No. _____

In the Supreme Court of the United States

LOUIS R. KOERNER, JR., Individually and as Assignee of Jean McCurdy Meade,

Petitioner

VERSUS

CMR CONSTRUCTION & ROOFING, L.L.C.,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case poses important questions regarding the procedural protections afforded to the non-moving party in a motion for summary judgment to have his summary judgment evidence accepted as true for the purpose of establishing material issues of fact, whether an otherwise valid Rule 54(b) motion is waived by not being asserted prior to final judgment so that relief available under Rule 54(b) cannot be available under Rule 59(e), and whether the court of appeal was correct in denying certification in violation of the applicable standard of consideration to the state supreme court where in order to make an *Erie* guess adverse to the non-moving party the court below refused by name to follow a recent Louisiana intermediate court.

Question I. Did the Fifth Circuit Court apply an incorrect standard of consideration by not considering the declarations of a non-moving party sufficient to

establish issues of fact inconsistent with summary judgment and did it disregard other important summary judgment evidence that established material issues of fact?

Question II: Did failure to file a Rule 54(b) motion prior to final judgment waive evidence of totally false assertions made to the district court that were "newly discovered" after issuance of the granting of the motion to set aside a default judgment but prior to final judgment, so that this dramatic, newly-discovered evidence could not be considered under Rule 59(e)?

Question III: Did the court below fail to utilize the proper standard of consideration in denying the motion for certification without written reasons and without addressing the proper standard of consideration, thereby erroneously permitting an admitted *Erie* guess as to the applicable state law to stand uncorrected even

though doing so required rejection by name of a recent Louisiana intermediate court of appeal decision?

RULE 14.1 STATEMENT - LIST OF PARTIES

Petitioner (petitioner-plaintiff-appellant below) is Louis R. Koerner, Jr.

Respondent (defendant-appellee below) is CMR Construction & Roofing, L.L.C.

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Wright & Miller, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995) 44, 49, 52

PETITION FOR A WRIT OF CERTIORARI

Petitioner Louis R. Koerner, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in *Koerner v. CMR Construction & Roofing, LLC*, No. 18-30019, 910 F.3d 221 (5th Cir. 2018).

OPINIONS BELOW

The opinion of the court of appeals was rendered on December 7, 2018, *Koerner v. CMR Construction & Roofing, LLC*, No. 18-30019, 910 F.3d 221 (5th Cir. 2018).[1] Rehearing, rehearing *en banc*, and a motion to certify to the Louisiana Supreme Court were denied on February 12, 2019.[2]

The district court's default judgment, reasons, and award of $497,257.71 were rendered on March 8,

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[1] App. A.

[2] App. B.

2017. *Koerner v. Vigilant Insurance Company*, 2017 WL 931341.[3]

The district court's order and reasons setting aside the default judgment was rendered on May 10, 2017, *Koerner v. Vigilant Insurance Company*, 2017 WL 1927742.[4]

The district court's final judgment and reasons for judgment dismissing Koerner's claims against CMR was rendered on October 18, 2017, *Koerner v. Vigilant Insurance Company*, 2017 WL 4682295.[5]

The district court's order ("the motion is denied") denying the Rule 59(e) motion seeking reconsideration of the May 10, 2017 order setting

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[3] App. C.

[4] App. D.

[5] App. E.

aside the default judgment was entered on November 16, 2018.[6]

The district court's order and reasons for judgment denying the Rule 59(e) motion for new trial of the dismissal judgment was rendered on January 4, 2018, *Koerner v. Vigilant Insurance Company*, 2018 WL 1471456.[7]

JURISDICTION

The court of appeal decision was rendered on December 7, 2018. The timely applications for rehearing, December 21, 2018, and motion to certify to the Louisiana Supreme Court, December 20, 2018, were denied without explanation on February 12, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[6] ROA 2457.

[7] App. F.

STATUTES, CODES, AND RULES INVOLVED

Louisiana Civil Code Article 1967:

Cause defined; detrimental reliance

Cause is the reason why a party obligates himself.

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

LSA-R.S. 13:72.1. Declaration of state law to federal courts:

> The supreme court of this state may provide that when it shall appear to the Supreme Court of the United States, or to any court of appeals of the United States, that there are involved, in any proceeding before it, questions or propositions of the laws of this state, which are determinative of the said cause, and there is no clear controlling precedent in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state […]

Louisiana Supreme Court Rule XII, Section 1:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law.

Rule 54. Judgment, costs.

(b) JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action presents more than one claim for relief— whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the

claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Rule 55. Rule 55 – Default; Default Judgment

(a) **Entering a Default**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) **Entering a Default Judgment**.

(1) *By the Clerk*. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court*. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) **Setting Aside a Default or a Default Judgment**. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Rule 56. Summary Judgment.

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Rule 59. New Trial; Altering or Amending a Judgment.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

ISSUES RAISED BY THIS CASE

This case raises important issues of federal law:

Question I. Absent extraordinary circumstances not here present, may courts disregard the non-movant's very specific declarations when those declarations are fully supported by other evidence in the summary judgment record and establish material issues of fact establishing fraud and detrimental reliance and are therefore inconsistent with the facts used by the courts below to justify granting and affirming summary judgment?

Question II. Does an order upsetting a default judgment become immune from challenge under Rule 59(e) after a final judgment has been entered when a considered decision was made not to file a Rule 54(b) motion for reconsideration or new trial? Was the possibility of seeking Rule 59(e) motion relief thus waived or made not available because the newly

discovered evidence came into the mover's possession after the judgment setting aside the default but prior to final judgment?

Question III. Was the denial by the court of appeal of petitioner's motion for certification to the Louisiana Supreme court inconsistent with the standard of consideration established by this Court, the court below, and other circuit courts in order to avoid an *Erie* guess? By so doing, why did the court below, after expressing uncertainty as to the law, decline by name to follow the most recent Louisiana intermediate appellate decision whose reasoning would have changed the result in this case?

