

No.:
21-6048

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
OCT 19 2021
OFFICE OF THE CLERK

SHAKINA ORTEGA
Petitioner,

vs.

HIGGS FLETCHER AND MACK LLP,
PAUL W. PFINGST and CHRISTINA DENNING

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL,
OF THE STATE OF CALIFORNIA FOURTH DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision to uphold the granting of the summary judgment motion when discovery was not complete, in conflict with the decisions of other appellate courts, which routinely reverse the granting of summary judgment motions when discovery was not complete, a violation of Petitioner's Constitutional right to Equal Protection under the law?

2. Whether Petitioner as a Self Represented African American Citizen was denied her Constitutional Right to an impartial court?

PARTIES INVOLVED

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at **Appendix A** to the petition and is unpublished.

The date on which the highest state court decided my case was September 17, 2021. A copy of that decision appears at **Appendix B**.

A timely petition for rehearing was thereafter denied on May 14, 2021 , and a copy of the modified order denying rehearing appears at **Appendix C**.

On July 21, 2021, The Supreme Court of the State of California denied Petitioner's petition for review and denied Petitioner's motion to correct the record on appeal, and a copy of the order appears at **Appendix D**.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that 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 it jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Factual Background

On June 4, 2012, Officer McCarthy shot and killed Petitioner's husband, Victor Ortega. (Victor) He was unarmed and posed no threat to the officer or any other person. Officer McCarthy said that Victor picked up his secondary weapon that had fallen to the ground and pointed it at him and that was why he shot and killed him. But there was none of Victor's DNA on the weapon, so the officer then changed his story and said that Victor lunged towards him with his hands outstretched and his hands were so close to his primary weapon, that he could not extend his arms, and that was why he shot him.

Victor's last words before those fatal moments were "I am going to sue you, I'm going to sue you." Two shots followed. There were no independent eyewitnesses to the actual shooting and there were no videos of the shooting. The only witness that could testify on behalf of the victim, regarding those last fatal moments, was Forensic Science. As such this was a Forensic Case.

Forensic Science is used in the legal or Justice System to support and uphold the law. When a crime has been committed and evidence is collected at the scene, Scientists analyze it, arrive at scientific results and give court testimony about their findings. The significance of Forensic Evidence is the key which a court or jury needs to render a decision. Without this evidence, there can be no proof.

Forensic Evidence provides the jury with information. Scientific evidence like DNA matching, trajectory, positioning, and GSR testing are generally beyond the scope or knowledge that juries possess and are therefore introduced as Scientific Evidence. A Forensic Scientist can tell where the shooter was standing and how close the shooter was to the victim. Forensic can help the jury answer all these questions.

The importance of Forensic Evidence in the underlying case cannot be overstated, as it is the key to proving if someone is guilty or innocent of the action

for which they've been accused. The importance of Forensic Evidence in the underlying case was that Science is objective, It doesn't lie. In short, Forensic Science knows how to sort through information to discover the truth, which was what Plaintiff was seeking.

As alleged in Plaintiff's complaint, Respondents failed to call Plaintiff's Forensic Science Expert, Brent Turvey. Brent Turvey is a Forensic Scientist, he wrote the book on shooting reconstruction, that is used all over the world. He examined the evidence and concluded that Victor could not have been reaching for the officer's weapon. The jury did not hear the testimony of Brent Turvey. Brent Turvey's proffered testimony was relied upon by both the District Court and the 9th Circuit Court of Appeals in denying qualified immunity in the underlying case.

As a result of the actions of the Respondents, Victor's voice was silenced twice, once by Officer McCarthy and then again by Respondents Higgs Fletcher and Mack, Paul Pfingst and Christina Denning. Their actions or inactions deprived Petitioner of the fair trial, guaranteed under the U. S. Constitution.

Relevant facts of this case.

On July 22, 2019, pursuant to Cal. Civ. Proc. Code Section 2033.070, Petitioner caused to be served upon Respondent, Paul Pfingst, (set two) Request for Admissions; Declaration of Shakina Ortega for additional discovery. (CT. P.

109-120). Also attached was a Proof of Service in strict compliance with Cal. Civ. Proc. Section 1013(a). Said documents were served by Express Mail pursuant to Cal. Civ. Proc. Section 1013(c).

