2003

Motion of the Fair Housing Center of Metropolitan Detroit for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of Petitioners, Paschal v. Flagstar Bank, FSB, 537 U.S. 1227 (Supreme Court of the United States of America 2003) (No. 02-961)

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AMICUS BRIEF

FILED WITH THE U.S. SUPREME COURT

THIS BRIEF IS GREEN IN COLOR

No. 02-961

In the
Supreme Court of the United States

GERALD PASCHAL AND LISA PASCHAL,
Petitioners,

v.

FLAGSTAR BANK, FSB,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF THE FAIR HOUSING CENTER OF METROPOLITAN DETROIT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The Fair Housing Center of Metropolitan Detroit moves for leave to file a brief *amicus curiae* because consent to file has been refused by Flagstar Bank, FSB, Respondent. A copy of the proposed brief is attached.

As more fully explained in the brief under "Interest of *Amicus Curiae*", the Fair Housing Center of Metropolitan Detroit is a nonprofit organization that investigates complaints of housing and mortgage lending discrimination, and assists complainants in litigating and resolving such claims. The Fair Housing Center supports Petitioners' request for Writ of Certiorari, and requests that the Court of Appeals' entry of judgment as a matter of law on appeal be reversed.

Accordingly, the Fair Housing Center respectfully requests that the Court grant leave to permit the filing of the attached brief *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

Amicus Curiae Fair Housing Center of Metropolitan Detroit will briefly address the following questions:

I. Whether the Sixth Circuit Court of Appeal's erroneous interpretation of F.R. Civ. P. 50(b) warrants corrective action by this Court?

II. Will the substantive rights of persons protected by this nation's fair housing laws be damaged if this Court fails to correct the erroneous action of the Sixth Circuit Court of Appeals?

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STATEMENT OF INTEREST

The Fair Housing Center of Metropolitan Detroit (Fair Housing Center) submits this brief as *Amicus Curiae*[1] in support of Petitioners' Petition for Writ of Certiorari. The Sixth Circuit Court of Appeals erroneously interpreted F. R. Civ. P. 50(b) in a manner which conflicts with decisions of this Court and other courts of appeals and, if let stand, will have a devastating affect on the substantive rights of protected persons to bring claims of fair lending violations under 42 U.S.C. §§ 1981 & 1982.

The Fair Housing Center was formed in 1977 for the purpose of addressing fair housing issues, including fair lending claims, throughout the metropolitan Detroit area. The Fair Housing Center seeks to assure equal access to housing without discrimination based upon race, sex, color, religion, national origin, familial status or handicap. In its 25 year history, the Fair Housing Center has investigated over 5,000 complaints of unlawful housing discrimination, and assisted hundreds of complainants resolve unlawful housing discrimination claims through state and federal lawsuits. The Fair Housing Center conducts fair housing tests of lending institutions, and provides training sessions and seminars to lending institutions and other housing providers.

In 1996, the Fair Housing Center joined other plaintiffs, including Petitioners Gerald and Lisa Paschal (Paschals), in this mortgage lending discrimination lawsuit

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[1]Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae*, its staff or its counsel, made a monetary contribution for the preparation or submission of this brief.

against Respondent Flagstar Bank, FSB (Flagstar). The Fair Housing Center's portion of this action has been settled. The Paschals' portion of this lawsuit continues with their Petition to this Court.

The Fair Housing Center was instrumental in assisting in the proofs in the present case, through testimony and introduction of testing evidence. *Paschal v. Flagstar Bank, FSB*, 295 F.3d 565, 577-580 & 583 (6th Cir. 2002)(Petition for Writ of Certiorari, App. A, at 21a-30a & 36a).

While the Fair Housing Center previously has not been involved as *amicus curiae* before this Court, the impact of the decision in the present case is one which will have a direct affect on the activities of the Fair Housing Center in seeking to eradicate unlawful discrimination in lending practices. The Fair Housing Center believes that its expertise in this area can assist this Court in its determination of this matter.

STATEMENT OF THE CASE

This lawsuit involved fair lending claims brought by plaintiffs Gerald and Lisa Paschal (Paschals) against defendant Flagstar Bank (Flagstar). Shortly after the lawsuit was filed, Flagstar moved for partial summary judgment on limitations grounds. The trial judge held that the applicable three-year statute of limitations did not bar the Paschals' claim under the 42 U.S.C. §§ 1981 and 1982, and a related claim under the Michigan Elliot-Larsen Civil Rights Act (Michigan ELCRA), Mich. Comp. Laws § 37.2504. The case proceeded to a jury trial, without Flagstar ever reasserting the limitations defense in any pretrial order or statement, or in any other way.

