

In The
Supreme Court of the United States

DEBRA K. SANDS,

Petitioner,

v.

JOHN R. MENARD, JR.,
MENARD THOROUGHBREDS, INC., MENARD, INC.,
WEBSTER HART AS TRUSTEE OF THE JOHN R.
MENARD, JR. 2002 TRUST AND RELATED TRUSTS,
ANGELA L. BOWE AS TRUSTEE OF THE JOHN R.
MENARD, JR. 2002 TRUST AND RELATED TRUSTS
AND ALPHONS PITTLERLE AS TRUSTEE OF THE
JOHN R. MENARD, JR. 2002 TRUST AND
RELATED TRUSTS,

Respondents.

**On Petition for Writ of Certiorari
To The Wisconsin Supreme Court**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Debra K. Sands (“Sands”) submits this Reply to the Brief of Respondents John R. Menard, Jr. (“Menard”), her former fiancé, and his various businesses (collectively “Menard, Inc.”). Rather than supporting denial of Sands’ Petition, Respondents provide convincing grounds why certiorari should be granted.

Respondents never deny that deciding an appeal on an issue never raised, briefed, or argued infringes due process in violation of the Fourteenth Amendment. Instead, Respondents falsely argue that the sufficiency of Sands’ complaint was actually litigated, notwithstanding the conclusion of two dissenting Justices that it was not; a conclusion unrebutted by the majority.

Respondents also demonstrate the urgency of granting review by showing the futility of moving for recusal in the Wisconsin Supreme Court. The deprivation of due process that occurred here is exactly the type of constitutional violation citizens now expect and decry from a politicized court. A deprivation of due process is constitutionally impermissible and should never be the result of partisan politics and money.

ARGUMENT

I. Sands’ right to due process was violated by deciding her appeal on a ground never raised, briefed, or argued.

It is a fundamental and indisputable principle that deprivation of property without an opportunity to be heard violates Fourteenth Amendment due process, *e. g.*, *Link v. Wabash R. Co.*, 370 U.S. 626, 632 (1962), as is the principle that a cause of action recognized under state law, as Sands asserted here, is property

protected under due process, *e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-30 (1982). Respondents do not deny this.

Instead, Respondents falsely assert that Sands ***was*** heard on the issue of whether her complaint stated a claim for unjust enrichment. Respondents misstate the record, which in fact supports Sands. Respondents repeatedly obscure the distinction between summary judgment and dismissal for failure to state a claim. For example, the Brief in Opposition inaccurately states, “The Wisconsin Supreme Court affirmed summary judgment, but on the other grounds raised in Respondents’ motion for partial summary judgment.” Br. in Opp’n at 2; *see also id.* at 3, making the same false assertion.

Clearly, the Wisconsin Supreme Court did ***not*** conclude or affirm that summary judgment was appropriate. Instead, it held that ***the allegations of Sands’ complaint*** failed to state a claim for unjust enrichment under the line of cases beginning with *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (Wis. 1987). The Court’s opinion unambiguously stated:

¶ 2. First, we consider whether Sands has pleaded facts sufficient to establish what she styled as an unjust enrichment claim under *Watts v. Watts*, 137, Wis. 2d 506, 405 N.W.2d 305 (1987), thereby necessitating a remand to the circuit court for a full hearing on the merits. ...

¶ 3. As to the claim she has characterized as a *Watts* unjust enrichment claim, we conclude that Sands ***has failed to allege facts*** which, if true, would support her legal conclusion that she and Menard had a joint enter-

prise that included accumulation of assets in which both she and Menard expected to share equally. [Pet. App. 3a (emphasis added)].¹

The Court's decision never claims to decide whether summary judgment was appropriate. Summary judgment requires development of an evidentiary record, while motions to dismiss for failure to state a claim are confined to the four corners of the complaint. Wisconsin is substantially identical to federal procedure in this respect. The Wisconsin statutes governing summary judgment provide, consistent with the provisions of Fed. R. Civ. P. 56,

When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. [Wis. Stat. Ann. § 802.08(3).]

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Wis. Stat. Ann. § 802.08(2).]

