NO. 21-_____

SUPREME COURT OF THE UNITED STATES

WALTER SKIPPER,

Petitioner

vs.

A&M DOCKSIDE REPAIR, INCORPORATED, &
HELIX RESOURCES, LLC

Respondents

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. Question Presented

Does precedent in the United State Court of Appeals for the Fifth Circuit which allows defendants to raise affirmative defenses in a motion for summary judgment or otherwise "at a pragmatically sufficient time" such that a plaintiff is "not prejudiced in its ability to respond" impermissibly allow defendants to circumvent the requirements to timely seek leave to amend their answers to assert such defenses pursuant to FRCP 15, and/or the more onerous requirements under FRCP 16 to modify a Scheduling Order to allow an untimely amendment of a responsive pleading, in conflict with Supreme Court precedent and decisions from three other circuits which hold otherwise?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion below (Pet.App.Doc. 2, p. 21) is published at 829 Fed.Appx. 1. The opinion respecting rehearing en banc (Pet.App. Doc. 3, p. 29) is not published. The district court's opinion (Pet.App. Doc. 1, p. 1) is published at 430 F.Supp. 3d 170.

JURISDICTION

The Fifth Circuit denied rehearing on October 14, 2020. Pet.App. Doc. 3, p. 29. The Court's Order of March 19, 2020 extended the time for filing any petition for a writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing. The Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Rule 8 of the Federal Rule of Civil Procedure sets forth the "General Rules of Pleading." FRCP 8(c) provides for "Affirmative Defenses" and states: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense…"[1]

[1] 28 USC App Fed R Civ P Rule 8

Rule 15 of the Federal Rules of Civil Procedure sets forth the rules pertaining to "Amended and Supplemental Pleadings." FRCP 15(a) provides for "Amendments Before Trial"; FRCP 15(a)(2) states that in all other cases other than those in which an amendment is allowed as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."[2]

Rule 16 of the Federal Rules of Civil Procedure sets forth the rules pertaining to "Pretrial Conferences; Scheduling; Management." FRCP 15(b)(4) provides for "Modifying a Schedule" and states: "A schedule may be modified only for good cause and with the judge's consent."[3]

STATEMENT OF THE CASE

On June 22, 2018, Walter Skipper filed a Complaint for damages in the United States District Court for the Eastern District of Louisiana against Cashman Equipment Corp. and A&M Dockside Repair, Inc. An Amended Complaint was filed on October 15, 2018. (Pet.App. Doc. 6, p. 41) The Amended Complaint added a new party – Osprey Line, LLC – as a possible owner of the barge. Mr. Skipper's claims against Cashman were voluntarily dismissed and Mr. Skipper later resolved his claims against Osprey, which was also dismissed.

[2] 28 USC App Fed R Civ P Rule 15
[3] 28 USC App Fed R Civ P Rule 16

In his Amended Complaint, Mr. Skipper alleged that on August 11, 2017, he was employed by the appellee, Helix Resources, LLC., as a blaster/painter. On that date, he was performing his assigned duties at a facility owned and/or operated by the appellee, A&M Dockside, working aboard a barge owned by Cashman. In the course of performing those duties, he was injured when fell in an open manhole cover on a barge he was working on.

A&M Dockside answered the Complaint and Amended Complaint (Pet.App. Doc. 7, p. 46) and filed a Third-Party Complaint against Mr. Skipper's employer, Helix Resources, LLC, for defense and indemnity. Helix Resources filed an Answer to the Third-Party Complaint (Pet.App. Doc. 9, p. 53) and although Mr. Skipper made no allegations against Helix (because Helix was his actual employer and was paying benefits under the LHWCA), Helix filed an Answer to Mr. Skipper's Amended Complaint. (Pet.App. Doc. 8, p. 49).

