No. 23-5452

In the Supreme Court of the United States

IN RE REINARD SMITH

On Petition for Writ of Prohibition to the United States District Court for the Eastern District of Pennsylvania

BRIEF OF RESPONDENTS MARK VOGIN, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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RESTATEMENT OF QUESTIONS PRESENTED

On May 24, 2023, a Pretrial Conference was held in the underlying matter, *Reinard Smith v. Key & V Auto Sales*, during which hearing, disagreeing, and being dissatisfied with the district court's rulings, petitioner abandoned the matter and left the Pretrial Conference. Thereafter, by its Order, dated May 24, 2023, the district court granted the Motion to Strike and entered the arbitration award as a final judgment. Petitioner did not appeal the May 24, 2023 Order.

The Questions Presented Are:

1. Whether petitioner waived and/or forfeited his right to seek a Writ of Prohibition by abandoning the May 24, 2023 Pretrial Conference and failing to file a timely appeal from the May 24, 2023 Order?

2. Whether petitioner's claim of "fraud upon the Court" justifies the issuance of a Writ of Prohibition where petitioner disagreed and was dissatisfied with the district court's rulings on his Motions?

3. Whether petitioner's claim of the district court's judicial misconduct and/or disqualification of respondent, Vogin, justify the issuance of a Writ of Prohibition where petitioner disagreed and was dissatisfied with the district court's rulings on his Motions?

4. Whether petitioner had an adequate remedy at law?

PARTIES TO THE PROCEEDINGS

Petitioner

- Reinard Smith

Respondents Represented by Marc Vogin

- Alex Kerchentsev, incorrectly identified as Alex Kerchentsef
- Key & V Auto Sales
- Although Marc Vogin, Esquire, incorrectly identified as Mark Vogin, Esq. was not a party to underlying action, petitioner has listed Marc Vogin, Esquire, incorrectly identified as Mark Vogin, Esq. as a respondent

Other Respondent

- Judge Eduardo Robreno

CORPORATE DISCLOSURE STATEMENT

Key & V Auto Sales is a fictitious name, which is owned by US Intron Co., Inc., which has no parent company and no public company owns 10% or more of its stock.

LIST OF PROCEEDINGS

Reinard Smith v. Key & V Auto Sales, et al.
Civil Action No. 19-4159, United States District Court for the Eastern District of Pennsylvania. On May 24, 2023, the court struck petitioner's demand for a trial *de novo* as untimely and reinstated the award of the arbitrators.
See Res Appendix A at Res.App.1a

Reinard Smith v. Key & V Auto Sales, et al.
Civil Action No. 18-3840, United States District Court for the Eastern District of Pennsylvania. Judgment was entered on February 12, 2019, dismissing the matter.

Reinard Smith v. Key & V Auto Sales, et al.
No. 19-3893, United States Court of Appeals for the Third Circuit. Judgment of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 19-4159, affirmed in part, reversed in part and remanded.

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Petitioner seeks relief from the district court's Order, dated May 24, 2023, which provides:

> AND NOW, this 24th day of May, 2023, upon consideration of (1) Plaintiff's motion under the "Federal Rules of Civil Procedure 60(B)(3) Fraud Upon the Court" (ECF No. 82), (2) Plaintiff's "Motion for an Immediate Hearing for Plaintiff's New Action for Fraud Upon the Court under FRCP Rule 60(d)(3)" (ECF No. 90) (3) Plaintiff's "Motion for a Temporary Restraining Order and Preliminary Injunction Federal Rules Of Civil Procedure, Rule 65(b) (ECF 94), (4) Defendant's "Motion to Strike Plaintiff's Arbitration Award Rejection" (ECF No. 77), and the responses, replies and sur-replies thereto, and after a hearing on the same date, it is hereby ORDERED that:
>
> 1. Plaintiff's motions (ECF Nos. 82, 90 and 94) are DENIED; and
>
> 2. Defendants' motion (ECF No. 77) is GRANTED and Plaintiff's rejection of the arbitration award and demand for a trial de novo is STRUCK as untimely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

> privileges or immunities of 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.

28 U.S.C. § 1651

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF FACTS

This matter arises from petitioner's September 1, 2017 purchase of a used motor vehicle from respondent, Key & V Auto Sales. Prior to his matter, petitioner filed two (2) actions in the Court of Common Pleas of Philadelphia County, PA, which were dismissed. Plaintiff also filed the matter of *Smith v. Key & V Auto Sales, et al.*, Civil Action No. 18-3840, which was dismissed. Although petitioner appealed the dismissal to the Court of Appeals for the Third Circuit, petitioner did not file his brief, which resulted in the dismissal of the appeal. Rather, petitioner filed this matter.

