No. 22-444

In the

Supreme Court of the United States

EMILY MORGAN,

Petitioner,

v.

YELLOW ROSE INSURANCE CO., INC.,

Respondent.

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

---

COMPETITION PACKET FOR THE
THIRTIETH ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2023

JORDAN A. HYDEN
Judge John R. Brown Admiralty Moot Court Competition
University of Texas School of Law
727 East Dean Keeton Street
Austin, Texas 78705
tel.: (940) 733 – 9980

DESMOND M. SIMS
Director of Special Competitions
Moot Court Board
Tulane University School of Law
6329 Freret Street
New Orleans, LA 70118-5670
Tel.: (832) 942 – 8468

Competition Directors

BRADLEY A. JACKSON
MICHAEL F. STURLEY
University of Texas School of Law
tel.: (512) 232 – 1350

MARTIN DAVIES
Tulane University School of Law

Competition Committee

Table of Contents

MATERIAL THAT CAN BE CITED IN THE BRIEFS AS "APPENDIX TO THE PETITION FOR CERTIORARI":

Opinion of the United States Court of Appeals for the Fifth Circuit 1a

Opinion of the United States District Court for the Southern District of Texas 13a

Order of the United States Court of Appeals for the Fifth Circuit denying rehearing 17a

ADDITIONAL MATERIAL INCLUDED IN THE COMPETITION PACKET:

Selected Chronology of the Case 1b

YELLOW ROSE INSURANCE CO., INC., Plaintiff-Appellant,

v.

EMILY MORGAN, Defendant-Appellee.

No. 20-12345

United States Court of Appeals,
Fifth Circuit

April 8, 2022

Appeal from the United States District Court for the Southern District of Texas.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

HAMMURABI, Circuit Judge:

Almost sixty years ago, we declared that the doctrine of *uberrimae fidei* ("utmost good faith") was "solidly entrenched in our body of federal maritime law." *Fireman's Fund Insurance Co. v. Wilburn Boat Co.*, 300 F.2d 631, 647 n.12, 1962 AMC 1593, 1615 n.12 (5th Cir. 1962). Thirty years ago, we held "that the *uberrimae fidei* doctrine is entrenched no more." *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882, 890, 1991 AMC 2211, 2219 (5th Cir. 1991). Today, recognizing developments in our sister circuits over the last three decades, we hold that the doctrine is entrenched once again.

Because we conclude that the *uberrimae fidei* doctrine is an entrenched part of federal maritime law, we must also decide the terms on which it applies. We follow the views of most of our sister circuits and hold that an insurer may declare a policy void (and must return the premium payments) if the insured misrepresented or failed to disclose a material fact when applying for the policy, regardless of whether the insurer relied upon that misrepresentation or non-disclosure.

When Plaintiff-Appellant Yellow Rose Insurance Co., Inc. ("Yellow Rose") discovered that Defendant-Appellee Emily Morgan had failed to mention a prior accident that she should have

disclosed on her application for insurance, it brought the present action seeking a declaratory judgment that it was entitled to avoid the marine insurance policy. The district court, following our decision in *Anh Thi Kieu*, held that Texas law — not federal maritime law — governed the dispute, and that Texas law did not permit Yellow Rose to avoid the policy unless it could show reliance. *See Mayes v. Massachusetts Mutual Life Insurance Co.*, 608 S.W.2d 612, 616 (Tex. 1980). We reverse.

I

In November 2016, Morgan's yacht the *San Jacinto* allided with a pier. A year and a half later, she purchased a second yacht, the *Channel Point*, and sought insurance coverage from Yellow Rose. She admits that in her application for that coverage she should have disclosed the 2016 allision, but she did not. Yellow Rose, based on its long-standing business relationship with Morgan, issued the policy on the *Channel Point* before it saw her new application.

On January 4, 2019, the *Channel Point* was destroyed in a marina fire. Morgan filed a claim with Yellow Rose, which declined to pay the claim after it discovered the non-disclosure in Morgan's application. Yellow Rose instead filed this action seeking a declaratory judgment that it was entitled to avoid the policy. Morgan counter-claimed for breach of contract. Morgan conceded that the non-disclosure was "material" and Yellow Rose conceded that when it issued the *Channel Point* policy it did not rely on the non-disclosure (*i.e.*, it did not matter to Yellow Rose at the time that Morgan had not disclosed the prior accident).

