

No. _____

In The
Supreme Court of the United States

JASON LOU PERALTA,
ANDREW W. SHALABY,
Petitioners,

v.

WORTHINGTON INDUSTRIES, INC., et al.
Respondents.

**REQUEST FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
(Hon. Elena Kagan)**

U.S. Dist. Ct., AZ., No. 2:17-cv-03195-JJT
Ninth Cir. No. 22-15140

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To the Honorable Justice Kagan:

Pursuant to Supreme Court Rules 13.5 and 30, Petitioners Jason Lou Peralta and Andrew W. Shalaby respectfully move for a 60 day extension of time to file their petition for writ of certiorari. Pursuant to Rule 30.4, Petitioner informs the Court that there is a pending motion to set aside the appellate memorandum and disqualify Hon. Judge Sidney R. Thomas, dkt. 82 filed 2/3/24 in appeal 22-15140. The appellees filed an opposition on 2/13/24, dkt. 84. However, there is no provision to extend the time to file a petition for certiorari in relation to a motion to set aside a memorandum and disqualify an Appellate Judge, therefore the time to file the petition for certiorari runs from the date of the mandate, which in this instance was 1/25/24 (Exhibit A, dkt. 81-1 in appeal 22-15140). The deadline to file the petition is therefore 4/24/24 despite the fact that the pending motion filed with the Court of Appeals has not yet been decided.

There is also a related appeal, *Bailey v. Worthington, et al.*, U.S. Dist. Ct., N.Dist. IL. No. 1:16-cv-07548 PGR, in which the judgment was issued by the Seventh Cir. Court of Appeals on January 22, 2024 (7th Cir. appeal no. 22-2111, dkt. 78). A petition for a writ of certiorari is due and shall be filed by April 22, 2024, and shall then be referenced on the petition for certiorari to be filed in this (Peralta) case. Therefore, in order to afford sufficient time for the Ninth Circuit Court of Appeals to issue an order on the pending motion, and to file and refer to the petition for certiorari in the *Bailey* matter, a 60 day extension to

file the petition for a writ of certiorari in this matter is respectfully requested, which would extend the time to file to Monday, June 24, 2024.

1. The Court of Appeals' Memorandum of Decision was issued January 25, 2024 (Exhibit A).
2. The motion to disqualify Honorable Appellate Judge Sydney R. Thomas was filed with the Ninth Circuit Court of Appeals on February 3, 2024, dkt. 82 in appeal no. 22-15140.
3. The appellate judgment on the related appeal case, *Bailey v. Worthington*, 7th Cir. appeal no. 22-2111, dkt. 78, was entered January 22, 2024.
4. The deadline to file the petition for certiorari on the related appeal is Monday, April 22, 2024, and Petitioner needs to cite to that petition.
5. The deadline to file the petition for writ of certiorari in this case is April 24, 2024. However, the 9th Cir. Court of Appeals has not yet ruled on the pending motion described above.
6. This petition is timely filed more than 10 days before the date the petition is due.

Petitioner respectfully requests that the petition due date be extended to Monday, June 24, 2024.

s/Daniel J. Russo
Daniel J. Russo,
Attorney for Petitioner
Andrew W. Shalaby

s/Andrew W. Shalaby
Andrew W. Shalaby,
Attorney for Petitioner
Jason Lou Peralta

1(a)

EXHIBIT A

Peralta v. Worthington Indus.
United States Court of Appeals for the Ninth Circuit
January 17, 2024, Submitted; January 25, 2024,
Filed No. 22-15140

Reporter
2024 U.S. App. LEXIS 1742 *; 2024 WL 287774

JASON LOU PERALTA, Plaintiff-Appellant,
ANDREW W. SHALABY, Appellant,

v.

WORTHINGTON INDUSTRIES, INC.;
WORTHINGTON CYLINDER CORPORATION;
WORTHINGTON CYLINDER WISCONSIN LLC;
BERNZOMATIC, Defendants-Appellees.

Appeal from the United States District Court for the
District of Arizona. D.C. No. 2:17-cv-03195-JJT. John
Joseph Tuchi, District Judge, Presiding.

Peralta v. Worthington Indus., 2022 U.S. Dist. LEXIS
6982, 2022 WL 124760 (D. Ariz., Jan. 13, 2022)
Disposition: AFFIRMED.

Counsel: For JASONLOUPERALTA, ANDREW W.
SHALABY, Plaintiffs - Appellants: Andrew W.
Shalaby, East Bay Law, El Cerrito, CA.

