No. _____

In The
Supreme Court of the United States

GEMCAP LENDING I, LLC,

Petitioner,

v.

QUARLES & BRADY, LLP and JAMES GATZIOLIS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

SANFORD L. MICHELMAN
MONA Z. HANNA
TODD H. STITT
REUBEN A. GINSBURG
JESSE J. CONTRERAS
Counsel of Record
MICHELMAN & ROBINSON, LLP
10880 Wilshire Blvd., 19th Floor
Los Angeles, California 90024
jcontreras@mrllp.com
(310) 299-5500
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. When an attorney representing a borrower makes false and misleading representations of fact and opinion in connection with a commercial loan application and that attorney is later sued for fraud, can the district court, consistent with the standard set forth in Rule 56(a) of the Federal Rules of Civil Procedure, grant summary judgment in favor of that attorney despite evidence that the attorney knew the representations were false and misleading at the time they were made?

2. Does an attorney's role as a zealous advocate relieve the attorney from his or her ethical obligations and responsibilities to be truthful and not conceal material facts?

CORPORATE DISCLOSURE STATEMENT

GemCap Lending I, LLC hereby certifies that it is a limited liability company, it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

DIRECTLY RELATED PROCEEDINGS

United States District Court for the Central District of California, Case No. 2:14-cv-07937 RSWL (Ex), *GemCap Lending I, LLC v. Quarles & Brady, LLP et al.*, judgment entered September 13, 2017.

United States Court of Appeals for the Ninth Circuit, Case No. 17-56514, *GemCap Lending I, LLC v. Quarles & Brady, LLP et al.*, judgment entered September 11, 2019.

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United States Court of Appeals for the Ninth Circuit, Case No. 17-56514, *GemCap Lending I, LLC v. Quarles & Brady, LLP et al*., judgment entered September 11, 2019, nonpublished opinion, 2019 WL 4303021.

II. STATEMENT OF JURISDICTION

The Ninth Circuit filed its opinion on September 11, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. RELEVANT LEGAL PROVISION

Rule 56 of the Federal Rules of Civil Procedure states in relevant part:

"(a) . . . 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. . . ."

IV. STATEMENT OF THE CASE

A. Loan Service Agreements

CropUSA Insurance Agency, Inc. and CropUSA Insurance Services, LLC (collectively "**CropUSA**") sold multi-peril crop insurance policies to farmers and growers associations. CropUSA made its sales through regional sub-agents and placed the policies with Diversified Crop Insurance Services ("**Diversified**"), an authorized manager for an approved insurance provider. Diversified paid CropUSA commissions for these sales, and CropUSA paid commissions to its subagents.

GemCap Lending I, LLC ("**GemCap**") and CropUSA entered into a $5 million Loan and Security Agreement in November 2011 and an Amended and Restated Loan and Security Agreement in February 2013 (collectively "**LSAs**"). Both LSAs required CropUSA to pledge all of its assets as collateral, including the commissions paid by Diversified. The LSAs further required CropUSA to disclose certain material facts in separate borrower disclosure schedules.

B. Legal Opinion Letters and Oral Representations

Quarles & Brady, LLC, a law firm, and James Gatziolis, a firm partner (collectively "**Quarles**"), represented CropUSA in connection with the negotiations with GemCap and the approval of the LSAs. Quarles prepared the borrower disclosure schedules for CropUSA and presented them to GemCap. Quarles also prepared legal opinion letters for the benefit of

GemCap as a condition to approving the LSAs. In this regard, Quarles authored and sent directly to GemCap two legal opinion letters and made various factual representations both within and outside of the legal opinion letters. The legal opinion letters confirmed that the provisions of the LSAs created a valid security interest in all of the loan collateral that CropUSA pledged in favor of GemCap. GemCap relied on Quarles' opinions, representations, and disclosure schedules in deciding whether or not to approve the LSAs and ultimately fund the loans. But for Quarles' representations, GemCap would not have funded the loans to Quarles' client CropUSA.

At the time Quarles was presenting its legal opinions and factual representations, and negotiating the loan documentation with GemCap, it was also serving as counsel of record to CropUSA in numerous state and federal lawsuits against CropUSA in the state of Idaho. Some of these lawsuits alleged that CropUSA, and its founder and president, R. John Taylor, had committed fraud and other misconduct, sought significant money damages, and challenged CropUSA's right to collect the Diversified commissions—which formed a large part of the collateral CropUSA pledged to secure the loans.

