

26-5552

No. 26-

ORIGINAL

In The
Supreme Court of the United States

Mary Eitel,
Petitioner,

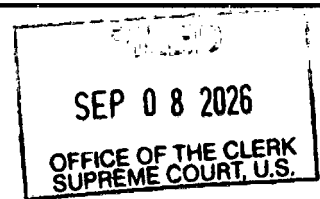
v.

Stoll Keenon Ogden, PLLC,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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September 8, 2026

QUESTION PRESENTED FOR REVIEW

Whether a federal court sitting in diversity may cite to docket entries in separate proceedings, uncited by either party and extrinsic to the complaint, as the basis for dismissal of the complaint under 12(b)(6) without permitting amendment or converting the motion to one for summary judgment under Rule 56. In effect, may the federal district courts delve into the role of advocate and utilize extrinsic evidence which is neither critical to nor relied upon by a non-moving Plaintiff opposing a 12(b)(6) motion on state statute of limitations grounds without abusing discretion?

PARTIES AND RELATED PROCEEDINGS

Parties

Petitioner Mary Eitel was Plaintiff-Appellant before the United States Court of Appeals for the Sixth Circuit and Plaintiff in the United States District Court for the Western District of Kentucky.

Respondent Stoll Keenon Ogden PLLC was Defendant-Appellee before the Sixth Circuit and Defendant in the United States District Court for the Western District of Kentucky.

Related Proceedings

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Mary Eitel v. Stoll Keenon Ogden, PLLC, No. 3:23-cv-00398-GNS, United States District Court for the Western District of Kentucky. Judgment entered September 25, 2024.

Mary Minton Eitel v. Stoll Keenon Ogden, PLLC, No. 25-5630, United States Court of Appeals for the Sixth Circuit. Direct appeal from 12(b)(6) dismissal and denial of Fed. R. Civ.

P. 59/60 Motion to Reconsider. Affirmed March 11, 2026. Petition for rehearing was denied April 8 .2026.

TABLE OF AUTHORITIES

STATUTES

KRS 413.245

Fed. R. Civ. P. 12(b)(6)

Fed. R. Ev. 201

CASES

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Wolfe v. Kimmel, 681 S.W.3d 7, 26 (Ky. 2023).....13

EQT Production Company v. Vorys, Sater, Seymour and Pease, LLP et. al, Case No.15-146-DLB-EBA (E.D. Ky. Apr. 27, 2018).....11-15

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PETITION FOR WRIT OF CERTIORARI

Mary Eitel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported but is reproduced at Appendix A. The order dismissing Petitioner's complaint by the district court (Pet. App. 11a-27a) is unreported but is reproduced in Appendix B. The Petitioner's Motion to Reconsider as denied by the district court (Pet. App. 28a-40a) is unreported but reproduced in Appendix C. The order denying the petition for rehearing (Pet. App. 41a) is unreported and reproduced at Appendix D.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals judgment entered on March 11, 2026. The order denying rehearing entered on April 8, 2026.

FEDERAL STATUTES

Federal Rule of Civil Procedure 12(b)(6): How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:...(6) failure to state a claim upon which relief can be granted. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with the one or more other defenses or objections in a responsive pleading or in a motion. **Subsection (d):** Result of Presenting Matters Outside the Pleadings. If, on motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are

presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

STATE STATUTES

Ky. Rev. St. §413.245. Actions arising out of the rendering, or failure to render, professional services to others. Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. Time shall not commence against a party under a legal disability until removal of the disability.

STATEMENT OF THE CASE

Petitioner strongly urges this Court, in the interests of justice, equity, efficiency, and predictability across all federal circuits, to reverse and remand this case to the district court to move forward with fact discovery. Petitioner would show this Court the district court and court of appeals utilized extrinsic evidence beyond that which is permitted under the intentions of the rules and as allowed in other circuits, creating a clear divergence which is unfettered by any ruling or guidance from this Court. To bring uniformity to federal courts, Petitioner pleads this Court, in the interests of justice, should create a new rubric of factors and tests for the circuits to utilize, so that the now-unbridled discretion of the 6th Circuit does not spin out of control.