STATEMENT OF THE CASE

On April 11, 2016, Koerner filed suit against his insurer, Vigilant Insurance Company, in state court. That action was removed to the Eastern District of Louisiana. Thereafter, Vigilant formally denied Koerner's claim for replacement of his roof, as being excluded from coverage, *inter alia,* because of the faulty workmanship exclusion. Koerner sought and was granted leave to join CMR.

After a **second** service of summons and complaint and many attempts by phone, email, and text to encourage CMR to make an appearance, Koerner sought and was granted an entry of default and then a default judgment against CMR in the amount of $497,257.71, *Koerner v. Vigilant Insurance Company*, 2017 WL 931341.[8]

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[8] App. C.

Based exclusively on the knowingly false affidavit of Steven Soulé, CMR's president and owner, the district court ordered the default judgment set aside. ROA.812 *Koerner v. Vigilant Insurance Company*, 2017 WL 1927742 (E.D.La., May 10, 2017).[9]

On August 8, 2017, CMR filed a motion for partial summary judgment and a motion to dismiss and/or for partial summary judgment. For procedural reasons, those motions were dismissed without prejudice. The motion for summary judgment was filed on September 1, 2017. That motion was extensively opposed on the merits and procedural grounds but granted on October 18, 2017 in a final judgment dismissing Koerner's claims against CMR. While these motions were pending, Koerner, who took Soulé's deposition (August 25, 2018) and using CMR's

[9] App. D.

document production, learned for the first time that Soulé's affidavit and the facts urged in its motion and accepted as true by the district court were fabricated and totally false.

Koerner timely filed Rule 59(e) motions to amend the dismissal judgment and to set aside the default judgment. Prior to the date on which CMR was due to respond to Koerner's dramatic impeachment evidence unequivocally establishing CMR's misrepresentations and its willfulness, the district court[10] "ORDERED that the motion was DENIED" without further explanation. The district court denied Koerner's motion to amend the summary judgment on January 4, 2018.[11] Notice of appeal was that day filed.

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[10] App-E-1.

[11] App. F.

The court of appeals affirmed the district court's judgments in all respects, rejecting his declaration as unworthy of belief and rejecting other summary judgment evidence that, if credited, would have established fraud and detrimental reliance. On account of an admitted *Erie* guess/refusal to follow a recent Louisiana intermediate appellate case, Koerner filed a motion to certify to the Louisiana Supreme Court on December 20, 2018. On December 21, 2018, applications for rehearing and rehearing *en banc* were filed urging the same grounds as urged to this Court. The applications for rehearing/motion for certification were denied without explanation on February 12, 2019.[12]

[12] App-B.

FACTS OF THE CASE

On account of Hurricane Katrina and a fire the week after, Koerner's historic New Orleans Garden District home suffered severe roof damage and the loss of its dormer. Koerner, who had over $500,000 of applicable insurance, was approached by a CMR salesman and convinced to purchase a Slate 2.0 roof that supposedly represented a great technological breakthrough, a titanium underlayment. Koerner was given neither samples nor literature. Hidden from him was that the slate was just decorative, was placed on metal hangers, and that the water seal was black plastic. This information was not available from the Slate 2.0 website that Koerner consulted which proclaimed the titanium underlayment and cost savings (which Koerner did not need) and did not disclose the use of black plastic or metal hangers. Koerner was told that he had a 75-year warranty but

did not receive a copy of the purchase agreement which also lacked a rear page whereon terms and conditions were normally located.

The pick-up crew hired by CMR did not install drip edges and did not properly seal the fire-damaged dormer, causing leaking and facade damage then and now, and failed to put back the original roof tiles as agreed.

When Koerner first complained about structural deterioration at his roof line, CMR responded.

On January 18, 2011, Koerner, concerned about defects, had his roof inspected by Guaranty Sheet Metal.[13] The Guaranty report identified multiple issues including the dormer and lack of drip edges.[14]

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[13] ROA.1320.

[14] ROA.1320-1325.

On September 6, 2011, Koerner contacted CMR regarding serious roof leaks and sent the Guaranty Report.[15] CMR employee Gary Klocke inspected the roof but did not disclose or offer any information on his findings.[16] Klocke told Koerner that CMR would address all of the issues in the Guaranty Report (which included installing drip edges and completely repairing the dormer, neither of which Koerner understood as problems).[17] However, CMR did not install drip edges to stop leaking and fascia damage nor make repairs to stop facade damage as those

[15] ROA.1333.

[16] ROA.1086.

[17] ROA.2023-24.

repairs required a man-lift for 2 necessary areas.[18] The job status was nevertheless changed to "closed."[19]

On February 27, 2012, Koerner again contacted CMR because of leaks.[20] After inspection, CMR acknowledged leaking and made repairs.[21] On September 5, 2012, Koerner again contacted CMR because his roof was still leaking,[22] then at the front chimney, those leaks being caused by the defective dormer repair, no drip edges, and lack of metal flashing around chimneys.

Claiming to want to fix the roof issues once and for all, Soulé, on November 1, 2012, came to Koerner's

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[18] ROA.1333.

[19] ROA.1333.

[20] ROA.1335.

[21] ROA.1335.

[22] ROA.1336.

home to inspect his roof and determine the work that needed to be done.[23] Koerner was induced to believe from these conversations that CMR's delineated scope of work would address **all** issues with his roof and that no further repairs would be necessary.[24]

Although CMR provided Brian Velasquez (with whom Koerner had no prior relationship) to perform the work proposed by Klocke,[25] the scope of work provided to Velasquez **did not include** fixing the dormer or installing drip edges.[26]

On November 2, 2012, Soulé emailed CMR's proposal to Koerner, Velasquez, and CMR's Brad Menerey, stating, "here is what CMR proposes," the

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[23] ROA.2024; ROA.2354.