On August 2, 2019, in a meet and confer communication counsel for Respondents indicated that there was some confusion about the discovery that was due from Respondents. In an attempt to informally resolve any discovery disputes and to avoid any mistakes or the need for court intervention, Petitioner sent an e-mail to counsel clarifying that (set two) Request for Admission were due on August 26, 2019 for both Paul Pfingst and Christina Denning. (CT. p. 221; Appendix E p.221) There was no response to the meet and confer communication, in violation to Cal Civ. Proc. Section 2023.010 (i)

On September 9, 2019, there was still no response from Respondent, Paul Pfingst to (set two) request for admission. Pursuant to California Rules of Court, rule 3.1300(b) Petitioner filed an ex parte application for an order shortening time to hear Petitioners' Motion for an order deeming admissions admitted before the hearing on the Respondent's summary judgment hearing, supported by a declaration showing good cause to shorten times for the filing and serving of papers. The motion to deem the request admitted and exhibits were attached to the moving papers pursuant to the Code of Civil Procedure Section 2033.280(b)

Petitioner moved the court for an order to deem the non responses to the request for admission deem admitted as a result of the Respondent's complete failure to respond to the request for admission.

On September 9, 2019, Respondents filed an opposition To the Ex Parte Application for an order shortening time to hear Plaintiff's motion for an order deeming admissions admitted and further submitted their opposition to Petitioner's Motion for an Order Deeming Admissions Admitted, served concurrently with Petitioner's Ex Parte Application, on the grounds that Respondents never received the request for admissions. (CT. p. 222)

On September 10, 2019, the Court, having read the moving papers and having heard from the parties, ruled on Respondent's motion to deem the request admitted by ordering Respondent to provide Petitioner the responses within 10 days and if there were no responses or inadequate responses then Petitioner was to come back and the court would deem the request admitted. The Court assured Respondent that he was not taking away her right. Yet three days later, the Court ruled on the summary judgment motion when discovery was not complete. (CT. 234)

REASONS FOR GRANTING THE PETITION

(1) Whether the Court of Appeals' decision to uphold the granting of the summary judgment motion when discovery was not complete, was in conflict with the decisions of other appellate courts, which routinely reverse the granting of summary judgment motions when discovery was not complete, in violation of Petitioner's Constitutional right to Equal Protection under the law?

The reason for granting this petition is because the Court's decision is in conflict with other Appellate Courts decisions which held that summary judgment is only appropriate after adequate time for discovery.

Pursuant to the Discovery Act of 1986 Title 4 Section 2016 - 2036 of the Code of Civil Procedure, Plaintiff had a right to conduct discovery. The Discovery Act and the current case law make it clear - the trial court must have legal justification for any order granting or denying discovery and an order lacking legal justification can be set aside on an appeal or request for a writ. See Johnson v. Superior Court (2000) 80 CA 4th 1061, 95 CR 2d 864, citing Greyhound Corp v. Superior Court (1961) 56 C2d 355, 378, 15 CR 90

Because a party moving for summary judgment must demonstrate the absence of any issue of material fact, a court should only grant summary judgment after the parties have been given an adequate opportunity for discovery. See, eg., Celotex Corp. V. Catrett, 477 U.S. 317, 322 (1986) (observing that summary

judgment is appropriate only “after adequate time for discovery”); *Anderson*, 477 U.S. at 250 n.5, 257 (noting that summary judgment should be refused “where the nonmoving party has not had the opportunity to discover information that is essential to his opposition,” and that the nonmoving party should have a full opportunity to conduct discovery”).

In *Americable Int’l, Inc v. Dep’t of Navy*, 129 F.3d 1271, 1274 (D.C. Cir. 1997) (summary judgment “ordinarily ‘is proper only after the plaintiff has been given adequate time for discovery’”) (quoting *First Chicago Int’l v. United Exch. Co.*, 836 F.2d 1375, 1380 (D.C. 1988); *Marin v. Malhoyt*, 830 F.2d 237, 256 (D.C. 1987) (“a reasonable opportunity to complete discovery before grappling with a summary judgment motion is the norm”); *City of Rome v. United States*, 450 F. Supp. 378,384 (D.D.C. 1978) observing that “ summary judgment motion would be premature until all discovery has been completed”)

In *Arguelles v. City of Orlando* 855 So. 2d 1202 (2003) the Court of Appeals held: “Because Arguelles were entitled to complete their pending discovery before the court considered the City’s motion for summary judgment, we reverse and remand for further proceeding”.

