

No. **24-791**

In the Supreme Court of the United States

In Re:

SYLVIA MARIE BYRNES

Debtor

Case No. 21-12086-t7

BARRY J BYRNES

Plaintiff

Consolidated Adv. Case No.

20-1070-t

v.

NO. 24-2015

(USCA - 10TH CIRCUIT)

SYLVIA MARIE BYRNES

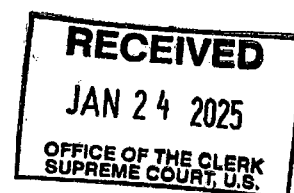
Defendant

Dist/Ag docket (D. N.M.)

2:22-CV-00426-JCH-GBW

PETITION FOR A WRIT OF CERTIORARI

Barry J. Byrnes, Plaintiff-Appellant Pro Se
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QUESTIONS PRESENTED
PREFACE

Petitioner sued Defendant in a state district court and demanded a jury trial. The state complaint included claims for Defamation and Intentional infliction of Emotional Distress (IIED).

Defendant's lawyer moved to dismiss all claims; the motion was denied with respect to the tort claims. The Defendant filed a Chapter 7 petition in the New Mexico Federal District Court and stayed the tort litigation.

Petitioner removed the tort claims to District Court for a jury trial which, in turn, referred the tort claims to a bankruptcy judge. Petitioner moved to withdraw the reference. The bankruptcy judge scheduled a pretrial conference to set date for a non-jury trial.

This action was taken before District Court could rule on the motion to withdraw the reference and/or instruct the bankruptcy judge as to those proceedings that can take place in bankruptcy court.

The bankruptcy judge scheduled the pretrial conference for May 13, 2022.

Petitioner appeared and refused to agree to a non-jury trial. On May 27, 2022, the bankruptcy judge, as a sanction, dismissed the tort claims and fined Petitioner \$12,941.14.

In June 2022 Petitioner appealed the bankruptcy court judgment to District Court. In December 2022, District Court and Tenth Circuit denied review of the motion to withdraw the reference because the bankruptcy judge dismissed the tort claims in May 2022.

On January 16, 2024, District Court affirmed the bankruptcy court judgment and Petitioner appealed to the Tenth Circuit.

On September 17, 2024, the Tenth Circuit ruled that Petitioner forfeited his right of appeal.

QUESTIONS

The questions presented are:

1. Did the bankruptcy judge enter an illegal judgment and violate Petitioner's right to a jury trial in district court on the tort claims?
2. Are the sanctions awarded by the bankruptcy judge illegal and excessive and a violation of the Petitioner's Eighth Amendment rights?
3. Did the District Court violate Petitioner's constitutional rights, including Petitioner's Seventh Amendment right to trial by jury?
4. Did the District court review the bankruptcy court judgement incorrectly by not reviewing the bankruptcy judge's opinion as findings and conclusions of law pursuant to 28 USC Section 157 and Bankruptcy Rule 8018.1?
5. Did the Tenth Circuit's refusal to review the District Court and underlying bankruptcy court judgments violate Petitioner's constitutional rights?

PARTIES/COUNSEL TO THE PROCEEDING

Barry Byrnes, appears Pro Se. Sylvia Byrnes is represented by Mark Pickett in the Tenth Circuit and in the lower courts (District and bankruptcy court). R. Trey Arvizu III appeared in the bankruptcy court and District court as co-counsel to Mark Pickett.

RELATED PROCEEDING

Barry Byrnes v. Sylvia Byrnes and Matthew Byrnes, Case No. D-307-2019-00916, State of New Mexico, Third Judicial District Court

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REASONS FOR GRANTING WRIT

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A - The removal proceeding (Count 1) is a non-core proceeding.

Petitioner refused consent to Judge Thuma trying the tort claims and did not waive his right to a jury trial. Where a jury trial is required and a party refuses to consent to bankruptcy jurisdiction, withdrawal of the case to the district court is required. See, e.g., In Re Guenther, 65 B.R. 650, 652 (Bankr D Colo 1986); In Re Northern Design, Inc, 53 B.R. 25 (Bank Ct. District of Vt. 1985)

B - The Tenth Circuit violated Petitioner's rights under the First, Fourteenth, Seventh and Eighth Amendments of the Constitution by refusing to give Petitioner a merit review on an appeal taken to its court as a matter of right.

C - Judge Riggs and the Tenth Circuit violated Petitioner's Fourteenth, Seventh and Eighth Amendments by refusing to give Petitioner a merit review on his motion to withdraw the reference.

D - Judge Herrera violated Petitioner's constitutional rights under the Fourteenth, Seventh and Eighth Amendments by not reviewing Judge Thuma's opinion and findings and legal conclusions de novo.

REASONS CONT'D

E - Judge Thuma violated Petitioner's Fourteenth, Seventh and Eighth Amendment rights by dismissing the tort claims and for fining Petitioner \$12,941.14 in a case over which he had no jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

Barry Byrnes petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit

OPINIONS BELOW (Appendix)

- (a) Opinion by Bankruptcy Judge Thuma, January 28, 2022, Appendix: In Re Byrnes, 2022 WL 272646@*3
- (b) Order and Opinion by Bankruptcy Judge Thuma, March 11, 2022, Appendix - unpublished.
- (c) Order and Opinion of the United States Court of Appeals for the Tenth Circuit - Appendix - April 7, 2022, - unpublished.
- (d) Order and Opinion by Bankruptcy Judge Thuma, May 27, 2022, Appendix - unpublished.
- (e) Order and Opinion by District Court Judge Herrera - January 16, 2024, - Appendix - unpublished
- (f) Order and Opinion of the United States Court of Appeals for the Tenth Circuit - Appendix - September 17, 2024, - unpublished.

JURISDICTION

The Tenth Circuit Order and Judgment was entered on September 17, 2024. The jurisdiction of the United States Supreme Court is invoked under 28 USC Section 1254 (1)

RELEVANT STATUTORY
AND CONSTITUTIONAL PROVISIONS

STATUTORY

28 USC Section 157 (a) reads in pertinent part:

(a) Each district court may provide that any or all cases ... arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district ...

