IN THE SUPREME COURT OF FLORIDA

DONALD G. RESHA,

Petitioner,

v.

CASE NO. 83,597

KATIE D. TUCKER,

Respondent.

_______________________/

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

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

For the convenience of the Court, Petitioner will follow the record reference system used by the parties in the court below. The trial court record will be referenced by the symbol "R" followed by the appropriate page number(s). The symbols "R1" and "R2" will be used to designate the first and second supplements to the record on appeal. The trial transcript, found in the record on appeal at pages 1302-2529, will be referred to by the symbol "T", followed by the original page number, rather than the record page number.

STATEMENT OF CASE AND FACTS

Petitioner seeks review of a question certified by the First District Court of Appeal:

> DOES A VIOLATION OF ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION GIVE RISE TO AN ACTION FOR MONEY DAMAGES?

Tucker v. Resha, 634 So. 2d 756, 760 (Fla. 1st DCA 1994).

Petitioner also seeks review of the decision of the court below that absolute immunity should have barred Petitioner's defamation action against Respondent. The Court may consider the entire case below on certified question jurisdiction or may exercise independent jurisdiction over the defamation issue because it expressly affects a class of state or constitutional officers, expressly conflicts with the rulings of other district courts, and expressly conflicts with rulings of the Florida Supreme Court. Rule 9.030(a)(2)(A)(iii), and (iv), Fla. R. App. P.; also Article

V, § (3)(b)(3), Fla. Const.[1]

Facts necessary to this review are essentially those recited by the court below.

The court below overturned a jury verdict for Resha for defamation and invasion of constitutional privacy.

Tucker had become executive director of the Florida Department of Revenue in 1988 and had immediately turned that agency's attention to Resha.

The invasion of constitutional privacy count arose from Tucker's use of the machinery of government to order various investigations of Resha in retaliation for his political opposition to her and her husband. This included illegally obtaining a report on Resha from the credit bureau, subjecting him to a criminal investigation, entering upon his premises, examining the records of his two businesses, and examining his personal financial records. The defamation count arose from Tucker fabricating and spreading allegations that Resha was involved in organized crime, tax evasion, money laundering, and illegal trafficking in guns, drugs, and pornography.

The defamatory statements and Resha's financial records became public records as part of an investigation of Tucker and were widely reported in the press.

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[1] Petitioner submitted a formal jurisdictional brief on the defamation issue, but undersigned counsel received a call from the clerk advising that the brief was unnecessary since the Court would decide jurisdiction after argument.

The history of Respondent Tucker's antagonism toward Petitioner Resha goes back nearly a decade.

Resha had run against Tucker's husband, Dan Miller, for president of the Florida AFL-CIO in 1985. Tucker described the election as a "nasty battle." (T. 346.) The jury was told that the Miller camp, during that campaign, launched the same slanders against Resha as those that form the basis of this action against Tucker. (T. 422-3, 509-10.).

In 1986, while Tucker was an official of the Department of Labor, FDLE investigated charges that she had misappropriated state funds to build an addition to her home. Four years later, she freely admitted to FDLE that she "knew" that Resha had anonymously made the report to the Governor that caused her to be investigated for the addition to the house. (T. 337-8.)

Resha contended, and the jury apparently agreed, that these events, together with Resha's intention to run against Miller again in the 1989 election, motivated Tucker to use her governmental authority to damage him.

The jury found that the Department of Revenue improperly intruded into Resha's private life, that Tucker caused the intrusion, and that, in doing so, she acted outside the scope of her duties and with improper motive. (R. 1092-3.)

The jury also found that Tucker had defamed Resha and acted outside the scope of her official capacity in doing so. (R. 1091.)

Following denial of her post-trial motions, Tucker appealed

the judgment to the First District Court of Appeal, which reversed the judgment and certified the question now before this Court.

Petitioner believes he should call attention to an offshoot of this case that is still pending before this Court on review of another certified question regarding whether Florida courts are bound by the federal practice of granting an interlocutory appeal to state officials who lose motions for summary judgment on qualified immunity. Tucker v. Resha, Case No. 80,991, reviewing, 610 So. 2d 460 (Fla. 1st DCA 1992).

In that case, the First District upheld the circuit court's denial of Tucker's motion for summary judgment on qualified immunity. Part of the decision was that Tucker violated clearly established law, the First Amendment, in performing exactly the same acts that form the basis of the defamation and privacy counts in the instant case. The District Court, however, said it might reach a different result had it received the case on plenary appeal for de novo review of legal findings rather than the deferential standard applied to certiorari review.

The two cases are, therefore, intertwined. If Tucker did indeed violate clearly established federal law, which is the present state of legal affairs, that conclusion must spill over into this case because Tucker could not act within the scope of office while acting illegally. She would therefore not be eligible for any privilege or immunity in this case unless the Court

overturns the other Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992).

SUMMARY OF ARGUMENT

The District Court erred in overturning the jury verdict on a theory of sovereign immunity. The state was not a party and no damages were awarded from the state treasury. Tucker alone was liable. It is not legally possible for sovereign immunity to apply to an official sued in her individual capacity.

Even if sovereign immunity could somehow apply, controlling precedent in Florida holds that sovereign immunity may not bar an action for redress of a violation of constitutional rights. Florida statutes and this Court's opinions state that the fact that an action is uniquely governmental does not make it subject to sovereign immunity if it is performed in violation of a person's rights.

Though the availability of money damages for violation of a human right guaranteed by the state constitution is a question of first impression, the courts of our state have long recognized such a remedy for violation of the property rights guaranteed by the state constitution.

Prior case law on the human rights issue has come so close to allowing damages as to make the conclusion foregone. Not to award damages in a situation like this one would be effectively to nullify a provision of the constitution. Substantial Florida case law has repeatedly held that legislative action is not a necessary

precondition to enforcement of the state constitution.

Because damages are the only possible meaningful remedy in this case, the right of access to courts demands that they be allowed. The U.S. Supreme Court has reached that conclusion with respect to federal constitutional rights. American common law as reported in the Restatement supports the proposition. Many other states have concluded that their constitutions allow a direct action for damages for violation of constitutional rights. Several tests have evolved around the country to determine which situations are appropriate for an award of damages for a constitutional violation. Resha passes all known tests.

Tucker is not eligible for an absolute privilege against liability for defamation because she acted outside the scope of her office in making the defamatory statements.

The law of Florida and American common law generally have always recognized an exception to absolute privilege for officials who act beyond the scope of their authority. The scope of office is most plainly exceeded when an official's actions are contrary to established law. Tucker's actions violated numerous laws as well as her department's internal procedures. Moreover, Tucker used her department against Resha with respect to matters outside the department's jurisdiction that properly belong to regular law enforcement agencies rather than the revenue department.

Tucker's claim to a second absolute privilege for statements to law enforcement officers must also fail. Florida law recognizes

no such absolute privilege except in limited circumstances involving subpoenaed testimony taken under oath. Neither of these circumstances existed when Tucker defamed Resha to FDLE officers in a tape recorded interview. The policy behind according any privilege, absolute or qualified, to statements to police is to encourage reporting of crime to protect public safety. Tucker made explicit in her statements to the FDLE that she was not reporting any crime by Resha and did not intend to do so.

