

**In The  
Supreme Court of the United States**

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HOWARD K. STERN, EXECUTOR OF  
THE ESTATE OF VICKIE LYNN MARSHALL,  
*Petitioner,*

v.

ELAINE T. MARSHALL, EXECUTRIX OF  
THE ESTATE OF E. PIERCE MARSHALL,  
*Respondent.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

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**PETITION FOR REHEARING  
ON SCOPE OF REMAND  
(SUPREME COURT RULE 44.1)**

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## INTRODUCTION

Petitioner seeks a rehearing as to the scope of the remand following this Court's June 23, 2011 decision, not the merits of the decision itself.

This Court's holding that a bankruptcy court lacks constitutional authority to enter a final judgment on a state law compulsory counterclaim to a proof of claim does not by itself require dismissal of Vickie Lynn Marshall's counterclaim or reversal of her \$89 million district court judgment, as the operative judgment here is not the bankruptcy court judgment but the district court judgment. As this Court recognized, the district court treated the bankruptcy court judgment merely as proposed findings of fact and conclusions of law "and engage[d] in an 'independent review' of the record." Opn. 4-5. The Ninth Circuit reversed the district court judgment on the sole ground that a Texas probate court judgment was "the earliest final judgment entered on matters relevant to this proceeding" and "the District Court should have 'afford[ed] preclusive effect' to the Texas 'court's determination of relevant legal and factual issues.'" Opn. 6, quoting Pet. App. 4-5.<sup>1</sup>

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<sup>1</sup> "Pet. App." refers to the appendix to Vickie's Petition For Certiorari filed August 3, 2010; "SER" refers to the Ninth Circuit supplemental excerpts of record, filed August 13, 2003 as docket entry 74.

However, Vickie has appealed the Texas probate court judgment, as have others; the judgment is therefore subject to reversal. That fact creates the manifest risk that Vickie could be stripped of her district court judgment because of the preclusive effect of a Texas judgment that ends up being reversed on appeal – a “grotesque result,” as a leading treatise calls it. 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4433 (2d ed. 2002). Happily, this Court’s own case law as well as settled law in both the federal courts and Texas support the prudent course of leaving Vickie’s judgment open pending the resolution of the Texas appeal. Rehearing is thus requested so that this Court can direct the Ninth Circuit to stay this appeal pending the resolution of Vickie’s Texas appeal.

**THE NINTH CIRCUIT SHOULD BE DIRECTED ON REMAND TO STAY THIS APPEAL PENDING THE RESOLUTION OF VICKIE’S APPEAL OF THE TEXAS PROBATE COURT JUDGMENT SO AS TO AVOID PERPETUATING A JUDGMENT RESTING ON NOTHING MORE THAN A SUBSEQUENTLY REVERSED JUDGMENT.**

**A. Vickie’s Appeal Seeking Reversal Of The Probate Court Judgment Is Pending In Texas.**

Vickie timely appealed the probate court judgment, as did other parties, and the appeal remains pending in the Texas First Court of Appeals, although it has been stayed due to another party’s bankruptcy. Tex. 1st Ct. App. case information, <http://www.1stcoa.courts>.

state.tx.us/opinions/case.asp?FilingID=83346 (last visited July 11, 2011).

Vickie's Texas appeal is prefigured in her trial and post-trial motions. SER 10353 & n.1; *see* Texas Rules App. Proc., Rule 33.1. There, among other grounds, she showed that the judgment entered against her was improper as a matter of law because Pierce's counterclaim for declaratory relief (the only claim that formed the basis of the judgment against her) was filed without leave of court, was filed after she had already dismissed all her affirmative claims, was not supported by the pleadings or jury findings and did not state a justiciable controversy. SER 10353-95.

If Vickie prevails on any of these grounds, the judgment as it relates to her would be reversed, and as explained below it could have no preclusive effect on her tortious interference claim.