At the conclusion of the trial on the merits, Flagstar moved for judgment as a matter of law under F. R. Civ. P. 50(a). Rule 50(a)(2) unequivocally provides that: "Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Flagstar simply asserted that the motion was based on "all the reasons known to the law" and did not mention the statute of limitations defense. Flagstar's motion was denied, and the jury returned a verdict in favor of the Paschals.

After the verdict, Flagstar renewed its motion for a judgment as a matter of law, which again made no mention of the statute of limitations. The trial court again denied the motion. Only on appeal did Flagstar attempt to assert its waived limitations defense. A panel of the Sixth Circuit Court of Appeals accepted Flagstar's argument.

ARGUMENT

I

The Sixth Circuit's Interpretation of F. R. Civ. P. 50(b) Conflicts with the Decisions of this Court and Other Courts of Appeals, and Raises a Substantial Question that Should Be Resolved

The opinion of the Court of Appeals violates the clear letter of F. R. Civ. P. 50(a)(2), and previous unambiguous decisions of this Court and other Courts of Appeals, and causes substantial injustice to the Paschals. This case raises an important question of civil procedure that concerns any party litigating cases in the Courts of the United States.

Rule 50(b) on its face provides no discretion to the Court of Appeals in considering the limitations claim. That rule allows a movant to renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment. Rule 50(a)(2) states that the moving party must specify the law and facts on which the moving party relies. The Sixth Circuit ignored the clear language of the Rule by holding that Flagstar preserved its limitations defense when it moved for judgment as a matter of law for "all the reasons known to the law." Because the motion did "not require the resolution of any disputed facts," the Court held that Flagstar did not waive "a pure question of law."

Rule 50 makes no distinction between questions of law and questions of fact. The specificity requirement in the rule is to prevent surprise to the non-moving party and to protect the integrity of the jury process. This Court has recognized that if a proper motion is made, the non-moving party might be able to fill the gap in the evidence. *Cone v. West Virginia, Pulp & Paper Co.*, 330 U.S. 212, 217 (1947).

In *Johnson v. New York, N.H. & H. R. Co.*, 344 U.S. 48, 51 (1952), this Court stated with respect to Rule 50(b): "[R]espondent's motions cannot be measured by its unexpressed intention or wants. . . . [S]urely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of respondent's counsel."

Even if the Court of Appeals is right that the Rule makes an exception for "pure" questions of law, the application of a statute of limitations is not a pure question of law. Whether the statute of limitations applies depends upon a careful assessment of when the acts occurred. *See, e.g., National Railroad Passenger Corp. v. Morgan,* 122 S. Ct.

2061 (2002). If counsel for the Paschals had been notified in advance that Flagstar was asserting a statute of limitations defense, counsel might well have developed the facts differently to show more specifically that the discriminatory acts occurred within the limitations period.

In the absence of a properly stated motion for judgment as a matter of law under Rule 50(a)(2), Rule 50(b) forbids an appellate court from entering a post-verdict judgment, *Johnson,* 344 U.S. at 51, such as the Sixth Circuit did in this case. Courts of Appeals hold that generalized or conclusory language in a motion for judgment as a matter of law is insufficient under Rule 50. *See, Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F. 3d 276, 286-287 (2d Cir. 1998); *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997); *Waters v. Young,* 100 F.3d 1437, 1441 (9th Cir. 1996).

The motion filed by Flagstar is so defective that it cannot even be characterized as generalized or conclusory. It does not even refer to a limitations problem. It gave no notice to either the Paschals or the Court about what legal claims Flagstar was attempting to assert.

The holding of the Sixth Circuit Court of Appeals eviscerates Rule 50, and invites litigants to file generalized motions to the detriment of orderly process. It allows slothful or unprincipled lawyers to take unfair advantage of their opponents and the trial court by asserting general objections in the trial court and then during the appeals process advancing objections that were not clearly stated below and which could perhaps have been corrected in due order in the trial court.

II

Allowing the Sixth Circuit's Erroneous Procedural Ruling to Stand Will Have Devastating Results on the Substantive Rights of Protected Persons to Bring Claims of Fair Lending Violations

If this Court were inclined to view this case as a mere procedural error, *i.e.*, a misapplication of this Court's rulings under Rule 50(b), this Court would wholly miss the substantive contexts in which this procedural error occurred. The Sixth Circuit Court of Appeals has committed reversible error in this the first appellate case brought by private parties that prevailed before a jury, under 42 U.S.C. §§ 1981 & 1982, for residential mortgage lending discrimination. The fact that this reversible error occurred in this appellate case has historic and practical reverberations for all private parties who bring fair lending claims under Sections 1982 & 1982, as well as the federal Fair Housing Act of 1968, *as amended by* the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3605. A brief review of the historical context in which this case appears makes this devastating impact more clear.

