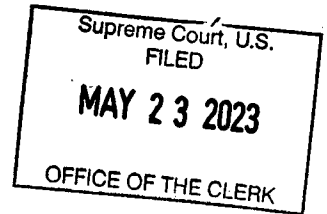


22-7719

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



JOSEPH J. BUTTERCASE,

Petitioner,

v.

JAMES MARTIN DAVIS, and
DAVIS LAW OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Joseph J. Buttercase, #76999
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PRO SE PETITIONER

QUESTIONS PRESENTED

1. Whether it is unconstitutional to require a criminal defendant to prove actual innocence to recover funds paid to his former defense attorney who never performed all agreed upon services?

2. Whether it is unconstitutional for a trial judge to have ex parte communications with an attorney defendant outside presence of the plaintiff who is the attorney's former client?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and decision of the Nebraska Supreme Court.

OPINIONS BELOW

The opinion and judgment on appeal from the Nebraska Supreme Court appears at Appendix A to the petition and is reported at **Buttercase v. Davis, 313 Neb. 1 (2022)**. The supplemental opinion and judgment on appeal from the Nebraska Supreme Court appears at Appendix B to the petition and is reported at **Buttercase v. Davis, 313 Neb. 587 (2023)**.

JURISDICTION

The order of the Nebraska Supreme Court denying a timely motion for rehearing was issued February 24, 2023, and appears at Appendix B to the petition. There was no extension of time to file this petition and it is timely filed by not later than May 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws."

STATEMENT OF THE CASE

B. PROCEDURAL HISTORY

Petitioner, Joseph J. Buttercase ("Buttercase" or "Petitioner"), timely initiated in the lower district court on February 22, 2017, the underlying civil lawsuit against Respondents for legal malpractice, breach of contract, breach of fiduciary duties, intentional and negligent misrepresentation, and intentional and negligent infliction of emotional distress (T1-18; T25-34) (E31) (44:23-45:11). Buttercase's first motion for leave to amend complaint was granted without objection from Respondents on May 10, 2017 (3d Supp. T15-16). Buttercase timely filed his second amended complaint in the district court on June 5, 2017, and Respondents were served with the summons and second amended complaint on June 14, 2017 (T13-18) (2d Supp.T1-8). However, the Respondents failed to answer Buttercase's second amended complaint until he filed a motion for default judgment (T19-24) (3d Supp.T18). The district court summarily overruled Buttercase's motion for default judgment and motion to strike at the hearing on September 18, 2017, holding that: "There is an Answer on file and we will proceed on that basis." (3:3-4).

On January 7, 2019, the district court granted Buttercase's second motion for leave to amend complaint and granted Respondents 14 days thereafter to file a responsive pleading (Supp.T1-2). Buttercase timely filed his third amended complaint in the district court on January 14, 2019, which is the operative pleading to this action (T25-34). On February 21, 2019, Respondents were both served by certified U.S. mail with the summons and third amended complaint (T37) (2d Supp.T17-24) (E3, pp.1-7). Buttercase filed his second

motion for default judgment in the district court on March 14, 2019, due to Respondents' second failure to timely answer the third amended complaint on or before the January 28, 2019, ordered due date deadline (4:1-12:24) (T35-36). The district court entered its Order on August 5, 2019, denying Buttercase's second motion for default judgment and granted Respondents another additional 14 days to file an answer to the third amended complaint (T37-38).

On September 13, 2019, Buttercase filed a motion to stay and motion for default judgment in the district court due to Respondents' third failure to answer the complaint on or before the August 19, 2019, ordered due date deadline (T43-45; T48-49). On September 16, 2019, Respondents filed late their answer to Buttercase's third amended complaint, twenty eight (28) days past the second August 19, 2019, ordered due date deadline or two hundred thirty one (231) days past the first January 28, 2019, ordered due date deadline (T46-47). Respondents' third failure to answer Buttercase's complaint within the 14 day specified time period, pursuant to the district court's orders, should have been treated as an admission to all allegations set forth within the third amended complaint (T45, ¶5). However, Respondents already knew that the district court would not hold them accountable or sanction them for their willful dilatory tactics (Appellant's Brief, at p.15). On October 28, 2019, as expected, the district court overruled Buttercase's third motion for default judgment, objection and motion to strike, and motion to stay (T50) (16:13-15).

