner: He found out about it and the order Exhibit K, during a routine review of the court files.

In the case in the District of Columbia, Rubinstein filed a Motion to Dismiss (see Exhibit G 48A), and the court rejected it. However, Rubinstein had requested a continuance and a stay of discovery, for spurious reasons. What was actually happening without Pisner's, and the Court's knowledge was that Rubinstein and the Court-Appointed Trustee, had decided, in secret, that they needed to clean up the record: This was the April 12, 2019, order issued by the Circuit Court, in secret.

Remember- the assets of the trust were gone, but there had been no legal distribution and Rubinstein already had all the trust assets (those documents and orders were in the dockets of the Maryland court of Special Appeals) and the court-appointed trustee had already been paid.

Rubinstein and the Court-Appointed Trustee had to correct the lack of a distribution and they had to account for the missing assets, so they fabricated a story, which yielded an order (see Exhibit K 68A): This was months after the complaint had been filed.

The order (Exhibit K 68A) and the Motion were dumped (along with the rest of the same three hundred pages that would later be dumped in the file of the Federal District Court), into the D.C. Superior Court file along with Rubinstein's Motion to Dismiss.

These documents confused the court, but given that the D.C. Superior Court, unlike the Federal District Court, had oral arguments and things were clarified : The D.C. Superior Court, based on the April 12, 2019 order thought that there was something significant still going on in the Maryland courts solely because the April

12, 2019 order had Rubinstein's name on it, so the D.C. courts, both the Superior and Appellate court approved the dismissal using their powers under Forum Non Conveniens, even though it had never been used in any jurisdiction in the United States when there was real property in the case's jurisdiction. One can see the effect of the April 12, 2019, order (see Exhibit E 28A).

The Honorable Florence Y. Pan, judge of the District of Columbia Superior Court (now of the District of Columbia Court of Appeals) never explained her verbal opinion and even when she was required by the District of Columbia Court of Appeals to respond to an outstanding Motion for Reconsideration, her response was lacking in content.

Using the Forum of non conveniens in the case was a total reversal of existing precedence in that there were no other cases in the U.S. where there res jurisdiction (D.C.), where all the real property- that was the subject of the case, was in the original forum; the contract was consummated in the original forum, and the Maryland Court's had already concluded that the assets were no longer under the control of the trust.

The District of Columbia Court of Appeals acknowledged, in its opinion, that the facts were unclear, but regardless, the appellate court seemed to rely totally on the April 12, 2019, order that was part of Rubinstein's 300-page paper dump.

It was clear that the fraudulently procured and rendered April 12, 2019, order was legally invalid: That was never really addressed by the court, but Pisner's appeal was successful in that the District of Columbia Court of Appeals opinion was beneficial to Pisner, in that the Court of Appeals, required that, to avoid any

prejudice (because of the change in forum), to Pisner, the Superior Court would– ironically maintain jurisdiction.

G. The problems with the April 12, 2019, order: How a fraud on a state court was migrated to the federal courts using judicial notice.

There were many extreme problems with the April 12, 2019, order:

- On February 14, 2019, the Court-Appointed Trustee, in response to the case filed against Rubinstein in the D.C. Superior Court, days after Rubinstein was served, filed his motion in the Montgomery County Circuit Court that would result in the order (see Exhibit K 68A), which falsely implied that the $50,000 settlement offer from Rubinstein and the Court-Appointed Trustee came from the trust, it did not; it came from Rubinstein's bank account.
- It was clear why Rubinstein's name appeared in the April 12 order (see Exhibit K 68A); it was because she was being sued and she wanted to be a party subject to the $50,000 General release) with, contrary to the motion any residual going to Rubinstein and nothing to Pisner, unless Pisner signed the general release of liability.
- It is clear that the April 12, 2019, order shows that Rubinstein and her accomplices had already misappropriated funds, because the order uses the term "remaining" in front of distribution.
- The language in the order is inconsistent with the language in the motion that elicited the order: In the motion, Pisner would get any residual and in the Court-Appointed Trustee prepared order, Pisner would get nothing.

