

No.

18-7369

Supreme Court, U.S.  
FILED

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OFFICE OF THE CLERK

IN THE

ORIGINAL

**SUPREME COURT OF THE UNITED STATES**

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RASH B. GHOSH and INTERNATIONAL INSTITUTE OF  
BENGAL BASIN,

*Petitioners,*

v.

CITY OF BERKELEY, ZACH COWAN, LAURA MCKINNEY,  
JOAN MACQUARRIE, PATRICK EMMONS, GREG HEIDENRICH,  
CARLOS ROMO, GREG DANIEL, MANAGEWEST, BENJAMIN  
MCGREW, KORMAN & NG, INC., MICHAEL KORMAN, MIRIAM  
NG, ROMAN FAN, ROBERT RICHERSON, KRISTEN DIEDRE  
RICHERSON, ANDREA RICHERSON, DEBRA A. RICHERSON,  
AND PRISM TRUST,

*Respondents.*

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**On Petition For a Writ of Certiorari  
To The California Court of Appeal,  
First Appellate District**

**PETITION FOR A WRIT OF CERTIORARI**

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## THE QUESTION PRESENTED

Ghosh owned two adjacent buildings in Berkeley, and the co-plaintiff, International Institute of Bengal Basin (IIBB) occupied one of them. In a pending lawsuit, petitioners filed a third amended complaint, alleging that newly discovered evidence showed that the newly-named defendants conspired with the other defendants to deprive them of their property and arrange for it to be sold at a below-market price to some of the new defendants.

The trial court sustained demurrers by the defendants, and Ghosh and IIBB sought to appeal.

Because Petitioner Ghosh had been found to be a vexatious litigant, he had to make application to the presiding justice of the Court of Appeal for permission to appeal, and show that the appeal had merit. He made application, and pointed out numerous (and sometimes obvious) errors the trial court had made in sustaining the demurrer. The appellate court denied the Application, stating only, "Mr. Ghosh has failed to show a reasonable possibility that his appeal has merit."

The question presented is, does due process affirmatively require the State to provide meaningful procedural safeguards when it responds to judicial petitions?

## **PARTIES TO THE PROCEEDINGS**

Petitioner Rash B. Ghosh and International Institute of Bengal Basin (IIBB) were plaintiffs and appellants in the court below.

The Respondents in the court below were the City of Berkeley, Zach Cowan, Laura MacKinney, Joan MacQuarrie, Patrick Emmons, Greg Heidenrich, Carlos Romo, Greg Daniel, Managewest, Benjamin McGrew, Korman & Ng, Inc., Michael Korman, Miriam Ng, Roman Fan, Robert Richerson, Kristen Diedre Richerson, Andrea Richerson, Debra A. Richerson, and Prism Trust.

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# IN THE UNITED STATES SUPREME COURT

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RASH B. GHOSH, et al.,

*Petitioners,*

v.

CITY OF BERKELEY, et al.,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Rash B. Ghosh and International Institute of Bengal Basis (IIBB) petition for a writ of certiorari to the California Court of Appeal, First District, to review its decision erroneously affirming the trial court's dismissal of their fraud case claiming the defendants conspired to take petitioners' two buildings (one of which was Ghosh's primary residence) and sold it to some of the defendants at a below-market price. The case also alleged the City took the property without just compensation (inverse condemnation).

### OPINIONS BELOW

The order of the California Supreme Court denying discretionary review appears at Appendix 1, and is unreported.

The order of the California Court of Appeal dismissing the appeal appears as Appendix 2, and is unreported.

Orders of the California Superior Court sustaining the defendants' demurrers appears at Appendix 7 & 10, and are unreported.

### JURISDICTION

The California Supreme Court denied discretionary review of petitioner's appeal on August 29, 2018. App. 1. This petition is filed within 90 days of that court's order, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State.

