

3/13/23

No. 22-1004

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IN THE SUPREME COURT OF THE UNITED STATES

Kurt Garrison  
*Petitioner,*

v.

City of Ottawa  
Wynndee Lee, Jim Sherman, Curt Altic  
*Respondents*

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*On petition for certiorari from the  
Kansas Supreme Court*

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PETITION FOR WRIT OF CERTIORARI

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Kurt Garrison, BSME, JD  
Proceeding without counsel

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### Questions Presented

1. Whether substantive due process applied by the state district court when erroneously dismissing this case with no evidentiary hearing, without discovery, without disputed issues of material fact determined by a jury denies Petitioner procedural due process and right of trial by jury guaranteed under the Fifth, Seventh and Fourteenth Amendments of the Constitution of the United States, 1787 (CUSA).
2. Whether substantive due process applied by the Kansas Court of Appeals when granting Respondents *arbitrary* authority to require that Petitioner obtain Professional Engineer (P.E.) design of residential structures that are exempt under K.S.A. 74-7033 from P.E. design, denies Petitioner due process and equal protection under the Fifth and Fourteenth Amendments of the CUSA
3. Whether substantive due process applied by the Kansas Court of Appeals when granting Respondents *arbitrary* authority to require Petitioner only design residential structures using the International Residential Code (IRC) when the IRC specifically allows the International Building Code (IBC) be used for residential design denies Petitioner due process and equal protection under the Fifth and Fourteenth Amendments of the CUSA
4. Whether substantive due process applied by the state district court and Kansas Court of Appeals when not applying the correct standard of review and not removing the trial judge for prejudice against

Petitioner proceeding without counsel, and bias in favor of parties represented by counsel, denies Petitioner due process and equal protection under the Fifth and Fourteenth Amendments of the CUSA.

#### PARTIES TO THE PROCEEDING

Petitioner Kurt Garrison, a Kansas State Citizen, a degreed mechanical engineer who graduated law school, is proceeding without counsel.

Respondent City of Ottawa is an incorporated municipality in Franklin County, Kansas. Wynndee Lee is the former director of planning and codes for the City of Ottawa. Jim Sherman is the former chief building inspector for the City of Ottawa. Curt Altic is a former building inspector for the City of Ottawa. All respondents are represented by Andrew Holder, of Kansas.

#### LIST OF ALL PROCEEDINGS

State District Court, Fourth Judicial District, Franklin County, Kansas case no. 2020-CV-12 journal entry (judgment) entered January 19, 2021.

Court of Appeals for the State of Kansas case no. 21-124309, Memorandum Opinion entered August 12, 2022.

Supreme Court of State of Kansas, December 15, 2022 issued Order denying Petition for Discretionary Review.

## TABLE OF CONTENTS

	Page
Questions Presented .....	i
Parties to the Proceedings .....	ii
List of All Proceedings .....	ii
Table of Authorities .....	iii
Decisions in Lower Courts .....	1
Statement of Jurisdiction .....	1
Constitutional and Statutory Provisions .....	2
Introduction .....	2
Statement of the Case .....	3
1. Facts of the case .....	3
2. State District Court proceedings .....	6
3. Kansas Court of Appeals proceedings .....	8
4. Kansas Supreme Court proceedings .....	10
Reasons for Granting the Petition .....	11
I. This Court should grant certiorari and define the use of substantive due process when the trial and appellate courts dispose of trial cases using summary proceedings denying Petitioner's fundamental rights and procedural due process guaranteed under the Constitution of United State America, 1787, Amendments V, VII, XIV .....	11

## TABLE OF CONTENTS (cont.)

A. Substantive due process definition and history .....	11
1. Substantive due process precedent .....	12
2. Kansas Supreme Court Substantive due process precedent .....	12
B. Due process under Fifth, Seventh and Fourteenth Amendments .....	13
1. Substantive and Procedural due process ...	14
2. United States Supreme Court review .....	14
3. Seventh Amendment .....	15
4. Due process applies to the state judiciary ..	16
II. This Court should grant certiorari and define the use of substantive due process by Kansas Court of Appeals when granting respondents <i>arbitrary</i> enforcement of K.S.A. 74-7033 contrary to due process rights of Petitioner guaranteed under Amendments V and XIV of the CUSA .....	18

v  
TABLE OF CONTENTS (cont.)

III. This Court should grant certiorari and define the use of substantive due process by the Kansas Court of Appeals when granting respondents arbitrary enforcement of Local Ordinances 3845-13, and 3846-13 contrary to due process rights of Petitioner guaranteed under Amendments V and XIV of the CUSA .....	18
A. Substantive due process in this case.....	19
1. District court substantive due process .....	19
2. Substantive due process of K.S.A. 74-7033 .	19
3. Substantive due process and local ordinance	21
4. Due process is not arbitrary .....	22
5. The good, the bad, and the ugly .....	23
B. Due process requires effective appellate review.....	25
1. Statutory appeal of right .....	25
2. Denial of due process on appeal .....	25
3. Review by the Kansas Supreme Court is discretionary .....	26

## TABLE OF CONTENTS (cont.)

IV. This Court should grant certiorari and define the use of substantive due process when determining prejudice and bias of the trial judge .....	27
A. Trial Judge .....	27
1. District Judge Godderz committed non-feasance of statutory duty against Petitioner .....	27
2. Petitioners history with trial judge .....	29
3. Standard of review to remove trial judge ...	30
4. Due process requires impartial judge .....	32
CONCLUSION .....	36
APPENDIX	
APPENDIX A: JOURNAL ENTRY, District Court of State Kansas, Fourth Judicial District (January 19, 2021) .....	A1
APPENDIX B: MEMORANDUM OPINION, Court of Appeals for the State of Kansas (August 12, 2022) .....	B1
APPENDIX C: ORDER, Supreme Court of Kansas (December 15, 2022) .....	C1

## TABLE OF AUTHORITIES

## STATE CASES

<i>Allison v. Board of County Comm'r's of Johnson County</i> , 737 P.2d 6, 241 Kan. 266 .....	25
<i>Crease v. State</i> , 252 Kan. 326, 845 P.2d 27 .....	31
<i>Garrison v. Ottawa, et al</i> 15-CV-69 .....	34
<i>Garrison v. Ottawa, et al.</i> no. Kan. App. no. [15]-114450 .....	34
<i>Garrison v Wallace</i> , 15-CV-121 .....	31
<i>Garrison v Ward, et al.</i> , 20-CV-79 .....	7, 28
<i>Hudson Properties, Inc. v. City of Westwood</i> 181 Kan. 320, 310 P.2d 936 .....	23
<i>Karnes Enterprises, Inc. v. Quan</i> , 221 Kan. 596, 561 P.2d 825 .....	16
<i>KSFTP v. Garrison</i> , no. 15-21 .....	20
<i>State v. Ames</i> , 222 Kan. 88, 563 P.2d 1034 .....	31
<i>State v. Griffen</i> , 241 Kan. 68, 734 P.2d 1089 .....	31
<i>Smith v. Hosford</i> , 106 Kan. 363, 187 P.685 .....	23
<i>State v. Risjord</i> , 819 P.2d 638, 249 Kan 497 .....	12

