

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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BRENDA SEWELL,

*Petitioner,*

vs.

BRAD BULL, BLUE CREEK REALTY GROUP, LLC,  
GEORGETOWN CONSTRUCTION COMPANY, L.L.C.,

*Respondents.*

—————◆—————  
**On Petition For Writ Of Certiorari  
To The Supreme Court Of Alabama**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED FOR REVIEW**

Petitioner filed a multi-count complaint. Respondents answered with multiple defenses and moved for summary judgment. The trial court granted summary judgment without opinion. The state supreme court affirmed without opinion. Petitioner's application for rehearing was denied without opinion.

The question presented is whether due process under §1 of the Fourteenth Amendment to the U.S. Constitution entitles the plaintiff to a judgment that explains why her case was dismissed and allows her, in at least one point in the judicial proceeding, a fair opportunity to challenge with specificity that the trial court erred or that the appellate court overlooked or misapprehended a point of law or fact.

**PARTIES TO THE PROCEEDING**

Petitioner Brenda Sewell was plaintiff in the Circuit Court for Tuscaloosa County, Alabama. Respondents Brad Bull, Blue Creek Realty Group, LLC, and Georgetown Construction Company, L.L.C., were defendants below. No entity was publicly held or related to a publicly held entity.

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**OPINIONS BELOW**

Order of the Supreme Court of Alabama, in case number 1160876, dated January 12, 2018, affirmed the trial court without opinion.<sup>1</sup> Application for rehearing to the Supreme Court of Alabama in case number 1160876, dated February 16, 2018, denied the application without opinion.<sup>2</sup> Neither the judgment nor the denial of the application for rehearing have been reported by the official reporter.

**JURISDICTIONAL STATEMENT**

The Supreme Court of Alabama denied relief to petitioner on January 12, 2018. A timely application for rehearing was made on January 23, 2018,<sup>3</sup> and denied on February 16, 2018.<sup>4</sup> The denial of the application for rehearing is the judgment sought to be reviewed.

This Court has jurisdiction under 28 U.S.C. § 1257(a).



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<sup>1</sup> App. 1.

<sup>2</sup> App. 3.

<sup>3</sup> App. 22.

<sup>4</sup> App. 3.

**CONSTITUTIONAL PROVISION INVOLVED**

U.S. Const. amend. IV, § 1: “. . . 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.”

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**STATEMENT OF THE CASE**

Petitioner Brenda Sewell (Brenda) sued Respondent Brad Bull and his affiliated limited liability companies (Bull) in the Circuit Court for Tuscaloosa County, Alabama. She alleged that by fraud, and in violation of laws, rules and regulations constituting negligence *per se* under Alabama law, Bull induced her to pay \$48,000 for a worthless piece of land.<sup>5</sup>

Bull pled multiple defenses<sup>6</sup> and moved for summary judgment. The trial court granted summary judgment without opinion<sup>7</sup> and dismissed the complaint. Under the facts and posture of the case, Brenda had no basis for determining the trial court’s reason for dismissal.

Brenda appealed to the Supreme Court of Alabama, addressing every issue posited in the motion for

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<sup>5</sup> App. 5.

<sup>6</sup> App. 16.

<sup>7</sup> App. 2.

summary judgment. The Supreme Court of Alabama denied the request for oral argument and affirmed the trial court without opinion.<sup>8</sup>

Rule 40 of the Alabama Rules of Appellate Procedure allows as a matter of right, an initial application for rehearing, requiring the petitioner to “state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended.” On application for rehearing, petitioner argued that it could not make a reasoned application because she had no way of knowing how the appellate court apprehended the facts in the record, or the law.<sup>9</sup> Brenda’s application for rehearing was a plea for an opinion that could be addressed. The application was denied – without opinion.

Because neither the trial court nor the appellate court wrote an opinion, the petitioner has no way of knowing why her case was dismissed, and on appeal had no way of confronting – by oral argument or by application for rehearing – an error or misapprehension at any level of judicial review.

The application for rehearing specifically urged that the due process clause of the Fourteenth Amendment required a modicum of fairness that would inform the litigant as to why she could not cross the threshold into court.<sup>10</sup> This was the first opportunity to

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<sup>8</sup> App. 1.

<sup>9</sup> App. 22.

<sup>10</sup> App. 24-28.

raise a federal question, and thus timely. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930); see *Saunders v. Shaw*, 244 U.S. 317, 319 (1917).

The brief on application for rehearing said:<sup>11</sup>

Due Process under §1 of Amendment XIV of the U.S. Constitution and under Article I §13 of the Alabama Constitution may be amorphous in definition, but nonetheless requires fundamental fairness to litigants. Fairness, in the context of this litigation, is the right to know *why* the plaintiff can't cross the trial court threshold.

And, in the application for rehearing:<sup>12</sup>

Due process is not served when, after a regular proceeding (summary judgment, appeal), a decision is rendered that cannot be reasonably questioned because it is without published basis. The full panoply of due process is truncated when the decision of the court of last resort just says: "Go hence."