On July 30, 2023, Petitioner initiated state-based claims against Respondent for legal malpractice in misdrafting her grandparents' trusts, resulting in the vast majority of the trust

assets to be distributed to a non-beneficiary. After Respondent filed a 12(b)(6) motion in response to Petitioner's complaint, the district court dismissed Petitioner's claims with prejudice due to a finding of futility based on the district court's review of Petitioner's separate and distinct claims in another litigation against fiduciary trustees for misinterpreting what Petitioner had long believed, pleaded, and been advised were narrow HEMS trust encroachment provisions under Internal Revenue Code Section 2041. Petitioner sought reconsideration due to her diagnosed disability and the complexity of the factual and legal issues, but the district court denied the motion. The 6th Circuit Court of Appeals affirmed the district court, finding Petitioner should have known of her legal injury against Respondent when she filed her separate and distinct claims against the fiduciary trustees. The Court of Appeals denied Petitioner's motion for rehearing.

Petitioner would show this Court the use of extrinsic evidence has led to a miscarriage of justice in this case, as the lower court conflation of "legal injury" with "damages" flowing therefrom, were only available to the lower courts due to the unrestricted discretion to utilize any extrinsic evidence the district court felt relevant in what Petitioner believes constituted an overstep from judge to advocate on behalf of Respondent.

REASONS FOR GRANTING THE WRIT

This case presents the ultimate test of circuit splits: the use of extrinsic evidence in assessing 12(b)(6) motions and the bounds of the judicial discretion in the utilization of documents and information at the lower courts' disposal. At present, most circuits have some exceptions to 12(b)(6)'s four corners rule, but they are identifiably distinct, and parties must think carefully and forum shop with the rules of each circuit in mind. Absent this Court's express delineation of brightline rules of when a court may or may not utilize extrinsic evidence,

the unfettered discretion will lead to such a disparity in standards, the four corners rule of 12(b)(6) shall become a nullity, specifically in the 6th Circuit. In Petitioner's case, the district court, sua sponte, looked to Petitioner's complaint in a separate litigation, and due to the subject-matter of family trusts being the same, the district court and appellate court utilized extrinsic evidence uncited by Petitioner or Respondent to unjustly eradicate valid timely claims. Given the expansive nature of extrinsic evidence the district court felt available (the entire docket of entries in the separate case), the 6th Circuit has split from the other circuits. Now, at any time, a district court in the 6th Circuit may look to any parallel litigation or previous litigation, and if the subject matter or parties are similar, the court may permissibly use discretion and such extrinsic documents to rule on 12(b)(6), eliminating the standards set forth in *Twombly* and *Iqbal*.

I. Lack of a Standard Extrinsic Evidence Test

This Court's reticence to impede upon the discretion of the district courts and courts of appeal in considering extrinsic evidence in support of 12(b)(6) motions has led to substantively disparate outcomes in diversity actions, dependent on which forum a party finds itself, rendering 12(b)(6)'s four corners rule nearly void.

If a litigant relies on the final order of a separate case, does such reliance open the door to the use of all filings in such separate case for the truth of the matters asserted under Fed. R. Ev. 201 when such other filings are neither integral to, relied upon, or referenced by the parties in their 12(b)(6) briefs?

While most of the courts of appeal maintain limited tests to determine whether use of extrinsic evidence is permissible without transformation into a Rule 56 summary judgment proceeding, the Sixth Circuit has determined the district courts may abandon those parameters or

factors and *sua sponte* utilize any extrinsic evidence it feels, in its discretion, bears on a party's claims, even if not referenced or cited by one of the parties.

The 5th Circuit observes a “centrality” exception¹, the 9th Circuit observes an “incorporation by reference” doctrine², and the 2nd Circuit observes a rubric embracing a court’s ability to consider extrinsic material the complaint incorporates by reference, is integral to the complaint, or of which courts can take judicial notice.³ An extrinsic document is integral to a complaint if the plaintiff himself relief on the terms and effect of the document in drafting the complaint.

II. Applying Non-6th Circuit tests, the 12(b)(6) dismissal was an abuse of discretion

Applying any of the other circuit tests on extrinsic evidence, or a combination thereof, renders the lower court decisions an abuse of discretion which makes a perfect example for this Court to intervene and standardize the bounds of the lower courts’ discretion in utilizing extrinsic evidence in evaluating a 12(b)(6) motion without converting the motion to one for summary judgment.