The district court, bound by our decision in *Anh Thi Kieu*, held that there was no entrenched federal law on point and that state law therefore governed. The parties had agreed that if any state law governed, it was the law of Texas (since no other state had any significant connection with the transaction). The parties had also agreed that Texas law does not permit Yellow Rose to avoid the policy unless it can show reliance. *See Mayes v. Massachusetts Mutual Life Insurance Co.*, 608

S.W.2d 612, 616 (Tex.1980). The district court therefore ruled that Yellow Rose was liable on the policy.

II

The first issue to resolve is whether state or federal law applies. Morgan, relying on our decision in *Anh Thi Kieu*, argues that state law must apply because the *uberrimae fidei* doctrine is not an entrenched aspect of general maritime law. As *Anh Thi Kieu* itself demonstrates, however, whether a doctrine is entrenched can vary over time. Thirty years before *Anh Thi Kieu*, we recognized in *Wilburn Boat* (on remand from the Supreme Court) that the *uberrimae fidei* doctrine was "solidly entrenched in our body of federal maritime law." 300 F.2d at 647 n.12, 1962 AMC at 1615 n.12. But in *Anh Thi Kieu*, we concluded that the situation had changed and "that the *uberrimae fidei* doctrine [wa]s entrenched no more." *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882, 890, 1991 AMC 2211, 2219 (5th Cir. 1991). Since *Anh Thi Kieu*, many of our sister circuits have addressed the doctrine and have uniformly held that it is an entrenched aspect of general maritime law. Based on those subsequent developments, we now conclude that the *uberrimae fidei* doctrine is entrenched once again.

A brief survey of some of the cases illustrates the wide-spread recognition that the *uberrimae fidei* doctrine is an entrenched aspect of the general maritime law. The First Circuit in *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Services, Inc.*, 778 F.3d 69, 81, 2015 AMC 694, 711 (1st Cir. 2015), held "that the doctrine of *uberrimae fidei* is an established rule of maritime law in this Circuit."[1] Applying the doctrine, the court permitted an insurer to

[1] Like this Court, the First Circuit was slow to reach the conclusion that the *uberrimae fidei* doctrine is entrenched. *See Commercial Union Insurance Co. v. Pesante*, 459 F.3d 34, 38, 2006 AMC 2113, 2118 (1st Cir. 2006) (finding it unnecessary to decide "whether *uberrimae fidei* is an established rule of maritime law"); *Windsor Mount Joy Mutual Insurance Co. v. Giragosian*, 57 F.3d 50, 54 n.3, 1995 AMC 2542, 2547 n.3 (1st Cir.1995) ("[I]t is debatable whether the doctrine [of *uberrimae fidei*] can still be deemed an 'entrenched' rule of law.").

avoid a $1.75 million marine insurance policy on a floating drydock because the applicant had obtained the policy without disclosing that the drydock's actual market value was "approximately $700,000 to $800,000." *Id*. at 74.

In *Puritan Insurance Co. v. Eagle Steamship Co., S.A.*, 779 F.2d 866, 870, 1986 AMC 1240, 1245 (2d Cir. 1985) (Kearse, J.), the Second Circuit did not apply the *uberrimae fidei* doctrine on the facts of the case but held that it was "well established" in marine insurance cases.

In *AGF Marine Aviation & Transport v. Cassin*, 544 F.3d 255, 2008 AMC 2300 (3d Cir. 2008), the Third Circuit applied the doctrine to permit an insurer to avoid a yacht policy because the owner had misrepresented the purchase price of the yacht. The court unequivocally declared that "[t]he doctrine of *uberrimae fidei* imposes a duty of the utmost good faith and requires that parties to an insurance contract disclose all facts material to the risk." *Id*. at 262, 2008 AMC at 2307; *see also id*. at 263, 2008 AMC at 2309 (declaring "that *uberrimae fidei* applies to maritime insurance contracts" and "the doctrine of *uberrimae fidei* is well entrenched").

