

No. 21-875

In The
Supreme Court of the United States

HARRY BARNETT,

Petitioner,

v.

MENARD, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Is the issue of a district court's discretion to enforce a pre-trial order an important legal matter that has conflicting rulings throughout the United States Circuit Courts of Appeals and this Court which warrants review by this Court?

DISCLOSURE STATEMENT

Barnett v. Menard, Inc., d/b/a Menards

Supreme Court of the United States
Docket No. 21-875

7th Circuit Docket No. 20-1024

District Court Docket No. 16-cv-09335

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Menard, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court:

Cremer Law, LLC

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any;

None

(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

DISCLOSURE STATEMENT—Continued

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BRIEF IN OPPOSITION
OPINION BELOW

The opinion for the United States Court of Appeals for the Seventh Circuit, issued March 23, 2021, is reported at *Barnett v. Menard, Inc.*, 851 Fed. Appx. 619 (7th Cir. 2021).

JURISDICTIONAL STATEMENT

Respondent does not dispute this Court's jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), but denies that the case satisfies the standard set forth in Supreme Court Rule 10. Petitioner filed his Petition for Writ of Certiorari on October 4, 2021.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case contains information that is irrelevant, including argument that improperly goes to the merits of the case. Accordingly, Respondent only sets forth the following concise facts that directly address the narrow issue to be considered by this Court. Therefore, Respondent offers the following as its Counterstatement of the Case.

On September 1, 2016, Petitioner filed his *Verified Complaint at Law* with the Circuit Court of Cook County, Law Division, in Chicago, Illinois. The Complaint alleged that Petitioner was allegedly injured after attempting to remove a plank of wood from a stack

located at Respondent's home improvement store. On September 29, 2016, Menard removed the matter to the United States District Court for the Northern District of Illinois, pursuant to 28 U.S.C. §1441(a) and 28 U.S.C. §1332(a)(2)(c)(1), there being diversity between the citizenship of the parties and the matter in controversy exceeding the sum or value of \$75,000, exclusive of interest and costs. Petitioner denied that it failed to stack and secure the boards in a safe manner. Petitioner also claimed that Petitioner's own actions resulted in his injury.

On February 18, 2017, Petitioner served Respondent with "Plaintiff's First Set of Interrogatories to Defendant" (sic). Consequently, on March 15, 2017, Respondent served its "Answers and Objections to Plaintiff's First Set of Interrogatories to Defendant." In response to interrogatory No. 15, Petitioner stated objections, but nevertheless stated:

.... Subject to and without waiving said objection, and limiting Defendant's answer to written safety measures in effect on the date of the alleged incident regarding products falling in Yard/Shipping/Receiving Department, Defendant states as follows: "Policy & Procedure #99-Material Handling."

Petitioner's interrogatories made no request for any type of documents. Petitioner failed to issue a FRCP Rule 34 production request or file any motion compelling the production of any documents prior to trial.

On July 27, 2018, Petitioner and Respondent filed their Joint Final Pretrial Order (“Pre-Trial Order”) with the District Court. As part of the Pre-Trial Order, Respondent listed the exhibits it intended to use at trial in its exhibit list. Respondent listed five exhibits on its list with Exhibit #5 being the “Policy and Procedure #99 (as redacted).” Petitioner stated “Plaintiff has no objections” in the Pre-Trial Order to all the five exhibits Menard’s had listed, including Policy #99.

Both Judge Bucklo who initially presided over the case, and Judge Leinenweber who presided over the trial, had standing pre-trial orders that stated objections to exhibits were waived if not made in the pre-trial order.

On November 4, 2019, the case proceeded to trial in front of the District Court Judge, Harry Leinenweber. At trial, Judge Leinenweber admitted Menard Trial Exhibit #5 (Policy and Procedure #99) over Petitioner’s objection on the basis that the objection had been waived. On November 6, 2019, Judge Leinenweber directed a verdict in favor of Petitioner regarding Petitioner’s own comparative fault but denied Petitioner’s motion for a directed verdict as to Respondent’s liability. As such, on November 6, 2019, the Jury returned a verdict in favor of Respondent finding that Respondent was not liable to Petitioner.