*State v. Strayer*, 242 Kan. 618, 750 P.2d 390 31

#### FEDERAL CASES

<i>Bigelow v. Forest</i> , 9 Wall. 339 (1869) .....	23
<i>Bloom v. Illinois</i> , 391 US 194 .....	32
<i>Bouie v. Columbia</i> , 378 US 347 .....	16
<i>Brinkerhoff-Faris Trust &amp; Savings Co. v. Hill</i> , 281 US 673 .....	16
<i>Carey v. Piphus</i> , 435, US 247 .....	14
<i>Cameron v. United States</i> , 148 US 301 .....	14
<i>Dobbs v. Jackson</i> , No. 19-1392, 597 U.S. __ (2022) .....	18
<i>Dred Scott v. Sanford</i> 60 (19 How.) US 393 ....	11
<i>Duncan v. Missouri</i> , 152 US 377 .....	22
<i>Giozza v. Tiernan</i> , 148 US 657 .....	22
<i>Johnson v. Mississippi</i> , 403 US 212, .....	32
<i>Joint Anti-Fascist Committee v. McGrath</i> , 341 U.S. 123 .....	34

<i>Lepper v. Texas</i> , 139 US 462 .....	22
<i>Marshall v. Jerrico, Inc.</i> 446 US 238 .....	34
<i>Mayberry v. Pennsylvania</i> , 400 U.S. 455 .....	32
<i>Meyer v. Nebraska</i> , 262 U.S. 390 .....	21
<i>Minneapolis &amp; St L. R. Co. v. Herrick</i> , 127 US 210 .....	22
<i>Missouri P. R. Co. v. Mackey</i> , 127 US 205....	22
<i>Mooney v. Holohan</i> , 294 U.S. 103 .....	33
<i>Moore v. Dempsey</i> , 261 U.S. 86, .....	33
<i>Murdock v. Memphis</i> , 87 U.S. (20 Wall.) 590	2
<i>Offutt v. United States</i> , 348 U.S. 11 .....	32
<i>Orr v. Orr</i> , 440 US 268 .....	15
<i>Palko v. Connecticut</i> , 302 U.S. 319 .....	33
<i>Powell v. Alabama</i> , 287 US 45 .....	13
<i>Re Murchinson</i> , 349 US 133 .....	32
<i>Semmes v. U.S.</i> , 91 U.S. 21 .....	23

<i>Slochower v. Board of Higher Education of New York City</i> , 350 US 551 .....	22
<i>Street v. New York</i> , 394 US 576 .....	15
<i>Tumey v. Ohio</i> , 273 U.S. 510 .....	33
<i>United States v. Carlton</i> , 512 US 26 .....	18
<i>United States v. Carolene Products Co.</i> , 304 U.S 144 .....	11
<i>U.S. v. Deters</i> , 143 F.3d 577 .....	14
<i>Vari-Build, Inc. v. City of Reno</i> , 596 F. Supp 673, (D. Nev. 1984) .....	25
<i>Whole Women's Health et al. v. Hellerstedt</i> , 579 U.S. 582 .....	17

#### CONSTITUTION OF THE UNITED STATES

U.S. CONST. Amend. V .....	<i>passim</i>
U.S. CONST. Amend. VII .....	<i>passim</i>
U.S. CONST. Amend. XIV .....	<i>passim</i>

#### FEDERAL STATUTES

28 U.S.C. § 1254 (1) .....	2
Judiciary Act of 1867 .....	2

Judiciary Act of 1789 .....	2
42 U.S.C. § 1983 .....	14

#### KANSAS CONSTITUTION

§ 5 of the Kansas Bill of Rights .....	15
--	----

#### KANSAS STATUTES

K.S.A. 20-3018 .....	26
K.S.A. 60-212 .....	16
K.S.A. 60-238 .....	15
K.S.A. 60-252 .....	16
K.S.A. 60-256 .....	16
K.S.A. 60-258 .....	29
K.S.A. 60-2102 .....	25
K.S.A. 74-7033 .....	passim
Kansas Tort Claims Act .....	6, 15

#### KANSAS ATTORNEY GENERAL

Kansas Attorney General Opinion 97-66 ..	20
--	----

#### CITY OF OTTAWA, KANSAS

Local Ordinance 3845-13 .....	passim
Local Ordinance 3846-13 .....	passim
Local Ordinance 3848-13 .....	passim

OTHER AUTHORITIES

Bouvier's Law Dictionary, 14 <sup>th</sup> Ed., Vol II, Entered according to Act of Congress, 1867.	29
Bouvier's Law Dictionary, Rawle's Third Rev. (1914) Vol II. ....	29
Cases on Constitutional Law, Noel T. Dowling, 4 <sup>th</sup> Ed. (1950) .....	12

## **DECISIONS IN LOWER COURTS**

The Kansas State District Court journal entry (judgment) granting respondents' motion to dismiss and summary judgment of this civil cause is not reported or published.

The Kansas Court of Appeals Memorandum Opinion upholding the state district court dismissal by summary judgment of this civil cause is not Reported.

The order of the Kansas Supreme Court denying discretionary review of this case is not reported.

## **STATEMENT OF JURISDICTION**

Original petition filed in the trial court by Garrison (Petitioner) demanded a trial by jury. Petitioner raised deprivations of due process in the trial court. The trial court denied Petitioner a trial by jury, erred in judgment, and the trial court denied due process deprivations raised by Petitioner.

The Kansas Court of Appeals ruled the district court erred in dismissing this case on the grounds listed in the journal entry [judgment]. Petitioner raised ten issues for review before the Kansas Court of Appeals and Kansas Supreme Court including denial of trial by jury and due process violations guaranteed Petitioner under the Constitution of the United States America, 1787 (CUSA) Amendments V, VII and XIV.

Historically, in order for this Supreme Court to have jurisdiction to revise the judgment of a state court, it must appear that the point on which plaintiff relies was made to the state court and decided against him, and that section of the Constitution of the United States relied on was brought to the notice of the state court, and the right which he now claims here claimed under it. This judicial doctrine was affirmed in *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874) when this Court considered the Act of 1867, 14 Stat. at Large 385 which amended the Judiciary Act of 1789. This judicial doctrine provides basis for this court to grant the writ of certiorari. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1254 (1).

#### **APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS**

This case involves Constitution of United States America (1789), Amendments V, VII, XIV, §1,

#### **INTRODUCTION**

This case petitions this Supreme Court to examine and define the allowable use of substantive due process by the trial court and Kansas Court of Appeals when dismissing a case of first impression of building regulations under summary proceedings with only one hearing, shielding respondents from answering for their torts and denying Petitioner the right to a trial by jury, procedural due process and equal protection of the laws.

