

No. 18-1404

In The
Supreme Court of the United States

DORSEY EUGENE WALLACE,

Petitioner,

v.

GARY EDWARD WALLACE, PHILLIP HOWARD
WALLACE AND WALLACE ELECTRIC COMPANY,

Respondents.

**On Petition For Writ Of Certiorari
To The Georgia Court Of Appeals**

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Argument	1
I. The Issue of Judicial Taking is Properly Before the Court	1
II. The Georgia Court of Appeals Deprived Doss of an Established Property Right	3
Conclusion.....	7

TABLE OF AUTHORITIES

	Page
CASES	
<i>Chicago B. & Q. R. Co. v. Chicago</i> , 165 U.S. 226, 17 S.Ct. 581 (1897)	7
<i>Hochster v. De La Toon</i> , 2 El & Bl 678 (1853)	3
<i>Public Access Shoreline Hawaii v. Hawaii County Planning Comm.</i> , 79 Haw. 425, 993 P.2d 1246 (1995)	6
<i>Phosphate Mining Co. v. Atlanta Oil & Fertilizer Co.</i> , 20 Ga. App. 660, 93 S.E.2d 532 (1917).....	4
<i>Rhoem v. Horst</i> , 178 U.S. 1, 20 S.Ct. 780, 44 L.Ed. 953 (1900)	3
<i>Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection</i> , 560 U.S. 702 (2010)	6
<i>Wallace v. Wallace</i> , 301 Ga. 195, 800 S.E.2d 303 (2017).....	1, 5
<i>Wallace v. Wallace</i> , 345 Ga. App. 764, 813 S.E.2d 428 (2018)	1
<i>Wojcik v. Lewis</i> , 204 Ga. App. 301, 419 S.E.2d 135 (1992)	3
STATUTES	
O.C.G.A. § 13-1-2(b)	3
OTHER AUTHORITIES	
I Williston on Contracts § 14 (3d ed. 1957).....	3

REPLY BRIEF OF PETITION FOR CERTIORARI

On May 6, 2019, Petitioner, Dorsey Eugene Wallace (“Doss”) filed his Petition for Certiorari to review the April 24, 2018 Final Judgment of the Georgia Court of Appeals in this matter. On June 6, 2019, Respondents served their Brief in Opposition to that Petition. This is to briefly reply to Respondents’ arguments.

ARGUMENT

I. The Issue Of Judicial Taking Is Properly Before The Court.

Petitioner did not raise the issue of an unconstitutional judicial taking in his Petition for Certiorari to the Georgia Supreme Court because the Georgia Court of Appeals (and the trial court previously) had ignored the Georgia Supreme Court’s admonition in its May 17, 2017 opinion that the lower courts must follow the law. *Wallace v. Wallace*, 301 Ga. 195, 199, 800 S.E.2d 303 (297); “ . . . the first maxim of equity is that equity follows the law.” (Appendix, p. 48). Rather than order specific performance of the Buy-Sell Agreement, which it had confirmed was the document that governed the sale of Doss’ stock back to Wallace Electric for “current value,” the Georgia Court of Appeals, in disregard of the Georgia Supreme Court’s earlier opinion, fashioned its “own notion of what was right,” *see* 301 Ga. at 199 (Appendix, p. 48) regarding the price to be paid a terminated employee for his stock, *Wallace v. Wallace*,

345 Ga. App. 764, 765, 769, 813 S.E.2d 428 (2018), (Appendix, p. 1) and ordered in equity that Doss' twenty-five percent shareholder interest be reduced to 16.67 percent, the percentage interest he owned in 2003, and that his remaining interest be sold, not at its “current value,” as required by the Buy-Sell Agreement (*see Appendix, pp. 64, 66*) but at its 2003 value. 345 Ga. App. at 772, (Appendix, p. 19). So the Court of Appeals, by judicial fiat, took away over \$2 million in value from Doss, and gave it to his brothers.

The Georgia Court of Appeals justified its departure from the Georgia Supreme Court’s express directions by finding that Doss had breached the Buy-Sell Agreement in 2003 when he declined his brother Philip’s invitation to return his stock to Wallace Electric. 345 Ga. App. at 770-772 (Appendix, pp. 12-15). But if that was the fact of the situation, then the Buy-Sell Agreement, which the Georgia Court of Appeals agreed to have governed any sale of a terminated employee’s stock, *see id.* at 769-770 (Appendix, pp. 10-11), provided the appraisal process for arriving at the current value for Doss’ stock, and for requiring the parties to comply with that determination. (Appendix, pp. 64-69). Counsel felt assured that the Georgia Supreme Court would grant certiorari to require the Court of Appeals to comply with its earlier direction to “follow the law” in ordering any sale of Doss’ stock back to Wallace Electric. But it did not. Had it done so, there would have been no constitutional issue to address.

After the Georgia Supreme Court denied Doss’ Petition for Certiorari, Doss did raise the issue of an

unconstitutional judicial taking in his Motion for Re-consideration which was denied by the Georgia Supreme Court on February 4, 2019. This Petition was filed within ninety days from that date.

II. The Georgia Court Of Appeals Deprived Doss Of An Established Property Right.

The Georgia Court of Appeals failed to comply with the law of executory contracts because it ignored the Buy-Sell Agreement's appraisal requirements after it concluded that Doss had breached that Agreement by declining his brother's inquiry about returning his stock to Wallace Electric, but without mentioning a price. Something remained to be done under the Buy-Sell Agreement. O.C.G.A. § 13-1-2(b). "If any performance remains by either side under any circumstances, it is an executory contract." *I Williston on Contracts* § 14 (3d ed. 1957). The Buy-Sell Agreement remained to be executed. *See Wojcik v. Lewis*, 204 Ga. App. 301, 303, 419 S.E.2d 135 (1992) ("The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as performance of the contract when due.").

