

No. 18-7868

IN THE
Supreme Court of the United States

CHARLES L. BURGETT, *Petitioner*,

v.

THE GENERAL STORE NO. TWO, INC., *Respondents*.

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

JOINT BRIEF IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI

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April 23, 2019

QUESTION PRESENTED

Whether the Eighth Circuit correctly concluded that the District Court did not abuse its discretion in dismissing Petitioner's lawsuit due to his intentional and willful refusal to comply with four separate Court Orders related to discovery, failure to appear at hearings, failure to appear for his deposition and failure to respond to communications from the Court and counsel for the Respondents based on the Federal Rules of Civil Procedure and case law precedent?

CORPORATE DISCLOSURE STATEMENT

Respondents W.S.C. Services, Inc. and the General Store No. Two, Inc. d/b/a Marsh's Sun Fresh Market state they do not have parent corporations and there is no publically held corporation that owns 10% or more of either Respondent's stock.

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**STATEMENT OF THE CASE/CORRECTION OF PERCEIVED MISSTATEMENTS
OF FACTS BY PETITIONER**

I. Factual Background

Petitioner's lawsuit arose from an incident that occurred at Marsh's Sun Fresh Market in Kansas City, Missouri, on April 10, 2014, at approximately 12:11 a.m. In summary, Petitioner – who is an African/American – alleges he was shopping at the Marsh's Sun Fresh Market grocery store and upon exiting the store a Kansas City, Missouri Class A Licensed Security Officer, Respondent Andrei Florea, employed by Respondent W.S.C. Services, Inc., whose security services Respondent Marsh's Sun Fresh contracted, approached him in the parking lot and asked him if he had anything in his pockets. According to Petitioner, Security Officer Florea assaulted him and wrongfully accused him of shoplifting. The Petition alleges that the Respondent Kansas City police officers were called, who also assaulted him and wrongfully arrested him for hindering or otherwise interfering with a police investigation.

On April 6, 2016, as a result of this incident, Petitioner filed a lawsuit in the Circuit Court of Jackson County, Missouri, against the Respondents and several other parties, which alleged the following causes of action: Assault and Battery, False Arrest and Imprisonment, Malicious Prosecution and Excessive Force against all; and Racial Discrimination against Respondents Marsh's Sun Fresh Market and W.S.C. Services. This lawsuit was removed to the United States District Court for the Western District of Missouri as it claimed civil rights violations under 42 U.S.C. § 1983, plus state law tort claims.

II. District Court Proceedings

A. Petitioner Failed to Appear at the June 21, 2016 Scheduling Conference

Petitioner's disregard for Court Orders and failure to participate in discovery started almost immediately after the Rule 26(f) Parties Planning Conference, which took place on June 14, 2016. The Court issued an Order on May 20, 2016, setting a Scheduling Conference for July 21, 2016. Unfortunately the Order contained a typographical error with regard to the year by identifying the year as 2017 instead of 2016. Counsel for Respondents all realized that the Scheduling Conference was to take place on July 21, 2016, but apparently Petitioner did not. Counsel for Respondents realized Petitioner's misunderstanding about the date at the Parties Planning Conference, and on July 5, 2016, counsel for Respondent W.S.C. Services mailed a letter to Petitioner, which was also sent by email, informing him that the Scheduling Conference was to take place on July 21, 2016 rather than 2017. [*USDC-WD MO - Doc 85-1*]. Despite the letter, and despite having over two weeks' notice of the date, Petitioner failed to appear at the July 21, 2016 Scheduling Conference. The District Court set a new hearing for August 30, 2016, noting its error, and warned that failure to attend hearings may result in dismissal of the case. [*USDC-WD MO - Doc 27*].

B. Petitioner's Failure to Attend the October 11, 2016 Hearing

A discovery dispute hearing with regard to Petitioner's failure to answer respondents' written discovery was scheduled to take place on October 11, 2016.

Petitioner did not appear for the hearing, and later claimed that he did not have notice of the hearing. However, his claim of no notice was absolutely without merit.

First, on October 3, 2016, Petitioner was sent an email from counsel for W.S.C. Services about a discovery conference taking place on October 11, 2016. [*USDC-WD MO – Doc 91-4*]. On that same date, counsel for the other respondents both responded by email, agreeing to the October 11 date. [*USDC-WD MO – Docs 91-5, 91-6*]. All three of the emails were sent to Petitioner's email address on October 3, 2016. Therefore, Petitioner was first provided notice of the discovery conference eight days before it took place.