28 USC Section 157 (b) (5) reads in pertinent part:

The district court shall order that personal injury tort ... claims shall be tried in the district court in which the bankruptcy case is pending ...

28 USC Section 157 (b) (1) reads in pertinent part as follows:

Bankruptcy judges may hear and determine cases ... arising in a case under title 11, referred under subsection (a) of this section ...

28 USC Section 157 (c) (1) reads in pertinent part as follows:

A bankruptcy judge may hear a proceeding that is not a core proceeding ...that is ... related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

28 USC Section 157 (c) (2) reads in pertinent part as follows: ... district court, with the consent of all the parties ..., may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

28 USC Section 157 (d) and (e) reads in pertinent part as follows: (d) ... district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party...

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 USC Section 158 reads in pertinent part:

(a) The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees ... of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title

(2) An appeal under subsections (a) ... of this section ... are taken to the courts of appeals from the district courts ...

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) ... of this section

28 USC Section 1291 reads in pertinent part:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States

CONSTITUTION

Amendment XIV

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

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved

Amendment I

Congress shall make no law ... abridging the freedom of speech

Amendment VIII

.... nor excessive fines imposed, nor cruel and unusual punishments inflicted

INTRODUCTION

Petitioner removed personal injury tort claims to the federal district court for a jury trial after Defendant filed a Chapter 7 petition. The tort claims were referred to a bankruptcy judge. Petitioner moved to withdraw the reference.

On May 13, 2022, the bankruptcy judge held a pretrial conference even though he was divested of management control on April 27, 2022. Only Judge Riggs had jurisdiction and management control over the tort claims after that date.

The bankruptcy judge tried to force Petitioner to agree to a non-jury trial. Petitioner refused and the judge, as a sanction, dismissed the tort claims and entered a \$12,941.14 judgment against him.

Petitioner appealed to district court which affirmed the judgment. Petitioner appealed to the Tenth Circuit which ruled that Petitioner forfeited his right to a merit review.

The Tenth Circuit and its lower courts violated Petitioner's constitutional and statutory rights.

STATEMENT OF THE CASE

Judicial Notice

This court is requested to take judicial notice of facts, not subject to debate, evidenced by documents filed in Case No. 22-CV-00426-JCH-GBW.

Federal Rule of Evidence 201 allows judicial notice to be of facts not subject to reasonable dispute at any stage of the proceeding, and even the first time on appeal.

Judicial notice may be taken of a fact or a document. *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007). Judicial notice is proper when a fact is beyond debate. *Lockett v. Fallin*, 841 F.3d 1098, 1111 (10th Cir. 2016).

Judicial notice is taken of facts that are a matter of public record. *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006)

I - FACTUAL BACKGROUND

(Facts not subject to dispute)

In April 2019, Petitioner sued Defendant in a New Mexico District Court and demanded a jury trial. Petitioner sued, among other things, for Defamation and Intentional Infliction of Emotional Distress.

Defendant moved to dismiss the tort claims; the motion was denied. The tort claims were re-pleaded in a supplemental complaint filed with the court on October 26, 2020. The Defendant filed a Chapter 7 petition a few days later. The bankruptcy case was assigned to Judge Thuma.

Petitioner filed two adversary proceedings after the bankruptcy filing and requested trial by jury in both proceedings. ROA, Volume 1, Amended Complaint, Document 22; Supplemental Jury Demand, Document 54

Judge Thuma obtained management control over the tort claims when District Court referred the tort claims to him. The bankruptcy judge consolidated the removal proceeding with the state law contract claim proceeding. Case 2-22-CV-00426 (D. NM) ROA, Volume 1, Document 10

The bankruptcy judge ordered Petitioner to file an amended complaint. Count I of the complaint is the tort claim proceeding. Count II is the contract claim proceeding. Petitioner re-asserted the right to a jury trial on the tort claims in the amended complaint ROA, Volume 1, Document 22, Amended Complaint.

Defendant answered Count I and filed a motion to dismiss Count II. Case 22-CV-00426 (D. NM) ROA, Volume 1, Documents 30 and 31

On March 24, 2021, Petitioner refused consent to have the bankruptcy judge try his Count I and II claims. Case 22-CV-00426 (D. N.M.) ROA, Volume 1, Document 43 Petitioner also moved in district court to withdraw the reference.

On April 1, 2021, Petitioner's motion to withdraw the reference was assigned to Judge Vasquez.

On January 28, 2022, Bankruptcy Judge Thuma ruled that he acquired jurisdiction over the tort claims because Petitioner did not timely file a notice of non consent and because the amended complaint is an informal proof of claim.

Judge Thuma also ruled that he could try the tort claims because Petitioner allegedly waived his right to a jury trial and because he did not consider the tort claims to be personal injury torts based on his analysis of out of circuit case law.

Judge Thuma ordered the parties to prepare a pretrial order by March 2022, and to expect a trial date by April 11, 2022. Case supra, Volume 1, Document 138

Judge Thuma did not submit findings and conclusions to district court for review and approval; nor did he request the district court to order the trial of the tort claims to take place in bankruptcy court. 28 USC Section 157(c)1. ROA, Volume 1, Document 137

On February 14, 2022, Petitioner requested a writ of certiorari to prevent Judge Thuma from asserting jurisdiction over the tort claims and to require that district court decide the motion to withdraw the reference. Appellate Case 22-2016, Document 1-1; Case supra, Volume 1, Document 144

On February 16, 2022, the bankruptcy judge vacated his pre-trial order and issued a second opinion and admitted that Petitioner "timely filed a notice of non consent on March 24, 2021, doc. 43." The judge did not change his opinion that the amended complaint is an informal proof of claim. Judge Thuma still maintained Petitioner waived his right to a jury trial and that the tort claims are personal injury torts. Case supra, Volume 1, Document 143

On March 11, 2022, the bankruptcy judge issued a third opinion, replaced his prior pre-trial order and abandoned his plan to set a trial date. The judge now admitted that the District Court had jurisdiction over the tort claims.