None of the answers filed by the respondents – neither A&M Dockside's Answers or Helix's answer to the Amended Complaint – asserted borrowed servant status as an affirmative defense. Despite the respondents' failure to plead this affirmative defense, the respondents filed a Joint Motion for Summary Judgment on September 24, 2019, asserting that they were entitled to the borrowed servant defense.

After the parties fully briefed the issues – including the respondents' failure to plead borrowed servant status as an affirmative defense – the respondents' motion was granted. The District Court in this matter chose to overlook the waiver of the borrowed servant defense. The District Court determined that the respondents had raised the defense "at a sufficiently pragmatic time" and that Mr. Skipper was not prejudiced in his ability to respond. (Pet.App. Doc. 1, pp. 6-9).

Mr. Skipper appealed the judgment in favor of the respondent to the United States Court of Appeals for the Fifth Circuit, which affirmed the District Court's judgment and its conclusion that the borrowed servant defense was raised "at a pragmatically sufficient time" such that Mr.. Skipper "was not prejudiced" in his ability to respond. (Pet.App. Doc. 2, pp. 23-24). Mr. Skipper requested rehearing en banc on this issue, and the petition for rehearing was summarily denied. (Pet.App. Doc. 3, p. 29).

REASONS FOR GRANTING THE WRIT

1. The court of appeals' decision conflicts with the plain language of Rule 8 of the Federal Rules of Civil Procedure.

The petitioner, Walter Skipper, filed his complaint in the United States District Court for the Eastern District of Louisiana, asserting a tort claim against the respondent, A&M Dockside, Inc. A&M Dockside subsequently filed a third-party claim for indemnity against Mr. Skipper's employer, Helix Resources, LLC ["Helix"]. By law, Mr. Skipper's remedy against Helix was limited to workers'

compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. In its Answer to Mr. Skipper's complaint and amended complaint, A&M Dockside asserted five defense, none of which were the borrowed servant defense. Helix thereafter filed answers to the third-party complaint and Mr. Skipper's complaints; like A&M Dockside's responsive pleadings, Helix asserted numerous defenses, none of which were the borrowed servant defense.

Thereafter, the respondents filed a Joint Motion for Summary Judgment, asserting the borrowed servant defense. The District Court determined that A&M Dockside – the only party against whom Mr. Skipper had a tort remedy – had not waived the borrowed servant defense, because responsive pleadings filed by Helix (against whom Mr. Skipper asserted no claims in the District Court) pled the it was immune under the Longshore Act and Mr. Skipper's remedy against Helix was limited to workers' compensation – facts which cannot be disputed. Helix's tort immunity was not an issue. However, nothing in Helix's responsive pleading raised the issue of borrowed servant status, because Mr. Skipper was its direct employee, nor did either of the respondents ever assert in a responsive pleading that Mr. Skipper was the borrowed servant of A&M Dockside – the only party against whom Mr. Skipper had a tort remedy. The words "borrowed servant" appear nowhere in the respondents' answers.

Rule 8 of the Federal Rule of Civil Procedure sets forth the "General Rules of Pleading." FRCP 8(c) provides for "Affirmative Defenses" and states: "In responding to a pleading, a party **must** affirmatively state any avoidance or affirmative defense…" (Emphasis added).[4]

In *Barnes v. Sundowner Offshore Services, Inc.*,[5] the Eastern District of Louisiana recognized that the borrowed servant defense is an affirmative defense "which must be specifically pled or suffer the penalty of waiver. *See* Fed.Rule of Civ.Pro. 8(c)."[6] If an affirmative defense is not included in an answer to a complaint, it is waived. Ordinarily, "[o]nce the defendant has waived that defense, it 'cannot revive the defense in a memorandum in support of a motion for summary judgment.'"[7]

Despite the foregoing rule and case law, the District Court in this matter chose to overlook the appellees' waiver of the borrowed servant defense and in doing so, it relied upon Fifth Circuit precedent which permits a defendant to raise the defense not in a responsive pleading (such as an answer), but instead in a motion for summary judgment. Relying upon *Motion Med. Tech., LLC v. Thermotek, Inc.*,[8] the

[4] 28 USC App Fed R Civ P Rule 8
[5] 1995 WL 529866 (E.D. La. Sept. 7, 1995)
[6] *Id.* at *1.
[7] *Lebouef v. Island Operating Co., Inc.*, 342 Fed. Appx. 983, 984 (5th Cir. 2009), citing *Funding Sys. Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir.1976).
[8] 875 F.3d 765 (5th Cir. 2017).

