

In the
Supreme Court of the United States

LAKE VILLA OXFORD ASSOCIATES, LLC
KENNETH BURNHAM, ET AL.,

Petitioners,

—v—

HOMESTEAD PROPERTIES, LP,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The trial court deemed a contractual clause on whether personal guarantee was assignable to another party without the guarantor's permission to be ambiguous, and sent the question to the jury, which decided in favor of Petitioner Kenneth Burnham. The jury verdict was overturned by the Michigan Court of Appeals, which substituted its own factual findings. The Questions Presented are:

1. Did the Michigan Court of Appeals violate the Seventh Amendment Re-Examination Clause of the United States Constitution when it substituted its own factual findings for that of the jury and denied Due Process under the Fourteenth Amendment to the Petitioner?
2. Did the Michigan Supreme Court err when it found no question from the appellee to be worthy of consideration regarding the trial court's delivery of an ambiguous contract to the jury fact finder?

CORPORATE DISCLOSURE STATEMENT

Lake Villa Oxford Associates, LLC has no parent company and no public company owns 10% or more of its outstanding stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Lake Villa Oxford Associates, LLC and Kenneth Burnham respectfully pray that a writ of certiorari issue to review the judgment below.



OPINION BELOW

The Order of the Supreme Court of Michigan, dated July 25, 2017, is reproduced in the Appendix at App.1a. The Court of Appeals of Michigan Opinion, dated September 25, 2016, is reproduced in the Appendix at App.3a. The Final Order of the County of Oakland dated October 8, 2014, is reproduced at App.11a.



JURISDICTION

The Michigan Supreme Court issued its denial of a motion for reconsideration on October 31, 2017. (App.12a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISIONS

- **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.

- **U.S. Const. amend. XIV, § 1**

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.



STATEMENT OF THE CASE

A. Procedural History

Petitioner Kenneth Burnham prevailed in a jury trial at Oakland County, Michigan on May 15, 2014. Judgment of the trial court issued on October 8, 2014. A copy of the Judgment is attached at App.11a. Res-

pondent appealed (attached at App.15a) and the Michigan Court of Appeals re-examined the facts, reversed and granted final judgment to Respondent, attached at App.3a (Petitioner's Brief in Opposition is attached at App.45a). Petitioner requested Reconsideration, attached at App.81a. The Court of Appeals refused Reconsideration, attached at App.14a. Petitioner requested Leave to the Michigan Supreme Court, attached as App.93a. Without opinion, the Michigan Supreme Court denied Leave, attached at App.1a. Petitioner requested Reconsideration from the Michigan Supreme Court, attached as App.69a. Without opinion, the Michigan Supreme Court denied Reconsideration, attached at App.12a.

The case stems from a purchase made by the Respondent of a Promissory Note owned by a non-party Christopher Investments which represented a loan for approximately \$4 million that Christopher Investments made to Petitioner Lake Villa Oxford Associates. The Petitioner Kenneth Burnham executed a Guaranty of Payment to Christopher Investments and Respondent's position at trial was that the personal guaranty of Burnham transferred automatically with the Promissory Note. The relevant language, and what the case hinged upon, was the words "permitted assigns" contained within the guaranty as applied to any transfer of the guaranty. The Guaranty, at ¶ 12, states, "This agreement shall be binding on and inure to the benefit of the parties and their respective successors and permitted assigns." Burnham would not permit the assignment. The Respondent offered to purchase the Guaranty. Burnham refused.

The Respondent did not produce any evidence of intent of the clause or course of conduct between the parties at trial. Petitioner Burnham testified that he, and the principal of Christopher Investments had always interpreted the word “permitted” to mean that a transfer of the Guaranty would need his consent. Because the trial court found ambiguity in the term “permitted assigns” it stated that “it’s possible for a reasonable jury to find that the guaranty was not assignable without Burnham’s consent.” The matter went to jury who returned a verdict in favor the Petitioner.

Respondent appealed to the Michigan Court of Appeals. The Court issued an unpublished Per Curiam Opinion on September 15, 2016, reversing the matter and awarding a judgment in favor of the Respondent. Attached herein at App.3a.

Petitioner requested Reconsideration from the Michigan Court of Appeals which was denied. Respondent then moved for Leave to the Michigan Supreme Court which was denied without opinion. The Petitioner filed a Motion for Reconsideration to the Michigan Supreme which was denied without opinion on October 31, 2017. (App.12a)



REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE MICHIGAN COURT OF APPEALS RE-EXAMINED THE FACTS AS FOUND BY THE JURY IN VIOLATION OF THE SEVENTH AMENDMENT “REEXAMINATION” CLAUSE OF THE UNITED STATES CONSTITUTION

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. From the filing of Respondent’s initial complaint, the Petitioner has always asserted from day one that the intent of the parties concerning the words “permitted assigns” was a disputed term requiring evidence of the intent of the parties. The reversal judgment by the Michigan Court of Appeals could not have been rendered without deciding adversely to the Petitioner’s constitutional right to be free from any fact tried by a jury to be re-examined by any court.

