

No. 18-859

In The
Supreme Court of the United States

EARNEST PEEL,

Petitioner,

vs.

H.E. BUTT GROCERY COMPANY,

Respondent.

**On Petition For Writ Of Certiorari
To The Fourteenth Court Of Appeals Of Texas**

PETITION FOR REHEARING

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QUESTION PRESENTED FOR REVIEW

Is it proper to vacate the denial of a Writ of Certiorari in this case when (1) a meritorious defense to the cause of action, (2) in which the Plaintiff was prevented from making by the opposing party's fraud, accident, or wrongful conduct or official mistake, (3) unmixed with any fault or negligence on the Petitioner's own part?

LIST OF PARTIES

- 1) Earnest Peel, Plaintiff and Petitioner and Respondent;
- 2) H.E. Butt Grocery Company, Defendant.

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OPINIONS BELOW

HEB employed Peel as a driver. According to Peel's first amended petition for bill of review, Peel believed HEB discriminated against him. In October 2013, Peel and HEB purportedly entered into a settlement agreement and Peel resigned.

Peel later sued HEB in October 2014, for alleged employment discrimination. HEB moved for summary judgment, which the trial court granted on August 28, 2015. Peel did not appeal that final judgment.

Eight months later, Peel filed a petition for bill of review in the present suit. In his first amended petition, he sought to set aside the 2015 summary judgment due to (1) [HEB's] attempts to impose the enforcement of a nonexistent settlement agreement upon Peel and (2) HEB colluding with Peel's prior counsel to prevent Peel from gaining other counsel to oppose HEB's summary judgment.

HEB filed a response in opposition to the petition for bill of review, which included a request that the court deny the petition and dismiss the case. HEB argued that Peel failed to allege or present *prima facie* proof of any of the essential elements necessary to obtain bill of review relief. *See Baker v. Goldsmith*, 582 S.W.2d 404, 406-07 (Tex. 1979). According to HEB, (1) Peel did not present *prima facie* evidence of a meritorious ground for appeal, (2) Peel could not show that he was prevented from presenting his arguments by accident, fraud, wrongful conduct of the opposing party, or official mistake, and (3) Peel's own fault or

negligence contributed to Peel's failure to pursue his appellate remedies.

The trial court held a hearing on Peel's petition. A summary judgment was issued in Case No. 2014/58069 in the State of Texas denying Plaintiff wrongful termination and dismissing Plaintiff's discrimination complaint with prejudice. The trial court granted summary judgment in HEB's favor in August 2015.

In Case No. 14-16-00852-CV, the Fourteenth Court of Appeals of Texas, 215th Judicial District, appeal was denied. The court held that Peel had made no attempt to prove fraud, accident, or a wrongful act by HEB or evidence that he was not negligent in failing to appeal the underlying summary judgment, and a new trial was denied.

In Case No. 2016-26177, the 215th Texas District Court under Judge Palmer denied Peel's Bill of Review motion.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Fourteenth Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment To The United States Constitution

Section 1. 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.

Title VII 42 U.S.C. § 2000e-2

(a) Employer practices:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

The Petitioner, Peel, is an individual residing in Harris County, Texas. The Defendant, H. E. Butt Grocery Company (HEB), is a corporation incorporated under the state of Texas. The Petitioner filed a case of discrimination against the Defendant for unemployment benefits, which was dismissed on August 28, 2015. On September 18, 2013, the Petitioner attended an EEOC mediation with HEB, and afterward HEB terminated his employment. Petitioner contends that HEB fired him for filing a discrimination complaint against them with the EEOC, and filed suit for breach of employment contract.

On October 14, 2013, Petitioner's former attorney, Mr. Vic Shapiro successfully negotiated a settlement consisting of a \$115,000 payment of uncontested unemployment benefits and resignation in lieu of

termination based on the employment contract. This settlement was not enforced because the Petitioner did not agree to the terms, and instead wanted to pursue a retaliation charge. The Petitioner disagreed with his lawyer about the terms of the case, and perceived that Mr. Shapiro was guilty of fraud, bad faith, or manipulation of the trust of his client. The Petitioner took over his own defense as a result.

B. The District Court Proceedings

Petitioner amended his discrimination charge to include retaliation on August 28, 2015, in part because Judge Palmer denied to enforce HEB's settlement agreement against Petitioner. Nonetheless, because of the disagreement between the Petitioner and Shapiro, a summary judgment was put into place and the initial case was closed by the courts.

C. The Appellate Court Proceedings

The Petitioner sought a new trial and remedies therein. The Petitioner asked the Fourteenth Court of Appeals to: a) vacate the summary judgment in case number 2014/58069; and b) reopen case number 2014-58069 and grant a new trial. The Petitioner believes that his former attorney, Mr. Shapiro, fraudulently cooperated with HEB's attorneys, specifically one Mr. Michael Mitchell, in order to secure the \$115,000 settlement payment of uncontested unemployment benefits instead of acting on his behalf and instructions in order to gain retaliation remedies. It is claimed that on

October 14, 2013 Mr. Mitchell worked with Mr. Shapiro to sabotage the discrimination case, which constitutes unprofessional misconduct. The Fourteenth Court of Appeals dispensed with this issue.