Before approving the initial LSA, GemCap expressed concerns to CropUSA and to Quarles about the lawsuits then pending against CropUSA and Taylor and the potential impact that the lawsuits could have upon CropUSA's ability to perform its loan obligations and the integrity of the secured collateral CropUSA

sought to pledge as collateral should the LSA be approved. Quarles held itself out to GemCap as uniquely qualified to render a legal opinion regarding the likely outcome of the pending lawsuits and their potential impact on both the proposed secured collateral and CropUSA's ability to perform its LSA obligations.

Quarles stated in a telephone call with GemCap (and others) before the first loan closed in November 2011 that the lawsuits were "all but over" and that CropUSA was "sure to prevail." Quarles further opined to GemCap that even if the lawsuits were decided against CropUSA, such an outcome would neither impair the proposed loan collateral nor CropUSA's ability to perform its loan obligations. Reinforcing those oral representations, Quarles' legal opinion letters represented that there were no lawsuits then pending or threatened against CropUSA that sought to prevent the consummation of any of the transactions contemplated by the loan documents or might adversely affect the validity or enforceability of any of the loan documents. Quarles' representations to GemCap were a substantial factor in GemCap approving the LSAs and in extending credit to CropUSA.

In 2012, ***after*** Quarles sent its first legal opinion letter to GemCap in 2011 to convince GemCap to fund the loan to its client CropUSA, Quarles prepared a Confidential Private Placement Memorandum for CropUSA in 2012 ("**Private Placement Memorandum**"). Quarles disclosed in the Private Placement Memorandum that the ***same*** Idaho lawsuits pending against CropUSA "could subject it [CropUSA] to

significant money damages." Quarles never disclosed to GemCap the Confidential Private Placement Memorandum or any of its opinions during the negotiations of the LSAs in November 2011 or in February 2013.

CropUSA defaulted on the LSAs in July 2013. GemCap's notice of default stated that CropUSA had defaulted by failing to repay amounts advanced by GemCap in reliance on erroneous information provided by CropUSA, by failing to pay other amounts due under the loan documents, and by misrepresenting material facts both before and after the consummation of the initial LSA. When GemCap sought to exercise its right to acquire the collateral by collecting the commissions payable to CropUSA from Diversified, Diversified refused to turn over the commissions.

C. District Court Proceedings

GemCap filed a complaint against Quarles in October 2014 and filed its third amended complaint in January 2017, alleging claims for (1) legal malpractice, (2) intentional misrepresentation, (3) negligent misrepresentation, and (4) concealment. Jurisdiction in the district court was proper under 28 U.S.C. § 1332(a)(1) based on diversity of citizenship and more than $75,000 in controversy.

GemCap alleged, *inter alia*, that Quarles breached its duty of care to GemCap by misrepresenting in the legal opinion letters that they knew of no facts that CropUSA's representations in the LSAs and the borrower disclosure schedules were inaccurate; by failing

to disclose its doubts about CropUSA's right to pledge the Diversified commissions as secured collateral for the LSAs; by misrepresenting that the LSAs created a valid security interest in the Diversified commissions; by failing to disclose in the borrower disclosure schedules the existence of certain material contracts and payments to affiliates that would substantially jeopardize CropUSA's ability to fulfill its LSA obligations to GemCap; and by concealing from GemCap orally and in its legal opinion letters that the Idaho lawsuits pending against CropUSA posed the risk of "significant money damages," and therefore created a risk to the collateral its client CropUSA pledged to secure the loans.

Quarles filed a motion for summary judgment in July 2017. GemCap moved for partial summary judgment at the same time. The district court denied GemCap's motion and granted Quarles' motion. The court found that in providing the legal opinion letters to GemCap, Quarles owed GemCap a duty of care as well as a duty to disclose facts that materially qualified the representations made. However, the court found that the evidence failed to create a genuine dispute of material fact as to whether Quarles had breached either of these duties or otherwise made any misrepresentation to or concealed from GemCap of any material facts.

Regarding Quarles's oral representations that the lawsuits were not a concern, the district court determined that these statements constituted a non-actionable prediction rather than actionable misrepresentations

of fact. The district court also concluded that the term "Collateral" in the LSA's did not encompass commissions payable to subagents.