The Guaranty does not define the term “permitted assigns.” Christopher Investment Company, Inc., drafted both the Promissory Note and the Guaranty. The parties intended that assignments be pre-approved before execution. The Petitioner told Homestead before and immediately after the sale of the Note that he did not consent to the assignment of his guaranty. As a result of the transaction, the SEC (Securities and Exchange Commission) placed the Respondent into receivership and stated that the guaranty at issue

did not appear to be valid. Petitioner Burnham testified at deposition before the SEC in August 2010. During the course of the deposition Burnham was shown a financial statement that purported to be a financial statement of Burnham, showing asset liabilities, liquidity, income net worth. He testified that that the financial statement that was produced was fraudulent., was not signed by him, that he was unfamiliar with it, and that it substantially misstated Burnham's financial position. The Respondent knew that the guaranty did not run with the Note. Respondent Homestead tried to buy the guaranty after the transfer of the Note. Homestead never rebutted that evidence at trial.

Petitioner is the only person with first-hand knowledge that testified about the guaranty's creation and that the guaranty was personal and unique. He testified at trial, "My position is that the guarantee [sic] was negotiated with Mr. Christopher and that the provision was put in there to protect me from my guarantee going somewhere that I didn't want it to go." Burnham told the jury that he did not intend to assign his personal guaranty to Respondent Homestead. It would alter his risk and reduce the transaction's value to him.

The plain meaning of the term "permitted" modifies the term "assignment." It is a condition precedent. It means to "allow (something) to happen," to give permission for (something)," or to allow (someone) to do or have something." *Merriam-Webster's Dictionary and Thesaurus* 599 (2007).

The Michigan Court of Appeals refused to consider whether the term "permitted assigns" was latently ambiguous under the circumstances or that the parol

evidence was admissible to explain the intended meaning of the parties. *See Biltmore Land Co. v. Munro's Estate*, 271 Mich. 125 (1935) (parol evidence admissible to show purpose parties intended to accomplish) 4A Mich. PL. & PR. § 36:779 (3d ed. West 2014) (“parol evidence is admissible as to the circumstances, custom, preliminary negotiations, and the intent of the parties”). A contract is ambiguous if its language is reasonably susceptible to multiple interpretations. *See Gortney v. Norfolk & W Ry Co.*, 216 Mich.App. 535 (1996). If the contract is ambiguous, its interpretation is a question of fact that must be decided by the jury in light of the relevant extrinsic evidence. *Klapp v. United Ins Group Agency, Inc.*, 663 N.W.2d 447 (2003).

The record shows that Christopher Investments, and its escrow agent, asked Petitioner Burnham for the right to transfer the guaranty of Burnham to Homestead. Burnham, through his attorneys, Davidson & Fink of Rochester, NY, denied Christopher Investment permission to do so. Burnham’s parol evidence proves that an unpermitted assignment of the guaranty is “validly precluded by contract,” based upon Kingston’s circumstances of the case standard. *See Kingston v. Markward & Karafilis, Inc.*, 134 Mich.App. 164 (1984).

A. The Michigan Court of Appeals Opinion

The Michigan Court of Appeals began its opinion by stating that “an anti-assignment clause was not created by the language of the guaranty.” At page 3. It substituted its opinion for the verdict of the jury and its finding that the contract required the permission of the Petitioner for the guaranty to pass and that the term “permitted assigns” constituted the intent of

the parties. The Opinion is unconstitutional in that it re-examines the factual findings of the jury in contravention of the Seventh Amendment of the United States Constitution. It seemed to ignore the simple fact that the trial court found an ambiguity and therefore submitted the case to the jury.

The Michigan Court of Appeals imposed upon the term “permitted assigns” the invocation of an anti-assignment clause status and then offered the opinion as a refute of the jury’s obvious verdict that “permitted” was an intended condition precedent of the assignability of the guaranty of Petitioner and that the term “permitted” was “plain language” sufficient to prevent unpermitted assignments. The Court of Appeals substituted its interpretation of intent in place of the jury thereby depriving Petitioner of his constitutional right to a jury trial without re-examination. The jury made its decision by the evidence admitted in front of them including parol and extrinsic evidence and was given the opportunity to determine the intent of the parties in an ambiguous assignability issue. The truth is that one word can restrict assignability if it is the intent of the parties.

The Court of Appeals cites 3 Restatement Contract, 2d § 317(2), p.15 for the notion that contractual rights are assignable so long as the assignment is not “validly precluded by contract” but does not define “validly.” The jury had already decided the intent of the parties. What could be more “valid” than that?

The Michigan Court of Appeals then states “The Clause at issue does not mention assignability.” But it does by virtue of the actual words employed in the contract and the judge and jury felt that it did. It

states “permitted assigns.” The Michigan Court of Appeals decision is an impermissible 7th amendment constitutional violation of the reexamination clause.