### STATUTES INVOLVED

Title 3A of the California Code of Civil Procedure, "Vexatious Litigants," states that if a person has been found to be a "vexatious litigant," as petitioner has, he must obtain leave of court from the presiding justice of the appellate court to file a new appeal. The relevant statute states as follows (with emphasis on the part relevant to this petition in bold):

**§ 391.7. Prefiling order prohibiting the filing of new litigation; contempt; conditions**

(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed.



Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

(b) **The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay.** The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve, or the presiding justice or presiding judge may direct the clerk to file and serve, on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding justice or presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding justice or presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.

(d) For purposes of this section, "litigation" includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(e) The presiding justice or presiding judge of a court may designate a justice or judge of the same court to act on his or her behalf in exercising the authority and responsibilities provided under subdivisions (a) to (c), inclusive

(f) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefiling orders and shall annually disseminate a list of those persons to the clerks of the courts of this state.

California, unlike the federal courts and most states, uses demurrers. The grounds for a demurrer are entirely statutory, and are set forth in California Code of Civil Procedure § 431.10:

**430.10. Objection by Defendant; grounds**

The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

- (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.
- (b) The person who filed the pleading does not have the legal capacity to sue.
- (c) There is another action pending between the same parties on the same cause of action.
- (d) There is a defect or misjoinder of parties.
- (e) The pleading does not state facts sufficient to constitute a cause of action.
- (f) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.
- (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct.
- (h) No certificate was filed as required by Section 411.35.
- (i) No certificate was filed as required by Section 411.36.

**BACKGROUND AND STATEMENT OF THE CASE**

The City of Berkeley declared part of one of Ghosh's two adjacent buildings a nuisance, but got a receiver to take over *both* buildings. App. 4. The receiver said if Ghosh deposited \$178,000 he

would repair the property. Ghosh put up \$160,000 cash, paid \$17,000 in permit fees, and the City collected \$6,000 boarding up costs from Ghosh's lender. But then the receiver sold the property and Ghosh never got his money back. Ghosh lost both his property and his deposit and IIBB lost their headquarters. They sued.

Petitioners filed a third amended complaint, alleging that they discovered a document that showed that newly-named defendants in the case had conspired with the City and other defendants and jointly acted against the interest of petitioners and their properties, to take Ghosh's two buildings (one of which was his principal residence) and sell the property to some of the new defendants, without notice to petitioners, at a below-market price, and concealed from petitioners that the property was sold to a partner of the real estate agent hired by one of the defendants to sell the property. The complaint also alleged inverse condemnation of his property by the City.

The defendants (except Benjamin McGrew and Managewest, who were served with summons but did not file an answer or appearance in the case) all filed demurrers, which the trial court granted.

Petitioners sought to appeal to the California Court of Appeal, and Ghosh filed an application for permission to appeal, as he was required to do because he had previously been declared a vexatious litigant.

The appellate court utilizes a form called "Application for Permission to Appeal or to File Writ Petition." It requires the applicant "IN THREE PAGES OR LESS" to describe the nature of

the action under review and to explain "why the appeal/writ has merit." App. 3. The appellate court has no trial court record or any papers from the trial court. There is no evidence to be weighed, which means the appellate court must base its decision on the statements in the Application, because the court has no other source for inputting information.

Under such circumstances, an appellate court must of necessity take the statements of the applicant as true.

The Court of Appeal denied permission to appeal, simply stating, "Mr. Ghosh has failed to show a reasonable possibility that his appeal has merit." App. 2.

Yet the Application stated numerous reasons which, if taken as true, showed on their face why an appeal would have merit.

### **Why It Was Error to Deny Permission to Appeal**

The issue before the Court of Appeal was whether the trial court erred by sustaining the demurrers. Many of the grounds stated by the trial court were invalid on their face. For example, the trial court said the claims were barred by § 47(b) of the California Civil Code, which defines a "privileged publication or broadcast," a defense to an action for libel or slander, which has nothing whatever to do with petitioners' claims that the defendants conspired to wrongfully appropriate their property. An appeal asserting that it was error to bar petitioners' claims on this particular grounds has obvious merit.