Substantive due process is a highly controversial and often arbitrary judicial philosophy justices of this Supreme Court and virtually all lower courts can and do disagree upon. Clearly defining the application of substantive due process regarding construction regulations and equal protection of the laws shall benefit virtually all courts and the legal process throughout the United States.

#### STATEMENT OF THE CASE

**1. Facts of the case.** This case was brought by Petitioner Kurt Garrison, a degreed mechanical engineer since 1983 who completed a degree of juris doctor in 2000, contractor since 2004 licensed in Ottawa since 2010, master electrician licensed in Ottawa since 2011 and master plumber licensed in Ottawa since 2012. Petitioner was contracted in 2019 to build a residential garage for a private party in Ottawa, Kansas. Petitioner designed the garage using both the International Residential Code (IRC) and International Building Code (IBC).<sup>1</sup>

During plan review, Respondents mandated Petitioner use only the IRC and imposed professional engineering (PE) design requirements on this simple residential garage which is exempt under state statute K.S.A. 74-7033 from P.E. design and the IBC

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<sup>1</sup> In regards to this case, the City of Ottawa had adopted the 2012 International Building Code (IBC) by Local ordinance 3845-13; the 2012 International Residential Code (IRC) adopted by Local ordinance 3846-13, and 2011 National Electric Code (NEC) adopted by Local ordinance 3848-13. Presently, the city has amended these local ordinances to adopt the 2018 IBC, 2018 IRC and 2017 NEC.

is adopted by local ordinance and also available for residential design. In so doing, respondents exerted *arbitrary* authority requiring Petitioner only use the IRC when local ordinance allows the IRC, IBC and NEC to be used interchangeably and, respondents exerted *arbitrary* authority requiring Petitioner obtain P.E. design of residential structures exempt from P.E. design under K.S.A. 74-7033.

During rough in inspection Respondents alleged that the garage was not constructed in conformity to the IRC and NEC, both adopted by local ordinance. No changes have been made to the electrical installation and the homeowner finished the interior structure without any actual code violation(s) existing contrary to Respondents' false allegations. In short, the garage has been completed and in use now since 2020 while the building permit remains open and this case unresolved.

Section R.301.1.3 of the International Residential Code (IRC) adopted by Local Ordinance 3846-13 allows the International Building Code (IRC) to be used interchangeably with the IRC. *Administrative* section "[A]104.11" of the International Building Code (IBC) adopted by Local Ordinance 3845-13 allows other adopted codes addressing the same requirements to be used in place of the IBC. In short, the adopted IBC, IRC and NEC are interchangeable when addressing the same construction issue(s).

The IRC uses tables and prescriptive methods and does *not* address all building conditions commonly used in residential construction. In some instances, such as sizing support piers for residential

decks porches & etc. and sizing load carrying beams, the IBC must be used to properly size piers and beams.

The IBC utilizes formulas and addresses all building situations. In many residential construction instances, resort must be made to IBC because the IRC does not provide information to accurately design residential structures. This fact was pointed out to the district and appellate courts in the trial court record with actual residential building project(s) subsequently completed by Petitioner using the IBC and approved by respondents which were included in the trial court record for reference.

City of Ottawa (City) established a Construction Board of Appeals (CBA) by Local Ordinance 3845-13 (which adopts the IBC) for the purpose of resolving disputed *non administrative* provisions of the adopted codes. Section 6-104 of local ordinance 3845-13 listed in the trial court record gives the CBA "no authority relative to the interpretation of the administrative portions of these codes." In short, the CBA has no authority to interpret administrative sections of the IRC, IBC or NEC which allows substitution of the construction codes. Nor does the CBA have authority to interpret state statutes under Kansas law.

Since this case was filed, respondents no longer have required Petitioner to obtain P.E. approval of exempt residential structures. Further, respondents Wynndee Lee, Jim Sherman, and Curt Altic are no longer employed by the City of Ottawa planning and building department. Yet, this case remains

unresolved and the building permit for this garage needlessly remains open.

**2. State District Court Proceedings.**

January 24, 2020, Garrison filed an original petition for mandamus and prohibition, and 15 separate Kansas common law tort counts against respondents for unlawful restraint of trade and defamation. Respondents filed a motion to dismiss. One hearing was held September 15, 2020 with no discovery, no evidentiary hearing allowed, and no trial by jury of disputed fact issues listed in Garrison's original Petition.

The district court (1) erred by granting dismissal for Petitioner's alleged failure to properly notify the City and individual respondents per the Kansas Tort Claims Act, and (2) erred by requiring this case be resolved by the CBA as shown by Memorandum Opinion attached.

October 20, 2020 Petitioner filed "I. [Seven] Objections to Defendant's Proposed Journal Entry, II Renewed [K.S.A.] 60-252 Motion for Facts and Conclusions of Law by the Court, III. Legal Requirements of Journal Entry." At no time thereafter was a hearing scheduled on these objections, nor was Petitioner timely notified that respondent's proposed journal entry [judgment] was signed and filed January 19, 2021 by District Judge Eric Godderz.

Without being notified of any hearing on said objections to the journal entry and not being notified or served a copy of the journal entry, April 9, 2021

Petitioner filed a motion to change Judge Godderz from this case.

Hearings were held February 9, 2021 and April 13, 2021 in a subsequent case, *Garrison v. Ward, et al* 20-CV-79 where Garrison was plaintiff and District Judge Eric Godderz was also presiding. At the conclusion of the hearing on April 13, 2021, Judge Godderz asked Petitioner about the motion to change judge in this case and committed non-feasance by failing to notify Petitioner that he had signed and filed a journal entry in this case on January 19, 2021. Providing notice and a copy to all parties of the signed and filed journal entry is a statutory requirement under K.S.A. 60-258.

Petitioner subsequently filed a motion to change Judge Godderz from *Garrison v. Ward, et al, id.* Both these motions to change judge were set to be heard at the same time on June 15, 2021.

At the June 15, 2021 joint hearing on motions to change Judge Godderz, when the court reporter was removed from the hearing as required by law, Petitioner first received notice from Judge Godderz that a journal entry had been filed January 19, 2021 in this case. At this hearing Judge Godderz refused to remove himself from this case. Petitioner filed affidavits in support of motions to change Judge Godderz in both cases. The motions to change judge were ultimately assigned to District Judge Witteman who did not apply the correct standard of review listed in affidavits and re-instated Judge Godderz as the trial judge in both cases.

**3. Kansas Court of Appeals Proceedings.**

Petitioner filed notice of appeal July 8, 2021. April 13, 2022, the Kansas Court of Appeals issued an order to show cause why this appeal should not be dismissed due to being filed out of time (due to non-feasance of Judge Godderz and trial court clerk). Petitioner filed a response to said show cause order and Respondents filed their objection.