As this Court well knows, the history of mortgage lending practices in the United States prior to the enactment of the Fair Housing Act in 1968 was one of officially approved discrimination. *See, e.g.*, Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. Mich. J. L. Ref. 527, 528 (1993). Even when discrimination in lending was not officially sanctioned, the practice of lending based upon the race of the applicant or the racial make up of a neighborhood was widespread and rampant. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*,

73 Tex. L. Rev. 787, 789 (1995). It has been empirically posited that "race" played, and still plays, a most significant role in who receives mortgage financing. Dane, 26 U. Mich. J.L. Ref. at 530.

Despite the historically documented discrimination in lending practices throughout the United States, there has been a dearth of litigation brought by private parties for lending discrimination. This is not because the discrimination is any less rampant. Since its enactment in 1989, the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2809-2810, has required all independent mortgage companies, and mortgage lenders owned by depository institutions, making at least 100 home purchases and/or refinance loans in a given year, to compile loan approval and denial data with respect to residential home lending. From the onset of the collection of this mortgage lending data, commonly referred to as "HMDA data", the scope of discriminatory lending practices became evident.

The first study of nationwide HMDA data revealed quite starkly that African-American applicants were turned down for mortgages 50% more often than Whites. *See, e.g.*, Canner & Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 Fed. Reserve Bull. 859 (1991). Because of criticism of this initial study (for failure to consider every criterion involved in making a lending decision), the Federal Reserve Bank of Boston commissioned a subsequent study of HMDA data to account for other variables that might affect a lending decision, including, *inter alia*, net worth, credit history, employment history, neighborhood characteristics, etc. After making appropriate adjustments for all of the other factors bearing on a lending decision, the Federal Reserve found that African-American were still denied mortgages 60% more often than Whites. *See*

Munnell, Tootell, Browne and McEneaney, *Mortgage Lending in Boston: Interpreting HMDA Data* (Federal Reserve Bank of Boston Working Paper No. 92-7, Oct. 1992). As recent as 1996, a study of HMDA showed residential mortgage rejection rates of 48.8% for African-Americans, 34.4% for Hispanics, and 24.1% for Whites. ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 18.2, at p. 18-12 & n.13 (West).

These lending disparities continue to the present date. As noted in a recent HUD Study:

> More than three decades after the passage of the Fair Housing Act . . . , African-American and Hispanic homebuyers still do not enjoy equal access to home ownership. Widespread evidence indicates that minority homebuyers are less likely than whites to obtain mortgage loans and, if they are successful, receive less favorable loan amounts and terms.

Turner, Freiberg, Godfrey, Herbig, Levy & Smith, *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, Final Report,* at 12 (Apr. 2002)(available at http://www.huduser.org/publications/hsgfin/aotbe.html).

The Court may ask, if residential lending discrimination is so rampant, why are so few cases brought by private citizens? Why is this just the first appellate case involving residential mortgage lending to reach this Court? The answer is quite obvious. To put together a *prima facie* case of lending discrimination, a plaintiff and counsel must spend a significant amount of time and money reviewing vast compilations of statistical data. *See, e.g.,* Regan, *Note, The Community Reinvestment Act Regulations: Another Attempt to*

Control Redlining, 28 Cath. U.L. Rev. 635, 636-637, 647-651, 661 (1979).

Other commentators have noted that in seeking to provide statistically significant differences between African-Americans and other protected class members and non-minorities, the expense may be great, involving the use of experts and sophisticated analysis of many bank files. Swire, 73 Tex. L. Rev. at 830-831. The trial judge in the present case eloquently noted the amount of work that had to be done by Plaintiffs' counsel in conjunction with expert witnesses (at great expense) in order to demonstrate that the Plaintiffs were treated differently than other similarly situated Whites. *Edwards v. Flagstar Bank, FSB,* 109 F. Supp. 2d 691, 694 (E.D. Mich. 2000)(Petition for Writ of Certiorari, App. D, at 58a).

It is in this context that the Petition for Writ of Certiorari must be reviewed by this Court. Consistent with Court precedent, Sections 1981 & 1982 should be given broad application to remedy racial discrimination in residential mortgage lending. This Court should not allow a strained and erroneous reading of a procedural rule, Rule 50(b), by an appellate court to undermine the substantive basis for the civil rights violation as determined by a jury. If, as the commentators agree, that mortgage lending discrimination is rampant, and if, as commentators agree, that putting together the proofs in a mortgage lending case is extremely expensive, complicated and time consuming, this Court should not allow an improper procedural interpretation to destroy and to further inhibit counsel from prosecuting fair lending violations.

CONCLUSION

The Court should grant a Writ of Certiorari, and peremptorily reverse the Sixth Circuit Court of Appeals.

Respectfully submitted,

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