Petitioner engaged in pretrial discovery. However, plaintiff did not depose or, even, seek to depose anyone, including respondent, Kerchentsev.

After extensive pretrial litigation, which included petitioner's filing of multiple motions (12), all of which were decided by the district court, on March 15, 2023, this matter was presented to a panel of arbitrators, who found in petitioner's favor in the amount of $1,350.00, which has been paid to petitioner.

Unhappy with the amount of the arbitration award, petitioner did file a demand for a trial *de novo*. Respondents, Kerchentsev and Key & V Auto Sales, filed a

Motion to Strike the demand as untimely. The District Court scheduled a Pretrial Conference for May 24, 2023.

On May 24, 2023, after a short interaction with the district court, during which the district court attempted to explain to petitioner why certain issues were matters for a jury, not the district court, petitioner abandoned the matter, in toto. *See* Res Appendix B, at Res.App.4a.

Petitioner did not appeal the May 24, 2023 Order to any court, including the Court of Appeals for the Third Circuit. Rather, petitioner submitted this petition to this Court on July 30, 2023.

SUMMARY OF ARGUMENT

By abandoning the May 24, 2023 Pretrial Conference and failing to timely appeal the May 24, 2023 Order, petitioner waived and/or forfeited his right to seek a Writ of Prohibition.

Petitioner did not exhaust his remedies before seeking relief from this Court, which failure rests solely with petitioner. Petitioner's excuse is meritless.

Petitioner's claim of "fraud upon the district court" does not justify the issuance of a Writ of Prohibition as petitioner abandoned to matter on May 24, 2023 and waiver and/or forfeited any rights by failing to timely appeal the May 24, 2023 Order. Petitioner has also failed to prove any fraud. Questions of fact and credibility issues are not fraud.

Petitioner's claim of the district court's judicial misconduct, which is not moot, which, in reality, is merely petitioner's disagreement and dissatisfaction with the district court's rulings, does not justify the issuance of a Writ of Prohibition.

Petitioner's attempt to disqualify respondent, Vogin, was waived and is meritless.

ARGUMENT

The authority of this Court to issue a Writ of Prohibition or Mandamus . . . "can be constitutionally exercised only in so far as such writs are in the aid of its appellate jurisdiction. *Marbury v. Madison*, 1 Cranch 137, 173-80." *Chandler v. Judicial Council of Tenth Circuit,* 398 U.S. 74, 86 (1970).

The purpose of a Writ of Prohibition "is to prevent the unlawful assumption of jurisdiction and not to correct mere errors or irregularities." *Ex parte Cooper*, 143 U.S. 472, 495 (1892).

The "issuance by the Court of an extraordinary writ . . . is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20.1; *See also* 28 U.S.C. § 1651. " . . . the petition must show that the right will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers and that adequate relief cannot be obtained in any other form from any other court" *id.*

"A petition seeking a Writ of Prohibition, . . . shall state the name and office or function of every person against whom relief is sought and shall set out with

particularity why the relief sought is not available in any other court." Sup. Ct. R. 20.3.

Only "a judicial usurpation of power," *Will v. United States*, 389 U.S. 90, 95 (1967), or a "clear abuse of discretion," *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) will justify the issuance of an extraordinary writ. *Will*, 389 U.S. at 95.

As explained in *Bankers Life & Cas. Co.*, *supra*., " . . . the traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confined an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Bankers Life & Cas. Co.*, 346 U.S. at 382. The Court also noted that a Writ of Prohibition cannot be used as a substitute for an appeal even if hardship would result from a delay. *Id.*, at 383. As stated by this Court in *Trump v. New York*, 141 S. Ct. 530, 535 (2020), a matter must be "ripe," not dependent on contingent future events that may not occur as anticipated or indeed may not occur at all.

A Writ of Prohibition is also only a provided remedy if a plaintiff has exhausted all other remedies. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). As this Court stated in *Alexander v. Crollott*, 199 U.S. 580 (1905), a Writ of Prohibition will lie to an inferior court only when it is acting manifestly beyond its jurisdiction and there is no other remedy.

A Writ of Prohibition can not be used in place of an appeal. *See Ex parte United States*, 263 U.S. 389, 393 (1923).

28 U.S.C. § 2107(a) and Fed R. App. P. 4.a.1 mandate that a notice of appeal be filed within thirty (30) days after the entry of such judgment, order or decree. filed with the district clerk within 30 days after entry of the judgment or order

I. THE PETITION IS NOT RIPE

The petition is not ripe for the issuance of a Writ of Prohibition for several reasons: 1) the district court had in personam and subject matter jurisdiction over the parties and claim presented by petitioner; and 2) by abandoning the May 24, 2023 Pretrial Conference and failing to timely appeal the district court's May 24, 2023 Order, petitioner waived and/or forfeited his right to any relief.

