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 REPLY 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. __". References to documents found in the Appendix to Respondent's Brief on the Merits shall be designated "Resp. App. ___". References to documents found in the Appendix to Petitioner's Reply Brief on the Merits shall be designated "Reply App. ___".

REPLY STATEMENT OF THE CASE

Tucker's petition to the First District Court of Appeal was filed on the last business day before trial. The trial court's order denying summary judgment had been entered that same afternoon of May 22, 1992.

There was a jury trial on state law claims. Appeal arising therefrom is pending as Case Number 92-3118 before the First District. The record of that four-day trial has not been submitted to this Court. Respondent's assertion that "[t]he facts supporting the two Florida law claims are identical in every particular to the facts supporting the First Amendment claim" cannot be tested here. Respondent's Brief, p. 2.

REPLY STATEMENT OF THE FACTS

Petitioner takes issue with Respondent's Statement of the Facts. Respondent's Brief, p. 3-8.

Summary of Complaint

Respondent fairly characterized his allegations.

Facts of Record

Respondent's statement that "Tucker authenticated an internal Department of Revenue document stating that she had ordered investigations of Resha and that no criminal activity had been found. Pet. App. E., 87." is misleading, as Tucker did not authenticate any documents on the cited page of her deposition.

Respondent's statement that "Tucker admitted that division director Larry Wood confronted her with the assertion that she had assigned him to undertake the investigation of Resha. Pet. App. E., 89", is incorrect. The transcript reads: "Larry Wood said this was a case on Resha and this was Resha's store that I had assigned."

Respondent's statements purportedly based upon references to Pet. App. E., 104-106, 124, 135, are inaccurate, misleading, and reference unauthenticated documents.

Pet. App. E., 175, is not petitioner's testimony to the effect that "she may not have been telling the truth when she wrote that letter" to Ash Williams.

No admission is found at Pet. App. E., 183-184.

Although Senator Hill did not tell petitioner that Resha was guilty of a crime, others had. Compare Pet. App. E., 319 with 318.

There is no authenticated evidence in the record that any documents were falsified. Pet. App. E., 274, 277, 278, 279, 281.

REPLY ARGUMENT

I. THE PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION

A. DENIAL OF THE SECOND MOTION FOR SUMMARY JUDGMENT IS REVIEWABLE.

Review of the denial of the first motion for summary judgment would have been futile because the trial court had entered a protective order prohibiting Resha from taking Tucker's deposition, and that protective order was still in effect when the trial court considered Tucker's first motion for summary judgment. Resp. App. B; Reply App. K.

B. THERE HAS BEEN NO WAIVER OF APPELLATE JURISDICTION UNDER FEDERAL LAW.

Respondent misreads Edwards v. Cass County, 919 F. 2d 273, 276 (5th Cir. 1990), as supporting his proposition that the right of appellate review should be lost here due to the delay in seeking summary judgment. In Edwards, the trial court established a deadline for the filing of summary judgment motions; long after the expiration of that deadline, in fact the day before trial commenced, the defendant filed a motion for leave to file a motion for summary judgment. The appellate court rightly declined review of the denial of the motion for leave to file the untimely summary judgment motion. Petitioner's motion here was timely.

The reasoning of Abel v. Miller, 904 F. 2d 394 (7th Cir. 1990), amply supports petitioner's decision not to appeal the denial of her prematurely considered initial motion for summary judgment in light of its holding that a public official is entitled to only one pretrial appeal on the qualified immunity defense.

Respondent's candor apparently retreated as evidenced by his quote from Abel, omitting the important last sentence of the paragraph otherwise quoted in full (except for the citation to Apostol), viz., "A single pretrial appeal is a sound accommodation of competing interests; multiple appeals are not." 904 F. 2d at 396; Respondent's Brief, p. 14-15.

The reference to and quotation from Apostol v. Gallion, 870 F. 2d 1335 (7th Cir. 1989), is interesting, but irrelevant (870 F. 2d at 1339, paragraphs referencing headnotes 4, 5 and 11 omitted from respondent's lengthy quote).

C. RESPONDENT'S FAILURE TO CREATE A MATERIAL ISSUE OF DISPUTED FACT DOES NOT DEPRIVE PETITIONER OF APPELLATE JURISDICTION.

Petitioner contends throughout this litigation that she did not violate clearly established law. Respondent is content to argue here that petitioner's testimony that she took no actions adverse to respondent deprives petitioner of jurisdiction. Respondent raised no such issue in the First District, devoting the majority of his efforts at seeking to persuade the court that the law allegedly violated by petitioner was clearly established at the time of the alleged conduct. Appellee's Response to Petition for Certiorari, points II, IV and V.

The confusion respondent would inject, belatedly, into a consideration of the qualified immunity defense is put to rest by the explanation of an appeal revolving around a purely factual dispute. Velasquez v. Senko, 813 F. 2d 1509, 1511-13 (9th 1987) (concurring opinion). Moreover, this entire line of cases

demonstrates that petitioner's first motion for summary judgment, prior to discovery, was premature and not a true candidate for appellate review. Ryan v. Burlington County, 860 F. 2d 1199, 1203 n. 8 (3d Cir. 1988).