The court of appeals rightly retained jurisdiction based upon Petitioner's response to said show cause order proving Petitioner was not timely notified of the signed and filed journal entry which tolled the time to file notice of appeal under Kansas law and due process.

The court of appeals rightly found that Judge Godderz erred by dismissing this case based upon the tort claim notice Petitioner provided respondents.

The court of appeals rightly found that the Ottawa Construction Board of Appeals (CBA) could not interpret state statute K.S.A. 74-7033 exempting residential structures from required design by a Kansas P.E.

1. The court of appeals erred and exercised substantive due process when holding respondents may *arbitrarily* require one or two unit dwellings be designed utilizing only the IRC ignoring section R301.1.3 of the IRC adopted by Local Ordinance 3846-13 that allows the IBC to be used for residential design and, misinterpreting section "[A]104.11" of the IBC adopted by Local Ordinance 3845-13 which allows "alternate materials, design, and methods of

construction and equipment," including substitution of adopted construction codes.

2. The court of appeals erred and exercised substantive due process when holding Respondents may *arbitrarily* require Petitioner obtain P.E. design for residential structures exempt under K.S.A. 74-7033 from P.E. design.

3. The court of appeals erred and exercised substantive due process when upholding dismissal of Garrison's petitions for writs of mandamus and prohibition and 15 tort counts based upon appellate error (1) granting respondents *arbitrary* authority to require the exclusive use of the IRC for residential design and (2) granting respondents *arbitrary* authority to require P.E. design of residential structures exempt under K.S.A. 74-7033 from P.E. design.

4. The court of appeals contradicted their opinion in this case and erred when determining that respondents were "justified" in requiring Petitioner "only use the IRC" to design this residential garage. Yet, the court of appeals directed Petitioner to seek relief from the CBA for respondents false allegation that Petitioner's garage electric installation allegedly violated the NEC, rather than conform to the electrical provisions of the IRC.<sup>2</sup>

5. The court of appeals erred when determining that the trial court did not abuse discretion when

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<sup>2</sup> The IRC has electrical requirements for the construction of one and two unit residential dwellings and accessory structures. The NEC provides electrical requirements for all electrical installations.

refusing to hold a hearing on Petitioner's filed objections even though the court of appeals found the trial court erred in fact and law as basis of dismissal.

6. The court of appeals erred when *not* applying the correct standard of review listed in Petitioner's appellate brief, *infra* regarding removal of trial Judge Godderz for prejudice against Petitioner proceeding without counsel, and bias in favor of respondents represented by counsel, not reversing the trial court judgment, and not assigning this case to another trial judge.

7. The court of appeals erred and exercised substantive due process when not addressing all seven filed objections raised by Petitioner against the proposed journal entry. Specifically, the court of appeals (1) did not rule on respondents violations of administrative provisions of the construction codes that allow the construction codes to be substituted. (2) did not rule on local ordinance 3845-13 sec. 6-104 denying CBA authority to determine administrative sections of the construction codes, (3) did not rule on Kansas legal requirements of journal entry, listed in Petitioner's seven objections filed October 20, 2020.

4. **Kansas Supreme Court proceedings.** This is a case of first impression before the Kansas Supreme Court regarding exemption of residential structures under K.S.A. 74-7033 from required P.E. design and, use of alternate construction codes adopted by local ordinance.

September 9, 2022 Petitioner filed a Petition for Discretionary Review with the Kansas Supreme

Court which was denied December 15, 2022 without oral argument or a hearing.

The Kansas Supreme Court abused discretion by not granting review and correcting noted errors of the Kansas court of appeals.

#### **REASONS FOR GRANTING PETITION**

**I. This Court should grant certiorari and define the use of substantive due process when the trial and appellate courts dispose of trial cases using summary proceedings denying Petitioner's fundamental rights and procedural due process guaranteed under the Constitution of United State America, 1787, Amendments V, VII, XIV.**

**A. Substantive due process definition and history.** Substantive due process is a judicial philosophy of enforcing rights not specifically enumerated in the Constitution of the United States of American and Bill of Rights. It arguably began with *Dred Scott v. Sanford* 60 (19 How.) US 393 (1856), when this Court denied petitioner Scott, a negro, freedom from slavery in favor of Sanford, a white slave owner, under the purported "right" to own slaves existing in some states at that time. Substantive due process has been changed, argued and contested in judicial opinions ever since.

**1. Substantive due process precedent.** Since *United States v. Carolene Products Co.*, 304 U.S 144 (1938), this Court in footnote 4 established the basis

of substantive due process for the protection of three types of rights subsequently defined as:

- i. Fundamental rights, expended in subsequent cases to the first eight amendments to the Constitution of the United States of America.
- ii. Rights to participate in the political process applying the "reasonable" or "rational" test to see if a rational relationship between the act and a legitimate government purpose exists.
- iii. Applying heightened scrutiny to determine rights of "discrete and insular minorities"

A more in depth discussion on the origins of substantive due process is presented in *Cases on Constitutional Law*, Noel T. Dowling, 4<sup>th</sup> Ed. (1950). In recent years Justices Scalia and Thomas of this Supreme Court have published criticism of substantive due process, see *infra*.

**2. Kansas Supreme Court Substantive Due Process precedent.** The Kansas Supreme Court has upheld the three separate levels of judicial review established by this Supreme Court under the Fourteenth Amendment applicable to substantive due process. First, "strict scrutiny" involving fundamental rights. Second, the "rational basis" or "reasonable basis" test to determine if there is any rational relationship between the act and a legitimate government purpose. Third, heightened scrutiny applicable to quasi-suspect classifications. *State v. Risjord*, 819 P.2d 638, 249 Kan 497.

**3. This case and substantive due process.** This case asks this Supreme Court to examine the

use of substantive due process by Kansas courts when dismissing this case to shield municipalities and their employees from defending a jury trial for their tortuous conduct, and shield the trial judge from removal for prejudice and bias, *infra*.

Another aspect of this case is that Petitioner at all times in every case before this same trial judge and at all times (and does so here) has proceeded without counsel and is a "discrete minority." Very few litigants that get to the appellate court and this Supreme Court proceed without counsel. This is significant due to prejudice exhibited in the case record by the Kansas courts against Petitioner proceeding without counsel. In short, Petitioner is not part of the legal "club" in Kansas and not welcome in the district court.

**B. Due process under Fifth, Seventh and Fourteenth Amendments.** This Court has set forth the required elements of due process. Notice and hearing together with a legally competent tribunal having jurisdiction of the case, constitute the basic elements of the constitutional requirement of due process of law. *Powell v. Alabama*, 287 US 45. Petitioner raises the issues in this case and that Petitioner was denied a "legally competent tribunal" by the fact Petitioner was denied an impartial trial judge, denied equal protection of the laws, denied due process, denied a jury trial, and denied effective appellate review.