Petitioner did not respond to the emails on October 3, 2016, the attorneys for Respondent W.S.C. Services called Petitioner at least two times on October 4, 2016, and left voicemail messages about the October 11 discovery conference. [*USDC-WD MO – Doc 91-7*]. Those voicemails were followed up by another email to Petitioner from counsel for W.S.C. Services. *Id.* In addition, and perhaps most importantly, the Court issued its Order Setting Discovery Dispute Hearing on October 4, 2016, one week before the Hearing. [*USDC-WD MO – Doc 55*].

Finally, on October 10, 2016, counsel for W.S.C. Services and Marsh's Sun Fresh sent their Memorandums to the Court by email in advance of the discovery conference, as required by the Court's Order Setting Discovery Dispute Hearing. *Id.* Both of those emails were also sent to Petitioner. [*USDC-WD MO – Docs 92-1, 92-2*]. The Court's Administrative Assistant, Tracy Diefenbach, responded to both emails from defense counsel, again, copying Petitioner on her emails. As a result,

Petitioner received a total of four (4) emails on October 10, 2016, related to the discovery dispute hearing on October 11, 2016, yet, Petitioner failed to appear for this hearing and was unable to be reached by telephone.

C. Failure to Comply With Court's Order on Written Discovery

On June 24, 2016 WSC's first set of discovery requests were sent to Petitioner. On August 11, 2016, Respondent Marsh's Sun Fresh also sent a first set of discovery to Petitioner. Petitioner provided insufficient responses with inappropriate objections to these initial sets of discovery. Several of the interrogatories from Marsh's Sun Fresh requested information on Petitioner's damages. Petitioner objected and submitted incomplete answers to the Respondents discovery, specifically discovery requests seeking basic information, including that if he was claiming personal injury to identify the injuries claimed, more information in regards to his claim for severe mental anguish and emotional pain, the name of his primary care physician, past addresses, past employers, medical bills, names of witnesses, and to sign a medical authorization, authorization for release of municipal records, and CMS form regarding Medicaid. Due to Petitioner's objections, W.S.C. Services and Marsh's Sun Fresh requested a discovery conference with the Court.

The discovery conference took place on October 11, 2016 in regards to Petitioner's objections set forth above. [*Pet. App. D, 20a-23a*]. As addressed above, Petitioner was given proper notice of the hearing, but did not appear. After the hearing, the Court issued an Order with regard to the issues raised at the hearing.

The Order required Petitioner to provide complete answers to several interrogatories and requests for production of documents on or before October 18, 2016. The District Court again warned Petitioner that if he failed to comply with this Order, the District Court may take corrective action, up to and including dismissal of Petitioner's Complaint. [*USDC-WD MO – Doc 59*].

Petitioner responded to the Court's Order by submitting Amended Answers and Objections to the discovery. [*USDC-WD MO – Doc 68-2*]. The amended responses were a clear and blatant violation of the Court's Order because Petitioner refused to answer two Interrogatories, refused to sign the Authorizations, continued to assert objections that had been overruled and raised additional new objections.

D. Petitioner's Failure to Attend the October 24 Hearing in Person

Due to this, a second discovery dispute hearing took place on October 24, 2016. Although Petitioner was ordered to appear *in person*, he failed to do so, and instead, called the Court and left a message that he could be contacted by telephone. A call was made to Petitioner and he participated by telephone. [*USDC-WD MO – Doc 137*]. The facts related to Petitioner's failure to attend in person were as follows.

After Petitioner failed to comply with the Court's October 11, 2016 Order, Respondent W.S.C. Services filed a Motion for Sanctions on October 19, 2016. [*USDC-WD MO – Doc 64*]. On that same date, the Court sent an email stating that Petitioner had contacted the Court and requested a conference. The email stated in

part:

Petitioner and Counsel:

Petitioner contacted me today requesting a conference with Judge Bough regarding a dispute with Respondent Marsh's Sunfresh Market.

Please check your calendars for the below listed dates and times and advise when you would be available for a conference to be held at our Kansas City Courthouse:

October 21 at 10:00 a.m.

October 24 at 10:00 a.m. or 1:30 p.m.

October 25 at 10:00 a.m. or 11:00 a.m.

[*USDC-WD MO Doc 101, Ex. 6*]. Petitioner responded to the email by stating: "I will be available on October 24, 2016 at 1:30 p.m." *Id.* Therefore, Petitioner clearly agreed to appear for an in-person hearing at the Courthouse on October 24, 2016 at 1:30 p.m. The emails were followed by a Text Order from the Court on October 20, 2016, which set the hearing to take place on October 24, 2016. [*USDC-WD MO - Doc 101, Ex. 5*]. The Text Order clearly stated that the hearing would take place "in Courtroom 7B, Kansas City (SRB) before District Judge Stephen R. Bough." *Id.* The emails and the Text Order clearly establish that Petitioner received notice that the October 24 hearing would take place at the Courthouse, and that Petitioner agreed to appear on the date and time identified by the Court. Therefore, his failure to appear in person at the October 24, 2016 hearing was another example of his willful and intentional refusal to follow Court Orders.

