

No..

In the
Supreme Court of the United States

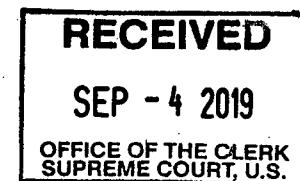
Endre' Glenn,
(Petitioner / Plaintiffs)

v.

Brennan H. Moss,
PIA ANDERSON DORIUS REYNARD & MOSS LLC.
(Respondents / Defendants)

On Petition for a Writ of Certiorari To The
Tenth Circuit Court of Appeals

Endre Glenn (Pro SE)
10518 165th PL NE
Redmond, WA 98052



QUESTIONS PRESENTED FOR REVIEW

1. Whether U.S. District Court violated client's right to jury trial under U.S. Const. Amend VII, and XIV due process, equal protection of the laws when they entered summary judgment for the client's former attorney when a genuine issue of fact exists? The district court failed to properly docket 47 exhibits filed with the complaint undermining the integrity of the proceeding; preventing the court from considering all material facts; hence substantially prejudicing the attorney's former client.
2. Whether the Utah Supreme Court lacked jurisdiction under the final judgment rule and collateral order doctrine when it accepted an interlocutory appeal from Utah Fourth District Court denial of summary judgment for both seller and buyer when material fact exists and required both parties to conduct discovery?

PARTIES TO THE PROCEEDINGS

William O. Kimball , Jr.
PIA ANDERSON MOSS & HOYT LLC
136 E SOUTH TEMPLE STE 1900
SALT LAKE CITY, UT 84111
(801)350-9000
bkimball@padrm.com
(Defendant)

Shane W. Norris
Coldwell Banker Residential Brokerage
1750 PARK AVENUE
PO BOX 2370
PARK CITY, UT 84060
(801)755-3717
shane.norris@summitsothebysrealty.com
(Movant)

John C. Rooker
JONES WALDO HOLBROOK &
MCDONOUGH (SLC)
170 S MAIN ST STE 1500
SALT LAKE CITY, UT 84101
(801)521-3200
jrooker@joneswaldo.com
(Movant)

Walter T Keane
2825 E Cottonwood Pkwy Ste 500
Salt Lake City, UT 84121
walter@waltertkeane.com
(801) 808-0125

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PUBLISHED DECISION FOR WHICH REVIEW IS SOUGHT

The opinion of the U.S. Court of Appeals Tenth Circuit appears at App 2, to the petition and is reported at Glenn v. Moss, No. 18-4033, 2019 WL 157529 (10th Cir. Jan. 10, 2019). U.S. Court of Appeals decision denying Glenn's petition for rehearing on February 11, 2019 is reprinted at App 1. The opinion of the Utah Supreme Court Decision appears at App 13 to the petition and is reported at Glenn v. Reese, 225 P.3d 185, 192 (Utah 2009).

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the above cited decisions of the U.S. Court of Appeals which was entered on January 10, 2019, and that courts denial of Petitioner's motion for rehearing on February 11, 2019. He also seeks this Court's review of collateral decision of Utah Supreme Court (Utah 2009). These cases involve the right to jury trial under U.S. Const. Amend. VII. The right to due process, and equal protection under U.S. Const. Amend. XIV. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1), and 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment VII Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Citizenship; Privileges And Immunities; Due Process; Equal Protection; Appointment Of Representation; Disqualification Of Officers; Public Debt; Enforcement

U.S. Constitution XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV

Utah Const. Art. I, § 10

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

STATEMENT OF THE CASE

I. Proceedings Below

This dispute originates from a failed real estate transaction. The Glenn's (seller) entered into Utah Real Estate Purchase Contract (REPC) with the Reese's (buyer) December 18, 2007 for the purchase of property in Murray, Utah. The terms of the real estate purchase contract (REPC) included a contract price of \$540,000, \$5,000 earnest money deposit, \$407,000 Cash, and \$130,000 conventional loan. The transaction failed when the buyer Robin Reese obtained his own appraisal (though he never disclosed who authored the appraisal until after Seller filed suit in Third District Court) that the property appraised for less than the purchase price. He subsequently cancelled the contract pursuant to REPC Addendum No 4 when the Seller did not accept REPC Addendum No. 3 purchase price \$460,000. Buyer's REPC Addendum No. 4 did not specify under which provision he cancelled the contract, REPC 2.4 Appraisal condition or 8.2 Evaluations & Inspection provision.

