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IN THE SUPREME COURT OF FLORIDA

KATIE D. TUCKER,

Petitioner/Defendant,

vs. CASE NO. 80,991

DONALD GEORGE RESHA,

Respondent/Plaintiff.

_____/

REVIEW OF A CERTIFIED QUESTION OF THE FIRST DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT BY AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Statutes

Rules

PRELIMINARY STATEMENT

The American Civil Liberties Union Foundation of Florida, Inc. (ACLU) has petitioned this Court to file a brief of amicus curiae in support of the Respondent. ACLU will not argue the specific facts and merits of the decision by the trial court and the district court of appeal in this case. ACLU will address only the legal and public policy issues regarding the certified question.

STATEMENT OF THE CASE

ACLU adopts the statement of the case as set forth in Respondent's answer brief on the merits.

STATEMENT OF THE FACTS

ACLU adopts the statement of the facts as set forth in Respondent's answer brief on the merits.

SUMMARY OF THE ARGUMENT

While state courts hearing cases brought under 42 U.S.C. § 1983 are bound by the United States Supreme Court's substantive construction of the statute, they may proceed in matters of practice and procedure in accordance with state and local procedural rules. Under Florida procedural law a denial of summary judgment is not a final appealable order. Therefore, a denial of qualified immunity upon a motion for summary judgment cannot be appealed until final judgment.

In federal courts, denials of qualified immunity are not

immediately appealable when resolution of the immunity defense depends upon disputed factual issues or upon mixed questions of fact and law. Because this case turned on disputed factual issues, even in federal courts, Petitioner's request for interlocutory appeal would be denied.

Finally, Justice Brennan's fear that the right to an interlocutory appeal from denial of qualified immunity would enable defendant officials to delay "litigation endlessly with interlocutory appeals," thus denying "full and speedy justice to those plaintiffs with strong claims on the merits and [causing] a relentless and unnecessary increase in the caseload of the appellate courts"[1] has turned out to be justified.

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[1] Mitchell v. Forsyth, 472 U.S. 511, 556 (1985) (Brennan, J., dissenting).

ARGUMENT

DENIALS OF QUALIFIED IMMUNITY UPON MOTIONS FOR SUMMARY JUDGMENT ARE NOT FINAL APPEALABLE ORDERS UNDER FLORIDA PROCEDURAL LAW AND IN CASES INVOLVING FACTUAL ISSUES, ARE NOT APPEALABLE IN THE FEDERAL COURTS

A. BECAUSE THE RIGHT TO AN INTERLOCUTORY APPEAL FROM AN ORDER DENYING QUALIFIED IMMUNITY STEMS FROM AN INTERPRETATION OF THE FEDERAL COURTS' FINAL JUDGMENT RULE AND COLLATERAL ORDER DOCTRINE, WHICH ARE UNIQUELY APPLICABLE TO FEDERAL COURTS, FLORIDA APPELLATE RULES APPLY AND MANDATE THAT THESE NONFINAL ORDERS ARE NOT APPEALABLE

The general rule in federal practice is that the denial of a motion for summary judgment is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits. 28 U.S.C. § 1291. While the federal courts of appeals generally hear appeals only from "final decisions" of the district courts, see 28 U.S.C. § 1291, the Supreme Court has carved out a narrow class of interlocutory decisions ("collateral orders"), which are viewed as final decisions that are immediately appealable in the federal courts. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Under the collateral order doctrine, an interlocutory order is immediately appealable if it conclusively determines an issue that is completely separate from the merits of the action and is "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

Petitioner asserts that the trial court's denial of her motion for summary judgment is a final appealable order based on the holding in Mitchell v. Forsyth, 472 U.S. 511 (1985), where the

United States Supreme Court held:

> that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.

Id. at 530 (emphasis added).

The Mitchell case carves out a very narrow exception to the general rule. In Mitchell, plaintiff alleged that the United States Attorney General engaged in unconstitutional conduct in performing his national security functions. The Mitchell court reasoned that, because the qualified immunity defense was conceptually distinct from plaintiff's underlying constitutional claim, see Mitchell, 472 U.S. at 524-530, a denial of summary judgment based on qualified immunity that turns on an issue of law is immediately appealable within the federal court system.