D. COLLATERAL ESTOPPEL IS NOT AN ISSUE AS TO THE FIRST AMENDMENT COUNT.

Petitioner moved to strike the jury verdict and final judgment from respondent's appendix because they are based on state law claims and because they occurred after the petition was filed with the First District. Respondent's point is frivolous, injected strictly to prejudice petitioner. "The jury verdict and judgment in this collateral case is not properly before this Court for review." Respondent's Brief, p. 19.

If the underlying facts are indeed the same and summary judgment should have been granted for failure of plaintiff to create any factual dispute, then it is the verdict and judgment which should topple.[1]

II. THE SUPREMACY CLAUSE IS NOT A FOOTNOTE TO THE FEDERAL RULES OF CIVIL PROCEDURE.

Respondent devotes nine pages (19-27) to his point II, entitled "The Supremacy Clause of the U.S. Constitution does not require Florida courts to copy federal procedure on interlocutory appeals of denials of qualified immunity." Respondent characterizes the right of a public official to prohibit a trial

[1] Summary judgment was also sought and denied as to the state claims. The trial court's error in denying the summary judgment motion on those claims is the subject of point VI of petitioner's initial appellate brief before the First District in Case Number 92-3118.

court from depriving her of her right not to stand trial as "purely procedural, not substantive at all", as "four rungs down the ladder from [the] status" of a substantive right, and as "a second level procedural right -- a procedure that effectuates a procedure." Respondent's Brief, p. 22-23. To respondent, civil rights plaintiffs have substantive rights, while public officials have "an unlimited reservoir of taxpayer dollars." Respondent's Brief, p. 12.

Perhaps so, but those same public officials have a "substantive federal right not to stand trial." In ruling against petitioner, the First District recognized that "[a]s a former public official, Tucker also asserted a substantive federal right not to stand trial, a right established by the United States Supreme Court in Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985)" and that "Tucker'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, see Flinn v. Gordon, 775 F. 2d 1551, 1552 (11th Cir. 1985), cert. den. 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed. 2d 656 (1986)." Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992). One can only imagine the torrent had the First District decided that a plaintiff's substantive right could be swept away by a trial judge with no right of appeal until after the right was gone. Justice is blind, especially in civil rights cases; substantive rights should be protected, even though the holder is not suing anyone.

III. THE CERTIFIED QUESTION DOES NOT LIMIT THIS COURT'S CONSIDERATION OF THE ISSUES PRESENTED.

Respondent conceded that this Court has authority to consider any aspect of any case before the Court. Respondent's Brief, p. 28. This point, lacking any citation of authority, is meritless.

IV. THE COURT'S RULE-MAKING AUTHORITY SHOULD BE INVOKED TO PROTECT SUBSTANTIVE RIGHTS.

Respondent correctly observes that the issues presented here have "far-reaching" implications. Respondent's Brief, p. 30. The remaining four pages of respondent's argument on point IV., relatively uncluttered with citation of authorities, amount to nothing more than conservative advice. Notwithstanding, substantive rights are paramount; form should not be elevated over substance.

Respondent's suggestion that public officials ought to "argue for adoption of the federal summary judgment standard" should be expanded to all summary judgment movants. Trawick, Fla. Prac. and Proc., § 25-5, n. 6.

CONCLUSION

Petitioner asks that this Court announce that there is a 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply Brief on the Merits has been furnished by United States Mail this 20th day of April, 1993, to:

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APPENDIX TO
PETITIONER'S REPLY BRIEF ON THE MERITS

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APPENDIX

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K. Protective Order and Order Denying Motion to Strike, June 25, 1990 (Petition for Emergency Writ of Prohibition and Petition for Writ of Certiorari, Appendix M)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

CASE NO. 90-454

DONALD RESHA,

Plaintiff,

vs.

KATIE TUCKER,

Defendant.

PROTECTIVE ORDER AND ORDER DENYING MOTION TO STRIKE

THIS CAUSE came on for hearing on June 13, 1990, on Defendant's Motion for Protective Order and Motion to Strike Reply. The court having heard argument of counsel, and being fully advised in the premises,

ORDERS AND ADJUDGES:

1. Defendant's Motion for Protective Order (regarding the deposition scheduled for June 18, 1990) shall be and the same is hereby granted. Defendant's ore tenus Motion for Protective Order (regarding Plaintiff's Interrogatories, Request for Admissions, and Request for Production of Documents) shall be and the same is hereby granted in part. Plaintiff's Notice of Taking Deposition, in which the deposition of Defendant was scheduled for June 18, 1990, is hereby quashed. Defendant shall be exempt from giving deposition testimony and from responding to Plain-

tiff's Request for Admissions and Interrogatories, for a period of not less than eight weeks from the date of this order. Thereafter, if the criminal proceedings which have been filed against the Defendant have not been resolved, the court will revisit the issue of whether the Defendant should continue to be protected from responding to Plaintiff's discovery requests. In the meantime, Defendant shall respond to the Request for Production of Documents; provided, however, that Defendant shall be entitled to claim her privilege against self-incrimination with regard to specific documents which have been requested.

2. Defendant's Motion to Strike Reply shall be and the same is hereby denied.

DONE and ORDERED, at Tallahassee, Florida, this 25th day of June, 1990.

P. KEVIN DAVEY
Circuit Judge

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