No. 18-1529

In The Supreme Court of the United States

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

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Paul J. Politz
Stephen T. Perkins
Counsel of Record
TAYLOR, WELLONS, POLITZ & DUHÉ, APLC
1515 Poydras Street, Suite 1900
New Orleans, Louisiana 70112
(504) 525-9888
(504) 525-9899
sperkins@twpdlaw.com

Counsel for Respondent

Dated: July 11, 2019

THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

Questions Presented

1. Whether the Fifth Circuit misapplied the summary judgment standard under Fed.R.Civ.P. 56, by crediting a declaration backed by contemporaneous business records over conclusory statements in plaintiff's own unsworn declaration.

2. Whether the Fifth Circuit erred by affirming the district court's denial of a motion to amend or alter a final judgment under Fed.R.Civ.P. 59(e), filed after the district court entered a final judgment, instead of treating the final judgment as an interlocutory ruling and applying a different standard under Fed.R.Civ.P. 54(b).

3. Whether the Fifth Circuit erred in failing to certify a question to the Louisiana Supreme Court in response to plaintiff-appellant's request for certification after issuance of the Fifth Circuit's decision on the merits of the appeal, based on a single Louisiana appellate decision, even though the Fifth Circuit supported its decision based on the language of Louisiana Civil Code article 1967 and multiple other decisions interpreting the requirements of a claim for detrimental reliance.

Parties to Proceeding and Related Cases

The parties to this proceeding are Louis R. Koerner, Jr. and CMR Construction & Roofing, LLC.

The proceedings in other courts that are directly related to this case are:

- *Koerner v. Vigilant Insurance Company*, No. 2:16-CV-13319, U.S. District Court for the Eastern District of Louisiana. Judgment entered January 4, 2018.

- *Koerner v. CMR Construction & Roofing, LLC*, No. 18-30019, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 21, 2019.

Corporate Disclosure Statement

Respondent CMR Construction & Roofing, LLC certifies that no publicly traded company owns more than 10% of its stock.

Table of Contents

Table of Authorities

Cases **Page(s)**

Statutes

Rules

Statement of the Case

After Hurricane Katrina struck New Orleans in August 2005, respondent CMR Construction & Roofing, LLC ("CMR") replaced a damaged roof for petitioner Louis R. Koerner, Jr. ("Koerner") with a Slate 2.0 roof that consisted of slate tiles installed on a metal hanger system, on top of a waterproof polymer sheeting.[1] Although Koerner now claims otherwise, CMR's salesman showed Koerner product literature and samples of the roofing.[2] Koerner also researched the Slate 2.0 roofing system himself, with his own emails indicating that he chose it in part because of lower cost.[3]

Contrary to Koerner's assertions in this lawsuit, Koerner knew exactly what he bought.[4] Although Koerner seeks to claim that he was offered a 75-year warranty on his new roof, what CMR provided to him was a written, ten-year, limited warranty that was spelled out in the terms and conditions of the contract that he signed, as CMR's Steve Soule established in an affidavit backed by CMR's contemporaneous business records.[5]

---

[1] *See* ROA1310-1311. The history of CMR's repair work for Koerner is set forth succinctly in the Second Declaration of Steven Soule and supporting documents, ROA1310-1350. *See also* ROA879-972, declarations and exhibits submitted in support of CMR's earlier dispositive motions.

[2] ROA 1311. As the district court noted, Koerner admitted this fact in his own unsworn declaration. *See* ROA 1984.

[3] The district court alluded to this evidence in its ruling on one of Koerner's Rule 59(e) motions. *See* ROA 2535.

[4] ROA1311-1313.

[5] ROA1313-1314.