**1. Substantive and procedural due process.** The Tenth Circuit has provided this applicable definition of substantive due process. Substantive

due process protects small number of fundamental rights from government interference regardless of procedures used; in general, government action infringing upon a fundamental right will not survive judicial scrutiny unless it serves a compelling state interest and is narrowly tailored to effect that interest. CUSA Const. Amend. 5, 14. *U.S. v. Deters*, 143 F.3d 577

This Supreme Court declared that "procedural due process" rules are meant not to protect persons from the deprivations, but from the mistaken or unjustified deprivation of life, liberty, or property. *Carey v. Piphus*, 435, US 247.

In *Carey*, *id.*, students were ejected from public school in violation of due process and subsequently brought civil suit under 42 USC §1983. This Court held that the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, the denial of procedural due process should be actionable for nominal damages without proof of actual injury, and therefore, if it is determined that the suspensions of the students in this case were justified, they nevertheless will be entitled to recover nominal damages. Pp. 435 U. S. 266-267.

**2. U.S. Supreme Court Review.** Long ago this Court determined that summary proceedings in a state civil case, decided without a trial, may be reviewed in the United States Supreme Court. *Cameron v. United States*, 148 US 301.

The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts. *Street v. New York*, 394 US 576, 584, (1969). See also: *Orr v. Orr*, 440 US 268 (1979).

**3. Seventh Amendment.** Seventh Amendment to the Constitution of United States of America, 1787 (CUSA) establishes the fundamental right to trial by jury of common law cases. This is a Kansas common law case brought under the Kansas Tort Claims Act where the amount in controversy exceeds 20 dollars. The Seventh Amendment specifically states:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ..." CUSA, Seventh Amendment.

Under the Kansas Constitution, § 5 of the Kansas Bill of Rights, the right of a trial by jury of common law case shall be inviolate. Kansas statute, K. S. 60-238 also secures Petitioner's right to trial by jury of common law cases as inviolate.

In this case Petitioner filed 15 separate common law tort claims under the Kansas Tort Claims Act. In Kansas, Petitioner's right to trial by jury extends to common law torts of restraint of trade and defamation. It is well settled in Kansas that the right to a jury trial guaranteed under the Bill of Rights refers to that right as it existed at common law.

*Karnes Enterprises, Inc. v. Quan*, 221 Kan. 596, 561 P.2d 825

**4. Due process applies to the state judiciary.**

In this case, the trial court and court of appeals determined all material fact issues without an evidentiary hearing and without a trial by jury though demanded by Petitioner, and granted dismissal and summary judgment of the entire case which denies "strict scrutiny" of fundamental rights of due process, trial by jury and, denies equal protection of the laws guaranteed Petitioner under the Kansas Bill of Rights and CUSA Amendments V, VII, XIV.

This Supreme Court in 1930 held: "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."

*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 US 673, 680. Further, "while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff, id* 682. See also: *Bouie v. Columbia*, 378 US 347.

Kansas statute K.S.A. 60-212 authorizing dismissal under certain criteria and K.S.A. 60-256 treating a motion to dismiss as a motion for summary judgment are valid statutes, but

*misapplied* by Kansas courts in this case when denying Petitioner's fundamental rights of a trial by jury of disputed facts, procedural due process, and equal protection of the laws, *Bouis*, *Id* and *Brinkerhoff-Faris*, *id.* and, "strict scrutiny" standard published in *State v. Risjord*, *Id.*

Cases like this where the Kansas courts failed to adhere to "strict scrutiny" in favor of substantive due process resulting in deprivations of Petitioner's fundamental constitutional rights as well as similar deprivations by other courts of the several states and United States under "substantive due process" may have provided the basis of criticism expressed by Justices Scalia and Thomas in their opinions.

"A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment. Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear." *Whole Women's Health et al, v. Hellerstedt*, 579 U.S. 582 (2016). Dissenting Opinion of Justice Clarence Thomas.

"But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and

adds, beyond that, a right to due process when life, liberty, or property is to be taken away." *Carlton*, 512 U.S., at 42 (opinion of Scalia, J.). Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it [substantive due process] from our jurisprudence at the earliest opportunity." *Dobbs v. Jackson*, No. 19-1392, 597 U.S. \_\_\_\_ (2022). Concurring Opinion of Justice Clarence Thomas.

In this case, Kansas courts have not adhered to the "strict scrutiny" standard of review established by this Supreme Court and the Kansas Supreme Court when denying Petitioner the right of trial by jury, due process and equal protection of the laws. There is no valid compelling state or local interest by (first) granting respondents *arbitrary* authority to discriminate against Petitioner, *infra* and other contractors, *infra*. (second) dismissing this tort case, (third) denying Petitioner mandamus and prohibition relief when Petitioner has no alternate remedy.

**II. This Court should grant certiorari and define the use of substantive due process by the Kansas Court of Appeals when granting respondents arbitrary enforcement of K.S.A. 74-7033, contrary to due process rights of Petitioner guaranteed under Amendments V and XIV of the CUSA**

**III. This Court should grant certiorari and define the use of substantive due process by the Kansas Court of Appeals when granting**

**respondents arbitrary enforcement of Local Ordinances 3845-13, and 3846-13 contrary to due process rights of Petitioner guaranteed under Amendments V and XIV of the CUSA**

**A. Substantive due process in this case.**

**1. District Court Substantive Due Process.**

As shown by Kansas Court of Appeals Memorandum Opinion, the district court erred in fact and law when dismissing this case.

As told the trial judge in court, an underlying reason that respondents want to arbitrarily require P.E. approval of exempt residential construction is because they "can't do the math" associated with IBC designs. As clearly indicated in the court record, Petitioner has been a degreed mechanical engineer since 1983 and has successfully performed the math associated with IBC design for decades. Yet, respondents seek to impose additional unnecessary and unlawful cost of requiring Petitioner obtain P.E. design of residential structures exempt under K.S.A. 74-7033 when Petitioner is capable of performing math required for IBC design.

Requiring Petitioner and other contractors to pay for P.E. design of exempt residential structures because Respondents "can't do the math" required of IBC design is not a legitimate government purpose justifying substantive due process relief.

**2. Substantive due process of K.S.A. 74-7033.**

In Garrison's Petition for Discretionary Review filed with the Kansas Supreme Court, legal precedent was

provided the Kansas Supreme Court from the published opinion of the Kansas Attorney General in *Kansas Attorney General Opinion 97-66* specifically exempting structures identified by K.S.A. 74-7033 from required P.E. design.

Further, a case was brought by the Kansas State Board of Technical Professions (KSBTP) in 2015 against Garrison in *KSBTP v. Garrison*, no. 15-21 for Garrison identifying as a mechanical engineer on a residential drawing exempt under K.S.A. 74-7033 and, performing engineering on an exempt residence without a Professional Engineering license.