In *Certain Underwriters at Lloyd's v. Inlet Fisheries Inc.*, 518 F.3d 645, 650-654, 2008 AMC 305, 318-320 (9th Cir. 2008), the Ninth Circuit held that a marine insurance policy was voidable because the insured had failed to disclose information about prior losses, the condition of its vessels, and its pending bankruptcy. The Ninth Circuit concluded "that the long-standing federal maritime doctrine of *uberrimae fidei* . . . applies to marine insurance contracts." *Id*. at 654, 2008 AMC at 316.

In *HIH Marine Services, Inc. v. Fraser*, 211 F.3d 1359, 1362, 2000 AMC 1817, 1820 (11th Cir. 2000), the Eleventh Circuit applied the doctrine to hold a marine insurance policy void with respect to coverage of a yacht because the insured had failed to disclose that a proposed chartering contract was unexecuted and that it did not have possession of the yacht. The court explained that "[i]t is well-settled that the marine insurance doctrine of *uberrimae fidei* is the controlling law of

this circuit." *Id*.; *see also*, *e.g.*, *AIG Centennial Insurance Co. v. O'Neill*, 782 F.3d 1296, 1302-03, 2015 AMC 1217, 1224 (11th Cir. 2015) ("The age-old federal marine-insurance doctrine of *uberrimae fidei* . . . provides 'the controlling federal rule even in the face of contrary state authority.'") (quoting *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695, 1985 AMC 956, 964 (11th Cir. 1984)).

Morgan has not cited, and our own research has not identified, any other circuits that currently hold that the *uberrimae fidei* doctrine is not an entrenched part of general maritime law. In light of this imbalance, we can no longer decline to enforce the doctrine. *Anh Thi Kieu* may have been correct when it was decided, but in light of recent developments its conclusion is now unsustainable.

III

Having concluded that federal law applies, the second issue we must resolve is whether the general maritime law requires an insurer seeking to invoke the *uberrimae fidei* doctrine to prove that it actually relied on a material misrepresentation or omission when it agreed to issue the policy. Morgan, citing decisions of the Second and Eighth Circuits and academic commentary, argues in favor of a reliance requirement. It is true that decisions in those circuits support Morgan's argument, but the leading academic authority on her side of the debate recognizes that it is a minority view:

> Many of the [U.S.] cases considering and applying utmost good faith . . . take a flawed approach by considering only materiality without requiring inducement as well. *Only the Second and Eighth Circuits require inducement* in addition to materiality.

2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 19:14 at 480 (6th ed. 2018) (Practitioner Treatise Series) (emphasis added).[2]

[2] The "inducement" requirement is simply another name for the reliance requirement.

We prefer to follow the majority view, which is well illustrated by a recent decision from the First Circuit. In *QBE Seguros v. Morales-Vázquez*, 986 F.3d 1, 10 (1st Cir. 2021), the First Circuit held that that "a showing of actual reliance is not required" to invoke the *uberrimae fidei* doctrine. The court explained "that the materiality of a false statement or an omission, without more, provides a sufficient ground for voiding [the marine insurance] policy." *Id*. at 8.

IV

Because we conclude that federal law applies to this dispute, and that the general maritime law does not include a reliance requirement, Yellow Rose was entitled to declare Morgan's insurance policy void based on her failure to mention the *San Jacinto*'s 2016 allision when she applied for the *Channel Point* insurance policy — an omission that Morgan concedes was "material." The judgment of the district court is

Reversed.

JUSTINIAN, Circuit Judge, concurring:

I fully agree with Judge Hammurabi's opinion for the Court, and I join it without reservation. If it were open to us, however, I would adopt a more straightforward resolution of the case and hold that issues of marine insurance law — like other aspects of maritime law — are presumptively governed by the general maritime law. It is well-established that a policy of marine insurance is a maritime contract and that marine insurance disputes are accordingly within the admiralty jurisdiction. *See*, *e.g.*, *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1871); *De Lovio v. Boit*, 7 Fed. Cas. 418, 2 Gall. 398 (Case No. 3,776) (C.C. D. Mass. 1815) (Story, J.). It is also well-established that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986). There is no good reason why marine insurance disputes should be an exception to the general rule.

Of course, it is not open to us to adopt this more straightforward analysis. We are bound by the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955). But if this case proceeds further, I urge the Supreme Court to reconsider that ill-advised and much-criticized decision.

