IN THE SUPREME COURT OF FLORIDA

KATIE D. TUCKER,

Petitioner/Defendant, CASE NO.: 80,991

vs.

DONALD GEORGE RESHA,

Respondent/Plaintiff.
_____/

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

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PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner may sometimes be referred to as "Tucker", while respondent may be referred to as "Resha." References to the record are to the Appendix to Petitioner's Brief on the Merits, containing documents considered by the District Court of Appeal and the trial court, which shall be designated "Pet. App. __".

STATEMENT OF THE CASE

This proceeding at the trial court level is Donald George Resha, Plaintiff, v. Katie D. Tucker, Defendant, Second Judicial Circuit, Leon County, Case No. 90-454. Tucker's petition before the First District Court of Appeal was Case No. 92-1744.

Resha filed a multi-count amended complaint against Tucker, including two civil rights claims. Pet. App. A. Tucker asserted qualified immunity as a defense to both claims. Pet. App. B. Tucker's motion for summary judgment on the civil rights claims, based on her qualified immunity defense, was denied. Pet. App. C, J.

Tucker's petition to the First District was denied, Tucker v. Resha, 17 Fla. Law Weekly D2388 (Fla. 1st DCA October 12, 1992), but that court certified the following question as one of great public importance, Tucker v. Resha, 18 Fla. Law Weekly D189 (Fla. 1st DCA December 30, 1992):

> IS A PUBLIC OFFICIAL ASSERTING QUALIFIED IMMUNITY AS A DEFENSE TO A FEDERAL CIVIL RIGHTS CLAIM ENTITLED IN THE FLORIDA COURTS TO THE SAME STANDARD OF REVIEW OF DENIAL OF HER MOTION FOR SUMMARY JUDGMENT AS IS AVAILABLE IN THE FEDERAL COURTS?

Tucker then petitioned this Court, asking that the certified question be answered in the affirmative and that judgment be entered in her favor on the civil rights claims.

STATEMENT OF THE FACTS

Respondent (plaintiff below) filed a multi-count amended complaint for damages in March, 1990. Pet. App. A. Petitioner (defendant below) answered, denying liability and asserting affirmative defenses of absolute privilege and qualified immunity to the state and federal claims. Pet. App. B.

On March 31, 1992, petitioner moved for summary judgment on all four remaining counts: defamation under state tort law principles (Count I); invasion of privacy under the Florida Constitution (Count III); violation of First Amendment rights under 42 U.S.C. § 1983 (Count IV); and, civil rights coverup under 42 U.S.C. § 1983 (Count VII). Pet. App. C. In support of the motion for summary judgment, petitioner submitted her affidavit. Pet. App. D. Respondent relied solely upon the deposition of petitioner Tucker. Pet. App. E. Hearing was duly noticed for April 21, 1992. Pet. App. F. The motion for summary judgment was heard on April 21, 1992. Pet. App. G. The trial court announced that it would deny summary judgment as to Counts I, III and VII, but would allow further written argument as to Count IV. Pet. App. G, p. 40 et seq. Respondent and petitioner submitted additional memoranda on the summary judgment motions. Pet. App. H as to respondent; Pet. App. I as to petitioner. On Friday, May 22, 1992, the court entered its "Order Denying Motion for Summary Judgment". Pet. App. J.

Facts unchallenged by respondent include the following, Pet. App. D:

> 1. Petitioner served as Executive Director of the Florida Department of Revenue from June, 1988, to February, 1990.
>
> 2. As Executive Director, petitioner had full discretionary authority to order tax investigations and audits of persons subject to tax liability under the laws of Florida, and this authority was part of the normal duties delegated to the Executive Director pursuant to chapter 213, Florida Statutes.
>
> 3. As part of petitioner's on-going responsibilities as Executive Director, she conveyed to members of the Department's investigative and auditing staff any information about persons subject to tax liability under the laws of Florida which came to her attention, from confidential or other sources.
>
> 4. In the normal course of the Department's business, tax investigations and audits are undertaken to determine if administrative action needs to be initiated to secure payment of taxes owed the State of Florida by persons subject to Florida's tax laws, and such administrative action can culminate in quasi-judicial administrative proceedings.
>
> 5. Petitioner did not, at any time during her service as Executive Director of the Florida Department of Revenue, personally participate in any tax investigation or audit of respondent or any business owned by respondent.
>
> 6. Petitioner did not, at any time during her service as Executive Director of the Florida Department of Revenue, personally release to the public or cause to be released to the public any information regarding respondent or any tax investigation or audit which may have been conducted with regard to him or any business owned by him.

SUMMARY OF ARGUMENT

A public official defending a federal civil rights claim is entitled to assert the defense of qualified immunity, which has been found to include the substantive right not to be compelled to even stand trial, and not simply the right to avoid a damages judgment. Recognizing that the public official's right not to stand trial is completely lost by overruling the qualified immunity defense and proceeding with the trial, the federal courts have interpreted the federal statute and this defense in particular as requiring appellate review when sought.

The courts of this State should be consistent with the federal courts in their treatment of these same rights when the state courts interpret and apply federal defenses to federal statutes. In doing so, the state courts should ensure that the substantive rights of public officials are at least as well-protected in their own courts as they are in the federal system, and accord public officials a right of appeal from the denial of a motion for summary judgment on the qualified immunity defense.

In analyzing this federal defense on appeal, the Florida courts should apply the same method of scrutinizing the facts and law that had been presented to the trial courts as do the federal appeals courts. Were the Florida courts to allow denials of summary judgment motions to stand, when federal courts clearly would not, would create an unequal system of justice, under precisely the same facts and law.

Even under existing Florida law, the conclusion of the First District, that a plaintiff may withstand a summary judgment motion by unsworn pleadings alone, is in error and should be reversed.

ARGUMENT

I. A PUBLIC OFFICIAL ASSERTING QUALIFIED IMMUNITY AS A DEFENSE TO A FEDERAL CIVIL RIGHTS CLAIM IS ENTITLED IN THE FLORIDA COURTS TO THE SAME STANDARD OF REVIEW OF DENIAL OF HER MOTION FOR SUMMARY JUDGMENT AS IS AVAILABLE IN THE FEDERAL COURTS.

Petitioner is a former public official of the State of Florida charged by respondent with, among other things, having violated his federal civil rights while she held office. The trial court denied petitioner's motion for summary judgment based on a qualified immunity defense to the federal civil rights claims. Petitioner, recognizing that there was no existing Florida appellate rule establishing a right of interlocutory appeal under such circumstances, sought review by certiorari.

The District Court of Appeal decided that, even though permitted under well-established federal case law, no interlocutory appeal right from denials of motions for summary judgment based on qualified immunity would be engrafted onto the Florida appellate rules; that certiorari was the appropriate vehicle for review of such a denial; and that, under the stringent scope of certiorari review, relief would not be granted.[1]

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[1]The District Court of Appeal concluded, despite its recognition of petitioner's "substantive federal right not to stand trial", and notwithstanding its acknowledgement that petitioner's "claim of qualified immunity from suit involves a type of protection that cannot be effectively or adequately restored by an appeal, once it is lost by exposure to trial", that "Florida law must control", and that "the governing Florida appellate rules . .

Even though the only vehicle currently available for appellate review in Florida courts of a denial of a motion for summary judgment is a petition for writ of certiorari, in cases such as this the standard of review should be that available in federal court to a public official asserting a qualified immunity defense to a 42 U.S.C. §1983 federal civil rights damages claim. Petitioner has a federal constitutional right to be accorded in state court the same standard of review of the denial of her federal qualified immunity defense she would have in federal court. In Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 2442, 110 L.Ed. 2d 332 (1990), the United States Supreme Court made it clear that, while state procedures govern actions in state courts, "[t]he elements of, and the defenses to, a federal cause of action are defined by federal law." (emphasis supplied) The District Court's determination that it would "not afford the type of relief provided in the federal courts" when considering petitioner's defenses to a federal cause of action is inconsistent with Howlett and the Supremacy Clause. Felder v. Casey, 487 U.S. 131, 151, 108 S.Ct. 2302, 2313-14, 101 L.Ed. 2d 123, 146 (1988) (state courts are

