No. 22-719

IN THE

Supreme Court of the United States

JESSICA MACKEY,

Petitioner,

v.

AMERICAN MULTI-CINEMA, INC.,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

In her previous filings in this Court, petitioner demonstrated the Fifth Circuit's multiple violations of the controlling precedent in *Broussard v. State of Louisiana, ex rel. Office of State Buildings*, 113 So. 3d 175 (La. 2013) for determining whether the uneven concrete at AMC's theater was unreasonably dangerous.

On March 17, 2023, only two days after petitioner's Reply Brief was filed in this Court, the Louisiana Supreme Court issued *Farrell v. Circle K Stores, Inc., et al.*, 22-00849 (La. 3/17/23), -- So. 3d. -- , 2023 WL 2550503, "to clarify once and for all a confusion-laden area of negligence law: the so-called 'open and obvious' defense in the context of a motion for summary judgment."[1] *Id.*, at 10 (Weimer, C.J. concurring).

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[1] In *Farrell* the plaintiff stopped at a Circle K to get gas. While her husband was refueling the car, plaintiff walked her dog. To reach a grassy area located at the edge of the store property, plaintiff had to cross a large pool of water in a low area of the parking lot. When plaintiff attempted to step over the water at the narrowest point (approximately one foot wide), she fell due to a slippery substance in the water and sustained personal injury. Plaintiff sued Circle K under Louisiana's premises liability law, and Circle K defended arguing that the allegedly hazardous condition of the water was "open and obvious." On summary judgment, the trial court denied Circle K's motion finding genuine issues of material fact in dispute as to whether the pooled water was "open and obvious." The court of appeal denied Circle K's request for supervisory review, but the Louisiana Supreme Court granted certiorari, reversed, and rendered summary judgment for Circle K. *Id.* Although the court found that Circle K owed plaintiff a duty to keep its premises in a "reasonably safe condition", *Id.*, at 4, the court also found that plaintiff failed to establish that she would be able to meet her burden of proof at

Pursuant to Sup. Ct. R. 15.8, petitioner files this Supplemental Brief to show how *Farrell* further exposes the Fifth Circuit's many errors in affirming the grantof summary judgment for AMC. Equally important, petitioner suggests that in light of *Farrell*, her case fits within the category of cases in which it is proper for this Court to issue a GVR order. That is because "intervening developments, . . . , reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, ..." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*). This Court has specifically approved the GVR mechanism "where a federal court of appeals decision on a point of state law had been cast in doubt by an intervening state supreme court decision . . . ." *Thomas v. American Home Products, Inc., et al.,* 519 U.S. 913, 914 (1996), *citing Lawrence*, *supra*, at 180 (Scalia, J., concurring).

I. Because The Louisiana Supreme Court Issued A Controlling Ruling In *Farrell* On March 17, 2023, The Fifth Circuit's Reliance On The Now Discredited "Open And Obvious" Defense In Affirming Summary Judgment For AMC Is Clearly Erroneous

At the outset of its unreasonable risk of harm analysis in *Farrell*, the Louisiana Supreme Court noted that whether a condition is open and obvious "has been applied differently and inconsistently in the jurisprudence." *Id.*, at 5. The court went on to discuss how numerous post-*Broussard* cases analyzing wheth-

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trial to show a breach of duty by Circle K or that defendant's conduct was a cause-in-fact of her injuries. *Id.*, at 9.

er a condition is "open and obvious" had erroneously conflated the "duty and breach elements",[2] which was caused in part by inaccurate statements by the court. *Id.* Seeking to "rectify" those past statements, *Id.*, and after "acknowledging the confusion which has arisen and the legitimate criticism thereof," *Id.*, at 8, the court wrote:

> whether a condition is open and obvious is embraced within the breach of the duty element of the duty/risk analysis and is not a jurisprudential doctrine barring recovery, but only a factor of the risk/utility balancing test. Specifically, it falls within the ambit of the second factor of the risk/utility balancing test, which considers the likelihood and magnitude of harm, and it is not a consideration for determining the legal question of the existence of a duty. Thus, although this Court has so stated before, it is inaccurate to profess that a defendant generally does not have a duty to protect against an open and obvious condition.

Id., at 8.

