NO 24-762

In the

Supreme Court of the United States

ORIGINAL

GARY PISNER,

Petitioner,

v

ROBERT MCCARTHY, 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

GARY PISNER

10561 Assembly Drive Fairfax, Virginia 22030

Tel: 703-665-4220

gpisner@outlook.com Pro Se Petitioner

QUESTIONS PRESENTED

1. Is there a minimum amount of explanation in an appellate opinion necessary to meet due process requirements, to verify that an appellate court has actually treated the appeal as an of right appeal, and a lack of explanation would undermine post opinion procedures, such as a Petition to Rehear or an appeal to a higher court?

2. Fed. R. Evid. Rule 201 and the 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?

3. If a trial court, such as a Federal District Court, fails to timely serve its opinion (within 30 days) and had also failed to act on multiple outstanding preliminary motions, nor conducted any hearing, in what appeared to be an oversight and simply dismissed the case would properly be corrected through Fed R. Civ. 60 rather than through app

4. eal.

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 Robert Mcarthy, Esq., Kevin McCarthy, Esq. and Dana Evans, CPA 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

There are no proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

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- **It dumps cases from the District Court on this Court, compounding this Court's workload. 33**

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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. McCarthy, et al, No. :22-CV-00019-GJH (August 25, 2022). The fourth Circuit Court of Appeals denied No. 23-1655 (April 15, 2024). The opinion of the Court of

Appeals is unpublished.

VI. JURISDICTION

The order of the 4th Circuit Court of Appeals was entered on April 15, 2024. The Court extended the time within which to file any Petition for a writ of certiorari due to 150 days. That order extended the date for filing this petition to September 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition was timely filed, but a letter from the Clerk's Office dated September 24th, was received on September 29th: : The letter listed some deficiencies and required resubmittal within 60 days of September 24, 2024, which is November 25, 2024.

VII. CONSTITUTIONAL AND FEDERAL RULE PROVISIONS INVOLVED

A. Rules

Fed. R. Evid. 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.

Fed. R. Civ. P. 59

Fed R. Civ. P. 60.

Fed. R. App. P. 4

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

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VIII. STATEMENT OF THE CASE

On January 5,2022, Gary Pisner (hereinafter "Pisner") filed a Complaint directed against three defendants, who are the Respondents Robert McCarthy, Esq. (hereinafter "McCarthy"

) Dana Evans (hereinafter "Evans") and Kevin McCarthy, Esq. (hereinafter "K. McCarthy"). The Maryland Circuit had appointed McCarthy as a Trustee of the Marion E. Pisner Trust. At that time, the Trust had approximately one million dollars in assets, most in the form of

real property.

As for the two other Defendants K. McCarthy and Evans, they were appointees under MD Code, Estates and Trusts, § 14.5-807 Delegation of powers and duties by trustee. Statutorily, both Dana Evans and Kevin McCarthy, Esq. were agent in service of Appellant Pisner, who was at the time the sole beneficiary of a trust, containing assets of roughly 1 million dollars, which based on the comments of an ex-beneficiary, a Marla Rubinstein, was almost entirely pocketed by McCarthy with the assistance of K. McCarthy, and Pisner's agent accountant Evans. On February 28, 2022, McCarthy and

K. McCarthy filed a Motion to Dismiss, which included six (6) exhibits, from the Montgomery County Maryland Courts, presumably to inject some information to counter the facts in the complaint itself, but it was rather unclear what facts were being proffered and under what law or rule the documents were being proffered. Even more strangely, most of the documents relate to actions by a court that preceded the action of the Defendants that were the subject of the suit; therefore, they were obviously irrelevant.

Pisner filed a Motion to Strike on the assumption that the Defendants intended to use their exhibits for the

Motion to Dismiss, so until he knew what facts were being proffered, Pisner would not be able to properly respond to the Motion to dismiss. Pisner filed a Motion to Strike In that document the relief requested was for Counsel for Defendants to first comply with the Federal Rules of Evidence regarding a contested attempt to have the court take judicial notice and given that it is very late in the game; to avoid any more obstructions, this Court should strike Counsel for Defendant's exhibits and arguments referencing those exhibits and confine the facts to what is in Pisner's complaint.

The Motion to Strike was never

reviewed or even addressed, so Appellant Pisner still has no idea what facts the defendants were attempting to proffer from their six exhibits: Pisner could not adequately address the Motion to Dismiss without knowing what facts were being proffered by the Defendants. Moreover, to complicate the matter the Defendant Evans, simply incorporated all of the McCarthy documents by reference in her Motion to Dismiss, although, she had not been a party in the Maryland Courts, thus it was unclear why she believed that she could stand in the shoes of McCarthy; therefore, due to the ambiguity Pisner filed a Motion for a

More Definite Statement directed to K. McCarthy and Evans.