**B. The Ninth Circuit Should Be Ordered To Stay This Appeal Because If Vickie's Texas Appeal Reverses The Probate Court Judgment, Thus Rendering It Null And Void For Preclusion Purposes, The Ninth Circuit's Preclusion-Based Reversal Of The District Court Judgment Should Not Stand, And Nothing Else Can Ensure That Result.**

The Ninth Circuit reversed the district court judgment on the sole ground that all the elements of preclusion had been satisfied and the district court

therefore erred in not affording issue-preclusive effect to the Texas probate court judgment. Opn. 6.

But “[s]ubstantial difficulties result from the rule that a final trial-court judgment operates as res judicata while an appeal is pending,” and “a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed.” Wright & Miller, *supra*, § 4433.

This is settled Texas law. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6-7 (Tex. 1986) (“[a] judgment in a second case based on the preclusive effects of a prior judgment should not stand if the first judgment is reversed”); *Jackson v. Smith Sec. Servs., Inc.*, 786 S.W.2d 787, 788 (Tex. App. 1990) (same).

This is also settled federal law. In *Butler v. Eaton*, 141 U.S. 240 (1891), for example, this Court reversed a federal judgment that had given preclusive effect to a prior state-court judgment that was subsequently reversed by this Court. *Id.* at 241-43. Having been reversed, the state-court judgment was “subverted and rendered null and void for the purpose of any such [preclusion] defense” in the federal action. *Id.* at 242-43. While preclusion had been an effective defense below, its effectiveness was “now entirely annulled.” *Id.* at 243-44.<sup>2</sup>

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<sup>2</sup> See also *Erebia v. Chrysler Plastics Prods. Corp.*, 891 F.2d 1212, 1215 (6th Cir. 1989) (“Where the prior judgment, or any part thereof, relied upon by a subsequent court has been reversed, the defense of collateral estoppel evaporates”); *Ornellas*

(Continued on following page)



A judgment that rests solely on the preclusive effect of another judgment still on appeal should “not stand if the first judgment is reversed,” and that “result should *always* be avoided.” Wright and Miller, *supra*, § 4433 (emphasis added). Courts ensure “full protection against the grotesque result of perpetuating a judgment that rests on nothing more than a subsequently reversed judgment” by “delaying further proceedings in the second action pending conclusion of the appeal in the first action,” *id.*, by “stay[ing] its own proceedings to await the ultimate disposition of the judgment in the trial court or on appeal,” Restatement (Second) of Judgments § 16, comment b (1982), or by “hold[ing] open the appeal in the second action until the determination of the appeal in the first action,” *Jackson*, 786 S.W.2d at 788; *see In re Prof’l Air Traffic Controllers Org. (PATCO)*, 699 F.2d 539, 544 & n.18 (D.C. Cir. 1983) (Ginsburg, J.) (citing Restatement §16, comment b for the proposition that a court that is “asked to accord a judgment preclusive effect may be well-advised to stay its own proceedings to await the ultimate disposition of the judgment on appeal”); *Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C. Cir. 1987) (Ginsburg, J.) (before applying preclusion, “care should be taken in dealing with judgments that are final, but still subject to direct review”).

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*v. Oakley*, 618 F.2d 1351, 1356 (9th Cir. 1980) (“A reversed or dismissed judgment cannot serve as the basis for a disposition on the ground of res judicata or collateral estoppel.”).

This case particularly requires the issuance of an order staying the appeal because there is no other mechanism that would ensure adequate relief in the event that Vickie's appeal reverses the probate court judgment. Ordinarily, a party may seek relief in the district court from a final judgment "if it is based on an earlier judgment that has been reversed." Fed. R. Civ. P. 60(b)(5). However, that remedy would be insufficient here because if the district court judgment is dismissed, Elaine Marshall, the executor of Pierce's probate estate, could distribute all assets and close the estate. Tex. Prob. Code, §§ 149E, 151. Not only would the assets be gone, but so would the judgment debtor.

Thus, this Court, in its remand order, should direct the Ninth Circuit to stay this appeal pending the resolution of Vickie's Texas appeal.



### **CONCLUSION**

For all the foregoing reasons, Vickie requests that this Court direct the Ninth Circuit on remand

to stay this appeal pending the resolution of her appeal of the Texas probate court judgment.

Dated: July 14, 2011

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.1.

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*Counsel for Petitioner*