Although a claim based upon 42 U.S.C. § 1983 presents a federal question to which defendants may assert federal defenses, the state of Florida is not bound by federal procedural rules. See Erie RR. Co. v. Tompkins, 304 U.S. 64 (1938). Though state courts are bound to follow the United States Supreme Court's interpretation of the substantive law regarding Section 1983 cases, the procedural practice in Florida is that a denial of summary judgment is not a final appealable order.[2] See Fla. R. App. P. 9.030(b)(1); 9.130.

As the First District held in this case:

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[2] The Supremacy Clause cannot create jurisdiction in a state appellate court where it does not otherwise exist.

> The constitutional law of Florida defines the jurisdictional limits of the district courts of appeal. See Fla. Const. art. V § 4(b). Although we may take notice of Mitchell and its progeny in interpreting the jurisdictional provisions governing this court, Florida law must control. See Klindtworth [v. Burkett], 477 N.W.2d 176, 181 (N.D. 1991) (dismissing interlocutory appeal from order denying summary judgment on qualified immunity claim in section 1983 suit, where state appellate procedural rules provided no jurisdictional basis and court rejected argument that "special nature of immunity defense" justified immediate relief).

Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992) (per curiam) (emphasis added). Other state courts have refused to allow the immediate appeal of these type of orders. See, e.g., Pizzato's v. City of Berwyn, 169 Ill. App. 3d 796, 523 N.E.2d 51 (1988); Noyola v. Flores, 740 S.W.2d 493 (Tex. Ct. App. 1987). Therefore, petitioner's assertion that federal case law creates new state procedural law is unfounded.

B. DENIALS OF QUALIFIED IMMUNITY ARE NOT IMMEDIATELY APPEALABLE WHEN RESOLUTION OF THE IMMUNITY DEFENSE DEPENDS UPON DISPUTED FACTUAL ISSUES OR UPON MIXED QUESTIONS OF FACT AND LAW

Even if Mitchell could be applied to state court proceedings, Mitchell's narrow holding would not apply to this case.

The language in Mitchell v. Forsyth which is relevant here is "to the extent that it turns on an issue of law." If qualified immunity can be determined as a matter of law, the federal courts can hear the appeal. If resolution of the immunity defense depends upon disputed factual issues, or upon mixed questions of fact and law, an immediate appeal will not lie, and review of the qualified immunity determination has to await the district court's resolution of the factual questions. See Bennett v. Parker, 898 F.2d 1530

(11th Cir. 1990); Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991); Moffitt v. Town of Brookfield, 950 F.2d 880 (2d Cir. 1991); Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1991), cert. denied, 112 S. Ct. 1939 (1992); Velasquez v. Senko, 813 F.2d 1509 (9th Cir. 1987); Chinchello v. Fenton, 805 F.2d 126, 131 (3d Cir. 1986).

Thus, Mitchell does not render "final" for purposes of Section 1291 every district court decision denying a public official's motion for summary judgment. Mitchell confers jurisdiction on a federal court of appeals only to review issues of law relating to the qualified immunity issue of whether the defendant's conduct violated clearly established legal norms.

In cases where officials claim only that they did not know about or had nothing to do with the events of which the plaintiff complains -- purely factual questions -- the appeal of a denial of summary judgment is unrelated to qualified immunity and is dismissed for want of jurisdiction. Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991).

This case involves an appeal of nothing but factual issues. Petitioner's qualified immunity defense relies entirely on two factual questions: whether Petitioner was the one who in fact ordered the tax audit of the respondent (Count IV of Respondent's Complaint); and whether Petitioner was the one involved in the cover-up (Count VII). See Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992); Petitioner's Brief on the Merits, at pg. 3. As the First District explained,

> Tucker [Petitioner] essentially admitted that Resha's [Respondent] seeking a union office is a clearly

> established, constitutionally protected activity under Mitchell and Harlow. Our independent research has disclosed ample decisional authority to show the First Amendment guarantees of free speech and association include the protection of an individual's right to join and participate in a labor union.

Id. Thus, as the First District makes clear, Petitioner does not contend that she acted in the shadow of legal uncertainty. The only points of contention involve whether Petitioner was the person who engaged in the unlawful conduct. Her appeal, therefore, is unrelated to qualified immunity and should be dismissed for want of jurisdiction.

