

No. _____

**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**

—◆—

PETITION FOR WRIT OF CERTIORARI

—◆—

JAMES LEE FORD, SR.
JAMES LEE FORD, P.C.
6111 Peachtree Dunwoody Road
Building G, Suite 100
Atlanta, GA 30328
(678) 281-8750
jlf@jlfordlaw.com

Attorney for Petitioner

QUESTIONS PRESENTED

1. Is there such a thing as a judicial taking?

According to the plurality opinion in *Stop the Beach*, “if a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the state had physically appropriated it or destroyed its value by regulation.” *Id.* at 714.

2. If so, what is the standard for a judicial taking?

The property right claimed to have been taken must be well established. *Stop the Beach*, 560 U.S. at 704.

3. Did the decision of the Georgia Court of Appeals amount to a judicial taking of Petitioner’s property, his stock ownership in Wallace Electric Company?

That is the issue addressed in this Petition. The greater issue is a clear explanation of judicial taking under the Fifth Amendment.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Table of Contents.....	ii
Table of Authorities	iv
Petition for Writ of Certiorari.....	1
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved.....	2
Introduction	3
Statement of the Case	4
Reasons for Granting Certiorari	14
Discussion.....	16
A. Corporate Stock is Property	16
B. How Doss' Stock was Taken By the Trial Court and the Georgia Court of Appeals.....	18
C. The Georgia Court of Appeals Took Doss' Stock From Him In Violation of the Tak- ings Clause	21
Conclusion.....	27

APPENDIX

Opinion of the Georgia Court of Appeals (April 24, 2018).....	App. 1
Order of the Georgia Court of Appeals (May 16, 2018).....	App. 22

TABLE OF CONTENTS – Continued

	Page
Final Order from Henry County (Aug. 3, 2017)	App. 23
Opinion of the Supreme Court of Georgia (May 15, 2017)	App. 41
Order from the Supreme Court of Georgia Denying the Petition for Writ of Certiorari (Jan. 7, 2019)	App. 51
Order from the Supreme Court of Georgia Denying the Motion for Reconsideration (Feb. 4, 2019)	App. 52
Buy-Sell Agreement of Wallace Electric Com- pany	App. 53

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arigoni Enterprises, LLC v. Town of Durham</i> , ___ U.S. ___, 136 S.Ct. 1409 (2016)	15
<i>BellSouth Advertising & Publishing Corp. v. McCollum</i> , 209 Ga. App. 441, 433 S.E.2d 437 (1993)	20
<i>Coca-Cola Co. v. Atlanta</i> , 152 Ga. 558, 110 S.E. 730 (1922)	17
<i>David v. McRae</i> , 183 F. 812 (1920)	20
<i>Express Co. v. Railroad Co.</i> , 99 U.S. 191, 25 L. Ed. 319 (1878)	21
<i>Georgia R.R. Banking Co. v. Wright</i> , 125 Ga. 589, 54 S.E. 52 (1906)	16
<i>Kelo v. City of New London</i> , 545 U.S. 469, 125 S.Ct. 2655 (2005)	24
<i>Marshall v. W.E. Marshall Co.</i> , 189 Ga. App. 510, 376 S.E.2d 393(1988)	17
<i>Milton v. Bank of Newborn</i> , 30 Ga. App. 55, 116 S.E. 861 (1923)	20
<i>Roehm v. Hurst</i> , 178 U.S. 1, 20 S.Ct. 780 (1900)	26
<i>Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection</i> , 560 U.S. 702, 130 S.Ct. 2592 (2010)	<i>passim</i>
<i>Wallace v. Wallace</i> , 301 Ga. 199, 200 S.E.2d 303 (2017)	<i>passim</i>
<i>Wallace v. Wallace</i> , 345 Ga. App. 764, 813 S.E.2d 428 (2018)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Wiley v. Tom Hewell & Assocs.</i> , 154 Ga. App. 235, 267 S.E.2d 816 (1979)	20
<i>Wojcik v. Lewis</i> , 204 Ga. App. 301, 419 S.E.2d 135 (1992)	20, 26
 CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. V	2
U.S. Const. amend. XIV	2
 STATUTES AND RULES	
28 U.S.C. § 1257(a)	2
O.C.G.A. § 13-3-1	20
O.C.G.A. § 13-3-2	20
Sup. Ct. R. 10(c)	14
 OTHER AUTHORITIES	
J. Pomeroy, <i>A Treatise on Specific Performance of Contracts</i> , §§ 17, 19 (1897)	20
J. Valasco, <i>The Fundamental Rights of the Shareholder</i> , 40 U. Cal. Davis L. Rev. 407, 415 (2006)	17

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dorsey Eugene Wallace (“Doss”), respectfully petitions this Court for a Writ of Certiorari to review the decision of the Georgia Court of Appeals regarding the issue of judicial taking.