The Seller filed a complaint in the Utah Third District Court. Robert K. Hilder, Presiding Judge transferred the case to Utah Fourth District Court because the buyer Robin Reese is a presiding judge in the Utah Third District Court. Judge Samuel McVey heard arguments on September 18, 2008. He denied both parties request for summary judgement, and suggested parties focus on discovery. App 39. There was no trial, no discovery of facts, no depositions or subpoenas duces tecum issued by either party, e.g. inspect REPC similar to the Reese REPC. The attorneys bypassed this discovery, i.e. trial process and submitted an interlocutory appeal directly to the Utah Supreme Court. The Court's decision rests on a single issue whether the buyer could cancel the REPC based on appraisal obtained under the evaluations and inspections REPC 8.2 Glenn v. Reese, 225 P.3d 185, 192 (Utah 2009) disregarding other key elements of the contract, Section 2.4, Appraisal Condition, 2.3 Finance Condition, and Section 24 Contract Deadlines where the

buyer agreed to apply for the loan by the loan application deadline December 21, 2007; seven days before he obtained the appraisal. R at 1607, R at 548, R at 1852.

The Seller retained the services of Attorney Brennan Moss with the law firm Pia, Anderson, and Moss to file suit against his former real estate agent Donna Kane, and brokerage Coldwell Banker. His attorney confirmed he had experience litigating claims against large real estate firms.

Trial court entered summary judgment in favor of defendants Coldwell Banker Real Estate. The Court found there was no evidence to support claims of breach of implied covenant of good faith and fair dealing, and no valid claim for breach of fiduciary duty. Court granted summary judgment for the real estate agent and brokerage Coldwell Banker. Attorney Moss failed to conduct any discovery, subpoena a single witness or issue a subpoena duces tecum. However, his adversary attorney Rob Ponte representing Coldwell Banker NRT served subpoena duces tecum on buyer's real estate broker, Susie Martindale December 22, 2010 (R. at 206-211).

The seller filed legal malpractice suit against his attorney and law firm; Attorney Brennan Moss, and PIA Anderson Dorius Reynard & Moss for mishandling litigation against his real estate agent and brokerage; Donna Kane, and Coldwell Banker Real Estate. He claimed professional negligence, breach of fiduciary duty, breach of contract, and breach of implied covenant of good faith and fair dealing. The District Court granted summary judgement for the attorney and dismissed the case with prejudice. U.S. Court of Appeals for the Tenth Circuit affirmed.

The subsequent lawsuit against real estate agent, and attorney suffered from the same problem encountered in the first lawsuit against the buyer. The seller's attorney conducted no trial, no discovery, no depositions nor subpoenaed a single witness or documents. He failed to conduct any discovery just like the attorney Walter Keane. Though Utah Supreme Court has power in equity case to weigh the evidence and to make its own findings, orderly process and appropriate deference to trial judge's superior position of being able to see the witnesses and assess their

credibility require that trial court enter findings in the first place. *Romrell v. Zions First Nat. Bank, N. A.*, 611 P.2d 392 (Utah 1980)

II. Underlying Facts

The REPC provided specific dates for buyer and seller to perform. Judge Robin Reese in his declaration admitted he never applied for the loan, or retained a lender. Although the contract he signed required him to apply for the loan by the loan application and fee deadline (R. at 283), he did not meet this requirement. This was a material fact. R. at 1852. The Utah Supreme Court decision could not fairly analyze these contractual issues because they were deprived of trial court discovery process, and jury to thoroughly review the facts.