SOLOMON, Circuit Judge, dissenting:

Because I disagree with my colleagues on both issues, I must dissent. In my view, state law should govern this case. The parties have agreed that the relevant state law would be Texas's and that Morgan prevails under Texas law. If we must apply federal law, I would follow the long-established views of the Second Circuit (more recently adopted by the Eighth Circuit) and hold that marine insurance policies — like contracts and insurance policies generally — can be avoided under the *uberrimae fidei* doctrine only if the party seeking to declare the policy void can show that it actually relied on a material misrepresentation or omission. Because Yellow Rose has conceded that it is unable to prove reliance, Morgan should prevail under federal law, as well.

I

Our decision today must be guided by the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955). Under that decision, we must apply state law unless an entrenched rule of federal maritime law governs. We all agree on that understanding of the Supreme Court's decision. Our only disagreement is over what it takes for a doctrine — in this case, the *uberrimae fidei* doctrine — to be "entrenched." My colleagues have looked to the decisions of our sister circuits. I believe that we should follow the example that the Supreme Court itself set in *Wilburn Boat* when it decided that there was no entrenched rule of maritime law governing warranties. Our sister circuits did not follow that approach in the

uberrimae fidei context; we should not repeat their errors and we should not allow their errors to entrench a doctrine that does not satisfy the *Wilburn Boat* standards.

On the two occasions that the Supreme Court addressed the *uberrimae fidei* doctrine in maritime cases, it was applying what was then a general principle of insurance law — not a unique rule of maritime law. *See Sun Mutual Insurance Co. v. Ocean Insurance Co.*, 107 U.S. 485, 510 (1883); *M'Lanahan v. Universal Insurance Co.*, 26 U.S. (1 Pet.) 170, 185 (1828). Indeed, the Court applied substantially the same analysis in its two subsequent *uberrimae fidei* cases, which were pre-*Erie*, non-maritime decisions in life insurance cases with no salty flavor whatsoever. *See Stipcich v. Metropolitan Life Insurance Co.*, 277 U.S. 311, 316 (1928); *Phoenix Life Insurance Co. v. Raddin*, 120 U.S. 183, 189 (1887). The Supreme Court decisions addressing the *uberrimae fidei* doctrine are thus analogous to the Supreme Court decisions addressing warranties that the Court in *Wilburn Boat* found inadequate to establish a rule of general maritime law. *See Wilburn Boat*, 348 U.S. at 314-316 (discussing *Imperial Fire Insurance Co. v. Coos County*, 151 U.S. 452 (1894); *Hazard's Administrator v. New England Marine Insurance Co.*, 33 U.S. (8 Pet.) 557, 580 (1834)). If the Court's warranty decisions applying general principles of insurance law were inadequate in *Wilburn Boat* to establish a rule of general maritime law, the same should be true in the present context.

The *uberrimae fidei* doctrine was once just a principle of general insurance law, but general insurance law has progressed significantly since then. One factor influencing our decision in *Anh Thi Kieu* was that "the sole remaining substantial vestige of the [*uberrimae fidei*] doctrine is in maritime insurance law." 927 F.2d at 888, 1991 AMC at 2217. The First Circuit has similarly explained that "the doctrine of *uberrimae fidei* . . . in modern American jurisprudence is extant only in the context of maritime insurance." *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Services, Inc.*, 778 F.3d 69, 75, 2015 AMC 694, 702 (1st Cir. 2015). Other courts have

agreed. *See*, *e.g.*, *Certain Underwriters at Lloyd's v. Inlet Fisheries Inc.*, 518 F.3d 645, 646, 2008 AMC 305, 306 (9th Cir. 2008) ("Today, *uberrimae fidei* has been displaced in most insurance contexts."). If there is to be any movement in our characterization of the doctrine, it should not be in the direction of imposing harsher penalties for errors on which the other party did not rely. A doctrine that was not entrenched thirty years ago, as we held in *Anh Thi Kieu*, should not have become entrenched in the meantime when all the movement in insurance law generally has been in the opposite direction — particularly when the doctrine originated as a principle of general insurance law.*

II

If we are to apply federal law, I would apply the general maritime law as the Second and Eighth Circuits have. They both hold that an insurance policy is not voidable under the *uberrimae fidei* doctrine unless the insurer shows that it actually relied on the insured's misrepresentation or non-disclosure of a material fact.