E. Refusal to Comply With the Court's Second Discovery Order

At the hearing on October 24, 2016, Petitioner again made arguments to support his objections, which had already been overruled on October 11, 2016. [*USDC-WD MO - Doc 137*]. Judge Bough heard these arguments and again issued an Order which required Petitioner to provide complete answers to the written discovery from Respondents and sign the authorizations within two weeks. [*USDC-WD MO - Doc 70*]. Judge Bough advised Petitioner on numerous occasions during the hearing and stated clearly in his written Order that continued failure to abide by the District Court's Order would result in dismissal of this case. *Id.*

In response to the October 25, 2016 Order, Petitioner provided Second Amended Answers and Objections to the First Interrogatories and First Request for Production of Documents to Respondents discovery. [*USDC-WD MO - Docs 85-9, 85-10*]. Rather than answer the interrogatories as required, Petitioner again submitted objections in direct and blatant defiance of the Court's Order. *Id.* Petitioner also refused to sign the authorizations for release of records. *Id.* Finally, he filed a Motion for a Protective Order and Motion to Vacate Discovery Orders continuing to assert the same arguments and objections overruled by the Court previously. [*USDC-WD MO - Docs 78, 79*].

F. Failure to Appear at the November 1, 2016 Deposition

The deposition of Petitioner started on October 26, 2016, and was conducted at the Courthouse in Judge Bough's Courtroom. Counsel for the police officer respondents started the questioning, followed by counsel for W.S.C. Services. At

some point during the deposition Judge Bough entered the Courtroom and advised the parties that the Courtroom would be closed at 5:00 p.m. and the parties would need to leave. [*USDC-WD MO – Doc 85-14, pp. 191-192*]. The deposition continued, but counsel for Marsh's Sun Fresh did not start asking questions until 4:40 p.m., and he was unable to complete his examination. [*USDC-WD MO – Doc 85-14, p. 262*]. It should be noted that there were breaks taken approximately every hour between the videotapes, and additional breaks due to objections by Petitioner during the deposition that had to be addressed by the Court. [*USDC-WD MO – Doc 85-14, pp. 20, 44, 84, 109, 24, 177, 191, 228*].

Furthermore, although the deposition started at 10:12 a.m. and concluded at 5:00 p.m., the actual testimony only lasted approximately 5 hours and 45 minutes, which included the time that Judge Bough was in the Courtroom ruling on objections. [*USDC-WD MO – Doc 85-14, p. 4, 280*]. At any rate, after the deposition had to be stopped at 5:00 p.m. there was a discussion on the record about continuing the deposition. Petitioner agreed to send an email with regard to his availability. [*USDC-WD MO – Doc 85-14, p. 4, 282*].

Thereafter, on October 27, 2016, Petitioner sent an email to all counsel providing several dates on which the deposition could be continued. The email also requested that the deposition take place at the offices of counsel for Marsh's Sun Fresh. Petitioner and all counsel for the respondents agreed to complete the deposition on November 1, 2016, and a Notice was filed. [*USDC-WD MO – Doc 74*]. The offices of counsel for Marsh's Sun Fresh did not have any available conference

rooms on that date so the deposition was moved to the offices of counsel for W.S.C. Services, which was only three miles away from the location Petitioner requested. Petitioner objected to that location. Thereafter, Petitioner failed to respond to several emails that were exchanged. [*USDC-WD MO – Docs 85-16, 85-17*].

A conference room then became available at the offices of counsel for Marsh's Sun Fresh, and on October 31, 2016, an email was sent to Petitioner advising him that the location he requested was available. [*USDC-WD MO - Doc 85-18*]. An amended deposition notice was filed which reflected the change in address back to the original location Petitioner requested. [*USDC-WD MO – Doc 75*]. On the same date, October 31, 2016, Petitioner filed a Motion to Quash Notice of Continued Videotaped Deposition that addressed the earlier deposition notice. [*USDC-WD MO – Doc 76*]. All counsel for the respondents appeared for Petitioner's deposition, as noticed, on November 1, 2016. Petitioner failed to appear for his deposition and a record was made. [*USDC-WD MO – Doc 85-21*]. Petitioner states in his Eighth Circuit Appeal brief that he knew about the deposition and chose to withdraw from a continued deposition. [*8th Cir. Appellant Brief, 17-1916, Entry 4558619*].