Finally, on April 25, 2022, two of the Defendants filed a Reply Brief in response to Pisner's opposition. The Reply brief of Defendants was defective in the it consisted of almost entirely new arguments, which was highly improper and based on the caselaw would be cured either by a Motion to Strike or a Motion for leave to file a surreply, but to avoid piecemeal litigation the Motion to Strike and
the Motion for a more definite statement needed to be ruled on first, so the surreply was put on hold.

On November 30, 2022, Pisner

received an E-mail relating to an ethics complaint, which Pisner filed against McCarthy and K. McCarthy. That Email and its attachment appeared to show that the Court had entered a dispositive order in the above styled case.

Pisner called the District Court and made an inquiry with this Court's Case Manager, and he was informed that an order dismissing this case had been entered, on September 26, 2022. This was the first time that Pisner had been aware that such an order existed and there were multiple motions that the court had never responded to.

The case manager's description, while

discussing the order on the phone, was ambiguous: It was not even clear that it was a final order.

Given the ambiguity of the conversation, Pisner drove to the Courthouse, and, upon request, the Clerk's office printed out a copy of the order.

After reviewing the copy, Pisner contacted chambers to confirm what had happened and Pisner was told that a Law Clerk or a contract lawyer had prepared the document and it would be difficult to contact the author.

Pisner is a Pro Se Plaintiff and Pisner understands that service, to him, is by

US
Mail (an application for electronic filing was rejected).

The case manager agreed to mail a copy of the order to Pisner, and that he received
September 26, 2022, order on
December 5, 2022.
December 5, 2022, was the first successful service of the September 26 order by the Court.
After a thorough search, Pisner verified that there had been nothing received from the
court before December 5, 2022, about a September 26, 2022, order.
On December 27, 2022, Pisner filed a

Rule 60(b) motion, because it seemed clear that the failure to address or even mention the Motion to Strike in the Court's order was an oversight and that Court's treatment of Pisner's Motion for a More Definite Statement, as being moot, was inconsistent with the arguments in the order itself, so what we had was too many inadvertent loose ends- to many factual errors- to take the matter to appeal and without proper timely service the oversights of the court could not be brought to the attention of the District Court through Rule 59. Shortly after Pisner was actually served in December, Pisner filed a Rule 60(b) motion directed to the

order dismissing the case. The Court responded in a manner inconsistent with the caselaw. Because of this Pisner filed a Rule 59 Motion directed to the obvious errors of the court. The Rule 59 Motion was dismissed by the court as a reconsideration of a reconsideration.

The case was appealed and a terse uninformative "Judgement" was issued by the Court of Appeals on, April 15, 2024, consisting solely of the sentence "In accordance with the decision of this court, the judgment of the district court is affirmed."

IX. STATEMENT OF FACTS

The Plaintiff-Appellee Pisner, who

was a Co-Trustee and Beneficiary of the Trust opposed Robert McCarthy's appointment, because substitution of Trustees was prohibited by the Trust document, because of the language in the trust document Pisner had a fiduciary duty to protect the trust, so Pisner opposed Robert McCarthy's appointment and after a time Pisner became aware that the approximately one million in assets being held in trust for Pisner had vanished, so Robert McCarthy was sued along with his two appointees.

X. REASONS FOR GRANTING THE WRIT

A. The devastating effects on due process resulting from a court's total failure to comply with Fed. R. Evid. 201. A complete failure to comply with the evidentiary rules for Judicial Notice in pretrial proceedings can result in fictional fact patterns, prejudiced fact finders, unchallenged legal fictions, and a complete breakdown of any procedural due process.

B. The apparent lack of recourse when there is an untimely lack of service for a final order, opinion or judgement issued due to an oversight This case is unusual because there was a Motion to

Dismiss that, because by its lack of specificity, failed to give sufficient This case addresses a poorly reviewed but extremely common issue, i.e., Is there a minimal amount of specificity required to prove that the court is actually complying with the Rule 4 Appeal of Right and for the parties to proceed with further

XI. ARGUMENT

A. TERSE UNIINFORMATIVE APPELLATE COURT OPINIONS

The Appellate Court's " Judgement" "In accordance with the decision of this court, the judgment of the district court is affirmed."

This what the uninformative opinion of the court.

By simply reviewing the statement of the case the number of reversable errors were extensive:

- No judicial Notice proceedings

- No earmarking of the documents submitted as candidates for judicial notice.
- No Judicial notice explanation by the court.
- Motion to Dismiss that was so ambiguous, Pisner had to request clarification, which was never acted on.
- Untimely service of the District Court's opinion.

- A Rule 60 Motion rejected for inexplicable reasons.

This terse explanation undermines due process and the federal rules in that:

- A Petition to Rehear is impossible, because one needs specificity to argue.
- It converts a court that is an "Appeal of Right" Court to a discretionary appeals court.

- It undermines any due process at the appellate level.
- It hobbles appeals to this Court.
- It dumps cases from the District Court on this Court, compounding this Court's workload.

Obviously there needs to be a threshold disclosure by the appellate court. This is a case of first impressions. Criteria need to be established

by this Court.

