

No. _____

In The
Supreme Court of the United States

BENNIE KENNEDY and JOHN H. DAVIS,

Petitioners,

vs.

SCHNEIDER ELECTRIC,
formerly known as SQUARE D COMPANY,

Respondent.

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

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Whether or not this Court should call for an exercise of this Court's supervisory power by rejecting the Seventh Circuit's reasoning which affirmed the district court's decision to dismiss petitioner's complaint with prejudice rendered by the Magistrate Judge Paul R. Cherry who, at the same time, was under a 28 U.S.C. §455 filed by the same petitioners?

Whether or not this Court should call for an exercise of this Court's supervisory power by rejecting the Seventh Circuit's reasoning where the Seventh Circuit ignored the pleadings by petitioners which set forth that a declaration served upon the district court by respondent, Schneider Electric, presented facts which were plausibly false under Rule 60(d) of the Federal Rule of Civil Procedure?

Whether or not this Court should call for an exercise of this Court's supervisory power by rejecting the Seventh Circuit's reasoning which holds that the district court's ruling which granted a summary judgment in favor of respondent, Schneider Electric – is presumptively reasonable – even when the district court ignored petitioner's pleading which set forth that respondent provided information that did not support respondent's position for a summary judgment and, in fact, respondent provided information which reflected that the facts submitted by petitioner actually supported a denial of a summary judgment?

QUESTIONS PRESENTED – Continued

Whether or not this Court should call for an exercise of this Court’s supervisory power by rejecting the Seventh Circuit’s reasoning which holds that confirming the district court’s ruling – is presumptively reasonable – even when the case involving respondent, Schneider Electric, was not merged with another case (*Kennedy v. Prairie State College*) as requested by petitioner where this other case is substantially pertinent to the resolution of the issues in both cases?

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**PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

Petitioners, BENNIE KENNEDY and JOHN H. DAVIS, respectfully pray that a writ of *certiorari* issue to review the opinion of the United States Court of Appeals for the Seventh Circuit issued on July 24, 2018, confirming the Indiana Northern District Court's dismissal of *Kennedy v. Schneider Electric* and awarding personal sanctions.



OPINION BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit, issued July 24, 2018, appears at App. 38 of the Appendix to this Petition.



JURISDICTION

i). The petitioner timely appealed the last Order sought to be reviewed – dated July 24, 2018, from the United States Court of Appeals for the Seventh Circuit.

ii). Petitioner seeks review in this Court of the last Order of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1), which is the Statute for Review for the United States Supreme Court.



CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

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



STATEMENT OF THE CASE

1. Factual Background

The complaint alleged that respondent, Schneider Electric, Inc., who is and was petitioner's employer, defamed him (Count I) and interfered with an advantageous relationship (Count II) when one of its employees contacted Prairie State College where petitioner taught part-time.

Petitioner, Bennie Kennedy alleged that the employee stated that petitioner had been misusing respondent's proprietary information and that this statement persuaded Prairie State College to revoke his approval to teach.

Respondent, Schneider Electric submitted portions of a deposition which contained testimony of petitioner, Bennie Kennedy, and testimony of respondent's witness, Gloria Olson. Additionally, respondent submitted a document which was not made available prior to its inclusion of the motion for summary judgment. Said document is an affidavit prepared and signed by Dean Marie Hansel of Prairie State College.

Respondent's motion for summary judgment was premised upon exhibits submitted in support of summary judgment which were excerpts of the deposition taken by respondent of petitioner Bennie Kennedy and within the same deposition, testimony by respondent's witness Gloria Olson, and a document from Dean Hansel of Prairie State College submitted as an affidavit regarding the dismissal of petitioner as adjunct teacher at Prairie State College.

A review of the above-mentioned excerpted portions of the deposition reflects that respondent Schneider Electric – in its argument in support of the motion for summary judgment – makes several contradictory statements regarding the contents of the excerpted portions of the above-mentioned deposition.

Respondent Schneider Electric's exhibit of the above-mentioned affidavit does not nor has it ever been supported by any material from the Higher Learning Commission.

In review of the materials and arguments adopted by Magistrate Judge Paul R. Cherry, petitioner Bennie Kennedy found that the contradictions – made by respondent Schneider Electric in the contents of the deposition and the lack of supporting materials from the Higher Learning Commission – supported an assertion that the materials constituted fraud. Petitioner continued careful research before filing a Rule 60 motion. This research continued for close to two (2) years until petitioner felt the need to file a Rule 60 motion.