The Wisconsin Supreme Court decision expressly acknowledges the existence of multiple issues of ma-

¹ The Court misstates Sands' claim which has only ever sought a *fair* share. Appropriate process would have prevented such misunderstanding.

terial fact in this case. *E.g.*, Pet. App. 4a at ¶ 5,² Pet App. 4a-5a at ¶ 6,³ Pet. App. 5a at ¶ 7, Pet. App. 5a-6a at ¶ 8⁴; *see also* Pet. App. 6a-8a at ¶¶ 9-13. On such a record of disputed issues of fact, summary judgment was impermissible. Therefore, to dispose of Sands' appeal, the Supreme Court's ruling had to rest on the allegations of the complaint alone.

The only motions Respondents made challenging the sufficiency of the complaint occurred in 2009 regarding the original and first amended complaints. The grounds for the original motion were that Sands was allegedly practicing law in Wisconsin without a license and had failed to comply with Wisconsin Supreme Court Rule 20:1.8(a) ("the Rule"), requiring lawyer-client business transactions to meet specified conditions of disclosure and consent. Pet. App. 8a-9a at ¶ 16. Their renewed motion to dismiss the First Amended Complaint raised only Sands' alleged non-compliance with the Rule. R.101. The first motion was mooted by the amended complaint. The court denied the second motion because the court did not find the requisite attorney-client relationship. R.101, R.124.

² "Sands claims that she moved in with Menard in the summer of 1998, and they became engaged later that year. Menard admits that he and Sands were engaged, but denies that they ever lived together."

³ "During their relationship, Sands alleges she made a number of business and personal contributions to both Menard and his companies, including Menard, Inc. and Menard Thoroughbreds, Inc. Although the parties agree that Sands made certain contributions, they do not agree as to the nature of those contributions, when they began, or who was the recipient at any given time."

⁴ "The parties also disagree as to whether Sands performed legal work for Menard or the Menard Defendants prior to the beginning of their romantic relationship."

Respondents thus *never* moved to dismiss Sands' complaint for failure to allege a *Watts* unjust enrichment claim on which relief could be granted.

The Brief in Opposition refers only to *summary judgment* motions filed by Menard. Br. in Opp'n at 9-13. Respondents asserted that, *on the evidence of record*, Sands could not prove the existence of a *Watts* joint enterprise, not that her complaint failed to allege one. R.287-97. Sands submitted voluminous evidence in opposition to this ground asserted for summary judgment. R.306-11. As is apparent from the Supreme Court's decision, Sands' evidence demonstrated a myriad of genuine issues of fact precluding summary judgment on this ground. Moreover, the focus and *ratio decidendi* of the summary judgment proceedings and subsequent appeal was the Rule. Sands' Petition at 9-11 shows that the issues presented on Sands' appeal in both the Wisconsin Court of Appeals and Supreme Court, as stated by *both parties*, related solely to whether the Rule barred Sands' *Watts* claim.

Attempting to show that the sufficiency of Sands' complaint was raised and briefed, Respondents refer to pages 6-8 and 35-37 in their Court of Appeals brief and pages 36-37 in their Supreme Court brief. Br. in Opp'n at 13-15. Pages 6-8 in their Court of Appeals brief merely recite facts from *the summary judgment record* in support of Respondents' argument that Sands was Menard's attorney. Similarly, pages 35-37 and 36-37 in the two briefs attempt to distinguish this case from *Watts v. Watts* for the same purpose—to convince the court that the Rule barred Sands' claim for unjust enrichment. Brief of Respondent at 6-8, 35-37, *Sands v. Menard*, 2016 WI 76 (No. 2012AP2377/2015AP870); Brief of Respon-

dent at 36-37, *Sands v. Menard*, 2017 WI 110 (No. 2012AP2377/2015AP870).

Respondents also quote ninety seconds of colloquy from the Supreme Court oral argument as establishing that the sufficiency of the complaint was raised, briefed, and argued. Br. in Opp’n at 15-16. The questioner, however, Justice Ann Walsh Bradley, was certainly not convinced of this, inasmuch as she joined Justice Abrahamson in dissenting from the Order denying Sands’ motion for reconsideration, finding that the majority had violated Sands’ “constitutional right to procedural due process” by “[r]uling sua sponte on issues not briefed by the parties.” Pet. App. 113a–15a. The majority did not rebut this.