**OPINIONS BELOW**

The Georgia Supreme Court denied Doss’ Petition for a Writ of Certiorari to review the opinion of the Georgia Court of Appeals, in *Wallace v. Wallace*, 345 Ga. App. 764, 813 S.E.2d 428 (2018), which had, in part, reversed the trial court’s August 3, 2017 Final Order, but which had failed to comply with an earlier decision of the Georgia Supreme Court, *Wallace v. Wallace*, 301 Ga. 199, 800 S.E.2d 303 (2017), as had the trial court, which had directed that the trial court must follow the law, and not its own notion of what was right, in arriving at a value, an amount of money, to pay Doss for his stock in Wallace Electric Company (“Wallace Electric”). In its April 24, 2018 opinion, the Georgia Court of Appeals took stock, or deemed it to no longer exist, that belonged to Doss to reach its decision. It then reduced the value for the remainder of Doss’ stock from its current value at the time of its decision, to its value in 2003.

Doss’ Petition for a Writ of Certiorari to the Georgia Supreme Court was denied on January 7, 2019. His

Motion for Reconsideration was denied on February 4, 2019.



JURISDICTION

This Petition is brought to address the question of whether a state court can enter a judgment which literally directs that property belonging to one shareholder first be devalued, and then one-third of it be taken from his possession and transferred to other shareholders, or proportionably increase the value of their stock, without violating the Takings Clause of the Fifth Amendment? This Court has jurisdiction under 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Cause of the Fifth Amendment to the Constitution of the United States provides that – “Nor shall property be taken for public use, without just compensation.” This constitutional right is secured to citizens against state action by Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



INTRODUCTION

This Petition is brought to address the April 24, 2018 decision of the Georgia Court of Appeals in *Wallace v. Wallace*, 345 Ga. App. 764, 813 S.E.2d 428 (2018), which in part affirmed the trial court’s August 3, 2017 Final Order holding that a Buy-Sell Agreement entered into between the individual stockholders of Wallace Electric Company (“Wallace Electric”), on June 30, 1988, and which expired by its own terms on June 30, 2008, governed the sale of Doss’ stock in Wallace Electric. But rather than directing the trial court to enforce the terms of the Buy-Sell Agreement, which provided an appraisal method for arriving at the “current value” to pay Doss for his stock, the Court of Appeals substituted its own determination in equity of the amount of money it believed Doss should be paid. That determination decreased the amount of stock Doss actually owned in Wallace Electric from a 25% interest to 16.67%, and the value of his stock from over \$2 million in 2018, to its value in 2003, which is yet to be determined by the trial court, but which Wallace Electric’s expert witness testified at its May 20, 2016 bench trial was \$305,700.00. 345 Ga. App. at 765, 772. The opinion of the Georgia Court of Appeals thus took

an established property right possessed by Doss in his Wallace Electric stock, and, in effect, gave Doss' property to his brothers, not for just, but for no compensation whatsoever.



STATEMENT OF THE CASE

This case began as a lawsuit by Doss, a minority shareholder in Wallace Electric, a small, family-owned corporation, against his brothers, Gary and Phillip, for breach of fiduciary duties owing him as a Wallace Electric shareholder, and for interference with his property interests as a shareholder.

In 1959, the individual parties' father, Herbert Dorsey Wallace, incorporated Wallace Electric as an electrical contracting company. In June 1988, the parties' father gave Respondents, Gary and Phillip Wallace, 30 shares each of the 120 issued and outstanding shares of Wallace Electric, and gave 20 shares to Doss. The father kept 40 shares. The parties' father died in 2000. He had willed his 40 shares of Wallace Electric stock to his wife, Lynne. A dispute then developed between Gary, Phillip and Lynne over the 40 shares left to her because Gary and Phillip thought they were supposed to inherit those shares. Finally, in 2009, for some consideration, Lynne allowed Wallace Electric to redeem her shares. That transaction left 80 shares of Wallace Electric stock outstanding. Gary and Phillip owned 30 shares each, and Doss owned 20 shares.

The Wallace Electric Bylaws, which were adopted at the time of Wallace Electric's incorporation, provided that upon a stockholder's termination from employment with Wallace Electric, he was to sell his shares back to the corporation. In June 1988, at the time the individual parties' father gave part of his Wallace Electric stock to his sons, the Wallace Electric shareholders, consisting of the father, Gary, Phillip and Doss, entered into a Buy-Sell Agreement, which also provided, *inter alia*, that upon termination from employment, "a shareholder shall sell and the corporation shall buy all of the terminated shareholder's Wallace Electric stock." The purchase and sale were to take place within sixty days of termination. *See Wallace v. Wallace*, 345 Ga. App. at 764.