"The courts of this state are committed to the rule laid down in *Hochster v. De La Tour*, 2 El & Bl 678 (1853), and followed by the Supreme Court of the United States in *Rhoem v. Horst*, 178 U.S. 1, 20 S.Ct. 780, 44 L.Ed. 953 (1900). The rule is: An absolute refusal by one party to perform an executory contract

containing mutual obligations, prior to the date or dates fixed for performance, if such repudiation goes to the whole contract, amounts to a tender of breach of contract, and if accepted as such by the opposite party to the contract, it constitutes an anticipatory breach, and the injured party may at his election at once sue and recover his entire damages. The opposite party is not required to accept a tender of a breach of contract, but may elect to keep the contract in force for the purpose for which it was made; and in such case, his obligation, as well as that of the other party, will continue until the time for performance, as fixed by the contract.” *Phosphate Mining Co. v. Atlanta Oil & Fertilizer Co.*, 20 Ga. App. 660, 93 S.E.2d 532 (1917). The Buy-Sell Agreement is yet to be performed.

Since the Georgia Court of Appeals affirmed the trial court’s conclusion that the Buy-Sell Agreement governed any sale of Doss’ stock back to Wallace Electric, its terms, under the law, had to be invoked to determine the “current value” to pay Doss for his stock. (Appendix, pp. 64-66). In the process of ignoring the terms of the Buy-Sell Agreement, after it had decided that the Agreement controlled the sale of Doss’ stock back to Wallace Electric, the Georgia Court of Appeals deprived Doss of his established property right in his Wallace Electric stock.

As stated in their Brief in Opposition, Respondents had a right and a duty to invoke the Buy-Sell Agreement to acquire Doss’ stock in the event of a dispute over that issue after Doss left Wallace Electric’s employment in 1994 (see Brief in Opposition, p. 5).

Respondents argue that “[t]he trial court determined that an equitable remedy was appropriate to give effect to the parties’ intent and require the conclusion that [Doss] be held to the terms of the Buy-Sell Agreement and that as a matter of equity, the company should only have to pay [Doss] the 1994 value for his stock.” (Brief in Opposition, p. 5). Respondents then refer to the Georgia Court of Appeals’ April 24, 2018 opinion which found that the Buy-Sell Agreement called for specific performance of that Agreement in the event of a dispute. (Brief in Opposition, pp. 6-8). But at Respondents’ urging, the Court of Appeals did not comply with the terms of the Buy-Sell Agreement in fashioning a remedy. It did not order specific performance of the Buy-Sell Agreement, but employed its own notion of what it thought the remedy should be.

The dilemma with Respondents’ argument, and with the Georgia courts’ application of its judicial power, rests in its shared duplicity. After the Georgia Supreme Court in *Wallace v. Wallace*, 301 Ga. 195, 200, 800 S.E.2d 303 (2017), had instructed the trial court that it must make findings of fact, and specifically instructed that a court exercising its jurisdiction in equity, “has no more right than a court of law to act on its own notion of what is right in a particular case for what the law demands,” 301 Ga. at 199, (Appendix, p. 48), the trial court determined in its August 3, 2017 “Final Order” that “the Buy-Sell Agreement is controlling with respect to the sale of [Doss] shares back to Wallace Electric.” (Appendix, p. 29). If the Buy-Sell Agreement controlled the sale of Doss’ stock back to

Wallace Electric after he left its employment in 1994, then it was that agreement which has to be specifically performed, as both the trial court and the Court of Appeals concluded. (Appendix, p. 33, “ . . . this agreement shall be enforceable by specific performance . . . ”; *id.*, p. 8, “ . . . the explicit acknowledgement in the Agreement that specific performance was the appropriate remedy in the event of a breach.”). Although the Georgia Court of Appeals agreed that the Buy-Sell Agreement governed the sale of Doss’ stock back to Wallace Electric (Appendix, p. 11), the Georgia Court of Appeals also erroneously applied its own notion of what was right, *see* 301 Ga. at 199, and ruled that Doss’ interest in Wallace Electric stock should be reduced from 25 percent to 16.67 percent, and Doss should only be paid his stock’s value in 2003 (Appendix, p. 19), rather than the stock’s current value, as determined by the Buy-Sell Agreement’s appraisal process at the time of sale.

So the Georgia Court of Appeals essentially took the law into its own hands to deprive Doss of his established property rights in his Wallace Electric stock. The Georgia Court of Appeals observed that “[a] trial court order issuing an award in a case pending before it is simply not an unconstitutional **governmental** taking.” But under *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), if it deprives a litigant of an established property right (in this case for no compensation) it is. *See Public Access Shoreline Hawaii v. Hawaii County Planning Comm.*, 79 Haw. 425, 451, 993 P.2d

1246 (1995) (“under the judicial taking theory, when a judicial decision alters property rights, the decision may amount to a judicial taking.”); citing *Chicago B. & Q. R. Co. v. Chicago*, 165 U.S. 226, 235, 17 S.Ct. 581 (1897) (“If compensation for private property taken for public use is an essential element or due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, it is to be deemed the act of the State within the meaning of that amendment.”).

CONCLUSION

The April 24, 2018 opinion of the Georgia Court of Appeals, which was the final judgment in this case, took Doss’ property from him and gave it to Respondents. Doss respectfully urges the Court to review that unconstitutional decision.

Dated: July 9, 2019.

Respectfully submitted,

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