District Court determined that the appellees had raised the defense "at a sufficiently pragmatic time" and that Mr. Skipper was not prejudiced in his ability to respond. The Fifth Circuit's original opinion agreed with the district court's analysis.

In support of its determination, the District Court did not refer to any pleading filed by A&M Dockside – the only party herein against whom Mr. Skipper would have a remedy in tort to which the borrowed servant defense would apply. Instead, the District Court referenced *Helix's* Answer to A&M's third-party complaint. In so doing, the District Court cited language in Helix's answers which merely stated undisputed facts and law concerning the relationship between Mr. Skipper and Helix, i.e., that Mr. Skipper was on an employment-related mission for Helix at the time of his accident and that he had no tort remedy against Helix – he was limited to a claim for workers' compensation benefits in regard to Helix.

The foregoing statements by Helix in its responsive pleadings were never in dispute. However, if Mr. Skipper was admittedly on an employment-related mission for Helix, that language does not put Mr. Skipper on notice that another party – A&M Dockside, the actual target of his tort claim – would also claim to be Mr. Skipper's employer by way of borrowed servant status. If Mr. Skipper was admittedly limited to a claim for workers' compensation *vis-à-vis* Helix, that fact does not put Mr. Skipper on notice that A&M Dockside would also claim the benefit

of the borrowed servant defense; the words "borrowed servant" did not appear in any of the respondents' answers.

Given that Mr. Skipper had no claims against Helix in this matter, it was error for the District Court to determine that Helix's vague references to Mr. Skipper's employment relationship with Helix put Mr. Skipper on notice that A&M would raise a borrowed servant defense.

None of the factors relied upon by the District Court in determining that the borrowed servant defense was raised "at a sufficiently pragmatic time" and that Mr. Skipper was not prejudiced in his ability to respond have anything to do with any pleading filed by A&M Dockside, the only real tort defendant in this matter. The fact that Mr. Skipper was able to put forward a response to the Motion for Summary Judgment does not relieve A&M of its obligation to plead an affirmative defense under FRCP Rule 8; Mr. Skipper opposed the motion because an opposition was due. In his opposition, he raised the fact that the defense had not been properly pleaded by A&M, and the Court chose to forgive that failure by referencing pleadings of some other party against whom Mr. Skipper had no claim herein, i.e., his employer, Helix.

Given that A&M Dockside failed to assert the borrowed servant defense as an affirmative defense, but instead raised it in a motion for summary judgment, the petitioner respectfully asserts that the defense has been waived pursuant to FRCP

8(c). For these reasons, District Court erred in overlooking the waiver of the affirmative defense and grating summary judgment in favor of A&M Dockside, and the Fifth Circuit erred in affirming judgment in favor of A&M Dockside on the basis of a defense which was clearly and without a doubt waived under Rule 8 of the Federal Rules of Civil Procedure and applicable case law.

2. The court of appeals' decision conflicts with rules pertaining to amended pleadings, amended scheduling orders, decisions of this Court and decisions of other circuit courts.