Section 3.2(d) of the Buy-Sell Agreement provides that a terminated employee is to be paid the "current value" for his stock. Section 1.3 of the Agreement defines the current value of Wallace Electric stock to have been \$1,860.00 at the time the Agreement was executed in June 1988, but provides that the shareholders agreed, "diligently and in good faith, to review the current value at intervals of not more than 12 months." If the parties do not agree on the stock's current value at the time of a shareholder's termination, Section 3.2(d) of the Buy-Sell Agreement contains an appraisal process to determine the current value of the stock. A court is not to be involved in determining the stock's current value unless, of course, one of the parties refuse to participate in the appraisal process. In that event, the Buy-Sell Agreement contains a provision by

which a court can order specific performance of the Agreement. Thus, one party has to act to make the Buy-Sell Agreement operative. That never happened after Doss left Wallace Electric's employment. Although found controlling by the Georgia Court of Appeals in its April 24, 2018 opinion, the Buy-Sell Agreement has never been invoked to arrive at a price, or "current value," to pay Doss for his stock.

Doss left the employment of Wallace Electric in 1994. He did not act to sell his stock back to Wallace Electric and Wallace Electric did not act to purchase it. In 2003, Phillip approached Doss and asked him if he would like to turn his stock back over to Wallace Electric? It is undisputed, however, that no price to pay Doss for his stock was ever mentioned. According to Phillip, "no dollar figures were mentioned." [May 20, 2016 Bench Trial Transcript ("T") 63]. "We did not discuss purchasing." [T. 68]. Although Respondents have argued that Phillip may have made several other overtures to Doss about turning his stock back over to Wallace Electric, the undisputed fact is that nothing has ever been done to accomplish that result. No price has ever been mentioned and neither the Wallace Electric Bylaws nor the Buy-Sell Agreement was ever invoked by Wallace Electric to purchase Doss' stock. In fact, according to Respondents' attorney, "Wallace Electric is not seeking to purchase Doss' stock." [Hearing Transcript, Sept. 13, 2013, pp. 16-17]. "There is no legal authority for a Court to order us to buy Doss' shares." *Id.* "First and foremost, we are not trying to enforce the Buy-Sell Agreement." *Id.* Nonetheless, the Georgia

Court of Appeals found that “Doss breached the Agreement in 2003 when he refused Phillip’s request to repurchase his stock,” Slip. Op., p. 15, 345 Ga. App. at 771, and because of that, even though the Buy-Sell Agreement was never invoked, Doss has been directed by the Georgia Court of Appeals to sell his stock back to Wallace Electric for two-thirds of its 2003 value.

In August, 2011, Doss commenced a civil action against Gary and Phillip in the Superior Court of Henry County, Georgia. In his Complaint, Doss sought an accounting and damages against Gary and Phillip for breach of fiduciary duty and deprivation of his property rights in his Wallace Electric stock. [R. 2]. On March 25, 2013, Wallace Electric was added as a Defendant by amendment. [R. 131]. On November 19, 2012, Doss filed a motion for a court supervised accounting and purchase of his stock. [R. 28]. Gary, Phillip and Wallace Electric responded to that motion on December 14, 2012, taking the position that Doss has no “legal or equitable right to force the purchase of his stock.” [R. 44].

As the litigation proceeded, the trial court decided on March 19, 2015 that it would conduct a trial in equity to determine a buyout of Doss’ twenty-five percent interest in Wallace Electric. The court declared:

I have carefully reviewed the case file including all pleadings and the briefing of the parties in an effort to try and determine whether this is a case that is appropriate for trial in equity as the Defendants suggest, and

I have concluded that it is and that the Court will conduct a trial in equity.

I have further concluded that the Court will be sitting in equity and will resolve all legal and equitable claims at a bench trial. I will not empanel a jury for assistance with any factual questions.

Also, just to be clear, the Court will determine whether the remedy of a forced buyout is appropriate, if so, the percentage of stock to be valued, and the value of stock to be sold, including any date of valuation.

And the Court will also consider the ancillary legal issues raised by the Plaintiff, whether there has been a breach of contract, whether there has been a breach of fiduciary duties and any damages.

I'm doing this, having this trial in equity as suggested by the Defendants because after considering all of the legal remedies that are being proposed, I find that the legal remedies are not as practical nor efficient as this approach in equity. (Hearing Transcript, March 19, 2015).

On May 20, 2016, the Superior Court of Henry County, Georgia conducted a bench trial "in equity" to determine the value of Doss' Wallace Electric stock. The trial court found that in 1988 "when all the brothers were working for Wallace Electric," the parties' father "awarded Gary and Phillip each a 25% share of stock, awarded [Doss] a 16.67% share, and kept a

33.3% share for himself.” The Order then recited that “as of June 30, 1994 (the approximate time Doss left Wallace Electric’s employment), his share of stock was valued at \$54,200.00. Since then, the value of [Doss]’ stock has dramatically increased, and in 2015, his share of stock was valued at over two million dollars.” [R. 124]. The trial court determined that as a matter of equity, “[Doss] shall sell his stock back to Wallace Electric at the purchase price of \$54,200, representing [Doss]’ 16.67% share (not the 25% he actually owned) as valued on June 30, 1994.” Thus the trial court took over \$2 million in value from Doss in that Order and, in effect, gave that value to his brothers. The trial court reduced Doss’ percentage interest as a Wallace Electric shareholder from 25% to 16.67% (because the father’s stock had not been redeemed in 1994) and the value of Doss’ remaining stock, which was over \$2 million in 2016, to \$54,200.00, his stock’s discounted value in 1994, as found by the trial court.