In the district court, Petitioner filed state-law claims for legal malpractice against Respondent, a law firm (as referenced herein as “SKO” or “Respondent”), after distinct litigation (*Eitel v. PNC Bank et. al.*, No. 3:20-cv-00012-RGJ/RSE, February 23, 2023) (referenced herein as “**Eitel v. PNC**”) made a final determination Respondent’s legal work product from nearly half a century ago, was incongruent with testator intentions for a set of family trusts intended to benefit Petitioner as a vested remainder beneficiary. The district court erroneously determined Petitioner’s complaint of improper trust distributions under the family trust encroachment provision by fiduciary trustees was the same legal injury as Petitioner’s claims the Respondent, as scrivener,

¹ *Shaw v. Restoration Hardware, Inc.* 2024 WL 640246 (5th Cir. Feb. 15, 2024).

² *Van Buskirk v. Cable New Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); See Also *Davis v. HSBC Bank, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012).

³ *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2nd Cir. 2002).

mis-drafted the family trusts. While the damages for each set of claims can be derived from distributions under the family trust terms, the legal injuries are separate and distinct. Further, Petitioner's cause of action against Respondent was not fixed or nonspeculative until the *Eitel v. PNC* court ruled the terms of the family trusts were not what the testators' intended (narrow HEMS provisions in accordance with I.R.C. 2041). In effect, the only extrinsic evidence Petitioner relied upon in her complaint against Respondent was the final order in the separate *Eitel v. PNC* matter.

In *Eitel v. PNC*, the district court determined limitations had lapsed for claims against bank-trustees for breaches of fiduciary duty centered in large part on the bank-trustees distribution of trust assets via the bank-trustees' interpretation of the family trusts encroachment provisions, as drafted by Respondent. *Id.* At no time prior to the judgment in *Eitel v. PNC* could a legal injury caused by Respondent even be fixed or irrevocable until the *Eitel v. PNC* court made the judgment and issued its final order. The *Eitel v. PNC* judgment is currently pending review in the Sixth Circuit Court of Appeals.

Petitioner's cause of action did not "occur" until the *Eitel v. PNC* decision fixed Petitioner's "legal injury" from Respondent's work product. Had the *Eitel v. PNC* court ruled differently, Petitioner would have had no standing to bring claims against Respondent, as denial of summary judgment in *Eitel v. PNC* would be prefaced upon the finding that the "legal injury" which was fixed was one of wrongful interpretation of the trusts' properly drafted terms by the fiduciary bank-trustees in that cause, effectively ruling the terms were HEMS standards under Internal Revenue Code Section 2041.

III. Kentucky Federal Case Law Supports Petitioner's Argument the lower court rulings erroneously confuse "legal injury" and "damages" sufficient to render the final orders incorrect decisions.

The District Court's reliance on Petitioner's complaint in separate litigation (*Eitel v. PNC*) against separate parties was an abuse of discretion and manifest error because Petitioner did not rely on or reference her prior complaint, nor was Petitioner's complaint in *Eitel v. PNC* integral to her complaint against Respondent. Petitioner merely cited a final order in her complaint against Respondent, while Respondent merely cited the unsubstantiated opinions of a designated expert witness in the *Eitel v. PNC* matter. Neither Petitioner nor Respondent referenced or cited Petitioner's complaint in *Eitel v. PNC* because the pleadings in such matter were not relevant to Respondents' defense. The only relevant determination was whether Petitioner's citation to the final order in *Eitel v. PNC* or Respondent's citation to the expert witness opinion constituted the triggering of "knowing" of a potential cause of action sufficient to trigger the clock for limitations.

A. EQT is identical to Petitioner's case and demonstrates dismissal was wrong

The decision in the Kentucky Eastern District Court in the EQT case clearly and concisely demonstrates the 6th Circuit's ruling on Petitioner's appeal was wrongly decided, in whole or in part due to reliance on extrinsic evidence which was misinterpreted and misused. *EQT Production Company v. Vorys, Sater, Seymour and Pease, LLP et. al*, Case No.15-146-DLB-EBA (E.D. Ky. Apr. 27, 2018) strikingly captures why the "occurrence" of Petitioner's claims under KRS 413.245 could not occur until the district court in *Eitel v. PNC* ruled Petitioner did not have a legal injury from the trust distributions because the trust encroachment provisions were broad, which in turn

and for the first time solidified the fixation of legal injury from Respondent's scrivenship of the trust provision with the intention to create a narrow HEMS standard.

