No. 20-90013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RENASANT BANK,

Defendant–Petitioner,

v.

LANDCASTLE ACQUISITION CORP.,

Plaintiff–Respondent.

On Petition for Interlocutory Appeal from the United States District Court
For the Northern District of Georgia
2:17-cv-00275-RWS

GEORGIA DEFENSE LAWYERS ASSOCIATION INC.'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF RENASANT BANK'S PETITION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1(d) and Eleventh Circuit Rules 26.1 and 27-1(a)(9), counsel for proposed *amicus curiae* Georgia Defense Lawyers Association, Inc. ("GDLA") discloses that GDLA is a Georgia non-profit corporation with no parent corporation, that no publicly held company owns 10% or more of GDLA's stock, and that GDLA has no subsidiaries. Counsel certifies that to the best of counsel's knowledge the following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations that own 10% of more of a party's stock, and other identifiable legal entities related to a party:

1. Ashby, Laura (former counsel for Defendant-Petitioner Renasant Bank)
2. Balch & Bingham LLP (counsel for proposed *amicus curiae*)
3. Burch, Jr., Edward D. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)
4. Crescent Bank and Trust Company
5. Drew Eckl & Farnham, LLP (counsel for proposed *amicus curiae*)
6. Driskell, Robert

7. Ellis, Painter, Ratterree & Adams LLP (counsel for proposed *amicus curiae*)
8. Federal Deposit Insurance Corporation, as receiver of Crescent Bank and Trust Company
9. Fidelity National Financial, Inc. (NYSE: FNF)
10. FNTS Holdings, LLC
11. FNTG Holdings, LLC
12. Georgia Defense Lawyers Association, Inc. (proposed *amicus curiae*)
13. Hardwick, IV, Nathan E.
14. Haynes, Elissa B. (counsel for proposed *amicus curiae*)
15. Kohler, Michael P. (counsel for Defendant-Petitioner Renasant Bank)
16. Landcastle Acquisition Corp. (Plaintiff-Respondent)
17. Martin Snow, LLP (counsel for proposed *amicus curiae*)
18. MHSLAW, P.C.
19. Miller & Martin PLLC (counsel for Defendant-Petitioner Renasant Bank)
20. Morris, Arthur
21. Morris Hardwick Schneider LLC
22. Morris Schneider Wittstadt Va., PLLC

23. Newman, David C. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)

24. Parsley, Robert F. (counsel for Defendant-Petitioner Renasant Bank)

25. Reed, Benjamin E. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)

26. Renasant Bank (Defendant-Petitioner)

27. Renasant Corporation (NASDAQ: RNST)

28. Schneider, Randolph

29. Smith, Gambrell & Russell, LLP (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)

30. Story, Hon. Richard W. (United States District Judge)

31. Walker, Stuart E. (counsel for proposed *amicus curiae*)

32. Wasmuth, Jr., Edward H. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)

INTRODUCTION

In accordance with Federal Rule of Appellate Procedure ("FRAP") 29, proposed *amicus curiae* GDLA moves the Court for leave to file the accompanying *amicus* brief (attached to this motion as Exhibit A) in support of Defendant-Petitioner Renasant Bank's ("Renasant") petition for permission to appeal an order of the district court, dated June 8, 2020 (Dist. Ct. ECF Doc. 96), in which the district court certified two questions of law as warranting interlocutory appeal under 28 U.S.C. § 1292(b). (Dist. Ct. ECF Doc. 96 at 41-45.)

One of the certified legal questions—addressing the *D'Oench* doctrine[1] and its statutory analogue, 12 U.S.C. § 1823(e)—was resolved by the district court in the June 8, 2020 order, which rejected Renasant's legal defense based on the *D'Oench* doctrine and 12 U.S.C. § 1823(e) and, as a result, denied summary judgment to Renasant. (Dist. Ct. ECF Doc. 96 at 14-21.) The other certified legal question—the application of Georgia's apportionment statute, O.C.G.A. § 51-12-33, to tort claims for conversion—was resolved in an order of the district court, dated October 15, 2019, in which the district court struck from Renasant's answer its apportionment defense based on O.C.G.A. § 51-12-33 after concluding, as a matter of law, that

[1] *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

damages for conversion claims cannot be apportioned. (Dist. Ct. ECF Doc. 53 at 2-8.)