Doss appealed the trial court’s June 6, 2016 Order to the Georgia Supreme Court. In its May 17, 2017 opinion, the court vacated the trial court’s June 6, 2016 Order and remanded the case to the trial court with direction to make findings of fact and conclusion of law, “including whether the Bylaws, Buy-Sell Agreement, or any other document governs the parties’ dispute.” *Wallace v. Wallace*, 301 Ga. 195, 200, 800 S.E.2d 303 (2017).¹ The court emphasized that “[e]quity does

¹ At the time of the appeal in 2016, the Georgia Supreme Court had subject matter jurisdiction over cases in equity. *Wallace v. Wallace*, 301 Ga. at 200, fn. 3, 800 S.E.2d 303 (2017).

not permit a court to substitute its own notion of what is right in a particular case for a determination of what the law demands.” *Id.* at 199. In other words, the Georgia Supreme Court directed that the trial court must adhere to the governing document in arriving at a value for Wallace Electric’s purchase of Doss’ stock. The court did not reach the merits of Doss’ appeal.

After remand, without conducting a hearing, or considering further argument or evidence, on August 3, 2017, the trial court entered its “Final Order.” In that Order, the trial court complied with part of the Georgia Supreme Court’s directions. It ordered that the 1988 Buy-Sell Agreement, which had expired in 2008 by its express terms, “is controlling with respect to the sale of Plaintiff’s shares back to Wallace Electric.” (R. 139 Order, p. 5). After finding that the Buy-Sell Agreement controlled any sale of Doss’ stock back to Wallace Electric, the trial court found that Doss had continuously refused to sell his shares back to Wallace Electric, and that “the refusal constituted a breach of the Buy-Sell Agreement.” *Id.* Applying its version of the rules of contract construction, the trial court then found that “[Doss’] breach of the Buy-Sell Agreement was ongoing and continued from 1994 through the expiration of the Buy-Sell Agreement on June 30, 2008.” *Id.* at 6. The trial court found that the 1988 Buy-Sell Agreement “replaced and superseded the stock sale provisions of the Bylaws.” *Id.* at 7.

At this point in the trial court’s August 3, 2017 Final Order, if not before, its reasoning seemed to become result oriented. Although both documents called for

Wallace Electric to purchase a terminated employee's stock, and for the terminated employee to sell his stock, the trial court, in a footnote, observed that "neither the Bylaws nor the Buy-Sell Agreement appear to be executory in nature." *Id.* at 8. Since Wallace Electric was required by the terms of the Buy-Sell Agreement to pay Doss the "current value" for his stock before Doss was required to sell or transfer his stock to it, the Agreement was clearly executory. The cases cited by the trial court in its footnote 1 to support its conclusion that the Agreement was not executory actually support the proposition that it was.

Assuming the Buy-Sell Agreement was in fact "controlling with respect to the sale of [Doss'] shares back to Wallace Electric," as the trial court found, it takes two to tango. And the undisputed fact is that Wallace Electric never invoked the Buy-Sell Agreement to acquire Doss' stock. The trial court, in its August 3, 2017 Final Order, states that Doss "refused (and admitted to refusing) to sell his stock back to Wallace Electric at all times from 1994 until well after the litigation in this case commenced." *See id.* at 3-4, 6. But the court failed to take cognizance of the fact that neither Phillip nor Gary nor anyone else on behalf of Wallace Electric ever invoked the Buy-Sell Agreement to determine a "current value" to pay Doss for his Wallace Electric stock. Indeed, as the trial court found, the Buy-Sell Agreement controlled any dispute over the sale of Doss' stock and it was never invoked. So even if Doss had breached the Agreement in 2003, it had to be invoked for Wallace Electric to acquire Doss' stock.

After incorrectly noting that the Buy-Sell Agreement was not executory, the trial court then departed from the Georgia Supreme Court's instructions that it must follow the law, and from its own order that "the Buy-Sell Agreement is controlling with respect to sale of [Doss'] shares back to Wallace Electric," *id.* at 5, and again concluded that to "balance the equities," Doss was to be paid, not his stock's "current value," as required by the Buy-Sell Agreement, but the same \$54,200.00, 1994 value that it had ordered Doss be paid over one year earlier. *Id.* at 12-13.