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. do not afford the type of relief provided in the federal courts. . . ." The District Court stated that it felt so constrained because "[t]he constitutional law of Florida defines the jurisdictional limits of the district courts of appeal." Tucker v. Resha, 17 Fla. Law Weekly D2388, D2389 (Fla. 1st DCA October 12, 1992).

required under the Supremacy Clause to proceed in a manner that protects the substantial federal rights of the parties).[2]

The District Court's decision means that petitioner must defend herself at a trial of the civil rights claims before having a right to appeal the denial of her qualified immunity defense, an event the federal qualified immunity defense is specifically designed to avoid.[3] The impact of the decision is much broader than that because now any citizen, taxpayer or tax evader can force a public official to trial merely by alleging in his complaint that his civil rights were violated, without offering any facts to support those allegations before trial. With such an advantage to be had in the courts of this state, plaintiffs will have the opportunity to engage in blatant forum shopping, officials may be bludgeoned into economically expedient settlements, the state trial courts may be deluged with long and complicated trials, and the

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[2]This is not a mere procedural issue. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985), accords petitioner a substantive federal right not to stand trial. Rich v. Dollar, 841 F. 2d 411 (11th Cir. 1988) (appeal should not be deferred until whole case adjudicated); Marx v. Gumbinner, 855 F. 2d 783, 788-89 (11th Cir. 1988) (appellate review guaranteed despite delay in consideration before trial court); Green v. Brantley, 941 F. 2d 1146 (11th Cir. 1991) (immediate appeal available even though other pending claims remain as to which qualified immunity inapplicable; case may proceed to trial on other claims).

[3]An order denying summary judgment, especially on the last business day before trial, amounts to a final order denying a public official's right not to stand trial. Deprivation of that right, without any right of state court appeal, amounts to a declaration that the trial court stands as the court of last resort in the state court system and as the final arbiter of the right not to stand trial at all, denies public officials appellate due process, and unfairly impairs their access to the appellate courts.

public may be deprived of the focused efforts of its top public officials in running the government. These consequences are not at all in keeping with the purpose of the federal qualified immunity defense, the purpose of which was, indeed, to avoid just such situations.[4]

The remedy is straightforward and appropriate. The district courts are constitutionally authorized to review "interlocutory orders [from trial courts] to the extent provided by rules adopted by the supreme court." Art. V, §4(b)(1), Fla. Const. This Court could, and petitioner believes should, amend Florida Rule of Appellate Procedure 9.130(a)(3) by adding the following language:

> (3) Review of non-final orders of lower tribunals is limited to those which:
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> * * *
>
> (C) determine:
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> * * *
>
> (vii) that a public official is not entitled to summary judgment premised upon the defense of qualified immunity to a federal civil rights damages claim.

Or, the Court could amend Rule 9.030 by adding the following clarification:

> (b) Jurisdiction of District Courts of Appeal.
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> * * *

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[4]The District Court's opinion observed that decisions of other states in which a right of interlocutory appeal was found to be essential were "merely persuasive", but apparently not persuasive enough. Tucker, 17 Fla. Law Weekly at D2389. Although faced with different procedural avenues and jurisdictional concerns, the reasoning of other state courts on this issue merits examination. See, e.g., McLin v. Trimble, 795 P. 2d 1035 (Okl. 1990); Breault v. Chairman of Bd. of Fire Comm'nrs of Springfield, 401 Mass. 26, 513 N.E. 2d 1277, cert. den., 485 U.S. 906, 108 S.Ct. 1078, 99 L.Ed. 2d 237 (1987); Anderson v. City of Hopkins, 393 N.W. 2d 363, 364 (Minn. 1986) (recognizing the analogy to situations presented in cases like Sherrod v. Franza, 427 So. 2d 161 (Fla. 1983)).

