

No. 23-103

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.

PETITION FOR REHEARING

Bruce Ellis and Willie Ellis Pro se,

P.O. Box 131

Sumner, MS 38957

(662) 902-4782

NOVEMBER 25, 2023

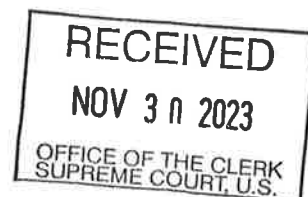


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1. There is a well-recognized conflict among the lower courts' application of Rule 12(c) and Rule 16(b). This Petition for Rehearing is filed to determine the apparent federal question conflict of the broader language of F.R.C.P. Rule 12(c), which appears to conflict with Rule 16 Scheduling Order in that, "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." 4

2. This Petition for Rehearing presents a federal question where the Court confronts a Rule 56(c) "genuine issue as to any material fact" in connection with a motion for summary judgment after the Court has "Denied Certiorari. Should the Trial Court decision be vacated?6

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v.

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**Portions of the Uniform Plumbing Code Chapter 7
Sanitary Drainage Table 701.1v**

1.

**PETITION FOR REHEARING
STATEMENT OF THE CASE**

Factual and Procedural Background

1. Petitioners filed Complaint Doc. [1] for damages on February 26, 2020, under Title 42 U.S.C. Sec. 1983 through an “Inverse Condemnation Claim.” See 21-60885.3 complaint document No. [1]. ROA.22.
2. In response to Respondents filing their Rule 56c Motion for summary judgment on 07/13/2021, Petitioners filed our Rule 12(c) motion for judgment on the pleadings on 08/06/2021 Approximately (6) six months prior to the Trial Court date due/set by the Court’s Rule 16 scheduling order “Rebutting” and establishing: (1). Municipal Policy Maker. (2). Municipal Policy Violation of City of Clarksdale “Ordinance” Chapter 11, Health and Sanitation Sec. 14-25(b)(9); and 40 CFR 122.41 (1)(6) requiring NPDES permit holders to report any noncompliance with the permit that may ‘endanger health or the environment’ and these violations of law establishes a causal connection between the policy violation and the Fifth Amendment Constitutional violation for which Plaintiffs seek relief pursuant to 42 U.S.C. Sec. 1983. See docket entry No. [222], [223], [233], [234]

2.

STRICKEN. SO ORDERED, this 27th day of September 2021. ROA.971.

3. A choice among alternatives by a municipal official with final decision-making authority may also serve as the basis of municipal liability. See, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy*, 594 F. 3d at 713 (explaining that a policy has been defined as a deliberate choice, made from among various alternatives, to follow a course of action). Also see Affidavit Document [187] of City of Clarksdale Engineer, Arch Corley. Clarksdale Public Utilities hired “Private Contractor to make repairs under the delta Cinema using slip joint technology to repair.
4. On 11/12/2021 The Trial Court Judge GRANTED Petitioners Rule 56(a) motion for Summary Judgment in Defendants Favor. See, ROA.1073-1086.
5. On May 08, 2023 The Fifth Cir. Ct. of Appeals AFFIRMED the District Court holding.
6. On September 29, 2023 Respondents filed their Oppositional Brief stating, “The Petitioners more particularly alleged ... the respondents’ operation and repair of the municipal sanitary sewer and storm drainage system caused damage to their property.” See page No. (1) BRIEF OF RESPONDENTS IN OPPOSITION.

3.

Factual and Procedural Background paragraph No. (2).

7. Petitioners are now filing a Petition for Rehearing pursuant to Supreme Court Rule 44 on the merits of the case alleging Respondents among other things asserted in paragraph (8) eight above a, “genuine issue as to any material fact” in connection with their motion for summary judgment GRANTED by Trial Court Judge, Honorable Debra Brown on November 12, 2021 and the FIFTH Cir. Ct. of Appeals AFFIRMED Trial Court Decision on May 8, 2023.
8. The “genuine issue as to any material fact” referenced above in questions and alleged by Respondents is supported by the Record and now Requires the Court to Vacate the District Court Decision.