- The order (Exhibit K 68A) is internally inconsistent because it is based on an alleged approximately $536,000 imbalance (a proposed value of the assets stolen) at the same time it refers to $500,000 in missing evidence of the imbalance because of missing documents allegedly being withheld by Pisner, which would support Rubinstein's claim that there was a $536,000 imbalance: A truly nonsensical argument, which is easily disproven by the record of the court.
- So there is no evidence; therefore, to oppose the claim of the imbalance, Pisner would have to produce evidence, which does not exist.
- The Appellate court had already found that the trustee had disposed of the assets in 2018 (see Appendix Exhibit I 62A and Exhibit J 66A).
- There was no notice to Pisner of the hearing of April 9, 2019 (see Appendix Exhibit K 66A), so Pisner did not attend the hearing.
- The Court-Appointed Trustee had refused to give Pisner, the beneficiary, access to the trust files, and others, including outside law firms, were instructed by the Court-Appointed Trustee not to cooperate with Pisner.
- Rubinstein was not, based on Maryland law, a beneficiary: She had violated the terms of the trust agreement.
- The Court-Appointed Trustee implied to the court that he was representing Pisner when he was not.
- The Montgomery County Circuit Court did not have subject matter jurisdiction, because the case was in the Maryland Court of Special Appeals, at that time.

- The obvious purpose was to get a general release of liability for $50,000 and to end the District of Columbia proceedings, which were reaching a critical point.
- The carefully worded order of the court prepared by Pisner's Court-Appointed trustee did not actually say that any of the assets were being distributed to anyone: it was any "remaining assets."
- The Motion, which elicited the order of April 16, 2019, contained numbers that would have been easily proven to have been fabricated to cover the property transfers to Rubinstein from the prior year. There were public documents that showed that any embezzlement by Pisner would be impossible, and those public tax records were being withheld from Pisner.
- The timing of the filing of the Motion to Dismiss in the District of Columbia Superior Court was within a few days after the Maryland Circuit Court issued its order and after multiple continuances and outstanding discovery deficiencies of Rubinstein in the D.C. Court case.
- The alleged assets that Pisner had taken could have never existed because, with few exceptions, the assets were in the form of real property, which could not be transferred by Pisner, without the signature of Rubinstein: This was reflected in ledgers of the trust and in the trust documents.
- There was documentation in the record of the Maryland Court of Special Appeals that contradicted what was in the motion that led to the April 16, 2019, order and that the Maryland Circuit Court did not have subject matter jurisdiction: These documents were concealed from the Maryland Circuit Court.

- Since the case was before the Maryland Court of Special Appeals, most of the records of the prior proceedings were in the Appellate court and thus unavailable to the Maryland Circuit Court on April 12, 2019.
- Based on the April 12 court transcript, much of the argument in the Circuit Court, related to Pisner's alleged contempt for not turning over documents. This alleged contempt was based on perjured testimony of the Court-Appointed Trustee's accountant and Rubinstein and in the record of the Maryland Court of Special Appeals, there was a written admission that the testimony of Rubinstein and the Trustee's accountant had been false: This admission had also been unavailable to the Circuit Court.

H. **Using Judicial Notice to transfer fraud on the court from one court to another.**

Pursuant to the instructions of the D.C. Court of Appeals, a complaint was filed in the US District Court for the District of Maryland (see Appendix Exhibit H 52A). Almost immediately, Rubinstein dumped the same three hundred (300) pages of documents that they had dumped into the files of the District of Columbia Superior Court along with an almost identical motion to dismiss: The Motion that the D.C. Courts had just rejected.

Just as with the D.C. courts, there was no explanation by Rubinstein of why the Court should take judicial notice and what was to be judicially noticed in the documents. Neither the Court nor Pisner knew:

- Were the Defendants asking the court to take judicial notice?

- What facts were being proffered from the documents?
- Why would the three hundred pages be judicially noticed, if those facts from the documents would easily be subject to a reasonable dispute based on public documents?
- How could one respond to a motion to dismiss if Pisner did not know what facts were being relied on?