Judge Thuma stated the following in his March Opinion (Appendix D):

... "he will try the tort claims subject to a different conclusion by the district court" ... "if the District Court has a different view about legal proceeding before the court and/or how best to proceed, it can supersede the court's decision when it rules on the reference withdrawal motion"; ... "if the claims are "core" because they were brought as part of a non-discharge-ability proceeding then the court will enter a final judgement. If the claims are not "core" then the court will enter proposed findings of fact and conclusions of law for review by the district court."

On April 7, 2022, Tenth Circuit denied the petition for mandamus/prohibition because "Petitioner still had other means for relief - asking a district judge to withdraw the reference is still open him". The motion to withdraw the reference was then transferred from Judge Vasquez to Judge Riggs.

On April 15, 2022, Judge Riggs denied the motion to withdraw the reference without prejudice and simultaneously entered a Rule 58 final judgment that dismissed the claims without prejudice. Case 22-CV-00426 (D. NM) ROA, Volume 1, Document 157 ; Appellate Case 22-2016, Document 29-1

Judge Riggs adopted a magistrate's advisory opinion issued in November 2021, and not the opinion Judge Thuma had filed in district court. Judge Riggs recognized that Judge Thuma only had management control as of March 2022.

Judge Riggs ordered Judge Thuma's March opinion to be reviewed by the same magistrate judge. This judge did not review Judge Thuma's March opinion, possibly because the tort claims were dismissed in May 2022.

On April 19, 2022, the bankruptcy judge set a date for a pretrial conference and ordered the parties "to prepare to agree to a trial date for the tort claims". The bankruptcy judge later re-scheduled this conference to May 13, 2022.

On April 27, 2022, Petitioner appealed the Rule 58 judgment and moved for reconsideration of his motion to withdraw the reference and for certification for appeal of an order that denies the motion to withdraw the reference. Case 22-CV-00426 (D. NM) ROA, Volume 5, Document 162 The appeal divested Judge Riggs and Judge Thuma of jurisdiction over the tort claims.

On April 29, 2022, the Tenth Circuit abated the appeal and restored jurisdiction and management control to Judge Riggs. This District Court judge did not instruct Judge Thuma, on or after April 29, 2022, to hold the pretrial conference scheduled to set a date for a non-jury trial on the tort claims

The Tenth Circuit requested Judge Riggs to decide Petitioner's motions. The Tenth Circuit made the same request every month from April 2022 until December 2022. No date was set by which the motions had to be decided.

On May 13, 2022, Petitioner appeared at the conference and refused to agree on a non-jury trial date because of his appeal and pending motions. Petitioner was accused of acting

in bad faith for refusing to agree to a non-jury trial date. Appendix F - Transcript of May 13 pre-trial conference

On May 27, 2022, the bankruptcy judge accused Petitioner of litigating in bad faith and engaging in harassing litigation, and intending to cause financial harm, and for refusing to try his case. Judge Thuma now alleged violations of Rule 16(f) and Rule 37 (b)(2)(A)(v) and Rule 41(b). Appendix E - Opinion

On December 19, 2022, Judge Riggs denied the motion to withdraw the reference as moot because the tort claims were dismissed in May 2022. Case 21-cv-00295, Document 62

On December 21, 2022, the Tenth Circuit lifted its abatement and dismissed the appeal taken from Judge Riggs' judgment for alleged lack of jurisdiction:

"Mr. Byrnes's appeal of the bankruptcy court's entry of judgment dismissing the adversary proceeding remains pending in Case No. 2:22-cv-00426: any appeal to this court regarding the district court's disposition of Case No. 2:22-cv-00426 must (emphasis supplied) be from the district court's entry of an appealable final order or judgment in that case. For the foregoing reasons, this court lacks jurisdiction over this appeal".

BANKRUPTCY APPEAL

Petitioner appealed the bankruptcy court judgment to district court. The appeal was assigned to Judge Herrera on June 6, 2022. Case 22-CV-00426 (D. N.M.) ROA, Volume 5, Document 1

APPEAL EVENTUALLY DECIDED

On January 16, 2024, Judge Herrera affirmed the bankruptcy court judgment. Case: 22 cv-00426, Appendix B - Opinion and Order

Judge Herrera took the position that 11 USC Section 105 (a) gave Judge Thuma jurisdiction to enter a final judgment. Judge Herrera did not review Judge Thuma's opinion as proposed findings of fact and conclusion of law.

Judge Herrera did not rule on the Petitioner's right to a jury trial or if the fine is illegal or excessive or rule on interlocutory orders.

II - PROCEDURAL SUMMARY

The removal proceeding is a non-core proceeding.

Petitioner did not give implied consent to Judge Thuma's trying his tort claims. Opinions Appendix C and D The bankruptcy judge did not rule that the tort claims were converted to a core proceeding when he dismissed the tort claims with prejudice on May 27, 2022. Opinion - Appendix E

Judge Riggs was obligated to make a reasonably prompt determination with respect to Petitioner's motions. Petitioner's motions should have been decided before the bankruptcy judge held his pretrial conference.

A ruling on the motion to withdraw the reference should not have been delayed until December 19, 2022, and it could have been decided on the merits even at that late date. Judge Riggs had jurisdiction and case management control over the tort claims on and after April 29, 2022.

Judge Thuma's illegal judgment did not divest Judge Riggs from jurisdiction or management control over the tort claims.

Judge Riggs' order that denied the motion to withdraw the reference as moot did not divest the Tenth Circuit of its appellate jurisdiction. Judge Riggs order is an appealable order, a final disposition of a claimed right to a trial by jury, which is not an element of the bankruptcy court judgment.

The right to a jury trial is too important to have been denied immediate appellate review. *Kaiser Steel v. Frates* (In Re Kaiser Steel Corp) 911 F. 2d 380 (10th Circuit 1990); *Cohen v. Industrial Loan Corp*, 337 US 541, 546 (1949)

On January 16, 2024, Judge Herrera incorrectly determined that Judge Thuma had jurisdiction over the tort claims and affirmed the bankruptcy judgement by applying an incorrect standard of review. Case 22-CV-00426 (D. N.M.) ROA, Volume 1, Documents 31 and 32

On September 17, 2024, the Tenth Circuit incorrectly determined that Judge Thuma had jurisdiction over the tort claims and affirmed Judge Herrera's judgment by incorrectly ruling that Petitioner forfeited his right to a merit review of the district court judgment.