As petitioner has set forth above, the pleadings filed in the District Court by the respondents failed to clearly and succinctly set forth a borrowed servant defense. Just as the plaintiff must clearly and succinctly set forth his claims against defendants, defendants – who are ably represented by counsel and who are well familiar with the borrowed servant defense –should be held to the same standards, i.e., to assert affirmative defenses in clear and concise language, in a timely filed pleading or one allowed by the rules to be filed with leave of court. A clear and concise statement of the defense is all that FRCP 8(b)(1)(A) requires – that a party set forth its defense in "short and plain terms."[9] The answers filed by A&M Dockside – the only party against whom Mr. Skipper actually had any claims for negligence – are completely devoid of any reference to a borrowed servant defense

[9] 28 USC App Fed R Civ P Rule 8

or any language which suggests such a defense. If Helix – a non-party to Mr. Skipper's claims – intended to plead a borrowed servant defense as the panel surmised, it simply could have used those words instead of all the language upon which the District Court relied.

Until the respondents' Motion for Summary Judgment was filed, the words "borrowed servant" did not appear in the record. Despite ample opportunity – the Complaint was filed in June of 2018, which A&M Dockside answered in August of 2018; an Amended Complaint was filed in October of 2018, which A&M answered in November of 2018; A&M's Third-Party Complaint against Helix was filed in January of 2019, and Helix filed its Answers in February of 2019; and the Motion for Summary Judgment which is the subject of this appeal was not filed until September of 2019 – in all of that time, neither of the respondents (particularly A&M Dockside) ever filed a motion under Rule 15 to amend their pleadings to clearly and succinctly set forth a borrowed servant defense – to file a pleading containing the words "borrowed servant" or "borrowed employee" or "borrowing employer."

The Scheduling Order in effect at the time the Motion for Summary Judgment was filed set a deadline for amendments to pleadings of July 22, 2019 – three months before the motion was filed in September of 2019, and some five months after the last responsive pleading was filed in February of 2019. The deadline to amend passed and, instead of complying with the additional burdents imposed by FRCP 16

to file an untimely amendment to their answers, Fifth Circuit precedent allows defendants to cure their faulty pleadings by raising an otherwise waived defense by asserting it in a Motion for Summary Judgment after the deadline to amend the pleadings had passed.

Allowing defendants to raise an affirmative defense in a Motion for Summary Judgment after the amendment deadline set by a Scheduling Order allows defendants a form of *carte blanche* to be neglectful in their pleadings – creating, in a sense, a form of excusable neglect which requires no excuse and bypasses the normal requirements for amendments to pleadings under FRCP 15 and/or amendment of the Scheduling Order pursuant to FRCP 16.

Normally, when a party fails to include a claim or defense in its pleading, it would have to file a timely Motion to Amend under FRCP 15. The Fifth Circuit – the Court from which this application is sought - set forth the factors which govern whether an amended pleading should be allowed in that Circuit:

> In deciding whether to grant leave to file an amended pleading, the district court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment.[10]

[10] *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993).

The burden is more onerous when a party seeks to amend a pleading after the deadlines for amendments in a Scheduling Order has expired, because the defendants would have had to seek to modify the Scheduling Order.

> While Fed. R. Civ. P. 15(a) provides that leave to amend shall be "freely" given, where a plaintiff seeks to amend its complaint after a scheduling order has been entered, Fed. R. Civ. P. 16(b) governs. Under that rule, a scheduling order "may be modified only for good cause and with the judge's consent. The court must consider four factors in determining whether there was good cause for the delay: (1) the explanation for the failure to timely move for leave to amend, (2) the importance of the amendment, (3) the potential prejudice the other party would suffer if the amendment was allowed, and (4) the availability of a continuance to cure that prejudice.[11]

Instead of holding defendants who fail to plead an affirmative defense to these standards, defendants are allowed to circumvent these rules by merely raising the defense in a Motion for Summary Judgment so long as it is raised, as stated by the District Court and the Fifth Circuit's original opinion, " 'at a pragmatically sufficient time" such that a plaintiff "was not prejudiced in its ability to respond.' "[12]

This procedure is fundamentally unfair to plaintiffs like Mr. Skipper. Fist, plaintiffs are not put on notice of a defense until it is raised in a summary judgment. Second, plaintiffs who are not put on notice of an affirmative defense until it is raised in a motion for summary judgment may be tasked with the additional burden of