As for the Court's premature termination of the case, in its Memorandum, in its section titled "Introduction" The Court makes the incorrect statement "Pending before the Court are the Rubinstein Defendants' Motion to Dismiss and Pisner's Motion to Strike the Motion to Dismiss, which are fully briefed.": We know from the docket of the case that the Court's statement is incorrect, given that Pisner could never file a complete answer to Defendants' Motion to Dismiss without the Court's compliance with the Federal Rules of Evidence, so the case was not fully briefed: It was impossible.

I. The District Court Issues a Memorandum Opinion after one year of inaction.

1. The memorandum attached to the District Court's order of January 31, 2022 (Exhibit E 05A), was a mix of alleged narratives that was peppered with false interpretations arising from limited review, little adherence to the Federal Rules, negligible adherence to any existing legal standards: In summary, a byproduct of a Fed. R. Evid. 201 and standards of review for a motion to dismiss, being completely ignored by the Court for 300-pages of cherry-picked documents that were dumped in the Court's file.

2. The Court's Memorandum made statements that had no relation to the full record to sidestep the judicial notice issue. In its Memorandum, the court stated that "Pending before the Court are the Rubinstein Defendants' Motion to Dismiss and Pisner's Motion to Strike the Motion to Dismiss, which are fully briefed."

   This did not happen; this could not happen.

   As argued, before one responds to a Motion to Dismiss, one must know what proper facts are before the court. The Motion to Strike of Pisner was filed to address the 300-page paper dump that was placed in the case's file without complying with Fed. R. Evid. 201 and with no due process, no evaluation.

   . As the record shows, Pisner was never permitted by the Court to file an answer to Defendants' Motion to Dismiss once the court ruled on Plaintiff's Motion to Strike; therefore, Pisner was never permitted to provide the evidence that the Judicial Notice of the Court was inadmissible, never provided with any basis for any judicial notice, nor with any specifics of what would be taken judicial notice of and its purpose: Without this information, Pisner did not know what facts would be relied on by the Court in its analysis of the Motion to Dismiss.

   Moreover, it appeared that the Court totally ignored the facts in the complaint itself. The alleged facts relied on were cobbled together totally from the three hundred pages of documents, and what was ultimately cobbled together was fiction and if one were to review all records, this would have been obvious.

   Moreover, given that the Court did not follow any of the required Rule 201 procedures, the memorandum was contaminated with easily debunked prejudicial

allegations: even worse, improperly, all facts were construed in favor of Rubinstein.

J. The appeal to the Fourth Circuit Federal Court of Appeals.

The District Court case was appealed, and a terse order was issued by the 4th Circuit with the following reason for the dismissal:

> Gary Pisner appeals the district court's order dismissing his complaint, in which he raised various state law claims related to completed state court litigation between Marla Rubenstein and Pisner concerning a trust for which the two were co-beneficiaries.

This opinion by the fourth circuit had no basis in the records of any case. Given the standard of review for a Motion to Dismiss:

- There was no dispute. Rubinstein was neither a beneficiary nor a trustee.
- The Maryland case that the 4th Circuit Court was referring to was between the court- appointed trustee and Pisner: Rubinstein was not a participant. That was stated in the record of the case.

Because of the District Court's failure to follow Fed R. Evid. 201, the facts and the law were completely muddled, in both the Maryland Federal District Court and by the 4th Circuit Court of Appeals: This is exactly what one would expect if Rule 201 was ignored and there was cherry-picking from contaminated documents by Rubinstein and The Court-Appointed Trustee.

IX. REASONS FOR GRANTING THE WRIT

A. The devastating effects on due process resulting from a court's total failure to follow Fed. R. Evid. 201.

1. **The standard of review for a Motion to Dismiss.**

When moving to dismiss under Federal Rule of Civil Procedure ("FRCP") 12(b)(6), the general rule is that a Court may not consider documents that are extrinsic to the complaint.

In considering a motion to dismiss under rule 12(b)(6), the court must accept all well-pled allegations in a complaint as true (see Albright v. Oliver, 510 US 266, 268 (1994). The court must construe all factual allegations in the light most favorable to the plaintiff (See Harrison v. Westinghouse Savannah River Co., 176 F3d 776, 783 (4th Cir. 1999).