Doss appealed the trial court's August 3, 2017 Final Order to the Georgia Court of Appeals, which on January 1, 2017 had been delegated jurisdiction over appeals of cases in equity. *Wallace v. Wallace*, 345 Ga. App. 764, 813 S.E.2d 428 (2018). On April 24, 2018, the Court of Appeals published its opinion. The Court of Appeals affirmed the trial court's determination that the 1988 Buy-Sell Agreement controlled the sale of Doss' stock back to Wallace Electric, *id.*, 345 Ga. App. at 769, and that the equitable remedy of specific performance, which was specified in Section 8 the Buy-Sell Agreement, "is appropriate here." *Id.* at 768.

The Court of Appeals noted that "a party suing for specific performance must be ready, willing and able to perform all provisions of the contract, including any payment . . . , but it is a well established rule that tender before suit is filed may be and is waived where the parties entitled to payment, by conduct or declaration, proclaim that, if tender should be made, acceptance would be received." *Id.* at 771. The Court of Appeals

then found that Wallace Electric was not required to tender any purchase price in 2003 because Doss had “indicated that he would never sell his stock.” *Id.* at 771. But a tender of the purchase price is not the issue. The Buy-Sell Agreement, which the Court of Appeals had found to control the sale of any terminated employee’s stock, was the precise document to be utilized to arrive at the purchase price. That kind of dispute is why the Agreement had been prepared. Even if Doss had breached the Agreement when he declined his brother’s inquiry, the remedy was specific performance of that Agreement, not some venture into equity to determine a value.

The Court of Appeals, in disregard for the Georgia Supreme Court’s earlier instructions that it must follow the law, *see infra*, p. 8, ignored the Buy-Sell Agreement’s requirements to determine “current value” through an appraisal process, and its disregard for the Georgia Supreme Court’s earlier directions, “substituted its own notion of what was right,” 301 Ga. App. at 199, regarding the value, or price, to be paid to Doss for his stock. The Court of Appeals decided that “the relevant year for purposes of the breach is 2003.” *Id.* But the court never explained how it got to bypass what it had found to have been the controlling document regarding Doss’ sale of his stock back to Wallace Electric, or how it lawfully “substituted its own notion of what is right,” instead of enforcing that Agreement to determine the “current value” as required by it as the controlling document.



REASONS FOR GRANTING CERTIORARI

Pursuant to Supreme Court Rule 10(c), the April 24, 2018 opinion of the Georgia Court of Appeals bypassed, or failed to take into account, an important question of federal constitutional law, the issue of judicial taking, which Doss submits is in conflict with relevant decisions of this Court. *See Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 130 S.Ct. 2592 (2010). Specifically, the Court of Appeals took stock in Wallace Electric belonging to Doss, which is an established property right under Georgia law, and directed that as a matter of equity, Doss must forfeit one-third of his stock back to Wallace Electric, and then only be paid what is now a sixteen-year-old dramatically diminished value for the remainder of his stock.

The question of an unconstitutional judicial taking was first raised by Doss in the trial court on April 4, 2016, prior to the first bench trial on May 20, 2016, in his pretrial Motion in Limine, citing *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, *supra*. The Takings issue was not addressed by the trial court in its June 6, 2016 Order which awarded Doss the discounted 1994 value for two-thirds of his Wallace Electric stock. Doss, however, raised the issue of an unconstitutional taking in his initial appeal to the Georgia Supreme Court on November 17, 2016, although the controlling issues in that appeal were of state law. After the Georgia Supreme Court vacated the trial court's June 6, 2016 Order, and remanded this case to the trial court, in its May 17,

2017 opinion, without addressing the Takings issue, the trial court, without notice to the parties, entered a “Final Order” on August 3, 2017 which, despite the Georgia Supreme Court’s opinion that it must follow the law, once again awarded Doss the discounted 1994 value for the two-thirds of his stock. In his appeal of that Order to the Georgia Court of Appeals, Doss again urged error on the basis that the trial court’s August 3, 2017 Order “unconstitutionally took Doss’ property and gave it to his brothers.” (Brief of Appellant, p. 18). In its August 24, 2018 opinion, the Court of Appeals found that remand was not necessary to decide the Takings issue “because the takings argument is without merit . . . a trial court’s Order issuing an award in a case pending before it is simply not an unconstitutional taking.” 345 Ga. App. at 774. Doss did not raise the issue of judicial taking in his Petition for Writ of Certiorari to the Georgia Supreme Court because the issue was not then ripe. Doss was asking the Georgia Supreme Court to enforce its previous decision which had directed that “the first rule of equity is that equity follows the law.” 301 Ga. at 199. Doss was taking the extra step of attempting to secure compensation to which he is entitled through the Buy-Sell Agreement, which both the trial court and the Court of Appeals found to control the sale of his stock back to Wallace Electric, but which neither court followed. *See Arigoni Enterprises, LLC v. Town of Durham*, ___ U.S. ___, 136 S.Ct. 1409 (2016).