[24] ROA.2024

[25] PREB.7-8.

[26] ROA.2354.

following step-by-step "[s]cope of work" for Velasquez to follow."[27] Soulé stated that, "CMR [was] to provide slate, ridge tiles, caulk, tile adhesive and two (2) 3 x 10 16-oz sheets of copper," with "[a]ll other materials to be provided by Brian Velasquez."[28]

On November 5, 2012, Menerey emailed Koerner and Soulé to inform them that he had spoken with Velasquez, that Velasquez would cover his own insurance, and that "we have tentatively set the start date to Thursday 11/8/12."[29]

On November 16, 2012, Koerner emailed Menerey (copy to Soulé and Velasquez) and asked, "[C]an you confirm that all of the work for CMR has

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[27] ROA.2354.

[28] ROA.2354.

[29] ROA.2355.

been done and done well."[30] Koerner further stated: "I do very much appreciate your loaning Brad to this job. On at least one occasion, he was instrumental in making sure that the flashing was done properly."[31] Koerner concluded: "The $1,600 [to be paid by Koerner for new vents installed by Velasquez] awaits completion and, hopefully by Brad, that the work is done and done up to CMR standards."[32]

Soulé immediately responded: "The **CMR work** has not been completed as of yet, but is anticipated to be completed today. The crew failed to use the foam adhesive under the ridge tiles, but we identified the error and are taking corrective action

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[30] ROA.2356.

[31] ROA.2356.

[32] ROA.2356.

today."[33] Shortly after, Koerner replied: "I am very grateful that I have blundered into getting the best possible result with your expertise, Brad's supervision, and Brian's hard-working crew."[34]

On November 18, 2012, Koerner emailed Velasquez and asked if he had "made arrangements to meet with Brad"[35] and stated that "Brad has graciously offered to supervise and approve the rest of your work and give Meagan authority to pay you." Velasquez agreed to meet with Menerey on Monday morning at 10 am.[36] Menerey confirmed the meeting with Velasquez's crew on November 19, 2012 to address the ridge tile issue, supposedly the lone

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[33] ROA.2357.

[34] ROA.2358.

[35] ROA.2359.

[36] ROA.2360.

remaining issue.[37] A separate entry in CMR's job file (November 27, 2012) states, "all work completed per Brad M," thus confirming Koerner's understanding.[38]

This all supports Koerner's declaration that Velasquez was provided by CMR and that the work was "reviewed" and verified as complete by CMR.[39] Of course, none of Velasquez's work covered the defective dormer work or the lack of drip edges, both known to Klocke and hidden from Koerner.[40]

CMR promised and Koerner relied on these many promises that CMR would fix everything listed

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[37] ROA.2360.

[38] ROA.2361.

[39] ROA.1444.

[40] ROA. 1446.

by Guaranty — issues including lack of drip edges and the dormer that were never fixed by CMR.[41]

In his August 25, 2017 deposition, Soulé **admitted** that the foregoing recitation, if indeed untrue, would constitute fraud:

> Q You would agree it was a reasonable request from me for CMR to address the issues in the Guaranty material?
>
> A Yes, sir, I would say so.[42]
>
> ***
>
> Q Now, if he assured me that everything was going to be fixed, did he have the authority to do so at a subsequent time that I could rely on what he said as being binding on CMR?
>
> A Well, I mean, I wouldn't think that you would have any reason to doubt anything that you were told by him.[43]

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[41] PREB.8-9.

[42] ROA.2329. Soulé, 8-25-17, 119/19-22.

[43] ROA.2329. Soulé, 120/23-121/5.

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A […] I can't think of any reason that you would have to doubt if they did tell you, yeah, we're going to take care of everything, to doubt that.

Q So if he told me that he was going to fix everything and he did intend to do so, I would be deceived?

A If he told you that he was going to fix everything and he intentionally did not do that, then, yes, that would be considered deception.[44]

Q I would be a victim […] of fraud?

A In that hypothetical scenario […] where he intentionally did not perform work, I would think that that would meet the legal burden of proof. […]

Q I would be mad and I could claim that John defrauded me?

A I can't speak for your mind but I could say that you would probably have a damn good right to feel that way.

Q And you would if you were in the reverse situation?

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[44] ROA.2329. Soulé, 122/24-123/7.

A **I believe so**.[45]

THE STANDARD OF CONSIDERATION APPLIED BY THE FIFTH CIRCUIT TO THE MOTION FOR SUMMARY JUDGMENT AND THE UNSUPPORTED SUMMARY JUDGMENT FACTS FOUND BY THAT COURT

A. The Standard of Consideration

The Fifth Circuit evaluated the district court's decision to grant summary judgment as follows:

> Finally, Koerner argues that the district court erred in granting summary judgment on (1) the fraud claim stemming from the 2006 purchase of his roof, (2) the claims related to the 2011 repairs, and (3) the negligence, fraud, and detrimental-reliance claims surrounding the 2012 repairs. After reviewing the district court's grants of summary judgment de novo, we find no error in any of the district court's conclusions.
>
> The question at summary judgment is whether "the record, taken as a whole, could . . . lead a rational trier-of-fact to find for the non-moving party." *Kariuki v. Tarango*, 709 F.3d 495, 501 (5th Cir. 2013) (defining a genuine

[45] ROA.2329-2330. Soulé, 123/8-124/2.

dispute of material fact). "Credibility determinations have no place in summary judgment proceedings" because "non-movants' summary judgment evidence must be taken as true." *Richardson v. Oldham*, 12 F.3d 1373, 1379 (5th Cir. 1994). All facts and inferences must be viewed in the light most favorable to the non-movant. *Love v. Nat'l Med. Enters.*, 230 F.3d 765, 770 (5th Cir. 2000). **However, "[s]elf-serving allegations are not the type of significant probative evidence required to defeat summary judgment," and "a vague or conclusory affidavit [without more] is insufficient to create a genuine issue of material fact in the face of conflicting probative evidence."** Kariuki, 709 F.3d at 505 (internal quotation marks omitted). **Therefore, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of . . . summary judgment."** *Scott v. Harris*, 550 U.S. 372, 380 (2007). With this familiar standard in mind, we turn to Koerner's claims.