**REASONS WHY PETITION FOR
REHEARING AND PETITION FOR WRIT
OF CERTIORARI SHOULD BE GRANTED**

I.

4.

1. There is a well-recognized conflict among the lower courts' application of Rule 12(c) and Rule 16(b). The broader language of F.R.C.P. Rule 12(c), appears to conflict with Rule 16 Scheduling Order in that, "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." See, *Argo v. Woods* 399 F. App'x 1 (5th Cir. 2010) holding that the magistrate judge did not abuse his discretion by permitting summary judgment motion after deadline for good cause, despite district court's denial of motion as untimely under Rule 16(b).
2. Respondents filed their Rule 56c Motion for summary judgment on 07/13/2021 just (2) two days prior to Rule 16 scheduling Order deadline. Relying on F.R.C.P. 7.2(d)'s 35 days grace period to respond to a "Dispositive Motion," Petitioners filed our Rule 12(c) motion for judgment on the pleadings on 08/06/2021 and Approximately (6) six months prior to the Trial Court date due/set by the Rule 16 scheduling order "Refuting" and establishing: (1). Municipal Policy Maker. (2). Municipal Policy Violation of City of Clarksdale "Ordinance" Chapter 11, Health and Sanitation Sec. 14-25(b)(9); and Title 40 CFR 122.41 (1)(6)

5.

requiring NPDES permit holders to report any noncompliance with the permit that may 'endanger health or the environment' and these violations of law establishes a causal connection between the policy violation and the Fifth Amendment Constitutional violation for which Plaintiff's seek relief pursuant to 42 U.S.C. Sec. 1983. See docket entry No. [222], [223], [233], [234] **STRICKEN. SO ORDERED**, this 27th day of September 2021. ROA.971.

3. See *Jones v. Coleman Co., Inc.*, 39 F.3d 749, 753-64 (7th Cir. 1994) (holding that magistrate judge did not abuse his discretion by permitting summary judgment motion after deadline for good cause, despite district court's prior denial of motion as untimely under Rule 16(b)).
4. The broader language of Rule 12(c), however, appears to conflict with Rule 16 in that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). We have not directly addressed this 'apparent conflict,' but the court finds *Riggins v. Walter*, 279 F.3d 422 (7th Cir. 1995), to be instructive regarding its resolution:

6.

5. These are precisely the type of factual issues that need to be resolved in full briefing. For these reasons, rehearing is appropriate. See, (Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (“summary disposition only appropriate in cases where law is settled and stable, the facts are not in dispute, and the decision below is clearly in error”).
6. Rule 5.1 requires the court to notify the appropriate Attorney General that an Act of Congress has been called into question.
7. Title 28 U.S.C. Sec. 2403(a) requires the Court to certify to the appropriate Attorney General that an Act of Congress has been called into question regarding F.R.C.P. 12(c); F.R.C.P. 16(b).
8. The decision below directly conflicts with Supreme Court precedents.

II.

1. Petition for Rehearing is also filed to determine the federal question conflict of the broader language of F.R.C.P. 56(c)

7.

regarding what happens when a court confronts a Rule 56(c) “genuine issue as to any material fact” in connection with a motion for summary judgment.

2. On September 29, 2023 Respondents filed their Oppositional Brief stating, “The Petitioners more particularly alleged ... the respondents’ operation and repair of the municipal sanitary sewer and storm drainage system caused damage to their property.” A choice among alternatives by a municipal official with final decision-making authority may also serve as the basis of municipal liability. See, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy*, 594 F. 3d at 713 (explaining that a policy has been defined as a deliberate choice, made from among various alternatives, to follow a course of action). Also see Affidavit Document [187] of City of Clarksdale Engineer, Arch Corley. Clarksdale Public Utilities hired “Private Contractor to make repairs under the delta Cinema using slip joint technology to repair.”
3. This statement made by Respondents is reflected in question No. (9) of Petition

8.

for Writ of Certiorari asserting whether another Appellate Court could reach a

different conclusion on the same issue where Trial Court Judge mistaken stated, Plaintiffs failed to rebut defendant's claims regarding their "surreply Dispositive Docs. [153] and [187]" when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c) or when an attempted response fails to comply with Rule 56(c), a Motion for summary judgment is improper?