Because the trial court was aware that the summary judgment motion was to be heard in the next three days, before it extended the discovery cut-off and

Ordered Respondents to respond to the request for admissions set two within 10 days. The trial court created a substantial injustice by ruling on the summary judgment motion three days later.

The trial court should not have entertained the Respondents' motion for summary judgment motion before the completion of the discovery. A party is entitled to disclosure in discovery as "a matter of right unless statutory or public policy considerations clearly prohibit it." *Greyhound Corp. v. Superior Court* (1961) 56 C 2d 355 383, 15 CR 90.

As was held in *Jack v. Wood* 258 Cal. App. 2d 639 "[17] The erroneous granting of a Summary Judgment is a denial of a fair trial and has been held reversible in other decisions too numerous to mention."

In *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal. App.4th 164, 174, the court concluded that a motion for summary judgment should not be granted where party opposing summary judgment "has been thwarted in the attempt to obtain evidence that might create an issue of material fact, or discovery is incomplete"; and in *Weber v. John Crane, Inc.* (2007) 143 Cal. App 4th 1433, 1442, 50 Cal Rptr. 3d 71 "a motion for summary judgment is not a mechanism for rewarding limited discovery" and in *Ganoe v. Metalclad Insulation Corp.* 227 Cal. App. 4th 1577 (Cal. Ct. App. 2014) the Court held that "It would be inequitable to allow a

moving party to withhold relevant discovery and then meet its burden on summary judgment without consideration of such newly disclosed evidence or the opposing party's response to that evidence.

The Equal Protection Clause of the Fourteenth Amendment provides "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws". It mandates that individuals in similar situations be treated equally by the law. The Fourteenth Amendment to the U.S. Constitution requires states to respect the procedures and must conduct legal proceedings according to established principles and procedures which were designed to ensure a fair trial.

(2.) WHETHER PETITIONER AS A SELF REPRESENTED AFRICAN AMERICAN CITIZEN WAS DENIED HER CONSTITUTIONAL RIGHT TO AN IMPARTIAL COURT?

Justice requires judges to act without regard to the identity of the parties or their attorneys. The Fourteenth Amendment to the Constitution confer on the court the responsibility to act fairly and impartially, without fear or favoritism, and that they will uphold the Constitution. Under 28 U.S.C. 455(a) "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Canon 3E (6) provides legal grounds for disqualification: "a person aware of the facts might reasonably entertain a doubt the judge would be impartial" then

Canon 3E “mandate that a judge must disqualify himself or herself whenever disqualification is required by law.” This law is aimed at the need to avoid even the appearance of impropriety.

Specifically, because the Honorable Justice Judith L. Haller, was a partner for many years with the Law Office of Higgs Fletcher & Mack for many years before her appointment as a superior court judge, this fact alone is such as to create a reasonable apprehension in the mind of Petitioner as well as the public.

Canon 3E(4)(c) requires disqualification when circumstances are “such that a reasonable person aware of the facts would doubt the justice’s ability to be impartial.” The application of the reasonable doubt standard uses an objective test; the perspective is of the “Average person on the street.” (United Farm Workers v. Superior Court (1985) 170 Cal. App. 3d 97, 105 [the reasonable person standard does not require proof of actual bias, the objective test ensures that proceedings appear to the public to be impartial, and hence worthy of public confidence].) “The “reasonable person” is not someone who is “hypersensitive or unduly suspicious,” but rather is a “well-informed, thoughtful observer.””

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification and give the parties an opportunity to waive disqualification.

Petitioner is not attacking the Justice's integrity, rather, feels that when the case came to her desk and she saw that her former partner was the defendant, she should have either declined the case or disclosed to Petitioner that she was a former partner of the Respondents and given Petitioner the opportunity to waive disqualification.

A reasonable person aware of the fact that, the Honorable Justice Judith L. Haller was a former Partner of the Respondents, Higgs, Fletcher & Mack, LLP, for more than 10 years before her appointment on the bench. Then later to sit in review of the case of her former partner and fails to disclose this information to the self represented party or to disqualify herself from the case , it is unlikely that an average person would think it fair and would surely cause the average person to doubt the judicial officer's ability to be impartial. Simply put, to avoid the appearance of partiality all that was required was to disqualify herself from the panel or at best to disclose this information and give the litigant an opportunity to waive disqualification or not.