[11] *Lampkin v. UBS Financial Services, Inc.*, 925 F.3d 727, 740-41 (5th Cir. 2019).
[12] *Skipper v. A&M Dockside Repair, Inc.*, 829 Fed. Appx. 1, 4 (5th Cir. 2020), citing *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983)).

asking for additional time to conduct discovery pursuant to FRCP 56(d) – which the District Court may or may not allow; a District Court is not required, under Rule 56(d), to allow a non-movant for summary judgment additional time to conduct discovery. Finally, the defendants are rewarded for their failure to follow Rule 8(c) and affirmatively plead a defense, or to seek leave to amend under FRCP 15 or 16, because a plaintiff makes "thorough and reasoned responses"[13] rather than putting forward a half-hearted response to the motion, which could have led to the granting of summary judgment. While placing these burdens on plaintiffs, defendants are relieved from the burdens of seeking leave to amend and the burdens under FRCP 15 or, if untimely under the Scheduling Order as in the present case, FRCP 16.

The current law in the Fifth Circuit allows defendants to raise affirmative defenses in a motion for summary judgment or otherwise "at a pragmatically sufficient time" such that a plaintiff "was not prejudiced in its ability to respond"[14] conflicts with Supreme Court precedent which provides that a party's failure to plead an affirmative defense will result in waiver of that defense.[15] In addition, two other

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[13] *Id.*

[14] *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983)).

[15] *Wood v. Milyard*, 566 U.S. 463, 470-71, 132 S. Ct. 1826, 1832 (2012) ("Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." Courts may have some discretion in "exceptional cases."); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133, 128 S.Ct. 750, 753 (2008) (observing that an affirmative defense is a defense that "the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver") (citing FED. R. CIV. P. 8(c)(1), 12(b), 15(a))

circuits have held that a defendant waived an affirmative defense by raising it for the first time in its motion for summary judgment;[16] another treats the same as a motion to amend an answer, and analyzes it under FRCP 15 or 16.[17]

The petitioner respectfully requests that Fifth Circuit precedent allowing defendants to raise an affirmative defense in a motion for summary judgment or otherwise "at a pragmatically sufficient time" such that a plaintiff "was not prejudiced in its ability to respond"[18] be reversed or modified so that the pleading of affirmative defenses is more in keeping with spirit of FRCP 8(c) and/or FRCP Rules 15 and 16 – that since they are "affirmative" defenses, they must be "affirmatively" pled at the pleading stage in an answer or after a proper motion to amend which meets *all* of the requirements of FRCP 15 and/or 16.

CONCLUSION

The petitioner, Walter Skipper, respectfully prays that this Honorable Court grant his Petition for Writ of Certiorari and, in due course, reverse the holdings of the U.S. Fifth Circuit Court of Appeals and the district court which allowed the respondents – and other defendants in civil matters – to circumvent the requirements of Rules 15 and 16 of the Federal Rules of Civil Procedure for amended pleading

[16] *Nguyen v. Biondo*, No. 12-13776, 2013 BL 37404 at *4 (11th Cir. 2/13/13); *Harris v. Secretary, U.S. Dept. of Veterans Affairs*, 126 F.3d 339, 341 (D.C. Cir. 1997) ["Rule 8(c) means what it says: affirmative defenses must be raised in a responsive pleading, not a dispositive motion."]
[17] *Saks v. Franklin Covey Co.*, 313 F.3d 337, 350-51 (2nd Cir. 2003).
[18] *Pasco, supra.*

and amended scheduling orders. The rule of the U.S. Fifth Circuit which allows defendants to cure a failure to plead an affirmative defense by raising the defense for the first time in a Motion for Summary Judgment impermissibly bypasses the requirements of Rule 8 of the Federal Rules of Civil Procedure, which states that affirmative defenses "must" be pled in a responsive pleading and fails to require defendants to show good cause and other matters required for amended pleadings under FRCP 15 and 16.

RESPECTFULLY SUBMITTED:

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