For WORTHINGTON INDUSTRIES, INC.,
WORTHINGTON CYLINDER CORPORATION,
WORTHINGTON CYLINDER WISCONSIN LLC,
BERNZOMATIC, Defendants - Appellees: Richard

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Ergo, Esquire, Attorney, Bowles & Verna, LLP,
Walnut Creek, CA.

Judges: Before: S.R. THOMAS, McKEOWN, and
HURWITZ, Circuit Judges.

Opinion

MEMORANDUM

Jason Lou Peralta appeals from the district court's summary judgment in his diversity action alleging products liability claims. Peralta and Andrew W. Shalaby also appeal from the district court's order revoking Shalaby's pro hac vice status. We have jurisdiction under 28 U.S.C. § 1291. We review de novo cross-motions for summary judgment. *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). We affirm.

The district court properly granted summary judgment for defendants because Peralta failed to raise a genuine dispute of material fact as to whether defendants acted unreasonably at the time of manufacture or design, or intentionally caused a harmful or offensive contact with Peralta. See *Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 709 P.2d 876, 881 (Ariz. 1985) ("For a plaintiff to [*2] prove negligence he must prove that the designer or manufacturer acted unreasonably at the time of manufacture or design of the product."); *Johnson v. Pankratz*, 196 Ariz. 621, 2 P.3d 1266, 1268 (Ariz. Ct. App. 2000) (explaining elements of a battery claim under Arizona law); see also *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*,

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815 F.3d 1195, 1210 (9th Cir. 2016) ("Under Arizona law, the act that caused the harm will qualify as intentional conduct only if the actor desired to cause the consequences—and not merely the act itself—or if he was certain or substantially certain that the consequences would result from the act." (citations and internal quotation marks omitted)).

The district court properly denied Peralta's motion for summary judgment on a strict liability theory because the operative complaint did not provide fair notice of this claim and it was raised for the first time in Peralta's summary judgment motion. See *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-93 (9th Cir. 2000) (concluding that allowing the plaintiffs to proceed with a new theory of liability at summary judgment after the close of discovery would prejudice the defendants).

The district court did not abuse its discretion by denying Peralta's motion to exclude Dr. Pfaendtner's testimony because Dr. Pfaendtner's opinion satisfied the requirements of Federal Rule of Evidence 702. See *Wendell v. Glaxo Smith Kline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (setting forth standard of review and admissibility requirements for expert [*3] opinion testimony under Rule 702, as explained in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)); see also *Daubert*, 509 U.S. at 595 (observing that "[t]he focus [of the district court's analysis], of course, must be solely on principles and methodology, not on the conclusions that they generate"). We reject as unsupported by the record

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Peralta's contentions that Dr. Pfaendtner lied and falsified evidence.

The district court did not abuse its discretion by revoking Shalaby's pro hac vice status after giving Shalaby notice and an opportunity to be heard on the grounds for revocation. See *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109-13 (9th Cir. 2005) (setting forth standard of review and explaining that a court may revoke pro hac vice status following notice and an opportunity to respond). We reject as without merit Shalaby's contention that the district court failed to scrutinize sufficiently defendants' motives for moving to revoke Shalaby's pro hac vice status.

We do not consider Peralta's challenges to the district court's orders excluding Peralta's experts and barring Shalaby from acting as counsel to Peralta's experts because they were raised for the first time on appeal. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

We reject as unsupported by the record Peralta's contention that the district court's procedures for discovery disputes violated the Federal Rules [*4] of Civil Procedure.

Appellants' motions to increase the page limit and file a late response (Docket Entry Nos. 67 and 68) are granted. All other motions and requests are denied.

AFFIRMED.

PROOF OF SERVICE

I, Sonia Dunn-Ruiz, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at 7525 Leviston Ave, El Cerrito, CA. On March 22, 2024 I served the attached:

**REQUEST FOR EXTENSION TO
FILE PETITION FOR WRIT OF
CERTIORARI
(SUPREME COURT RULE 13.5, 30)**

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

Mr. Richard A. Ergo Bowles & Verna LLP 2121 N. California Blvd., Suite 875 Walnut Creek, CA 94596	U.S. District Court Suite 1 401 W. Washington St. Phoenix, AZ 85003
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and served the named document in the manner indicated below:

BY MAIL: I am familiar with the practices of the U.S. Postal Service, and I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelopes(s) addressed to the addressees, at an office of the U.S. Postal Service in El Cerrito, California, for collection and mailing by first class mail with the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed March 22, 2024, at El Cerrito, California.


Sonia Dunn-Ruiz