No. 20-431

In the

ORIGINAL

SUPREME COURT OF THE UNITED STATES

JOHN L. CORRIGAN, SR.

Petitioner,

v.

GRANT COUNTY, a municipal corporation; D. ANGUS LEE; PATRICK SCHAFF; JANIS WHITENER-MOBERG; BRIAN D. BARLOW; JOHN A. ANTOSZ, and TIMOTHY KRON

Respondents.

On Petition For Writ Of Certiorari To
The Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Trial court granted stay of discovery for Motion to Dismiss only – stay not available for Summary Judgment. Motion to Dismiss was granted without conversion and appealed. Court of Appeal *sua sponte* claimed conversion to summary judgment -without explanation - and summarily dismissed appeal on summary judgment grounds.

Was Corrigan's U.S. Constitutional Fifth Amendment right to due process violated by Court of Appeals when:

a. The appellate court *sua sponte* determined that a conversion took place, ruled on summary judgment grounds, and summarily dismissed the case?

b. The appellate court dismissed on summary judgment conversion when there was no discovery, no opportunity to respond, and no reasonable opportunity to present material pertinent to the summary judgment determination?

PARTIES TO THE PROCEEDING

Petitioner John Louis Corrigan was the plaintiff in the Washington State Superior Court proceedings and appellant in the Washington State Court of

Appeals proceedings. Respondents Grant County, D. Angus Lee, Patrick Schaff, Janis Whitener-Moberg, Brian Barlow, John Antosz and Timothy Kron were defendants in the superior court proceedings and respondents in the appellate court proceedings.

RELATED CASES

- Corrigan v. Grant County, No. 16-2-00254-7, Superior Court of Washington for Kittitas County, Order Granting Defendants Grant County Motion for Dismissal Pursuant to CR 12(b)(6), July 11, 2018.

- Corrigan v. Grant County, No. 16-2-00254-7, Superior Court of Washington for Kittitas County, Order Granting Defendant Timothy Kron's Motion for Dismissal, July 11, 2018.

- Corrigan v. Grant County, Court of Appeals of the State of Washington, Division III, No. 36244-2-III, Unpublished Opinion, November 26, 2019 –

  > John Corrigan appeals the trial court's CR 12(b)(6) order dismissing his amended complaint. Because the trial court considered matters outside the pleadings, we review the trial court's order as if it were a CR 56 order granting summary judgment. Applying that standard, we affirm.

- Corrigan v. Grant County, The Supreme Court of Washington, No. 98133-7, Order, that petition for review is denied, April 29, 2020.

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APPENDIX

TABLE OF AUTHORITIES

Cases

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Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

John Louis Corrigan, Sr. petitions for a writ of certiorari to review the judgment of the Washington State Supreme Court in this case.

OPINIONS BELOW

The Order of the Washington State Supreme Court denying petition for review dated April 29, 2020, is unreported and reproduced at App. 15.

The Washington Court of Appeals, Division III, Order Denying Motion for Reconsideration dated December 31, 2019, is unreported and reproduced at App. 10.

The Washington Court of Appeals, Division III Unpublished Opinion dated November 26, 2019, affirming the trial court's CR 12(b)(6) order as if it were a CR 56 order and granting summary judgment and reproduced at App. 1-9.

The Order Granting Grant Co. Defendants Motion for Dismissal Pursuant to CR 12(b)(6) dated July 11, 2018, is unreported and reproduced at App. 11.

The Order Granting Defendant Kron Motion for Dismissal Pursuant to CR 12(b)(6) dated July 11, 2018, is unreported and reproduced at App. 16-17.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Unique Jurisdiction Issues for Review of U.S. Supreme Court

A. U.S. Constitutional Issues Presented to State Courts

The Court of Appeals (COA) Motion to Reconsider is the first opportunity Petitioner had to address the U.S. Constitutional issues. Prior to that time, there was nothing out of the ordinary at the trial court level. Only when the COA – without any warning – jumped the tracks and erroneously claimed that the CR 12(b)(6) motion was converted to a CR 56 motion did either court interferer with Petitioner's due process - U.S. Constitutional rights. This conversion was a complete surprise, could not be anticipated, and totally contrary to law – by denying Corrigan due process of law under the Fifth Amendment.[1]

a. Petitioner's Motion to Reconsider at Court of Appeals

> This Court Is Violating Appellant's Sixth Amendment Right To A Fair Trial Under The U.S. Constitution And His Fifth Amendment Right To Due Process Under The U.S. Constitution – Both Through The Fourteenth Amendment To The U.S. Constitution. Based on the court relating to violations of CR 12(b)(6), Appellant is denied a fair trial and a right to due process under the Fifth and Sixth Amendments to the U.S. Constitution applicable to the states under the Fourteenth Amendment.

