23-1057 ORIGINAL

No. _____

FILED
FEB 15 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

PAUL JOHNSON

Petitioner,

v.

MATTHEW TEPPER

Respondent.

On Petition For Writ of Review
To The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

Paul Johnson
Petitioner *pro se*
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QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court will review the actions of a Texas Court of Appeals, which departed from its role as a neutral arbiter by engaging in advocacy for a governmental entity against a pro se plaintiff, violating the principle of party presentation by raising issues and arguments sua sponte, unaddressed by either party.

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CITATIONS OF OPINIONS

On 1/24/2023 Tepper filed a Motion to Determine Johnson to be a Vexatious Litigant. (App. 140-149).

On 1/29/2023 Johnson filed a Response to Vexatious Litigant Accusation and Motion for Sanctions (App. 130-139).

On 3/1/2023 Tepper filed a "Bench Brief for Hearing to Declare Paul Johnson a Vexatious Litigant" (App. 124-129).

On 3/1/2023 Judge Carson Campbell issued an order declaring Johnson to be a vexatious litigant (App. 122-123).

On 4/19/2023 Johnson filed Appellant's Brief (App. 101-121).

On 5/26/2023 Tepper filed Appellee Matthew Tepper's Brief (App. 73-100).

On 6/13/2023 Johnson filed Appellant's Reply Brief (App.57-72).

On 8/7/2023 the Court of Appeals issued its Memorandum Opinion (App. 48-57).

On 8/22/2023 Johnson filed Motion for Rehearing. (App. 39-48).

On 8/23/2023 the Court of Appeals requested a response to the motion for rehearing (App. 38-39),

On 9/5/2023 Tepper filed Appellee Matthew Tepper's Response to Motion for Rehearing (App. 28-38).

On 9/7/2023 the Court of Appeals denied Johnson's Motion for rehearing (App. 27-28).

On 10/23/2023 Johnson filed Petition for Review to the Supreme Court of Texas (App. 1-27).

On 12/1/2023, the Texas Supreme Court denied Johnson's petition for review (App. 1).

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is invoked pursuant to Rule 10 of the Rules of the United States Supreme Court. The Court should grant certiorari in this case as a Texas Supreme Court decision has implicated a significant federal question, thereby conflicting with established precedents of the United States Supreme Court concerning the fundamental principle of party presentation.

The opinion in question was rendered by the Seventh Court of Appeals on August 7, 2023. A subsequent Motion for Rehearing before the Seventh Court of Appeals was denied on September 7, 2023. A Writ of Review was sought from the Texas Supreme Court, which was denied on December 1, 2023. This Petition for Writ of Certiorari is timely filed on or before February 29, 2024, adhering to the time constraints stipulated by the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are from the Fourteenth Amendment, the portion pertinent to this case is that States must provide due process and equal protection of the laws:

"No State shall ... deny to any person within its jurisdiction the equal protection of the laws" which should prohibit discriminating against pro se litigants and ensure fairness in legal proceedings.

STATEMENT OF THE CASE

This case concerns an appeal of an order declaring Petitioner Paul Johnson (Johnson), to be a vexatious litigant (App. 122-123). Johnson had filed a slander suit against Respondent Matthew Tepper (Tepper) and then Tepper filed a motion to have Johnson be declared a vexatious litigant (App. 140-149). Johnson non-suited the slander case but continues to appeal the order declaring him to be a vexatious litigant.

When the case was appealed to the Seventh Court of Appeals of Texas (COA), they issued a Memorandum Opinion on August 7, 2023, (App. 48-56), which will hereinafter be referred to as The Opinion. The Opinion was not based on the issues or arguments of the parties, but the COA acted as a party advocate for Tepper, creating findings that the lower court never found, and raising issues and defenses for Tepper that had not been raised or argued in the lower court.

The lower court found five specific "qualifying cases" orally at the hearing that they used against Johnson (App. 150-151). The lower court refused to issue written findings about the cases they used, so the orally stated cases in the record are the cases that needed to be supported on appeal.