The district court did not wrongfully assume jurisdiction. Petitioner's claims were based upon diversity of citizenship, seeking an amount in excess of the jurisdictional limit. *See* 28 U.S.C. § 1332(a). Petitioner is a citizen of the State of New Jersey and respondents, Kerchentsev and Key & V Auto Sales, are citizens of the Commonwealth of Pennsylvania. Therefore, the district court did not wrongfully assume jurisdiction. Petitioner demanded in excess of the jurisdictional of $75,000.00. Therefore, the district court had jurisdiction and this petition is not ripe.

By abandoning this matter and failing to appeal the district court's May 24, 2023 Order, petitioner did not exhaust his available remedies and waived and/or forfeited his right to a Writ of Prohibition. Petitioner's futility argument, which is nothing but self serving statements, does not relieve him of his obligation to have filed an appeal.

Disagreement and/or dissatisfaction with the district court's rulings does not entitle petitioner to a Writ of Prohibition. Rather, petitioner was entitled to appeal the May 24, 2023 Order. He chose not to do so. Petitioner cannot be allowed to use a Writ of Prohibition in the place of an appeal. *See Heckler*, *supra. and Ex parte United States*, *supra*.

Petitioner has not cited a single case where this Court granted a Writ of Prohibition before a plaintiff has exhausted all of his remedies, including an appeal to the appropriate appellate court. Therefore, the petition must be denied.

II. THE PETITIONER IS NOT ENTITLED TO A WRIT OF PROHIBITION

If petitioner's petition is ripe, the petition has meritless.

Petitioner is asking this Court to use one of its "most potent weapons" to reverse discretionary, interlocutory and ordinary decisions, as well as the final judgment of the district court, in denying his motions and striking his untimely demand for a trial de novo. *Will*, 389 U.S. 95-96. The district court's decision to deny any motion was not extraordinary, warranting a Writ of Prohibition. Rather, such action was in the everyday course of business of the district court and subject to the ordinary appeal process.

As such, the petition must be denied.

III. No Fraud Upon the District Court Exists to Warrant the Issuance of a Writ of Prohibition

Petitioner's argument for "fraud upon the Court" stems from respondent, Kerchentsev's Affidavit, which was used to support respondents' opposition to petitioner's Motion for Summary Judgment. As pointed out to petitioner on May 24, 2023, the Affidavit created an issue of fact. Petitioner could still prove the opposite to a jury.

Even if the district court has granted his Motion for Summary Judgment, in toto, petitioner was still required to prove his damages, which were contested.

Before filing his Motion for Summary Judgment, petitioner did not request to depose anyone, including respondent, Kerchentsev.

In his affidavit, respondent, Kerchentsev, as the owner, stated the customary business practices of respondent, Key & V Auto Sales. Throughout the matter, a central issue was whether a "Buyer's Guide" was displayed on the vehicle petitioner purchased.

Petitioner disagreed with the amount he was awarded and untimely sought a trial de novo. If petitioner did not abandon this matter on May 24, 2023, he may have had a jury decide the amount of damages, if any, he was entitled to recovery. However, petitioner waived and/or forfeited this right by deserting the district court.

Petitioner's Motions pursuant to Fed.R.C.P. 60 were premature as when the motions were filed no final judgment or order existed from which the district court could grant petitioner relief. The final judgment was not entered until May 24, 2023.

Petitioner also wrongly equates respondent, Vogin's zealous representation of respondents, Kerchentsev and Key & V Auto Sales, with fraud.

As their advocate, respondent, Vogin, was obligated to oppose petitioner's claim and various motions. In doing so, respondent, Vogin, was entitled to direct the district court to petitioner's mischaracterization and misrepresentations of case law. An example for this Court is petitioner's statement that "the Pennsylvania Superior Court in *Evangelical Lutheran Church of the Atonement v. Horst Construction*, 251 A.3d 1221 (Pa. Super. 2021) ruled that personal injury claims are not barred by the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201, et seq. *See* petitioner's Appendix F or G, as petitioner did not label the documents. In reality, the Pennsylvania Superior Court held that plaintiff did not timely file its complaint and that as a religious institution, plaintiff was not entitled to relief under the UTPCPL.

Although petitioner cites a multitude of cases regarding "fraud upon the court," petitioner has not cited any case, which warrants the issuance of a Writ of Prohibition where a petitioner prevailed on his/her claims but was unhappy with the award of damages failed to timely demand a trial de novo and failed to file a timely appeal.

Therefore, the petition must be denied.

