No: 23-7515

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS DAVIS
Petitioner,

Vs.

HEMMERSBACH U S LLC
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Carlos Davis

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Appellant - Pro Se

I QUESTION PRESENTED

Verbal agreements are contracts made by individuals through a verbal exchange. There need not be more information involved in an oral contract than just the **offer and the acceptance of that offer**. If a person does not fulfill their part of the verbal contract, there are grounds to sue.

The Due Process Clause of the Fourteenth Amendment guarantees every litigant the right "to present their case and have its merits fairly judged *Logan v Zimmerman Brush Co. (1982).* As the brief explains, this right must include the right to present evidence necessary to establish a constitutional claim.

This case therefore presents the following questions:

1. **Does the 5th Circuit's circuit rules supersede The Federal Circuit and U.S Supreme Court, particularly when parties may present new arguments for the first time on appeal?**
2. **Did Plaintiff have the rights to present all evidence in regards to this case? Are the proceedings of this case being presented by the statue of the law?**
3. **Are verbal agreements legally binding? Was there a verbal agreement between the Plaintiff and the Defendant?**

PARTIES TO THE PROCEEDINGS BELOW

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner is Carlos Davis

Respondents are Zascha Blanco Abbott; Mark Carver; and Angella H. Myers;

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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III. Table of Authorities

Cases

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IV. Petition for Writ of Certiorari

Carlos Davis, Petitioner, (Pro Se), asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

V. Opinions Below

The decision by the Fifth Circuit refusing to hear new arguments by Presenter is reported as in *Lopez Ventura v. Sessions, --- F.3d ----, 2018 WL 5093238 (5th Cir. Oct. 19, 2018)*, which states the Fifth Circuit Court of Appeals granted relief to Manuel Lopez Ventura, based on a specific argument that was raised for the first time on appeal.

VI. Jurisdiction

Mr. Davis' Petition for Hearing En Banc to the FIFTH CIRCUIT COURT OF APPEAL was denied on March 5, 2024. Mr. Davis invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the FIFTH CIRCUIT COURT OF APPEAL Court's judgment.

VII. Constitutional Provisions Involved

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII. Statement of the Case

The US Supreme Court voted that a verbal agreement is legally binding. By an agreement being legally binding, if one does not hold up there end of the agreement, there are grounds to sue *(Morin v. Caire, 77 F.3d 116, 120 (5th Cir. 1996)*. The courts reference *"Employment is presumed to be at-will unless a Plaintiff alleges sufficient facts to establish the existence of an employment agreement or contract, the violation of which may support a claim of wrongful termination"*). When Petitioner was hired, as part of the conditions of employment, he was told that they are to never take parts home. Also, it was

something that he was reminded on a daily during the morning meetings via Microsoft Team. In *Wells v Devani*, the U.S Supreme Court found that a contract made verbally during a telephone call was enforceable and clarified the circumstances in which legally binding relations will be created.

This case presents the question of whether if Pro Se has the right to argue the correct law during the Appeal. It also present the question of was Presenter allowed to present all evidence in the proceedings.

1. Presenting new arguments for the first time on appeal?

Presenter filed his Complaint on 06/27/2023 stating that he was wrongfully terminated because he would not allow the Defendant to use his home as a personal storage for one of their newly acquired clients. This counterintuitive statement is directly tied to the verbal agreement upon hire. The complaint also reference the following disputes: Wrongful Termination (Retaliation), Bribery (Quid Pro Quo), Emotional Distress Damages, Race Discrimination, Hostile Work Environment (Intimidating Behavior), and Disparate Impact (Treated Different) which are valid employment claims that can be filed in Federal Court. On 06/28/2023, Motion to Appoint Counsel was denied and **Motion to proceed in forma pauperis** was granted. Motion to Dismiss was filed on September 22, 2023 stating that Plaintiff "fail to state a claim in which relieve can be granted". Counsel