Following the 2005-2006 replacement of his roof, CMR responded to several warranty claims by Koerner, including damage that occurred after Tropical Storm Lee in 2011 and heavy rains in February 2012.[6] However, CMR never committed to any broad scope of repair, despite Koerner's claim that CMR agreed to address all of the issues raised in a Guaranty Sheet Metal report.[7]

In September 2012, after Hurricane Isaac struck New Orleans, Koerner again sought to have CMR repair his roof.[8] CMR demurred, noting that Koerner had suffered storm damage.[9] However, CMR ultimately agreed to help with repairs by an independent contractor named Brian Vela, if Koerner would back off his effort to hold CMR liable for interior damage to his home.[10]

On April 11, 2016, unbeknownst to CMR, Koerner sued his homeowner's insurer, Vigilant Insurance Company ("Vigilant") in Civil District Court for Orleans Parish.[11] On November 14, 2016, after removal of the suit to federal district court, Koerner added CMR as a defendant.[12] CMR did not think it needed to respond to the suit papers it received from Koerner, due to the caption of the suit

---

[6] ROA1314-1316.

[7] ROA1312-1316.

[8] ROA1316-1317.

[9] ROA1316.

[10] ROA1316.

[11] ROA23-24.

[12] ROA389-395.

including Vigilant but not CMR as a defendant, the passage of over ten years since CMR's roof replacement work for Koerner, and the naming of a different CMR entity on the cover sheet of the service papers.[13]

In March 2017, after CMR did not respond to Koerner's lawsuit, Koerner successfully moved for a default judgment against CMR for over $497,00.00[14] – more than five (5) times the amount he paid CMR to replace the roof more than ten years earlier. In April 2017, CMR moved to set aside the default.[15] On May 10, 2017, the district court granted that motion.[16] CMR later advised the court that it would move for summary judgment because Koerner's claims were time-barred by a statute of repose, La. R.S. 9:2772.[17] Koerner successfully moved the district court for leave to file a third amended complaint asserting fraud, which is not covered by the statute of repose.[18]

On August 25, 2017, Koerner took the corporate deposition of CMR. In that deposition, CMR's Steve Soule confirmed that, while the cover sheets on the court papers that CMR received from Koerner listed Vigilant as defendant and a CMR affiliate as the recipient of the papers, CMR itself was named in the underlying, attached papers. This

---

[13] ROA716-717.

[14] ROA670-675.

[15] ROA680-787.

[16] ROA812-818.

[17] ROA837.

[18] ROA837.

testimony did not contradict anything that Mr. Soule had said in his affidavit in support of the motion to set aside default judgment, but Koerner wrongly seized upon it to argue that Soule had lied earlier.[19]

On September 1, 2017, CMR moved for summary judgment based on the statute of repose for Koerner's older claims and on the merits and timeliness of Koerner's purported claims for fraud or misrepresentation.[20] On October 28, 2017, the district court granted CMR's motion for summary judgment[21] and entered a final judgment in CMR's favor on all claims.[22]

On November 14, 2017, Koerner timely filed two motions to amend or alter the district court's judgment, specifically requesting relief under Fed.R.Civ.P. 59(e). In one of his Rule 59(e) motions, Koerner argued for the first time that "newly discovered evidence" from the August 25, 2017 deposition of CMR justified relief from the district court's May 10, 2017 ruling on CMR's motion to set aside default.[23] The district court denied that motion two days later.[24]

---

[19] *See* ROA2371.

[20] ROA1299-1381.

[21] ROA1967-2000.

[22] ROA2001.

[23] ROA2365-2456.

[24] ROA2457.

In his other motion filed on November 14, 2017,[25] Koerner also specifically sought relief under Rule 59(e), this time from the district court's grant of summary judgment. On January 4, 2018, the district court denied Koerner's motion.[26]

Koerner unsuccessfully appealed the district court's rulings to Fifth Circuit, and he now asks this Court to issue a writ of certiorari to the Fifth Circuit. In his Statement of Facts, Koerner relies almost exclusively on his Rule 59(e) motions to support seven (7) of the eleven (11) pages in the Statement of Facts contained in his Petition for a Writ of Certiorari. (*See* Petition at pp. 20-26.) Those purported facts were untimely raised below, and they should not serve as the basis for a writ of certiorari.

---

[25] ROA2002-2364.

[26] ROA2526-2537.