One of the facts – supporting petitioner’s decision to file a Rule 60 motion, was and is the fact that numerous emails sent to and by petitioner Bennie Kennedy between several faculty members of Prairie State College included the faculty member who headed up the department in which petitioner Bennie Kennedy had been hired continuously for over six (6) years to teach subjects in the area of petitioner’s Bennie Kennedy’s training, knowledge, license, and expertise.

In the pleadings by the parties, respondent argued that petitioner’s Rule 60 motion was time-barred, which is Rule 60(b). The motion for Rule 60(b) is limited in time to one year and also has exceptions that could take it beyond one year such as Rule 60(b)(2)(3) and (6).

Petitioner, in pleadings, continued to point out that petitioner’s Rule 60 motion was based upon Rule 60(d)(3) that does not contain a limitation in time for filing said motion. Respondent in its pleadings under the Rule 60 motion suggested and implied that petitioner accused respondent Schneider Electric and Prairie State College of collusion, fraud or bribery, and respondent Schneider Electric suggested that petitioner included that the Magistrate Judge Paul R. Cherry had also been bribed by respondent Schneider Electric.

Respondent stated that there was no defamation based upon an assertion that the statements – made telephonically by Gloria Olson (Schneider Electric’s employee) which included that petitioner used or took

proprietary materials or information from Schneider Electric without permission or authorization – were true.

Respondent also asserted in its pleading for summary judgment that alternatively there may be or is a qualified privilege. Respondent stated in its pleading against petitioner's Rule 60 motion that there is a high bar regarding a Rule 60(d)(3) motion.

Respondent Schneider Electric's Affidavit of Dean Marie Hansel of Prairie State College which was used to support its objection to petitioner's Rule 60 motion prompted petitioner to subsequently file a lawsuit against Prairie State College on April 14, 2016.

Said lawsuit is ongoing.

2. Procedural Background

Petitioner Bennie Kennedy originally filed his two (2)-count complaint in Lake County, Indiana Circuit Court on February 10, 2012. This matter was removed to the United States District Court for the Northern District of Indiana on the basis of diversity of citizenship on March 20, 2012. On March 28, 2012, respondent Schneider Electric a/k/a Square D Company filed a motion to dismiss. Judge Jon DeGuilio referred that motion to dismiss to Magistrate Judge Paul R. Cherry for a Report and Recommendation on June 27, 2012.

On November 16, 2012, the Magistrate Judge Paul R. Cherry recommended that Judge DeGuilio deny that motion to dismiss. On December 11, 2012, Judge DeGuilio issued an Opinion and Order adopting that recommendation. On May 8, 2013, Magistrate Judge Paul R. Cherry was advised that all non-Doe parties had filed forms of consent to have this case assigned to Magistrate Judge Paul R. Cherry to conduct all further proceedings and to order the entry of a final judgment in this case. The Doe defendants were severed from this case and the Indiana Northern District Court had jurisdiction to decide this case pursuant to 28 U.S.C. §636(c). On March 7, 2014, respondent Schneider Electric filed its motion for summary judgment. On or about March 2014, emails that were submitted with an affidavit by petitioner – Bennie Kennedy were stricken on a motion to strike by respondent – Schneider Electric based upon the fact that the affidavit submitted did not reflect a handwritten date even though it reflected a handwritten signature and was signed the same date reflected by the court’s electronic file-stamp.

On September 5, 2014, Magistrate Judge Paul R. Cherry granted respondent’s motion for summary judgment. On April 13, 2016, petitioner Bennie Kennedy filed a Rule 60(d)(3) motion which was dismissed without prejudice based upon local rules regarding length of motions, and was re-filed on May 24, 2016 with the corrections regarding format/length. Respondent’s Declaration by Marie Hansel – Dean of Prairie State College, which was used to support respondent’s objection to petitioner’s Rule 60 motion,

prompted petitioner to subsequently file a lawsuit against Prairie State College on April 14, 2016.

On June 30, 2016, petitioner Bennie Kennedy filed a motion to disqualify judge under 28 U.S.C. §455. Under leave of court to file a late response to petitioner's Rule 60(d)(3) motion, respondent Schneider Electric filed its response to petitioner's Rule 60(d)(3) motion on July 1, 2016. Thereafter, on or about July 2016, petitioners filed their reply to respondent's response motion.