On December 2, 2019, Petitioner filed Rule 50 and Rule 59 post-trial motions to set aside the Jury’s verdict in favor of Respondent. The Court denied Petitioner’s motion on December 4, 2019. Subsequently,

Petitioner appealed the decision to the 7th Circuit Court of Appeals, and on March 23, 2021, the Seventh Circuit affirmed the trial court's ruling in a nonprecedential disposition. Petitioner filed a motion for rehearing on April 12, 2021, which the Seventh Circuit denied on May 5, 2021.

In affirming the jury verdict, the 7th Circuit stated as follows:

“Enforcement of a final pretrial order is within the sound discretion of the district court. *Abellan v. Lavelo Prop. Mgmt., LLC*, 948 F.3d 820, 830 (7th Cir. 2020). Barnett received ample notice that Menards planned to introduce the policy at trial and has provided no good explanation for his failure to object before trial or move to compel production of the document. On the contrary, Barnett’s reply brief suggests that the decision not to object was strategic—he proclaims that Menards’s “refusal to produce anything during discovery was a boon” and “behooved” his case at trial. Indeed, in both his questioning and closing argument, Barnett’s counsel focused on Menards’s reticence and the missing policy; for example, on direct examination, counsel asked Barnett’s safety expert whether it was “concerning” that Menards “had no specific policy and procedure for the safe handling of lumber and stacking of the boards.” “It is not an appellate court’s responsibility to rescue a party from a tactical decision that, in hindsight, he regrets.” *Sanchez v. City of Chicago*, 880 F.3d 349, 360 (7th Cir. 2018). We therefore

see no abuse of discretion in the court’s decision to enforce the pretrial order and admit the policy. *See Dominguez v. Hendley*, 545 F.3d 585, 593 (7th Cir. 2008) (upholding admission of exhibit at trial where no objection was made in pretrial order).”

Barnett v. Menard, Inc., 851 Fed. Appx. 619 (7th Cir. 2021).

Petitioner then filed the instant Petition on October 4, 2021.

REASONS FOR DENYING THE PETITION

I. The Petition Fails to Meet the Criteria for Review Under Rule 10 of the Rules of the United States Supreme Court

The Court should deny the subject Petition because it fails to meet the criteria set forth in Rule 10 of the Rules of the United States Supreme Court that would make it worthy of this Court’s precious time and resources. Pursuant to Rule 10 of the said rules, the Court uses the following criteria to evaluate whether a case deserves the Supreme Court’s consideration:

“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

As discussed below, the Petition fails the criteria set forth in Rule 10, and improperly argues factual merit-based issues which are improper for said Petition.

A. The Petition Does Not Implicate an Important Legal Matter or Issue

Seeing how acceptance of this Petition is not by right, it is abundantly clear from reviewing Petitioner's Petition that none of the above enumerated requirements for review exist in the present case. First, there is no "important" legal issue or legal matter arising from this case as is required by Rule 10. Despite trying to frame this as a novel conflict between the Federal Rules of Civil Procedure and local district practice, it is nothing more than a rudimentary inquiry regarding a district court's discretion in enforcing its pre-trial orders. This is not an important question or legal issue that needs the review of the highest Court in the United States of America.

In fact, various Circuit Courts of Appeals have already addressed this issue and have come to a consensus. The Courts that have considered this issue agree that a district court has sound discretion in enforcing its pre-trial orders. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985); *Geiserman v. MacDonald*, 893 F.2d 787, 790 (5th Cir. 1990); *Habecker v. Clark Equip. Co.*, 36 F.3d 278, 289 (3d Cir. 1994); *Tatum v. Land*, No. 95-6378, 1997 U.S. App. LEXIS 3798, at *5 (6th Cir. Feb. 26, 1997); *Sosa v. Airprint Sys.*, 133 F.3d 1417, 118 (11th Cir. 1998); *Dominguez v. Hendley*, 545 F.3d 585, 593 (7th Cir. 2008) (upholding admission of exhibit at trial where no objection was made in pretrial order); and *Abellan v. Lavelo Prop. Mgmt., LLC*, 948 F.3d 820, 830 (7th Cir. 2020). In fact, the 7th Circuit Court of Appeals cited to this rationale in ruling that

the district court did not abuse its discretion in enforcing its pre-trial order and admitting exhibit #5. Thus, whether two district courts decide to enforce a pre-trial order differently from each other is of no consequence. The lack of importance of any legal issue is further supported by the fact that the 7th Circuit designated its opinion as “Nonprecedential Disposition.” Thus, the 7th Circuit in giving its opinion this designation clearly shows its own belief that the appeal did not present any novel or important legal issues. Otherwise, it would have wanted its own opinion to have precedential effect.