Summary of Arguments for Denying Certiorari

In all three points raised in his Petition, Koerner has failed to meet his burden of showing a compelling reason why this Court should order review of the Fifth Circuit's decision based on a conflict with decisions of other appellate courts or a departure from the accepted and usual course of judicial proceedings, under Supreme Court Rule 10(a). Koerner also has not shown that the Fifth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court, under Supreme Court Rule 10(c).

In short, Koerner offers no compelling reason why this Court should grant certiorari. Instead, Koerner asserts that the district court and the Fifth Circuit decided CMR's motion for summary judgment the wrong way, that Koerner's Rule 59(e) motion on the default judgment ruling should have been granted, and that the Fifth Circuit should have granted Koerner's request to certify a question to the Louisiana Supreme Court even though Koerner made request after the Fifth Circuit had issued its decision on the merits of his appeal.

These arguments do not support the issuance of a writ of certiorari. They also lack substantive merit.

Argument

I. The Fifth Circuit correctly applied the summary judgment standard under Fed.R.Civ.P. 56, by crediting a declaration backed by contemporaneous business records over conclusory statements in plaintiff's own unsworn declaration.

Koerner first challenges the Fifth Circuit's affirmance of the district court's summary judgment decision on the merits. However, Koerner attacks the Fifth Circuit's recitation of the appropriate standards, not the Fifth Circuit's reasoning in upholding the district court's ruling.

The Fifth Circuit first properly stated that credibility determinations have no place in summary judgment proceedings, because the non-movant's evidence must be taken as true. (Appendix A at p. 13, *quoting Richardson v. Oldham*, 12 F.3d 1373, 1379 (5th Cir. 1994).) The appellate court next stated, however, that "[s]elf-serving allegations are not the type of significant probative evidence required to defeat summary judgment," and that "a vague or conclusory affidavit [without more] is insufficient to create a genuine issue of material fact in the face of conflicting probative evidence." (*Id.* at p. 14, *quoting Kariuki v. Tarango*, 709 F.3d 495, 505 (5th Cir. 2013) (brackets in appellate court's opinion).)

The Fifth Circuit then applied these principles to the facts disclosed by the record: the absence of any fraudulent intent on CMR's part (aside from Koerner's conclusion that it existed), Koerner's own knowledge from other sources about the nature of the roofing product that he purchased in 2005, the

completion of particular items of work in 2011 rather than 2012 based on contemporaneous job tickets, and the involvement of an independent contractor (Brian Vela) in the 2012 roof repairs performed for Koerner, based on contemporaneous correspondence as opposed to Koerner's conclusory assertion that CMR directed the contractor's work.

Koerner's argument, and not the Fifth Circuit's decision, runs afoul of this Court's decision in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). In *Scott*, this Court reversed a lower court's denial of summary judgment, crediting the testimony of a police officer, backed by a videotape, over the testimony of the driver who was later arrested, with regard to what actually happened during the course of a car chase. Koerner disregards the fact that this case strongly resembles *Scott*: CMR's Steve Soule and Koerner tell different versions of what occurred with Koerner's roof, but CMR's version is backed by job tickets, contract documents, and other objective evidence. Koerner's version, on the other hand, consists of "self-serving allegations" contained in a "conclusory affidavit."

This case differs substantially from another decision of this Court (also involving excessive force) discussed by Koerner, *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014). In that case, as in *Scott, supra*, this Court again reversed the lower courts' rulings, this time finding a genuine issue of material fact that should have defeated the summary judgment motion below. In *Tolan*, the Court confronted testimony from the plaintiff and his mother, both eyewitnesses, that conflicted with the testimony of two police officers who were involved. In that case,

unlike in *Scott*, there was no objective evidence like a videotape, or like the job tickets and other evidence at issue in this case. *Tolan* therefore does not apply here.

Further, Koerner does not point to specific facts to support his argument that summary judgment was precluded by the existence of genuine issues of material fact. Instead, Koerner merely contends that "there was a massive amount of contrary evidence in the summary judgment record" and a reference to "the compelling physical evidence" that he allegedly provided. (Petition at p. 38.)