Then the Michigan Court of Appeals made their holding: “considering the plain language of the contract and the absence of strict language in the “plainest words” barring assignment, we conclude that the guaranty was assignable by law.” But, the rationale fails when they state that, “The clause at issue does not mention assignability and it contains no negative language regarding assignment.” This is the smoking gun, the point where the Michigan Court of Appeals decision is an impermissible 7th amendment constitutional violation of the reexamination clause. The clause does mention assignability and there is a restrictive limiting language notably “permitted assigns.”

The phrase “no negative language” is an attempt by the Michigan Court of Appeals to snatch the rightful intent determination finding from the jury. It is unconstitutional in nature.

Then the Michigan Court of Appeals portends to tell the parties on how they should have contracted: “In other words, there is no language like, for example, “this contract shall not be assigned” or “this contract is not assignable by Christopher Investment without the prior written consent of Kenneth C. Burnham.” The parties were not mandated to utilize that language in their Agreement. They were free to contract.

The Appeals Court violated the Petitioner’s constitutional rights when it supplanted its interpretation of the facts, reformed the contract and therefore reexamined the jury’s findings based upon its own reexamination of the facts found by the jury. The

Court of Appeals also reversed the jury because the contract did not contain words that the Appellate Court thought that it should. This goes against the general premise that parties are free to contract and use any words they *see* fit to describe their intent. Its Decision that the term “permitted” overturned the jury’s finding that the guaranty required the permission of the Petitioner to assign is in violation of the Seventh Amendment Reexamination Clause of the United State Constitution. The Court of Appeals wrongfully decided that the term “permitted” was not indicative of the intent of the parties. The judge and jury permissively found the opposite. The Appellate Court decided that the intent of the parties did not matter in the slightest. The term “permitted assigns” was the plainest language that the contracting parties intended to use.

The claims of the Petitioner goes to the very heart and foundation of the whole proceedings so far as it relates to Homestead. There is a “true and rational rule” pursuant to *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 143 stating [it]”is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied upon a party who brings the writ of error, and that the right thus claimed by him was denied.” *Roby v. Colehour*, 146 U.S. 153, 159. Petitioner had an expectation that the reexamination clause of the Seventh Amendment to the constitution would be followed by the Court of Appeals. The Michigan Supreme Court also failed to review that claim of right.

II. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE MICHIGAN SUPREME COURT FAILED TO PROVIDE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, CLAUSE 1, OF THE UNITED STATES CONSTITUTION BY ALLOWING THE COURT OF APPEAL'S REVERSAL TO STAND AND NOT REVIEWING SEVENTH AMENDMENT CONSTITUTIONAL VIOLATIONS BY THE COURT

The Supreme Court of Michigan affirmed the Michigan Court of Appeals without an opinion or rationale. The argument that the intent of the parties rather than a Court of Appeals decision upon reexamination was properly put before the Supreme Court of Michigan.

Even if Petitioner did not specifically mention the Seventh Amendment, the matter was sufficiently brought before the court. Since 1897 this Court has allowed the benefit of the right if it appears from the record that such right . . . claimed in the state court (was) in such a manner as to bring it to the attention of the court. Petitioner's steady beat of the drum regarding intent of the parties and the jury's role in deciding that intent were clear indicators of the Petitioner's invocation of his constitutional right to a trial by jury and all that it encompasses. *Chicago, B & QR Co. v. Chicago*, 166 U.S. 226, 243 (1897).

Even the consequences of the judgment of the Michigan Court of Appeals are suspect. Jurisdiction is being invoked upon the ground that a right or immunity, . . . has been denied by the judgment sought to be reviewed, it appears from the record that the opinion necessarily affects the law of judgment by the Court of Appeals.

A. State of the Law in the US Supreme Court

Since 1897, *Chicago, B & QR Co v. Chicago*, 166 U.S. 226, 243 (1897), this type of writ has been allowed: “It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the state.” *Id.* “It could not have been intended thus to restrict the powers of the courts of the United States to reexamine facts tried by juries in the courts of the Union, and leave it open for those courts to reexamine, in disregard of the rules of common law, facts tried by juries empaneled in the state courts in cases which, by reason of the questions involved in them, could be brought under the cognizance of the courts of the United States.”

B. Form or Procedure Does Not Trump the Common Law Right of Trial by Jury

The aim of the (Seventh) Amendment is to preserve the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate circumstances. *See Baltimore & Carolina Line, Inc., v. Redman*, 295 U.S. 654 (1935).

The remaining question is whether the particular issue occurring within the jury trial is itself necessarily

a jury issue, the guarantee being essential to preserve the right to a jury's resolution of the ultimate issue, for example, whether the intent of the parties was to limit the assignability of the contract. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). Petitioner submits that the term "permitted assigns" invoked a jury determination of the intent of the parties.



CONCLUSION

The Petition for a writ of Certiorari should be granted.

Respectfully submitted,

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