It is important to remember that the sole issue raised by a general demurrer is whether the facts pleaded in the complaint state

a valid cause of action, not whether those facts are true. Thus the plaintiff's allegations must be accepted as true, "however improbable they may be." *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal.App.3d 593, 604, 176 Cal.Rptr. 824, 829 (1981).

Petitioner in his Application for Permission to Appeal pointed out how numerous grounds relied on by the trial court were error:

**[Intervening Court Action]** The trial court ruled that all plaintiffs' claims were barred by "the courts' intervening exercise of independent judgment," citing *Mamta Management v. City of San Bernardino*, 43 Cal.4th 400 (2008). App. 7, 10. But the Application, App. 4, points out the trial court omitted a important qualification in *Manta*—an exception if "the judicial officer reached an erroneous decision as a result of being misled as to the relevant facts." *Id.* at 363. Petitioner's complaint asserted that he was deprived of his "right to an impartial trial (Count 2), he was deprived of "a full and fair hearing" (Count 6), and alleges that the defendants acted jointly to deprive plaintiff of his property, concealing the fact that the purchaser of the property was a partner of the agent that was hired to handle the sale.

**[Collateral Estoppel]** The trial court said Count 6 [unjust enrichment], Count 8 [elder abuse], and Count 9 [conspiracy] were actually litigated and finally determined in prior proceedings, and are barred by "collateral estoppel." App. 7, 10.

The Application pointed out that is a plea in abatement. App. 4. See Calif. Code of Civil Procedure § 597: "Collateral estoppel" is *issue* preclusion, not *claim* preclusion, and "issue preclusion does not bar entire causes of action." *DKN Holdings LLC v. Faerber* 61 Cal.4th 813, 824-825(2015). It is not estoppel by judgment, and is not grounds for a

demurrer. "An estoppel by judgment may be made by demurrer only when plaintiff's complaint discloses the matter relied upon to support the plea, and *must otherwise be pleaded affirmatively by the defendant in his answer, and not in a memorandum in support of demurrer.*" *Ion Equipment Corp. v. Nelson*, 110 Cal.App.3d 868, 881, 168 Cal. Rptr. 361, 367 (1980) [italics added].

Calif. Code of Civil Procedure § 430.10(c) requires that the other case is "between the same parties" on the "same cause of action." App. 4. "The identity of two causes of action is determined by a comparison of the facts alleged which show the nature of the invasion of plaintiff's primary right." *Bush v. Superior Court (Rains)*, 10 Cal.App.4th 1374, 1384 (1992). The defendants alleged the claims were the same, but never offered a comparison of the facts in each, and neither did the trial court when it granted the demurrer. A comparison would have shown, for example, that a claim for elder abuse was never asserted in *any* prior actions.

**[Extrinsic Fraud]** The trial court ruled that plaintiffs' complaint did not establish extrinsic fraud, App. 10, citing *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 10 (1998), which describes intrinsic fraud as something like "the presentation of false evidence or the suppression of evidence," such as perjury or destroying evidence. Extrinsic fraud, on the other hand, prevents a party from having a fair day in court. "A party may attack a judgment when the extrinsic fraud of the other party has deprived him of an opportunity to present his case or obtain a fair adversary hearing." *Craney v. Low*, 46 Cal.2d 757, 759 (1956). The leading case of *Caldwell v. Taylor*, 218 Cal. 471, 479 (1933) says it is extrinsic fraud if "the unsuccessful party was prevented by his adversary from presenting all of his case to the court." *Granzella v. Jargoyhen*, 43 Cal.App.3d 551, 556

(1974) says “the courts are liberal in determining facts which constitute extrinsic fraud.” A case can have both. As asserted in the Application, App. 4, plaintiffs alleged concealment that resulted in an unfair hearing.

**[Statute of Limitations]** The trial court said Count 6 [unjust enrichment] was barred by the statute of limitations, but does not say which statute. App. 11.