for the Defendant is only basing their argument off activity protected by Title VII. Motion to Dismiss was granted for Defendant on 11/01/2023 by Judge David C Joseph. In *Conley v. Gibson, 355 U.S. 41 (1957)*, the U.S Supreme Court stated the interplay between Rule 8 (pleading) and Rule 12(b)(6) as follows: "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. In *Bell Atlantic Corporation v. Twombly, 55 U.S. 544 (2007)*, the Court noted questions raised regarding the "no set of facts" test and clarified that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," id. at 563. Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir. 1986) states "The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true". Notice of Appeal was filed on November 13, 2023. Opening Brief was filed on December 12, 2023. Presenter requests oral argument to assist the Court in deciding the multiple complex issues that have arisen and also reference the verbal agreement upon hire. Brief of Appellee was filed on January 8, 2024. Counsel for the Defendant welcome the opportunity to participate in oral argument to answer any questions. It is here Counsel also argues that the **verbal contract is not only insufficient a matter of law** but it cannot be considered by the Fifth Circuit

because it was not raised at the District Court level. The lower courts moved forward with the dismissal of the case. The Federal Circuit noted that arguments made for the first time on appeal may be considered (1) when new, retroactive legislation is passed while an appeal is pending, (2) when there is a change is jurisprudence of the reviewing court or the Supreme Court after consideration of the case by the lower court, **(3) when the issue is properly before the court but the parties did not argue the correct law, the court may nevertheless apply the correct law, and (4) where the party appeared pro se before the lower court, a court of appeals may be less stringent in requiring the issue to have been raised below.** On January 22, 2024, the Appeals Court dismiss the argument referencing *Burge v. St Tammy Parish, 336 F.3d 363, 372 (5th Cir. 2003).* **In this case, there was assigned counsel**. **They were not Pro Se**. The Third Circuit has also recognized that "while parties may not raise new arguments, they may place greater emphasis on an argument or more fully explain an argument on appeal" and may even "reframe their argument within the bounds of reason". *Gen. Refractories Co. v. First State Ins. Co., 855 F.3d 152, 162 (3d Cir. 2017)*. The Sixth Circuit expressed the same view in *Golden v Kelsey–Hayes, Co, 73 F3d 648, 657–658 (CA 6, 1996):* We will deviate from this rule only in **exceptional circumstances**, such as when following the rule would cause a **miscarriage of justice**, and particularly where **the question is entirely legal** and has been fully briefed by both parties. We

have also made exceptions when the proper answer is beyond doubt, no factual determination is necessary, and injustice might otherwise result. The most common situation where an appellate court might consider an argument raised for the first time on appeal is where it involves **"a question of law apparent on the face of the record,** which could not have been avoided if raised at the proper juncture"—that is, where there is nothing the opposing party could have done below to make a factual record that would change the resolution of the issue. *(See 41 Clinton Avenue Corp. v. Silver, 150 A.D.3d 1053, 1054 (2d Dept. 2017; Muniz v. Mount Sinai Hosp. of Queens, 91 A.D.3d 612, 618, 937 N.Y.S.2d 244; see Navillus Tile, Inc. v. George A. Fuller Co., Inc., 83 A.D.3d 919, 920, 920 N.Y.S.2d 786; Parry v. Murphy, 79 A.D.3d 713, 715, 913 N.Y.S.2d 285)*. Meaning, if the Complaint had read, "Plaintiff was wrongfully terminated because he would not let the Defendant use his home as a storage. This violates the verbal agreement upon hiring". Could counsel have a valid defense for the Defendant knowing that there are (9) witnesses that can confirm the agreement? Presenter also presented to the courts that there are witnesses that can testify to this verbal agreement.

2. Was presenter allowed to present all evidence in the case?

On Appeal, courts reference that presenter amended his complaint twice. Motion to Appoint Marshal Service to Serve Complaint was granted on 07/12/2023. All paperwork was filed with the U.S Marshall office on 07/20/2023. As of this day, Presenter has yet to receive for his records the "Acknowledgment of Receipt" copy for all the USM-285 forms or the "Notice of Service" copy that the law requires must be filed in the courts.

