No. 20-6

In the
Supreme Court of the United States

WILLIAM BURKE,
Petitioner,

v.

PROGRESSIVE GULF INSURANCE,
Respondent.

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

BRIEF IN OPPOSITION

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RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent Progressive Gulf Insurance Company makes the following corporate disclosure:

Progressive Gulf Insurance Company is not a publicly owned corporation or publicly held entity. Progressive Gulf Insurance Company is owned by The Progressive Corporation, which is Progressive Gulf Insurance Company's parent organization. The Progressive Corporation owns 10% or more of Progressive Gulf Insurance Company's stock. There are no other publicly held corporations, nor any other publicly held entities that have a direct financial interest in the outcome of this litigation.

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RELEVANT CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

A. The United States Constitution

Article III, § 2

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the

same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1

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 re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII

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.

B. The United States Code

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

. . . .

28 U.S.C.A. § 1333 (1).

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

28 U.S.C.A. § 1332(a).

§ 1391. Venue generally

(b) Venue in general.--A civil action may be brought in--

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

28 U.S.C.A. § 1391(b)(1)-(2).

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

. . .

> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

28 U.S.C.A. § 1292.

C. Federal Rules of Civil Procedure

9(h) Admiralty or Maritime Claim.

> (1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.
>
> (2) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

STATEMENT OF THE CASE

Petitioner William Burke (hereinafter, "Burke") had a large motor yacht, the *CALUSA EXPLORER*, designed and custom-built for himself when he lived in Florida. He then moved to the mountains of western Virginia and had the *CALUSA EXPLORER* trucked overland and launched into the waters of Smith Mountain Lake, where he kept the vessel tied up at a dock behind his house. Once the *CALUSA EXPLORER* was there, Burke bought a policy of marine insurance from Progressive Gulf Insurance Company (hereinafter, "Progressive"). In order to be afforded coverage under that policy, Burke was required properly to winterize his vessel prior to the onset of cold weather each year and to keep the *CALUSA EXPLORER* in a seaworthy condition. He did neither. As a result, during a cold spell in January of 2018, the *CALUSA EXPLORER* sank at her mooring behind Burke's house. Progressive investigated that loss and determined that Burke's yacht flooded and sank as a direct result of his failure properly to winterize the *CALUSA EXPLORER*, which also rendered the vessel unseaworthy. Because of that, Progressive denied Burke's claim for damage arising out of the sinking.

Burke disputed Progressive's denial of his claim. Accordingly, Progressive sought a declaratory judgment from the United States District Court for the Western District of Virginia that its policy afforded no coverage for this loss. Based on Burke's own sworn admissions concerning the facts of his case and the plain language of Progressive's policy, the District Court awarded summary judgment to Progressive,

finding no coverage for this loss because Burke had failed to keep the *CALUSA EXPLORER* seaworthy. Burke—who had been represented by counsel before the District Court—then appealed, *pro se*, to the Fourth Circuit Court of Appeals.[1] That appeal was a brazen and misguided attempt to relitigate the merits of the case. It included Burke's attempt to introduce new "evidence" and his making new arguments not made in the trial court. In a *per curiam* opinion, the Fourth Circuit, declining to address issues first raised on appeal, found no error in the proceedings below and affirmed the District Court's grant of summary judgment.

Now, in seeking a writ from this Court, Burke for the first time raises a challenge to the District Court's jurisdiction to decide his case. Likewise, although never raised before, he challenges the constitutionality of summary judgment as a procedural device. Yet neither assignment of error has any merit. The District Court unquestionably had jurisdiction to decide the

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[1] It should be noted that Burke drifts in and out of *pro se* status as and when it suits his needs. Despite being nominally *pro se* now, he has been represented by no fewer than four attorneys at one time or another in this case. Significantly, he was represented by counsel when his Examination Under Oath was taken during Progressive's investigation of this loss and throughout the entirety of his case's pendency before the District Court. Thereafter, he reverted to *pro se* status, resulting in the Fourth Circuit being remarkably patient with him and according him considerable leniency with regard to its deadlines and rules. Yet, by the end of Burke's appeal before the Fourth Circuit, it was plain that his "*pro se*" briefing there was being ghostwritten by an attorney. That also appears to be so in regard to Burke's instant Petition for a Writ of Certiorari.

underlying case, both under its constitutional grant of admiralty jurisdiction and—alternatively—under that court's diversity jurisdiction as well. As for Burke's contention that summary judgment is itself unconstitutional, he's just wrong. Not only has this Court consistently upheld the constitutionality of trial courts deciding cases on summary judgment, but the facts of Burke's case are particularly well suited to pretrial resolution.