4. Traditionally the requirements for relief under Sec. have articulated as: (1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a person (4) acting under color of state law. See *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir, 1991).
5. Petitioners provided relevant photographic evidence showing Respondents through private contractors making repairs to its public use utility easement located under plaintiff's floor that caused the flooding and the property

damages. See photo appendix No. (1- 6) filed with this Petition for Rehearing. See also Doc. [23]; ROA.92-94; [Doc.93-1] ROA.344. Scott v. Harris, 550

U.S. 372, 381, 127 S. Ct. 1769, 167 L.Ed. 2d 686 (2007); Carnaby v. City of Houston, 636 F.3d 183, 187 (5th Cir. 2011) (“Although we review evidence in the light most favorable to the nonmoving party, we assign greater weight, even at summary judgment stage, to the facts evidenced from video recordings taken at the scene.”). See Petitioners’ document #: [93-1] CCTV video and photographic evidence (App.1-App.6) that is associated with the Rehearing Petition. Petitioner’s Doc. #: 121-1 Filed: 03/16/2021 Pages: 1-13, Case: # 4:20-cv-00032-DMB-JMV. ROA.497. See, Celotex Corp. v. Catrett-477 U.S. 317, 106 S. Ct. 2548 (1986).

6. Throughout the course of this litigation, the Ellises have submitted various photographs, both with and without explanation; repair estimates; an “NPDES Compliance Inspection Manual ROA.497-513 and portions of the Uniform Plumbing Code which

established under section 701.1 "No galvanized wrought-iron or galvanized steel pipe shall be used underground and shall be kept not less than (6) inches (152 mm) above ground. See ROA.601. See also Appendix photographs (App.1-App.2) showing galvanized steel piping used underground and City of Clarksdale Notice of Incident / Injury Report ROA.162. Moreover, a policy of inaction may be a municipal policy within the meaning of Monell. See, *Waggy v. Spokane County Washington*, 594 F. 3d 707, 713 (9th Cir. 2010); *Fairley v. Luman*, 281, F. 3d 913, 918 (9th Cir.2002) (per curiam). See, Photo No. (App.1-2) showing Raw Sewage and Strom Drain water escaping Public Use Utility Easement prior to repairs in fall 2017 establishing the causal connection alleged in sec. III C. question 2 Complaint Doc. [1]. "Sections of pipe running in and around personal property were completely missing or deteriorated."

7. Defendants used Galvanized steel pipe to construct their public use utility easement. See appendix color photos Appx.(1-2) attached that support

Complaint Doc. [1] Section III. C. question (1) through (3). Also See, Doc. [23], 21-60885.92-93 [151-1] ROA.601. A policy “promulgated, adopted, or ratified by a local governmental entity’s legislative body unquestionably satisfies Monell’s requirement.” See, *Thompson v. City of Los Angeles*, 885 F. 2d 1439, 1443 (9th Cir. 1989), overruled on other grounds by *Bull v. City & County of San Francisco*, 595 F. 3d 964 (9th Cir. 2010) (en banc).

1. Respondents Statement in Their Oppositional Brief Filed 09/29/2023 alleging, “Petitioners More Particular Alleged that ... Respondents’ Operation and Repair of the Municipal Sanitary Sewer and Storm Drainage System Caused Damage to Their Property.” is a Genuine disputed issue Supported by the Record and Now Requires the Court to Vacate the District Court Decision. Defendants Admit, “In the course of ‘**diverting**’ the combined stormwater and sewer effluent flow to the sewer treatment system, it was also discovered that a portion of the piping that connected to the larger, existing sewage collection system was constructed with corrugated-steel piping.” See, ROA.1083. In 1963, THE Supreme Court wrote that “conventional notions of

finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.” See *Sanders v. United States*, 373 U.S. 1, 8 (1963)

2. The decision below directly conflicts with Supreme Court precedent; in *Dugan v. Rank*, 372 U.S. 609 (1963); establishing no showing of Fault is required for liability in diversion cases.