## REASONS FOR GRANTING THE PETITION

Brenda's case was a "hard case." To prevail, Brenda had to overcome or distinguish precedent with vigorous and creative representation, opposed by learned and experienced counsel. On motion for summary judgment

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<sup>11</sup> App. 25.

<sup>12</sup> App. 27-28.

by Bull, lengthy and serious briefs and submissions were made by both parties. Rather than set the stage for appellate review with its order, the trial court granted the motion for summary judgment without opinion.

Because the trial court gave no basis for its ruling, Brenda's appeal to the Supreme Court of Alabama could not be focused but had to address every material fact, every cause of action, and every defense set out in the motion for summary judgment. The Supreme Court of Alabama affirmed, without opinion.

Since neither the trial court nor the appellate Court disclosed an opinion, Brenda does not know why she is unable to present her case to a finder of fact. Rule 40 of the Alabama Rules of Appellate Procedure – similar in material respect to Rule 40 of the Federal Rules of Appellate Procedure – allows as a matter of right an initial application for rehearing, requiring the petitioner to “state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended.” But, because at no stage in the judicial proceeding was Brenda's dismissal articulated, she was denied her right under Rule 40 to know how either the trial or appellate court viewed the facts or apprehended the law. She was denied the right afforded by Rule to other litigants – the right to meaningfully question the judicial actions in her case.

A meaningful opportunity to be heard is the promise of the due process clause. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

Absent a judicial opinion, Brenda is left to wonder: (1) Was her counsel ineffective? (2) Did the trial court simply transfer the issue to appeal? (3) Did the trial or appellate court misconstrue the facts? or (4) Was the law misapplied?

Due Process under §1 of Amendment XIV of the U.S. Constitution may be amorphous in definition, but nonetheless requires fundamental fairness to litigants. Fairness, in the context of this litigation, is the right to know *why* the plaintiff can't cross the trial court threshold.

“A person’s rights to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence. . . .” *In re Oliver*, 333 U.S. 257, 273 (1948).

Fairness of procedure is “due process in the primary sense.” *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 (1930); *see also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

Due Process is “‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions. . . .” *Carey v. Phipus*, 435 U.S. 247, 266 (1978).

Particularly in the framework of an application for rehearing, where a litigant has her final opportunity to challenge a misperception by the appellate court, the concern of due process is to prevent “unjustified or

mistaken deprivations.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Written in another context but universally applicable, the Court wrote in *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972): “It has long been recognized that fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . .”

And in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951), the Court wrote:

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. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

In *Bright v. Westmoreland County*, 380 F.3d 729 (3d Cir. 2004), the circuit court reversed a district court judgment because it was not the independent product of the judge. At page 732, it wrote:

Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic.

Though clearly written from a different context, the philosophy of the *Bright* opinion nicely states the expectations of litigants whose substantive, serious claims land in the province and power of the judiciary. *Bright* dealt with a tainted written explanation of judgment. Brenda has no explanation, written or even oral.

The Supreme Court of Tennessee, in *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 313 (2014), citing *Bright*, supra, affirmed its Court of Appeals in reversing a judgment below because it was not the independent product of the trial judge. Referring to Tenn. R. Civ. P. 56.04, which required a trial judge “upon request . . . [to] state the legal grounds upon which the court grants the [summary judgment] motion . . . ,” wrote that the Rule was intended to address two concerns:

First, they reflect the growing awareness of both the Advisory commission and this court that explanations of the basis for judicial decisions promote respect for and acceptance of not only the particular decision but also for the legal system. Second, skeletal orders containing no explanation of the reasons for granting the summary judgment were complicating the ability of the appellate courts to review the trial court’s decision.

Due process does not impose upon a state a particular appellate remedy or procedure. But:

. . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord

the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect.

*Brinkerhoff-Faris Trust & Savings Co.*, 281 U.S. 673, 682 (1930).

The due process clause does not require the state to establish a perfect system, *Ownbey v. Morgan*, 256 U.S. 94, 111 (1921), but where it has established a procedure for appellate review (by application for rehearing), due process is violated when a litigant cannot take advantage of the review by the refusal of the appellate court itself to express its opinions on the facts and law that led to a judgment. By its failure to express its opinion, the court below took away the last opportunity for due process to “minimize substantively unfair or mistaken deprivations. . . .” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972), distinguished in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

Due process is not served when, after a regular proceeding (summary judgment, appeal), a decision is rendered that cannot be reasonably questioned under existing rules because it is without expressed basis. The full panoply of due process is truncated when the decision of the court of last resort just says: “Go hence.”

Due process does not prevent Brenda from losing her case; it protects her against arbitrary justice or

honest error. Due process entitles her to know why she lost her case. She has been denied that protection and that closure.



### **CONCLUSION**

For the foregoing reasons, Petitioner Brenda Sewell respectfully requests the Court grant a writ of certiorari to the Supreme Court of Alabama.

Respectfully submitted,

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