Petitioner previously pointed out that the Fifth Circuit failed to conduct the four-factor risk-utility balancing test required by *Broussard*. Pet. 15-18. AMC defends the Fifth Circuit on this point by noting

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[2] The Louisiana Supreme Court's concern for conflation of duty and breach tracks the legal analysis by Louisiana tort scholar, Professor Thomas Galligan, in a forthcoming article in the Tulane Law Review, which was cited approvingly in *Farrell*. *Id.*, at 10, n. 1, *citing* Thomas C. Galligan, Jr., *Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach*, 97 Tul. L. Rev. (forthcoming March 2023). Pet. App.17a-31a.

that the panel cited to the court's earlier unpublished opinion in *Buchanan v. Wal-Mart Stores, Inc.*, 834 Fed. Appx. 58 (5th Cir. 2020). Opp. 12. However, review of *Buchanan* shows that in affirming the district court's determination that the uneven expansion joint where plaintiff fell was "obvious and apparent",[3] the Fifth Circuit cited to a holding now discredited by *Farrell*: "if the risk of harm is obvious, universally known and easily avoidable, the risk is not unreasonable, and the defendant has no duty to warn or protect against it." *Buchanan*, 834 Fed. Appx., at 62, *citing Smith v. Winn-Dixie Montgomery, LLC*, 13-194, 2014 WL2740405, at *3 (M.D. La. June 17, 2014).

Because the Fifth Circuit's opinion below specifically relied on *Buchanan*'s now discredited statement of the open and obvious defense, the court's decision affirming summary judgment for AMC is clearly erroneous.[4]

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[3] *Buchanan v. Wal-Mart Louisiana, LLC*, 17-1314, 2019 WL 7018879, *3 (W.D. La. 12/18/2019).

[4] A recent *per curiam* decision by the Fifth Circuit affirming the grant of summary judgment in a case involving a plaintiff's trip and fall over a sprinkler head in a grassy area of a casino parking lot indicates that the Fifth Circuit continues to misinterpret Louisiana's "open and obvious" jurisprudence. *See Badeaux v. Louisiana-I Gaming*, 22-30129, 2023 WL 334783 (5th Cir. 01/20/2023). "Under Louisiana law, a defendant does not have a duty to protect against that which is "obvious and apparent," because an "open and obvious" hazard does not present an unreasonable risk of harm." *Badeaux*, *Id.*, at 2. After *Farrell*, such statements "should disappear from the jurisprudence, joining other discarded areas of negligence law such as "assumption of the risk." *Farrell*, *supra*, at 10 (Weimer, C.J. concurring). *Badeaux*'s rejection of plaintiff's argument that the district court failed to consider Louisiana's risk-utility balancing test, because "Louisiana law does not require a risk-utility analysis when the hazard is 'open and obvious'", *Badeaux*, at 3, n.3, is similarly discredited in light of *Farrell*.

II. *Farrell* Held That The Plaintiff's Knowledge Of A Defective Condition Is Irrelevant At The Summary Judgment Stage, So The Fifth Circuit's Consideration Of Petitioner's Testimony Regarding Whether She Was Aware Of The Uneven Concrete Is Not Determinative

After explaining that it is incorrect to say that a defendant has no duty when the allegedly defective condition is open and obvious, *Farrell* went on to discuss how the "open and obvious concept" will be considered within analysis of unreasonable risk of harm. *Farrell*, *Id.*, at 8. Responding to Circle K's pointing out "certain facts relative to Mrs. Farrell's subjective awareness," the Louisiana Supreme Court held:

> [w]hether the plaintiff has knowledge of the condition is irrelevant in determining whether the thing is defective. Otherwise, the analysis resurrects the long ago abolished doctrines of assumption of the risk and contributory negligence, both of which focus on the knowledge and acts of the plaintiff. The plaintiff's knowledge is appropriately considered in assessing fault, *but is not appropriate for summary judgment proceedings*. Therefore, as applied to this case, Mrs. Farrell's knowledge and appreciation of the allegedly hazardous condition is not determinative. Although it would be relevant in a trial on the merits, for purposes of potential comparative fault, *Mrs. Farrell's awareness is irrelevant to Defendants' entitlement to summary judgment*.

Id. (emphasis added).

As previously pointed out, the only evidence specifically considered by the Fifth Circuit below was petitioner's deposition testimony that she was being careful as she walked towards the theater's box office. Pet. App. 4a. In light of *Farrell*, this testimony by petitioner was irrelevant at the summary judgment stage and should not have been considered by the Fifth Circuit in reviewing the district court's decision. Considering that the Fifth Circuit's opinion failed to discuss any of petitioner's substantial other evidence, the court's affirmance of summary judgment for AMC is totally unsupported.

III. *Farrell* Affirmed *Broussard*'s Holding That The Determination Of Unreasonable Risk Of Harm Is A Question Of Breach To Be Determined By The Factfinder At Trial, An Analysis Never Conducted By The Fifth Circuit

In *Farrell* the Louisiana Supreme Court affirmed *Broussard*'s holding that "the proper analysis for evaluating an unreasonable risk of harm was in the context of whether there was a **breach of a duty owed**." *Id.*, at 6. Further, *Farrell* explained that *Broussard*'s language -- "[a]s a mixed question of law and fact, it is the fact-finder's role – either the jury or the court in a bench trial – to determine whether a defect is unreasonably dangerous" – was later misinterpreted, with some courts wrongly concluding that the question of breach could never be resolved as a matter of law on summary judgment. *Id.* While subsequent decisions of the Louisiana Supreme Court clarified that "the summary judgment procedure can be used to determine whether a defect constitutes an unreasonably dangerous condition," *Farrell* admitted that "the language of these decisions failed to elimi-

nate the conflation of duty and breach as had been addressed in *Broussard*." *Id.*

Farrell confirms once again that the Fifth Circuit's affirmance of summary judgment in favor of AMC ignored *Broussard*'s "analytic framework" for determining unreasonable risk of harm (whether AMC breached a duty owed to petitioner) (Pet. 18-21).