If it was error for the trial judge to let the jury decide Tucker was outside the scope of office, it was a harmless error because the judge had already decided it on several occasions. Thus submitting it to the jury could only help Tucker, not hurt her. Status determinations are proper jury questions when key facts are at issue.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REVERSING THE VERDICT FOR DAMAGES UNDER ARTICLE I, § 23.

A. THE COURT BELOW INCORRECTLY APPLIED SOVEREIGN IMMUNITY.

Though no damages were awarded against the State of Florida nor against any other governmental entity, the court below still relied on a sovereign immunity argument to reach its conclusion that damages were not available to Resha under Article I, § 23, Fla. Const., which provides in pertinent part:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

The State of Florida was never a defendant in this case. The jury awarded no damages whatever against the state, only against Katie Tucker individually. It is thus not even theoretically possible that sovereign immunity is an issue in this case.

The court below opined that a governmental intrusion action "is ex hypothesis an action against the government rather than against a private person." Tucker v. Resha, 634 So. 2d 756, 759 (Fla. 1st DCA 1994). This conclusion -- the cornerstone of the opinion -- is completely erroneous. King Louis XIV of France was once able to say with credibility, "L'etat c'est moi" ("I am the State.") Contemporary American law, however, separates the individuals who wield governmental power from the government itself. In doing so, it holds official malefactors individually accountable for abuse of power, though that power be uniquely governmental in nature.

Thus a public employee who exercises governmental powers outside the scope of her legitimate authority forfeits the protection of sovereign immunity and is individually and personally liable for damages just as though she were a private citizen. District School Board of Lake County v. Talmadge, 381 So. 2d 698, 702-4 (Fla. 1980). The jury made a special finding that Tucker acted outside the scope of her authority in invading Resha's privacy, (R. 1093), as had the judge on several prior occasions. Thus the immunity of the state and the immunity of officials acting in the legitimate scope of authority have nothing to do with the

issues in this case.

It is extremely important to note how the court below, with no citation at all, plucked from thin air the untenable notion that a government official who injures a citizen through unlawful exercise of governmental power is necessarily protected by sovereign immunity from individual civil liability.

The absence of authority is no accident, because this notion has been uniformly rejected in every American jurisdiction which has considered it, not just in Florida in Talmadge.[2] The leading authority is probably the seminal -- and unanimous -- opinion of the U.S. Supreme Court in Hafer v. Melo, 502 U.S. __, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). That case once and for all establishes the critical distinction between official-capacity suits and individual-capacity suits against officials for abuse of governmental powers. It does so by explaining what the law has always been rather than by making new law: sovereign immunity does not apply to individual-capacity suits against public officers, but actions performed under color of law by defendants such as Tucker are still "state action" even when they are illegal.

The court below, 634 So. 2d at 759, ruled that the state constitutional right to privacy could not be self-executing for

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[2] The 1980 amendment to § 768.28(9), Fla. Stat., was meant to change the result of Talmadge with respect to cases involving officials acting within the course and scope of duty, but not those like Tucker who commit intentional torts beyond the scope of office.

purposes of damage suits unless the legislature specifically waived sovereign immunity for this particular cause of action.[3] Even if sovereign immunity could apply in this case -- and it can not -- the holding of the court below violates the established precedent of this Court in State Road Department of Florida v. Tharp, 1 So. 2d 868 (Fla. 1941). This delightful and oft-neglected gem from two generations ago remains the controlling authority for the proposition that sovereign immunity does not bar a suit for violation of a constitutional right:

> Immunity of the State from suit does not afford relief against an unconstitutional statute or against a duty imposed on a State officer by statute, nor does it afford a State officer relief for trespassing on the rights of an individual even if he assume to act under legal authority.

Id. at 869.

Tharp squarely confronts the claim of the court below that a section of the state constitution requires an explicit statutory waiver of sovereign immunity for any damages suit:

> [I]t has no application to the case at bar, and if it did, it should be read in connection with Section 4 of the Bill of Rights [now Article I, § 21] providing that all courts be open in order that every person may seek redress for injury done to his lands, goods, person, or reputation.

Id.

Vindication of a constitutional right must trump sovereign

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[3] This, it cannot be overstressed, is despite the fact that the public treasury was not liable for the judgment and the State was not named as a defendant.

immunity in order that our most fundamental rights remain more than "the tinkling of empty words." To do otherwise would "raise administrative boards above the law and clothe them with an air of megalomania" that would jeopardize the rights of citizens and "reverse the order of democracy in this country and head it into a blind alley." Therefore, "in the administration of constitutional guarantees, the State cannot afford to be other than square and generous." All this is "as evident as the rouge on a flapper's face." Id. at 870. That is the controlling law in Florida.[4]

On a more pedestrian level, our contemporary legislature itself recognizes that sovereign immunity is not implicated when the official defendant "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." § 768.28(9)(a), Fla. Stat.[5]

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[4] This Court has more recently acknowledged the constitutional rights exception to sovereign immunity in Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 918-919 (Fla. 1985), albeit without quite the sparkle of 1941.

[5] In analyzing another subsection of that statute, the court below fell into the error of assuming that an exception to sovereign immunity can not arise for acts that are uniquely governmental in nature. The argument starts with the legislative language about governmental liability being the same as if a private person would be liable. The court below reasons (wrongly) that a "governmental intrusion" can not be caused by a private person, therefore the barrier of sovereign immunity would be insurmountable. This Court has already considered and rejected exactly that argument in Dept. of Health & Rehabilitative Services v. Yamuni, 529 So. 2d 258, 260-1 (Fla. 1988). The fact that some activities such as investigating child abuse or building miles of highways are not done by private persons does not mean sovereign immunity is impenetrable for those activities. See also Commercial (continued...)

Perhaps most disappointing about the District Court's analysis of the self-execution issue is its assertion, 634 So. 2d at 759, that Resha rests his argument on _In Re T.W._, 551 So. 2d 1186 (Fla. 1989). Resha did not even cite that case to the District Court, let alone rely upon it.

The argument in question was actually advanced by Tucker, not Resha. In contrast to the District Court, both litigants agreed that the Florida privacy amendment is self-executing as evidenced by the substantial and coherent body of case law that has arisen from it in the absence of any implementing legislation to effectuate its purpose. Tucker's argument thus far, however, has been that the mere fact that a constitutional provision is self-executing for purposes of declaratory and injunctive relief does not necessarily mean that monetary damages may be awarded under it without special enabling legislation. See Tucker's Amended Initial Brief to the District Court at 29. With all respect to the District Court, Tucker's argument is thus altogether more formidable than that of the District Court, which relies wholly on a theory of sovereign immunity that is totally irrelevant to the facts of this case. Tucker's argument is rebutted below.

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[5](...continued)
Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1016-17 (Fla. 1979). Thus the District Court's argument collapses even if we concede its erroneous premise that sovereign immunity is somehow relevant to this case.

B. FLORIDA LAW SUPPORTS AN AWARD OF MONEY DAMAGES FOR VIOLATIONS OF THE STATE CONSTITUTION.

The court below is technically correct in noting that an award of damages for violation of the privacy clause of the Florida Constitution, absent an implementing statute establishing such a cause of action, is a question of first impression, never before specifically decided by an appellate court. However, the question has been so thoroughly surrounded by Florida law that it is merely a matter of filling the smallest of gaps. It is much like a connect-the-dots drawing in which only one small line remains to be drawn to complete the picture.

