

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 REPLY BRIEF

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ARGUMENT

I. AN ACTION BASED ON "GOVERNMENTAL INTRUSION" IS NOT NECESSARILY AN ACTION AGAINST THE STATE.

Tucker, in her Answer Brief at 13, seeks to normalize the District Court's ruling on sovereign immunity by misrepresenting it. Tucker argues that the District Court really meant to say that a government official is legally identical with the government itself only when the official is acting properly and within the scope of duty. In fact, that interpretation can not be teased out of the opinion below no matter how gymnastic a reading one undertakes. The operative language is this:

A "governmental intrusion" action is ex hypothesis an action against the government rather than against a private person. The award of money damages against Tucker naturally implicates sovereign immunity.

Tucker v. Resha, 634 So. 2d 756, 759 (Fla. 1st DCA 1994).

The court below makes no allowance for the possibility that a rogue official, acting illegally and in excess of authority but with a power possessed only by virtue of holding an official position, could create a "governmental intrusion" for which the offending official, but not the government employer, would be legally liable. In other words, the District Court holds what is commonly known as an "individual capacity" lawsuit against a government official to be impossible and further holds sovereign immunity to apply to illegal acts as well as legal ones.

It is important to understand that in so holding, the court below departs completely from the jurisprudential underpinnings of

American law. The District Court unwittingly embraced the pre-Enlightenment notion that "the king can do no wrong" by adopting its corollary that the official is inseparable from the office -- a conception of sovereign immunity first eroded by Lockean social theory and finally swept away by the advent of Jeffersonian democracy. It is not surprising that Tucker seeks to moderate the holding below by reading into it qualifications and exceptions that are simply not there. It is incumbent on this Court, however, to face the atavism squarely.

II. IT IS POSSIBLE FOR AN IMPROPER MOTIVE TO RENDER ILLEGAL AN ACT THAT WOULD OTHERWISE BE LEGAL.

On the issue of absolute immunity from defamation, Tucker's answer brief does a good job of sharpening the issue. In defense of the District Court ruling, Tucker maintains that the executive director of the Florida Department of Revenue can, with absolute immunity, order audits and investigations of any taxpayer, and, in the course of ordering those audits and investigations, is privileged to make false and malicious allegations against the targeted taxpayer. Tucker is correct in arguing that this kind of protection for malicious motive is essential to the concept of absolute immunity as it has come down to us in Barr v. Matteo, 360 U.S. 564 (1959), and in McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966).

Tucker also now concedes (for the first time) that illegal acts do fall outside the scope of office and are therefore not

eligible for absolute immunity.

The weakness that brings down Tucker's entire house of cards is her implicit assumption, shared by the court below, that an improper motive can never make illegal an act that would be otherwise legal -- that a certain mens rea as the criminal lawyers say, or a certain scienter is always irrelevant to the legality of an official act.

This is manifestly false. For example, though Tucker was free to order audits and investigations of taxpayers who happen to be Blacks, Jews, or Republicans, it would be incontestably illegal to audit and investigate these same taxpayers because of their race, religion, or political viewpoint. The equal protection, due process, freedom of speech, and freedom of religion clauses of the state and federal constitutions would prohibit such actions and would not permit any sort of absolute immunity to attach to false statements made in the course of giving such illegal orders to her staff. Thus in some instances it is precisely the motive for the statement/action that determines whether it is legal or not and, therefore, whether absolute immunity can apply to it.

This was perfectly clear to the trial judge and to the jury. It was also clear enough to Tucker, who repeatedly alternated between telling the jury that DOR's actions against Resha went on without her knowledge and then telling them that she targeted him because he was in a high-cash business or that she had a secret source of information about him.

At trial, Tucker understood implicitly that slandering Resha in the course of aiming the machinery of government at him because he owned a video store would qualify her for absolute immunity while doing the same thing because he was a political opponent of herself and her husband would violate the state and federal constitutions, thereby rendering her ineligible for immunity for statements made in the course of and in furtherance of the illegal acts.

It is therefore a bit disingenuous that she embraces the District Court's careless conclusion that motive never plays a role in absolute privilege.¹

III. THE DISTRICT COURT EXCEEDED ITS JURISDICTION IN HOLDING THAT ABSOLUTE IMMUNITY WAS NOT A JURY QUESTION.

A most troubling development in this case is Tucker's argument, Answer Brief 47-48, that the District Court properly overturned the defamation verdict because the trial judge allowed the jury to decide the absolute privilege issue.

Tucker persuaded the trial judge, over Resha's objection, to submit the question of absolute privilege to the jury. (T. 1054-7.) The jury decided the question against her, as had the judge on the six previous occasions she submitted it to him. Then, on

¹ A sad irony in this case is that another panel of the 1st DCA, in a related case, recognized that Tucker's motive in targeting Resha would determine the legality of her actions and statements and therefore would determine her eligibility for federal qualified immunity. Tucker v. Resha, 610 So. 2d 460, 465-6 (Fla. 1st DCA 1992). That case is now pending before this Court as Case No. 80,991.

appeal, Tucker persuaded the District Court to overturn the defamation verdict on the ground that the trial judge had allowed the jury to decide the question of absolute privilege.

When Resha protested this manipulation to the court below, Tucker acknowledged the inconsistency and defended it as follows:

By that time appellant's counsel had to say something, as the trial court had already denied motions to dismiss, for summary judgment, and for directed verdict. Counsel was not about to argue that the trial judge, whose position had been made manifest throughout, ought to take that issue from the jury and rule as a matter of law; the result would have been to waive the privilege without an opportunity to convince the jury.

Appellant's Reply Brief at 4.

This being so, the District Court exceeded its jurisdiction in even allowing Tucker to raise the issue, not only for reasons of equitable estoppel but also because of a provision of the civil rules on jury instructions:

The court shall then require counsel to appear before it to settle the charges to be given. At such conference all objections shall be made and ruled upon and the court shall inform counsel of such charges as it will give. No party may assign as error the giving of any charge unless that party objects thereto at such time, or the failure to give any charge unless the party has requested the same.

Fla. R. Civ. P., 1.470(b) (emphasis added).

Not only did Tucker fail to object to the charge that ultimately sunk the defamation verdict, she insisted upon it. This ploy is called "invited error" and this court has condemned it for nearly a century. See, e.g., Roe v. Henderson, 139 Fla. 386, 190 So. 618 (1939) (appellant can not appeal jury charge requested by

him); Gracy v. Atlantic Coast Line RR Co., 53 Fla. 350, 42 So. 903 (1907) (party may not appeal opposing party's instruction that is similar to one's own).

That the District Court even heard the argument was error, for it lacked jurisdiction by authority of Rule 1.470(b). That the District Court actually overturned a verdict based upon the forbidden argument hurts our legal system as much as it hurts Resha.

The trial judge was correct in holding Tucker ineligible for absolute immunity each of the six² times he so ruled prior to the jury verdict and again when he so ruled a seventh time upon Tucker's post-trial motions. Thus even if it was error to allow the jury a crack at the same question, it was harmless error. Moreover, as shown in the previous section, the illegality of Tucker's actions depends in large part on her motive in taking those actions. That involves a credibility determination which may well be a proper jury function for a defamation privilege under the authorities discussed at 46-7 of Petitioner's Initial Brief.

CONCLUSION

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

Respectfully submitted,

² Tucker sought absolute immunity on a motion to dismiss, a motion for judgment on the pleadings, two motions for summary judgment, and two motions for directed verdict.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by U.S. Mail this 29th day of September, 1994, to Brian S. Duffy, P.O. Drawer 229, Tallahassee, Florida 32302-0229, 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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