The Fourteenth Amendment promise every citizen of the United States a fair and impartial court. The Court traditionally has held that the Due Process Clause protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.

With respects to the Honorable Kenneth J. Medel, During the hearing on September 10, 2019, Respondents represented to the court that “We never got the documents.” the court responded “ Well, I’m just going to look at the big picture now, ...” “I got this email here. I looked in there...” “But the big picture is, that when we answer the interrogatories, the general questions, sometimes they’re not general; sometimes they’re specific. There’s special interrogatories, then it’s just a matter of providing information back-and-forth. And as one of my Associate Lawyers, young Lawyer said, “it’s no big woof,” whatever that means. It’s not a big deal.

But when we look for Requests for Admissions they have a - - and I’m not sure what yours say, but most lawyers use those to really track and lock in and dispose of the case, “you admit you were negligent, don’t you? You admit this, you admit that.” And it really - - so hear me out just for a second - - they’re really designed to really knock out the case. They’re not just asking “what color was your dress on that day”? What color was the light when you approached it”?

They’re like, “you admit you were negligent, you admit that your negligence caused damages,” and it just goes down the line. Sometimes it’s not that broad, maybe it’s “you admit you ran that red light, didn’t you”? You know, and there are these big important concepts that if the person doesn’t answer them, they close

them off.” (RT. pp. 6:22-28 and 7:1-22)

It was at this point in the hearing that Petitioner was faced with her most troubling threat to justice. When the trial court asked, “So what firm do you work with?” and counsel responded, “Pettit, Kohn.” (RT p. 7:23-24)

Although, fair and impartial justice requires that judges act without regard to the identity of the parties or their attorneys, it appeared that the court found itself in a dilemma and then the following exchange occurred:

THE COURT: Okay. It would be surprising if a firm like that wouldn't respond to those kind of questions, you know - - you're not listening to me.

MS. ORTEGA: No. I'm listening.

THE COURT: No; you want to talk. So maybe I should just shut up and let you talk. (RT p.7:25-28 & p. 8:1-2)

It was at that moment that the “big picture” changed, as well as the look on the trial court's face. Petitioner, a Pro Per, female African American litigant, with a fee waiver, attempting to have request for admissions deemed admitted against a familiar law firm, found herself faced to face with old enemies , bias and partiality. It was at this point that it appeared that the “game” changed to partial treatment. It was here that it appears the trial court stopped looking at the law, and started looking at the law firm. Even after counsel informed the trial court

that the non responses to request for admission could be immediately deemed admitted the trial court responded, "Never mind." (RT p.10:3)

From here, the trial court did not rest his decision on legal justification, instead he based his decision on " I'm just trying to deal with things in a practical way before anyone engages in a ton of unnecessary work." (RT p. 10:26-28) and "but at least it will help the issues along." It was at this point that the trial court came up with "a *better solution* is in the next 10 days, if you can answer those." (RT p. 9:10) Then three days later said "Request for admissions is a different thing"

The trial court made a compromise in a discovery dispute, which goes against the philosophy of the Discovery Act, current case laws and the Constitution. This action appears to have been partial treatment and infected the court's entire consideration in the hearing on the motion. Petitioner was not only entitled to have her motion heard by the court but to have the requested discovery deemed admitted, as a result of Respondent's complete failure to perform his discovery obligations, regardless of the parties involved or the law firm.

The Due Process Clause of the Fourteenth Amendment, guarantees every litigant the right to an impartial court. However, the above mentioned actions or inactions, makes it all too clear that the legacy of past injustices inflicted on

African American Citizens persists powerfully and tragically to this day. This is why the highest Court in this land should exercise its discretion, to ensure that the Constitution's promise of equal justice under law is for all of its citizens a living truth. The importance of this case is not only for Petitioner, but because Petitioner is only one of the millions who have been led to march down the streets of this Great Country and cry out for a justice system that works fairly and equally for all of its citizens.

CONCLUSION

The Petitioner request that the Court grant the petition for writ of certiorari

Respectfully Submitted

A handwritten signature in cursive script, reading "Shakina Ortega", is written over a horizontal line.

Shakina Ortega, In Pro Per