In *Puritan Insurance Co. v. Eagle Steamship Co., S.A.*, 779 F.2d 866, 1986 AMC 1240 (2d Cir. 1985) (Kearse, J.), for example, insurers sought a declaratory judgment that a marine insurance policy was void because the shipowners had failed to disclose two prior losses when they applied for insurance. The district court held that the insurers were liable on the policy because they had not relied on the information in the application when deciding to accept the risk. *Id*. at 870, 1986 AMC at 1241. The Second Circuit, affirming that judgment, explained that "[t]he principle of *uberrimae fidei* does not require the voiding of the contract unless the undisclosed facts were material *and relied upon*." *Id*. at 871, 1986 AMC at 1246 (emphasis added). Because the district

* The origin of the *uberrimae fidei* doctrine is commonly traced to a dictum in *Carter v. Boehm*, (1766) 3 Burr. 1905, 1910, 97 Eng. Rep. 1162, 1164 (KB), a non-maritime case in which Lord Mansfield announced a "governing principle" that was "applicable to *all* contracts and dealings."

court found that the insurers had not relied on the incomplete information, they were not entitled to avoid the policy. *Id*. at 872, 1986 AMC at 1241; *see also*, *e.g.*, *Atlantic Specialty Insurance Co. v. Coastal Environmental Group Inc.*, 945 F.3d 53, 66 (2d Cir. 2019); *Fireman's Fund Insurance Co. v. Great American Insurance Co. of New York*, 822 F.3d 620, 638, 2016 AMC 1217, 1233 (2d Cir. 2016); *Federal Insurance Co. v. Keybank N.A.*, 340 Fed. App'x 5, 7 (2d Cir. 2009).

In *St. Paul Fire & Marine Insurance Co. v. Abhe & Svoboda, Inc*., 798 F.3d 715, 719-722, 2015 A.M.C. 2113, 2116-22 (8th Cir. 2015), the Eighth Circuit followed the Second Circuit in recognizing the reliance requirement. An insurer sought a declaratory judgment that an insurance policy on a barge was void because the insured when it applied for coverage had failed to disclose a survey report. The Eighth Circuit held that the policy was not voidable unless the insurer could show that the non-disclosure induced it to enter the policy. Several factors influenced that result. First, a party to a contract generally may not rescind the contract based on a misrepresentation or non-disclosure without proving reliance. *Id*. at 720 (citing RESTATEMENT (SECOND) OF CONTRACTS § 164 cmt. c (AM. L. INST. 1981); 27 RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:32 (4th ed. 2014)). The court could "discern no reason why the requirement of causation should be removed in the context of marine insurance contracts." *Id*. Second, the contrary rule "would create a moral hazard on the part of marine insurers." *Id*. When an insurer was aware of a misrepresentation or omission, it could issue the policy and collect the premium — avoiding the policy if a loss occurred. *Id*. at 720-721. Third, insurers are required to demonstrate reliance before avoiding a policy in other insurance contexts. *Id*. at 721. Finally, some courts have effectively required reliance by applying a subjective standard for materiality. *Id*. at 721-722. "These decisions are consistent in substance with our conclusion, but we think clarity is enhanced by preserving actual reliance and objective materiality as distinct elements." *Id*. at 722.

I am persuaded that we should follow the lead of the Second and Eighth Circuits for many of the same reasons. In addition, adopting a reliance requirement would help to maintain uniformity with the law of England, which is still home to the world's leading marine insurance market. The Supreme Court has long recognized the value of maintaining uniformity with the law in England on issues of marine insurance. *See*, *e.g.*, *Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co.*, 263 U.S. 487, 493 (1924). Under the Insurance Act 2015, c. 6 (U.K.), and the Consumer Insurance (Disclosure and Representations) Act 2012, c. 6 (U.K.), an insurer has no remedy for a misrepresentation unless it can show reliance (as in the Second and Eighth Circuits). When an insurer can show reliance, its available remedies are detailed in Schedule 1 to the 2012 Act. Avoiding the contract is an option only for a deliberate or reckless misrepresentation.