Finally, as they have done throughout the ten-year history of this litigation, Respondents misrepresent, fabricate, omit and cherry-pick facts to falsely accuse Sands in their effort to blacken her good name and reputation, Br. in Opp’n at 4,⁵ then allege their own “facts” in a false light most negative to Sands, while

⁵ Respondents grossly misrepresent any alleged financial benefit to Sands. For example, Respondents falsely imply that Sands had a financial interest in Eagles Printing (a 120-year old company). She did not. Also, all coffee purchased from Prima was sold on Menard’s below-market terms. R.306 at 38; R.309 at 2520. Respondents also claim that Sands failed to disclose that her sister’s arbitration award was vacated, Br. in Opp’n at 6, n.3, insinuating that her sister ultimately lost on the merits. She did not. The link cited shows that the award was vacated after seven days of trial based on the court’s being “advised that dispute is resolved.” <https://wcca.wicourts.gov/caseDetail.html?caseNo=2007CV000991&countyNo=18&index=0>. The trial referenced was for her sister’s claim for front pay ordered by the Wisconsin Supreme Court. *Sands v. Menard, Inc.*, 2010 WI 96, 328 Wis. 2d 647, 787 N.W.2d 384 (Wis. 2010); *Sands v. Menard, Inc.*, 2013 WI App 47, 347 Wis. 2d 446, 831 N.W.2d 805 (Wis. Ct. App. 2013).

painting a hagiographic portrait of Menard. *Id.* at 5-13.⁶ All this does, however, is underscore that this case has been litigated on contested fact issues that a jury should decide. The issue of whether Sands' complaint adequately stated a claim for unjust enrichment was never litigated. Sands ultimately prevailed on all issues that were actually before the Wisconsin Supreme Court. What she did not prevail on was an issue never raised, briefed, or argued, and decided in violation of her right to due process.

Compounding the injustice of the Supreme Court's denial of due process was the absence of an opportunity to amend to cure any perceived insufficiency of her allegations, which Sands surely would have had if the circuit court had granted a motion to dismiss for failure to state a claim. But it did not.

II. The urgency and importance of granting certiorari is underscored by respondents' own brief.

Respondents argue that Sands never moved to recuse any of the Wisconsin Justices. This is correct, but should be excusable.

As this Court has said, "The law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001); *Searfoss v. Lehigh Valley R. Co.*, 76 F.2d 762, 763 (2d Cir. 1935). The futility of a motion to recuse is apparent from a review

⁶ Respondents neglect to mention, however, that the explosive growth in Menard's net worth coincided precisely with Sands' entry into his life and reinvigoration of his business with modern, woman-friendly innovations. R.311 at 3189-3282.

of Wisconsin Supreme Court decisions since 2010, when, disregarding *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the Court adopted changes to the State Code of Judicial Conduct authored by Wisconsin Manufacturers and Commerce (“WMC”) to permit judicial campaigns to solicit unlimited contributions and allow Justices to sit on cases involving their donors regardless of amounts contributed. Pet. at 3, 21.

The Wisconsin Supreme Court has also ruled, over strenuous dissents, that only the Justice whose recusal is requested may rule on the motion, and that the other Justices cannot review the ruling. *Polsky v. Virnich*, 2011 WI 69, 335 Wis. 2d 555, 804 N.W.2d 80, 81 (Wis. 2011); *State v. Henley*, 1 WI 67, 338 Wis. 2d 610, 802 N.W.2d 175, 176 (Wis. 2011); *Adams v. State*, 2012 WI 81, ¶ 1, 342 Wis. 2d 374, 822 N.W.2d 867 (Wis. 2012). When refusing to recuse themselves, Justices backed by dark money have typically stated no grounds for denying the motion. *State v. Circuit Court for Dane Cnty.*, 2012 WI 82, ¶¶ 6-7, 822 N.W.2d 67 (Wis. 2012). In proceedings investigating the financing of Governor Walker’s recall campaign, these same Justices participated without formally ruling on recusal motions, letting their silence stand for denials. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165, 279-80 (Wis. 2015) (Abrahamson, J., concurring and dissenting in part).

Further, when subjected to ethical inquiries, these Justices have used recusal as a weapon to frustrate the proceedings. In what became a *cause célèbre*, the Wisconsin Judicial Commission filed a misconduct complaint against Justice David Prosser for violating the Wisconsin Judicial Code by, *inter alia*, choking and grabbing Justice Ann Walsh Bradley by her neck, and calling Chief Justice Abrahamson “a total bitch.”