(5) Final Orders. Final orders include those orders or judgments determining that a public official is not entitled to summary judgment premised upon the defense of qualified immunity to a federal civil rights damages claim.

An amendment to procedural rules in direct response to the issues joined in a case before the Court is certainly not novel. Mandico v. Taos Constr., Inc., 605 So. 2d 850, 854-55 (Fla. 1992) (amending Rule 9.130(a)(3)); Timmons v. Combs, 608 So. 2d 1, 3 (Fla. 1992) (adopting section 768.79 as a rule of court).

II. QUALIFIED IMMUNITY BARS THE FEDERAL CIVIL RIGHTS CLAIMS UNDER A FEDERAL STANDARD OF REVIEW.

Respondent failed to support his federal civil rights claims under the law or the facts; the qualified immunity defense bars the claims.

Respondent, as plaintiff, carries the burden of showing both the existence of constitutional rights that were allegedly violated by the defendant public official and that those constitutional rights were clearly established at the time the alleged violations took place. McDaniel v. Woodard, 886 F. 2d 311, 313 (11th Cir. 1989). In seeking to determine whether respondent had met this burden, the District Court correctly noted that petitioner had admitted paragraph 35 of the amended complaint, which alleged that respondent had certain inalienable rights under the first Amendment, including the right to associate with others by seeking union office. Petitioner's admission, however, amounted to nothing more than the ackowledgement of a "broad legal truism." Id. at 314. "'The words 'clearly established . . . constitutional rights' may

not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms. . . .'" Id. at 313-14, quoting Azeez v. Fairman, 795 F. 2d 1296, 1301 (7th Cir. 1986). A generalized constitutional right is not "a clearly established right in the particular factual context presented." Polenz v. Parrott, 883 F. 2d 551, 554 (7th Cir. 1989). Under the required objective test, measured by case law and not by the Constitution alone, the respondent must come forward with case law establishing that the right alleged is clearly established "in relation to the specific facts confronting the public official when he acted." Colazzi v. Walker, 812 F. 2d 304, 308 (7th Cir. 1987) (emphasis supplied). While the cases need not be factually identical to the instant situation, they must at least be factually analagous. Rakovich v. Wade, 850 F. 2d 1180, 1209 (7th Cir. 1988). The cases relied upon by respondent and those cited by the District Court explain to a public official in the context of this case no more than the generalizations of paragraph 35.

In his amended complaint, respondent alleged that petitioner called for an audit and investigation of his businesses and that she was motivated to do so because respondent had unsuccessfully run against petitioner's husband for a position with a union. There are no cases that even remotely deal with similar claims, and certainly none which establish such a constitutional right in the particular facts of this case. See Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As in Sims v.

Metropolitan Dade County, 972 F.2d 1230, 1236 (11th Cir. 1992), First Amendment rights do not automatically protect citizens against governmental action, such as tax audits and investigations.

The qualified immunity inquiry does not end there. "Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." Mitchell v.Forsyth, 472 U.S. at 526. When the federal defense of qualified immunity is presented, the party defending against the motion for summary judgment cannot simply "rest on his pleadings." Wright v. South Arkansas Regional Health Center, Inc., 800 F.2d 199, 204 (8th Cir. 1986). Unconstitutional motivation is not established by claims amounting to "mere allegations of malice." Id. And under the circumstances here, "past political disagreements are not a sufficient basis . . . on which to base a reasonable inference of present retaliatory motive." Id. at 205.