Garrison filed a motion to dismiss this KSBTP case because Garrison earned a bachelor of science in mechanical engineering from an accredited university and the residential structure in question was exempt under K.S.A. 74-7033. Based on Garrison's motion to dismiss, this KSBTP case was dismissed. Garrison's motion to dismiss and KSBTP order of dismissal is included in the appendix of Garrison's Petition for Discretionary Review filed in the Kansas Supreme Court.

Contrary to the Memorandum Opinion in this case, the Kansas Attorney General determined that design of structures exempt under K.S.A. 74-7033 is not a crime. Further, the KSBTP also determined that Petitioner's design of residential structures exempt under K.S.A. 74-7033 is not a crime. If design of residential structures exempt from P.E. design is not a crime, then Respondents may not prevent Petitioner from "engag[ing] in any of the common occupations of life ... and generally to enjoy those

privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" *Meyer v. Nebraska*, 262 U.S. 390, 399. The Kansas Supreme Court abused discretion by denying review and not reversing the Kansas Court of Appeals and trial court.

In their Memorandum Opinion in this case, the Kansas Court of Appeals granted respondents *arbitrary* authority to compel Petitioner to obtain Kansas P.E. design of residential structures exempt under K.S.A. 74-7033 from P.E. design.

This is particularly egregious because local authorities can now require P.E. approval for one designer - contractor and not require P.E. approval for another designer - contractor. In essence, the Kansas court of appeals has given local authorities *arbitrary* power to discriminate against any designer - contractor they choose and require that designer - contractor to bear the additional cost of hiring a P.E. on residential construction projects exempt under K.S.A. 74-7033 from P.E. design.

**3. Substantive due process and local ordinances.** Further, the Memorandum Opinion in this case grants respondents *arbitrary* authority to compel Petitioner to only use the IRC to design residential structures, contrary to section R301.1.3 of the IRC which specifically allows the IBC to be used for residential construction. And contrary to *administrative* section "[A]104.11" of the IBC which allows alternate methods of design and construction.

This is significant because by using the IBC a designer can design and build more cost efficiently by correctly sizing footings, piers, beams and other structural members, instead of over sizing because tables in the IRC do not match actual construction situations. In short, using the IBC results in more cost efficient construction and eliminates the "guess work" often associated with IRC design.

In Garrison's Petition for Discretionary Review filed with the Kansas Supreme Court, Petitioner listed several Kansas Supreme Court cases where the Kansas Court of Appeals overturned Kansas appellate court rulings that granted *arbitrary* authority to a municipality (see *infra*). Yet, in this case all *arbitrary* authority granted Respondents stands and denies Petitioner due process and equal protection under the CUSA Amendments V and XIV.

**4. Due process is not arbitrary.** This Court has repeatedly held due process of law within the meaning of the CUSA Amendments V & XIV is secured if the laws operate on all alike, and does not subject the individual to an arbitrary exercise of the powers of the government. *Missouri P. R. Co. v. Mackey*, 127 US 205, *Minneapolis & St L. R. Co. v. Herrick*, 127 US 210, *Lepper v Texas*, 139 US 462, *Giozza v. Tiernan*, 148 US 657, *Duncan v. Missouri*, 152 US 377, *Meyer v. Nebraska* *id.* The protection of the individual from arbitrary action is the very essence of due process of law. *Slochower v. Board of Higher Education of New York City*, 350 US 551.

The holding in this case granting Respondents *arbitrary* authority to require P.E. design and

*arbitrary* authority to mandate only the use of the IRC contradicts former holdings the Kansas Supreme Court who have repeatedly held that *arbitrary* power exercised by building officials is prohibited, *Hudson Properties, Inc. v. City of Westwood*, 181 Kan. 320, 310 P.2d 936 citing, *Smith v. Hosford*, 106 Kan 363, 187 P. 685. These cases were listed in Garrison's Petition for Discretionary Review filed with the Kansas Supreme Court.

**5. The good, the bad and the ugly.** This Supreme Court has repeatedly held that "it is settled law that a judgment may be good in part, and bad in part, — good to the extent it is authorized by law, and bad for the residue. *Bigelow v. Forest*, 9 Wall. 339.[76 U.S. 339, 19 L. Ed. 696, (1869)]" Cited in *Semmes v. U.S.*, 91 U.S. 21 (1875).

**The Good.** As noted in the Statement of the Case, *id.* The Kansas Court of Appeals correctly determined that (first) that jurisdiction was retained, (second) the facts and law relied on by the district court were completely erroneous (third) that the Construction Board of Appeals (CBA) had no authority to interpret K.S.A. 74-7033 making this portion of the Memorandum Opinion good.

**The Bad.**

i. The Memorandum Opinion of the Kansas Court of Appeals grants respondents *arbitrary* authority to require P.E. approval of residential structures exempt from P.E. design under K.S.A. 74-7033, making this portion of the opinion bad.

- ii. The Memorandum Opinion grants respondents *arbitrary* authority to require only the use of the IRC when the IBC is also adopted by local ordinance and section R301.1.3 of the IRC allows the use of the IBC for residential design, making this portion of the opinion bad.
- iii. The Memorandum Opinion directs Petitioner to seek redress from the Construction Board of Appeals regarding interpretation of administrative sections of the IRC, IBC and NEC in violation of Local Ordinance 3845-13, section 6-104 making this portion of the opinion bad.
- iv. The Memorandum Opinion errs by dismissing petitions for mandamus and prohibition based on erroneous findings of fact and law making this portion of the opinion bad.
- v. The Memorandum Opinion dismisses the 15 tort claims based on erroneous findings of fact and law making this portion of the opinion bad.
- vi. The Memorandum Opinion does not apply the more recent and correct standard of review and consider all the relevant facts and circumstances regarding removal of the trial judge, *infra* making this portion of the opinion bad.
- vii. The Memorandum Opinion does not remove the trial judge for prejudice and bias, *infra* making this portion of the opinion bad.

**The Ugly.** Allowing noted errors of the Memorandum Opinion in this case to be established

as precedent and res judicata against Petitioner, thereby unconstitutionally restraining Petitioner's lawful trade of design of exempt structures without legal recourse.

**B. Due process requires effective appellate review.**

**1. Statutory appeal of right.** Kansas Statute K.S.A. 60-2102 guarantees Petitioner an appeal to the Kansas Court of Appeals "as a matter of right." Petitioner raised ten issues for appeal of which all were capable of vacating or reversing the judgment of the trial court based on disputed facts and evidence filed by Petitioner in the trial court.