Burke has had his day in court. He lost. He exercised his right of appeal and lost again. He is now down to grasping at straws. Given all that has gone before, Progressive respectfully submits that further litigation of this case is unwarranted. It manifestly would be a waste of this Court's time and the parties' money. Accordingly, it asks that Burke's Petition be denied.

SUMMARY OF THE RESPONDENT'S ARGUMENT

Petitioner's Question I: Is an insurance company allowed to manipulate outdated, obsolete maritime laws in order to falsely claim that a vessel is located in navigable waters with the primary goal of putting the insured at a legal and financial disadvantage?

Progressive did not "manipulate" anything. It invoked the District Court's admiralty jurisdiction because a policy of marine insurance is a maritime contract. There can be no doubt that the District Court was properly empowered to interpret the parties' rights and obligations under it by exercising its constitutional

grant of admiralty jurisdiction. By focusing on whether the *CALUSA EXPLORER* was located on navigable waters when it sank, Burke is conflating the federal courts' admiralty *tort* jurisdiction with its jurisdiction to hear cases arising out of maritime *contracts*. As it is, the District Court relied on Virginia state law to supply the rule of decision in Burke's case in any event, and Progressive invoked the District Court's diversity jurisdiction in the alternative, the exercise of which would have led to precisely the same result.

Petitioner's Question II: Did the [sic] Summary Judgment deny Mr. Burke's constitutional right to a fair trial under Amendment 7?

The award of summary judgment in this case did not deprive Burke of any constitutional right. This Court consistently has held that litigants are not deprived of their Seventh Amendment right to trial when material facts are not in dispute. Burke admitted that he failed to comply with the policy's requirement that he maintain his vessel in a "seaworthy" condition, as that term is defined in Progressive's policy. Because of that failure, there can be no coverage under the policy for his claim. Moreover, by failing to raise this issue before, Burke has forfeited the right to premise his appeal on it, for the first time, now.

ARGUMENT

I. Progressive properly invoked the District Court's admiralty jurisdiction, the District Court properly relied upon the General Maritime Law as the substantive law of the case, resulting in the application of Virginia contract law to decide the dispute, and the same result would have been obtained had the District Court exercised the diversity jurisdiction that Progressive also invoked, in the alternative.

A. Progressive properly invoked the District Court's admiralty jurisdiction.

Progressive's declaratory judgment action invoked the admiralty jurisdiction of the District Court because the policy of marine insurance in dispute was and is a maritime contract. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 75 S. Ct. 368, 370, 99 L. Ed. 337 (1955) ("Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction.") (citing *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. 1, 2, 20 L. Ed. 90 (1870); *see also Irwin v. Eagle Star Ins. Co.*, 455 F.2d 827, 828-29 (5th Cir. 1972) ("A hundred years ago, the Supreme Court, in a thoroughly exhaustive opinion authored by Mr. Justice Bradley, held that a contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States Courts . . . .") (internal citations omitted); *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022 (9th Cir. 2001) (finding an insurance

policy for a pleasure vessel is within that court's admiralty jurisdiction).

Burke appears not to have understood the foregoing jurisdictional basis for this case. Instead, he has seized on the concept of "navigable waters", which would be a key component of the jurisdictional analysis *if* the instant action involved a maritime tort. It doesn't. This is a maritime contract case. That's why Progressive never alleged that the *CALUSA EXPLORER* sank in navigable waters. It didn't need to. Progressive issued Burke a marine insurance policy. Any dispute over the rights and obligations of the parties to that maritime contract fall squarely within the federal courts' constitutional grant of admiralty jurisdiction.

B. The District Court, using General Maritime Law principles, properly applied Virginia's contract construction principles to decide the case.

The District Court properly applied Virginia's contract construction principles in interpreting Progressive's policy and applying them to the facts of Burke's claim. In *Wilburn Boat*, this Court held that, under the General Maritime Law, disputes involving marine insurance contracts are to be governed by state law unless an established federal maritime common law rule applies, or the need for national uniformity warrants fashioning such a rule. *See Wilburn Boat*, 348 U.S. at 321; *Graham v. Milky Way Barge, Inc.*, 811 F.2d 881, 885 (5th Cir. 1987). In this instance, no federal maritime common law rule was implicated, nor is there a need for national uniformity that would justify fashioning such a rule. Thus, the Progressive policy at

issue is to be construed under state law. In this case, it is Virginia's contract interpretation principles that should have been—and were—applied.

Burke was and is a Virginia resident who applied to Progressive for a policy of marine insurance that was delivered to him in Virginia, and which was intended to insure a vessel that he operated and kept solely in Virginia. Because of that, under *Wilburn Boat*, the District Court turned to the contract construction law of Virginia to interpret the Progressive policy Burke was issued for the *CALUSA EXPLORER*. *See Progressive Gulf Ins. Co. v. Burke*, No. 7:18-CV-00293, 2019 WL 2076403, at *3 (W.D. Va. May 10, 2019), *aff'd*, 791 F. App'x 432 (4th Cir. 2020). Under Virginia law, the interpretation of an insurance policy presents a question of law. Hence, given the facts of this case, the District Court was able properly to decide the coverage issue presented at the summary judgment stage. *See Va. Farm Bur. Mut. Ins. Co. v. Williams*, 677 S.E.2d 299, 302 (Va. 2009).