In the realm of property rights, Florida already allows a direct action for damages for violations of the "takings" clause of Article X, § 6, Fla. Const.[6] E.g., Pinellas County v. Brown, 420 So. 2d 308 (Fla. 2d DCA 1982), rev. den., 430 So. 2d 450 (Fla. 1983) (inverse condemnation); Schick v. Dept. of Agriculture, 504 So. 2d 1318 (Fla. 1st DCA), rev. den., 513 So. 2d 1060 (Fla. 1987) (constitutional inverse condemnation action predicated on negligence in nematode eradication program); In Re Forfeiture of 1976 Kenilworth Tractor, 569 So. 2d 1274 (Fla. 1990) (damages for failure for two years to honor an order for return of confiscated

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[6] The "takings" clause provides in pertinent part:
(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
Art. X, § 6(a), Fla. Const.

property); Dept. of Agriculture v. Mid-Florida Growers, 521 So. 2d 101 (Fla. 1988) (damages for state destruction of property).

In the realm of human rights, our state courts have perhaps come closest in Schreiner v. McKenzie Tank Lines, 408 So. 2d 711 (Fla. 1st DCA 1982), aff'd, 432 So. 2d 567 (Fla. 1983). There, the First District Court, relying on established authority, reaffirmed that constitutional provisions must be construed to make them meaningful. A construction that nullifies a specific clause must be avoided unless absolutely required by the context. Absent such a circumstance, constitutional provisions must be presumed to be self-executing, i.e., capable of serving as an independent basis for a cause of action without the existence of enabling or implementing legislation. To hold otherwise would be to negate the will of the people who approved the amendment, thereby ignoring the paramount consideration of state constitutional jurisprudence. Id. at 714.[7]

Tucker has made much of the fact that the Schreiner Court noted:

> Apparently no case has ever found that violation of a constitutional provision permits monetary relief merely because it is self-executing.

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[7] The same spirit animates a recent holding of this Court:

> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein.

Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992).

Id. at 714 (citing Figueroa v. State, 61 Haw. 369, 604 P.2d. 1198, 1206 (1980)).

This is, of course, true. Resha has never contended that the self-executing nature of Article I, § 23, Fla. Const., or any other constitutional provision, is alone sufficient to establish a remedy of money damages. Frequently, sovereign immunity stands in the way, as was the case in Figueroa where the state was the defendant, but not here where Tucker alone is the defendant, though it was governmental power she abused. Another consideration would be the absence of state action, particularly with a provision such as Florida's right of privacy which protects only against "governmental intrusion." The absence of state action was dispositive in Schreiner. In the instant case, state action is indisputable. Other factors that have influenced courts around the nation are discussed below.

1. The Absence of Implementing Legislation Is No Bar To Judicial Enforcement Of Constitutional Rights

Resolution of Tucker's contention that implementing legislation is necessary for recovery of damages for a constitutional violation turns largely on the easy question of where the constitution fits in the hierarchy of state law. Plainly, it stands at the top.

Florida courts recognize an implied cause of action for money damages, without any sort of enabling legislation, for violations of statutes, Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959),

and even for violations of administrative regulations, Florida Freight Terminal v. Cabanas, 354 So. 2d 1222 (Fla. 3d DCA 1978).[8] This being so, it would seem inconceivable that violations of the constitution, an enactment of much greater dignity, securing the most fundamental of rights, could be ineligible for a monetary remedy.

Even where the legislature has enacted a comprehensive remedy to effectuate a constitutional right, a citizen retains the right to sue directly under the Florida Constitution, either instead of or in addition to the statutory cause of action. Such was the holding of Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986), in which a federal court applying Florida law allowed a plaintiff to sue a county for disability discrimination under Article I, § 2, Fla. Const., despite the fact that a comprehensive scheme for redress of such discrimination was codified in Chapter 760, Fla. Stat. The plaintiff was free to pursue relief under the statute, the constitution, or both. Id. at 660. If the presence of implementing legislation is thus no substitute for a direct action under the constitution, the absence of such legislation could hardly be a bar.

Certainly, Florida cases have established that legislative inaction will not prevent judicial enforcement of constitutional

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[8] At least one Florida court has allowed an implied cause of action to arise from violation of a privacy statute. Cape Publications, Inc. v. Hitchner, 514 So. 2d 1136 (Fla. 5th DCA 1987), rev'd on other grounds, 549 So. 2d 1374 (Fla. 1989).

rights as a general matter:

> [P]reference for legislative treatment cannot shackle the courts when legally protected interests are at stake. As people seek to vindicate their constitutional rights, the courts have no alternative but to respond. Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.

Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980).

The jurisprudential concern, as expressed in Schreiner, supra, about a direct cause of action being necessary to prevent nullification of a fundamental right was prefigured in a highly relevant context by this Court years earlier:

> We think it is appropriate to observe here that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights. The judiciary is in a lofty sense the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it.
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> ***
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> When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.

Dade County Classroom Teachers Association, Inc. v. Legislature of the State of Florida, 269 So. 2d 684, 686 (Fla. 1972).

Thus it requires no extension or alteration of existing Florida law for a court to provide whatever remedy is appropriate for a violation of the state constitution.

2. Damages Are The Only Appropriate Remedy In This Case

Assuming that "the Constitution is the highest law," Id., it

is ancient and well-settled doctrine in this state that the right to damages for violation of that law is not to be questioned:

> For every actionable injury there is an absolute right to damages; the law recognizes such an injury whenever a legal right is violated. Rights are legal when recognized and protected by law, so every invasion of a legal right threatens the right itself, and to some extent impairs the possessor's enjoyment of it. The logical sequence of finding an invasion is the legal sequence, a legal injury that entitles the injured party to compensation proportioned in amount to the injury.

Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 326, 171 So. 214 (1936). Accord, Florida East Coast Railway Co. v. McRoberts, 111 Fla. 278, 281, 149 So. 631 (1933).

These holdings of the Florida Supreme Court contradict Tucker's claim that the only remedies for violations of the state constitution must be declaratory or injunctive relief. A citizen does not always have advance notice that constitutional rights will be violated. Injunctive relief can not cure a completed violation because injunctions, by their very nature, are preventive and prospective.

The right of access to courts codified at Article I, § 21, Fla. Const., demands a remedy to redress every injury. In cases such as this one, damages are the only meaningful remedy.

The U.S. Supreme Court underscored this point. The Court faced the fact that, though 42 U.S.C. § 1983 provided a cause of action for damages to redress violations of the federal constitution by state and local officials, no legislation provided damages for violations of the federal constitution by federal

officials. Federal narcotics agents, without a warrant or probable cause, forcibly entered a plaintiff's home, searched it, used excessive force in unlawfully arresting him, strip-searched him, and relentlessly interrogated him. Though the Court declined to allow damages against the federal government as an institution, it recognized a direct cause of action under the Fourth Amendment against the individual narcotics agents who had acted outside the scope of their authority. In doing so, the U.S. Supreme Court followed the same line of reasoning later advanced in the Florida cases cited above: the most fundamental constitutional rights of citizens would be mere empty words on paper if the absence of enabling legislation could serve as the basis for denying damages. A reading of constitutional rights that renders them a nullity must be avoided. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

In an oft-quoted passage in a separate opinion, the most conservative Supreme Court justice of that time put the matter succinctly:

> [S]ome form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

Id., 403 U.S. at 410 (Harlan, J., concurring) (emphasis added).