The buyer and agent litigation both suffered from the same issue of no discovery, especially as it pertained to obtaining discovery records from Susie Martindale, Judge Robin Reese's real estate agent. Attorney Brennan Moss failed to investigate any of the facts of this case; unsigned interrogatories, no depositions, or subpoenas. He made one agreement with opposing counsel Rob Ponte... delay expert discovery until after the summary judgment hearing. The expert witness report cites the attorney's decision to delay expert work until after the motion for summary judgment was a breach of the standard of care, and proximate cause to failure in the agent case (R. at 676).

The Magistrate judge in her May 17, 2016 Memorandum Decision and Order, stated "The Court analysis has to be cognizant of Plaintiff's obligation to prove not only this case but the case-within-this-case Glenn et al v. Kane which was dismissed because of defendants negligence (R. 520).

Client (*Plaintiff*) requested discovery from nonparty Coldwell Banker, Utah Real Estate Division, and REMAX Real Estate. The case was marred in discovery disputes which essentially rendered moot the attorney planning schedule. The

Clients February 10, 2016 motion to extend discovery per Fed. R. Civ. P. 26 and Fed R.CivP 34 (b) (2) addressed fact and expert discovery R. at 6¹.

Basically after 14 months of nonparty litigation, motions to compel discovery, quash subpoenas, and protective orders, the Magistrate judge denied the client's motion to compel production of documents subpoena duces tecum. The trial judge rendered this decision on May 17, 2016 R. at 519. The court scheduled the depositions but also ordered REMAX to turn over remaining documents stemming from their compliance with subpoena issued by Rob Ponte Attorney for Coldwell Banker R. at 351-352. Susie Martindale never complied with the court order to turn over this information. R. 525. Since the court quashed the subpoena duces tecum because it would impose an undue burden on Coldwell Banker Real Estate, and Utah Division of Real Estate, the Magistrate Judge scheduled depositions with real estate agents Donna Kane, and Susie Martindale. Magistrate judge cautioned both parties to follow the rules of procedure that govern all litigants. Just because a Plaintiff is proceeding *pro se* does not give the Defendants the right to rebuff their own obligations under the rule. R at 528.

In the July 27, 2016 hearing the Magistrate Judge revised the deadlines for expert discovery but ignored the client's request for additional time to identify an expert witness. The court set the dates for expert discovery without fulling exploring the issue (R. at 916 5:24) or request for attorney to disclose work product pertaining to communication between Attorney Brennan Moss and law firm regarding how they handled the client's case. R. 922 11:1-10.

The client's August 15, 2016 motion to extend discovery addressed the questions raised in the July 27, 2016 hearing for the disclosure of internal communications between Attorney Brennan Moss, and law firm principles because Attorney William Kimball provided incomplete initial disclosure R. at 8². The motion also advised the court, the client was resolving a dispute regarding the

¹ DKT no. 46 was not included in the appellate record.

² DKT no.76 was not included in the appellate record but the court included defendant's opposition to the motion for extension of time, Expert Witness Reports.

deposition transcripts; therefore this information is not in his possession. The magistrate judge denied the Plaintiffs Motion for Extension of Time." R. 655-656.

But, relevant here, is the fact that the Court held a scheduling conference on July 27, 2016, where the Court announced new discovery dates, including a new dispositive motion cutoff date, and scheduled a trial setting for this matter. At no time during that hearing did Plaintiff indicate the need for additional time for expert witnesses or for dispositive deadlines, yet approximately three weeks later, Plaintiff filed the motion for additional time.

A review of the record indicates the Plaintiff raised these issues in his request for more time to identify an expert witness, and regarding attorney work-product relevant internal communication R. 916 5:18-25, R. 922 11:1-4 respectively. He also advised the court of additional time required to resolve dispute with CitiCourt regarding transcripts for Donna Kane, and Suzie Martindale depositions. CitiCourt delivered the transcripts September 14, 2016. R. 679-680. The magistrate judge ignored these issues raised during the July 27, 2016 hearing.