IV. No Judicial Misconduct by the District Court Exists to Warrant the Issuance of a Writ of Prohibition

Petitioner's argument, which stems from his disagreement and dissatisfaction with respondent, Robreno's rulings on his motions, is moot as Judge Robreno has resigned from the district court to return to private practice with McCarter & English. Regardless, no judicial misconduct existed.

28 U.S.C. § 455 sets forth the grounds for disqualification of a federal judge. § 455 does not mandate that a federal judge be disqualified if a party disagrees or is dissatisfied with the judge's rulings.

As stated by this Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) "a fair trial in a fair tribunal is a basic requirement of due process." The Court noted that "most matters related to judicial disqualification do not rise to a constitutional level." *Id.*

Disagreement and/or dissatisfaction do not equal judicial misconduct. If disagreement and/or dissatisfaction equal judicial misconduct, then in every court in every jurisdiction, federal and state, judicial misconduct is committed everyday.

Petitioner does not direct this Court to any improper relationship between respondent, Robreno, and any other respondent, including respondent, Vogin. Petitioner's allegations of a scheme or agreement between said respondents is not supported by any evidence. Rather, this argument is merely an extension of petitioner's disagreement and dissatisfaction with the district court's rulings and his arbitration award.

Petitioner's unreasonable delay argument is not supported by any evidence. Delays are inherent in litigations. After petitioner's successful appeal, the district court issued a scheduling order, which was complied with by the parties. A thirty (30) continuance of the arbitration hearing was permitted as respondent, Vogin, was previously attached in a child custody matter.

By failing to appeal the May 24, 2023 Order, petitioner waived or forfeited his right to complain about any or all of the district court's rulings. A timely appeal would have provided petitioner with an adequate remedy at law for his disagreement and dissatisfaction.

As such, this petition must be denied.

V. NO BASIS EXISTS TO PRECLUDE RESPONDENT, VOGIN, FROM CONTINUING TO REPRESENT RESPONDENTS, KERCHETSEV AND KEY & V AUTO SALES

At no time during the litigation did petitioner seek to disqualify respondent, Vogin, from representing respondents, Kerchentsev and Key & V Auto Sales. Only in his Preliminary Statement of his petition does petitioner seek to disqualify respondent, Vogin. No argument is presented.

Although petitioner has not provided the Court with the standard for attorney disqualification, as stated by the district court "the court must first consider whether the disciplinary rule has been violated and if it has, determine if disqualification is an appropriate penalty. *Argue v. David Davis Enters.*, 2004 U.S. Lexis 22630* (EDPA 2004).

Throughout this litigation, respondent, Vogin, represent respondents, Kerchentsev and Key & V Auto Sales, zealously, opposing petitioner's claim,

defeating most of petitioner's motions and limiting his damages award. Such advocacy is not a basis for disqualification. Petitioner was treated with respect of a fellow attorney. No conflict of interest exists between petitioner and respondent, Vogin.

In this petition, petitioner does not state any basis for disqualification.

As such, this petition must be denied.

VI. PETITIONER HAD AN ADEQUATE REMEDY AT LAW

Petitioner's no adequate remedy at law argument is meritless.

Petitioner's adequate remedy at law was to file a timely appeal of the May 24, 2023 Order to the Court of Appeals for the Third Circuit, an act that petitioner did at least twice in the past.

Contrary to petitioner's unsupported argument, petitioner has not demonstrated that the district court or appellate court were biased against him. In fact, petitioner's earlier successful appeal in this matter demonstrates petitioner's argument is meritless.

Having failed to file a timely appeal, petitioner is without justification to argue he has no adequate remedy at law.

Although petitioner makes bald allegations against the district court and appellate court, he does not support that argument with facts.

Petitioner's states that " . . . my use of the PACER system was suspended . . . ." But petitioner does not explain why his use was suspended. For non use? For non payment? For abusing the PACER system or some other unknown reason?

Regardless, not being permitted to use the PACER system does not equate with having no adequate remedy at law.

As petitioner was successful in his earlier appeal in this matter, his argument against the Court of Appeal for the Third Circuit is absurd.

Without an appeal, we can only speculate what remedy petitioner could have received, which does not equal the lack of an adequate remedy at law or justify the issuance of a Writ of Prohibition.

As such, this petition must be denied.

CONCLUSION

As the petition is not ripe, petitioner has failed to demonstrate that the issuance of a Writ of Prohibition is warranted for his disagreement and dissatisfaction with the district court's rulings, petitioner's judicial misconduct argument, which is moot, is also meritless and petitioner has an adequate remedy at law, respondents respectfully request that this Court deny the Petition for Writ of Prohibition.

Respectfully submitted,

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