19-7872

~~No. 19-7069~~

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL WILDER

Petitioner,

v.

WILLIAM F. KREBS, IN HIS INDIVIDUAL CAPACITY AS DENTIST AT MCCORMICK CORRECTIONAL INSTITUTION.

Respondent.

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

FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Samuel WILDER
386 Redemption Way
McCormick, SC 29899

REPLY TO QUESTION PRESENTED

Did the Fourth Circuit properly affirm the district court's correct application of rules 15(a) and 59(e) of the Federal Rules of Civil Procedure when the district Court (1) denied relief on Petitioner's Complaint when amending the complaint was futile and (2) denied Petitioner's motion to reconsider the district court's order granting Respondent's renewed motion for summary judgment when there was no intervening change in controlling law, no new evidence not previously available and no clear error of law or manifest injustice, Petitioner objects, Whether there be a clear error of law, or abuse of discretion, is for this court to decide but Rule 8(c) state the affirmative defense must be pled or waived. Counsel for the Defendant did not raise it in their Answer and did not amend it until during pretrial conference.

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES, RULES, AND LEGISLATIVE HISTORY:

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OPINION BELOW

The unpublished opinion of the Fourth Circuit is available at 785 F. App'x 198 (4th Cir. Nov. 26, 2016). The Unpublished opinion of the district Court is available at 2016 WL 4020211 D.S.C. Aug. 23, 2018).

PROVISION INVOLVED

1. Motion for reconsideration filed without Rule 59(e) shall be filed no later than 28 days after the entry of the judgment. Fed. R. Civ. P. 59(e).

2. Rule 15(a) of the Federal Rules of Civil Procedure that:

Leave to amend shall be freely granted, when justice so requires.

STATEMENT OF THE CASE

The case arise out of a 42 U.S.C. § 1983 action Petitioner filed pro-se and forma Pauperis in the United States District Court for the District of South Carolina against Respondent, a licensed dentist, alleging Respondent failed to provide his dental treatment in violation of Petitioner's rights under the United States Constitution. Respondent filed a motion for summary judgment which the district court denied Subsequently,

Respondent moved for leave to amend his answer, after admitting his answer don't need amending, which the district court granted. Respondent filed an amendment answer, after waiving that defense, asserted, res judicata and collateral estopped as defenses, and a renewed motion for summary judgment all after a pretrial conference. The district court granted the renewed motion for summary judgment in spite of the unusual circumstances and dismissed the case with prejudice, holding that res judicata and collateral estoppel applied to bar Petitioner's claims.

Petitioner filed a motion for reconsideration among other issues asserted that Respondent has waived and forfeited hsi defense and not filing it timely and motion to amend which the district court denied pursuant to Rule 59(e) and 15(a) of the Federal Rules of Civil Procedure respectively, and there was no warning from the court that motion for RECONSIDERATION WILL BE evaluated under Rule 59(e). The district court had previously granted Petitioner leave to amend his complaint on May 4 and October 11, 2017, in order to developed a claim, because of motion to dismiss by the respondent and courts are reluctant to dismiss the claim of a prisoner proceeding pro se solely on procedural grounds and usually allow prisoners to correct deficiencies by amendment. Therearter, Petitioner appealed the district court"s orders denying relief on his complaint and denying his motion for reconsideration. The fourth Circuit improperly affirmed the district court's order on the merits.

REASON FOR DENYING RESPONDENT'S PETITION

The Fourth Circuit improperly affirmed the district court's incorrect application of Rule 59(e) and 15(a) of the Federal Rules of Civil Procedure. Certiorari should be granted be granted to determine whether the Fourth Circuit who never heard Petitioner's issues and district court improperly applied the well-established doctrine that affirmative defense is waived if not pleaded. Fed. R. of Civ. Procedure, Rule 8(c). The Fourth Circuit gave the Respondent who is lawyer guidance, but left pro-se litigant without direction whether to respond timely and ignored re hearing and en bank with and unpublished opinion. The Respondent did not raised there defense timely accordingly, the court should grant the petition for a writ of certiorari.

A motion for reconsideration under Rule 59(e) should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there be an intervening change in controlling law. McDowell v. Calderson, 197 F.3d 1253 9th Cir. Court of Appeals 1999).