**2. Denial of effective due process on appeal.** Unresolved objections filed by Petitioner in the trial court, noted errors and those issues not taken up by the Kansas Court of Appeals effectively denies Petitioner statutory appeal of right. "An arbitrary decision cannot be validated by a procedurally correct review process that produces an equally arbitrary ruling. *Vari-Build, Inc. v. City of Reno*, 596 F. Supp. 673, 679 (D. Nev. 1984)" cited by the Kansas Supreme Court in *Allison v. Board of County Comm'r's of Johnson County*, 737 P.2d 6, 241 Kan. 266, 271.

Dismissal by the Kansas Court of Appeals and granting respondents substantive due process relief, unknown to Kansas law and the CUSA, denies Petitioner an effective appeal of right.

**3. Review by the Kansas Supreme Court is discretionary.** Petitioner timely filed a Petition for Discretionary Review with the Kansas Supreme Court in this case which was denied without a hearing. Under Kansas Statute K.S.A. 20-3018, review by the Kansas Supreme Court is discretionary and not mandatory. Thus, disputed material facts and dispositive issues authorizing this case proceed to a jury trial that were not addressed by the trial court, Kansas Court of Appeals and Kansas Supreme Court effectively denied Petitioner appeal "as a matter of right." And, as shown here, denies Petitioner procedural due process and equal protection of the laws guaranteed Petitioner under the Fifth, Seventh and Fourteenth Amendments to the Constitution of United States of America, 1787.

As noted in this brief, this is a case of first impression regarding: P.E. design of residential structures exempt under K.S.A. 74-7033 from P.E. design and, mandated use of only the IRC for residential design when the IBC may be used. As shown here, these issues are incorrectly decided by the Kansas Court of Appeals and remain in force and effect denying Petitioner all relief, right to a trial by jury, right of due process, and equal protection of laws secured under CUSA Amendments V, VII, XIV.

Considering the conflict between substantive due process applied by Kansas courts in this case and Petitioner's fundamental due process and equal protection of law guaranteed under CUSA Amendments V, VII, & XIV, review by this Supreme Court would be appropriate and proper to establish

noted constitutional standards regarding summary proceedings at the trial and appellate courts.

**IV. This Court should grant certiorari and define the use of substantive due process when determining prejudice and bias of trial judge.**

**A. Trial Judge**

**1. District Judge Godderz committed non-feasance of statutory duty against Petitioner.** October 29, 2020, defendants filed their proposed journal entry with Petitioner's filed objections and Petitioner's K.S.A. 60-252 motion for facts and conclusions of law attached. No hearing was held nor action has been filed in the record by Judge Godderz on Petitioner's motion for facts and conclusions of law. This motion is unanswered by Judge Godderz and a post judgment motion to modify judgment under Kansas law.

January 19, 2021, the journal entry was signed and filed by Judge Godderz with the clerk of the district court and served electronically only on defense counsel Andrew Holder, not on Petitioner. No copy was mailed to Plaintiff-Appellant at any time.

Hearings were held February 9, 2021 and April 13, 2021 in subsequent case *Garrison v. Ward, et al.*, 20 CV 79 in which Judge Godderz was presiding and Garrison was in attendance as party plaintiff unrepresented by counsel.

Not having received notice or a copy of said January 19, 2021 journal entry in this case, April 9, 2021 Garrison filed a motion to change judge to remove Judge Godderz from this case. Petitioner later filed a motion to change judge in *Garrison v. Ward, et al, id.* Both motions to change judge were set at the same time for June 15, 2021.

After said April 13, 2021, hearing in *Garrison v. Ward, et al, id.*, Judge Godderz asked Garrison what the motion to change judge was about in this case. Judge Godderz stated to Garrison that he dismissed this case in September, 2020. Petitioner told Judge Godderz that he had not received a notice of hearing on objections to the journal entry or a journal entry. Judge Godderz intentionally failed to notify Garrison that he had signed and filed the journal entry January 19, 2021 in this case.

No person from the district court or any other party notified Plaintiff – Appellant of said January 19, 2022 journal entry in this case at any time until the dual hearing to change judge was held June 15, 2021. At that hearing Judge Godderz verbally notified Petitioner for the *first time* of said filed January 19, 2021 journal entry, well beyond the statutory time period to file a notice of appeal.

June 16, 2021 Petitioner filed in the record of the district court in this cause “Failure to Provide Petitioner Notice and Copy of Signed Journal Entry” and filed a notice of appeal July 8, 2021. Based upon these facts and law presented in Petitioner’s response to order to show cause why the appeal should not be

dismissed, the Kansas Court of Appeals tolled the time to file notice of appeal and retained jurisdiction.

Judge Godderz committed non-feasance by intentionally failing to notify Petitioner at either the February 9, 2021 or April 13, 2021 hearings in *Garrison v. Ward, et al, id.* that he had signed and filed a journal entry in this case even though on April 13, 2021 Judge Godderz discussed with Garrison dismissing this case in September 2020.

K.S.A. 60-258 imposes a mandatory statutory duty on the trial judge and clerk to provide notice and a copy of the judgment or journal entry to all parties. Non feasance is an actionable common law tort of failing to do a mandatory duty.

“When a legislative act requires a person to do a thing, its non-feasance will subject the party to punishment ..” **Non-Feasance**, Bouvier’s Law Dictionary, 14<sup>th</sup> Ed., Vol II., p. 231. Entered according to Act of Congress, 1867. Bouvier’s Law Dictionary, Rawle’s Third Rev. (1914) Vol II, p. 2356.

Judge Godderz’ intentional act of discussing this case on April 13, 2021 with Petitioner and failing to notify Petitioner that he had signed and filed the journal entry January 19, 2021 is non-feasance of his duty under K.S.A. 60-258 subjecting Judge Godderz to punishment under common law non feasance.

**2. Petitioner’s history with trial judge.** As shown in the trial record, beginning in 2013, Petitioner has been a party to five separate civil suits

before District Judge Eric Godderz. Petitioner filed the last four of these civil cases as plaintiff and has prevailed in two of these cases to date. In the last three cases (this case included), Petitioner filed motions to change Judge Godderz for prejudice against Petitioner proceeding without counsel, and bias in favor of opposing parties represented by counsel. In each instance, Judge Godderz refused to recuse himself and the case was assigned to another district judge for review who erred when ruling that Petitioner's affidavit was insufficient to remove Judge Godderz.