Johnson's brief to the COA effectively debunked the lower court's qualifying cases (App. 101-121), so to bolster Tepper's case, The Opinion sua sponte came up with five different "qualifying cases," (App. 51-53).

The Opinion also sua sponte raised the issue of absolute immunity for Tepper to lie under oath and make false and defamatory statements against Johnson because the lies were made under oath while giving testimony at a semi-judicial proceeding (App. 54-55). Tepper had not raised that argument in the lower court, nor in his brief to the COA. The Opinion came up with the argument of

absolute immunity, by independently researching the record and sua sponte coming up with issues and arguments that were not before the Court of Appeals.

The Opinion also sua sponte made the argument that Johnson did not preserve his issue of constitutionality because Johnson had not presented that argument to the trial court (App. 55-56). Tepper never made that argument nor cited any authority for it, so Tepper had already waived that issue because it was not properly briefed.

The Opinion issued was based on unassigned error, errors that had not been presented to the court by either party. The Texas Supreme Court has repeatedly found that to be error:

> "The Court of Appeals based its judgment on a point neither party had assigned, i.e., on unassigned error. The court itself found what it obviously regarded as fundamental error. In so doing, it erred." *American General Fire and Cas. Co. v. Weinberg,* 639 S.W.2d 688, 25 Tex.Sup.CtJ. 405 (1982), Supreme Court of Texas.
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> "By reversing on this unassigned error, the Court of Appeals erroneously elevated a pleading defect to the status of fundamental error....Therefore, the application for writ of error is granted and, without hearing oral arguments, the judgment of the Court of Appeals is reversed and this cause is remanded to the Court of Appeals for disposition of points of error properly presented thereto." *Department of Human Resources, v. Wininger*, 657 S.W.2d 783 (1983), Supreme Court of Texas.

> "We reverse the Court of Appeals' attorney's fees judgment because it was based on unassigned error." *Texas Nat. Bank v. Karnes*, 717 S.W.2d 901 (1986), Supreme Court of Texas.
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> "The ground set forth by the Court of Appeals for reversing summary judgment was not raised by Garvey in either his response to Vawter's motion for summary judgment, his brief to the Court of Appeals, or his application for writ of error to this court...This court therefore reversed the Court of Appeals' judgment, holding that it had erred by raising grounds for reversal sua sponte." *Vawter v. Garvey*, 786 S.W.2d 263 (1990), Supreme Court of Texas.

The Federal Courts use the terminology of party presentation instead of unassigned error, but the United States Supreme Court routinely prohibits decisions being made that do not follow the principle of party presentation:

> "...the reports relied upon by that court included a variety of data and economic observations which had not been examined and tested by the traditional methods of the adversary process. We are not cited to any statute, rule, or decision authorizing the procedure employed by the Court of Appeals." *Pont Nemours and Company v. Collins Securities and Exchange Commission v. Collins*, 432 U.S. 46, 97 S.Ct. 2229, 53 L.Ed.2d 100 (1977), United States Supreme Court.
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> "In both civil and criminal cases, in the first instance and on appeal, courts follow the principle of party presentation, i.e., the parties frame the issues for decision and the

> courts generally serve as neutral arbiters of matters the parties present....Courts do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties." *Greenlaw v. United States,* 128 S.Ct. 2559, 171 L.Ed.2d 399, 554 U.S. 237, 8 Cal. Daily Op. Serv. 7716, 21 Fla. L. Weekly Fed. S 421, 76 USLW 4533, 2008 Daily Journal D.A.R. 9297 (2008), Supreme Court of the United States.
>
> "...we now hold that the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion. We therefore vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel....In our adversarial system of adjudication, we follow the principle of party presentation....in both civil and criminal cases, in the first instance and on appeal...we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-SmithI,* 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020), Supreme Court of the United States.