GDLA's proposed *amicus* brief addresses only the district court's ruling that damages for conversion claims under Georgia law cannot be apportioned among multiple persons under O.C.G.A. § 51-12-33; it does not address the *D'Oench* doctrine or 12 U.S.C. § 1823(e).

FRAP 29(a)(3) STATEMENT

GDLA is an association of nearly 1,000 lawyers, ranging from solo practitioners to lawyers in multi-national law firms. Though its membership is diverse, GDLA's members share a common interest in supporting and improving the civil defense bar, in improving the adversary system of jurisprudence, in eliminating litigation delay, and in improving the administration of justice. In particular, GDLA is committed to ensuring that basic principles of Georgia tort law are clearly defined and consistently applied.

GDLA has an interest in this appeal because the apportionment statute is implicated in some manner in the vast majority of tort cases filed in Georgia. GDLA's members are regularly called upon to defend their clients against tort claims, which include conversion, where fault must be allocated and damages apportioned among parties and non-parties alike under O.C.G.A. § 51-12-33. GDLA's interest in this appeal is particularly acute, however, because the district

court's ruling undermines Georgia law as it relates to the divisibility of fault and, as a result, threatens inequitable outcomes.

The erroneous ruling of the district court—that, as a matter of law, damages for conversion claims under Georgia law are ineligible for apportionment—flouts the Supreme Court of Georgia's recent admonition that O.C.G.A. § 51-12-33, drafted in capacious language, is designed to reach *all* species of tort claims alleging an "injury to person or property" where the conduct of more than one person contributed to the injury. *See FDIC v. Loudermilk*, 305 Ga. 558 (2019).

The district court's ruling unquestionably harms Renasant's ability to adequately defend itself in this case by taking a potent defense off the table. But from the institutional perspective of GDLA and its members the mischief sown by the district court's order will reverberate much further than the prejudice to Renasant in this case. If left uncorrected, the district court's order (though it is not binding) will be cited with much fanfare by tort plaintiffs in all future cases alleging tort claims for conversion under Georgia law—as authority for stripping defendants of a defense that serves as a vital component of the tort reform measures enacted by the Georgia General Assembly in 2005. Because the district court's misapplication of O.C.G.A. § 51-12-33 threatens prejudice to the clients of GDLA's members in cases in state and federal courts throughout the State of Georgia, GDLA has a substantial interest in ensuring that the district court's error is corrected as swiftly as possible.

An *amicus* brief submitted by GDLA is desirable in this case because GDLA brings to bear on this important question of Georgia law an institutional perspective different from the perspective of a party to the litigation. The Court, in determining whether to grant Renasant's petition for interlocutory appeal, may find it desirable to have before it a brief explaining that the harms caused by the district court's legal error, if not promptly corrected, will spread far beyond this case.

The matters discussed in GDLA's proposed *amicus* brief are relevant to this Court's disposition of Renasant's petition for interlocutory appeal. GDLA's proposed brief explains why the district court's misapplication of O.C.G.A. § 51-12-33 involves a controlling question of law that threatens widespread prejudice to the rights of the clients of GDLA's members—beyond the prejudice that Renasant will suffer at trial if the district court's ruling is not reversed. And the brief explains why this Court's prompt reversal at the interlocutory-appeal stage will conserve judicial resources in the long run by preventing an error-infused trial and verdict (at which Renasant cannot ask the jury to allocate fault and apportion damages among those responsible for Plaintiff's injury), an appeal and likely reversal on the apportionment issue (remanding with instructions to allow Renasant to assert on retrial the apportionment defense), and a second trial and verdict (at which Renasant can ask the jury to allocate fault and apportion conversion damages). This Court's pre-

judgment review is necessary to ensure that the resolution of this litigation is not needlessly prolonged.

* * *

Counsel for Renasant have consented to the filing of an *amicus* brief by GDLA in support of Renasant's petition for permission to appeal under 28 U.S.C. § 1292(b). Counsel for Landcastle, however, have opposed the filing of an *amicus* brief by GDLA, which is what has prompted the filing of this motion for leave of court.