### **3. Standard of review to remove trial judge.**

In their Memorandum Opinion, the Kansas Court of Appeals cites no authority to support their decision not to remove Judge Godderz from this case. District Judge Witteman, who re-instated Judge Godderz in this case and *Garrison v. Ward, et al.* *id.* used older Kansas case precedent and ignored the more recent standard of review listed in Petitioner's affidavit when evaluating removal of a district judge. Petitioner's briefs filed in the Kansas Court of Appeals and Kansas Supreme Court lists the more recent Kansas precedent and standard of review regarding removal of a trial judge which is as follows:

"The more recent cases on this issue hold that the standard to be applied in considering judicial disqualification is whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in the mind of a

reasonable person with knowledge of all the circumstances. *State v. Griffen*, 241 Kan. 68, 72, 734 P.2d 1089 (1987).” *State v. Strayer*, 242 Kan. 618, 750 P.2d 390. Cited in *Crease v. State*, 252 Kan. 326, 845 P.2d 27

“A party who shows a judge is prejudiced against him has a right to have his case tried before some other judge — either a judge in some other division or district, or a judge *pro tem*. *In re Peyton*, supra. The first step in getting a new judge, *pro tem* or otherwise, is to show prejudice.” *State v. Ames*, 222 Kan. 88, 563 P.2d 1034.

District Judge Witteman, the Kansas Court of Appeals and the Kansas Supreme Court did not follow this applicable and more recent precedent regarding removal of Judge Godderz from this case and *Garrison v Ward, et. al.*,

It would have been a simple matter to assign Petitioner’s cases to another trial judge and avoid the necessity to appeal every case and bring this case before this Supreme Court.

It is noteworthy that Petitioner’s motions to change judge in this case and later case *Garrison v Ward, et. al, id.*, were concurrently filed and both directed to Chief Judge Wine for review. Judge Wine recused himself from reviewing Petitioner’s affidavits in support of motion to change judge in both cases because Judge Wine (then a magistrate) had presided over the successful mediation of the second case filed by Petitioner, *Garrison v Wallace*, 15-CV-121 where Garrison obtained a settlement. Yet, in

spite of the trial court record in this case proving non-feasance of Judge Godderz, stated prejudice of Judge Godderz against Garrison in the court record in later case *Garrison v. Ward, et al. id.*, see *infra*., and past other three cases listed in Petitioner's affidavits showing hostility and prejudice toward Petitioner, District Judge Witteman, the Kansas Court of Appeals, and the Kansas Supreme Court somehow believe that there is no evidence of Judge Godderz' prejudice against Petitioner?

**3. Due process requires impartial judge.** In this case, Petitioner raised Judge Godderz' consistent and repeated exhibited prejudice against Petitioner proceeding without counsel, and bias in favor of all other parties in all five cases who were represented by counsel. This Supreme Court has repeatedly held that a "[t]rial before "an unbiased judge" is essential to due process. *Bloom v. Illinois*, 391 U.S. 194, 205; *Mayberry v. Pennsylvania*, 400 U.S. 455, 465." Cited in *Johnson v. Mississippi*, 403 US 212.

Further, this Supreme Court has expanded upon this premise in repeatedly holding "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. ... to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Offutt v. United States*, 348 U.S. 11, 14. Cited in: *Re Murchinson*, 349 US 133, 136.

As shown by the court record in this case, Judge Godderz has not allowed an actual jury trial in any of

the four cases filed by Petitioner though demanded, and required by procedural due process under CUSA amendments V, VII, and XIV. This Supreme Court has repeatedly held "this Court has construed it to be inherent in the independent concept of due process that [judgment] shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. *Palko v. Connecticut*, 302 U.S. 319, 327; *Mooney v. Holohan*, 294 U.S. 103; *Moore v. Dempsey*, 261 U.S. 86. .... Trial must be held before a tribunal not biased by interest in the event. *Tumey v. Ohio*, 273 U.S. 510." Cited in: *Fay v. New York*, 332 US 261, 288.

In *Johnson v. Mississippi*, *id.* when assigning the case to another trial judge this Supreme Court held "because our remand will entail a hearing before another judge. In concluding that [trial] Judge Perry should have recused himself, we do not rely solely on the affidavits filed by the lawyers reciting intemperate remarks of Judge Perry concerning civil rights litigants. Beyond all that was the fact that Judge Perry immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that. From that it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit." *Johnson v. Mississippi*, *id.*

Included in Petitioner's affidavit to remove Judge Godderz filed in the trial court record in this case, at the close of the first case in 2015 Judge Godderz publicly chastised Petitioner for filing objections to the judgment "he" wrote. Petitioner prevailed in the first two of four civil cases filed before Judge

Godderz. Both of these first two cases were brought before the Kansas Court of Appeals. In the first case filed by Petitioner, *Garrison v. City of Ottawa, Curt Altic 15-CV-69*, for unlawful P.E. requirement of exempt residential structures, Judge Godderz' judgment was vacated on appeal., *Garrison v. Ottawa, et al.* no. [15]-114450. In the second case *Garrison v. Wallace, id.* Petitioner obtaining a settlement after an interim appeal was denied without prejudice.

In discussing requirements of an impartial and disinterested tribunal, this Supreme Court held: "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... At the same time, it [due process] preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.* 446 US 238, 242.

In *Garrison v. Ward, et al, id* filed in the district court after this case, as shown by the transcript, Judge Godderz stated at the first hearing February 9, 2021:

"... the Court can assess sanctions against either party, most likely the plaintiff in this particular

case if the defendants' facts are true ..." 2/9/21  
Tran. p.10, ln. 7-10

This statement made by Judge Godderz in *Garrison v. Ward, et al.*, *id.*, before any discovery or subsequent proceedings occurred clearly indicates prejudice by Judge Godderz against Petitioner. At that same hearing on February 9, 2021 Judge Godderz denied Petitioner's January 26, 2021 motion for mediation indicating he [Judge Godderz] had predetermined to rule against Petitioner and award Respondents attorney fees ignoring evidence filed in the trial court by Petitioner proving respondents had committed tort. Further, defendants in *Garrison v. Ward, et al.*, *id.*, did not file any admissible evidence in support of their motion to dismiss and never did even though ample opportunity was provided. In spite of these facts, Judge Godderz dismissed this case and wrongfully awarded sanctions against Garrison as prejudged February 9, 2021.

Further, facts and circumstances for all five cases where Petitioner was a party detailing Judge Godderz' prejudice against Petitioner proceeding without counsel, and bias in favor of parties represented by counsel, hostility exhibited by Judge Godderz due to Petitioner's filed objections to erroneous judgments, and Petitioner's success on appeal against errors of Judge Godderz. In short, Judge Godderz "was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit." *Johnson v. Mississippi*, *id.* considering all the facts and circumstances, a "reasonable person" *Crease v. Stat*, *id.*, would conclude Judge Godderz is not impartial when

presiding over Petitioner's cases. Allowing orders and the judgments of Judge Godderz clouded by prejudice and bias to stand in this case and later case *Garrison v. Ward, et al., id.*, deprives Petitioner's fundamental rights of due process under CUSA Amendments V, VII, and XIV.

## CONCLUSION

This case provides an ideal opportunity for this Supreme Court to define and clarify the appropriate use of substantive due process when evaluating summary proceedings at the trial and appellate level. As a matter of justice, certiorari should be granted.

This 8<sup>th</sup> day of March, 2023



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