C. Progressive invoked the District Court's diversity jurisdiction, in the alternative, in its Complaint, the exercise of which would have led to precisely the same result.

Burke's challenge to the District Court's exercise of its admiralty jurisdiction in this instance is moot. Burke is a citizen of Virginia. Progressive is a corporate citizen of Ohio. The amount in dispute exceeded $75,000. Because of that, Progressive's Complaint seeking declaratory judgment also invoked the diversity jurisdiction of the District Court, in the

alternative.[2] Had the District Court actually decided the case under its grant of diversity jurisdiction, it necessarily would have applied the same Virginia rule of contract construction that it applied—via *Wilburn Boat*—in deciding the case under its admiralty jurisdiction . . . leading to precisely the same result. Hence, Burke's attacking the District Court's decision on jurisdictional grounds is just that much more of a legal red herring.

II. Summary judgment does not violate the Seventh Amendment right to a jury trial, and the District Court appropriately applied that procedure in this case.

A. Summary judgment itself does not violate the Seventh Amendment.

Burke claims that the District Court granting Progressive summary judgment deprived him of his constitutional right to trial by jury.[3] He is wrong about that. This Court long ago made it clear that the federal courts' well-entrenched summary judgment procedure itself does not deprive litigants of their Seventh Amendment rights. That Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the

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[2] In his Answer to Progressive's Complaint, Burke admitted that the trial court properly has diversity jurisdiction over this dispute.

[3] Burke is raising this issue for the first time now. Because he has not raised or preserved the issue before, Progressive submits that it is not properly before this Court as a basis for granting Burke the writ he is now requesting.

> right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in a Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. Yet this Court has held that "[n]o one is entitled in a civil case to trial by jury ***unless and except so far as there are issues of fact to be determined***." *Ex parte Peterson*, 253 U.S. 300, 310 (1920) (emphasis added). The constitutionality of that rule consistently has been upheld. For example, In *Parklane Hosiery Co. v. Shore*, this Court reasoned that "many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment," ***including summary judgment***. 439 U.S. 322, 336, 99 S.Ct. 645, 58 L. Ed. 2d 552 (1979) (citing *Fid. & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 319-21, 23 S. Ct. 120, 47 L. Ed. 194 (1902)) (emphasis added).

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter;" rather, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

When properly applied, summary judgment does not violate the Seventh Amendment because a court awarding summary judgment decides only questions of law, as no triable issue of fact exists to be submitted to a jury. *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) (citing *Fid. & Deposit Co.*, 187 U.S. at 319-20). This procedure balances litigants' right to a jury with the proper functioning of our courts, helping to insure that only cases with genuine disputed issues of fact go to trial, thereby conserving limited judicial time and resources.

In *Jefferson v. Sewon Am., Inc.*, the 11th Circuit addressed the constitutionality of summary judgment, writing, "an *amicus curiae* . . . advances the radical argument that summary judgment is always unconstitutional. Nonsense. The Supreme Court made clear long ago that 'summary judgment does not violate the Seventh Amendment.'" 891 F.3d 911, 919 (11th Cir. 2018) (finding a jury trial unnecessary when pertinent facts are indisputable from the record and the only remaining matters are legal questions) (quoting *Parklane Hosiery Co.*, 439 U.S. at 336 (citing *Fid. & Deposit Co.*, 187 U.S. at 319-21)). The foregoing proposition is widely recognized across the Circuits. *See, e.g., Calvi v. Knox County*, 470 F.3d 422, 427 (1st Cir. 2006) (finding argument that summary judgment violates right to jury trial is "hopeless" because that right exists only with respect to genuinely disputed issues of material fact); *Baranowski v. Hart*, 486 F.3d 112, 126 (5th Cir. 2007) (finding the function of a jury

is to try material facts; where no such facts are in dispute, there is no occasion for a jury trial); *Stanko v. Mahar*, 419 F.3d 1107, 1112 (10th Cir. 2005) (finding proper entry of summary judgment does not violate Seventh Amendment where no triable issues exist to be submitted to a jury).

There is nothing wrong with summary judgment as a procedural device in deciding cases before a federal trial court. It is a jury's job to decide questions of fact. It is the court's job to decide questions of law. When, as here, there are no disputed questions of material fact to be decided, there simply is no need for—and, clearly, no right to—a jury to hear the case.