In response, Justice Prosser moved to recuse the remaining Justices. His allies—those in the *Sands* majority—acquiesced, depriving the Court of the four-Justice quorum necessary to hear and decide the charges, terminating the case. *Wis. Judicial Comm’n v. Prosser*, 2013 WI 18, 345 Wis. 2d 615, 827 N.W.2d 605, 606-07 (Wis. 2013); *Wis. Judicial Comm’n v. Prosser*, 2012 WI 69, 341 Wis. 2d 656, 817 N.W.2d 830 (Wis. 2012).⁷

Respondents’ brief addresses this very problem, pointing out that if *Sands* had moved to recuse majority Justices, she would have faced the same situation Justice Prosser created to his own advantage, but to her great disadvantage, by potentially precluding a quorum for the Supreme Court to hear her case and leaving her bound by the Court of Appeals’ erroneous decision unjustly stripping her of any recovery. Br. in Opp’n at 6, n.3. The tactical choice to move for recusal and risk alienating a tribunal is always difficult. In Wisconsin, however, the problem is compounded by certain Justices’ demonstrated propensity to deny such motions without explanation; the inability to obtain corrective action from the rest of the Court; and the threat of retaliation through concerted recusals to destroy a quorum and thus the ability to hear the appeal. Nor is it certain that any Justice would fairly apply the “ancient Rule of Necessity,” *United States v.*

⁷ Respondents also argue that because the Supreme Court affirmed dismissal of Menard, Inc.’s counterclaim, the Justices cannot have been prejudiced against *Sands*. The counterclaim, however, was patently frivolous, failing to survive in any court. Menard, Inc., sought \$300 million from *Sands* arising mostly from losses from an improvident racetrack/casino investment in which *Sands* had no involvement. The Justices no doubt realized that their decision would look unduly punitive, lack credibility, and potentially cast unwelcome light on their connection with Menard if they ruled in his favor on this as well.

Will, 449 U.S. 200, 212-17 (1980), to preserve a quorum to hear Sands' appeal. *Wis. Judicial Comm'n v. Prosser*, 817 N.W.2d at 832-34.

Thus any motion for recusal by Sands would have been not only futile, but potentially destructive of her right to appeal. In these circumstances, failure to make recusal motions should not prevent this Court from granting review, but should militate in favor of review.⁸

Finally, regardless of whether Sands moved for recusal, the facts in the Petition are important and persuasive on the need to grant certiorari to review the denial of Sands' right to due process. Those facts present a compelling record of how vast sums of dark money have politicized a state supreme court, to the detriment of ordinary litigants lacking comparable resources.

Unfortunately, the decision in this case is exactly what one would expect from such a court in such an environment. Unable to rule for Respondents on the issues actually raised, briefed, and argued, the Wisconsin Supreme Court reached for an issue on which Sands never had an opportunity to be heard, the sufficiency of her complaint, on which there had never

⁸ Respondents present an extended discussion of Sands' inability to tie specific Menard contributions to specific judicial election campaigns. Br. in Opp'n at 33-36. As noted in Sands' Petition, however, WMC was a substantial contributor to the campaigns of the Justices in the Sands majority. Menard was not only a Director of WMC, but the Treasurer of the Board, obviously with input on where the money went. See G. Zimmerman, *Wisconsin Elects John Menard as Chief Justice*, Rejected by the Post Crescent (Apr. 8, 2015), <https://zimm1117.wordpress.com/2015/04/08/wisconsin-elects-john-menard-as-chief-justice-of-the-wisconsin-supreme-court/>. Moreover, by definition, "dark money" is hidden and generally undiscoverable.

been an adverse ruling. It thereby stripped her of any access to justice except in this Court after more than eight years of hard work and devotion to Menard and his businesses and another decade of fruitlessly seeking justice in the Wisconsin courts.

The violation of due process here is not an ordinary deprivation, if there is such a thing. It is the deprivation that comes when the legal system itself is compromised by the power, wealth, and politics of special interests able to buy Justices and justice.

The ongoing politicization of the Wisconsin Supreme Court, exemplified by the decision in this case and its extreme injustice, has created a crisis of confidence in the judicial system, and is not unique to Wisconsin. It is a stain spreading throughout the country that calls for action by this Court. It is an abuse of wealth, power, and influence causing injustice not just to Debra Sands, but to all women. The public is at last saying “Enough.”

CONCLUSION

For all the reasons in Sands’ Petition and this Reply, this Court should grant the petition.

Dated: July 2, 2018.

Respectfully submitted,

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