Had the Georgia Supreme Court directed the Georgia Court of Appeals to follow the law, i.e., order that the Buy-Sell Agreement be implemented to accomplish the sale of Doss' stock back to Wallace Electric, the issue of a judicial taking by the Georgia Court of Appeals would have been moot. But the Georgia Supreme Court denied Doss' Petition, citing *Stop the Beach Renourishment, Inc.* Doss did raise the issue that the Georgia Court of Appeals' decision had unlawfully deprived him of his property in his January 17, 2019 Motion for Reconsideration of Doss' Petition for Writ of Certiorari, which the court denied on February 4, 2019.

◆

DISCUSSION

A. Corporate Stock Is Property.

As the value of Wallace Electric increased, so did the value of Doss' stock in the company. The Georgia Court of Appeals took that value away from Doss when it decided in 2018 that although there had never been any monetary offer, and the Buy-Sell Agreement had never been invoked to arrive at a price, Doss should only be paid for the value of the stock he owned in 2003.

The owner of a share of stock in Georgia is the owner of property. *Georgia R.R. Banking Co. v. Wright*, 125 Ga. 589, 54 S.E. 52 (1906). "It would be more than idle to contend in this day that one who owns shares of stock in a corporation is not an owner of property. It is

true that the value of the property depends largely, if not entirely, upon a fiction of law. But every holder of a share of stock in any corporation is a property owner.” 125 Ga. at 595. “Stocks are property and are as valuable as the assets behind the shares make them so.” *Coca-Cola Co. v. Atlanta*, 152 Ga. 558, 568, 110 S.E. 730 (1922).

Shares of stock are a form of personal property which increase in value as the corporation increases its profit. J. Valasco, *The Fundamental Rights of the Shareholder*, 40 U. Cal. Davis L. Rev. 407, 415 (2006). Shares of stock are assets of the shareholders, not the corporation. *Id.* at 432. It is repugnant to the idea of private business corporations that a corporation may sit on a shareholder’s stock for years, and then reap the benefit of an increase in value of that stock at the expense of the shareholder. The directors and controlling stockholders of Wallace Electric are tempered by their role as fiduciaries to protect the other shareholder’s investment. *Marshall v. Wallace Electric Marshall Co.*, 189 Ga. App. 510, 512, 376 S.E.2d 393 (1988). The Georgia Court of Appeals’ opinion turns the concept of shareholder rights on its head, as well as turning its own determination that the Buy-Sell Agreement controls the sale of Doss’ stock back to Wallace Electric upside down.

B. How Doss' Stock Was Taken By the Trial Court and the Georgia Court of Appeals.

If one assumes that Doss breached the Buy-Sell Agreement in 2003, as the Court of Appeals concluded, then pursuant to its April 24, 2018 opinion, the Buy-Sell Agreement would control any sale of Doss' stock back to Wallace Electric, and as a matter of law, must be applied to determine the current value of Doss' stock. Wallace Electric should have been required to invoke the Agreement, and appoint an appraiser to provide Doss with a "current value" for his stock. If Doss then disagreed, the parties should have then followed the appraisal provisions of the Agreement to arrive at the current value. If Doss ultimately refused to go along, then the remedy of specific performance was expressly provided for in the Agreement to enforce it. But the truth is that Phillip and Gary, who controlled Wallace Electric, had no intention of repurchasing Doss' stock in 2003, or at any other time. As Doss has already pointed out, Respondents argued that "there is no legal or equitable remedy by which [Doss] can force Wallace Electric to purchase its shares." (R. 538-624, Defendants' Brief in Response to Plaintiff's Motion for a Court Supervised Buy-Out and Accounting, p. 14). "The Defendants firmly believe that [Doss] has no legal or equitable right to force the purchase of his stock." (R. 2194-2208, Defendants' Brief in Response to Plaintiff's Motion in Limine, June 19, 2013, p. 1). According to Respondents' attorney, "there is no legal authority for [the trial court] to order us to buy [Doss'] shares." (Hearing Transcript, Sept. 13, 2013, p. 16).

As stated above, Respondents' attorney stated that Wallace Electric was not seeking to purchase Doss' stock.

After it affirmed the trial court's decision that the 1988 Buy-Sell Agreement controls the sale of Doss' stock back to Wallace Electric, the Court of Appeals, in a departure from the Georgia Supreme Court's earlier directions in its May 17, 2017 opinion, decided not to enforce the terms of the Buy-Sell Agreement, but erroneously decided to "substitute its own notion of what is right in a particular case," *see* 301 Ga. at 199, to arrive at a value to be paid Doss for his stock. It concluded that Doss' remaining stock was to be sold at its 2003 value.

The equitable remedy of specific performance provided for in the Buy-Sell Agreement was, obviously, specific performance of that Agreement, and not the Georgia Court of Appeals' own notion of what kind of specific performance to order. "Equity does not permit a court to substitute its own notion of what is right in a particular case for a determination of what the law demands." *Wallace v. Wallace*, 301 Ga. at 199. In fact, the Court of Appeals acknowledged that specific performance was specific performance of the Buy-Sell Agreement. 345 Ga. App. at 771. But it failed to comply with its own admonition.