Koerner's arguments do not draw on the details of events like the car chase at issue in *Scott, supra* or the driveway arrest scene vividly discussed in *Tolan, supra*. Rather, like the declarations he submitted in the district court, Koerner's argument is simply self-serving and conclusory. It should be rejected here, as it was in the Court of Appeals for the Fifth Circuit.

II. The Fifth Circuit properly affirmed the district court's denial of a motion to amend or alter a final judgment under Fed.R.Civ.P. 59(e), filed after the district court entered a final judgment, instead of treating the final judgment as an interlocutory ruling and applying a different standard under Fed.R.Civ.P. 54(b).

Koerner also argues that he was entitled to relief under Fed.R.Civ.P. 54(b), and should not have been denied relief under Fed.R.Civ.P. 59(e), with regard to the district court's ruling setting aside his preliminary default. Several basic problems plague this argument.

First, Koerner did not timely seek relief under Fed.R.Civ.P. 54(b). He provides no explanation for why he waited until after the district court's October 18, 2017 summary judgment ruling to present his "newly discovered evidence" from an August 25, 2017 deposition, to urge the reversal of the district court's (even earlier) May 10, 2017 ruling.

Second, Koerner specifically moved for relief under Rule 59(e). His November 14, 2017 motion to alter or amend the judgment expressly invoked Rule 59(e), not rule 54(b). It was Koerner's decision, not the decision of the district court, not to raise his argument until almost three (3) months later. Koerner could have filed a Rule 54(b) motion at any time between August 25, 2017 and October 18, 2017. *See, e.g., Cabral v. Brennan*, 853 F.3d 763, 766 (5th Cir. 2017) (explaining different timing and standards under Rules 54(b) and 59(e)). Instead, Koerner himself decided to wait until November 14, 2017 to seek relief based on the deposition. Even then, he presented no argument for relief under Rule 54(b), but instead relied solely and explicitly on Rule 59(e).

Third, Koerner seeks to invoke principles such as "one misstep" on procedure (Petition at pp. 47-48). However, as CMR pointed out above, Koerner made no misstep – he made a deliberate decision to wait almost three (3) months. Similarly, Koerner improperly seeks to invoke substance over "mere technicalities" (*id.*, p. 50), and denigrates the decision below as "casuistic and simply wrong" (*id.*, p. 46). In fact, Koerner is discussing which rule applied to the court's October 18, 2017 ruling, which depends on the fact that it was a final judgment and not an interlocutory ruling. The district court could not

simply pretend that it had not issued a final judgment, just so Koerner could invoke relief under Rule 54(b) instead of Rule 59(e). That issue does not present a "technicality," but a matter of substance.

In short, different rules of procedure apply at different stages of litigation, and Koerner chose his own timing, and therefore the Rule 59(e) form, of his challenge to the district court's May 10, 2017 ruling. Koerner did not misstep; he miscalculated. His miscalculation does not merit the issuance of a writ of certiorari.

III. The Fifth Circuit properly denied certification of a question to the Louisiana Supreme Court in response to Koerner's request for certification after issuance of the Fifth Circuit's decision on the merits of the appeal.

As the third argument in support of his Petition, Koerner contends that the Fifth Circuit should have granted his motion to certify a question involving detrimental reliance to the Louisiana Supreme Court.[27] Yet Koerner does not address his argument to the standards established by Louisiana law nor to the procedures typically followed by the Fifth Circuit.

First, La. R.S. 13:72.1(A) and Rule XII (1) of the Louisiana Supreme Court Rules both provide, in pertinent part, that the Fifth Circuit "may" certify a

---

[27] The district court carefully discussed the detrimental reliance issues in its opinion. *See* ROA1992-1996. Koerner nonetheless waited until after the Fifth Circuit issued its opinion to ask the Fifth Circuit to certify a question to the Louisiana Supreme Court on this issue.

question to the Louisiana Supreme Court if "there are no clear controlling precedents in the decisions" of the Louisiana Supreme Court or appellate courts. Koerner was unable to meet the long-standing threshold consideration for a court exercising its discretion under that statute and rule:

> In determining whether to exercise our discretion in favor of certification, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law – statutes, judicial decisions, attorney general's opinions – to allow a principled rather than conjectural conclusion.[28]

In this case, the Fifth Circuit's decision showed that no argument exists for a close question or a lack of authority. First, the Fifth Circuit's identified the plain language of Civil Code article 1967 as the basis for its decision that detrimental reliance must be based on a "promise" – article 1967 specifically states that "[a] party may be obligated by a promise," not by a "representation."[29] Second, the appellate court's decision explained that other decisions by the Louisiana Supreme Court and the Louisiana First Circuit Court of Appeal, as well as prior decisions by the Fifth Circuit itself, had all emphasized the

---

[28] *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir. 1998), *quoting State of Fla. Ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-275 (5th Cir. 1976) (emphasis added).

[29] *Koerner v. CMR Construction & Roofing, LLC*, 910 F.3d 221, 230 (5th Cir. 2018).

involvement of a promise for detrimental reliance claims – even if some of those decisions first stated the general rule more broadly, before making clear that a promise was indeed involved.[30]

Second, the Louisiana Civil Code and the decisions of the Louisiana Supreme Court and Louisiana appellate courts are "controlling precedents" properly considered by the Fifth Circuit in reaching its decision.[31] In a decision on rehearing involving a similar "*Erie* guess" under Louisiana law, the Fifth Circuit explained its reasons for rejecting a similar request to certify a question to the Louisiana Supreme Court, noting that:

> [I]t is our 'duty' to decide the case as would an intermediate appellate court of the state in question if, as here, the highest court of the state has not spoken on the issue or issues presented. Certification is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state. Neither is it to be used as a

---

[30] *Id.* at 230-231. Even in the state court decision relied upon by Mr. Koerner, the plaintiff argued that it "does have a claim for detrimental reliance because [the defendant] obviously made a 'promise.'" *Feingerts v. D'Anna*, 2017-0321 (La.App.4 Cir. 1/10/18), 237 So.3d 21, 26. Further, the issue in that case was whether the plaintiff relief upon a promise or a legal opinion, not a simple representation.

[31] *See, e.g., Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988-989 (5th Cir. 1992), *reh'g denied*, 958 F.2d 622 (5th Cir. 1992).

> convenient way to duck our responsibility….[32]

The existence of "uncertainty" on any issue does not automatically abrogate a federal court's duty "to predict state law" by making an "*Erie* guess."[33] To the contrary, Fifth Circuit has noted that "the mere 'absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification.'" [34]

Relying heavily on the dissent in a Second Circuit decision affirming a refusal to certify a question,[35] Koerner argues in this Court that certification of a question of state law is required in virtually any case in which uncertainty exists concerning a legal question. Koerner's argument ignores the fact that courts decide legally uncertain questions every day. He also ignores the Fifth Circuit's stated reluctance to certify a question of law "absent a compelling reason to do so."[36] Koerner's argument on this point should therefore be rejected.

---

[32] *Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 958 F.2d 622, 623 (5th Cir. 1992).

[33] *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018); *see also Volvo Financial Services v. Williamson*, 910 F.3d 208, 212 (5th Cir. 2018).

[34] *Wiltz v. Bayer CropScience, Ltd. Partnership*, 645 F.3d 690, 703 (5th Cir. 2011), *quoting Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997).

[35] *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997).

[36] *Johnson v. Teva Pharmaceuticals USA, Inc.*, 758 F.3d 605, 614 (5th Cir. 2014), *quoting Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997).

Conclusion

For all of the reasons stated above, respondent respectfully submits that this Court should deny Koerner's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Paul J. Politz
Stephen T. Perkins
Counsel of Record
TAYLOR, WELLONS,
POLITZ & DUHÉ, APLC
1515 Poydras Street, Suite 1900
New Orleans, LA 70112
Telephone: (504) 525-9888
Facsimile: (504) 525-9899
Email: sperkins@twpdlaw.com

Counsel for Respondent