A time bar must appear “clearly and affirmatively” on face of the complaint. “It is not enough that the complaint might be time-barred.” *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors*, 48 Cal.4th 32, 32 (2010). The Declaration of Zach Cowan (p. 4, citing Exhibit V) stated the judgment in the receiver case was “entered on July 17, 2015.” App. 5. The statute of limitations for injury to real property and for fraud are both 3 years. See California Code of Civil Procedure § 338(b) and (d).) Three years had not passed when the trial court ruled.

**[Elder Abuse]** The trial court said Count 8 does not show the Richersons assisted in appropriating plaintiff’s property as elder abuse is defined. App. 11.

Elder abuse includes taking or assisting in taking property of an elder adult for a wrongful use or with intent to defraud. Calif. Welfare & Institutions Code § 15610.30 (a).) App. 5. Property is taken for a “wrongful use” if the taker knew or should have known his conduct is “likely to be harmful” to the elder adult. Calif. Welf. & Instit. Code § 15610.30 (a). Plaintiff adequately stated a claim. See *Elder v. Pac. Bell Tel. Co.*, 205 Cal.App.4th 841, 858 (2012) [complaint only needs “particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action”].

**[Conspiracy]** The trial court said Count 9 does not show the defendants engaged in a conspiracy. App. 11. The complaint's introductory paragraph says, " Each paragraph alleged is intended to apply to each cause of action against each defendant." The complaint describes in great detail what the municipal defendants did to deceive plaintiff and prevent him from receiving a fair trial, and Paragraph 5 alleges the Richersons (who bought the property) acted in concert with Korman & Ng (the real estate agent) with regard to the acts and omissions described herein, and participated in the sale of Ghosh's property. Paragraph 47 alleges the Richersons conspired to commit the wrongful acts or omissions described in the foregoing paragraphs, and "knew their co-conspirators intended to commit those wrongful acts or omissions and agreed to cooperate in furtherance thereof." That is sufficient to allege knowing joint action by all defendants. App. 5-6.

**[Statutory Duties]** The trial court says Count 5 [Failure to discharge Mandatory Duties] does not cite an applicable statute. App. 8. Calif. Code of Civil Procedure § 568.5 authorizes a receiver to sell property upon the notice & manner in Article 6 [commencing with § 701.510 of the Code]. App. 6. Section 701.540 requires notice of the sale be served on the judgment debtor and occupants. The complaint (para. 42) says receiver gave no notice to petitioner of the intended sale. *People v. Riverside University*, 35 Cal.App.3d 572, 583 (1973) merely said a court can prescribe a different "mode" of sale that is in "the best interest of the parties" (there, "sell unneeded furniture and equipment"). Notice and an opportunity to be heard is basic to a fair trial, and a court cannot dispense with it.



**[Inverse Condemnation]** The trial court said the inverse condemnation claim (Count 1) does not allege the property was taken for a public use. App. 8. But Paragraph 37 of the complaint clearly says the property was taken “allegedly for the public use of abating a nuisance.” App. 6. Not only that, but the defendants’ own Points & Authorities (at p. 13), after stating that the complaint does not allege a taking for a public use, then states that the complaint alleges a taking of Ghosh’s real property, “allegedly for the public use of abating a nuisance.”

**[Leave to Amend Must Be Granted]** The court says Count 1 did not allege the Fifth Amendment claim was made pursuant to 28 U.S.C. § 1983. App. 8. That can be corrected by a simple amendment adding the words “in violation of 28 U.S.C. § 1983.” App. 6. If a defect can be cured by amendment, leave should be granted. *Goodman v. Kennedy*, 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 384 (1976) [court abuses its discretion if it sustains a demurrer without leave to amend “if there is any reasonable possibility that the defect can be cured by amendment”].

**[Irregularities in Amendment of Pleadings Not Grounds for Demurrer]** The trial court said plaintiff did not ask for leave to sue certain City in violation of California Rules of Court, Rule 3.1324 [Requirements for Motion to Amend Pleadings]. App. 7. Failure to comply with a rule of court is not one of the grounds for a demurrer. App. 6. Rule 3.1324 merely describes what must be in a “motion to amend a pleading.” There was no motion pending. Leave to amend should be freely granted, and “failure to obtain leave” or even violation of a court order is not grounds for demurrer. Calif. Code of Civil Procedure § 430.10.