REASONS FOR GRANTING WRIT

- a. The Tenth Circuit's rulings conflict with Petitioner's right to due process and trial by jury.
- b. The Tenth Circuit's rulings conflict with case law concerning the rights of Pro Se litigants.
- c. The Tenth Circuit's rulings conflict with a state court ruling which held that the Petitioner has the right to a jury trial on his personal injury tort claims.
- d. The Tenth Circuit's decision is in conflict with federal statutes and case law that concern the jurisdiction and authority of its lower courts.

DUE PROCESS

Due process requires laws to be applied even handedly and that individuals are not to be subjected to the arbitrary exercise of governmental power. *Merchant v. Pennsylvania Railroad*, 150 US 380, 386 (1894)

Due process requires notice and the right to be heard promptly by an impartial tribunal vested with jurisdiction over a specific cause. *Mathews v. Eldridge*, 424 US 318 (1976); *Carey v. Piphus*, 435 US 2d 247 (1978); *Nelson v. Adams*, 529 US 460 (2000).

Due process is flexible and calls for such procedural protections as a particular situation demands. *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972)

BANKRUPTCY JUDGE DUE PROCESS VIOLATIONS

On May 13, 2022, the bankruptcy judge accused Petitioner of "refusing to participate in the pretrial conference in good faith".

On May 27, 2022, the bankruptcy judge accused Petitioner of "litigating in bad faith and engaging in vexatious and harassing litigation". Petitioner had the right to be notified about these more serious accusations before the tort claims were dismissed and the \$12,941.14 fine imposed.

Judge Thuma entered an illegal judgment. The bankruptcy judge did not have jurisdiction or management control over the tort claims on May 13, 2022. Judge Thuma's opinion had

to be submitted to Judge Riggs as findings of fact and conclusions of law. Judge Riggs' delays in ruling on Petitioner's motions did not release Judge Thuma from the obligation to submit findings of fact and conclusions of law to Judge Riggs.

The bankruptcy judge prevented a ruling on the motion to withdraw the reference by entering the illegal judgment and denied Petitioner a hearing on sanction issues by not submitting findings and conclusions to Judge Riggs.

JUDGE RIGGS DUE PROCESS VIOLATIONS

Judge Riggs violated Petitioner's due process rights by not promptly ruling on Petitioner's motions, and by ignoring the Tenth Circuit's monthly requests for a decision on Petitioner's motions, and by not deciding the motion to withdraw the reference on the merits.

Judge Riggs could grant the motion to withdraw the reference because only she had jurisdiction and management control over the tort claims. The illegal judgment entered by the bankruptcy judge did not divest Judge Riggs from jurisdiction and management control over the tort claims.

JUDGE HERRERA DUE PROCESS VIOLATIONS

Judge Herrera violated Petitioner's constitutional rights by not correctly determining bankruptcy judge jurisdiction and by incorrectly reviewing an illegal bankruptcy court judgment. Judge Herrera was required to review Judge Thuma's opinion as proposed findings of fact and conclusions of law pursuant to Rule 8018.1.

Judge Herrera should have determined that Judge Thuma's judgment to be illegal because he did not acquire jurisdiction over the tort claims.

Judge Herrera judge should have determined that Petitioner had a right to a jury trial and that the tort claims are personal injury torts. Judge Herrera should have ruled on interlocutory orders.

TENTH CIRCUIT DUE PROCESS VIOLATIONS

The Tenth Circuit denied Petitioner due process by incorrectly determining that Judge Thuma's illegal judgment divested Judge Riggs from jurisdiction over the tort claims. Tenth Circuit denied Petitioner due process and a right to trial by jury by not allowing Petitioner to appeal from the order entered by Judge Riggs on December 19, 2022.

Tenth Circuit denied Petitioner due process and a right to trial by jury by ruling that Petitioner forfeited his right of review of the judgment that was entered by Judge Herrera on January 16, 2024, and by not reviewing the underlying bankruptcy court judgement that was entered on May 27, 2022.

The Tenth Circuit violated Petitioner's due process and First Amendment rights by holding that Petitioner made disparaging remarks about the bankruptcy judge in his Opening Brief and at the May 13 pretrial conference and at certain hearings that took place in 2021.

The Tenth Circuit denied Petitioner due process and the right to a jury trial by refusing to review Petitioner's Opening and Reply Briefs.

TENTH CIRCUIT RULINGS

The Tenth Circuit made the following rulings in support of the finding that Petitioner forfeited his right to a merit review:

- (1) The bankruptcy judge had jurisdiction to enter a final judgment;
- (2) Petitioner is not entitled to the protections normally afforded to pro-se litigants;
- (3) Petitioner made disparaging remarks about the bankruptcy judge;
- (4) Petitioner's Opening Brief did not comply with appellate rules of procedure

(1)

BANKRUPTCY COURT JURISDICTION

Federal appellate courts are authorized by Article III and statutes enacted by Congress to determine the jurisdiction of the lower court whose judgment is being reviewed. The Tenth Circuit and District Court had to determine if Judge Thuma judge had jurisdiction and/or management control over the tort claims.

The Tenth Circuit incorrectly cites *In Re Courtney Inns, Ltd, Inc*, 40 F3d 1084 (1994) as precedent for a finding that 11 USC Section 105 (a) gave Judge Thuma jurisdiction over Petitioner's tort claims. Appendix G - Order and Judgment

In Re Courtney Inns concerns the right to impose sanctions on the president of a debtor corporation that filed a bankruptcy case to prevent a creditor from enforcing its rights. The bankruptcy court had core jurisdiction over the sanction issue because the issue arose in a bankruptcy case.

Petitioner's situation is very different because his case is a non-core proceeding. Petitioner filed a pre-petition case and removed tort claims from state court to district court for a jury trial after the Defendant filed for bankruptcy.