A court may consider documents that are "explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits..." Goines v. Valley Cmty. Servs. Bd., 822 F3d. 159, 166 (4thCir. 2016).

2. **The improper approach of the Defendants.**

As the record of the case indicates, the principal approach used by Rubinstein was to dump three hundred (300) pages of proceedings in the Maryland court, which contains irrelevant material with Rubinstein (not the Marla Pisner 2011 Trust) as a party for a brief period of a few months, material where Rubinstein was not a party, and where there was rampant extrinsic fraud.

The underlying fraud and defamation by Rubinstein, in the complaints, in the form of forged and altered documents and false statements, was directed to people and not to the court (see Exhibit E 52A). Yes- the records were thoroughly corrupted, but it was not by Rubinstein, rather it was by the Court-Appointed Trustee.

3. A complete failure to comply with the evidentiary rules for Judicial Notice in pretrial proceedings can cause fictional fact patterns, prejudiced fact finders, unchallenged legal fictions, and a complete breakdown of any procedural due process.

Taking Judicial Notice under Fed. R. Evid 201 should have proceeded like this: Once Defendants identified the alleged documents and their purpose, they would have to move for this Court to take Judicial Notice of Federal Rules of Evidence Rule 201, which is:

> That ... the movant must supply the court "the necessary information" and that the non-moving party must be given the "Opportunity to be heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.

Pisner made a timely request "necessary information" in his notice of intent to file a motion to strike and in his Motion to Strike- absolutely.

Pisner also requested an "opportunity to be heard per Fed R. Evid. 201(e).

In the real world, a motion to dismiss has its facts derived from a plaintiffs' complaint and its attachments.

The one exception are documents that are part of the record that have entered the record by Judicial Notice, so Rubinstein's 14 documents three hundred (300) pages must be brought into the record of the case through the Federal Rule of Evidence Rule 201.

The Defendants must make their case by "supplying "necessary information" such as relevancy and that those "[f]acts and propositions ... are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."[5]

In general, the rationale for allowing judicial notice to be taken is that judicial notice may be taken of certain matters instead of formal proof where those matters are indisputably true.

In its Memorandum opinion, the District Court misinterprets a large percentage of what was in defendants' three-hundred-page paper dump.

This is the reason the Federal Rules of Evidence has a specific procedure for taking judicial notice of documents.

The District Court, in its memorandum opinion, does not grasp the procedures and the limitations of Judicial Notice.

For example, the Court constructed its background section of its Memorandum by copying alleged facts from the Court-Appointed Trustee's pleadings in the three-hundred-page paper dump. Even worse, the Court was also clearly pulling legal arguments from the Court-Appointed Trustee's legal arguments.

4. Given that Rule 201 was ignored there were no guardrails.

There are quite a few cases that have considered whether judicial notice can be taken of matters in judicial records.

[5] This was not done in the District Court and that is why the Federal District Court's background section is so riddled with so many inaccuracies.

The reliability of judicial records is not in question and their existence can certainly be judicially noticed (see Asarco, LLC v. Union Pacific R.R. Co., 765 F 3d 99); however, the underlying facts in a judicial record are not beyond dispute. For example, in Taylor v Charter Medical Corp., 162 F3d 827, 830 (5th Cir. 1998), a former patient at a residential hospital sued under 42 U.E.C. sec 1983 for alleged mistreatment. The defendant argued that it was not a state actor. The plaintiff responded that the court was required to take judicial notice that the defendant's predecessor has been found by another court to be a state actor in an unrelated litigation. The court rejected this argument, holding that "a court cannot take judicial notice of factual findings of another court." This is so because "(1) such findings do not constitute facts not subject to reasonable dispute within the meaning of Rule 201; and (2) were it permissible for a court to take judicial notice of a fact merely because it has been found to be true in some other action, the doctrine of collateral estoppel would be superfluous (see General Electric Capital Corp. V. Lease Resolution Corp. 128 F. 3d 1074 (7th Cir. 1997) (trial court erred in taking judicial notice of a finding that a settlement in a prior proceeding was fair, reasonable and adequate); United States v. Jones, 29 F .3d 1549 (11th Cir. 1994)(court could not take judicial notice of findings of another court establishing the nature of the salary dispute in question in the instant action).The distinction is therefore between the existence of judicial records and the truth of facts recorded. A court can take judicial notice that a pleading was filed or that a judgment was entered. Likewise, a court can take judicial notice that court filings alleged certain allegations, or that findings of fact were made by another court,

