No. 20-6

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM BURKE,

Petitioner,

vs.

PROGRESSIVE GULF INSURANCE,

Respondent.

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

REPLY BRIEF OF PETITIONER

William Burke
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INTRODUCTION

Progressive Gulf Insurance did not act in good faith in their dealings with their client William Burke. Progressive has a history of engaging in "unfair and deceptive business practices" . (*Bobby Jones v. Progressive Casualty Insurance Company, et al.*, Case No. 3:16-cv-06941, in the U.S. District Court for the Northern District of California).

Progressive offers 'lowball' settlements. When policyholders refuse the settlements, Progressive sues forcing the client to incur exorbitant legal fees.

Progressive disparages their policyholders. Progressive referred to Mr. Burke as a "soap salesman" when in fact, he worked his way up to the position of a District Manager. They impugned his character by questioning his Pro Se status. In the final stages of this case, Mr. Burke daughters and their friend, who were trained in elementary education and social work, a far cry from law, helped him write the briefs. Progressive is again trying to manipulate the court by calling into question William Burke's honesty and veracity. Progressive avoids jury trials in favor of Summary Judgments in order to deny claimants their proverbial day in court. (Progressive Mountain Insurance Company *v.* Auto-Owners Insurance Company, 19-11439 11th Cir. 2020) By petitioning the court for a Summary Judgment and receiving a judgment in their favor, Progressive is able to avoid paying out claims. Another tactic Progressive employs is accusing plaintiffs of bringing up new issues.

This case is a clear example of Progressive's questionable practices.

REPLY TO ARGUMENTS

I. Progressive claims that they properly invoked the District Court's admiralty jurisdiction and that the same result would have been obtained had the District Court exercised the diversity jurisdiction that Progressive also invoked.

Progressive did not properly invoke the District Court's admiralty jurisdiction.

Progressive invoked the admiralty jurisdiction of the District Court because the policy of marine insurance in dispute was and is a maritime contract. However, the Ninth Circuit's interpretation of *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23, 125 S. Ct. 385, 160 L.Ed.2d 283 (2004) does not concur. The Ninth Circuit's "primary objective" test examines whether the contract has a primary purpose of affecting maritime commerce. They concluded that a policy is not maritime if it primarily covers shore-side risks and excludes maritime risks. The vessel in question was basically a "floating dock" at the time of the occurrence. As such, maritime law does not apply. Putting the case in maritime court added excess burden on William Burke. Mr. Burke tried and failed to acquire legal representation familiar with maritime law. The cost of this legal burden is exorbitant and out-of-reach to the average Progressive client. The underlying motive behind this tactic cannot be disputed.

II. Progressive's argument is that summary judgment does not violate the Seventh Amendment right to a jury trial and was appropriately awarded.

A. Summary judgment does violate the Seventh Amendment.

"Summary judgments should be cautiously invoked so that no person will be improperly deprived a trial of disputed factual issues." Arkansas Right to Life v. Butler, 983 F. Supp. 1209, 1215 (W.D. Ark. 1997), aff'd 146 F.3d 558 (8th Cir.1998). It is "an extreme remedy which should be sparingly employed." Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir.1970). "Summary judgment is a lethal weapon, and courts must . . . beware of overkill in its use." Brunswick Corp. v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1967).

The Seventh Amendment guarantee of a right to trial by jury is violated by allowing summary judgments where there are "genuine issue[s] as to . . . material fact[s]" and a right to jury trial exists. Mr. Burke preferring a jury trial is not a new issue. It is his constitutional right. The court decision should be reserved for a jury.

Even so-called "meritless" cases should go to a jury if the non-moving party has any evidence that would allow a jury to reasonably find for him or her. The important question is whether the non-moving party, or party that did not bring the case, can meet his or her burden of production—and not whether the case ultimately has "merit." (*The Unconstitutional Application of Summary Judgment in Factually Intensive Inquires* Journal of Constitutional Law Craig M. Reiser* January 2014). Fed. R. Civ. P. 56(f) expressly provides for the denial of summary judgment motions if the nonmoving party has not had an opportunity to make full

discovery. For example, a Mr. John Flaherty, employed at Defender Industries, never had an opportunity to make a statement to the court. Flaherty clearly stated that, "If you are using a reverse cycle air conditioning system year-round, you don't winterize the system. If it were winterized you would need to commission the system every time it was turned on."

B. Summary judgment was not valid in this case.

Progressive claims that a Summary Judgment was warranted because no material facts were in dispute. There are facts in dispute. At the heart of this case is the dispute about winterizing the vessel. Mr. Burke did winterize his catamaran houseboat per customary and manufacturer-recommended maintenance guidelines and per local custom. The houseboat was equipped with two Marvair SeaMach systems which are reverse cycle air conditioner and heater systems allowing Mr. Burke to use his houseboat year round including the winter. Mr. Ryan repeatedly refers to these as air conditioning units. He is incorrect. Perhaps Mr. Ryan did not recognize or was not familiar with reverse cycle air conditioner and heater systems. If Mr. Ryan would have contacted the manufacturer, he would have learned that the boat had been properly winterized according to the manufacturer-recommended guidelines and local custom. While Mr. Burke did not recall seeing the manual, he never stated that he did not winterize the boat properly as attested to by Mr. John Flaherty of Defender Industries. During Mr. Burke's examination under oath on May 17, 2018, Christopher Abel, Progressive's counsel, brought a manual and

entered it into evidence admitting that it was most likely not the correct manual, "... And it may not be the same model ... that this is the owner's manual for a kind of Marvair marine air conditioner." Mr. Abel, just as Mr. Ryan, erroneously refers to an "air conditioner". Progressive concluded that Mr. Burke did not follow the manufacturer -recommended guidelines based on an incorrect manual for the Marvair SeaMach reverse cycle air conditioner and heater system. Mr. Burke continued to maintain that he followed all customary and manufacturer recommended maintenance guidelines and local custom.

Progressive's claim that the strainer bowl in question cracked due to the winter weather is also in dispute. Neither Mr. Ryan nor Progressive exercised due diligence in seeking the cause of the broken strainer bowl. Progressive did not want to acknowledge this fact.

In addition, there is another dispute in this case and that is with Progressive itself. Progressive Gulf Insurance initially determined that William Burke's claim had merit and saw fit to offer a monetary award. While the offer was far below the value of the vessel, it does prove that Progressive did acknowledge that Mr. Burke's claim was valid and that they deemed his vessel seaworthy.

Conclusion

William Burke respectfully requests the Writ of Certiorari be granted.

Respectfully Submitted,

William P Burke Jr

William P. Burke Jr