28 USC Section 157 defines bankruptcy court jurisdiction because Judge Thuma did not acquire jurisdiction over the tort claims and did not have managerial control over the tort claims after April 29, 2022.

CONGRESSIONAL INTENT

Congress intended that a bankruptcy court shall have exclusive jurisdiction over core proceedings pursuant to 11 USC Section 105 (a), and that its jurisdiction over non-core proceedings is limited by 28 USC Section 157 (c) (1)

Limitations on jurisdiction over non-core proceedings maybe imposed for constitutional reasons. For example, where a person has a right to a jury trial. See: *Granfinanciera v. Nordberg*, 492 US 33 (1989)

Limitations on jurisdiction over non-core proceedings may be imposed for other reasons. For example, Congress decided that a bankruptcy court should not try personal injury torts. *Leatham v. Von Volkmar*, (In Re Volkmar), 217 BR 561, 565 (Bank Ct. ND Ill 1998); *In Re Schepp Food Stores, Inc.*, 169 BR 374, 377 (Bank Ct. S.D. Texas 1994)

11 USC SECTION 105 (a)

11 USC Section 105 (a) is a very broad section that has its limitations. A bankruptcy court's equitable powers can only be exercised within the limits of the bankruptcy code.

The bankruptcy court cannot exercise equitable powers over cases in which it has no jurisdiction and act in contravention to other sections of the bankruptcy code or the constitution. *Law v. Siegel*, 571 US 415 (2014)

Judge Thuma admitted that he did not acquire jurisdiction over the tort claims by consent. And, the amended complaint is not an informal proof of claim. Bankruptcy court jurisdiction is defined by the Seventh Amendment and 28 USC Section 157 (c) (1) and 28 USC Section 157 (b) (5).

28 USC Section 157 (c) (1) does not allow a bankruptcy judge to enter final judgments in a non-core proceeding. Judge Thuma had to submit proposed findings of fact and conclusions of law to Judge Riggs who had the right to enter a judgment.

Judge Thuma did not have the statutory right to enter a judgment in a case that involves the liquidation of personal injury torts and in which Petitioner has the right to a jury trial. Seventh Amendment and 28 USC Section 157 (b) (5)

The Tenth Circuit and its district court had to determine jurisdiction based on the application of the Seventh Amendment and 28 USC Section 157 (c) (1), and 28 USC Section 157 (b) (5), and not by 11 USC Section 105 (a).

The Tenth Circuit and its district court abridged Petitioner's constitutional right of due process by not correctly applying these jurisdictional laws.

CASE MANAGEMENT

The district court and its bankruptcy court was divested of jurisdiction by the appeal Petitioner took on April 27, 2022. *Griggs v. Provident Consumer Discount Co.*, 459 US 56, 58 (1982). The appeal was not a frivolous appeal. *Stewart v. Donges*, 915 F2d 572 (10th Cir. 1990).

The Tenth Circuit abated the appeal and restored jurisdiction and management control over the tort claims to Judge Riggs. The Tenth Circuit required Judge Riggs to rule on Petitioner's motions for: (1) Reconsideration of an order that denied the motion to withdraw the reference and (2) Certification of an order that denied the motion for reconsideration.

The abatement did not restore Judge Thuma's management control. The Tenth Circuit did not allow the bankruptcy judge to hold a pretrial conference and set a date for a non jury trial. Only Judge Riggs had this authority.

Judge Thuma also did not have management control because the judge did not have the statutory authority to impose sanctions for the reasons expressed in his opinion dated May 27, 2022, Appendix E.

Judge Thuma's judgment is illegal and void for the reasons expressed in *Stewart v. Donges*, supra.

TENTH CIRCUIT JURISDICTION

The Tenth Circuit had jurisdiction over Petitioner's April 2022 appeal on December 21, 2022.

28 USC Section 1291 and 28 USC Section 158 (d) empowered the Tenth Circuit to hear the appeal and review the orders entered by Judge Riggs on December 19, 2022, and rule on the motion to withdraw the reference. See: *Stewart v. Donges*, supra.

(2)

PETITIONER'S STATUS

The Tenth Circuit is denying Petitioner Pro Se status based on the holding in *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) because he was once licensed to practice law. This case does not apply to Petitioner.

Petitioner is listed as inactive by the New Mexico Board of Bar Examiners. Inactive means that a person passed the bar and retired or discontinued the practice of law. N.M. R. Gov. Bar 24-102. 2 (A) 1 Petitioner cannot be reinstated unless he can obtain permission from the New Mexico Board of Bar Examiners.

Petitioner's Opening Brief was not liberally construed by the Tenth Circuit even though he had not practiced law for over 18 years as of the date Defendant filed for bankruptcy. Cf: *Haines v. Kerner*, 404 US 519, 520-21

Petitioner was denied due process because his Opening Brief was reviewed as if it was prepared by a currently licensed attorney. See: *Village of Willowbrook v. Olech*, 528 US 562, 564 (2000)

(3)

ALLEGED DISPARAGING REMARKS

Petitioner was denied review for remarks made about Judge Thuma in the Opening Brief, at the pre-trial conference, and for highly selected statements made at certain court hearings held in 2021. A transcript review will show the statements are taken out of context.

The Tenth Circuit based its ruling on *Garrett v. Selby Connor Maddux & Janer*, 425, F3d. 386, 840-41 (10th Circuit 2005) Garrett's statements are extreme and his briefs are not based on valid legal argument. Reliance on this case is misplaced.

Petitioner did not forfeit his right to a merit review for what he wrote or said. The remarks are truthful and necessary to protect Petitioner's constitutional and statutory rights and other protections.

The Tenth Circuit violated Petitioner's right of free speech by ruling that Petitioner forfeited the right to a merit review for what he wrote in his Opening Brief or said at bankruptcy court hearings. *New York Times v. Sullivan*, 376 US 254 (1964)

Issue Preclusion

The Tenth Circuit violated Petitioner's right to due process by ruling that Petitioner forfeited a merit review for the reasons requested by defense counsel.

Defense counsel requested that Petitioner's appeal not be reviewed because of what was said to Judge Thuma at certain court hearings and for comments made at the pretrial conference held on May 13, 2022.