but the truth of those allegations and findings are not a proper subject of judicial notice (see International Star Class Yacht v. Tommy Hilfiger U.S.A., Inc., 146 F. 3d 66 (2d Cir. 1998). In the real world a motion to dismiss has its facts derived from a plaintiffs' complaint and its attachments.

The message of the caselaw that the Court had before it was clear regarding the use of facts from a prior case, but the Court ignored precedence and extracted disputable material from Rubinstein's three hundred pages of exhibits.

In the Court's memorandum it states:

> The Court need not consider the accuracy of the facts and factual findings asserted in the attached materials from the other court proceedings in evaluating the Rubinstein Defendants' arguments. Rather, the Court will consider the content of the exhibits only to the extent necessary to determine whether certain claims or issues were previously asserted, litigated, and decided in the prior cases, regardless of whether the facts stated were accurate or whether the claims were rightly decided. Because the attached exhibits are filings and orders from court proceedings relevant to the Rubinstein Defendants' arguments and are of undisputed authenticity, the Court may take judicial notice of them and consider them in resolving the Motion to Dismiss.

As one can see, the District Court's Memorandum fails to comply with its own standard because it liberally used the alleged facts from the three-hundred-page

paper dump and "rightly decided" must be coupled with legal adequacy and legal inconsistency.

As indicated in Pisner's Motion to Strike, that was something that should have been addressed, under the Federal Rules of Evidence, by hearing and briefs, that never happened.

For example, if Rubinstein was not a party in Maryland between the Court-Appointed Trustee and Pisner why would the exhibits be relevant? Rubinstein never explained the basis for her inclusion of the exhibits in their appendix. Given the comments of the District Court appears to make assumptions in light most favorable to the Defendants.

If one looks at the Background section of the Memorandum, as Pisner it is essentially a cut and paste of facts from the three hundred page paper dump and has taken as absolutely true and at the same time the Court has totally mangled and misinterpreted the propertied facts and it has interpreted the content of defendants' exhibits, contrary to the standard of review, which she has espoused, in favor of the Defendants.

In its Memorandum, the Court states that:

> The Rubinstein Defendants ask the Court to take judicial notice of these documents.
>
> Pisner does not dispute the authenticity of any of the attached documents but instead argues that the materials are irrelevant and that the factual conclusions underlying the decisions in those cases may not be considered for their truth in this matter.

First- given that neither Rubinstein, nor her personal trust were parties in the Maryland case in the Defendants' submission, the material is irrelevant; moreover, the Court misses the whole point of the Pisner's challenging the dumping of the three hundred pages of documents, without explanation, through his Motion to Strike.

The Motion to Strike was not a substantive answer to the Motion to Dismiss at all. It was procedural: Substantive arguments would have come later once the Motion to Strike was addressed.

Read the Motion to Strike and you see the problem was that Judicial Notice, from an evidentiary standpoint must be entered by the court under the Federal Rules of Evidence, which were ignored by the Court.

Given that the three hundred pages of Cherry-picked documents could contain irrelevant, contradicted, prejudicial material, Rule 201 had to be addressed before the fact finder addressed the motion to dismiss.

The purpose of the Motion to Strike was not to argue the validity of the Defendant's submissions. That would occur during a hearings and briefs on a motion to take Judicial Notice, which were required, but never happened; therefore, the statement of the Court makes no sense.

- Were the Defendants parties to the Maryland cases, which was included in their 300-page appendix?

- Were there documents missing that would contradict what was in the exhibits and superseded those documents proffered by defendants? We know there were plenty of documents.

The Defendants must make their case by "supplying "necessary information" such as relevancy and that those "[f]acts and propositions ... are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

It appears that the Court sees anything that is in the public record as being acceptable for Judicial Notice.