B. Erroneous Application to This Summary Judgment Record

Koerner's claim that he was victimized in the initial sale was improperly rejected. However, as discussed *supra,* his main claim is that from September 2011 to the end of 2012, he sought and received false assurances from CMR that the defects delineated in the Guaranty Report, none of which could be seen from the ground, would be fixed, when CMR knew that they would not be fixed and were not.

> Turning to the 2011 repairs, Koerner argues that the district court erred in dismissing Koerner's claims as perempted. We disagree.
>
> The district court held that under Louisiana Revised Statute § 9.2772(A), any claims arising from repairs done to Koerner's roof are subject to a five-year peremptive period. Since Koerner first asserted claims against CMR on November 14, 2016, the district court held that "any claims arising from 'improvement[s]' that Koerner 'occupied'" *prior* to November 14, 2011, would fall outside the required five-year

window and be perempted. Koerner does not challenge these premises; he argues only that the 2011 repairs should not have fallen within this five-year period because the 2011 and 2012 repairs were part of the same project. There is no dispute that if the 2011 and 2012 repairs are considered one project, then the 2011 repairs should not have been perempted.

But the only evidence in support of this proposition is one conclusory assertion in Koerner's declaration that "based on [his] understanding," the 2011 repairs were part of a larger remedial project that was not completed until November 2012. But this subjective belief is belied by other more concrete evidence in the record. For example, CMR's job report documented the 2011 job as closed on November 10, 2011. It then separately agreed to do work three months later, in February 2012. After reviewing the record as a whole, we agree with the district court that the 2011 claims are perempted.

[…]

Koerner asserts a negligence claim against CMR for the repairs done in November 2012. There is only one problem—CMR did not perform the repairs; a different roofer named Brian Velasquez did. As in the district court,

Koerner argues that CMR can be held liable for Velasquez's work because he was CMR's independent contractor. But under Louisiana law, Koerner must point to a valid contract between Velasquez and CMR before he can successfully argue that they had a principal/independent-contractor relationship. *See Bourquard v. L.O. Ausauma Enter.*, Inc., 52 So. 3d 248, 253 (La. Ct. App. 2010). This, he cannot do.

The summary-judgment evidence shows that Koerner entered into a contract with Velasquez—not CMR—to repair his roof in November 2012. It is true that CMR was involved with the repairs in many ways: it agreed to reimburse Koerner for Velasquez's work, set the scope of the work it would reimburse, had some supervisory power over Velasquez, and later assured Koerner that Velasquez's work was complete and done well. None of this, however, is evidence of a contract between CMR and Velasquez. At best, it is evidence of an independent agreement between Koerner and CMR to pay for, supervise, and inspect Velasquez's work. But the transitive property does not apply in contract law. The fact that Koerner had a contract with Velasquez and a contract with CMR does not mean that Velasquez and CMR had a contract with each other. And without a

> contractual relationship, CMR cannot be held responsible for Velasquez's alleged negligence.

Koerner's declaration, the CMR documents, and the Soulé deposition admission unequivocally established issues of fact that should have prevented summary judgment, and would have had the proper standard of consideration/review been followed.

MISAPPLICATION OF RULE 59(e) IN LIGHT OF KOERNER'S DECISION NOT TO FILE A RULE 54(b) MOTION BUT WAIT FOR FINAL JUDGMENT AND FILE A RULE 59(e) MOTION

The Fifth Circuit evaluated the district court's denial of this Rule 59(e) relief sought by Koerner:

> Koerner next challenges the district court's summary denial of his Rule 59(e) motion to reconsider the order setting aside the entry of default and partial default judgment. That motion contained additional evidence impeaching Soulé's affidavit—the only evidence supporting the non-willfulness finding.
>
> "Reconsideration of a judgment after its entry is an extraordinary

remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). "There is no requirement that reasons be stated for the denial of a motion for reconsideration under Rule 59(e)," especially if "valid—indeed compelling—reasons for denying the motion are obvious and apparent on the face of the record." *Briddle v. Scott*, 63 F.3d 364, 381 (5th Cir. 1995).

Koerner was not entitled to this extraordinary relief, and there is an obvious reason on the face of the record why this is so. To be granted, a Rule 59(e) motion "'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' that was not available before the judgment issued." *Molina v. Equistar Chemicals LP*, 261 F. App'x 729, 733 (5th Cir. 2008) (quoting *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003)). The district court set aside the default in May 2017. The evidence that Koerner attached to his Rule 59(e) motion came to light after Soulé's deposition on August 25, 2017. The court entered final judgment on October 18, 2017. Thus, because the evidence came to light before final judgment was entered, relief under Rule 59(e) was improper.

Koerner should have instead filed a Rule 54(b) motion while the case was

still open. Under that rule, district courts can amend interlocutory orders for any reason they deem sufficient before final judgment is entered. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336–337 (5th Cir. 2017) (describing the differences between Rule 59(e) and Rule 54(b)). But in the interest of finality, Rule 59(e) sets a much higher threshold for relief once judgment is entered. *Id.*

Koerner actually admits that he could have filed a Rule 54(b) motion, but he says that he did not do so because they are disfavored for having the potential to interfere with the underlying case's progress. He cites no cases for this perplexing proposition. We fail to see how sitting on potentially dispositive evidence until the district court completes more work and enters final judgment on a summary-judgment motion is preferable to correcting error as soon as possible.