In the *EQT* case, EQT, a coal production company, brought legal malpractice claims against a law firm who provided inaccurate title opinions to EQT, which led, in a separate litigation, to EQT being ordered to pay over 14 million dollars' worth of coal-mining land to Journey Acquisition, LP because of the defective title opinions EQT received from its attorneys.⁴ After losing the case against Journey, EQT turned around and sued their lawyers whose work product was officially determined the cause of liability to *Journey*. In determining whether EQT's claims against the title opinion attorneys were time-barred, the district court determined EQT's malpractice claims did not "occur" under KRS 413.245 until the *Journey* litigation ended because, in the event EQT would have won in the *Journey* litigation, there would be no fixed legal injury from the defective title opinions.⁵

Applied here, Petitioner's legal injury and resulting damages against Respondent for improper drafting of the Eitel Trusts' encroachment provisions and resulting trustee distribution of assets to non-beneficiaries or beyond the standards of distribution, could not be fixed or occur until the *Eitel v. PNC* court rendered its decision in reference to the bank trustees. Put plainly, either the bank-trustees misinterpreted the trusts and were the legal injury causing parties, or the attorneys who drafted the trusts caused the legal injury by improperly drafting the trusts to allow distributions which were not in accordance with the testator's wishes that Petitioner receive appreciated principal trust assets. Petitioner's claims of malpractice would be nonexistent had the *Eitel v. PNC* court ruled in her favor on summary judgment thereby eliminating standing against Respondents, therefore such final order is the only plausible trigger of the occurrence statute of

⁴ *Journey Acquisition-II, L.P. v. EQT Prod. Co.*, No. 6:12-cv-108-GFVT-EBA (E.D. Ky. 2012).

⁵ *EQT Production Company*, Case No. 15-146-DLB-EBA (E.D. Ky. Apr. 27, 2018) at 19-21*.

limitation under Kentucky law and KRS 413.245. Respondents' and the lower court's confusion under the *Wolfe*⁶ precedent interpreting "fixed and irrevocable" as it pertained to damages has no relationship with the fact Petitioner's "legal injury" was not fixed and certain, as it related to Respondent, until the final order in *Eitel v. PNC*. To claim otherwise, would simply require Petitioner to bring claims against Respondent prior to having legal standing and prior to even knowing Respondent was involved or may have potential liability.

Had Petitioner been successful against the bank-trustees in *Eitel v. PNC* and recovered for the allegedly improper distributions, Petitioner would have no damage or legal injury from the alleged malpractice of Respondent. The contingency of recovery against the bank-trustees made the damage and legal injury from Respondent's scrivenship entirely speculative just like EQT's malpractice claims did not become fixed and non-speculative until the end of the *Journey* litigation.

IV. The Lower Court's Reliance on Uncited Extrinsic Evidence Nullifies 12(b)(6) Four Corners Rule

At what point do the voluminous and unfettered exceptions to a rule, under the guise of judicial discretion, will the original rule become a nullity? Petitioner pleads with this Court to see the wisdom in resolving to identify a strict test of factors within which to predictably outline and homogenize the standards of 12(b)(6) consideration of extrinsic evidence.

Under any other circuit rubric, Petitioner would have been provided the ability to engage in discovery or at the very least to be provided additional time to enhance her pleadings to demonstrate all of the factual and legal evidence demonstrating Petitioner's legal injuries caused by Respondent could not accrue until finality came in *Eitel v. PNC* determining the liability of the

⁶ *Wolfe v. Kimmel*, 681 S.W.3d 7, 26 (Ky. 2023) clarifying Kentucky law of limitations for malpractice is triggered when the damages from an existing legal injury from a lawyer's conduct is fixed and non-speculative, not when the volume of damages is determinable to the dollars and cents.

bank-trustees distributing allegedly inappropriate trust assets. Absent such determination, there could be no fixed or nonspeculative legal injury flowing from Respondent's legal work, as a different decision in *Eitel v. PNC* holding the bank-trustees liable to Petitioner would impliedly or explicitly require a finding the bank-trustees misinterpreted an otherwise appropriate narrow trust encroachment provision. Instead, the *Eitel v. PNC* court determined the bank-trustees were not liable, in part, because the court found the trusts were broad.⁷ This decision cemented, for the first time, that the scrivenship of Respondent was defective.