In general, the rationale for allowing judicial notice to be taken is that "judicial notice may be taken of certain matters in lieu of formal proof where those matters are indisputably true."

5. You can't pull allegations out of the file of another case in a different jurisdiction with different parties and totally disregard the allegations in the complaint for a Motion to Dismiss.

When moving to dismiss under Federal Rule of Civil Procedure ("FRCP") 12(b)(6), the general rule is that a court may not consider documents that are extrinsic to the complaint.

In considering a motion to dismiss under rule 12(b)(6), the court must accept all well-pled allegations in a complaint as true (see Albright v. Oliver, 510 US 266, 268 (1994). The court must construe all factual allegations in the light most favorable to the plaintiff (See Harrison v. Westinghouse Savannah River Co., 176 F3d 776, 783 (4th Cir. 1999).

A court may consider documents that are "explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits..." Goines v. Valley Cmty. Servs. Bd., 822 F3d. 159, 166 (4th Cir. 2016).

The facts in Pisner's complaint were ignored.

6. **Why the District Court failure to comply with the Federal rules of Evidence stripped the Due Process from the case.**

Fed. R. Evid. 201 (e)

Requires:

> that ... the movant must supply the court "the necessary information" and that the non-moving party must be given the "Opportunity to be heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.

A moving party must make their case for judicial notice by "supplying "necessary information" such as relevancy and that those "[f]acts and propositions ... are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Consider how Rubinstein's behavior, i.e., dumping 300 pages of documents in the record without explanation gives no context, no usage information, no argument; therefore, there is no means to argue the propriety of judicial notice so the party opposing is hobbled and unable to act; moreover, the Court has stated that Federal Rule of Evidence 201 permits a Court to take judicial notice of any fact "capable of

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

How would a court suggest that a party be able to question the accuracy for a paper dump? If there are different public documents that contradict each other, than they are all accurate and they are all questionable.

7. Consider the Due Process Problem.

The Court's failure to allow an informed response and with no chance to review: This is unconstitutional. "As we have seen, taking judicial notice of a fact without giving the parties an opportunity to be heard on the question has been held to be unconstitutional (see Castillo-Villagra v. I.N.S., C.A.9th, 1992, 972 F.2d 1017, 1029)." (See also Lussier v. Runyon, C.A.1st, 1995, 50 F.3d 1103, 1114 (error to take judicial notice without giving parties opportunity to be heard on tenor of fact and propriety of notice).

8. **Why Certiorari should be granted.**

One can see what has been presented here, is that there are serious gaps in the Judicial Notice process.

One can see that Judicial Notice may work for one document, but as the number of documents increase, the system collapses; Judicial Notice may be easily addressed sometimes, but in others like where the attorney representing the party is acting against the party and where records may be inconsistent and

contaminated, Judicial Notice must be carefully managed; must be carefully timed to avoid prejudice, to avoid misdirection.

Obviously, it did not work in this instance.

The courts have limited guidance for addressing complex judicial notice issues and it appears to be a topic that the courts must have guidance and under certain conditions, the lack of guidance can produce catastrophic due process failures, especially when the sources of the judicially noticed documents have their own due process problems.

B. The January 2018 D.C. case and appeal, where the same Motion for Judgement was heard, was ignored by the Federal District Court.

The District Court's failure to apply Rooker-Feldman, Collateral Estoppel created from the D.C. case and appeal is inexplicable.

The Court never explained why the District of Columbia Superior Court case, a case with the same parties, the same facts, the same counts, would be totally ignored and the Federal District Court never explained itself.

Unlike the Maryland cases, which the Federal District Court cannibalized, false facts, bad legal arguments, rampant fraud, where the Defendants were not parties and the facts and issues were not the same, whereas the D.C. case had every single requirement for Judicial Notice, Rooker-Feldman and Collateral Estoppel were met. In the D.C. case:

- The Superior Court case had the same parties.