C. THIS COURT SHOULD PROHIBIT MITCHELL APPEALS IN FLORIDA COURTS BECAUSE THEY CREATE AN UNNECESSARY DRAIN ON JUDICIAL RESOURCES AND AN UNDUE BURDEN UPON ECONOMICALLY UNEQUAL LITIGANTS

Justice Brennan's dissenting opinion in Mitchell was prophetic. He accurately predicted that the right to an interlocutory appeal from denial of qualified immunity would enable government officials to delay "litigation endlessly with interlocutory appeals," thus denying "full and speedy justice to those plaintiffs with strong claims on the merits and [causing] a relentless and unnecessary increase in the caseload of the appellate courts." Mitchell v. Forsyth, 472 U.S. 511, 556 (1985) (Brennan, J., dissenting).

After Mitchell, Section 1983 plaintiffs have been burdened, and the courts of appeals deluged, with unprecedented numbers of interlocutory appeals from denials of qualified immunity. Judge Easterbrook of the Seventh Circuit observed that interlocutory appeals from denial of qualified immunity are frequently harmful to

civil rights claimants and the judicial system:

> During the appeal memories fade, attorney's meters tick, judges' schedules become chaotic . . . . Plaintiff's entitlements may be lost or undermined. Most deferments will be unnecessary. The majority of Forsyth appeals -- like the bulk of all appeals -- end in affirmance. Defendants may seek to stall because they gain from delay at plaintiff's expense, an incentive yielding unjustified appeals. Defendants may take Forsyth appeals for tactical as well as strategic reasons; disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal . . . .

Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989). See also Schwartzman v. Valenzuela, 846 F.2d 1209, 1210 (9th Cir. 1988), disparaging officials for considering "it mandatory to bring these [interlocutory] appeals from any adverse ruling, no matter how clearly correct the trial court's decision."

Furthermore, as Judge Easterbrook has warned:

> Unless courts of appeals are careful, appeals on the authority of Mitchell could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. Although it is important to protect public officials from frivolous claims and burdens of trials, it is also important to curtail the outlay and delay of litigation, so that victims of official misconduct may receive the vindication that is their due. . . .

Abel v. Miller, 904 F.2d 394, 396 (7th Cir. 1990).

The added cost and delay of these endless appeals in the especially important area of civil rights litigation could be extremely detrimental to those who wish to vindicate their constitutional rights. Section 1983 claims are normally brought by public employees, prisoners, mental patients, recipients of public

benefits, students, consumers, and others who do not have endless resources at their disposal. If these litigants are further deterred from bringing Section 1983 suits due to the added cost and delay of Mitchell appeals, landmark constitutional cases -- such as Brown v. Board of Education and Roe v. Wade -- may never be heard.

In addition, the disallowance of Mitchell appeals will decrease costs not only for plaintiffs, but for defendants as well. The bulk of all appeals end in affirmance. Apostol, 870 F.2d at 1339. Accordingly, if defendants were to appeal orders denying their qualified immunity defense, they would almost certainly be affirmed and remanded, and then the suits would go to trial. Thus, for all the delay and expense of the appeal, both parties would still be in the position of having to litigate at trial. Justice would still be served without a Mitchell appeal for the defendant would still have the right to appeal the trial court's final judgment, all without the added expense of a previous Mitchell appeal.

Because the vast majority of appeals end in affirmance, the argument that Section 1983 defendants will be forced to remove their cases to federal courts in order to receive the right to a Mitchell appeal is disingenuous. First, there is no incentive to remove a case to federal court when it will simply add more costs and delays and ultimately end in affirmance of the trial court's summary judgment decision. Second, in cases such as this where there are only issues of fact, the Eleventh Circuit has firmly held that it would not hear the appeal. "[T]his court has consistently

held that denial of a motion for summary judgment based on a claim of qualified immunity is not a final appealable order if the claim is denied because the case turns on factual questions in dispute." Bennett v. Parker, 898 F.2d 1530, 1532 (11th Cir. 1990) (citing cases). Thus, there would be no reason for a defendant, such as Petitioner, to remove to federal court only to be denied an appeal. In sum, scarce judicial resources would be saved and costs to all parties would be minimized, if Mitchell appeals were prohibited in Florida courts.

CONCLUSION

For the above and foregoing reasons, this court should affirm the judgment below.

Respectfully submitted,

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