In the instant case, Tucker had invented allegations of illegal trafficking in guns, drugs, and pornography and of involvement in organized crime, money laundering and tax evasion against Resha and aimed the machinery of government at him on that basis. Resha had no way of knowing this until the story exploded in the media in the wake of FDLE's report on Tucker's misconduct. At that point, prevention was impossible. For Resha, no less than Bivens, it is damages or nothing.

3. The Bivens Doctrine Is Deeply Rooted In American Common Law

Bivens was not a revolutionary case, but a small step in the development of an organic body of ancient law.

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.

Bivens, 403 U.S. at 395.

For this proposition, the Court cited a lengthy string of authority reaching back to 1884. Id. at 395-6. The Court noted that, in a more general sense, the doctrine is rooted in the very origins of our constitutional jurisprudence:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

Id. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

This principle is now codified in our state constitution at Article I, § 21, the access-to-courts provision. It is not

surprising, therefore that this Court turned to the same portion of Marbury in reaching its conclusion in Dade County Classroom Teachers, supra, 269 So. 2d at 687. This Court, id. at 686-7, found further support for its holding in McCulloch v. Maryland, 17 U.S. 316 (1819). Being thus rooted in law so seminal as to be taught to every American school child, these doctrines are hardly vulnerable to Tucker's characterization of them as somehow foreign to our jurisprudence or the District Court's characterization of them as inappropriate for consideration by a jury.

Indeed the right to damages for constitutional violations, state or federal, is familiar enough to warrant inclusion in what is perhaps the most authoritative compendium of our common law:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

Restatement (Second) of Torts, § 874A. Comment a to the section explains explicitly that "legislative provision" includes constitutional provisions as well as statutes, ordinances, and administrative regulations.[9]

As far back as 1931, California courts followed this sort of

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[9] In Jones v. Memorial Hospital System, 746 S.W.2d 891, 893-4 (Tex. Ct. App. 1988), section 874A served as support for the holding that a direct action for damages is available for violation of the free speech provision of the Texas constitution.

reasoning to award damages for violation of an implied constitutional right of privacy, long before the express right of privacy was codified in the California constitution in 1972. Melvin v. Reid, 112 Cal. App. 285, 291-2, 297 P. 91, 93 (1931).[10]

4. Resha Meets All Established Tests For Damages

The leading scholar in damage awards under state constitutions has been Professor Jennifer Freisen.[11] Her recent treatise State Constitutional Law: Litigating Individual Rights, Claims and Defenses, (Matthew Bender 1992 & 1993 Supp.), surveys developments in all 50 states. Most states have not reached the question. At least twelve states have recognized by rulings or dicta that a direct action for money damages is available for violations of their state constitutions.[12] Four states have rebuffed all the

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[10] Following passage of an explicit privacy right in 1972, Article I, § 1, Cal. Const., damages were awarded in numerous constitutional privacy cases. See Freisen, State Constitutional Law, § 7.07 [1], nn. 5, 6 (collecting cases).

[11] She staked out the turf with Recovering Damages for State Bill of Rights Claims, 63 Tex. L. R. 1269 (1985).

[12] Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986); Walinski v. Morrison & Morrison, 377 N.E.2d 242 (Ill. App. Ct. 1978); Moresi v. State, 567 So. 2d 1081 (La. 1990); Widgeon v. Eastern Shore Hospital Center, 479 A.2d 921 (Md. 1984); Phillips v. Youth Dev. Program, Inc., 459 N.E.2d 453 (Mass. 1983) (Massachusetts later enacted legislation providing a damages remedy for violations of the state bill of rights, Mass. Gen. L. ch. 12, §§ 11H-I (1986)); Smith v. Dept. of Public Health, 410 N.W.2d 749 (Mich. 1987); Cooper v. Nutley Sun Printing Co., 175 A.2d 639 (N.J. 1961); Corum v. University of North Carolina, 413 S.E.2d 276 (N.C. 1992); Kristenden v. Strinden, 343 N.W.2d 67 (N.D. 1983); Jones v. Memorial Hospital System, 746 S.W.2d 891 (Tex. Ct. App. 1988); Woodruff v. Board of Trustees, 319 S.E.2d 372 (W.Va. 1984).

claims that have thus far been presented to them,[13] but interestingly enough, none of those four has definitively rejected the concept, only the particular claims and fact scenarios thus far presented.

Examination of the holdings in Freisen's survey shows that Resha's claim has all the characteristics favoring acceptance and none of the characteristics favoring rejection. The state is not a defendant, so sovereign immunity does not enter the equation.[14] The individual governmental actor sued was plainly acting illegally and outside the scope of her authority.[15] State action is unquestionably present.[16] No preemptive statutory scheme exists to redress this injury.[17] Injunctive relief would afford no remedy.[18] The right violated is self-executing.[19] No alternative

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[13] King v. Alaska State Housing Authority, 633 P.2d 256 (Alaska 1981); Rockhouse Mountain Property Owners Ass'n v. Town of Conway, 503 A.2d 1385 (N.H. 1986); Provens v. Stark County, 594 N.E.2d 959 (Ohio 1992); Hunter v. City of Eugene, 787 P.2d 881 (Or. 1990).

[14] As distinct from Figueroa v. State, 604 P.2d 1198 (Haw. 1979).

[15] As distinct from 77th District Judge v. State of Michigan, 438 N.W.2d 333 (Mich. Ct. App. 1989).

[16] As distinct from Schreiner v. McKenzie Tank Lines, 408 So. 2d 711 (Fla. 1st DCA 1982), aff'd, 432 So. 2d 567 (Fla. 1983).

[17] As distinct from State v. Haley, 687 P.2d 305 (Alaska 1984).

[18] As distinct from 77th District Judge v. State of Michigan, 438 N.W.2d 333 (Mich. Ct. App. 1989).

damages remedy is available to redress this injury.[20] It leads into no swamp of esoteric due process claims such as disputed criteria in a bid system of awarding public contracts.[21] And it implicates no vague and amorphous rights as the right to safe schools or a quality education.[22] One or more of these reasons was dispositive in every claim for damages under a state constitution that has ever been denied. See State Constitutional Law, §§ 7.07 [1] and [2]. Resha's claim passes every one of these tests.

5. Resha Had No Alternative Tort Remedy

The court below claims that Resha's action for constitutional invasion of privacy should have been barred because he had an alternative remedy in tort via suit for common law invasion of privacy. Tucker, 634 So. 2d at 759.

There is no authority for the proposition that a plaintiff must seek an available alternative tort remedy in preference to a constitutional remedy. The only Florida case on point is to the contrary. Shuttleworth v. Broward County, 639 F.Supp. 654, 660 (S.D. Fla. 1986). The only state supreme court to have addressed

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[19] (...continued)

[19] As distinct from Leger v. Stockton Unified School District, 202 Cal. App 3d 1448, 249 Cal. Rptr. 688 (1988).

[20] As distinct from Walt v. State, 751 P.2d 1345 (Alaska 1988).

[21] As distinct from King v. Alaska State Housing Authority, 633 P.2d 256 (Alaska 1981).