- The assets had already been transferred to Rubinstein and then to her personal Trust in 2018 and the Trustee had claimed that he no longer had them.
- That case was final earlier than any other case in Maryland; therefore, every proceeding case would be subject to its findings via Collateral Estoppel.
- The assets were in the District of Columbia, consisting almost entirely of real property.
- The D.C. Superior Court had already rejected Rubinstein's Motion to Dismiss.
- The Motions to Dismiss were almost identical, with the exception that, in the D.C. case, Rubinstein falsely claimed that she had no contacts with D.C., which was obviously false.
- The exhibits that Rubinstein had submitted were the same.
- Many of the cases cited appear to be the same.
- The D.C. Superior Court case has priority over the Maryland cases, in time, in terms of finality for the Defendants' Motion to Dismiss.
- It is on the record of the D.C. case that Rubinstein claimed that she acquired Pisner's assets through an auction, yet Pisner has received nothing, thus the damage to Pisner occurred in the District of Columbia.

Regarding the D.C. case, The Federal District Court was silent on why the D.C. case was ignored.

What inferences did the Court make for the dismissal under the Doctrine of non conveniens?

There is nothing.

Apparently, the District Court's only takeaway is that it should analyze the case using Maryland law, which, given the full record, was improper.

Moreover, the District of Columbia Court of Appeals specifically said that there were still facts in dispute, so the dismissal was not analyzed as grounds for a Motion to Dismiss, so Rubinstein's Motion to Dismiss was rejected by the D.C. courts in its entirety.

Under Maryland law, [and other most state laws] collateral estoppel applies; Rooker-Feldman applies when:

- The issue to be precluded is identical to the one previously decided.

- There was a final judgment on the merits.

- The party against whom estoppel is to be applied was a party or in privity with a party in the prior adjudication.

- The party against whom estoppel is to be applied was given a fair opportunity to be heard on the issue. Leeds Fed. Sav. & Loan Ass'n. v. Metcalf, 630 A.2d 245, 2S0 (Md. 1993).

In the D.C. case:

- The issues were identical with the Federal District Court in the two motions to dismiss.
- The District of Columbia courts issued a final judgement and as part of the final judgement, was the finality of the District of Columbia Superior Court and Court of Appeals: Rubinstein did not appeal the dismissal of her Motion to Dismiss.
- Rubinstein and Pisner were the same parties who the estoppel is being applied.
- Marla Rubinstein briefed her Motion to Dismiss and there were oral arguments, so Rubinstein was given a fair opportunity to be heard and to appeal.

In the Maryland court:

- Rubinstein name appears in the April 12, 2019, order after a long absence, but given that the court that issued the order lacked subject matter jurisdiction, there was no final judgement. The remainder of the proceedings were between the Court Appointed Trustee and Pisner; that is on the record:

> These appeals, Nos. 3041 and 1037, are brought by appellant Gary Pisner ("Pisner"), one of two former co-trustees of a Maryland trust. The other co-trustee was Marla Pisner Rubinstein ("Rubinstein") .... The appellee is Robert M. McCarthy ("McCarthy"), a Maryland attorney who was

- appointed by the circuit court to replace Pisner and Rubinstein as co-trustees. Rubinstein ... has not participated in these appeals.

- There was additional irregularities that are considered to be extrinsic fraud (see above April 12, 2018 discussion in Statement of the Case).
- Since no assets were actually transferred to Rubinstein, (that had been done the prior year) her privity was in the form of a request for a general release of liability and not any privity related to a motion to dismiss.
- The April 12, 2019, proceeding was concealed from Pisner by Rubinstein and the Court-Appointed Trustee, so he did not attend the hearing, so there was no fair opportunity to be heard. That is on the record of the Maryland Circuit Court.

As for the Maryland Cases, it was on the record of those cases and stipulated by the Trustee in his filings that Rubinstein was not a party.

What could be clearer - so why did the District Court apparently take Judicial notice of litigation where the parties to the appeal both indicate that Rubinstein was not a party? If correct, neither.

Collateral Estoppel, Res Judicata, or Rooker- Feldman would apply.

Would it be possible that something in the three-hundred-page paper dump threw the Court off? If so, we see another manifestation of the Judicial Notice procedure failure.

If yes- the outcome was inconsistent with existing caselaw and this needs to be addressed by this Court because it destroys the concept of issue preclusion.