B. Summary judgment was appropriately awarded in this case.

Setting aside Burke's unwarranted and unsupported claim that insurance companies unfairly seek out summary judgment in order to avoid paying claims, his remaining contention that summary judgment was improperly awarded in this case just does not comport with the facts. To begin with, the same District Court that Burke claims was so unfair to him *declined* to award Progressive summary judgment on the question of whether Burke had properly winterized the *CALUSA EXPLORER*. *See Progressive Gulf Ins. Co.*, 2019 WL 2076403 at *3. Indeed, it decided that, viewing the facts in the light most favorable to Burke, a genuine issue of material fact existed regarding the "local custom" for winterizing boats on Smith Mountain Lake. *See Id.* Unfortunately for Burke, there simply were no material facts in dispute when it came to his failing to maintain the

CALUSA EXPLORER in a "seaworthy" condition, as that term was defined in Progressive's policy.

Among other things, the Progressive policy specified that, in order to satisfy its requirement that an insured vessel be maintained in a seaworthy condition, Burke had to follow all customary and manufacturer-recommended maintenance guidelines.[4] *See Id.* at

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[4] The Policy defines "Seaworthy" as:

> ***GENERAL DEFINITIONS***
>
> ***13. "Seaworthy"*** *means fit to withstand the foreseeable and expected conditions of weather, wind, waves, and the rigors of normal and foreseeable use in whatever type of waters a watercraft will be located. For a watercraft to be considered seaworthy, you must (without limitation):*
>
> *a. exercise due diligence to properly manage the watercraft;*
>
> *b. comply with all federal safety standards and provisions; and*
>
> *c. follow all customary and manufacturer-recommended maintenance guidelines.*

Progressive Gulf Ins. Co., 2019 WL 2076403 at *2.

The Policy also excludes from its coverage those losses that occur because a watercraft is not seaworthy:

> *Your Representations to Us Regarding Your Covered Watercraft.*
>
> *You represent to us that, at the inception of this policy, your covered watercraft is in seaworthy condition. Violation of this representation will void this policy from its inception.*
>
> *You further represent to us that you will continue to maintain your covered watercraft in a seaworthy condition*

*3-*4. Burke did not. Indeed, he admitted that he did not under oath.[5] *See id.* at *1. Burke's son, to whom Burke had delegated the task of winterizing the *CALUSA EXPLORER*, separately confirmed in writing that those guidelines were not followed. *See id*. And the unrebutted evidence presented to the District Court was that it was because of Burke's admitted failure to follow the maintenance guidelines of the *CALUSA EXPLORER*'s air conditioning system's manufacturer that the vessel sank at its berth in January of 2018. *See id.* at *1, *3-*4. Likewise, there was no dispute about what Burke's Progressive policy required in regard to following those manufacturer's guidelines. Both those policy terms and the guidelines at issue are undeniably plain and unambiguous. They mean just what they say. And Burke admitted that he did not comply with them. Small wonder, then that the District Court granted Progressive summary judgment in this case, or that the Fourth Circuit saw no reason whatsoever to disturb the District Court's judgment on appeal.

> *and to comply with all federal safety standards and provisions. This policy does not cover any loss or damages caused by your failure to maintain your covered watercraft in seaworthy condition or to comply with all federal safety standards and provisions.*

Id.

[5] Not only did Burke not comply with the manufacturer's instructions for the *CALUSA EXPLORER*'s air-conditioning system, he admitted that he had never even seen them before when presented with a copy of them in his examination under oath, conducted well after the *CALUSA EXPLORER* sank.

If ever there was a case for which an award of summary judgment was appropriate, this was it. Burke may not have liked the fact that the District Court granted Progressive a declaratory judgment that its policy did not afford Burke coverage for the loss of the *CALUSA EXPLORER*, but the law and the facts of this case—facts to which Burke himself admitted under oath—could not have led to any other result. There was nothing illegal, unfair, or unconstitutional about summary judgment being awarded in this case. The facts were undisputed and the law was clear. Any other outcome would itself have been improper.

CONCLUSION

William Burke got everything to which he was entitled in the proceedings before the United States District Court for the Western District of Virginia. And the Fourth Circuit Court of Appeals was absolutely correct to affirm those same results. The trial court had multiple appropriate bases upon which to exercise jurisdiction over this case. It relied on the appropriate law to inform its decision. That decision was reached via the constitutionally sound process of summary judgment and premised firmly and appropriately on the lack of any genuine dispute of material facts in this case. For the very same reasons that both the District Court and the Court of Appeals have ruled that Progressive's policy afforded no coverage to William Burke for the *CALUSA EXPLORER*'s sinking in 2018, Progressive Gulf Insurance Company respectfully prays that this Court deny Burke's instant Petition for Writ of Certiorari.

Respectfully submitted,

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