[22] As distinct from Leger v. Stockton Unified School District, 202 Cal. App. 3d 1448, 249 Cal. Rptr. 688 (1988).

the question concluded that an action for damages under the state constitution could be brought despite the existence of a similar action in tort and instead of it. Widgeon v. Eastern Shore Hospital Center, 479 A.2d 921, 924 (Md. 1984).

The general theory of constitutional rights in the United States has been that they are more fundamental and of greater dignity than other rights and therefore their enforcement may not be limited by the availability of some other form of redress. See, e.g., Monroe v. Pape, 365 U.S. 167, 183 (1961).

Nor is it likely that Resha had an alternative cause of action in tort for common law invasion of privacy. That tort has developed into four general branches: intrusion, false light, public disclosure of private facts, and appropriation. Prosser, Law of Torts, § 117, (4th Ed., West 1971). No appropriation of likeness or name for commercial purposes occurred. Any damages for portrayal in a false light would have duplicated the damages for slander, so that injury would not have been additionally compensable.

Resha's privacy claim arose from Tucker causing her underlings to obtain his credit report illegally, to enter his stores and warehouses, audit his businesses, go through his financial records, and to subject him to both a personal investigation and a criminal investigation. Eventually, Resha's private affairs became public record as a direct and proximate result of Tucker's misconduct in giving these orders. In Florida, this might not qualify as public

disclosure of private facts because the facts disclosed must be something about the plaintiff that is "highly offensive to a reasonable person." Cape Publications v. Hitchner, 549 So. 2d 1374, 1377 (Fla. 1989). None of Resha's documents or any other facts of his life that were revealed through Tucker's actions were scandalous nor were they the sort of facts that would offend the public. They were simply matters in which he had a reasonable expectation of privacy.

That leaves intrusion, which was also possibly not available because of the governmental nature of Tucker's actions. Tucker's minions did intrude upon Resha's premises and into his papers, but they did so in a uniquely governmental capacity. The Bivens Court anticipated the difficulty of redressing that sort of intrusion through common law actions for invasion of privacy or trespass:

> The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against the private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the state to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.

Bivens, 403 U.S. at 394 (citations omitted).

Thus the invasion of Resha's privacy lacked the essential element of involuntariness or resistance on his part that would be necessary to prevail at common law under the intrusion branch of invasion of privacy. If "consent" (regardless of the degree of coercion) under those circumstances would not negate the cause of action, it would at least take it off into murky, uncharted regions of the law where the outcome would be at best a roll of the dice.

It is the uniquely governmental nature of Tucker's intrusion which makes the constitutional claim of "governmental intrusion" perfectly appropriate, whereas the common law tort is ill-fitting and speculative in these circumstances.

II. BY ACTING OUTSIDE THE SCOPE OF HER AUTHORITY, TUCKER FORFEITED ALL CLAIMS TO ABSOLUTE PRIVILEGE

The two issues in this appeal are inextricably intertwined. Resolution of each depends upon whether Tucker acted outside the legitimate scope of her office. If so, she is not only liable for damages under the privacy amendment; she is also not eligible for absolute privilege.

The central question in this case is whether Tucker's actions violated any law, regulation, custom, or policy so as to take her outside the scope of office. Nearly everything hinges on that question yet the court below steadfastly refused even to consider it.

Absolute privilege in defamation is a two-prong inquiry that

involves examination of both the content and the context of the offending statements to determine whether they are in the legitimate scope of office. The content prong of the analysis looks at the subject matter of the statements. If the subject falls beyond the outer perimeter of the official's job, no absolute privilege will lie. The context prong of analysis looks at the regulatory scheme governing the offending communication. If the utterance is prohibited by law or regulation, no absolute privilege will lie regardless of how squarely the subject matter fits into the official's duty.

The court below erred in both prongs of analysis. The more flagrant error entailed completely leaving out of account the context prong of analysis. The other error entailed defining the scope of Tucker's office so broadly as to encompass virtually any conceivable human action, thereby robbing any meaning from the concept of boundary that has been so important to every other court which has considered the issue.

A. VIOLATIONS OF LAW ARE ALWAYS BEYOND THE SCOPE OF OFFICE.

The starting point of any discussion of absolute privilege for executive branch officials is usually Barr v. Matteo, 360 U.S. 564 (1959), which established absolute immunity for federal officials and which this Court adopted as the model for our state doctrine of absolute immunity for executive officials in McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966).

Some years later, the U.S. Supreme Court found it necessary to

clarify Barr in part to correct exactly the error committed by the court below -- assuming that absolute immunity could attach to an unlawful statement so long as the subject matter is pertinent to the official's job. Noting that it had been a close question whether the official in Barr had acted outside the scope of duty in issuing a press release to explain the firing of two employees, the Court stated:

> [H]ad the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld . . . Barr did not, therefore, purport to depart from the general rule, which had long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers.

Butz v. Economou, 438 U.S. 478, 489 (1978).

In McNayr, this Court correctly read Barr and took pains to prevent the misapplication of absolute privilege corrected in Butz and now committed in the instant case by the court below. McNayr requires that absolute immunity attach only when the offending statements arise out of "an official and authorized act," 184 So. 2d at 429 (e.s.), and "in connection with the performance of the duties and responsibilities of their office," id. at 433. No reasonable interpretation of these words would permit absolute privilege to apply in connection with an illegal or prohibited act, even if the subject matter of the defamation were in the area of

the official's job.[23]

Though prior cases have anticipated the eventuality, the instant case is the first appellate case in Florida history that squarely presents the issue of the existence vel non of an official privilege for illegal acts. It is therefore all the more regrettable that the District Court saw fit totally to ignore that issue even though it was the major basis for the outcome of the case at the trial court level.

The issue has, however, been anticipated by another Florida appellate court which reached the opposite conclusion. In Densmore v. City of Boca Raton, 368 So. 2d 945 (Fla. 4th DCA), rev. den., 378 So. 2d 343 (Fla. 1979), the court found absolute immunity for a city manager who made public his reasons for firing a subordinate, but the court noted the probability of a different result if the city personnel rules prohibited the release of information concerning the discharge of an employee. Id. at 947.

The court below was able to sidestep the correct rule of law only by locking onto the degree of maliciousness as though it were

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[23] This Court's later decision in Hauser v. Urchison, 231 So. 2d 6,8 (Fla. 1970), likewise required that statements of officials must be "in connection with their official duties" for absolute privilege to attach. Both McNayr and Hauser, coming as they did after Barr, articulated a standard more protective of officials than the earlier version of absolute privilege which could be pierced by the plaintiff if the holder of the privilege "availed himself of his position to gratify his malevolence." Meyers v. Hodges, 53 Fla. 197, 44 So. 357, 362 (1907). Neither falsehood nor ill-will can defeat the modern privilege; it can be penetrated only by illegality or by exceeding the jurisdiction of the official position. Tucker has done both.

the only question and then concluding that no degree of maliciousness can negate an absolute privilege. This is an absolutely correct conclusion and an absolutely irrelevant one. The question that matters is not whether the defamatory statements were malicious, but whether they were illegal. Malice alone will not take an action outside the scope of authority, but illegality will.