Under the Fed. R. E. 201 exception to extrinsic evidence, the district court in any other circuit would not have been permitted to take judicial notice or use of Petitioner's prior complaint because the facts asserted were plainly in dispute. Under the centrality standard, Petitioner's prior complaint against other parties for distinct and separate conduct was not central to Petitioner's claims against Respondent. Under the incorporation by reference standard, Petitioner did not incorporate all pleadings in *Eitel v. PNC*, nor did Respondent. Instead, the parties disputed the trigger date between either an expert witness report or a final order in *Eitel v. PNC*, not all unenumerated and disputed facts in pleadings from *Eitel v. PNC*. The district court's exercise of discretion here goes beyond the bounds of reasonability.

The district court dismissed Respondent's claims under 12(b)(6) with prejudice and without leave to amend, finding Petitioner's claims were futile under a limitations bar as the district court felt Petitioner's knew or should have known of her legal injury at the time she sued the bank-trustees in *Eitel v. PNC* because some of the damages resulted from the bank-trustees interpretation of the trust encroachment provision.⁸ The 6th Circuit affirmed, finding Petitioner

⁷ *Eitel v. PNC Bank et. al.*, No. 3:20-cv-00012-RGJ/RSE (KYWD February 20, 2023 at 11*).

⁸ Appendix, District Court Record Entry 38 dismissing Petitioner's claims with prejudice and without leave to amend due to a sua sponte finding of futility.

should have discovered her legal injury at the time she sued the bank trustees.⁹ These decisions rely exclusively on the truth of matters asserted in extrinsic evidence of which Petitioner neither incorporated into her complaint against Respondent, nor documents referenced or relied upon by Petitioner. In essence, the district court, sua sponte, relied on the precept that if damages in a separate legal action flow partially from the same subject matter documents then legal injury must be the same, and therefore the clock against the concealed tortfeasor (Respondent herein) begins against Petitioner, extinguishing claims before she knows she has them. The reason the “occurrence” was impossible until the final order in *Eitel v. PNC* is due to the simple fact: had the *Eitel v. PNC* district court denied the bank-trustee defendants motions for summary judgment, then Petitioner would have no claims against Respondent, as the crux of *Eitel v. PNC* evolved to whether the bank-trustees misinterpreted an appropriate HEMS encroachment clause or the bank-trustees appropriately utilized a mis-drafted broad non-HEMS provision. The identical issue was resolved in *EQT* by the Eastern District Court of Kentucky in which previous litigation was the trigger of occurrence for legal malpractice as the outcome of such previous litigation would determine *EQT*’s standing to sue their attorneys for malpractice. The same issue arose here – but instead of identifying the connection between cases, the district court not only dismissed Petitioner’s complaint, but deprived her of the ability to amend or at least convert the proceedings to Rule 56 summary judgment and permit Petitioner additional time for discovery and supplementation of evidence to disprove the limitations defense, including by pointing out Respondent was party-counsel in *Eitel v. PNC* and had every opportunity to disclose their predecessor’s involvement as scrivener and withdraw and force Petitioner herein to amend her

⁹ Appendix, 6th Circuit Court Order Affirming the district court on March 11, 2026.

complaint against the bank-trustees to add Respondent in that case. Instead, Respondent chose to stay silent and caused the current posture in this set of proceedings

CONCLUSION

The decisions below represent a clear circuit divergence of the 6th Circuit, as well as the ever-slippery slope of discretion proffered to district courts in utilizing extrinsic evidence during 12(b)(6) decisions. In this case, the district court's decision and the appellate court's affirmation reflect a new era of extrinsic evidence: the entire docket of pleadings in a separate matter regarding the same subject matter but different parties and distinct claims. 6th Circuit courts are now apparently free to utilize their clerks to seek and utilize documents containing contested matters of fact to establish just cause for eliminating a complaint while simply reviewing for plausibility. Justice and fairness necessitate predictable and equal boundaries. In effect, because the discretion is unlimited, the four corners rule of 12(b)(6) is now effectively a nullity. To preserve the functional, predictable, and fair rendition of procedural justice, Petitioner respectfully urges this Court to establish boundaries of discretion on when, how, and what caliber of extrinsic evidence district courts may utilize in the 12(b)(6) process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: 9/7/2026