On or about July 13, 2016, respondent also filed a new motion for sanctions which argued that the Rule 60 motion was designed to harass respondent and petitioner filed a response to that motion which pointed to the recent formal accreditation review of Prairie State College by the Higher Learning Commission, which occurred during the six (6) years petitioner Bennie Kennedy continuously taught at Prairie State College with no problem, as material that had not been submitted earlier and could now reflect new material along with new emails. On March 1, 2017, Magistrate Judge Paul R. Cherry denied Petitioners' Rule 60 motion. On March 1, 2017 Magistrate Judge Paul R. Cherry ruled on the motion to disqualify judge under 28 U.S.C. §455 denying same. On March 1, 2017 Magistrate Judge Paul R. Cherry granted respondent's motion for personal sanctions against Attorney John H. Davis. On March 28, 2017, petitioner Bennie Kennedy filed a motion for default judgment in the Indiana Northern District Court (Case no: 2:16-cv-00125-JVB-JEM), in that eleven (11) months had elapsed without

any response from defendants (Prairie State College) to the complaint filed against them in April 2016.

On or about March 29, 2017, petitioner Bennie Kennedy filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit (“Seventh Circuit”). On or about March 30, 2017, Magistrate Judge Paul R. Cherry awarded sanctions. On or about April 15, 2017, a notice of appeal was filed in the Seventh Circuit by Attorney John H. Davis, petitioner regarding the personal sanction. On or about April 17, 2017, the Seventh Circuit ordered mediation. On or about June 19, 2017, parties engaged in mediation which did not lead to resolution. On or about July 25, 2017, petitioners’ brief and supplemental appendix was filed. On or about September 14, 2017, respondent’s response brief was filed. On October 6, 2017, petitioners filed a reply brief. On January 10, 2018, the cases were argued in the Seventh Circuit before a panel of three (3) judges. On June 19, 2018, the Seventh Circuit’s panel of three (3) judges ruled on both cases. (Case # 17-1645 & 17-1786). On July 6, 2018, a petition for panel rehearing was filed. On July 24, 2018, the Seventh Circuit denied the petition for panel rehearing. On October 22, 2018, this petition for writ of certiorari was filed with the United States Supreme Court.

28 U.S.C. §1254(1) is the basis sought for review of an Order from the United States Court of Appeals for the Seventh Circuit.



REASONS FOR GRANTING THE WRIT

As to Question #1, the Court should not accept the holding of the Seventh Circuit as set forth in Question #1 in that the magistrate judge rendering that ruling was felt to be biased by the petitioner and therefore should have recused himself. Furthermore, respondent Schneider Electric fostered a prejudice by the magistrate judge, in that, respondent – in respondent’s pleadings, stated that petitioner accused the magistrate judge Paul R. Cherry of taking a bribe. This pleading submitted by respondent Schneider Electric creates another element of fraud on the court in that it was submitted in a document/pleading to the court by the attorney for respondent.

The fact is that petitioner filed a 28 U.S.C. §455 motion against the magistrate judge based upon the magistrate judge referring to a previous case handled by petitioner which was completely unrelated to the instant case, giving an appearance of bias. Moreover, in no way did petitioner ever suggest that the magistrate judge took a bribe. Respondent Schneider Electric was certainly seeking to prejudice the magistrate judge.

As to Question #2, the Court should not accept the holding of the Seventh Circuit as set forth in Question #2 in that there are and were factual basis to go to a Trier of Fact, therefore a ruling for a summary judgment under the criteria that there were no factual basis – is and was incorrect. Thus, this was a violation of the petitioner’s Fifth Amendment rights.

As to Question #3, due process was denied in reference to Question #3 in that the Seventh Circuit ignored facts submitted to the Seventh Circuit which negated the confirmation of the motion for summary judgment, and thereby, violated petitioner's constitutional rights under the Fifth Amendment.

As to Question #4, this Court should not accept the holding of the Seventh Circuit in that the holding of the Seventh Circuit confirmed the Indiana Northern District Court's refusal to merge another case – i.e., *Kennedy v. Prairie State College* which is significantly related to a complete resolution of the instant case, and thereby, violated petitioner's constitutional rights under the Fifth Amendment.

Finally, this petition for a writ of *certiorari* should be granted because the United States Court of Appeals for the Seventh Circuit has entered numerous decisions which have so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.



CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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