Magistrate Judge entered report and recommendations granting summary judgment to the attorney, defendants. Client objected to the report, citing court should have imposed lighter sanctions before imposing "death penalty" sanctions. He described the difficulty in retaining expert witness. The buyer in the underlying agent case is a presiding judge in the Utah Third District Court. None of the prospective attorneys accepted the litigation because the buyer Robin Reese is a judge at Utah Third District, R. at 1583. The only attorney who accepted the case was licensed to practice in Utah and Oregon.

The trial court and Court of Appeals expect for the client's expert witness to produce a report without the benefit of discovery obtained in the legal malpractice case. Based on this reasoning then the nonparty discovery disputes, court's denial of subpoena duces tecum, and third party REMAX non-compliance with court order to turnover said record in underlying litigation have no bearing on the timely production of the expert witness report.

The magistrate judge was well aware of opposing counsel noncompliance with initial discovery disclosure, and the delay in securing the deposition transcripts.

The Court required counsel to comply by providing initial disclosures but failed to take into consideration the latter when imposing expert discovery deadline.

These issues have a direct bearing on the timely production of the expert witness report. For the court to ignore these facts is an abuse of discretion denying client discovery he's entitled to per Fed R. CivP 26, 34. The motion to extend expert discovery was filed before the deadline expired. (DKT 76). *Bolden v. City of Topeka, 441 F.3d 1129, 1149 (10th Cir. 2006)*

REASONS FOR GRANTING THE PETITION

III. Right Jury Trial, Due Process, and Equal Protection under U.S. Constitution XIV, VII Respectively.

The jury historically has been an integral part of the Anglo-American legal system. Constitutional Amend VII. As a fact-finding body, they provide an important and useful alternative to a single individual's resolving disputed issues of fact. In this regard the accumulated experience and the combined powers of jurors may produce more accurate fact finding than a single person, no matter how learned in the law. The right to jury trial in actions to recovery specific real or personal property, with or without damages, or for money claimed as due contract as damages for breach of contract, or for injuries, an issue of fact tried by a jury unless a jury trial is waived. *Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418 (Utah 1981). The initial complaint filed against the buyer included a demand for a jury trial. R at 1859. Attorney Walter Keane represented the buyer's interest more than he represented his own client's interest.

Magistrate judge said in May 27, 2016 Order, "The Court's analysis therefore has to be cognizant of the Plaintiff's obligation to prove not only this case, but also the case-within-this-case— Glenn et al v. Kane—which was dismissed at summary judgment allegedly because of Defendant's negligence. R. 520. The expert report created a genuine issue of fact. The exclusion of this report by the magistrate judge was an abuse of discretion when the client, petitioner, properly raised the issue during the July 27, 2016 hearing. The magistrate judge ignored client's request and promptly change the subject because of perceived misunderstanding. R. 916 5:1-25.

1 THE COURT: All right.

2 MR. KIMBALL: What we're asking the Court to do is

3 we have a few deadlines that we'd like to move. We'd like to

4 move the dispositive deadline to September 16th, 2016. The

5 Rule 26(a)(3) pretrial disclosure deadline to November 4th, 2016

13 THE COURT: All right. Let me ask you before I ask
14 Mr. Glenn for his side. Do you know how long -- well,
15 Mr. Glenn is plaintiff, so let me ask that of him.
16 Mr. Glenn, first of all, how long do you anticipate
17 it's going to take to try this matter?

18 MR. GLENN: Your Honor, I mean, I just deposed two
19 witnesses. You know, one from RE/MAX. But to be honest, you
20 know, I'll probably wind up calling them at trial. So I don't
21 think, you know, those further depositions would be warranted,
22 you know. **I need time to identify expert witness.** I'm close
23 to that so. It's really just coming down to, you know, close
24 to trying the matter at this point.