Koerner made a poor tactical decision by waiting until after final judgment to bring the new evidence forward. But the fact remains: the evidence was available before final judgment was entered, so he is not entitled to the extraordinary relief that Rule 59(e) provides.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S MISAPPLICATION OF THE STANDARD OF REVIEW OF A SUMMARY JUDGMENT CONFLICTS WITH THAT APPLIED BY THIS COURT AND OTHER CIRCUIT COURTS

The Fifth Circuit's decision conflicts with decisions of this Court as well those of other courts of appeal. The Fifth Circuit misconstrued the standard of review established by this Court's decision in *Scott v. Harris*, 550 U.S. 372, 380 (2007), on which it relied in order to disregard the unsworn declarations of Louis R. Koerner, Jr., a distinguished attorney, a member without blemish since 1967 of the bar of the Fifth Circuit and of this Court, and a person whose sworn declarations and testimony should not have been within the scope of the following standard of review articulated by court below:

> Therefore, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the

> record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ... summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). With this familiar standard in mind, we turn to Koerner's claims.

Scott v. Harris, 550 U.S. at 380-81 involved unique facts not present here:

> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

The complete absence of such unique facts, as here, and various permutations of facts less compelling than those in the present case are reflected in decisions of this Court that are inconsistent with the panel decision, to wit: *Matsushita Elec. Indus. Co.*

v. Zenith Radio Corp., 475 U.S. 574 (1986); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970), and *Tolan v. Cotton,* 572 U.S. 650, 657, 134 S. Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014).

In *Tolan*, this Court reversed summary judgment because of the lower court's "fail[ure] to credit evidence that contradicted some of its key factual conclusions." Because the lower court "improperly weighed the evidence and resolved disputed issues in favor of the moving party" (*id.* 1866), coupled with the court of appeals' repeated "fail[ure] to credit the testimony of the plaintiff and members of his immediate family" (*Id.* 1866–67), this Court has determined that the court of appeals "weigh[ed] the evidence and reach[ed] factual inferences contrary to [the nonmovant's] competent evidence." This Court vacated the court of appeal's affirmance of the district court's summary judgment.

Rather than follow the proper standard of review of a non-movant's evidence applied by this Court, the court below cited *Scott v. Harris*, a factual outlier where there was a video tape unequivocally contradicting one party's story – here no such evidence exists. If, *arguendo*, Koerner's declarations were not considered sufficient to establish contested issues of fact, there was a massive amount of contrary evidence in the summary judgment record (recited in the Statement of Facts, *supra*). The "facts" stated by the courts below[46] are inconsistent with the cited record, Koerner's September 8, 2017 declaration, and the compelling physical evidence he provided. The version of the facts that the courts below accepted relies on arbitrarily choosing which facts to consider and disregarding Koerner's extensive and clear

[46] App. A-2-4.

evidence. In his declaration, Koerner provided detailed analysis and factual rebuttal (supported by citation to the summary judgment record) of each and every statement made by CMR together with statements of additional material facts in dispute.[47] Despite this comprehensive and well-supported presentation of the facts, the courts below disregarded Koerner's evidence and adopted CMR's contentions as fact.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), this Court stated that "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." In its characterization of Koerner's unsworn statement and other evidence as "blatantly contradicted by the

[47] R.O.A. 1428.

record, so that no reasonable jury could believe it," the court below misapplied *Anderson*:

> By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly weighed the evidence and resolved disputed issues in favor of the moving party. […]
>
> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to [the non-movant's] competent evidence, the court neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the non-moving party.

In concluding that Koerner's declarations and other evidence could be disregarded as not establishing fraud or detrimental reliance, the courts below resolved factual disputes between Koerner and CMR and weighed the evidence, thus deviating from

its obligation to draw reasonable inferences in favor of Koerner, the non-moving party.

Other circuit courts of appeal have refused to discount a non-movant's affidavits/declarations under much less compelling circumstances and either reversed summary judgment or approved its denial. See *Patterson v. City of Wildwood*, 354 F.App'x 695, 696–98 (3d Cir. 2009); *Coble v. City of White House, Tenn.*, 634 F.3d 865, 865–71 (6th Cir. 2011); *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 276–78 (4th Cir. 2011); *Skelly v. Okaloosa Cty. Bd. of Cty. Comm'rs*, 415 F.App'x 153, 154–55 (11th Cir. 2011), and *Reeder v. Chitwood*, 595 F.App'x 890, 896 (11th Cir. 2014).

In *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 565–82 (4th Cir. 2015), the court stated:

> Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses

> in order to evaluate their credibility, summary judgment is not appropriate.

The courts below arbitrarily chose to discredit Koerner's declarations even though an evaluation of credibility at trial is more appropriate to resolve underlying factual issues and makes summary judgment inappropriate.

The *Jacobs* court held that the "court cannot weigh evidence and reach factual inferences contrary to the nonmovant's competent evidence." Not only did the court below not credit the declarations and the extensive evidence recited, *supra*, but it resolved factual issues by granting an inappropriate summary judgment when there was massive amounts of evidence supporting Koerner's factual positions.