In considering GDLA's motion for leave, the Court should be aware that other federal circuit courts of appeal regularly permit *amicus* briefs to be filed in support of petitions for permission to appeal under 28 U.S.C. § 1292(b). *See*, *e.g.*, *Tesoro Hawaii Corp. v. United States*, Case No. Misc. 747, 89 Fed. Appx. 732, 2004 WL 288648 (Fed. Cir. 2004) (granting leave to file *amicus* brief in support of petition for interlocutory appeal under 28 U.S.C. § 1292(b)); *Bank of America, N.A. v. City and Cnty of San Francisco*, Case Nos. 99-17590, 99-17591, 215 F.3d 1332, 2000 WL 340773 (9th Cir. 2000) (same); *Wolfchild v. United States*, Case No. Misc. 861, 260 Fed. Appx. 261, 2007 WL 4698448 (Fed. Cir. 2007) (same); *Astrazeneca AB v. Mylan Pharmaceuticals, Inc.*, Case No. 15-117, ECF Docs. 4 & 29 (Fed. Cir. 2015) (same); *Serrano v. Union Pacific R.R. Co.*, Case No. 16-80801, ECF Docs. 2, 3, & 12 (9th Cir. 2016) (same); *Feit Elec. Co. v. CFL Technologies, LLC*, Case No. 20-110, ECF Doc. 24 (Fed. Cir. 2020) (same); *In re Volkswagen "Clean Diesel"*

Marketing, Sales Practices, and Products Liability Litigation, Case No. 20-80026, ECF Docs. 4, 5, & 9 (9th Cir. 2020) (same); *In re Big Lots, Inc.*, Case No. 17–0303, 2017 WL 4404634 (6th Cir. 2017) (granting motion for leave to file *amicus* brief in support of petition for interlocutory appeal).

GDLA respectfully requests that this Court exercise its discretion in favor of granting GDLA's motion for leave to file the attached proposed *amicus* brief.

July 16, 2020

Respectfully submitted,

/s/ Stuart E. Walker

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Anne Kaufold-Wiggins, Vice Chair
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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I hereby certify that

- the foregoing motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,232 words; and
- the foregoing motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), made applicable to the motion by Federal Rule of Appellate Procedure 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman.

/s/ Stuart E. Walker
STUART E. WALKER
Georgia Bar No. 141620

Counsel for Proposed *Amicus Curiae*
Georgia Defense Lawyers
Association, Inc.

Exhibit A

No. 20-90013

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GEORGIA DEFENSE LAWYERS ASSOCIATION INC.'S *AMICUS CURIAE* BRIEF IN SUPPORT OF RENASANT BANK'S PETITION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1(d) and Eleventh Circuit Rule 26.1, counsel for *amicus curiae* Georgia Defense Lawyers Association, Inc. ("GDLA") discloses that GDLA is a Georgia non-profit corporation with no parent corporation, that no publicly held company owns 10% or more of GDLA's stock, and that GDLA has no subsidiaries. Counsel certifies that to the best of counsel's knowledge the following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations that own 10% of more of a party's stock, and other identifiable legal entities related to a party:

1. Ashby, Laura (former counsel for Defendant-Petitioner Renasant Bank)
2. Balch & Bingham LLP (counsel for proposed *amicus curiae*)
3. Burch, Jr., Edward D. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)
4. Crescent Bank and Trust Company
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20. Morris, Arthur
21. Morris Hardwick Schneider LLC
22. Morris Schneider Wittstadt Va., PLLC

23. Newman, David C. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)

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25. Reed, Benjamin E. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)

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30. Story, Hon. Richard W. (United States District Judge)

31. Walker, Stuart E. (counsel for proposed *amicus curiae*)

32. Wasmuth, Jr., Edward H. (counsel for Plaintiff-Respondent Landcastle Acquisition Corp.)

TABLE OF CONTENTS **PAGE**

TABLE OF CITATIONS

CASES

STATUTES

STATEMENT OF THE ISSUE

As it relates to this *amicus* brief,[1] the question of law presented by the petition for permission to appeal under 28 U.S.C. § 1292(b) filed by Defendant-Petitioner Renasant Bank ("Renasant") (Pet'n for Perm. to App., 6/18/20) is whether damages from tort claims for conversion under Georgia law may be apportioned among multiple persons under O.C.G.A. § 51-12-33. The district court concluded—as a matter of law— that damages for conversion under O.C.G.A. § 51-12-33 cannot be apportioned according to fault. (Dist. Ct. ECF Doc. 53.) The district court erred in resolving that pure question of law in an order that merits—and is particularly well suited to—interlocutory review under 28 U.S.C. § 1292(b).[2]