The district court entered a defense judgment in September 2017.

D. Ninth Circuit Opinion

A three-judge panel of the Ninth Circuit Court of Appeals affirmed the district court's judgment in a memorandum opinion filed on September 11, 2019. The Ninth Circuit acknowledged the rule that an attorney owes a duty not to defraud or mislead the opposing party to a transaction, citing *Cicone v. URS Corp*., 183 Cal.App.3d 194, 202 (1986) ("[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length") and *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal.App.3d 104, 110 (1976) ("[A]n attorney may owe a duty to a third person, and may be liable if the third person who was intended to be benefitted by his performance is injured by his negligent execution of that duty"). However, the Ninth Circuit found that there was no genuine issue of material fact regarding any breach of duty, misrepresentation, or concealment.

Regarding the oral representations to GemCap that the lawsuits were not a concern, the Ninth Circuit did not conclude that the statements were a nonactionable prediction. Instead, the Ninth Circuit found that the representations were true because the lawsuits

ultimately did not result in a judgment against CropUSA, that they were not the reason GemCap had declared a default, and that there was no evidence that the litigation impaired the LSAs. The Ninth Circuit also concluded that the issue of whether the collateral included commissions payable to subagents was beyond the scope of the legal opinion letters.

V. REASONS FOR GRANTING THE WRIT

Summary judgment is proper only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 572 U.S. 650, 656-657 (2014). "In making that determination, a court must view the evidence 'in the light most favorable to the opposing party.' [Citations.]" *Tolan*, at 657. The district court must draw all reasonable inferences in favor of the party opposing summary judgment. *Tolan*, at 660; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1987). The Court of Appeals reviews the ruling on a motion for summary judgment de novo, applying the same standard as the district court. *Head v. Wilkie*, 936 F.3d 1007, 1010 (9th Cir. 2019).

The requirement of viewing the evidence in the light most favorable to the opposing party, including all reasonable inferences that can be drawn from the evidence, is a fundamental principle of summary judgment jurisprudence firmly established by this Court's precedents. *Tolan v. Cotton*, *supra*, 572 U.S. at 559-660; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159

(1970). Failure to adhere to this fundamental principle is a compelling reason for this Court's intervention. *Tolan*, at 559-660; *Adickes*, at 158-159.

GemCap presented evidence in opposition to the defendants' summary judgment motion that Quarles stated in a conference call prior to execution of the initial LSA that: (a) the litigation against CropUSA was "all but over"; (b) CropUSA was "sure to prevail"; and (c) even if the litigation were adversely decided, such an outcome would not impair the loan collateral or CropUSA's ability to perform its loan obligations. Quarles held itself out as uniquely qualified to state an opinion regarding the lawsuits because, *inter alia*, it had long represented CropUSA in the litigation and other matters. Quarles made these representations to GemCap in November 2011 and again in February 2013 in order to secure a multi-million dollar commercial loan from GemCap for its client CropUSA. Yet, incongruously, in 2012, after the execution of the LSA and prior to its amendment, Quarles represented in a Private Placement Memorandum that the same pending litigation could result in significant money damages against CropUSA, an opinion that was concealed from and never shared with GemCap.

The district court ruled that Quarles' statements were only a prediction and therefore were not actionable representations of fact. Contrary to the district court's ruling, the oral representations were actionable representations of fact because Quarles held itself out as specially qualified, and whether they were factual representations was itself a question of fact. *Jolley v.*

Chase Home Finance, LLC, 213 Cal.App.4th 872, 892 (2018); see *Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund*, 135 S.Ct. 1318, 1330-1331 (2015).

The Ninth Circuit did not rely on the district court's faulty reasoning, but instead affirmed the ruling on another ground. The Ninth Circuit concluded that Quarles' representations were true because the lawsuits against CropUSA did not result in a judgment against CropUSA, they were not the reason GemCap had declared a default, and there was no evidence that the litigation impaired the loan. The court's reasoning ignores that at the time Quarles made these representations to GemCap, it knew that the lawsuits against CropUSA were a serious concern, that the outcome of those lawsuits was uncertain, and that if successful those lawsuits could have resulted in the loss of collateral (i.e. the Diversified commissions) and significant money damages against CropUSA, adversely affecting its ability to repay the loan.[1] The evidence certainly suggests that Quarles had reason to know all of this. Moreover, the Private Placement Memorandum that Quarles prepared for CropUSA in 2012, shortly after Quarles's oral representations and first legal opinion letter, expressly acknowledged that the same pending litigation against CropUSA "could subject it [CropUSA] to significant money damages," belying Quarles's oral

[1] In fact, at least one of the lawsuits against CropUSA is still pending in federal district court in Idaho.

representations to the contrary and creating a triable issue of material fact precluding summary judgment.