Even before the legislation of the last decade, British law recognized substantially the same reliance requirement that the Second and Eighth Circuits apply. *See*, *e.g.*, *Pan Atlantic Insurance Co. Ltd. v Pine Top Insurance Co. Ltd.*, [1995] 1 AC 501 (HL) 549 (Lord Mustill) ("[T]here is to be implied in the [Marine Insurance] Act of 1906 a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using 'induced' in the sense in which it is used in the general law of contract."); *Assicurazioni Generali SpA v Arab Insurance Group (B.S.C.)*, [2002] EWCA (Civ) 1642 [62] (Clarke, L.J.), [2003] 1 All ER (Comm) 140, 158 ("In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.").

III

I share the hope implicitly expressed in Judge Justinian's concurring opinion that the Supreme Court will review our decision. But I hope that the Court will take the opportunity to reaffirm *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955), and hold that state law *always* governs marine insurance disputes or, if it does decide to apply federal law here, to bring the general maritime law on the doctrine of *uberrimae fidei* into the 21st century. In the meantime, I respectfully dissent.

United States District Court
for the Southern District of Texas

YELLOW ROSE INSURANCE CO., INC., Plaintiff,

v.

EMILY MORGAN, Defendant.

No. 17-Civ-6838

August 3, 2020

PORTIA, J.:

Plaintiff Yellow Rose Insurance Co., Inc. ("Yellow Rose") filed the present action against defendant Emily Morgan ("Morgan") seeking a declaratory judgment that the ancient doctrine of *uberrimae fidei* ("utmost good faith") permitted it to avoid the policy of marine insurance on her yacht, the *Channel Point*. When Morgan applied for that policy, she failed to disclose an allision involving another vessel that she owns. During Yellow Rose's investigation after the *Channel Point* was destroyed in a marina fire, it discovered Morgan's failure to make that required disclosure. Yellow Rose therefore declared the insurance policy void and declined to pay Morgan's claim.

Findings of Fact

1. On November 8, 2016, Morgan was operating her yacht, the *San Jacinto*, in Galveston Bay when she allided with a pier on Red Fish Island, causing minor damage to both her yacht and the pier. Yellow Rose, Morgan's marine insurer, paid for the damage (less the policy deductible).

2. On May 1, 2018, Morgan purchased a second yacht, the *Channel Point*. She berthed her new yacht at the Kemah, Texas, marina alongside the *San Jacinto*.

3. On the same day she purchased the *Channel Point*, Morgan asked her insurance broker to determine whether Yellow Rose would offer policy terms and a premium competitive with or better than other yacht insurers. Yellow Rose immediately agreed to insure the new yacht on very favorable terms because Morgan was a good customer, having also insured her car, house, and life with Yellow Rose's parent company.

4. On May 5, 2018, Morgan formally filled out her application for marine insurance as offered by Yellow Rose, which issued a policy of marine insurance on the *Channel Point*.

5. When filling out the company's standard-form insurance application, Morgan failed to disclose the allision involving the *San Jacinto* when answering the application's inquiry about any previous losses involving a vessel owned by Morgan. She instead wrote "none."

6. While Morgan was hosting a New Year's party for friends on the *San Jacinto* in Galveston Bay on January 4, 2019, a serious fire broke out at the Kemah marina resulting in the destruction of several vessels, including the *Channel Point*. The *Channel Point* was declared a total loss. Morgan filed a claim with Yellow Rose.

7. On March 18, 2019, Yellow Rose declined to pay for the loss and filed this action against Morgan seeking a declaratory judgment that it is entitled to avoid the policy and return the premium.

8. On April 16, 2019, Morgan filed her counter-claim for breach of contract.

9. In response to written discovery and in her deposition during the ensuing litigation, Morgan testified that she simply forgot about the relatively minor allision some eighteen months before when she was completing the application for insurance on the *Channel Point* in May 2018.

10. In response to written discovery and at a corporate representative deposition, Yellow Rose said that its yacht risk underwriter never looked at the formal application for marine insurance on the *Channel Point* when Morgan's broker presented it because of the existing policy on the *San*

Jacinto and the company's favorable business relationship with Morgan. The corporate representative also said that the underwriter should already have known about the *San Jacinto* allision because the insurer paid for loss, but she had forgotten about it.