Even having improperly and completely blown off Koerner's declarations, the court below further erred in affirming summary judgment inasmuch as

Koerner, the nonmoving party, offered a rebuttal of the movant's evidence and proof, CMR's president Soulé's sworn statement, and his contrary deposition. In accordance with this Court's guidance,[48] the valid evidence contradicting CMR's facts, and Koerner's own declarations, the court below should have reversed the summary judgment on account of issues of material fact

II. THE COURT BELOW ERRONEOUSLY HELD THAT NOT REQUESTING 54(b) RELIEF WAIVES OTHERWISE AVAILABLE RULE 59(e) RELIEF

A. Rule 59(e) and Rule 54(b) Relief Compared

The standard of consideration/review of Rule 54(b) motions is more lenient than that under Rule 59(e). Under Rule 54(b), the district court must find that it committed an error of law or an error in

[48] *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505.

exercise of discretion. Rule 59(e) was satisfied by the Soulé deposition taken on August 25, 2017, newly-discovered evidence after the time that the district court rendered its ruling setting aside the default judgment based on a false affidavit and fabricated facts exposed by Soulé in his deposition and admitted at oral argument before the court below.

Such result is in accordance with Wright & Miller, *Federal Practice and Procedure* § 2810.1. There are four basic grounds upon which a Rule 59(e) motion may be granted: (1) it is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) there was an intervening change in controlling law.

The district court rendered its order setting aside the default judgment against CMR on May 10,

2017. New evidence obtained on August 25, 2017 completely undermined the legal and factual bases of that order. While final judgment was entered on October 18, 2017, these two judgments had nothing to do each other, other than the earlier judgment becoming appealable and subsumed (for appeal purposes) within the second. The only consequence of the October 18, 2018 was to make the earlier order no longer interlocutory but final and appealable. That the new evidence was found "before" final judgment was entered has no legal significance. What matters is that the evidence was newly discovered after the order setting aside the default judgment against CMR was rendered. The district court was required to reconsider the earlier order in light of evidence discovered after that order was rendered as was the court of appeal.

The court below improperly moved the goal post to the date of the final judgment as opposed to the date on which the district court considered the motion to set aside the default thus prohibiting Rule 59(e) relief because the Soulé deposition, admitted newly discovered evidence vis-a-vis the May 10, 2017 judgment was not vis-a-vis the October 18, 2017 judgment. This was casuistic and simply wrong.

In *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1470, the Fourth Circuit states that "as its terms indicate, Rule 54(b) governs reconsideration of interlocutory orders and opinions." *A contrario*, Koerner could not have waived 59(e) relief by simply not contesting an interlocutory order and opinion of the district court, since the main distinction between 54(b) and 59(e) is that the latter is for final judgments, whereas 54(b) is only for interlocutory judgments.

B. Failure to Grant 59(e) Relief Was Error According to the Principle Governing One Misstep

Despite having definitively alleged newly discovered evidence that would have changed the result had it been known, the motion for Rule 59(e) relief was done in accordance with the principles of the Federal Rules of Civil Procedure and should not have been waived or forfeited. Koerner could not have waived Rule 59(e) relief by not moving in September of 2017 for Rule 54(b) relief.

This holding, if let stand, goes against the underlying philosophy of the Federal Rules of Civil Procedure, expressed in Rule 1 and Rule 8(a), of doing justice for the litigants, construing pleadings liberally, and preventing one alleged misstep from being fatal. *Arguendo,* should the Soulé deposition not be considered as new evidence (which it is), filing the motion for Rule 59(e) relief would have still been

appropriate since Koerner could not have raised this evidence or any legal and/or factual arguments arising from the deposition as of the time when the district court issued its ruling.

Compare *Conley v. Gibson*, 355 U.S. 41, 48, 78 (1957) in which this Court stated that the Federal Rules of Civil Procedure reject the approach that pleading is a game of skill in which one purported misstep may be decisive to the outcome, while accepting the principle that the purpose of pleading is to facilitate a proper decision on the merit.[49] The use of pleadings under the Federal Rules of Civil Procedure "should not set barriers which prevent the achievement of that end."[50]

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[49] *United States v. Hougham*, 364 U.S. 310 (1960).

[50] *Maty v. Grasselli Chemical Co.*, 303 U.S. (1938)

Wright & Miller conclude:

> [A]s the case law makes very clear, the district court is obligated to make a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his or her favor, whenever the interest of justice so requires.[51]

By not allowing Koerner to present Soulé's deposition as newly discovered evidence for the purposes of his Rule 59(e) motion, the court below committed legal error that conflicts with the authority of this Court and the principles established by the Federal Rules.

Compare, *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998) ("prolixity is a bane of the legal profession but a poor ground for rejecting potential meritorious claims."); *F.D.I.C. v. World University Inc.*, 978 F.2d

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[51] *Charles A. Wright Arthur R. Miller*, Federal Practice and Procedure § 1286.

10 (1st Cir. 1992) (the Federal Rules of Civil Procedure reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome).

The court below erred in denying Koerner's motion for 59(e) relief solely because he made an alleged "poor tactical decision" in not filing for Rule 54(b) relief before final judgment despite good reasons for not doing so.

The rules of procedure should be liberally construed and "mere technicalities" should not stand in the way of consideration of a case on its merits. *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 316, 1988). It is entirely contrary to the spirit of the Federal Rules of Civil Procedure for a decision on the merits to be avoided on the basis of mere technicalities. *Foman v. Davis*, 371 U.S. 178, 181 (1962).

The pleading rules make pleadings, in and of themselves, relatively unimportant because cases are to be decided on the merits. Moore's Federal Practice, ¶8.02, 8–10). Further,

> [Rule 1] sets a theme of liberality in the application of the procedural rules and fosters the principle that the outcome of cases should turn on their merits rather than on technical issues of pleading and procedure")[52]

[…]

> The general philosophy of the pleading rules is that they should give fair notice, should be liberally construed, be subject to liberal amendment, and that decisions should be on the merits and not on technical niceties of pleading" (footnotes omitted).[53]

According to Wright & Miller, where a party has not been misled nor prejudiced by another party's pleading, an alleged inadvertent mistake in said

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[52] Moore's Federal Practice, ¶ 1.13[1], 1–59.