25 THE COURT: Okay. I think you misunderstood my question. How long do you
anticipate the trial will take.

Procedural due process requires a real opportunity to be heard at a meaningful time and in a meaningful manner; in other words to qualify under the due process standards the opportunity to be heard must be meaningful, full and fair and not merely colorable or illusive. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law. *AMJUR § 1008 Requirement Full Evidentiary hearing.*

The magistrate judge denied the subpeoana duces tecum to compel discovery of records from nonparty, REMAX, Coldwell Banker, and Utah Division of Real Estate. Client was denied access to similar real estate purchase contracts like the Reese REPC which Attorney Rob Ponte representing Coldwell Banker Real Estate obtained from Susie Martindale in the underlying lawsuit. The client was entitled to same evidence afforded in the underlying legal malpractice case to establish proximate cause. R. 520. Though magistrate judge ORDERED Susie Martindale Broker REMAX to turn over the files she failed to comply with the order. R. 525. Magistrate judge failed to impose sanctions on REMAX while they held the *Pro Se* litigant to comply with the *Fed R. of CivP*. Court imposed the death penalty sanction, dismissing expert report for noncompliance; effectively granting summary

judgment to the attorney. Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules. *Cire v. Cummings, 134 S.W.3d 835, 839 (Tex. 2004)*.

The Fed Rules of CivP should be applied equally to all parties, and nonparties. Per Fed Rules of CivP 34, nonparty can be required to produce documents evidence. U.S. Constitution Amend. XIV guarantees all citizens equal protection under the laws. The district court acknowledge this requirement in its May 17, 2016 ORDER,

"The Court cautions both parties to follow the rules of procedure that govern all litigants. Just because Plaintiff is proceeding pro se does not give Defendants the right to rebuff their own obligations under these rules".

The Court of Appeals opinion cited the inadequate briefing for the client not raising the missing 47 exhibits at the trial level. Utah District Court requires Pro SE litigants to file complaints by mail. Therefore the client could not have been aware of the missing 47 exhibits, nor questioned it when he received confirmation from Travis Reitz, Constable Bob Reitz, 7026 S. Commerce Park, Dr. Ste 1B, Midvale Utah that the complaint was properly filed, and served on the defendants R. at 1³. In fact, the client raised the issue October 28, 2016 that the 47 Exhibits attached to the complaint represented disclosure he planned to raise at trial, REPC, Earnest Money Deposit Release, Attorney/Client agreement, etc.. R. 1303. The record shows that the court granted permission for the client to receive electronic notices of electronic filing January 27, 2017. R. 1465. Magistrate issued Report & Recommendations less than 69 days later. R. 1558. These facts demonstrate extenuating circumstances preventing the client from raising the issue until he noticed the exhibits missing in the appellate record March 13, 2018.

The appellate record failed to include several client motions DKT 46, 76, requesting for extension of time to complete expert discovery but included the opposing motion filed by the attorney William Kimball . R. at, 1, at 8. The February

³ DKT 3

10, 2016 Motion to Extend Discovery per Fed R. CivP 26, and 34 requested the extension of fact, and expert discovery contrary to the Court of Appeals opinion. App 2. The record was incomplete; missing several motions of the client, and 47 exhibits severely tainted court proceedings denying the client procedural due process. U.S.C.A. Const. Amends. 14. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Attorney Walter Keane and Attorney Brennan Moss represented the Seller in the claim against the buyer, and his real estate agent Donna Kane, and brokerage respectively. Both attorneys have significant experience in litigating these claims but neither one raised the issue of buyer's noncompliance with the contract provisions to apply for the loan by the loan application due date or his misrepresentation of the facts. Judge Reese's Attorney Alain Balmanno filed his declaration among one of the various pleadings he filed with the Fourth District Court. Unlike Reese's attorney, Walter Keane filed the Seller's and his broker's declarations separately in the docket. Clearly the buyer agreed to apply for the loan by loan application & fee deadline December 21, 2017. R 1607. He issued REPC Addendum 3 on December 28, 2007, seven days after his non-performance. R. 1611. Any jury reviewing the contract terms, and addendum would have reached the same conclusion the buyer cancelled the contract pursuant to section 2.4 REPC because of his fraudulent misrepresentation of his intention to apply for the loan. Just as the buyer proposed in his April 17, 2007 offer that included Loan Pre-Approval letter from Infinity Mortgage Company R. 1602; thereby demonstrating his compliance with REPC 2.3. Obviously a red herring introduced to entice the buyer to act on his December 18, 2007 offer.