In related contexts, this Court has held that illegal acts are outside the scope of duty. Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 918-19 (Fla. 1985); District School Board of Lake County v. Talmadge, 381 So. 2d 698, 702-3 (Fla. 1980). Our appellate courts have likewise held that government officials are without discretion to disobey the law and that they step outside the scope of office when they do disobey it. Feldstein v. City of Key West, 512 So. 2d 217, 219 (Fla. 3d DCA 1987); A. L. Lewis Elementary School v. Metro Dade County, 376 So. 2d 32, 34 (Fla. 3d DCA 1979).

1. Tucker's Violations of Law Void Absolute Privilege.

One need not look far to find the constitutional and statutory provisions Tucker violated in the course of defaming Resha.

Tucker knew or should have known that § 213.01, Florida Statutes, required her to treat Resha fairly and impartially, not to single him out for investigations and audits because of his political opposition to her and her husband.

Article I, § 2 (equality before the law), § 4 (freedom of

speech), and § 9 (due process of law), of the Florida Constitution all impose duties upon Tucker which limit the scope of her authority. Her conduct towards Resha was outside the scope of those limits on her authority, thereby negating any privilege or immunity. Tucker's authority was likewise limited by counterpart provisions of the First and Fourteenth Amendments to the U.S. Constitution.

The First Amendment prohibits governmental punishment of persons because of the opinions they hold while belonging to a union or running for office within a union. U.S. v. Brown, 381 U.S. 437 (1965). Florida AFL-CIO v. Florida Dept. of Labor & Employment Security, 676 F.2d 513 (11th Cir. 1982). This limit on the scope of governmental authority was clearly established at all times pertinent to this case.[24]

Tucker and the court below cite various statutes giving the Department of Revenue authority to enforce tax laws and investigate potential violations. But none of those laws allow revenue authorities a blank check to violate the constitution and statutes in the course of exercising those powers. The court below never comes to grip with that point or even acknowledges it as an issue

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[24] Case authority on the doctrine that governmental agencies may not be used to punish citizens for their political opposition is simply massive. Resha summarized much of it in a memorandum to the trial judge. (R. 659-66.) The memorandum was designed to show a violation of the First Amendment, but, in doing so, it automatically places Tucker outside the scope of her office, thereby negating all state and federal privileges whether they be absolute or qualified.

even though it was dispositive at the trial court level.

2. Tucker's Violations of the Department's Internal System of Checks and Balances Void Absolute Privilege.

The Florida Department of Revenue has internal checks and balances to assure the integrity of assigning audits and investigations in circumstances where the responsible official may have a personal conflict with the taxpayer. Tucker disregarded those checks and balances in attacking Resha.

Sam Alexander, a 37-year employee of the department who served in many of its executive posts, including the two highest positions, testified that disclosure should be made when a personal interest in the taxpayer is involved, (T. 140), and that an assignment for the purpose of harassing a taxpayer would be completely inappropriate (T. 140-1).

Larry Wood, a 19-year employee of the department who had served as its inspector general, was director of its division of collection and enforcement when Tucker told him to investigate Resha and his businesses. (T. 164-6.) In all Wood's years at the department, an executive director had never before targeted an individual taxpayer. (T. 184-5.) Moreover, Tucker sought to conceal her targeting of Resha, ordering Wood to report only to her on the Resha case, (T. 172), and stating that she had a confidential source she would not reveal (T. 167-8). Wood further testified that, where a personal connection is involved, FDLE should be brought in to assume some of the accountability after

disclosure of the facts. (T. 187.)

When, in the course of the investigation, investigator Michael Wynn discovered a personal connection between Resha and Tucker's husband, he brought the information to his supervisor David Skinner, who took it on to his supervisor Larry Wood. All agreed that in light of this information, they would end the investigation. (T. 196-8).

Plainly, all the seasoned department personnel who learned the reason for the audits and investigations of Resha realized these actions were improperly motivated and beyond the scope of Tucker's legitimate authority.

B. TUCKER'S STATEMENTS EXCEEDED THE OUTER PERIMETER OF HER JURISDICTION.

The court below just barely acknowledges the relevance of the "content" prong of analysis -- the possibility that a statement could be unprivileged for falling outside what the plurality in Barr called the "outer perimeter" of an official's duty. Most other courts have taken this inquiry far more seriously than would be indicated by the desultory and perfunctory pass at it made by the court below.

This is no small irony in that it was another panel of that same court that gave Florida its leading analysis on the issue of defining the "outer perimeters" of office for purposes of absolute privilege.

In Albritton v. Gandy, 531 So. 2d 381 (Fla. 1st DCA 1988), the

First District held that a county commissioner who abused his office to secure the firing of a political adversary acted outside the scope of his office and therefore was not eligible for absolute immunity because personnel matters fell under the county manager, not the commissioners. The county commissioner at least had the tenuous argument that he was part of the board that supervised the manager who in turn handled the personnel matters. Tucker was much further outside the scope of her authority -- she was not even in the right unit of government to be exercising the powers she arrogated to herself. The notable difference is that the Albritton court actually analyzed the job of the official in question instead of just reasoning that county commissioners are ultimately over all county employees and therefore absolutely immune for anything said in connection with county employment.

The analysis of Albritton, which should have controlled the result below, came after and does not conflict with that court's observation that "the Florida Supreme Court has adopted a broad definition of the phrase 'scope of office.'" Huszar v. Gross, 468 So.2d 512, 515 (Fla 1st DCA 1985), quoting, Danford v. City of Rockledge, 387 So. 2d 967 (Fla. 1st DCA 1981).

A broad definition by no means is an unlimited one. In the literature of the field, a broad definition is one that grants an absolute privilege to statements within the reasonable discretion of the official as well as to statements that the official is required to make. This Court arrived at that conclusion after

grappling with the issue in McNayr, 184 So. 2d at 430, just as the U.S. Supreme Court did in Barr, 360 U.S. at 570. A "broad definition" has never before been one that encompasses within scope of office matters so remote and attenuated that one must speculate as to their possible relationship to the job.

The term "absolute privilege" as used in the law of defamation has always been a misnomer because there have always been exceptions for which public officials and others could be liable in defamation though their privilege was denominated as "absolute." Recent trends have shown further shrinkage in the scope of absolute privilege even while the scope of certain qualified privileges has expanded.[25] Even the most sacrosanct of absolute privileges, the one for members of the U.S. Congress enshrined in the Speech or Debate clause of the U.S. Constitution at Article I, § 6, has been considerably narrowed from what was once considered the norm. Senator William Proxmire (D-Wis.) for years sought to call attention to waste of tax dollars by publicizing individual examples which he lampooned with his regular "Golden Fleece" awards. One aggrieved recipient sued the Senator for defamation and managed to pierce the absolute privilege on the ground that the

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[25] This Court itself has found recent occasions to eliminate two formerly absolute privileges. The absolute privilege for reports to law enforcement officers was reduced to a qualified privilege in Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992). The absolute privilege to be free from retaliatory "SLAPP" suits for exercise of the First Amendment right to petition the government was reduced to a qualified privilege in Londano v. Turkey Creek, Inc., 609 So. 2d 14 (Fla. 1992).

Senator's remarks were made from his office rather than on the floor of the Senate. Hutchinson v. Proxmire, 443 U.S. 111 (1979). Certainly Senator Proxmire's concern (that the plaintiff was squandering federal research funds on silly research about monkeys clenching their jaws) was more related to his job than Tucker's allegation that some of the movies in Resha's local video store were obscene. Yet the some of the means chosen by the Senator for expressing his concerns fell outside the "outer perimeter" of his job even though discussion of the federal budget is well within a U.S. Senator's scope of office.