[53] *Id.* § 15.15 [2], 15–146.

pleading can and should not be held against the pleader.[54] As such, technical deficiencies should not delay a trial on the merits nor deny a party their right to be heard in court because of the way the federal rules are designed. Koerner was denied relief otherwise available although there was no proven nor explained technical deficiency. There was no authority cited for Rule 59(e) relief waiver or adverse consequence for not filing for Rule 54(b) relief, and there appears to be none. The comment about Koerner's alleged "poor tactical decision" is a misapplication of Rules 54(b) and 59(e) and a disregard of the principles preventing disastrous consequences for one alleged misstep.

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[54] *Charles A. Wright & Arthur R. Miller*, Federal Practice and Procedure § 1286, at 558–59 (2d ed. 1990).

III. REFUSAL TO CERTIFY WAS ERROR

A. Detrimental Reliance in Louisiana

The well-established common law equitable remedy of detrimental reliance was formally adopted as La. Civ. Code Art. 1967 of the 1985 revision of the 1870 Civil Code. For the detailed history, please see doctrinal analyses of detrimental reliance by one of its drafters, Herman, *Detrimental Reliance in Louisiana Law –Past Present, and Future(?)*: The Code Drafter's Perspective, 58 Tul. L. Rev. 707 (1984) and by Palmer, *The Many Guises of Equity in A Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 Tul. L. Rev. 7, 54-61 (1994).

The pre-codal jurisprudential disdain for the former common law doctrine of detrimental reliance that led it, at one time, to be repudiated by the Louisiana Supreme Court, is reflected in the pre-revision case of *Wilkinson v. Wilkinson*, 323 So. 2d

120, 126 (La. 1975) and echoed as a matter of rote in *Luther v. IOM Co. LLC*, 2013-0353 (La. 10/15/13), 130 So. 3d 817, 827 (neither proponent prevailed) and by the court below.

Palmer, 69 Tul.L.Rev. at 613, unlike the court below but upon careful consideration, concludes that:

> What effect the new reliance principle in the Book of Obligations will have is difficult to predict. It is not clear that estoppel will be undercut and disappear from the scene; to the contrary, resort to the doctrine may be intensified, for the new blackletter principle may legitimate the jurisprudential development and remove the "disfavored" label from the doctrine.
>
> It is ironic to note that since the 1985 Revision, courts have continued to echo the old "disfavored" refrain, citing the pre-1985 jurisprudence and paying almost no attention to the existence of the equivalent principle now found in the Civil Code. *E.g., Woodard v. Felts*, 573 So. 2d 1312, 1315 (La. Ct. App. 2d Cir. 1991); *Kethley v. Draughon Business College*, 535 So. 2d 502, 505-07 (La. Ct. App. 2d Cir. 1988).

Including the panel decision and according to Westlaw, the most recent Louisiana Supreme Court authority, in favor of the plaintiff, *Suire v. Lafayette City-Par. Consol. Gov't,* 2004-1459 (La. 4/12/05), 907 So. 2d 37, has been cited 134 times on detrimental reliance. Interpretation of the Louisiana Civil Code, particularly now that Art. 1967 (1985) changed the law, is of exceeding importance to Louisiana citizens and practitioners and furnishes a remedy with a 10-year prescriptive period for the fraudulent acts and misrepresentations made by CMR that might otherwise be remedied by the Louisiana Unfair Trade Practices Act and La. Civ. Code Art. 2762 before its emasculation.

The issue proposed for certification concerned the limits of the doctrine of detrimental reliance. There was no novel cause of action espoused.

B. The Standard of Consideration Established by This Court and Other Circuits Is Consistent With that Established by the Fifth Circuit and Not Followed By that Court

According to this Court, resort to *Erie* guesses often amounts to speculation in order to determine the content of the applicable state law. In *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491 (1985), this Court stated:

> [S]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from federal court.

This statement is both clear regarding cases which involve questions to which no answer was provided by controlling precedent of state's highest court (see *Old Republic Insurance Company v. Stratford Insurance Company*, 777 F.3d 74 (1st Cir.

2015)) and just as applicable to situations where there is a doubt as to the application of state law.

The proper standard of consideration is to adopt a liberal approach on certification by resorting to state courts in addressing questions that arise from doubtful or unclear state precedent regarding the matter. *Alabama Gas Corporation v. Travelers Casualty and Surety Company*, 2013 WL 3242743 (N.D. Ala. 2013), aff'd, 569 Fed Appx. 837 (11th Cir. 2014), Federal courts "have tended to be far too reluctant to certify questions to the state courts."[55] Judge Calabresi, in his famous 1997 dissent[56], addresses the issue of reluctance to certify while relying on state lower court opinions to define state law. Such reluctance is characterized as wrong and

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[55] *McCarthy v. Olin Corp.*, 119 F.3d 148, 157–70 (2d Cir. 1997).

[56] *Id.*

unjust in that it leads to the very forum shopping that *Erie* was intended to prevent. In the absence of such resort to state lower courts and denial of certification where it is merited, the state loses the ability to develop or restate the principles that it believes should govern the category of cases. The states should have the right to apply and clarify their own genuine law, and denial of certification by federal courts only serves to further violate fundamental principles of judicial federalism (see *Hakimoglu v. Trump Taj Mahal Assocs.,* 70 F.3d 291, 302 (3d Cir. 1995)) and state sovereignty. See *Todd v. Societe BIC, S.A.,* 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc). Certification is an alternative to prognostication as well as:

> [A]n alternative that respects the right of the state courts to define their own substantive law, deters forum shopping, and ensures that litigants […] will have their state-law created rights

> determined by "the only judges who can give definitive answers" as to those rights.