Under Rule 8 (c) of the Federal Rules of Civil Procedure, the defense of claim preclusion and issue oreclusion are affirmative defenses but must be pleaded. Blonder-Tongue Labs, nc. v. Univ. of I"LL Found, 402 U.S. 313, 350, 91 S.Ct. 1434, 28 L.E2d 788 (1971). citing Fed. R. Civ. 8(c). A party may be hold to have waiveo such preclusion defenses when that party has not properly and timely assert them. See Arizona v. California, 530 U.S. 392, 410, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000). Res judicata is an affirmative defense that is ordinarily lost if not timely raised. Georgia Pacific Consumer Products, LP v. Von Drehle Crop., 710 F.3d 537 4th Cir.).

Even when a preclusion defense is not available at the outset of a case, a party may waived such a defense arising during course of litigation by waiting too long to assert the defense after it becomes available, See Arizona, 530 U.S. at 413, 120 S.Ct. 2304(holding that party could not raise preclusion as a defense when party could have raised the defense earlier in the

proceeding but did not "despite ample opportunity and cause to do so"). Davignon v. Clemmey, 322 F.3d 1, 15 (1st Cir. 2003)(holding that district court abused its discretion by allowing defendant to assert preclusion defense "at the eleventh hour"); Aetna Cas & Sur. Co. v. Gen Dynamics Corp. 968 F.2d 707, 711, (8th Cir. 1992)(holding that preclusion defense which was not available at the outset of litigation had to be "raised at the first reasonable opportunity after rendering of the decision having the preclusive effect"). Home Deport, Inc. v. Guste 713 F.2d 616, 620 n. 4 (5th Cir. 1985) (Even if it is not practicable to raise [preclusion as an affirmative defense] in the pleading, the party wishing to raise the defense is obliged to assert it at the earliest moment practicable"); Evans v Syracuse City Sch Dist. 704 F.2d 44. 47 (2nd Cir. 1993) The party wishing to raise [preclusion as a] defense is obliged to pled it at the earliest possible moment. The respondent did not raise the preclusion defense at the earliest opportunity available, so Petitioner's writ must be granted and the district court acted in an arbitrary manner and abuse it discretion, in granting Respondent renew motion for summary judgment and motion for leave to amend.

Rule 15(a) of FRCP, provides that leave to amend shall freely granted, when justice so requires. This liberty of pleading or freedom of amendment, however, is limited when there is undue delay, bad faith or dilatory motive, on part of the moving party

and undue prejudice to the opposing party ... Foman v Davis 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed2d 222 (1962). Although the grant or denial of leave to amend is within the discretion of the district court a decision, without any justifying reason may be an abuse of discretion and inconsistent with the sprit of the federal rules.

The garden of parties, in requesting or resisting the amendment of pleading, was noted in Advocat v. Nexus Industries, Inc. 497 F. upp. 328, 331 D. Del. 1980) in which the court observed that:

> As a practicle matter, however, any delay in asserting am affirmative defense for a significant period of time will almost invariably result in some prejudice, to the nonmoving party. The proper standard is owe that balance the length of the delay against the resulting prejudice. The longer the period of an unexplained delay the less will be required of the nonmoving party in terms of showing of prejudice.

On appeal, the question is whether the discretion reposed in the trial court has been abused. See norbeck v. Daverpont Community School District 545 F.2d 63, 70 (8th Cir. 1976).

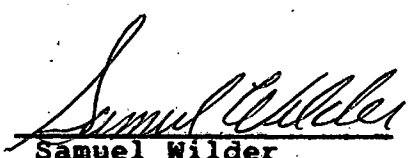
An indication of the test to be applied in determining whether the trial court has abuse its discretion in allowing leave to amend is contain in Nevels v. Ford Motor Co., 439 F.2d 251, 257 (5th Cir. 1971).

Amendment should be tendered no latter than the times of pretrial, unless compelling reasons why this could not have been done are present ... The Court must weigh good cause shown for the delay in moving visa v visa dilateriness of counsel resulting

in last minute surprise and inability of opposing counsel to meet the tendered issue.

CONCLUSION

For the foregoing reasons, Respondent opposition to Petitioner's Writ of Certiorari must be denied.



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