If it is to be concluded that Doss breached the Buy-Sell Agreement in 2003, as determined by the Court of Appeals, the remedy was for Wallace Electric to have invoked Section 8 of the Agreement which provides

that “the parties will be irreparably damaged if this Agreement is not specifically enforced,” and then calling for enforcement of Section 3.2(d) of the Agreement, by specific performance. But, there was never any resolution reached under the terms of the Buy-Sell Agreement which determined the “current value” to pay Doss for his stock. The law regarding executory contracts is that the parties “have a right to the maintenance of the contractual relations up to the time for performance. . . .” *Wojcik v. Lewis*, 204 Ga. App. 301, 303, 419 S.E.2d 135 (1992), quoting *Milton v. Bank of Newborn*, 30 Ga. App. 55, 116 S.E. 861 (1923). Having never invoked the Buy-Sell Agreement, the time for performance was when the Georgia Court of Appeals decided in 2018 to order the sale of Doss’ stock back to Wallace Electric, not 2003.

The undisputed fact is that Gary and Phillip, as the controlling shareholders and directors of Wallace Electric, never provided Doss with a price for his Wallace Electric stock. It is bedrock law that price is an essential element of any valid contract, and until there is an agreement as to a price, there is no valid contract. O.C.G.A. § 13-3-1, 13-3-2; see *BellSouth Advertising & Publishing Corp. v. McCollum*, 209 Ga. App. 441, 444, 433 S.E.2d 437 (1993); *Wiley v. Tom Hewell & Assocs.*, 154 Ga. App. 235, 236, 267 S.E.2d 816 (1979). Until payment of the “current value,” as determined pursuant to the Buy-Sell Agreement, Doss could not sell his shares. *David v. McRae*, 183 F. 812, 815 (1920), citing J. Pomeroy, A Treatise on Specific

Performance of Contracts, §§ 17, 19; *Express Co. v. Railroad Co.*, 99 U.S. 191, 200, 25 L. Ed. 319 (1878).

Doss owned all of his stock, not two-thirds of it because Wallace Electric has never acted under the Buy-Sell Agreement to arrive at a “current value” to purchase it. The decision of the Georgia Court of Appeals, which arbitrarily took Doss’ stock from him, and effectively gave what it took to his brothers, amounted to an unlawful judicial taking in violation of the Fifth Amendment – “nor shall private property be taken for public use, without just compensation.” Why the Georgia Supreme Court chose not to address the Court of Appeals’ failure to follow its May 17, 2017 opinion is a mystery.

C. The Georgia Court of Appeals Took Doss’ Stock From Him In Violation of the Takings Clause.

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 130 S.Ct. 2592 (2010), this Honorable Court addressed the Takings Clause – “nor shall private property be taken for public use, without just compensation.” U.S. Constitution, Amend. V. The property claimed to have been taken in *Stop the Beach*, was newly established beachfront which had resulted from the State of Florida’s restoration of the beach in Walton County after it had been eroded by several hurricanes. 560 U.S. at 711. The Court observed that “generally speaking, state law defines property interests.”

The dispute between the beachfront property owners and the state centered on whether the newly established beachfront property was the result, under Florida law, of accretion or avulsion? “In Florida, as at common law, the littoral owner automatically takes title to dry land added to the property by accretion, but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the state).” *Id.* at 709.

In determining whether private property has been taken under the Takings Clause, the Court pointed out that while the manner of state action may matter, “the particular state actor is irrelevant.” *Id.* at 715. “If the legislature or a court declares that what was once an established right of private property no longer exists, it has taken the property, no less than if the state had physically appropriated it or destroyed its value by regulation.” *Id.*

In *Stop the Beach*, Justice Scalia explained that the Takings Clause “is not addressed to the action of a specific branch or branches.” *Id.* at 713. “It would be absurd,” wrote the plurality, “to allow a state to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.” *Id.* at 714. “In sum, the Takings Clause bars the state from taking personal property without paying for it, no matter what branch is the instrument of the taking.” *Id.* at 715. “If a legislature, or a court, declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the state had physically

appropriated it or destroyed its value by legislation.”
Id.

In *Stop the Beach*, the plurality ultimately decided that the decision of the Florida Supreme Court did not constitute a taking because it did not deprive the beachfront, or littoral property owners, of any established right to future accretions of beach land or contact with the water. *Id.* at 731. That rather peculiar issue of state law does not exist in this case. Doss’ ownership of 20 shares of Wallace Electric stock, or twenty-five percent of the company’s issued and outstanding stock, belonged to him under the law of Georgia, pure and simple. The Georgia Court of Appeals’ opinion, in failing to follow the parties’ Buy-Sell Agreement, which it had found to have controlled the sale of Doss’ stock back to Wallace Electric, took part of Doss’ stock from him and effectively gave it to his brothers because that act proportionately increased Gary’s and Phillip’s ownership interest. The opinion also arbitrarily reduced the value of the remainder of Doss’ stock, also effectively giving that value to his brothers. The undisputed facts of this case provide the perfect scenario to decide the issue of judicial taking.