In Johnson's case, the COA was anything but a neutral arbiter. Since The Opinion was based on issues, arguments, and evidence that Johnson was never allowed to challenge, Johnson was not granted his Constitutional privilege to challenge a court's ruling, thus denying Johnson due course of the laws.

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures....words of the Due Process Clause...require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. The fundamental requisite of due process of law is the opportunity to be heard, a right that has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to...contest....No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Goss v. Lopez*, 8212 898, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), United States Supreme Court.

Johnson had no opportunity to challenge the five different cases the COA found sua sponte. Johnson had no opportunity to challenge the issues the COA sua sponte considered, argued and cited, of absolute immunity and preservation at the trial court. Thus, The Opinion denied Johnson his constitutional due process of law.

REASONS FOR GRANTING THE PETITION

Granting Petition for Certiorari in this particular case is extremely important because Johnson has already been given a life sentence of not having access to the courts.

Even though not deferring the sanctions of a vexatious litigant order until the appeals are over is an abuse of discretion (*In re Stephen Casey,* No. 18-0289 (2019), Supreme Court of Texas, "We therefore granted relief directing the trial court to modify the sanctions order to defer payment of the monetary and performative sanctions until rendition of final judgment, thus allowing the merits of the sanctions order to be determined on appeal."), in this case the judge abused his discretion and did not defer the monetary or non-monetary sanctions. They have already caused Johnson to nonsuit the underlying slander case because he could not pay the monetary sanction. Johnson has also been denied access to the courts to file a simple Consumer Protection Act suit in a Justice of the Peace court, and other filings in district court.

Not granting certiorari in this case will deny Johnson access to the courts for life, and Johnson never had an opportunity to challenge the issues and arguments that the COA sua sponte made without party presentation.

The United States Supreme Court has recognized its obligation to intervene when lower courts err, especially when the lower courts' errors deprive pro se litigants of their constitutional right to due process and access to the courts.

In *McGee v. McFadden* this Court recognized that reviewing bodies may too often turn their decisions into a rubber stamp when a *pro se* litigant is involved. This Court

was considering litigation that originated determining a Certificate of Appealability.

> "A court of appeals might inappropriately decide the merits of an appeal, and in doing so overstep the bounds of its jurisdiction. A district court might fail to recognize that reasonable minds could differ. Or, worse, the large volume of COA requests, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a rubber stamp, especially for *pro se* litigants. We have periodically had to remind lower courts not to unduly restrict this pathway to appellate review." *McGee v. McFadden*, 139 S.Ct. 2608 (2019), Supreme Court of United States. (internal citations omitted).

In Johnson's case, when the COA erred and made their determination on issues that were not before the court, the Texas Supreme Court, because of the small chance that any particular case would lead to further review, and because Johnson was a pro se litigant, turned appellant Johnson's Petition for Review into a rubber stamp of the faulty COA opinion (App. 1).

Just as the United States Supreme Court did in the *McGee* case, it appears to be time to remind the Texas Supreme Court not to unduly restrict that pathway for appellate review. Without this writ, Johnson will never get to exercise his constitutional right to challenge the issues and arguments that the COA sua sponte made to turn that court away from being a neutral arbiter and turned them into a party advocate for Tepper.

Johnson has a constitutional right to be able to challenge the issues, arguments and evidence that the COA

sua sponte used against him. Denial of this Petition for Certiorari will forever deprive Johnson of that constitutional due process of law.

CONCLUSION

Granting certiorari is essential to safeguard the due process rights of litigants in Texas. The practice of Texas Courts of Appeal deciding cases based on issues and arguments they invent, rather than those presented by the parties, undermines the integrity of the judicial process. Therefore, Johnson respectfully requests this Court to grant certiorari and remand the case to a Texas Court of Appeals for adjudication solely on the issues raised by the parties, ensuring fair and impartial consideration of the matter at hand.

Respectfully submitted,

/s/ Paul Johnson

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