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[1] The district court certified two questions for interlocutory appeal under 28 U.S.C. § 1292(b). (Dist. Ct. ECF Doc. 96 at 41-45.) One of the certified legal questions was resolved by the district court in an order, dated June 8, 2020, which rejected Renasant's legal defense based on the *D'Oench* doctrine [*D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)] and its statutory analogue, 12 U.S.C. § 1823(e) and, as a result, denied summary judgment to Renasant. (Dist. Ct. ECF Doc. 96 at 14-21.) The other certified legal question—concerning the application of Georgia's apportionment statute, O.C.G.A. § 51-12-33, to tort claims for conversion—was resolved in an order, dated October 15, 2019, in which the district court struck from Renasant's answer its apportionment defense based on O.C.G.A. § 51-12-33 after concluding—as a matter of law—that damages arising from conversion claims are ineligible for apportionment. (Dist. Ct. ECF Doc. 53 at 2-8.) This *amicus* brief addresses only the district court's ruling that damages for conversion claims cannot be apportioned among multiple persons according to their fault under O.C.G.A. § 51-12-33; it does not address the *D'Oench* doctrine or 12 U.S.C. § 1823(e).

[2] As it was required to do, the district court—noting that its apportionment ruling "involved a pure question of Georgia law which could control a significant part of

IDENTITY OF *AMICUS CURIAE*

Georgia Defense Lawyers Association, Inc. ("GDLA") is an association of nearly 1,000 lawyers, ranging from solo practitioners to lawyers in multi-national law firms. Though its membership is diverse, GDLA's members share a common interest in supporting and improving the civil defense bar, in improving the adversary system of jurisprudence, in eliminating litigation delay, and in improving the administration of justice. In particular, GDLA is committed to ensuring that basic principles of Georgia tort law are clearly defined and consistently applied.

INTEREST OF *AMICUS CURIAE* IN THE APPEAL[3]

GDLA has an interest in this appeal because the apportionment statute is implicated in some manner in the vast majority of tort cases filed in Georgia. GDLA's members are regularly called upon to defend their clients against tort claims, which include conversion, where fault must be allocated and damages apportioned among parties and non-parties alike under O.C.G.A. § 51-12-33.

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the case" and calling its ruling "one of first impression [that] was difficult"—certified its apportionment ruling for interlocutory appeal under 28 U.S.C. § 1292(b). (Dist. Ct. ECF Doc. 96 at 41-45.)

[3] In accordance with FRAP 29(a)(4)(E), counsel for *amicus curiae* certifies that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and that no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

GDLA's interest in this appeal is particularly acute, however, because the district court's ruling undermines Georgia law as it relates to the divisibility of fault and, as a result, threatens inequitable outcomes.

The district court's ruling unquestionably harms Renasant's ability to adequately defend itself in this case by taking a potent defense off the table. But from the institutional perspective of GDLA and its members the mischief sown by the district court's order will reverberate far beyond the prejudice to Renasant in this case. If left uncorrected, the district court's order (although not binding) will be cited with much fanfare by tort plaintiffs in all future cases alleging tort claims for conversion under Georgia law—as authority for eliminating an important defense that serves as a vital component of the tort reform measures enacted by the Georgia General Assembly in 2005. Because the district court's misapplication of O.C.G.A. § 51-12-33 threatens widescale prejudice and inequitable results to the clients of GDLA's members in cases in state and federal courts throughout the State of Georgia, GDLA has a substantial interest in ensuring that the district court's error is corrected as swiftly as possible.

SOURCE OF AUTHORITY TO FILE

This Court entered an order permitting the filing of this *amicus* brief over the objection of Plaintiff-Respondent Landcastle Acquisition Corp.

ARGUMENT AND CITATIONS OF AUTHORITY

The interlocutory-appeal statute, 28 U.S.C. § 1292(b), "give[s] [this Court] discretion to exercise appellate jurisdiction now instead of waiting until after final judgment." *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1255 (11th Cir. 2004). This Court's discretion under § 1292(b) is exercisable only after the district court has stated in a written order: (1) that its order "involves a controlling question of law"; (2) that "there is substantial ground for difference of opinion" about the resolution of the question of law; and (3) that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The district court did so here. (Dist. Ct. ECF Doc. 96 at 41-45.) These are the three criteria that govern this Court's consideration of a petition for interlocutory appeal. *McFarlin*, 381 F.3d at 1257.