Although respondent need not produce a "smoking gun", the Court is obligated "to scrutinize each piece of admissible circumstantial evidence in isolation and then in combination with all other pieces of admissible circumstantial evidence to determine whether all admissible pieces establish" the claim. Burrell v. Bd. of Trustees of Ga. Military College, 970 F.2d 785, 793 (11th Cir. 1992) (summary judgment should have been granted on qualified immunity defense to a section 1983 claim of conspiracy to deprive

plaintiff of First Amendment rights where the allegations "collapsed under the weight of depositions"). The only admissible evidence before the Court is the sworn testimony of petitioner by deposition[5] and affidavit. Petitioner's deposition establishes that she did not take any retaliatory actions against respondent; petitioner did not request an investigation of respondent's businesses;[6] petitioner had no animosity towards respondent;[7] and, petitioner did not authenticate documents prepared by others which were shown to her during the course of the deposition.[8]

Respondent offered absolutely no proof to counter the sworn denials by petitioner of the allegations in his complaint. Respondent submitted no affidavit, deposition, interrogatory answer, or anything under oath to support his bald assertions that petitioner abused her public office in an effort to deprive respondent of his federal civil rights. Inferences may not be drawn from the leading questions of respondent's attorney at petitioner's deposition, but only from her sworn responses, which stand as unequivocal denials of the underlying factual allegations urged in support of the federal civil rights claims. The admissible evidence demonstrates that the qualified immunity defense defeats the First Amendment retaliation claim.

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[5]Petitioner's deposition transcript was on file before the trial court at the time of the summary judgment hearing and is included in the record before the Court. Pet. App. E.

[6]Pet. App. E., pp. 89-91.

[7]Pet. App. E., p. 171.

[8]Pet. App. E., p. 320.

Similarly, and as the District Court concluded, petitioner denied the allegations of the civil rights cover-up under oath at her deposition.[9] Contrary to the Court's finding that "a genuine issue of material fact exists concerning whether the cover-up occurred",[10] there was no admissible evidence establishing a cover-up. Again, respondent cannot simply "rest on his pleadings." Wright, 800 F.2d at 204.

Thus, under the methodology of review of cases such as this in the federal system, petitioner's qualified immunity defense should have been upheld.

III. QUALIFIED IMMUNITY BARS THE FEDERAL CIVIL RIGHTS CLAIMS EVEN UNDER A CERTIORARI STANDARD OF REVIEW.

The trial court's denial of petitioner's motion for summary judgment, denying the qualified immunity defense to the federal civil rights damages claims, was a departure from the essential requirments of law.

The only evidence before the trial court was petitioner's affidavit, Pet. App. D., and deposition, Pet. App. E. Respondent offered no evidence to contradict the sworn testimony of petitioner. Respondent presented no affidavit as to his inability to muster evidence to defeat summary judgment.[11]

Respondent claimed that petitioner made defamatory remarks about him (that he was involved in organized crime and other

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[9]Tucker, 17 Fla. Law Weekly at D2391.

[10]Id.

[11]Rule 1.510(f), Fla.R.Civ.P.

illegal activities). Respondent claimed that petitioner caused the Florida Department of Revenue to target corporations he owns for audits and to target respondent for an investigation of such illegal activities. Respondent claimed that petitioner made the statements and directed the audits and investigation in 1988 to retaliate against respondent for running against, but losing to, petitioner's husband for president of a statewide federation of labor organizations in 1985, and to deter respondent from running against petitioner's husband in the 1989 election. Respondent claimed that when petitioner's statements and conduct were discovered in 1990 (after the 1989 election), she sought to reshape the written record to conceal the fact that her motivation had been to pursue a vendetta against her husband's competitor.

No evidence before the trial court at summary judgment supported any of those theories.

The evidence before the trial court established that the allegedly defamatory statements were not made or were not improperly published.[12] The evidence before the trial court established that petitioner did not direct any audits and investigations that improperly targeted respondent or his businesses.[13] The evidence before the trial court established that any actions taken and statements made bearing any relationship to

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[12]Pet. App. E, pp. 66, 67, 70, 71, 79, 106, 164, 173.