Motion to Reconsider, p. 8.

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[1] The trial court granted a stay of discovery for the limited purpose of allowing defendants to seek a CR 12 motion to dismiss. Any conversion action was completely contrary to the trial court's decision relating to the stay of discovery – which was within the sound discretion of the trial court judge.

b. Petitioner's Petition for Review – Washington State Supreme Court.

The Court Should Accept Review Because The Court Of Appeal's Denial Of The Petitioner's Motion For Reconsideration Violated Due Process Of Law When The COA Converted -Sua Sponte -A CR 12(b)(6) Motion To A CR 56 Motion Without Notice, Opportunity To Respond, Or Discovery And Thus Involves Significant Questions Of Law Under The 5th And 14th Amendments To The Constitution Of The United States And The Washington State Constitution, Article I § 4. RAP 2.5(a)(3).

Petition for Review, p. 9.

B. Washington State Has No Independent nor Adequate State Law Claim.

The conversion rule in Washington Rules of Civil Procedure (CR) 12(b)(6) to a CR 56 Summary Judgment emanates directly from the Federal Rules of Civil Procedure FRCP 12(b)(6).[2]

> . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and **all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.** (emphasis added)

3A Wash. Prac., Rules Practice CR 12 (6th ed.), Washington Practice Series TM, August 2017 Update, CR 12. Defenses and Objections, (b) How Presented.

Here, the state law is the federal law.

> ... if a state law "holds that a particular state action violates state law *because* it violates a parallel provision of federal law, then the Supreme Court has power to review the case [because] the state law decision in such a case is not independent of federal law."

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[2] WA Rule CR 12(b)(6) is similar but not identical to the Federal Rule. However, the conversion rule was identical to the Federal Rule prior to 2007 when the federal rule was restyled - moving the conversion rule to Rule 12(d) and changing the wording slightly – "shall be" changed to "must."

Justice O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 5-6 (1884)

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 – Civil Action for Deprivation of Rights, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fifth Amendment due process through the Fourteenth Amendment.

INTRODUCTION AND STATEMENT OF THE CASE

The issues presented in this case is whether or not: 1) a conversion from CR 12(b)(6) to CR 56 was legitimate or a fraud; and based on the conversion, was Corrigan afforded due process under the CR 12(b)(6) conversion rules.

On April 22, 2011, Corrigan was custodially arrested for speeding (civil) and failure to stop (criminal).[3] The speeding charge was dismissed. After a criminal trial on September 2, 2011, Corrigan was found guilty of failure to stop for a police officer. That conviction was overturned on appeal June 20, 2012. On March 25, 2013, Corrigan filed a 42 U.S.C. § 1983 Civil Rights action relating to his arrest for speeding and failure to stop for a police officer.

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[3] Corrigan stopped for a marked police vehicle but refused to stop for an unmarked police vehicle.

On July 2, 2013, the State refiled charges of failure to stop for a police officer,[4] and on November 12, 2013, the State found Corrigan guilty of failure to stop for a police officer. Corrigan's § 1983 action was dismissed on December 10, 2013, in part due to the state's re-conviction. Corrigan appealed to the Ninth Circuit, but the Ninth Circuit denied it, finding the appeal "so insubstantial as to not warrant further review."

On September 15, 2016, Corrigan brought suit in Kittitas County Superior Court against certain defendants. In that suit, he asserted a 42 U.S.C. § 1983 claim for retaliatory prosecution, abuse of process, malicious prosecution, and negligence. The case was removed to federal court.

In federal court Corrigan filed an amended complaint, which asserted only state law claims. Corrigan moved to remand the case, and the federal court remanded to Kittitas County Superior Court for lack of federal jurisdiction.

On April 23, 2018, defendants moved to dismiss Corrigan's amended complaint pursuant to CR 12(b)(6). The trial court agreed with the defendants' arguments and granted their motions for dismissal. (App 11 and App 13) Corrigan timely appealed to Division Three of the Court of Appeals (COA) pursuant to the CR 12(b)(6) dismissal.

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[4] Over one year after appeals court overturned his conviction.

The Washington COA dismissed the complaint on summary judgment grounds. (App. 1) Corrigan motioned for reconsideration because the decision of the COA was a complete surprise and could not have been reasonably anticipated from prior decisions. (App. 18) The COA denied the motion for reconsideration. (App. 10)

Washington State Supreme Court denied review. (App. 15)

REASONS FOR GRANTING THE WRIT

I. BLACK LIVES MATTER

Introduction.