The Utah Supreme Court and Court of Appeals charged the Seller with reading the contract, and failure to seek legal counseling about the terms and conditions but failed to apply the same laws to the buyer. The buyer Judge Reese read and agreed to the terms and conditions of the contract including the REPC 2.3 Application for Loan. R. 1604. This was a material fact the Buyer failed to disclose that the Seller relied on to his own detriment.

The parties to a contract are deemed to intend that the terms of a contract should be construed in a manner which assumes the parties intended that the duties and rights created by the contract should be performed and exercised in good faith." This means that "one party may not render it difficult or impossible for the other to continue performance and then take advantage of the nonperformance he has caused. *Zion's Properties, Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975)

IV. Final Judgment Rule, Collateral Order Doctrine.

By statute, federal courts of appeals have "jurisdiction of appeals from all final decisions of the district courts," except where direct review may be had in U.S. Supreme Court. 28 U.S.C. § 1291. "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress but as a 'practical construction of it. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 1995, 128 L.Ed.2d 842 (1994) (quoting Cohen, 337 U.S., at 546, 69 S.Ct., at 1226). In Cohen, Supreme Court held that § 1291 permits appeals not only from a final decision by which a district court disassociates itself from a case, but also from a small category of decisions that, although they do not end the litigation, must nonetheless be considered "final." Id., at 546, 69 S.Ct., at 1225–1226. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)

In Stanley, the Supreme Court refused to allow expansion of the scope of an interlocutory appeal. That civil case involved an order certified by the trial court, and accepted by the appellate court, for immediate review pursuant to § 1292(b). Immediate appellate review, this Court held, was limited to the certified order; issues presented by other, noncertified orders could not be considered

simultaneously. 483 U.S., at 676–677, 107 S.Ct., at 3059–60. *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987).

Utah Supreme Court accepted interlocutory appeal when the Utah Fourth District Court denied summary judgment and cross motion for summary judgment because a genuine issue of fact exists. App 42. Though Utah Supreme Court recognized its power in equity case to weigh the evidence and make its own findings, orderly process and appropriate deference to trial judge's superior position of being able to see the witnesses and asses their credibility require that trial court enter findings in the first place. *Romrell v. Zions First Nat. Bank, N. A.*, 611 P.2d 392 (Utah 1980).

The Utah Supreme Court failed to follow final judgement rule, and collateral order doctrine to allow trial judge to enter finding of facts, and law first. Ordinarily, orders denying summary judgment do not qualify as “final decisions” subject to appeal. 28 U.S.C.A. § 1291. *Ortiz v. Jordan*, 562 U.S. 180, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2011)

The U.S. Supreme Court stated in *Mohawk Indus v. Carpenter* in applying Cohen 's collateral order doctrine, we have stressed that it must “never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009).

In actions at law, predominantly factual issues are in most cases allocated to the jury; allocation rests on a firm historical foundation, and serves to preserve the right to a jury's resolution of the ultimate dispute. U.S.C.A. Const.Amend. 7. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)

CONCLUSION

Based on the foregoing, Petitioner submits that this case is worthy of review by this Court because it presents important constitutional issues on right to jury trial, Constitutional Amend. VII, due process; equal protection, Constitutional Amend. XIV, and proper adjudication of interlocutory appeals under the final judgment rule, and collateral order doctrine.

Friday, May 10, 2019

Respectfully submitted,



Endre' Glenn (Pro SE)
10518 165th PL NE
Redmond, WA 98052