B. MISHANDELING JUDICIAL NOTICE: AN ENDRUN AROUND DUE PROCESS.0F[1]

1. 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

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[1] The Judge that wrote the opinion that dismissed the Federal District Court case, the Honorable George J. Hazel wrote his opinion on September 26, 2022, but resigned his judgeship, effective date ,weeks later was February 24, 2023.

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. Misusing Judicial Notice

On April 20, 2022, "Plaintiff's Response in Opposition to Defendant's Kevin and Robert McCarthy's Motion to Dismiss and Motion to Strike their Exhibits for Their Failure to Comply with the Federal Rules of Evidence.

The Defendants apparently wanted this court to take judicial notice of its exhibits,

without proper procedure. Either on motion or on its own initiative, "the

court may order stricken
from any pleading any insufficient
defense or any redundant, immaterial,
impertinent, or scandalous
matter."Fed.R.Civ.P. 12(f).
Pisner has listed the standard of review
for a motion to dismiss. Facts come
from the complaint and its attachments.
Yes- the exception is that facts subject
to judicial notice can also be considered,
but the process for a court to take
judicial notice is dictated by the Federal
Rules of Evidence.
In This Motion, Counsel for Defendant's
exhibits, were simply appended to This
Motion.
Once Defendants identified the alleged
documents, they would have to move for

this Court to take Judicial Notice under Fed. R. of Evid. 201: Judicial Notice of Adjudicative Facts" [which] 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.

Counsel for Defendants obviously did not follow the required procedure, so Counsel for Defendants' attachments, pursuant to the failure to comply with the Federal Rules of Evidence, must be stricken and this Court needs to confine its review to the facts in Pisner's

complaint.

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).•

Claim: The District Court has stated that "While this Court did not formally deny Plaintiff's. Apparent "motion to strike," was improper or merits Rule 60(b) relief."

C. Rule 60 – a Remedy for Court Oversights When service is untimely.

Rule 60(b) states:

(b) Grounds for Relief

from a Final Judgment,
Order, or Proceeding.
On motion and just
terms, the court may
relieve a party or its
legal representative
from a final judgment,
order, or proceeding
Rule 60(b) states:
(b) Grounds for Relief
from a Final Judgment,
Order, or Proceeding.
On motion and just
terms, the court may
relieve a party or its
legal representative
from a final judgment,
order, or proceeding for

the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

> (5) the judgment has
> been satisfied, released,
> or discharged; it is based
> on an earlier judgment
> that has been reversed
> or vacated; or applying
> it prospectively is no
> longer equitable; or
> (6) any other reason that
> justifies relief.

In this instance there was a:

- Oversight: Lack of Response to the Judicial Notice issue reflected in Pisner's Motion to Strike: The omission is clear from the District Court's opinion.
- Oversight: Lack of Response for Motion for More Definite Statement.

D. **The Motion to Dismiss lacked notice.**

Pisner filed a Motion for a More Definite Statement because Evans, based on Statute was an Independent Contractor and as such her duties and responsibilities were dictated by statute. She also claimed that she was a trustee, which followed another set of laws; finally she claimed that she was an employee, which made her subject to employment laws.

The confusion was multiplied

when she incorporated by reference the arguments of McCarthy who was a Trustee and K. McCarthy, who status was the same as Evans and not the same as the Trustee McCarthy.

This was so confusing to Pisner that he could not proceed responding to the Motion to Dismiss and, ironically, it was confusing to the court in that it vacillated between independent contractor and employee – eventually dismissing the case against Evans and K McCarthy based on their faulty belief that they were employees: This was not addressed in the Motion for a

More Definite Statement, but the faulty employee theory appeared on the final opinion.

XII. CONCLUSION

The petition for a Writ of Certiorari should be granted because this case addresses a serious hole in state and federal due process, which is the gross mishandling of the Judicial Notice by the courts to a point where the outcome can be determined by Extrinsic and Intrinsic Fraud

Given the facts and law, it is clear that the granting of Defendants' Motion to

Dismiss was improper for a catalog of Word reasons.

The remedy is very simple do what is required by First, the court needs to address the missed Motion to Strike: This will given to the parties the facts required to address the Motions to Dismiss of Robert McCarthy. Moreover, since defendant Dana Evans has incorporated the other defendants' Motion to Dismiss, by reference, she should explain why that is proper and that she is legally equivalent to Robert McCarthy: This added information will allow Pisner to respond to Kevin McCarthy's and Dana Evans' Motion to Dismiss.

Finally consider that the District Court

totally ignored the Pisner's Rule 59 motion for legally improperly reasons, simply because of that error alone this matter needs to be remanded to the District Court to address the Rule 60 Motion in light of the arguments in the Rule 59(E) motion.

Respectfully submitted,

GARY PISNER, Esq

Pro Se

10561 Assembly Drive,

Fairfax,

Virginia

22030

gpisner@outlook.com

Corrected

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25, 2024