An appellate court should not consider an issue raised for the first time on appeal. *Telecommunications v. Commissioner of Internal Revenue*, 12 F3d 1005, 1007 (10th Circuit 1983). An issue must be presented to and considered by the lower court for it to be preserved for appeal. *Lyons v. Jefferson Bank Trust*, 994 Fd. 716, at 721 (10th Circuit 1993).

Judge Herrera's Opinion is based on Judge Thuma's opinion. Judge Thuma did not sanction Petitioner for what he said at any hearing held in 2021, or for comments made at the pre-trial conference held on May 13, 2022.

Petitioner was sanctioned for allegedly litigating in bad faith, and for interfering with the judicial process, and for disobeying a trial management order. Appendix E - Opinion - May 27, 2022.

(4)

APPELLATE RULES

The Tenth Circuit states that Petitioner's Opening Brief should not be considered because:
(a) Mr. Byrnes... did not provide adequate citations to the record...(b) the brief does not explain what is wrong with the reasoning of the district court...

See: Appendix G - Tenth Circuit Order and Judgment - September 17, 2024

a. The citations are adequate

The Tenth Circuit accepted Petitioner's briefs for filing in April 2024. The reasonable assumption is that the Tenth Circuit screened the briefs and accepted them as being in compliance with FRAP Rule 28 and Tenth Circuit Rule 28.1.

The citations to the record in the Opening Brief are based on the PACER system. Petitioner also inserted a footnote in the Opening Brief to indicate "references are to documents docketed under Case No. 20-1070-t". Petitioner makes reference to a specific transcript by page and line number. This transcript is appended to the Opening Brief.

Petitioner's Reply Brief is not formatted the same way as the Opening Brief because of objections made by Defendant's lawyer in his Response Brief. All references to relevant documents in the Reply Brief are to the ROA.

The Tenth Circuit should have considered Petitioner's briefs because a pro se litigant's briefs are to be construed liberally. *Haines v. Kerner*, 404 US 519, 520-21 (1972). In other words, if the briefs can read to state the reasons by which Petitioner can prevail, they should be accepted and reviewed. *Hall v. Bellmon*, 935 F. 2d 1106 (Tenth Circuit 1991).

The Tenth Circuit is denying Petitioner due process by not considering both the Opening and Reply Brief and for denying Petitioner a merit review based on the way citations to the record appear in the Opening Brief.

b. The focus of Petitioner's briefs

Petitioner's briefs are primarily, but not exclusively, focused on what the bankruptcy judge did wrong.

Petitioner alleges that the district court ..."incorrectly reviewed an illegal bankruptcy court judgment and the bankruptcy judge's conduct for abuse of discretion". ... "should have reviewed the bankruptcy judge's findings and conclusions de novo pursuant to Rule

8018.1" ... "incorrectly ruled the bankruptcy court judgement was entered in a core proceeding" See: Opening Brief - Statement of Issues

c. Review of bankruptcy court opinions

The Tenth Circuit routinely reviews bankruptcy court opinions on appeal from judgments entered by a reviewing court, a district court or a bankruptcy appellate panel. See: *In Re Albrecht*, 233 F3d 1258 (Tenth Circuit 2000); *Phillips v. White (In Re White)* 25 F3d 931, 932 (Tenth Circuit 1994)

Review is de novo when there are no factual disputes and the issues to be resolved depend on the proper application of bankruptcy statutes and case law. *Octagon Res Inc. v. Bennett Res Corp (In Re Meridian Reserve Inc.)* 87 F3d 406, 409 (Tenth Circuit 1996)

Petitioner had a reasonable expectation because of prior Tenth Circuit opinions that an appeal would first focus on jurisdiction and then on the bankruptcy judge's findings and conclusions.

Petitioner also had the reasonable expectation that Judge Herrera would review Judge Thuma's opinion as proposed findings and conclusions of law pursuant to 28 USC Section 157 (c) 1 and Rule 8018.1.

Instead, Judge Herrera reviewed Petitioner's objections to a magistrate judge's advisory opinion de novo and Judge Thuma only for abuse of discretion.

JUDGE THUMA'S LEGAL ERRORS

Judge Thuma's legal errors may be summarized as follows: (1) he alleged that he had jurisdiction over the tort claims; (2) incorrectly ruled that the tort claims are not personal injury torts; (3) and that Petitioner waived his right to a jury trial.

(1)

Jurisdiction over Tort Claims

Judge Thuma's jurisdiction is defined by 28 USC Section 157 (c) 1 and not by 11 USC Section 105 (a). Count I of the amended complaint (the tort claims) is a non-core proceeding. *In Re Seven Fields Dev. Corp.*, 505 F3d 237 (3rd Circuit 2007)

Judge Thuma alleged that he acquired jurisdiction over the tort claims because Petitioner "impliedly consented to bankruptcy court jurisdiction". At first, he gave two reasons for his

finding: (1) Petitioner did not timely file a notice of non-consent and (2) he considered the amended complaint to be an informal proof of claim.

On February 16, 2022, Judge Thuma admitted that Petitioner "timely filed a notice of non-consent on March 24, 2021, doc 43". Case 22 cv- 00426 (D. NM) ROA, Vol. 1, Document 143 Judge Thuma could only acquire jurisdiction over the tort claims if the amended complaint could legally be considered to be an informal proof of claim. An informal proof of claim is a document filed by a creditor who has not filed a standard proof of claim by a date set by a bankruptcy court.

The amended complaint as a document could not be treated as an informal proof of claim for legal reasons. In *Re Integrity Directional Services*, No. 23-6111 (Tenth Circuit 2024)

Petitioner's amended complaint could not be an informal proof of claim also because the estate has no assets and because the bankruptcy court did not set dates for the filing of standard proofs of claim in Defendant's Chapter 7 case.

28 USC Section 158 (a), (d) required the Tenth Circuit and district court to determine bankruptcy court jurisdiction based on all jurisdictional laws. Petitioner was denied due process because he was denied a merit review as to whether he gave implied consent to bankruptcy court jurisdiction.