Under a Pro se liberal construction of the pleadings the record on appeals shows, Municipal Respondents City of Clarksdale, Clarksdale Public Works, and Clarksdale Public Utilities are (1). Policy Makers Under Section 1983. (2). Violation of Policy of City of Clarksdale “Ordinance” Chapter 11, Health and Sanitation Sec. 14-25(b)(9); or custom has been established. (3). Liability has been established and the District Court’s summary judgment order should be vacated.

3. Document # [251] Filed: 11/12/2021 Page 12 of 13 PageID#: 1093 also document photos cited above in 4;20-cv-00032-DMB-JMV ROA.1084.

4. The Court held in *Dugan v. Rank*, 372 U.S. 609 (1963); no fault is required for liability to be established in diversion cases under the exceptions to the Doctrine of sovereign immunity.
5. Defendants Admit, “In the course of ‘**diverting**’ the combined stormwater and sewer effluent flow to the sewer treatment system, it was also discovered that a portion of the piping that connected to the larger, existing sewage collection system was constructed with corrugated-steel piping.” See, ROA.1083.
6. A policy “promulgated, adopted, or ratified by a local governmental entity’s legislative body unquestionably satisfies Monell’s requirement.” See, *Thompson v. City of Los Angeles*, 885 F. 2d 1439, 1443 (9th Cir. 1989), overruled on other grounds by *Bull v. City & County of San Francisco*, 595 F. 3d 964 (9th Cir. 2010) (en banc).
7. Moreover, a policy of inaction may be a municipal policy within the meaning of Monell. See, *Waggy v. Spokane County Washington*, 594 F. 3d 707, 713 (9th Cir. 2010); *Fairley v. Luman*, 281, F. 3d 913, 918 (9th Cir.2002) (per curiam). See, Photo No. (1) App.1 showing Raw Sewage and Strom Drain water escaping Public Use Utility Easement prior to repairs in fall 2017.

8. A choice among alternatives by a municipal official with final decision-making authority may also serve as the basis of municipal liability. See, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986); *Waggy*, 594 F. 3d at 713 (explaining that a policy has been defined as a deliberate choice, made from among various alternatives, to follow a course of action). Also see Affidavit Document [187] of City of Clarksdale Engineer, Arch Corley. Clarksdale Public Utilities hired "Private Contractor to make repairs under the delta Cinema using slip joint technology to repair."

9. (1). The conduct complained of was committed by a person Municipality Respondents City of Clarksdale, Clarksdale Public Works, and Clarksdale Public Utilities in their failure to remain compliant with their own City Ordinance Ch. 11- sec. 14-25(b)(9) which strictly forbid the collection of unsanitary waters within the City Limits as shown in App.1 photo their public use utility easement located on our personal property and used to divert sewage effluent and storm water escaping due to the drain losing its water-tight and gas-tight characteristics and as a result, Petitioner personal property was flooded and the

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damages alleged in complaint document [1]. See photo Exhibits contained in appendix showing sewage effluent and storm water exiting the public use utility easement and escaping into the foundation soils. (2). This conduct deprived the plaintiffs of constitutional rights. Arch Corley admitted to Complaint Document No. [1] question Defendants operating a "Storm Sewer" being operated for the good of the public is lying and situated in a northerly and southerly direction under the Theatre floor.

CONCLUSION

1. These are precisely the type of factual issues that need to be resolved in full briefing. For these reasons, rehearing is appropriate. See, (Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) ("summary disposition only appropriate in cases where law is settled and stable, the facts are not in dispute, and the decision below is clearly in error").

