

In The
Supreme Court of the United States

BRUCE ELLIS AND WILLIE ELLIS,

Petitioners,

v.

CITY OF CLARKSDALE; CLARKSDALE PUBLIC
WORKS; AND CLARKSDALE PUBLIC UTILITIES,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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BRIEF OF RESPONDENTS IN OPPOSITION
STATEMENT OF THE CASE

Factual and Procedural Background

Petitioners filed a *pro se* § 1983 complaint in the U.S. District Court for the Northern District of Mississippi claiming that the Respondents violated their Fifth Amendment rights through inverse condemnation by “taking plaintiff’s [sic] private property for public use to transport untreated raw sewage and storm drain water without paying just compensation.”

The petitioners more particularly alleged that they owned a building in downtown Clarksdale, Mississippi and the respondents’ operation and repair of the municipal sanitary sewer and storm drainage system caused damage to their property. The respondents denied these allegations and asserted that the only work they performed on the property was to line the piping that ran beneath the petitioners’ property and subsequently test that piping to assure that it was sound. Respondents also contended, through their expert engineer, that “there is no action or inaction by [respondents] . . . that would explain any detrimental effects to the [petitioners’] property alleged in their complaint.”

The petitioners failed to designate any expert or produce any expert reports before the expert designation deadline set in the scheduling order. After that deadline expired, petitioners filed a *Daubert* motion to exclude respondents’ expert. In reliance on their experts’ opinions, the respondents filed motions for

summary judgment. The district court (Hon. Debra M. Brown), on the record then existing, granted respondents' motions and dismissed petitioners' action, reasoning that the petitioners had failed to create a factual dispute by neglecting to refute the opinions of respondents' experts that the respondents did not cause the alleged damage. (See Nov. 12, 2021 opinion of district court. ROA.1073)

From that grant of summary judgment, petitioners appealed, and in a *per curiam* opinion the Fifth Circuit affirmed the district court, holding that "no matter how liberally we construe [petitioners'] filings on appeal or below, there are no reasonable inferences that can be drawn that lead to the conclusion that [petitioners] have created a factual dispute regarding their Fifth Amendment claim." Fifth Circuit Opinion, May 8, 2023. The Fifth Circuit, citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 663 (1978), *Shumpert v. City of Tupelo*, 905 F.3d 310, 316 (5th Cir. 2018), and *Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008), found that petitioners failed to identify any officials who were policy makers or identify any policy that caused their alleged damage. The Court further found that petitioners failed to produce any evidence that respondents caused the alleged damages, let alone that the respondents had any official custom or policy that caused it.

Petitioners now ask this Court to review this matter, and claim their case presents federal questions involving the Antiterrorism Effective Death Penalty Act, "Equivalent Due Process Limits," and other unrelated

or tangential matters that simply have nothing to do with this case and/or were never raised below. The petitioners recite no less than twenty-one “Questions Presented” and twenty-two “Reasons for Granting the Petition,” none of which address the petitioners’ own failure to provide evidence of causation sufficient to survive summary judgment or to otherwise address the deficiencies cited by the courts below.

REASONS FOR DENYING CERTIORARI

1. The Petitioners Have Never Offered Evidentiary Support for Their Complaint.

The petitioners have not properly supported the claims of their Complaint with the requisite substantive evidence despite the efforts of both the district court and the Fifth Circuit to construe their claims and the evidence offered in the most liberal construction reasonably conceivable. As the district court explained it:

“In all their filings in response to the motion s for summary judgment, the [petitioners] failed to provide any evidence to refute the [respondents’] experts’ opinions that their alleged damages were not caused by any action of the [respondents]. The [petitioners] have thus failed to create a factual dispute as to whether their property was taken as a result of the [respondents’] actions.”

Opinion of District Court, November 12, 2021.

2. The Petitioners Have Not Demonstrated Any Real Split Among Federal Circuits Regarding Any Issues Raised.

There is no showing that any other circuits would have decided this case on these facts any differently. The circuits uniformly take the position that cases may be dismissed on summary judgment pursuant to Rule 56, Fed.R.Civ.P. where one or more elements of the plaintiff's claim is not supported by evidence. For example, in a case from the Third Circuit, *Wilmington Trust Co. v. Caucus Distributors, Inc.*, Civ. A No. 86-5148, 1987 WL 7854 at *1 (E.D. Pa. Mar. 11, 1987), that Court recited a familiar standard:

"In a summary judgment action, the moving party has the initial burden of identifying evidence which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986). However, where the nonmoving party bears the burden of proof, it must by affidavits or by the depositions and admissions on file make a showing sufficient to establish the existence of [every] element essential to that party's case. *Id.* at 2552-53. *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, No. 86-3478, slip. op. at 7 (3d Cir. March 2, 1987)." [Internal quotes omitted.]

It is axiomatic that where a plaintiff fails to support an essential element of his case, it may be dismissed on summary judgment after a defendant demonstrates the absence of a genuine issue of material fact. *Catrett*, 106 S. Ct. 2548, 2553 (1986). There is no conflict between the circuits on circumstances such as these.

3. Liberal Construction of the Petitioners' Claims Cannot Save Them from Summary Judgment.

In claiming that they, by virtue of the liberal construction doctrine, have raised these twenty-one questions in the courts below which those courts either failed to address or erroneously ruled upon, the petitioners seek to convert the doctrine of liberal construction from a shield into a sword, and ride liberal construction to its most absurd extreme. Respondents pray that this Court decline to sanction such a notion.

As the Fifth Circuit expressed in its *per curiam* opinion:

“We give pro se briefs a liberal construction.” *Brown v. Sudduth*, 675 F.3d 472, 477 (5th Cir. 2012). But even though “this court applies less stringent standards to parties proceeding pro se than to parties represented by counsel and liberally construes the briefs of pro se litigants, a pro se appellant still must actually argue something that is susceptible of liberal construction.” *Toole v. Peak*, 361 F. App’x 621, 621 (5th Cir. 2010) (citing *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995)). Here, no matter how liberally we construe Plaintiffs’ filings on appeal and below, there are no reasonable inferences that can be drawn that lead to the conclusion that Plaintiffs have created a factual dispute regarding their Fifth Amendment claim.

Fifth Circuit Opinion, May 8, 2023.

As the Petitioners have failed to demonstrate a factual dispute regarding their Fifth Amendment claim, so have they failed to preserve any other supposed issues. A question not raised below is not open in proceeding on writ of certiorari. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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