11. The insurance contract was formed in Houston, Texas.

12. The insurance policy was issued and delivered in Houston, Texas.

13. The insured vessel was customarily docked in Kemah, Texas.

14. The parties have stipulated that "the state having the greatest interest in the resolution of the issues" in this case, as the Fifth Circuit used that phrase in *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882, 890, 1991 AMC 2211, 2221 (5th Cir. 1991), is Texas.

15. Morgan concedes that her failure to report the *San Jacinto* allision was "material" in the sense that it could possibly have influenced a prudent and intelligent insurer in deciding whether to accept the risk.

16. Yellow Rose concedes that it is unable to prove that it actually relied on Morgan's failure to report the the *San Jacinto* allision when it agreed to issue the policy. Indeed, it did not even see her application until after it had issued the policy.

Conclusions of Law

Binding Fifth Circuit precedent controls this Court's decision. In *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991), the court of appeals held that the *uberrimae fidei* doctrine was not entrenched in general maritime law. Under the Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955), the issue is therefore governed by state law. The parties have stipulated that (1) in the absence of governing federal law, Texas law applies, and (2) Texas law does not permit Yellow Rose to avoid the policy unless it can show reliance. Both of those stipulations are fully justified. On the first point, the policy was issued in Texas, the insured property was located in Texas,

Morgan is a Texan, and no other state has any significant connection to the transaction. On the second point, the Texas Supreme Court has recognized the reliance requirement in this context. *See*, *e.g.*, *Mayes v. Massachusetts Mutual Life Insurance Co.*, 608 S.W.2d 612, 616 (Tex. 1980).

Because Yellow Rose has conceded that it is unable to prove that it actually relied on Morgan's failure to report the *San Jacinto* allision when it agreed to issue the policy, it follows that Yellow Rose has no right to avoid the policy and its refusal to pay Morgan's claim was accordingly a breach of the insurance contract.

Conclusion

Yellow Rose is liable for the full value of Morgan's claim. Judgment will be entered accordingly.

YELLOW ROSE INSURANCE CO., INC., Plaintiff-Appellant,

v.

EMILY MORGAN, Defendant-Appellee.

No. 20-12345

United States Court of Appeals,
Fifth Circuit

July 8, 2022

Appeal from the United States District Court for the Southern District of Texas.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

JUSTINIAN, Circuit Judge, concurring:

I agree that there would be no point in our rehearing this case en banc. Only the Supreme Court has the freedom to do what needs to be done.

SOLOMON, Circuit Judge, dissenting:

For the reasons expressed in my dissenting opinion to the panel decision, I would grant the petition for rehearing and set the case for argument en banc.

Selected Chronology of the Case[*]

Nov. 8, 2016	Emily Morgan's yacht *San Jacinto* allides with a pier on Red Fish Island
May 5, 2018	Morgan applies for and Yellow Rose Insurance Co., Inc. issues a policy of marine insurance on the yacht *Channel Point*.
Jan. 4, 2019	A marina fire destroys the *Channel Point*.
Mar. 18, 2019	Yellow Rose declines to pay the loss and files the present action against Morgan seeking a declaratory judgment that it is entitled to avoid the policy
Apr. 16, 2019	Morgan files a counter-claim for breach of contract
Aug. 3, 2020	District court rules that Yellow Rose is liable on the policy under Texas law (opinion reported as *Yellow Rose Insurance Co., Inc. v. Morgan*, 476 F. Supp. 3d 1419 (S.D. Tex. 2020))
Apr. 8, 2022	Court of appeals reverses the district court's judgment, holding that (1) the general maritime law, not Texas law, governs the dispute, and (2) Yellow Rose is entitled to avoid the policy under the general maritime law (opinion reported as *Yellow Rose Insurance Co., Inc. v. Morgan*, 30 F.4th 1382 (5th Cir. 2020))
July 8, 2022	Court of appeals denies a timely petition for rehearing
Oct. 3, 2022	Morgan files petition for certiorari (docket number 20-444) raising only two issues: (1) whether state or federal law governs the parties' dispute, and (2) if federal law governs, whether the *uberrimae fidei* doctrine requires an insurer to prove reliance to avoid the policy.
Dec. 5, 2022	Supreme Court grants petition for certiorari

[*] This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.