(2)

Personal Injury Torts

Judge Thuma also could not exercise jurisdiction over the tort claims if the tort claims are personal injury torts. 28 USC Section 157 (b) (5)

Judge Thuma ruled that Defamation and IIED are not personal injury torts based on out of circuit case law that accepts a narrow definition of the legal term "personal injury tort". There is a disagreement among the circuits as to how this legal term should be defined and the Tenth Circuit has not taken a position on the subject.

Circuits that narrowly define the legal term "personal injury tort" recognize that a complaint that alleges trauma or bodily injury is not subject to bankruptcy court jurisdiction. In *Re Atron Inc. of Michigan*, 172 BR 54 (W.D. Michigan 1994); *Perino v. Cohen*, 107 BR 453 (SDNY 1989); *In Re Vinci*, 108 BR 439 (SDNY 1989)

Count I of the Amended complaint alleges "Plaintiff lost standing in the community, suffered severe emotional distress, suffered physical stress and anxiety, and sustained money damages".

The Tenth Circuit and the district court were required by 28 USC Section 158 (a), (d) when making their jurisdictional determinations to take into consideration 28 USC Section 157 (b) (5) and Count I of the amended complaint.

Petitioner was denied due process for this reason and denied, as a result, a merit review on his Tenth Circuit appeal.

(3)

Right to a Jury Trial

Judge Thuma could not exercise jurisdiction over the tort claims if Petitioner has the right to a jury trial. Seventh Amendment and 28 USC Section 157 (c) (1) (e) The tort claims originated in a state court and not in the bankruptcy court and were removed to the federal district court by the filing a notice of removal.

The right to a jury trial is protected by the Seventh Amendment to the United States Constitution, which applies to federal courts. When a case is removed from state court to federal court, the right to a jury trial is preserved. Rule 81 (c).

There is no dispute that Petitioner had a right to a jury trial on the tort claims removed from the New Mexico State court.

The bankruptcy judge forced Petitioner to file an amended complaint. Petitioner re-asserted his right to a jury trial in his amended complaint. See: Rule 38 and Amended Complaint and supplemental jury demand.

The Tenth Circuit and the district court incorrectly determined jurisdiction by not considering how the Seventh Amendment and 28 USC Section 157 (c) (1) (e) affected bankruptcy court jurisdiction.

Petitioner was denied due process because he was denied a merit review as to whether he had the right to a jury trial.

SUMMARY

28 USC Section 158 (a), (d) required the Tenth Circuit to determine if Petitioner impliedly consented to bankruptcy court jurisdiction, and waived the right to trial by jury, and if the tort claims are personal injury torts. See: *Kaiser Steel v Frates*, 911 F 2d 380 (10th Cir. 1990)

CASE MANAGEMENT ERRORS
BILL OF RIGHTS VIOLATIONS
SANCTIONS

The sanction to dismiss the tort claims based on Rule 16 (f) violates Petitioner's right to due process and trial by jury. The primary focus of Rule 16 (f) is that parties and their lawyers do not unreasonably delay or interfere with trial preparation.

The primary purpose of sanctions is to insure compliance with reasonable requirements for trial preparation. The secondary purpose is to compensate a party for reasonable expenses caused by non-compliance with reasonable management orders. *Mulvaney v. Rivair Flying Service Inc.*, 744 F2d 1138 (10th Circuit 1984).

On May 13, 2022, Judge Thuma's first reaction was to impose a '\$500 sanction for "comments" Petitioner made at the pretrial conference and not for disobeying his trial management order. Appendix F - Transcript

This is the only time that Judge Thuma stated that what Petitioner said at any hearing he considered to be sanctionable speech. The \$500 sanction, if imposed, would be a violation of Petitioner's right of free speech.

The judge asked for Defendant's lawyer's opinion about a sanction for Petitioner's refusal to set a date for a non-jury trial. Defendant's lawyer said that dismissal is appropriate because he did not "imagine that he (Petitioner) would be willing to show up for trial and participate in the trial." Appendix F - Transcript

The Defendant's lawyer had no support for his opinion. The record does not reflect any prior instance where the Petitioner failed to appear for and participate in a court ordered hearing.

Judge Thuma's management order is not reasonable because Petitioner is being ordered to submit to a non-jury trial before his right to a jury trial is determined by Judge Riggs and because he did not have management control over the tort claims after April 27, 2022.

ADDITIONAL VIOLATIONS

The failure to give Petitioner notice about the basis for sanctions, and the rules that would justify an award of sanctions, and the lack of an evidentiary hearing on sanction issues are due process violations. *Grandfinanceria v. Nordberg*, 492 US 33 (1989)

On May 27, 2022, Judge Thuma issued an opinion in which he ruled that Rule 16 (f) and Rule 37 (b) (2) (A) (v) and Rule 41 (b), read in combination, allow him to dismiss the tort claims with prejudice and fine Petitioner \$12,941.14.

Judge Thuma accused Petitioner of not litigating in good faith, and not wanting to try his case, and multiplying the proceedings just to "drain Defendant of what little assets she has".

Judge Thuma's accusations are not based on evidence presented at a sanction hearing. Defendant's lawyer did not move under Rule 41(b) and present evidence as to why the amended complaint (Count I) should be dismissed. Judge Thuma did not require Petitioner to show cause as to why sanctions should not be imposed.

Petitioner was not notified about these serious accusations before the sanctions were imposed and he was not told that sanctions would be based on the combined application of Rule 16 (f) and Rule 37 (b) (2) (A) (v) and Rule 41 (b).

Judge Thuma's findings and conclusions are based on his personal beliefs about Petitioner's litigation motives and his personal view of the procedural history of this case, and not on evidence adduced at a hearing on sanctions.

ADDITIONAL VIOLATIONS ILLEGAL JUDGMENT

The judgment is an illegal document.

Judge Thuma denied Petitioner a right of due process by entering an illegal final judgment, and dismissing the tort claims with prejudice, and by fining the Petitioner almost \$13,000 for refusing to waive his right to a jury trial.