In applying these criteria, the Supreme Court has noted that "[t]he preconditions for § 1292(b) review . . . are most likely to be satisfied when a [district court] ruling involves a new legal question or is of special consequence." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009). Both features are present here. The district court admittedly resolved "a new legal question" under Georgia law, never before addressed by any court, *and* the district court's interpretation of O.C.G.A. § 51-12-33 is "of special consequence" because it invalidates an important defense to an entire species of tort claims (conversion)—a decision whose consequence will

be felt in a sizable number of future cases in which tort claims for conversion under Georgia law are alleged.

"A Controlling Question of Law"

This Court has held that, for purposes of § 1292(b), a "controlling question of law" means a "pure" question of law that is not factbound—a question that can be separately and cleanly decided on appeal without any need for the reviewing court to engage in intensive scrutiny of the factual record. *McFarlin*, 381 F.3d at 1258. A controlling question of law "does not mean any question the decision of which requires rooting through the record in search of the facts or of genuine issues of fact." *Id.* As this Court observed in *McFarlin*, "§ 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts." 381 F.3d at 1259. Similarly, as used in § 1292(b), "[t]he term 'question of law' does not mean the application of settled law to fact." *Id.* at 1258. The apportionment ruling is a pure question of law.

Here, the district court concluded, as a matter of law, that damages arising from tort claims for conversion under Georgia law cannot be apportioned among multiple persons under O.C.G.A. § 51-12-33. (Dist. Ct. ECF Doc. 53.) The district court's conclusion on that point of law did not turn on any assessment of the factual record or on any unique feature of the conversion claim alleged in Landcastle's complaint.

Nor did the district court's interpretation of O.C.G.A. § 51-12-33 turn on "the application of settled law to fact." *McFarlin*, 381 F.3d at 1258. Far from it. As the district court itself acknowledged, its decision to exempt conversion claims from the scope of O.C.G.A. § 51-12-33 was not compelled by the application of "settled law." Instead, the district court explained that its decision on this point was a "difficult" "question of first impression" based on conjecture about how the Georgia Supreme Court would answer the question if confronted with it. (Dist. Ct. ECF Doc. 96 at 42.)

Under *McFarlin*, the district court's interpretation of O.C.G.A. § 51-12-33 presents a "controlling question of law" for purposes of § 1292(b).

What is more, "[t]here is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment," thereafter requiring "further proceedings"—e.g., a new trial. 16 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 3930 (3d ed. 2014; April 2020 update) ("Wright & Miller").[4] Here, the district court's "incorrect disposition" of a pure question of

[4] The flip side of this coin: "[T]here is little doubt that a question is *not* controlling if the litigation would be conducted *in the same way* no matter how it were decided." Wright & Miller, § 3930 (emphasis added). The trial in this case will be conducted in a quite different way if this Court grants § 1292(b) review and reverses the district court's ruling on the scope of O.C.G.A. § 51-12-33, because the effect of the reversal will be to restore Renasant's apportionment defense and to permit Renasant at trial to ask the jury to allocate fault (and thus apportion damages) on the conversion claim to others. The manner in which Renasant will defend the case and conduct the trial will be significantly different depending on the resolution of this question of law. That is why it is "controlling" for purposes of § 1292(b).

law—i.e., its conclusion that damages for conversion claims may not be apportioned according to fault under O.C.G.A. § 51-12-33—would require the reversal of any final judgment based on a jury verdict finding Renasant liable for conversion, on the ground that Renasant was unable at trial to ask the jury to apportion to non-parties, according to their fault, the damages associated with the conversion claim. A reversal of that final judgment would require the whole case to be retried, at great expense, and would serve to prolong the resolution of this case even further. The probability that judicial and other resources (time, money, etc.) will be conserved by this Court's review at this stage of the proceedings is important, because "a question is controlling [under § 1292(b)] . . . if interlocutory reversal might save time for the district court, and time and expense for the litigants." Wright & Miller, § 3930.

"A Substantial Ground for Difference of Opinion"

For purposes of § 1292(b), there exists a "substantial ground for difference of opinion" about how to resolve a question of law where this Court is not in "'complete and unequivocal' agreement with the district court['s]" resolution of the question. *McFarlin*, 381 F.3d at 1258. Put differently, if there is a reasonable probability that the district court erred in resolving a question of law, then there is substantial ground for difference of opinion about the correctness of the court's ruling—and a reason for this Court's pre-judgment intervention.