16. F.R.C.P. subdivision (e)(2) – show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the Court cannot grant summary judgment without determining whether those facts can be genuinely disputed.
17. F.R.C.P. 52(b) 'Plain Error Rule' provides a plain error that affects a substantial right may be considered even though it was not brought to the Court's attention.
18. There need be no showing of maliciousness, willfulness, or fault to support a finding of liability under the Act 86 Stat. 816, 33 U.S.C. sec. 1251, and 1251(a) et seq. of the law. See, e.g., U.S. v. Texas pipeline company, 611 F. 2d 345, 347 (10th Cir. 1979).
19. As a government actor, it is the Defendant's burden to justify its actions as consistent with the U.S. Constitution. See, Vugo, Inc. v. City of New York, 931 F. 3d 42, 48 (2d Cir. 2019) (citing Sorrell v. IMS Health Inc., 564 U.S. 552, 571-572, 131 s. Ct. 2653, 180 L. Ed. 2d 544 (2011)).

The Court in Kemp v. U.S decided (06/13/2022), held Trial Court Judge's mistakes are reviewable under F.R.C.P. 60(b)(1).

20. "Under appropriate circumstances, damage to property will be construed as a taking." See, Porter v. United States, 473 F2d 1329, 1336 n.9 (5th Cir. 1973).

Pro se Petitioners pray in the name of Jesus, that the Court uses its discretionary authority to ensure that God's will shall be done to correct the injustice committed in this civil action.

Respectfully submitted,
Bruce Ellis and Willie Ellis
Petitioners Pro Se
P.O. BOX 131
Sumner, MS 38957
(662) 902-4782

November 25, 2023

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App.1



App.2.



App.3.



App.4



App.5



App.6



CERTIFICATE OF COMPLIANCE SUPREME COURT RULE 44.

No. 23-103

BRUCE ELLIS and WILLIE ELLIS

PETITIONER(s)

v.

CITY OF CLARKSDALE /

CLARKSDALE PUBLIC WORKS;

AND CLARKSDALE PUBLIC UTILITIES

RESPONDENT(s)

Pursuant to Supreme Court Rule 44.1, I certify that the Petition for Rehearing is presented in good faith and not for delay.

Also, as required by the Supreme Court Rule 44.2, I certify that the Petition for Rehearing grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

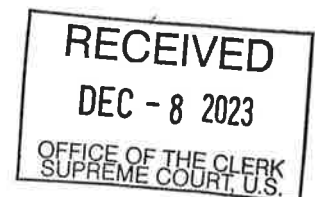
I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 2023

Bruce Ellis / Willie Ellis

Bruce Ellis

Willie Elli



CERTIFICATE OF COMPLIANCE

No. 23-103

BRUCE ELLIS and WILLIE ELLIS

PETITIONER(s)

v.

CITY OF CLARKSDALE /

CLARKSDALE PUBLIC WORKS;

AND CLARKSDALE PUBLIC UTILITIES

RESPONDENT(s)

As required by Supreme Court Rule 33.1(h), I certify that the Petition
For Rehearing contains 2,530 words, excluding the parts of the
Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 29, 2023

Bruce Ellis / Willie Ellis

Bruce Ellis

Willie Elli

PROOF OF SERVICE

23-103

I, Bruce Ellis / Willie Ellis, do swear or declare that on this date December 6, 2023 as required by Supreme Court Rule 44, served the enclosed PETITION FOR REHEARING on the party's Lead Counsel, Kenneth S. Womack # 254640 by depositing an envelope containing the above documents in the United States mail properly addressed and with first -class postage prepaid, or delivery by email within 3 calendar days.

The names of those served are as follows:

Mr. Kenneth S. Womack, Lead Counsel for Respondents:

1020 highland Colony Parkway / Ridgeland, MS 39157.

(1). Mr. Wilton V. Byars III, (2). Mr. Joseph Miles Forks,

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 2023.

I, the undersigned, do hereby certify that this day filed the foregoing Petition for Rehearing to the Supreme Court of the United States / Office of the Clerk Washington, D.C. 20543-0001 by Unites States Priority Mail Express postage prepaid and will send notification of the foregoing to Lead Counsel Mr. Kenneth S. Womack at Maron Marvel Bradley Anderson & Tardy, L.L.C. / 1020 Highland Colony Parkway / Ridgeland, MS 39157.

Bruce Ellis / Willie Ellis

Bruce Ellis / Willie Ellis