Issuing subpoenas to witnesses appearing before a committee of Congress, the House Un-American Activities Committee, was part of the staff job of the defendant in Wheedlin v. Wheeler, 373 U.S. 647 (1963). He over-stepped the "outer perimeter" of office, however, when, without authorization of any committee member, he issued a subpoena to a political foe who lost his job as a result of being thus linked to subversion. The U.S. Supreme Court formally declared the absolute privilege of Barr to be inapplicable to conduct so patently outside the scope of office. Id. at 650-1. Had the Supreme Court followed the logic of the court below, absolute privilege would have attached because the imputation of disloyalty was part of the committee's function.

After citing a few tax statutes of tangential relevance, the court below summed up its rationale:

Tucker's statements to members of her staff about Resha's

> alleged activity in illegal gun sales, drugs, pornography, money laundering and organized crime involved activities which could include nonpayment of tax or violation of reporting requirements, and therefore were within the scope of Tucker's office at the Department of Revenue as a matter of law.

Tucker v. Resha, 634 So. 2d at 758.

Petitioner can find no other decision in the entire history of Anglo-American jurisprudence that adopts such a boundless conception of an official's scope of office. The Supreme Court in Barr struggled with whether it was in the scope of office for an official to issue a release explaining the reason for discharging two subordinate officials, calling the question a "close one" just barely in the "outer perimeter of petitioner's line of duty." 360 U.S. at 574-5. Justice Stewart actually dissented on that question. Id. at 592. But for the court below, there apparently is no "outer perimeter" because there is no possible activity that, with certainty, could not include nonpayment of taxes or violation of reporting requirements.[26]

Police chiefs are not absolutely privileged to fabricate murder charges against innocent political opponents, though that

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[26] The implications are staggering. If the executive director of the Department of Revenue were to dislike the court's decision in this case, he could, with absolute privilege and for no motive other than retaliation, fabricate from thin air an allegation that the judges were associated with organized crime and send his minions out to "investigate," questioning family, friends, and associates, spreading the lies, all because "organized crime involve[s] activities which could include nonpayment of tax or violation of reporting requirements, and therefore [is] within the scope of [] office at the Department of Revenue." 634 So. 2d at 758.

crime falls within their jurisdiction. The secretary of HRS is not absolutely privileged to invent allegations that his leading critic is afflicted with AIDS, though that disease may fall under his department's jurisdiction.

American common law has uniformly rejected such conclusions. See generally, L. Eldredge, The Law of Defamation, at §§ 72-77[27]; Harper & James, The Law of Torts, at §§ 5.21-23; Prosser, The Law of Torts, at § 114; Restatement (Second) of Torts, at §§ 585-92A; Veeder, Absolute Immunity in Defamation: Legislative and Executive Proceedings, 10 Colum. L. Rev. 131 (1910).

1. Tucker Falsely Accused Resha of Crimes Beyond Her Agency's Jurisdiction.

The Florida Department of Revenue is not a criminal justice agency. Chapter 213, Fla. Stat., which contains the basic outlines of the department's powers and duties confers no law enforcement powers upon it. The department's auditors and investigators wear no badges, carry no guns, and are not empowered to arrest criminals.

Some of Tucker's answers to Plaintiff's Requests for Admissions were read to the jury. (T. 369-86.) In those answers, Tucker admitted that the revenue department has no statutory or other authority to investigate or prosecute violations of laws

[27] Eldredge's illustration is a judge who would be denied absolute privilege for accusing a defendant of poisoning his mother to collect insurance in the course of a proceeding on a completely unrelated matter.

relating to pornography or firearms. (T. 386). With respect to the other alleged offenses for which Tucker investigated and audited Resha, such as money laundering, organized crime, and illegal drugs, Tucker further conceded that the department has no investigatory or prosecutorial authority, but qualified her answer to add that these activities typically involve unpaid taxes, so the department may become involved in an investigation of that aspect of the illegal activities. (T. 381-4.)

It is obvious that the department of revenue has no means of determining whether a book or movie is obscene in violation of Chapter 847 or whether a particular firearm violates Chapter 790, Fla. Stat. These are perhaps the most plain and incontestable examples of Tucker's statements exceeding her jurisdiction. The amount of tax collected in the video store on a particular movie would not vary according to whether it was obscene or not.

In matters such as organized crime and drug trafficking, the department participates in an inter-agency council with FDLE and other criminal justice agencies. (T. 185.) The department sometimes imposed tax liens on the proceeds of such criminal activities after law enforcement agencies had initiated the prosecutorial process. (T. 382.) Except for tax evasion, none of the crimes of which Tucker accused Resha fall within the jurisdiction of the department of revenue in other than a subsidiary and after-the-fact fashion. Certainly none of these crimes is a matter the department is empowered to handle on its

own. Yet Tucker told Wood to report only to her on the Resha case, (T. 172), and by her own admission on a tape played to the jury, Tucker never reported any of these alleged crimes to law enforcement agencies or sought to involve them in any way (T. 335). She kept it all within her department.

This is especially important because the only way any of the pertinent crimes except tax evasion fall within Revenue's jurisdiction is when that department works jointly with some other agency.

2. Tucker's Statements To FDLE Were Beyond the Scope of Absolute Privilege.

The court below saw fit to make a separate finding that Tucker's statements to FDLE officers were absolutely privileged because of her official position, even if statements are made to the press. In the next sentence, however, the court hinges the privilege on the fact that the interview with FDLE was at that agency's request rather than at Tucker's instigation. 634 So. 2d at 759. This may suggest two independent bases for finding absolute privilege, as Tucker argued below. In an abundance of caution, Petitioner will refute the alternative basis for finding absolute privilege.

Quite apart from the absolute privilege associated with statements of government officials, Tucker claimed a second absolute privilege for some of her defamatory statements because they were made to law enforcement officers from FDLE.

In so doing, Tucker recognized she was swimming against the tide because this Court recently abolished that particular absolute privilege and replaced it with a qualified privilege which can be overcome by a showing of malice. Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992).

Tucker's strategy, therefore, was an effort to pound the round peg of her case into the square hole of some exceptions recognized in Fridovich. She cited an exception for statements made under subpoena which remain absolutely privileged because the court still considers them to be incident to a judicial proceeding. Tucker's brief to the court below left the false impression that she was under subpoena when making the slanderous statements to FDLE. Appellant's Amended Brief to the First District Court at 26. Nothing in the record even suggests this to be true. FDLE obtained subpoenas for some documents to be produced by persons other than Tucker. (T. 349.)

The possibility of Tucker having been under subpoena did not even arise in this case until the post-trial motions hearing when Tucker's counsel delivered himself of this:

> As I recall, Investigator Smart testified that he had state attorney subpoenas issued. It was unclear whether there was one served on Katie Tucker. And I don't -- I didn't come in here to argue that she was responding to a state attorney subpoena. I don't know that there is evidence in the record on that one way or another, but it is clear that Investigator Smart was conducting or was in the throes of conducting a criminal investigation of Katie Tucker. She didn't know that at the time.