Viewed in the light most favorable to GemCap, as required in a de novo review of the order granting summary judgment, the evidence compels the conclusion that there is a genuine dispute of material fact as to whether Quarles misrepresented its knowledge and opinion concerning the significance of the lawsuits against CropUSA and breached its duty of care owed to GemCap as a nonclient it intended to influence. *Cicone v. URS Corp*., *supra*, 183 Cal.App.3d at 202; *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, *supra*, 57 Cal.App.3d at 110. The evidence also compels the conclusion that there is, at minimum, a genuine factual dispute concerning the materiality of Quarles' misrepresentations. The Ninth Circuit should have acknowledged and credited GemCap's evidence creating a genuine factual dispute on these issues. The Ninth Circuit failed to view the evidence in the light most favorable to the party opposing summary judgment, as required by F.R.C.P. Rule 56 and the interpretive guidance of this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1987).

The purported fact that the lawsuits ultimately did not result in a judgment against CropUSA does not negate the facts in existence as of the time of Quarles's oral representations to GemCap. The ultimate disposition of the lawsuits does not negate the evidence that, at the time they were pending, the lawsuits were a serious concern, created a significant potential liability,

and could have adversely affected CropUSA's ability to repay the loan and impaired the collateral.

The Ninth Circuit opinion essentially condones an attorney with special knowledge providing a legal opinion to the opposing party with the intention of inducing that party's reliance when the attorney knows the opinion is false. But an attorney's role as a zealous advocate does not relieve the attorney from his or her ethical obligations and responsibilities as an officer of the court. "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients." *Hickman v. Taylor*, 329 U.S. 495, 510. "[A]ll attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court." *Azar v. Garza*, 138 S.Ct. 1790, 1793 (2018). Judicial tolerance of such conduct undermines the public's confidence in the legal profession and the administration of justice. In short, a person is not permitted to commit fraud simply because he or she is a lawyer.

The Ninth Circuit also failed to view the evidence in the light most favorable to the party opposing summary judgment in concluding that the lawsuits against CropUSA were not the reason GemCap had declared a loan default and did not impair the collateral. The reasons cited in GemCap's notice of default included CropUSA's failure to pay amounts due under the loan documents and misrepresenting material facts both before and after the consummation of the initial loan. A reasonable inference from the evidence is that the

cost and disruption of the ongoing litigation against CropUSA depleted its assets (i.e., collateral) and impaired its ability to perform its loan obligations.

The Ninth Circuit also failed to view the evidence in the light most favorable to the party opposing summary judgment by failing to credit GemCap's evidence that the collateral encompassed all of GemCap's receivables, including commissions ultimately payable to subagents. GemCap's evidence included John Taylor's declaration and Gatziolis' deposition testimony explaining the arrangement, and deposition testimony by defendants' expert specifically stating that the collateral included commissions payable to subagents.

By failing to credit the evidence contradicting factual conclusions central to its opinion, the Ninth Circuit improperly weighed the evidence and resolved disputed factual issues in favor of the moving party. *See Tolan v. Cotton*, *supra*, 572 U.S. at 657; *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249. Certiorari is warranted to prevent the Ninth Circuit from undermining the fundamental principle that the evidence must be viewed in the light most favorable to the party opposing summary judgment and all reasonable inferences must be drawn in that party's favor. Certiorari is also warranted to protect against any erosion of an attorney's ethical obligations and responsibilities as an officer of the court and to preserve public confidence in the legal profession and the administration of justice.

VI. CONCLUSION

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

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Respectfully submitted,

MICHELMAN & ROBINSON, LLP
SANFORD L. MICHELMAN
MONA Z. HANNA
TODD H. STITT
REUBEN A. GINSBURG
JESSE J. CONTRERAS, *Counsel of Record*

Attorneys for Petitioner
GemCap Lending I, LLC