The apathy of the judicial system regarding civil rights litigation has contributed directly to the justifiable anger of many people sympathetic to the *Black Lives Matter* movement.

A. U.S. Supreme Court – *Heck v. Humphrey*[5]

In *Heck* this Court held that a state prisoner cannot bring a § 1983 suit for damages where a judgment in favor of the prisoner would "necessarily imply the invalidity of his conviction or sentence." This action created significant and continuing litigation: 1) what types of claim would imply the invalidity of the conviction; 2) a later holding that false arrest claims accrue when "the claimant becomes detained pursuant to legal process;" 3) when an action concerns conditions or fact of confinement but does not challenge conviction; and 4) the circuit courts are

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[5] *Heck v. Humphrey*, 512 U.S. 477 (1994).

split on whether *Heck* applies when *habeas corpus* is no longer available. See *Police Misconduct: Law and Litigation*, 3d Edition, © 2015 Thomson Reuters, § 1:6 October 2018 Update. In 2010 there were seven circuits (Second, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh) that determined that a prisoner unable to pursue *habeas* was not barred by *Heck*. Four circuits (First, Third, Fifth, and Eighth) remained steadfast waiting for clear direction from this Court.[6]

This split started when the First Circuit (1998) determined that *Heck did not* bar litigation when habeas was not available and the Seventh Circuit determined that *Heck did* bar even when habeas was not available (1998).[7] It is now 2020 and this Court has not healed the conflict for over twenty years – to the ever growing *Heck* body of case controversy – and the apathy of this Court to *Black Lives Matter* / civil rights issues.

B. Ninth Circuit Court – *Brooks v. City of Seattle*[8]

Malaika Brooks, a seven-month pregnant woman of color, was stopped in Seattle for speeding, refused to sign her traffic ticket, hauled out of her vehicle, eventually tased three times within a minute and forced to kiss the pavement – by the then three Seattle Police Department male officers involved in the altercation. After trial, a 3-panel appellate hearing, and an *en banc* review by the Ninth Circuit, it was held

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[6] *Cohen v. Longshore*, 621 F.3d 1311, 1315-1317 (10th Cir. 2010)

[7] *Id.*, at 1315-1316.

[8] *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010)

that Brooks alleged valid Fourth Amendment violations, but that the officers were entitled to qualified immunity.[9]

That is not rational. Our laws are supposed to be constitutional. No constitutional law would allow police officers to yank a person (of color or not, of gender or not, of pregnant or not) out of their vehicle and beat the crap out of them – just because they would not sign a ticket – a ticket that simply claims its just an "Acknowledgement of Receipt." Where is the compelling state interest in that law? If it was so compelling in 2010, why isn't the state still requiring it?[10]

It is interesting to note that the three male police officers receiving qualified immunity had no probable cause to arrest Brooks in the first place – as Judge Berzon correctly pointed out to her colleagues in her justifiably, scathing 3-panel dissent.

C. The Actions of The Court of Appeals is a Fraud on the Court

The Washington Appellate Court claimed that there was a conversion from a Rule 12(b)(6) motion to a Rule 56 motion. This is plain error but also a *fraud on the court*.[11] There was no conversion and the appellate court knew it. The trial court already determined that because of his granting a stay of discovery, the only option

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[9] Evidently, the idea of beating up pregnant was not firmly established in the police lexicon.

[10] The state finds it inconvenient because tickets are printed out on their computer and are now simply handed to the violator – a situation the state does not consider a problem.

[11] See *In Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), the court stated "Fraud upon the court is fraud which is directed to the judicial machinery itself . . . **thus where the impartial functions of the court have been directly corrupted.**" [Emphasis added]

for the defendants at that time was a Rule 12(b)(6) motion. There would not be a conversion – plaintiff, defendants, and the court were all on that same page. The trial court judge even went so far as to immortalize that concept:

> **I do note that there was a motion to stay discovery pending the motion to dismiss.** Judge Federspiel, by order dated April 2, 2018, indicated that discovery would be stayed so long as the Court was able to rule on the CR 12 motion without resorting to a CR (unintelligible), and when additional facts remain to be supplemented, the Court can convert a CR 12 motion to a CR 56 summary judgment if necessary. **The Court finds in this case that there has not been a supplementation of facts in this case, that this matter was actually properly brought before this Court on a CR 12 motion.** [Emphasis added]

Verbatim Report of Proceedings from an Audio File, June 18, 2018, pp. 14-15. It is up to the discretion of the court whether or not to ignore extra-pleading materials submitted to the court[12] – but in this case there were no "extra-pleading materials" and the court stated that "there has not been a supplementation of facts." The trial court did not abuse its discretion – but the COA did by fraudulent claiming a conversion took place.