**[Trial Court Names Wrong Attorney]** The trial court in its order said the attorney who appeared in “limited scope” as IIBB’s

attorney was "James Gallagher," who is an inactive attorney, so the entity was not represented by counsel. App. 11. But the Application asserted that "James Gallagher" did not appear for petitioner or IIBB; rather, James O'Gallagher, Bar No. 97088, of Hayward appeared for IIBB, which means IIBB was properly represented by counsel. App. 6. Attorney O'Gallagher is active and fully licensed. Rule 3.36(a) says an attorney "may" file a written form giving notice of such limited scope representation, but it does not say the form is mandatory.

#### WHY THE PETITION SHOULD BE GRANTED

The First Amendment guarantees the right of the people to petition the Government for a redress of grievances, and the Fourteenth Amendment prohibits the States from depriving any person of property without due process of law.

The procedure adopted by the California Court of Appeal for a vexatious litigant to apply for permission to appeal allows the submission to the court of only one paper, the applicant's Application for Permission to Appeal. The appellate court's docket shows there was no record on appeal, no opposition from opposing parties, and no other pleadings or papers.

In order to give meaningful access to the courts, the appellate court must of necessity accept the statements in the application as true.

The Fourteenth Amendment guarantees "due" process, in other words, fair and reasonable process. A cause of action is a property interest. *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 807

(1985) (“[A] chose in action is a constitutionally recognized property interest. . . .”); *Mullane v. Central Hanover Trust*, 339 U.S. 306, 313 (1950) (noting that the right to have others “answer for negligent or illegal impairment of . . . interests” is a form of property right). Once a person has filed his claim, the State assumes control over its disposition, and cannot not simply deny the claim without reasonable consideration, because to do so would be the equivalent of the State depriving a person of property without due process of law. Put another way, the Due Process Clause guarantees a fair response by the State—something the State ignored here.

Petitioners raised the due process guarantee in their Petition for Review submitted to the California Supreme Court, at p. 8 and p. 9.

In addition, the Petition Clause of the First Amendment mandates that the State must allow the people to come to it. The ability to apply for justice is the starting point of all justice.

Here the only reason given for denying Ghosh’s Application was the terse statement that “Mr. Ghosh has failed to show a reasonable possibility that his appeal has merit.” But it is apparent that at least some of petitioners’ claims have merit. For example, the Application stated that one of the grounds for the trial court’s sustaining the demurrer was that the claim for inverse condemnation did not allege that the property was taken for public use, when in fact Paragraph 37 of the complaint stated that the property was taken “allegedly for the public use of abating a nuisance.” If that were not enough, the Application points out that the City’s own Points and Authorities in support of the demurrer state that the

complaint alleges a taking of Ghosh's real property, "allegedly for the public use of abating a nuisance."

Nor could petitioners' claims be barred by a statute that describes a defense to an action for defamation, something that has nothing to do with petitioners' claims.


The Application points out that another ground for sustaining the demurrer was that petitioner's claim for elder abuse was barred by collateral estoppel in a prior case, and then asserts that Ghosh never made a claim of elder abuse before.

Petitioners could go on, but it is readily apparent that the Application did describe several valid reasons why the appeal had merit, yet the Application was summarily denied, without explanation.

Petitioners assert that the procedure utilized by the California Court of Appeal affords him no procedural safeguards, and allow the State to deny his appeal without giving due consideration to his claims, that is, the appellate court did not make a fair response to the Application. And IIBB had not been declared a vexatious litigant; it did not even have to apply for permission to appeal or show that the appeal had merit.

There must be minimal procedural safeguards for litigants when a court addresses whether proposed litigation has merit. The court should grant the petition to establish these safeguards.

Respectfully submitted,

  
Rash B. Ghosh  
*Pro Se*