Buttercase and Respondents all filed in the district court cross-motions for summary judgment (T57-66; T71-81). The district court mechanically adopted verbatim or "rubber stamped" the Respondents' prepared and submitted order which granted the Respondents' amended motion for summary judgment and denied

Buttercase's amended motion for partial summary judgment (T95-100). On or about December 15, 2020, when Buttercase received his copies of the transcript of pleadings for appeal in this case, he discovered that Respondents filed their amended motion for summary judgment, annotated statement of undisputed facts, and evidence index before Judge Ideus even filed a progression order (T57-70). Respondents filed the aforementioned pleadings on May 8, 2020, at 11:08:51 AM CDT, pursuant to the aforementioned future progression order, whereas Judge Ideus did not even file the progression order until 1:13 PM on May 8, 2020 (T57-70). See Filing stamps on the mentioned pleadings (id.). See also, (Appellant's Brief, at pp.32-34).

On December 9, 2022, the Nebraska Supreme Court affirmed the district court's decision in *Buttercase v. Davis*, 313 Neb. 1 (2022). Apparently not favoring Buttercase's reference in his rehearing brief of the finding that "'the timing of Davis' filing and the court's progression order was purely coincidental' is a flimsy, makeweight excuse," the Nebraska Supreme Court overruled Buttercase's motion for rehearing on February 24, 2023, in *Buttercase v. Davis*, 313 Neb. 587 (2023). See (Appellant's Rehearing Brief, at p.8).

B. STATEMENT OF FACTS

On December 12, 2012, Buttercase was indicted in the United States District Court for the District of Nebraska on 3 counts alleging various criminal activity in *United States v. Joseph Buttercase*, No. 8:12CR425 (E31). On February 6, 2014, Philip and Maria Buttercase (Petitioner's parents) hired Respondents to represent Buttercase in his federal Case No. 8:12CR425 for a flat fee of \$15,000.00 to cover all motions, hearings, trial, and not more

than two (2) appeals in said case (E32-35). Shortly after hiring Respondents in February, 2014, Buttercase telephoned Respondents wherein James Martin Davis explained his representation to Buttercase in the same exact terms as he had explained them to Buttercase's parents and Theodore Pysh as previously discussed above (E32). On February 12, 2014, Respondents entered an appearance on behalf of Buttercase to represent him in his federal case No. 8:12CR425 (E32) (43:8-20).

Respondent James Martin Davis negligently attempted to coerce Buttercase to plead guilty to Count 3 of the federal case indictment, Buttercase refused to plead guilty to Count 3 of the federal case indictment, insisted on going to trial, and persistently maintained his innocence (E32). On February 3, 2015, Respondents sent Buttercase a letter containing a written contract and demanded more money from Buttercase in an illegal extortion scheme (E37). Buttercase refused to sign this written contract in that it was a fraudulent attempt by Respondents to secure even more funds than agreed upon at such a critical juncture of near trial (E32). On February 19, 2015, Buttercase sent Respondents a letter rejecting their renegotiation or extortion attempt and requested a full refund of \$15,000.00 to employ a new attorney if Respondents chose to withdraw from the case (E38). On March 12, 2015, Respondents filed a motion to withdraw as counsel in Buttercase's federal case in which Respondent James Martin Davis made a number of unsubstantiated and fraudulent allegations against Buttercase (E39) (43:20-44:16).

On March 20, 2015, over Buttercase's objection, Respondents' motion to withdraw as counsel was granted upon Respondent James Martin Davis' deceptive statements to the federal tribunal (E40). Respondents negligently breached the

verbal agreement by withdrawing as counsel for Buttercase before tendering all agreed upon services, specifically trial and as discussed in the third amended complaint (E31-32). After the plea and during sentencing in Buttercase's federal case, Samantha Kelley (Buttercase's ex-wife and the alleged victim) disclosed in open court that the recorded videos and images of intimate relations in question were performed when she was over the age of 18 and married to Buttercase (E20, at pp.17-18) (38:7-39:8) (T120, ¶138). On June 24, 2016, the underlying charges of Counts 1, 2, and 3 of the federal indictment, for which Respondents represented Buttercase, were all dismissed in their entirety on motion of the Government (E41). Respondents have not yet as of this date refunded any of the substantial prepaid \$15,000.00 in which Buttercase needed to employ another attorney (E31-32). The district court granted Respondents' summary judgment motion and denied Buttercase's summary judgment motion (T95-100).