The judge had to submit findings and legal conclusions to district court. Only a district court judge could enter a final judgment or an order for an alleged violation of Rule 16 (f) and Rule 37 (b) (2) (A) (v) and Rule 41 (b).

Petitioner was entitled to a hearing on sanctions in district court and to "specifically object" to the imposition of sanctions before sanctions were imposed. *Nuwesra v. Merrill Lynch, Fenner Smith*, 174 F3d 87, 94 (2nd Cir 1999); *Johnson v. Waddell Reed Inc.* 74 F3d 147, 152 (7th Cir. 1996); *Hutchinson v Pfeil*, 208 F3d 1180, (10th Cir. 2000)

Judge Thuma is not allowed to enter a final judgment in a non-core proceeding over which he did not acquire jurisdiction by express or implied consent. 28 USC Section 157 (c) (1)

Judge Thuma violated Petitioner's rights by relying on Rule 41 (b) as a basis for dismissing the tort claims. Defendant never moved for dismissal for the failure to prosecute.

28 USC Section 1927

Judge Thuma is requiring Petitioner to pay Defendant's legal fees. Judge Thuma explicitly states that he can do this because Petitioner unreasonably and vexatiously multiplied the proceedings in this case.

28 USC Section 1927 allows a district judge to make a lawyer pay for a Defendant's legal fees if the lawyer unreasonably and vexatiously multiplies court proceedings. There is a split in the circuits as to whether Pro Se litigants can be sanctioned under 28 USC Section 1927. The Tenth Circuit has not squarely addressed the issue.

The New Mexico district court has held that a Pro Se litigant cannot be sanctioned under 28 USC Section 1927. *Schueller v. Experian Info Solutions, Inc.*, Case No. 11 cv 0955 (D.NM 2013) And: *In Re Courtney Inns, Ltd., Inc.*, 40 F3d 1084 (10th Cir. 1994)

The sanction is a Fourteenth and Eighth Amendment violation. The Eighth Amendment applies in civil as well as in criminal cases. See: *Austin v. United States*, 509 US 602 (1993).

In any case, for a Section 1927 sanction to be proper, a causal connection must exist between the objectionable conduct and multiplication of the proceedings.

The objectionable conduct must result in proceedings that would not have been otherwise conducted. *Baca v. Berry*, 806 F.3d 1262, 1268 (10th Cir. 2015); *Chung v. Lamb*, No. 22-1266 (10th Cir. 2023)

Petitioner was denied the right to a district court hearing on sanctions and show why he did not unreasonably and vexatiously multiply proceedings in this case.

ADDITIONAL VIOLATIONS

Petitioner was denied the right to offer evidence if he was subject to sanction for unreasonably and vexatiously multiplying proceedings.

If Petitioner was allowed a hearing on this issue, he would be able to offer evidence that he filed a writ of prohibition with the Tenth Circuit and an appeal from Judge Riggs Rule 58 judgment to protect his Seventh Amendment right to a jury trial.

Petitioner can also provide evidence that he had to appeal the dismissal of Count II for the failure to state a claim. The appeal was filed after the judge refused him the right to amend

Count II. The order to dismiss for failure to state a claim could have been treated as a final order.

Petitioner can also provide evidence that he had to appeal from an order that sanctioned him for an alleged violation of Rule 37. Judge Thuma stated that his order is to be treated as if it were a judgment and that the sanction is immediately collectible.

MOTION TO WITHDRAW THE REFERENCE

A - Delays

An unexplained delay in ruling on a motion to withdraw a reference in a non-core proceeding should be a due process violation, especially where the delay results in the denial of the right to trial by jury. See: Canon 3, Code of Conduct for United States Judges, Adjudicative Responsibilities

Petitioner had to wait over a year for a ruling on the motion to withdraw the reference. In December 2022, when the ruling was finally made, the motion was denied as moot because the bankruptcy judge had dismissed the tort claims with prejudice in May 2022.

Due process should require that Judge Riggs take reasonably prompt judicial action on the motion to withdraw the reference, given the bankruptcy judge's clearly expressed intention to try the tort claims.

The long delay in ruling on the Petitioner's motion for reconsideration of the motion to withdraw the reference is a major reason why Petitioner was denied his right to a jury trial.

B- Procedural Restrictions

The District Court and Tenth Circuit's procedural restrictions prevented Petitioner from having a merit hearing on his motions.

Petitioner was denied due process because he was only allowed to appeal the bankruptcy court judgment.

The Tenth Circuit should have allowed Petitioner to move forward on his appeal from the final orders entered by Judge Riggs on December 19, 2022. *Stewart v. Donges*, supra; *Kaiser Steel v. Frates* (In Re Kaiser Steel Corp) supra.

REASONS FOR GRANTING WRIT

A - The removal proceeding (Count 1) is a non-core proceeding. Petitioner did not consent to Judge Thuma trying the tort claims and did not waive his right to a jury trial.

Where a jury trial is required and a party refuses to consent to bankruptcy jurisdiction, withdrawal of the case to the district court is required. See, e.g., *In Re Guenther*, 65 B.R. 650, 652 (Bankr D Colo 1986); *In Re Northern Design, Inc*, 53 B.R. 25 (Bank Ct. District of Vt. 1985)

B - The Tenth Circuit violated Petitioner's rights under the First, Fourteenth, Seventh and Eighth Amendments of the Constitution by not giving Petitioner a merit review on an appeal taken to its court as a matter of right.

C - Judge Riggs and Tenth Circuit violated Petitioner's Fourteenth, Seventh and Eighth Amendments by not giving Petitioner a merit review on the motion to withdraw the reference.

D - Judge Herrera violated Petitioner's constitutional rights under the Fourteenth, Seventh and Eighth Amendments by finding that Judge Thuma had jurisdiction over the tort claims and by not correctly reviewing the judge's opinion and findings and conclusions de novo.

E - Judge Thuma violated Petitioner's Fourteenth, Seventh and Eighth Amendment rights by dismissing the tort claims and fining Petitioner \$12,941.14 in a case over which he lacked jurisdiction or management control.

CONCLUSION

The Petition should be granted.

Respectfully Submitted,



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