In *McCarthy v. Olin Corp.*, 119 F.3d 148, 157–70 (2d Cir. 1997), the court reiterates that federal courts must be careful to certify only in appropriate cases., then defines "appropriate":

> [A]ppropriate must mean virtually any case in which 1) a significant and dispositive issue of state law is in genuine doubt (despite the existence of non-binding lower court decisions, especially where those decisions—like the ones relied upon by the majority—were never appealed to the state's highest court), and 2) certification is specifically requested by the party that did not invoke federal court jurisdiction. By such a standard, I believe that certification is not used enough, and that cases like the one before us are especially suited to its use.

C. The Standard of Consideration Established by the Fifth Circuit, Consistent with that Established by this Court and Other Circuits, Was Not Followed Without Explanation, But Required Certification to the Louisiana Supreme Court

The applicable Louisiana certification statute and court rule are found in LSA-R.S. 13:72.1 and Louisiana Supreme Court Rule XII.

The Fifth Circuit's standard of consideration, consistent with that of this Court and other circuits, is that the following considerations should be examined: (1) how close the question is and the existence of sufficient sources of state law, (2) the degree to which considerations of comity are relevant, and (3) practical limitations of the certification process such as significant delay. [57] By not granting

[57] *JCB, Inc. v. Horsburgh & Scott Co.*, 908 F.3d 953, 956 (5th Cir. 2018), as revised (Nov. 14, 2018), certified question accepted (Nov. 30, 2018) and *Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, No. 17-20527, 2018 WL 3954218, at *3–4 (5th Cir. Aug. 16, 2018), certified question accepted (Aug. 24, 2018).

certification here, the court below permitted a decision to stand that contradicts its own recited precedent even though Koerner met all 5th Circuit requirements for certification. The court below did not explain how or why it found Koerner's claim to be ineligible for certification even though the circumstance in which there can be application of detrimental reliance in Louisiana were both important and unclear.

In several cases, the court below, as well as this Court and other Circuit Courts, have found certification to be appropriate while considering similar factors as those stated above and establishing concordant standards of consideration. In *MCI Communications Services, Inc. v. Hagan,*[58] the court below granted certification pursuant to Louisiana

[58] 641 F.3d 112, 115.

Supreme Court Rule XII on a case involving an important and determinative question of Louisiana law to which there was no controlling Louisiana Supreme Court precedent. Moreover, in *Silguero v. CSL Plasma, Inc*[59], the court below refused to answer the question whether a plasma collection center was deemed a "public facility" because it saw it difficult to do so. In fact, it had relied on the idea that state courts had not interpreted the term "public facility", and the State Supreme Court had only done so once. According to the court below, such reasons would justify the granting of certification to State Supreme Courts. Rather than second-guess state law, it is prudent to obtain clarity from the state itself.[60]

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[59] 907 F.3d 323, 332.

[60] *In re Deepwater Horizon*, 807 F.3d 689, 698–99 (5th Cir. 2015), *certified question accepted* (Dec. 4, 2015)

In *Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 703 (5th Cir. 2011), a case involving very different facts and law, this Court, after thoroughly discussing the extensive associated and definitive state-court litigation and other applicable law, declined certification. It found that there was no compelling reason to certify the plaintiffs' proposed question to the Louisiana Supreme Court because, amongst other reasons not present in this case, said questions are already resolved by the Louisiana Supreme Court's clear and controlling decision in another analog case (*PPG Industrice, Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984)).

In the present case, it has been clearly established that there is no such controlling decision of the Louisiana Supreme Court that the court below could have followed in its *Erie* guess. The court below admitted inconsistent treatment of detrimental

reliance in its own prior jurisprudence and that its *Erie* guess was reluctant. It had been 13 years since the last time the Louisiana Supreme Court spoke on this issue. The court below also declined to follow the most recent Louisiana intermediate appellate decision that would have established the applicability of detrimental reliance even on the basis of the few facts found favorable to Koerner.

D. Had the Proper Standard of Consideration Been Applied to the Facts Urged by Koerner and Found in the Summary Judgment Record, Detrimental Reliance Would Have Been Established

The facts in the summary judgment record as recited above, had they been accepted as true for the purpose of summary judgment as they were supposed to be, conclusively demonstrate detrimental reliance. Koerner's proof, even outside his completely discounted declaration, demonstrates an undertaking to fix the defects in the Guaranty report, a deliberate

failure to disclose that the dormer defects and lack of drip edges were purposely not disclosed and not fixed, and decent performance, **other than the drip edges and dormer**, through CMR's contractor, Velasquez. Had the district court or the court below accepted this proof and applied the correct standard of consideration, there would be unmistakable evidence of detrimental reliance, and the issue of certification would not have arisen. However, the facts as recited by the court below[61] and that court's refusal to accept contray facts as properly disputed makes certification necessary.

The panel opinion candidly admits lack of clarity from the Louisiana Supreme Court regarding the requirements for a detrimental reliance claim[62]

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[61] App. A.

[62] App. A, A28.

and refused to follow a recent intermediate appellate decision. Considering the uncertainty as to the application of detrimental reliance in Louisiana and the conflicting and rejected Louisiana court of appeals decision,[63] certification on that court's own motion and certainly on Koerner's motion was appropriate. In deciding which of the two conflicting cases properly applied La. Civ. Code Art. 1967, the court below did not correctly inform its *Erie* guess.[64]

CONCLUSION

Considering the conflict among the courts of appeal, the novel decision to waive Rule 59(e) relief by not filing for Rule 54(b) relief prior to final judgment, the pretextual disregard for the proof offered by the nonmoving party by declaration and other convincing

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[63] App. A, A26.

[64] App. A, A31-32.

proof, and the failure to certify an issue of law to the Louisiana Supreme Court about which the court below had to make an *Erie* guess and refused to follow by name a recent Louisiana intermediate appellate case, this Court should grant review

For the aforementioned reasons, this petition should be granted.

Respectfully submitted,

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