Here, it is exceedingly hard to see how this Court could find itself in "complete and unequivocal agreement" with the district court's conclusion that fault for conversion claims is indivisible and thus damages unapportionable under O.C.G.A. § 51-12-33. It is hard to see because the district court's conclusion on this question of law is not settled by precedent, finds no support under Georgia law, and—worse still—flouts the Supreme Court of Georgia's recent pronouncement about the proper interpretation and broad scope of O.C.G.A. § 51-12-33. *See FDIC v. Loudermilk*, 305 Ga. 558 (2019).

The erroneous ruling of the district court—that, as a matter of law, fault for conversion claims is indivisible and that damages are thus categorically ineligible for apportionment—cannot be squared with the Supreme Court of Georgia's recent admonition in *Loudermilk* that O.C.G.A. § 51-12-33, drafted in capacious language, is designed to reach *all* species of tort claims alleging an "injury to person or property" where the conduct of more than one person contributed to the injury.[5] Renasant's petition adequately explains why there is a substantial ground for

[5] The decision in *Loudermilk* carved out a narrow exception to the broad reach of O.C.G.A. § 51-12-33 for tort claims based on the "concerted action" of multiple tortfeasors. 305 Ga. at 572-73. That exception is premised on the view that "fault" is not divisible where tortfeasors act in concert with each another to achieve a common purpose or plan. And if fault is not divisible, then damages are not apportionable. But the district court did not determine—and no one contends—that *Loudermilk*'s concerted-action exception to O.C.G.A. § 51-12-33 is appliable in this case.

difference of opinion about whether the district court correctly resolved this question of law, and GDLA, for purposes of this brief, adopts Renasant's explanation. (Pet'n for Perm. to App., 6/18/20, at ECF pp. 33-36.)

If left standing, the district court's erroneous interpretation of O.C.G.A. § 51-12-33 will reverberate far beyond this case. Although statistics are unavailable to identify the precise number of lawsuits filed each year in state and federal courts throughout the State of Georgia in which tort claims for conversion under Georgia law are alleged, this Court, based on its own judicial experience, can be confident that the number is substantial. Tort plaintiffs in those cases will doubtlessly cite the district court's order (though it is not binding) as authority for stripping defendants of their apportionment defense. The district court's interpretation of O.C.G.A. § 51-12-33 threatens widescale prejudice and inequitable outcomes to the clients of GDLA's members. A reversal by this Court would restore O.C.G.A. § 51-12-33 to its full vitality for all tort claims involving "injury to person or property" where fault can be divisible—including conversion claims—and would resolve an issue with great statewide importance to all future cases in which the apportionment statute is implicated. "The opportunity to achieve appellate resolution of an issue important to other cases may provide an additional reason for certification." Wright & Miller, § 3930.

"Materially Advance the Ultimate Termination of the Litigation."

"The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." Wright & Miller, § 3930. For the reasons explained above, the district court's interpretation of O.C.G.A. § 51-12-33 is a "pure" and controlling question of law, and this Court's pre-judgment review would materially advance the ultimate termination of the litigation—thereby conserving judicial and other important resources—because a pre-judgment reversal of the district court's error would avoid the need for that issue to be the subject of a post-judgment appeal, reversal, and retrial.

CONCLUSION

If left uncorrected, the district court order in this appeal (Dist. Ct. ECF Doc. 53) will have significant, negative consequences for defendants in all tort cases that require a jury's determination of the divisibility of fault. The Court should thus grant Renasant's petition for interlocutory appeal to correct the district court's erroneous determination that fault for the tort of conversion is indivisible and that, as a result, damages cannot be apportioned under O.C.G.A. § 51-12-33.

July 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a), I hereby certify that

- the foregoing *amicus* brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,025 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f); and
- the foregoing *amicus* brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25, I hereby certify that on July 16, 2020, I filed the foregoing Georgia Defense Lawyers Association, Inc.'s Motion for Leave to File an *Amicus Curiae* Brief in Support of Renasant Bank's Petition for Interlocutory Review under 28 U.S.C. § 1292(b) by electronically uploading it to this Court's e-filing system, which will cause service to be effected on the following counsel of record:

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