[13]Pet. App. E, pp. 89, 90, 103, 108-9, 115, 121, 122, 163, 165, 201, 247; Pet. App. D, ¶ 6.

respondent were in the scope of petitioner's official duties.[14] No improper motive was in evidence.[15] Audits and investigations, such as those allegedly conducted by the Florida Department of Revenue in this instance, were legal and proper.[16]

No genuine issue of material fact existed at the time of the summary judgment hearing. Summary judgment was proper under Landers v. Milton, 370 So.2d 368 (Fla. 1979), where this Court held:

> A movant for summary judgment has the initial burden of demonstrating the non-existence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist. Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla. 1965); Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); see Fla.R.Civ.P. 1.510.

Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So.2d 254 (Fla. 5th DCA 1985). Nor may respondent rely upon unauthenticated documents attached to a deposition transcript.[17] Unauthenticated exhibits may not be considered by the trial court, even if they might have raised an issue of fact had they been properly submitted. Tunnell v. Hicks, 574 So.2d 264 (Fla. 1st DCA 1991).

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[14]Pet. App. E, pp. 223, 224; Pet. App. D, ¶ 5.

[15]Pet. App. E, p. 171.

[16]Pet. App. E, p. 247; Pet. App. D, ¶¶ 2-5.

[17]Pet. App. E, p. 320.

The second prong of the Mt. Healthy test[18] requires that respondent show that the "substantial" or "motivating" factor in petitioner's alleged decision to retaliate against him was his constitutionally protected activity. But there was no evidence before the trial court tending to support any assertion that the substantial motivation for any act of petitioner was to retaliate against respondent or to chill his desire to run for AFL-CIO office. Even had the trial court considered the allegations of the unsworn amended complaint, petitioner's motivation could not be said to have been unlawful when the audit generated additional revenues for her agency. To the extent intent may be a factor in considering qualified immunity, improper motivation must be accompanied by some specific factual support. Rakovich v. Wade, 850 F.2d 1180, 1210 (7th Cir. 1988).

The so-called civil rights cover-up claim, premised upon an alleged denial of respondent's access to courts (Count VII), requires proof that there was an intentional and wrongful concealment of records or information critical to respondent's ability to present his claims and proof that the concealment and delay substantially prejudiced respondent's claims. Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983). Respondent submitted no evidence to contradict

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[18]Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977).

petitioner's denial of any "cover-up".[19] Respondent submitted no evidence of any prejudice caused by the alleged denial of access to courts.

Once petitioner established a prima facie case warranting summary judgment, it was incumbent upon respondent to present evidence sufficient to defeat summary judgment; respondent failed to do so. Respondent's casual approach to summary judgment should be fatal, as thoroughly explained in the qualified immunity analysis of Rich v. Dollar, 841 F.2d 1558, 1563-66 (11th Cir. 1988) (reversing denial of a Florida state attorney's investigator's summary judgment motion), in federal and state courts alike.

Conclusion

The trial court should have granted summary judgment to petitioner dismissing the federal civil rights claims because the law and the facts presented by respondent were insufficient to overcome petitioner's qualified immunity defense. The District Court should have reversed and directed that judgment be entered for petitioner.

The District Court should have accorded petitioner the same thoroughness of review and applied the same standard of review as would have been available in a federal appeals court. The hearing on the summary judgment motion was in a very real sense a final hearing on whether petitioner would have to stand trial; once that right is lost, a post-trial appeal is a wholly insufficient remedy.

Petitioner asks that this Court announce that there is a

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[19]Pet. App. E, pp. 223-4.

concomitant right of appeal in the courts of this State as has been found in federal court. That right of appeal should carry with it an entitlement to a careful and thorough scrutiny of the law and of the evidence before the trial court at the time of the summary judgment hearing. Such scrutiny in this case would require reversal and a direction to enter judgment for petitioner on these federal claims.

Even under Florida law existing at the time of the summary judgment hearing, it would not suffice for a party to rest on his pleadings in the face of sworn contradictory evidence. The conclusion of the District Court so holding should be reversed.

Respectfully submitted,

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