The appellate court denied Corrigan due process of law by:

- claiming conversion without any factual support;
- providing no opportunity to respond;
- denying discovery;
- ignoring Rule on Appeal (RAP) 9.12 – requiring the appellate court on summary judgment to consider only evidence and issues called to the attention of the trial

[12] See *Swedberg v. Marotzke*, 339 F.3d 1139, 1142 (9th Cir. 2003).

court – as there was no evidence or issues addressed other than under the CR 12 motion; and

- ignoring RAP 12.1 Basis For Decision – appellate court will decide a case only on the basis of issues set forth by the parties in their briefs – or notify the parties if they are considering other issues so that the parties will have an opportunity to respond.

The Washington appellate court is showing contempt for the conversion rules when dealing with civil rights matters. First of all there was no conversion. Secondly, if a conversion did take place, the appellate court is completely ignoring the process that is due when a conversion does take place – a violation of Corrigan's Fifth Amendment Rights to due process.

Conclusion

Admittedly, the above instances are not horrific examples of police abuses or government overreach. *Black Lives Matter* is not just about police brutality and the death of men and women of color. Its also about the apathy of the courts that do not consistently curb police enthusiasm and/or prejudice and basically end up condoning outrageous police/government actions. This is costing lives unnecessarily – mostly black. The courts have a responsibility to take seriously civil rights issues that are legitimately before the court and not minimize the issues represented by: 1) a Supreme Court 20-year failure to heal a seemingly "yea" or "nay" circuit split; 2) qualified immunity for tasing a woman in her 7th month pregnancy; and 3) a

fraudulent conversion with its accompanying shameful Fifth Amendment violations related to it.

II. COA CLAIMED CONVERSION IS AN ABUSE OF DISCRETION

As pointed out above, the trial judge specifically stated:

> **The Court finds in this case that there has not been a supplementation of facts in this case, that this matter was actually properly brought before this Court on a CR 12 motion.** (emphasis added)

Verbatim Report of Proceedings from an Audio File, June 18, 2018, pp. 14-15.

> Although this conversion procedure is mandatory, not discretionary, conversion does not occur automatically. The court retains the discretion to ignore any extra-pleading materials that the parties have submitted and instead to resolve the motion solely on the basis of the pleading itself, in which case no conversion is necessary. In fact, even when the court fails to expressly exclude the extra-pleading materials, a conversion may not be necessary if the materials were, in fact, ignored by the court or otherwise irrelevant to the court's resolution of the motion. (citations omitted)

Federal Civil Rules Handbook, Baicker-McKee, Janssen, Corr, © 22019 Thomson Reuters/West, Rule 12(d)-Presenting Matters Outside the Pleadings, pages 481-482.

Here we have the assurance of the trial court that there has been no extra-pleading materials and that the CR 12 motion was properly before the court. The COA abused its discretion by claiming otherwise.

III. DENIED FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

The COA abused its discretion by conversion. However, the conversion comes with a process that must be followed for a fair trial.[13] Corrigan was entitled to the protection of the Fifth Amendment to the U.S. Constitution. Due process requires that when a Rule 12(b)(6) motion is converted to a Rule 56 motion – there must be at a minimum:

- Notice of conversion;[14]
- Adequate time for discovery;[15] and
- Opportunity to both be heard and to present further materials in support of their positions on the motion:"[16]

The COA by *sua sponte* converting the CR 12(b)(6) to a CR 56 bypassed Corrigan's right to due process der the Fifth Amendment to the U.S. Constitution.

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[13] See FRCP Rule 12(d)

[14] *Parada v. Banco Industrial De Venezuela, C.A.*, 753 F.3d 62, 68 (2d Cir. 2014)

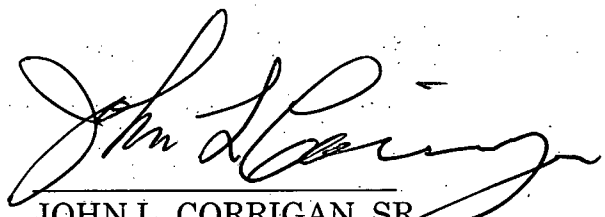
[15] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)

[16] *U.S. ex rel. Customs Fraud Investigations, LLC. V. Victaulic Co.*, 839 F.3d 242, 251 (3rd Cir. 2016)

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,



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