G. Failure to Appear at the Court Ordered November 10, 2016 Deposition

After Petitioner failed to appear for his deposition on November 1, 2016, counsel for W.S.C. Services e-mailed the Court, Petitioner, and all counsel, requesting a telephone conference hearing or in-person hearing to resolve any and all issues related to the continuance of Petitioner's deposition. [*USDC-WD MO –*

Doc 85-22]. In response, on November 2, 2016, the Court Ordered Petitioner's deposition to be continued on November 10, 2016 beginning at 9:30 a.m. in Courtroom 7B in the U.S. District Courthouse in Kansas City, Missouri. [*USDC-WD MO – Doc 77*]. Petitioner responded to the Order on November 8, 2016, by filing a Motion to Vacate the Court Ordered Deposition. [*USDC-WD MO – Doc 80*]. Petitioner's Motion clearly established that he was aware of the Court's Order requiring him to appear for a deposition on November 10. The Court denied Petitioner's Motion to Vacate the Order on November 8, 2016, and again Ordered Petitioner to appear for the continuation of his deposition on November 10, 2016 commencing at 9:30 a.m. in Courtroom 7B in the U.S. District Courthouse in Kansas City, Missouri. [*USDC-WD MO – Doc 81*]. On November 10, 2016 at 9:30 a.m. all defense counsel appeared for the deposition at the Courthouse. [*USDC-WD MO – Doc 82*]. Judge Bough was present. *Id.* Petitioner again failed to appear for his deposition, willfully disregarding the Trial Court's Order.

The Court's Order of Dismissal was entered on December 28, 2016 and Judgment was entered on the same date, which disposed of all claims in the lawsuit. [*Pet. App. B, 7a-18a*]. According to the Order of Dismissal, the case was dismissed pursuant to Rule 41(b) due to Petitioner's failure to comply with the Court's Orders, and as a discovery sanction pursuant to Rule 37. Petitioner filed a Motion to Reconsider on January 24, 2017, which was denied on February 24, 2017. [*USDC-WD MO – Doc 130*].

H. Eighth Circuit Proceedings.

Petitioner's Notice of Appeal was filed on March 24, 2017. On March 23, 2018 the Eighth Circuit affirmed the Judgment of the District Court dismissing Petitioners civil rights action as a sanction under Federal Rules of Civil Procedure 37 and 41(b) for violating Court Orders. [*Pet. App. A, 1-6*]. The Eighth Circuit denied the Petitioner's Motion for Rehearing in Banc. [*Pet. App. C, 19a*].

REASONS FOR DENYING CERTIORARI

I. Certiorari is not appropriate as this decision was based on well settled Federal Rules of Civil Procedure.

Petitioner's lawsuit was dismissed pursuant to Rules 37 and 41(b) of the Federal Rules of Civil Procedure. [*Pet. App. B, 7a-18a*]. These rules are well settled and applied in all Federal Courts. There is no conflict in the law at issue in this matter. Therefore, the request for certiorari should be denied.

The only dispute here is factual and the Judge's determinations and exercise of his discretion in granting dismissal in this specific matter pursuant to the well settled Federal Rules of Civil Procedure 37 and 41(b). The review of sanctions imposed under Rule 37 or 41(b) is for abuse of discretion. *Comstock v. UPS Ground Freight, Inc.*, 775 F.3d 990, 992 (8th Cir. 2014); *Martin v. Daimler Chrysler Corp.*, 251 F.3d 691, 694 (8th Cir. 2001). Although the sanction of dismissal is scrutinized more closely, the ultimate review is still for abuse of discretion. *Id.* The Eighth Circuit has also stated:

[I]f dismissal "lies within the spectrum of appropriate sanctions, we will not substitute our own judgment for that of the district court even

though we may have chosen a different sanction had we been standing in the shoes of the trial court."

Martin v. Daimler Chrysler Corp., supra, 251 F.3d at 694, quoting from *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1020 (8th Cir. 1999).

Here, the decision of the District Court was correct. The Eighth Circuit explained in its opinion that it had no concerns and found no clear error in the District Court findings that Petitioner violated the several orders willfully and in bad faith, and that Respondents were prejudice by the denial of information and process to which they were entitled. [*Pet. App. A, 3a*]. Petitioner's request for a writ of certiorari should be denied as his asserted errors are erroneous factual findings allegedly leading to the misapplication of the Federal Rules of Civil Procedure 37 and 41(b). *See* Supreme Court Rule 10.