In his concurring opinion in *Stop the Beach*, Justice Kennedy engaged in a brief analysis of the mechanics of the Takings Clause as an essential part of the constitutional structure. He observed that “[i]t is natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.” *Id.* at 735. But he then undertook to distinguish what might amount to a judicial taking on

the basis that complications may arise with judicial decisions that may not amount to a physical taking of property. In this case, a physical taking is exactly what has happened.

Justice Kennedy's concerns are not an issue in this matter. If the Georgia Court of Appeals' decision is allowed to stand, it would mean that courts, at least in Georgia, could declare, as a matter of equity (and even though the Georgia Supreme Court had earlier directed that the court could not), that Joe's property must be transferred to Moe for substantially less than the property is worth, and for no public purpose.

Justice Breyer was concerned with becoming involved with "federal interference in matters that are primarily the subject of state law." *Id.* at 743. But in this case, the Constitutional question is squarely before the Court. If the law of Georgia is, as the Georgia Supreme Court declared in *Wallace I* did the Georgia Supreme Court, by denying Doss' Petition for Certiorari, allow the Georgia Court of Appeals to effectively and literally take Doss' Wallace Electric stock and give it to his brothers, or declare that a substantial part of Doss' private property no longer exists? The undisputed facts of record present a classic case to allow for a solid decision of what amounts to a judicial taking.

In *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005), the Court addressed the "public purpose" requirement of the Takings Clause. The Court explained that the "public purpose" requirement for condemned property must be defined broadly.

However, found the Court, “it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another party B, even though it was paid just compensation.” 545 U.S. at 477. But that is precisely what the Court of Appeals’ decision has done. It has, by its own equitable determination, taken Doss’ established property right, 25% of the issued and outstanding amount of Wallace Electric’s stock, and reduced that percentage interest to 16.67%. It has then reduced the value of Doss’ remaining 16.67% from its “current value,” over \$2 million, to its hugely diminished value in 2003. This deprivation of Doss’ established property right was not for any public purpose, however broadly defined, but for the benefit of the other two Wallace Electric shareholders, Gary and Phillip. The Georgia Court of Appeals ignored the Buy-Sell Agreement, which it found to control the sale of Doss’ stock back to Wallace Electric, and in disregard of the Georgia Supreme Court’s earlier decision, “substituted its own notion of what was right in a particular case for what the law demands.” 301 Ga. at 199.

In this action, Doss was a stockholder of Wallace Electric, just like his brothers. He had an obligation to sell his stock back to Wallace Electric when he left his employment in 1994, but no one has ever invoked the Buy-Sell Agreement, which Respondents maintained, and which the trial court and the Court of Appeals both declared to control the sale of Doss’ stock back to Wallace Electric. Doss’ right to be paid the “current value” for his stock is not subordinate to any corresponding right because the Buy-Sell Agreement has never been

invoked to acquire Doss' stock. Indeed, as the Georgia Supreme Court ruled in *Wallace I*, "when rights are defined and established by existing legal principles, they may not be changed or unsettled in equity. *Id.* at 199. Although equity does seek to do complete justice, it must do so within the parameters of the law." 301 Ga. at 199.

The undisputed fact is that Wallace Electric has never acted under the Buy-Sell Agreement to purchase Doss' stock. Assuming that Doss breached the Buy-Sell Agreement in 2003 when he told Phillip that he had no intention of selling his stock, the remedy was for Wallace Electric to have invoked the Agreement. "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." *Wojcik v. Lewis*, 204 Ga. App. at 303; *see Roehm v. Hurst*, 178 U.S. 1, 8-9, 20 S.Ct. 780 (1900). Even if Doss had unequivocally informed Phillip in 2003 that he would not sell his stock back to Wallace Electric, Wallace Electric had the complete remedy under the Buy-Sell Agreement to require Doss to specifically perform the Agreement. But it chose not to do that until now, and as it has argued, and the Court of Appeals has ruled, the Buy-Sell Agreement controls. Accordingly, Wallace Electric must comply with the Agreement and pay Doss "current value" for his stock, not its 2003 value. Wallace Electric could not simply sit on Doss' stock, and reap the benefits of his equity, without a corresponding obligation to pay Doss

“current value” under the terms of the Buy-Sell Agreement when it does act to acquire Doss’ stock.



CONCLUSION

The Georgia Court of Appeals incorrectly applied state law in a manner which contravenes Doss’ due process rights in his private property. Doss respectfully requests that his Petition for a Writ of Certiorari be granted.

Dated: May 6, 2019.

Respectfully submitted,

JAMES LEE FORD, SR.

JAMES LEE FORD, P.C.

6111 Peachtree

Dunwoody Road

Building G, Suite 100

Atlanta, GA 30328

(678) 281-8750

jlff@jlfordlaw.com

Attorney for Petitioner