R. 2547-8.

Even better evidence on this point came from Tucker's own mouth at trial: "I did not testify to FDLE because that was not under oath." (T. 673.) And this: "Sir, I didn't know that it was a formal investigation. Nobody ever told me it was." (T. 639.)

This Court in Fridovich stressed that the remnant of absolute privilege would still attach to statements made under subpoena and oath because the penalties for perjury and false swearing would deter slander sufficiently to warrant an absolute privilege against civil liability for defamation. Id., 598 So. 2d at 69, n.5. Tucker was under neither subpoena nor oath and therefore can not qualify for absolute privilege.

Tucker's brief below further created the false impression that her only slanderous statements to FDLE concerned organized crime, failure to pay sales taxes, and failure to report large cash transactions-- matters purportedly in the scope of Tucker's duty at the department of revenue. Appellant's Amended Brief to the First District at 26. In fact, her statements included slanders about "dealing in some porno tapes and in videos that were not legal to be sold," and guns. (T. 327). Her statements to FDLE included such gratuitous disparagements as that Resha is "sexually based and arrogant and that he was just really -- I didn't think there was an honest bone in his body," (T. 699) and naming Resha's fiance "Miss Piggy." (T. 701.) Some scope of duty!

The jury, observing Tucker, must have quite reasonably concluded that her urge to invent fantastic defamations against

Resha in any context is simply uncontrollable. Indeed, at her deposition in this case, as read to the jury, she stated, "I don't think organized crime would have him." (T. 698.) In front of the jury, she raised for the first time a new allegation:

> I had heard that he killed a man. I had heard that he, that he beat up some people and that he had threatened people with bodily harm, or that he told them he would kill them.

T. 754.

This Court in Fridovich makes clear that the policy foundation for any privilege, absolute or qualified, for statements to police is to encourage citizens to come forward to report crime so that criminals may be brought to justice. 598 So. 2d at 69. Yet in Tucker's interview with FDLE, she lays great emphasis on the fact she does not then intend and has never intended to report Resha for any crime. (T. 335.)

It is important to understand that FDLE sought Tucker out not as a coordinate colleague who might assist in a common enterprise but as the target of a criminal investigation in which she was eventually arrested and sentenced.

C. SUBMISSION OF THE ABSOLUTE PRIVILEGE ISSUE TO THE JURY WAS EITHER CORRECT OR HARMLESS ERROR.

The District Court faults the trial judge for allowing the issue of absolute privilege to go to the jury rather than dismissing the case upon Tucker's claim of it. Tucker, 634 So. 2d at 758.

This overlooks a crucial fact that Tucker herself pointed out

to the District Court in her Reply Brief at 4: the trial judge had already ruled as a matter of law that Tucker was not entitled to absolute privilege on her motion to dismiss, on her motion for judgment on the pleadings, on her two motions for summary judgment, and on her two motions for directed verdict. Tucker was helped, not prejudiced by the fact the trial judge gave her a <u>seventh</u> bite at the absolute immunity apple by letting the jury consider it after he rejected it six times. The trial judge had lived up to his responsibility, if any, to decide the absolute privilege issue as a matter of law. The transcript at 1054-7 shows that an absolute immunity instruction went to the jury at Tucker's insistence and over Resha's objection. The court below ought not to have heard Tucker's complaint about a jury instruction written at her own insistence.

Moreover, it is the better view that absolute immunity is a jury question when the question of scope of office turns on factual issues.

The District Court makes only the most perfunctory and passing reference to the requirement that the existence of the privilege is a matter of law for the judge only if the facts and circumstances of the defamatory communications are known. This is not a requirement to be so lightly taken for granted or assumed to exist in every case. Yet such is the unfortunate attitude of the court below.

As it happens, many of the key circumstances in this case

depend upon credibility determinations. If Tucker's motivation in falsely accusing Resha of various crimes was an effort to punish him for his political views and actions or to settle her old grudges, her conduct was in violation of § 213.01, Florida Statutes, as well as numerous provisions of both the state and federal constitutions and the internal policies and customs of the Department of Revenue calling for disclosure and recusal for tax officials having a personal interest in actions against taxpayers, as cited and discussed above. Tucker denied being so motivated. A great deal of evidence was contrary to her denial. Only the jury could resolve the credibility issue and on that resolution hung a goodly portion of the answer as whether she was within the legitimate scope of duty and therefore eligible for the privilege.

Florida Standard Jury Instructions, MI 4, Comment 2, acknowledges occasions when status determinations are properly referred to the jury, though the great majority of such issues are decided by the judge as a matter of law. Whether Tucker was acting within the scope of her authority determines her official status for absolute privilege purposes.

The jury made a specific finding that Tucker acted outside the scope of her authority in making the slanderous statements, (R. 1091), after the judge carefully instructed them on the nature of absolute privilege (T. 1170). Where, as here, the facts necessary to establish the privilege are in dispute, the question must be submitted to the jury. Axelrod v. Califano, 357 So. 2d 1048, 1051

(Fla. 1st DCA 1978); Hartley & Parker v. Copeland, 51 So. 2d 789 (Fla. 1951). At the charging conference, Tucker's counsel admitted that whether she acted in the scope of her authority is a proper question for the jury. (T. 1056.)

In the press of business, the court below was apparently moved to rely upon Tucker's Reply Brief at 5 to quote out of context a passage from Prosser disparaging the "eccentric and unreliable judgment of a jury" as inadequate protection for a public officer seeking to be shielded by high office from a defamation action.[28]

It is quite important to note that in context, in that volume and in its predecessor, Dean Prosser's words were meant as a caricature to ridicule and scorn that position, not to endorse it. It is quite unfortunate that a reported appellate decision now attributes to a distinguished deceased scholar a position he most vigorously pilloried as

> affording a golden opportunity for utterly unscrupulous politicians to abuse their position by inflicting outrageous injury upon the helpless and innocent, for the worst kind of motives, and with no redress. It can scarcely be said that our governments, state or federal, have always been so free of scoundrels as to inspire confidence in such a rule.

Prosser and Keeton on Torts, § 114, at 822-3 (5th ed. 1984).

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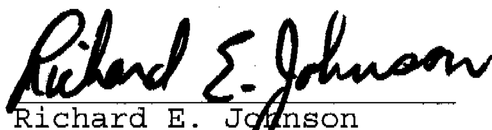
[28] Tucker, 634 So. 2d at 758, quoting W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, § 114, at 822 (5th ed. 1984).

CONCLUSION

For the foregoing reasons, the verdict of the jury should be reinstated in every particular.

Respectfully submitted,



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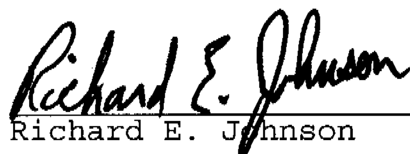
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by HAND DELIVERY this 6th day of July, 1994, to Brian S. Duffy, 101 North Monroe St., Suite 950, Tallahassee, Florida 32301, and by U.S. Mail to James K. Green, One Clearlake Center, Suite 1300, 250 Australian Avenue South, West Palm Beach, Florida 33401; to Gary Gerrard, Alhambra West Suite 525, 95 Merrick Way, Coral Gables, Florida 33134; and to Barbara Green, Grove Place, Third Floor, 2964 Aviation Avenue, Coconut Grove, Florida 33133.



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