The Nebraska Supreme Court affirmed the district court's decision in *Buttercase v. Davis*, 313 Neb. 1 (2022), rehearing denied 313 Neb. 587 (2023). (Appendices A & B). The present petition for writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNANSWERED QUESTION OF WHETHER THE FOURTEENTH AMENDMENT PROHIBITS STATES FROM REQUIRING ACTUAL INNOCENCE TO MAINTAIN SUIT AGAINST A FORMER DEFENSE ATTORNEY FOR BREACH OF CONTRACT.

The facts of this case present this Court with an ideal opportunity to address whether a state violates substantive due process by requiring actual innocence to recover funds from a former defense attorney who withdrew from

the case before tendering all agreed upon services. The holding in this case is contrary to public policy and opens the door to any criminal defense attorney in Nebraska to steel money from their clients before tendering all agreed upon services, or any services for that matter. Fourteenth Amendment imposes on states the standards necessary to ensure that judicial proceedings are fundamentally fair. **Lassiter v. Department of Social Services of Durham County, N.C.**, 452 U.S. 18, 33 (1981).

Buttercase and his family established a verbal agreement with Respondents on February 6, 2014, that established Respondents' representation of Buttercase in federal case No. 8:12CR425 for a flat prepaid of \$15,000.00 to cover all motions, hearings, trial, and not more than two (2) appeals in said case (E31-36). Respondents negligently breached the verbal agreement by withdrawing as counsel for Buttercase in his pending federal case before tendering all agreed upon services, specifically trial and as discussed in the third amended complaint (E31-35). At the summary judgment hearing on July 28, 2020, Buttercase offered to the district court Exhibits 31-41 in support of his amended motion for partial summary judgment and all of said Exhibits were received without objection (E31-41) (40:22-42:19). "A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Respondents did not submit an anotated statement of disputed material facts nor did Respondents submit any admissible contradictory evidence to the district court showing the existence of a material fact that prevents Buttercase's partial summary judgment as a matter of law. Thus, all allegations and evidence submitted to the district court in

support of Buttercase's partial summary judgment motion is undisputed by Respondents (41:4-42:22; 46:1-11) (T71-87; T117-18,¶23).

"A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract." (emphasis added). **Intercall, Inc. v. Egenera, Inc.**, 284 Neb. 801, 809 (2012). Any reasonable fair minded layperson would conclude that Respondents breached the verbal agreement or committed "Professional Negligence" by withdrawing from Buttercase's federal case before tendering all agreed upon work and, further conclude that Respondents committed fraud or "Professional Negligence" by failing to refund any of the substantial prepaid \$15,000.00 needed to hire another attorney for completion of all originally agreed upon work, specifically trial and as discussed in the third amended complaint (E31-41) (43:8-45:3). "Under the common knowledge exception, expert testimony is not needed if the alleged negligence is within the comprehension of laypersons." **Rice v. Poppe**, 293 Neb. 467, 474 (2016). Expert testimony is not required or necessary for Buttercase's Breach of Contract or, when liberally construed, "Professional Negligence" claim in that the evidence and circumstances are such that recognition of Respondents' negligence with respect to this claim is within the comprehension of laypersons.

Furthermore, Buttercase labeling "Breach of Contract" as one of his claims in the third amended complaint is not a valid basis to deny him partial summary judgment because Buttercase is not an attorney, he is a pro se

litigant (T115, ¶13). A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (PER CURIAM); citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Buttercase's Breach of Contract claim can be liberally construed as a "Professional Negligence" claim (T116, ¶15). Also, Buttercase timely filed the underlying lawsuit in the district court before the limitation period expired, thus, he was not trying to label the alleged professional negligence claim as a breach of contract claim in hopes of receiving the benefit of a longer statute of limitation than professional negligence allows. See *Gravel v. Schmidt*, 247 Neb. 404, 407 (1995).