IV. *Farrell* Held That The Determination Of Unreasonable Risk Of Harm At Trial Differs From Such A Determination On Summary Judgment, A Distinction That Undermines AMC's Citation To Trial Cases

In explaining how some courts had misinterpreted *Broussard* as limiting summary judgment, *Farrell* noted that *Broussard* "involved a jury trial, not a motion for summary judgment." *Id.*, at 7. *Farrell* then explained that courts should remain mindful of *Broussard*'s "procedural posture", because "[a] fact-intensive determination after a trial on the merits as to whether a defect is unreasonably dangerous differs from such a determination at the summary judgment stage." *Id.*, n. 7.

For this reason AMC's citation to trial cases allegedly supporting determination of unreasonable risk of harm on summary judgment (Opp. 9) are all distinguishable.

V. *Farrell* Held That Summary Judgment Is Only Proper When Reasonable Jurors Could Not Disagree On Whether The Defendant Breached A Duty Owed, A Consideration Never Addressed By The Fifth Circuit

In *Farrell* the Louisiana Supreme Court summed up the standard for determining whether there is a "genuine issue"[5] for trial on whether an allegedly defective condition presents an unreasonable risk of harm: "[s]ummary judgment on the issue of an unreasonably dangerous condition is warranted upon a finding that no reasonable juror could have found that the defendant was in breach of the duty."[6] *Id.*, at 9.

Because the Fifth Circuit never addressed whether, on the substantial evidence introduced in opposition to AMC's motion for summary judgment by petitioner, a reasonable juror could have found that AMC's concrete was unreasonably dangerous, the court's grant of summary judgment for AMC was clearly erroneous.

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[5] La. C. C. P. Article 966 regarding motions for summary judgment provides: ". . . a motion for summary judgment shall be granted if the motion, memoranda, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." The Louisiana rule is very similar to Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[6] Similarly, under this Court's summary judgment standards, a fact issue is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

VI. *Farrell*'s Emphasis On The Size And Location Of The Allegedly Defective Condition Under *Broussard*'s Risk-Utility Balancing Test Provides Another Example Of How The Fifth Circuit Did Not Credit Important Evidence Supporting That AMC's Uneven Concrete Was Unreasonably Dangerous

In analyzing the second factor ("the likelihood and magnitude of harm, including the obviousness and apparentness of the condition") of *Broussard*'s four-part risk utility balancing test, the Louisiana Supreme Court emphasized the importance of the size and location of the allegedly unreasonably dangerous condition:

> [w]e note that the size of the allegedly unreasonably dangerous condition is relevant. The more obvious the risk, the less likely it is to cause injury because it will be avoided. Thus, it is conceivable that an allegedly hazardous condition, as alleged in this case, located at the entrance to the store, may ultimately be determined to be unreasonably dangerous; whereas, the same condition, located in the corner of a parking lot, may not be unreasonably dangerous because the likelihood and magnitude of harm is vastly different. It is also relevant that the pool of water was not located in a customarily traversed area, such as the entrance to the store, where patrons would likely encounter it or be forced to encounter it to go into the location. It also was not located near the gas

> pumps, where, again, it would necessarily or likely be encountered by customers.

Farrell, *Id.*, at 5.

In petitioner's case the Fifth Circuit failed to credit her expert's testimony that the uneven concrete (3/4 – 7/8 inches) where petitioner fell was obscured by the wet and unclean condition of the area (Pet. 25-26) or her expert's testimony that the uneven concrete was located in an accessible route that leads to and from the movie theater entrance. Pet. 5. Clearly, the combination of the size and location of the uneven concrete is highly relevant to analysis of the "likelihood and magnitude of harm" factor in petitioner's case, but the Fifth Circuit did not consider let alone credit this evidence.

CONCLUSION

The petition for a writ of certiorari should be granted. Additionally, this Court may wish to vacate and remand this case to the Fifth Circuit for reconsideration in light of the Louisiana Supreme Court's just released and controlling precedent in *Farrell v. Circle K Stores, Inc.*, *et al.*, 22-00849 (La. 3/17/23), -- So. 3d. -- , 2023 WL 2550503.

Respectfully submitted,

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