The 215th Texas District Court, under Judge Palmer denied the Petitioner's Bill of Review motion on Sept 23, 2016. In the court transcript, Mr. Okorafer, the Petitioner's attorney, asked Judge Palmer if the court would allow the Petitioner to speak briefly about the post-trial procedures in this case and why he could not get appellate counsel. Judge Palmer denied this, while allowing HEB lawyers to speak, thus denying the petitioner his First Amendment rights.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Re Caldwell v. Barnes, 941 S.W.2d 182, it is proper to vacate the denial of Certiorari in this case and remand the case for further consideration so that the following evidence can be reviewed, because a meritorious defense to the cause of action alleged, or a meritorious ground for new trial or appeal, or a meritorious claim which the Petitioner was prevented from making by the fraud, accident, or wrongful act of the opposing party, or by official mistake is the foundation for this action. In this case, there is evidence of fraud.

I. The holding shows that the Petitioner has a meritorious defense.

On September 18, 2013, the Petitioner attended an EEOC mediation with HEB. Sandra Herrera, HEB's human resource representative, suspended the Petitioner because she said that he had filed a discrimination complaint against HEB with the EEOC. On October 3, 2013 the Petitioner hired Mr. Shapiro to address this issue and regain his employment. In two taped conversations from October 14th and 16th 2013, Mr. Shapiro offered a binding agreement where he asked HEB for \$200,000 on Petitioner's behalf but instead settled on \$115,000. Mr. Shapiro told the court that pursuant to the authority the Petitioner gave him via a text message on October 14th, 2013, he had successfully negotiated a settlement consisting of a \$115,000 payment of uncontested unemployment benefits and resignation in lieu of termination. This was not true because a HEB request for information reveals that prior to October 15th, 2013, HEB had not offered to settle the Petitioner's claims of discrimination. A transcript of a phone call between the Petitioner and Mr. Mitchell from October 15th, 2013 also suggests that there was an acceptance of a \$115,000 severance payout from HEB to the Petitioner that was in dispute, as the Petitioner had not accepted this agreement, but that Mr. Shapiro had communicated this agreement to Mr. Mitchell nonetheless. This suggests that the documents that Mr. Shapiro filed with the court are fraudulent.

II. The holding shows that the Petitioner was prevented from making a meritorious defense by the opposing party's fraud.

The arrangement between Mr. Shapiro and the Petitioner was that the settlement would consist of \$200,000 rather than \$115,000. Shapiro's personal financial interest in a fast settlement in which he would quickly turn around fees resulting in \$38,333.33 precluded his adequate representation of the Petitioner. Working with Mr. Tom Laucius, Mr. Shapiro's attorney, Mr. Shapiro collected his attorney fees on a settlement contract that he did not negotiate in the Petitioner's best interest, or with the Petitioner's agreement. The fiduciary relationship between attorney and client in the United States imposes upon the attorney a "duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest" (*Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978)) which was not upheld in this case.

In addition, "the relationship between attorney and client has been described as one of *uberrima fides*, which means, 'most abundant good faith', requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception" (*Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.-Corpus Christi 1991)). The Petitioner therefore believes that he has the right to a new trial based on the fact that his attorney did not act in good faith, and instead Mr. Shapiro told Mr. Mitchell that the Petitioner

had accepted a payout of \$115,000 when in fact the Petitioner had only agreed to a payout of \$200,000.

III. The holding shows that the Petitioner did not bear any fault or negligence on the Petitioner's own part.

The Petitioner fired Mr. Shapiro on knowing that he accepted a payout of \$115,000 when in fact the Petitioner had only agreed to a payout of \$200,000. After the Petitioner's subsequent attorney Mr. Debes resigned from this discrimination case, the Petitioner was at a disadvantage because he had two months to either prepare for the case or hire an attorney to represent him for the August 28, 2015 enforcement hearing. While he wanted to hire an attorney, the fraudulent \$115,000 settlement agreement made it impossible for him to find one to take his case so he had to represent himself. The court ruled on HEB's motion for summary judgment on the same day they ruled on HEB's fraudulent settlement agreement. This course of action denied the Petitioner his due process.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Supreme Court grant this Motion for Rehearing on the Petition for Review, grant the Petition for Review, and after briefing and argument reverse the judgment of the Court of Appeals and the District Court and remand this matter for further

proceedings and/or for trial on the merits, and for such other relief to which Petitioner may be entitled. Because the Petitioner was not represented in a good faith capacity, one that he required in order to sue HEB inclusive of a retaliation charge, he should have the right to refile his suit against HEB under new representation. In addition, because he was denied his right to free speech and to petition the Government for a redress of grievances, the Petitioner suggests that requisite decisions to deny the Bill of Review for this case are problematic because they are a part of a series of barriers to his engagement in his own case.

To this end, the denial of the Writ of Certiorari should be overturned, and a new trial be permitted to take place in order to protect the interests of the Petitioner.

Based on the foregoing, Petitioner respectfully submits that it is proper to vacate the denial of the Writ of Certiorari in this case and remand the case for further consideration so that the evidence as the Petitioner presents it can be reviewed.

Dated: April 10, 2019

Respectfully submitted,

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CERTIFICATE OF PETITIONER

Pursuant to Rule 44.2, Petitioner certifies that the Petition is restricted to the grounds specified in the Rule with substantial grounds not previously presented. Petitioner certifies that this Petition is presented in good faith and not for delay.

EARNEST PEEL, Petitioner