Moreover, Buttercase should not have to prove actual innocence arising from professional negligence by an attorney who has breached a contract with his client. However, Buttercase did prove his actual innocence of the underlying charges that were dismissed in the federal case and, his actual innocence of 18 U.S.C. § 1465, for the following reasons:

First, Buttercase is actually or factually innocent of the crimes as charged originally in that any videos or depictions of the married couple's intimate relations was legally produced when he and his wife were both over the age of 18 (E10; E14; E20, at pp.17-18; E31-32). Second, Buttercase is actually or factually innocent of 18 U.S.C. § 1465 because simple possession of a visual depiction(s) of a married couple's private intimate relations that has not been mailed, shipped, or transported interstate and is not intended for interstate distribution or for economic or commercial use cannot be justified under the Commerce Clause.

If the First Amendment means anything, it means that a State [or the Government] has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. (alterations made).

Stanley v. Georgia, 394 U.S. 557, 568 (1969). See also, **Paris Adult Theatre 1 v. Slaton**, 413 U.S. 49, 66 (1973). Third, Buttercase is actually or factually innocent of 18 U.S.C. § 1465 in that his rights to privacy and to substantive due process, especially in regards to his marital and consensual relationships, and to his personal decisions involving fundamental aspects of his freedoms and the sanctity of his own home, are firmly rooted in our legal system. See e.g., **Skinner v. Oklahoma**, 316 U.S. 535, 541 (1942); **Griswold v. Connecticut**, 381 U.S. 479, 484-86 (1962); **Eisenstadt v. Baird**, 405 U.S. 438, 454 (1972); **Carey v. Population Services, Interm**, 431 U.S. 678, 684-85 (1977); **Washington v. Glucksberg**, 521 U.S. 702, 720 (1997); **Lawrence v. Texas**, 539 U.S. 558, 578 (2003).

Finally, Buttercase is actually or factually innocent of 18 U.S.C. § 1465 because any videos or depictions of the married couple's intimate relations is not "hard-core" pornography and, when considering the work as a whole, its redeeming value would be judged not "obscene" or offensive under **Miller v. California**, 413 U.S. 15 (1973). See also, **Ashcroft v. Free Speech Coalition**, 535 U.S. 234, 248 (2002); **United States v. 12 200-Ft Reels of Film**, 413 U.S. 123, 130 (1973); **United States v. Friedman**, 506 F.2d 511, 516 (8th Cir.1974); **United States v. Bagnell**, 679 F.2d 826, 833 (11th Cir.1982). In other words, Buttercase is actually innocent of all crimes alleged in **United States v. Buttercase**, No. 8:12CR425 (D.Neb. 2016), because the videos and depictions are not obscene and no one depicted is under the age 18. The Due Process

Clause does not tolerate convictions for conduct that was never criminal.

The Fourteenth Amendment imposes upon a state the requirement that all similarly situated persons should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The United States Court of Appeals for the Eighth Circuit has also held that "[t]he Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people alike, a protection that applies to prison inmates." (emphasis added). *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 984 (8th Cir.2004). Generally, legislation or a court decision will be presumed to be valid if the disparate treatment of a class of citizens is rationally related to a legitimate state interest. See *Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, strict scrutiny of state laws is required if a suspect class is involved or "when state laws impinge on personal rights secured by the Constitution." *Cleburne v. Cleburne Living, Inc.*, 473 U.S. 432, 440 (1985).

Since Buttercase's ineffective assistance of counsel claims could not be known to him at the time he entered his guilty plea, Buttercase's plea was not a voluntary, knowing, and intelligent act (51:11-15) (T121, ¶42). In order to satisfy the dictates of due process, a plea of guilty must be a voluntary, knowing, and intelligent act. *Brady v. United States*, 397 U.S. 742, 748 (1970). In this case, but for Respondent James Martin Davis' errors or ineffective assistance of counsel by failing to investigate or discover material exculpatory evidence, and as discussed in the third amended complaint, Buttercase would not have pleaded guilty and he would have insisted on going to trial (E9; E14) (51:19-23) (T120-23). See *Hill v. Lockhart*, 274 U.S. 52 (1985). Accordingly, the Nebraska Supreme Court's holding in this case that

actual innocence must be proven by a plaintiff for professional negligence arising from a breach of contract clearly violates Buttercase's federal constitutional rights to due process of law and to equal protection of the laws. The Nebraska Supreme Court's holding in this case is inconsistent with traditional principles of justice and recognized principles of fairness.