Presenter filed for Production of Documents with the courts on August 7, 2023 and August 10, 2023 and sent to the Defendant/Counsel on August 7, 2023 and August 8, 2023. In these request, presenter ask for email communications that took place while he was employed. Specifically, communications that will prove that management for the Defendant did attempt to have Presenter store parts for their clients which would violate the verbal agreement upon hiring. Presenter then received email communication from counsel for the Defendant on August, 31, 2023 and October 10, 2023 informing that the request for Discovery is premature and therefore counsel objects to the request. **The law states that after the Defendant files their answer with the courts in response to the Appellants complaints, the parties move into the Discovery Stage.**

Rule 26. Duty to Disclose; General Provisions Governing Discovery:

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, **without awaiting a discovery request**, provide to the other parties:

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

Rule 26 and the accompanying Advisory Committee Notes make clear that 26(f) conferences should happen sooner rather than later, regardless of the preliminary nature of the proceedings. Fed. Rules Civ. Proc., rule 26, 1993 Advisory Comm. Notes ["It will often be desirable . . . for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint . . . "].) Rule 26(f)(1) expressly states that "the parties must confer as soon as practicable." Respondent are in violation of the Rules and their clear directives. Motion to Compel Discovery was filed with the court on August 1, 2023, August 21, 2023 and August 29, 2023. Respondent has yet provided the information. Motion to Dismiss was granted for defendant on 11/01/2023.

Motion of Subpoena Duces Tecum was filed on August 8, 2023 and granted on August 9, 2023. With this motion, presenter was asking the third party, ADP Workforce Now, for the "Viewing Edit Audit". Within sequence of presenter responding to email communication in regard to picking up parts, a representative for the Defendant access the presenters account and added a significant amount of hours (doubled) to their time entry. These were hours the presenter could not have possibly work. The "Viewing Edit Audit" will show the Chain of Custody of the events that took place on my account and whom made the changes.

A certified letter was sent to the third party requesting the information but somehow gotten stuck "in transit" with USPS. Presenter was able to make contact to third party via email September 18, 2023 and was informed of the correct third party to retrieve the information and reference the information to the lower courts in the Appellant Brief filed on December 12, 2023. Presenter was not given the opportunity to retrieve this evidence *see Logan v Zimmerman Brush Co. (1982)*.

IX. REASONS FOR GRANTING THE WRIT

Appellate Division has broad "jurisdiction to address unpreserved issues in the **interest of justice**". The Appellate Division regularly exercises its authority to review new arguments on this basis, "as long as the issue is **determinative** and the record on appeal is sufficient to permit review." *See Watson v. City of New York, 157 A.D.3d 510, 511 (1st Dept. 2018).* The Fifth Circuit has adopted an incorrect approach for determining when an individual representing in Pro Se may present new argument *Merrill by Merrill v. Albany Med. Cntr. Hosp., 71 N.Y.2d 990, 991 (1988)* states that in some circumstances an appellate court will consider an argument even if it was not presented in the lower court. This rule applies with equal force in the Court of Appeals *See Rivera v. Smith, 63 N.Y.2d 501, 516, n.5 (1984). Goldman & Associates, LLP v. Golden, 982 N.Y.S.2d 519* **However, "questions of law which appear on the face of the record and which could not have been avoided if raised at the proper juncture may be raised for the first time on appeal"**

X. CONCLUSION

At present, the Fifth Circuit is taking a significantly narrower view of what constitutes an actionable "procedural defect" than other Circuits, a conflict that deserves resolution by this Court. The Fifth Court has erred in not acknowledging the rulings of cases not only in its own circuit Lopez Ventura v. Sessions but those of other circuits *Gen. Refractories Co. v. First State Ins. Co,* and *Golden v Kelsey–Hayes, Co,*.

The U.S Supreme Court intervention is necessary to correct legal error in this case to review the Fifth Circuit's judgment refusing to hear new arguments during the appeal stage by Pro Se, summarily reverse the decision below, hold this case as it considers the scope in other cases, or grant such other relief as justice requires. For the foregoing reasons, Mr. Davis prays that this Court grant a Writ of Certiorari to resolve the questions presented.

Respectfully submitted this 6th day of May 2024.

/s/ CD

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