Similarly, Petitioner’s attempt to magnify the importance of his argument by invoking the 5th Amendment of the United States Constitution is completely without merit. First, merely arguing a constitutional issue is involved does not automatically invoke the jurisdiction of the United States Supreme Court. Second, contrary to Petitioner’s contention, the district court’s and 7th Circuit’s decisions have absolutely no bearing on his 5th Amendment rights. The proceedings giving rise to this Petition arose from a Civil trial involving a premises liability case at a home improvement store. Petitioner was given a full chance to pursue his case through pre-trial procedures such as discovery and motion practice, along with pursuing his case at trial and on appeal. As the 7th Circuit stated in its opinion, “Barnett received ample notice that Menards planned to introduce the policy at trial and has provided no good explanation for his failure to object before trial or move to compel production of the document.” As

such, Petitioner cannot complain that he has been denied due process in pursuing his claim.

The fact that Petitioner felt the district court made a wrong ruling does not invoke any violation of his 5th Amendment right to due process. Using Petitioner's logic, every party's 5th Amendment right to due process would be infringed anytime a district court issued a ruling that was adverse to a certain party. Thus, Petitioner's 5th Amendment argument fails to raise this petition to a level necessitating review by this Court.

Accordingly, Petitioner has provided no support that his Petition involves any important legal matter or issue.

B. Petitioner Fails to Demonstrate Conflicting Opinions Amongst the Circuit Courts and Supreme Court

Not only does Petitioner have to show there is an important legal matter at issue pursuant to S. Ct. Rule 10, he has to also show there are inconsistent rulings amongst the various Circuit Courts regarding this issue. Even assuming arguendo that there is an important legal matter at issue, Petitioner fails to cite to any inconsistent opinions amongst the Circuit Courts. However, as stated to the contrary above, the Circuits that have addressed this issue agree that the district courts have broad discretion in enforcing pre-trial orders. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985); *Geiserman v. MacDonald*, 893 F.2d 787, 790 (5th Cir. 1990); *Habecker v. Clark Equip. Co.*, 36

F.3d 278, 289 (3d Cir. 1994); *Tatum v. Land*, No. 95-6378, 1997 U.S. App. LEXIS 3798, at *5 (6th Cir. Feb. 26, 1997); *Sosa v. Airprint Sys.*, 133 F.3d 1417, 118 (11th Cir. 1998); *Abellan v. Lavelo Prop. Mgmt., LLC*, 948 F.3d 820, 830 (7th Cir. 2020). Instead of discussing any conflicts in the opinions of the various Circuits, Petitioner improperly argues the merits of his case.

Similarly, Petitioner fails to demonstrate how the 7th Circuit's opinion regarding this matter is inconsistent with any prior opinion of this Court.

Any conflict alleged by Petitioner is a self-created one. While Petitioner alleges there is a conflict between the Federal Rules of Civil Procedure and the local district court rules, he again presents no case law from the various Circuits indicating that such a conflict exists. The only conflict that exists is the continued disagreement by Petitioner with the verdict in the district court and the affirmation of said verdict by the 7th Circuit Court of Appeals. Petitioner cannot continue to raise the same stale arguments in order to relitigate a case that was properly decided.

Accordingly, the Petition set forth must be denied.

CONCLUSION

After review of this Petition, it is quite clear that Petitioner has failed to meet his burden in showing that this Petition for Writ of Certiorari should be granted. Petitioner cannot show that this Petition

involves important legal matters or issues leading to conflicting opinions between the various Circuit Courts of Appeals and this Court. As such, Respondent respectfully asks this Court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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