Certiorari should be granted to address whether Nebraska law regarding professional negligence is unfair and inadequate under the Due Process Clause of the Fourteenth Amendment. This Court's discretionary review is necessary to ensure pro se litigants, such as Buttercase, have an adequate judicial process to litigate "Professional Negligence" claims against criminal defense attorneys who breach a contract.

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER EX PARTE COMMUNICATIONS BETWEEN ATTORNEY DEFENDANTS AND THE TRIAL JUDGE VIOLATES THE FOURTEENTH AMENDMENT.

The fundamental principles of due process that are implicated in this case are of substantial importance to litigants in Nebraska that file suit against a former defense attorney who is friends with the trial judge. The right to an impartial judge is guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. **Ward v. Village of Monroeville, 409 U.S. 57 (1972)**. Here, Judge Darla S. Ideus has a personal bias against Buttercase because he is a convicted prisoner and, such a high degree of favoritism towards her attorney Respondent friends as to make fair judgment impossible. On or about December 15, 2020, when Buttercase received his copies of the Transcript of pleadings in this appeal, he discovered that Respondents filed their amended motion for summary judgment, annotated statement of undisputed facts, and evidence index before Judge Ideus even filed the

progression order (T57-70). Respondents filed the aforementioned pleadings on May 8, 2020, at 11:08:51 AM CDT, pursuant to the aforementioned future progression order, whereas Judge Ideus did not even file the progression order until 1:13 PM on May 8, 2020 (T57-70). See Filing stamps on the mentioned pleadings (*id.*).

Buttercase was not served by Respondents with this proposed progression order that was drafted by Respondents prior to its submission to Judge Ideus (T69-70). Also, Buttercase was not served by Respondents with the proposed order granting them summary judgment and denying Buttercase partial summary judgment that Judge Ideus mechanically adopted verbatim or "rubber stamped" (T95-100). Nor did Respondents serve Buttercase any file stamped copies of their summary judgment motions with corresponding pleadings and, the proposed orders do not bear any notation of "Prepared By" Respondents James Martin Davis and Davis Law Office (T57-70; T95-100). See Neb.R.ofProf.Cond. § 3-501.2(c). How did Respondents know to submit pleadings in the district court pursuant to a progression order that was not yet filed without ex parte communications? To protect its lawyers and judges, the Nebraska Supreme Court found that:

[T]he progression order in question concerned the original motions for summary judgment. It makes no mention of an amended motion or sets any deadline for the filing of one. As such, Davis' May 8 filing was not made "pursuant" to the court's order. Rather, the timing of Davis' filing and the court's progression order was purely coincidental.

Buttercase v. Davis, 313 Neb. 1, 27 (2022). Buttercase argued in his brief for rehearing that this finding "is a flimsy, makeweight excuse." (Appellant's Rehearing Brief, at p.8). It is impossible for Respondents to know about all the pleading requirements and file numerous pleadings before the progression

order was even entered without ex parte communications (T57-70). A judge should not initiate, invite, or consider an ex parte communication concerning a pending or impending proceeding before the judge. *State v. Barker*, 227 Neb. 842, 847 (1988). This Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), held that "it certainly violates the Fourteenth Amendment ... to subject [a person's] liberty or property to judgment of a court the judge of which has a direct, personal, pecuniary interest in reaching a conclusion against him in his case." (alterations made and emphasis added). *Id.*, 273 U.S. at 523. This Court adopted a new standard that requires recusal "when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009). Judge Ideus' impartiality would be questioned under an objective standard of reasonableness by any reasonable person who knew the circumstances of this case (53:19-23).

This Court's discretionary intervention is necessary to address this important issue that will undoubtedly recur in future cases. A writ of certiorari should issue on this basis.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 23, 2023