II. Certiorari is not appropriate as this decision is based heavily on the facts and lacks exceptional importance.

Here, Petitioner is contesting the District Judge's factual findings of the intentionality and willfulness of his actions. He claims that the specific factual scenario did not warrant the sanction of dismissal under the well settled Federal Rules of Civil Procedure 37 and 41(b). The Supreme Court is not a fact finding body and certiorari is not needed to resolve factual issues.

Petitioner's lawsuit was dismissed based on the factual history of Petitioner's actions that proved intentional violations of multiple Court Orders.

Please see the Statement of the Case section¹. Here, the District Court Judge used his discretion in light of Petitioner's failure to appear for hearings, refusal to engage in discovery and intentional violation of the Court's Orders. As discussed above in the Statement of Cases section, Petitioner: (1) Failed to appear for the Scheduling Conference on July 21, 2016; (2) Failed to appear for a discovery dispute hearing on October 11, 2016; (3) Failed to comply with the Court's Order regarding specific interrogatories and requests for production of documents; (4) Failed to appear in person for a hearing on October 24, 2016; (5) Failed to appear for his deposition on November 1, 2016; and (6) Failed to appear for his deposition on November 10, 2016, after two separate Orders by the Court requiring his deposition on that date. Due to these failures, Respondents all filed motions for sanctions and dismissal, which were sustained on December 28, 2016. [*Pet. App. B, 7a-18a*]. The record clearly establishes an intentional and willful disregard of several separate Court Orders, which proves that the District Court did not abuse its discretion in dismissing Petitioner's lawsuit. All of this intentional conduct by Petitioner occurred despite the District Court's patience and continual warnings that failure to comply with the Court's Orders could result in dismissal of this action. [*Pet. App. A, 3a*]. The Eighth Circuit upheld that dismissal of this action and found the sanctions imposed were reasonable under the factual circumstances and not an abuse of the District Court's discretion. [*Pet. App. A, 1a-6a*]. Clearly, this rendition of the facts and the finding of no abuse of discretion after evaluation by

¹ It is worth noting that Respondents disagree with Petitioner's claim that he did not receive two of the four Orders. Respondents set forth the facts showing notice was provided in the Statement of Case section.

The United States Court of Appeals for the Eighth Circuit shows that the main issue here is the lengthy complex factual history and District Judge's factual findings, which is not appropriate for certiorari.

Moreover, there is well settled case law showing it is within the Court's discretion to impose sanctions for discovery violations, including dismissal. *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 993 (8th Cir. 1975). More specifically, the Court in its discretion may dismiss a case against a *pro se* Petitioner for intentionally failing to comply with the rules of discovery. *Lindstedt v. City of Granby*, 238 F.3d 933 (8th Cir. 2000). The Eighth Circuit expressed that District Judges, most of whom are overburdened with litigation, must be able to require litigants, even *pro se* litigants, to promptly proceed with the requirements of litigation. *Id.* A *pro se* litigant is bound by the litigation rules as is a lawyer, particularly with the fulfilling of simpler requirements in discovery. *Id.* As the Eighth Circuit cited, if the violation is willful and in bad faith, then the appropriateness of dismissal as a sanction is "entrusted to the sound discretion of the district court." *Avionic Co. v. Gen. Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992). [Pet. App. A, 3a].

Here, dismissal as a discovery sanction was appropriate and is merely the application of the Federal Rules of Civil Procedure, which gives the District Court this discretion based on the Court's factual findings. The Order dismissing Petitioner's case included an analysis of lesser sanctions and set forth the prejudice to all Respondents. [Pet. App. B, 16a-17a]. After discussing lesser sanctions, the

Court stated: “[t]he Court finds lesser sanctions would not be effective in compelling Petitioner’s compliance with the Court’s orders.” The Court also stated: “In sum, Petitioner violated several Court orders, all Defendants were prejudiced by Petitioner’s willful, bad-faith conduct, and lesser sanctions are not adequate to ensure compliance with the Court’s orders. [*Pet. App. A, 17a*]. The Eighth Circuit clearly stated they “see no clear error in the findings. [Petitioner] violated the several orders willfully and in bad faith, and that WSC and Sunfresh were prejudiced by the denial of information and process to which they were entitled.” [*Pet. App. A, 3a*].

This case is of little importance to anyone outside of the parties. The District Court’s evaluation of the facts and use of its discretion to grant the sanction of dismissal of Petitioner’s lawsuit fits with the well settled case law and the Federal Rules of Civil Procedure themselves. This fact specific matter is not a matter of nationwide importance. There is no conflicting legal issue necessitating certiorari.

CONCLUSION

The Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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