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Rare Supreme Court Reversal for Error Correction

By Joseph Callanan, *Litigation News* Associate Editor – August 21, 2014

In a rare example of "error correction," the U.S. Supreme Court reversed summary judgment because two lower courts "neglected to adhere to the fundamental principle" when considering such a motion. A decision of the U.S. Court of Appeals for the Fifth Circuit had affirmed a grant of summary judgment, but in a per curiam opinion, the Supreme Court's reversal emphasized to the federal courts that "reasonable inferences should be drawn in favor of the nonmoving party." This case with its unusual procedural posture reminds lawyers that courts should only grant summary judgment when there are undisputed material facts.

In *Tolan v. Cotton*, a Section 1983 civil rights case, an officer-involved shooting resulted from the police mistakenly identifying a stolen car. Tolan's mother had left her house to tell the police officers that no crime had occurred, because the car belonged to her and Tolan was her son. Officer Cotton shot Tolan three times while he attempted to protect his mother, who Cotton was either grabbing or escorting.

On a motion for summary judgment based on qualified immunity, the U.S. District Court for the Southern District of Texas resolved disputed facts against Tolan, such as the lighting at the scene, his mother's demeanor, and the reasonable interpretations of the actions of those involved. The Fifth Circuit affirmed.

The Supreme Court criticized the Fifth Circuit for failing to "credit evidence that contradicted" some of the key factual conclusions and "for a clear misapprehension of summary judgment standards in light of our precedents." In response to Tolan's petition for certiorari, the Court granted certiorari, and then immediately within the same decision vacated the judgment and remanded without full briefing or oral argument.

Juries Decide Conflicting Facts

The bedrock doctrine that "genuine disputes are generally resolved by juries in our adversarial system" acted as a key factor in the Court's reversal of the award of summary judgment. The lower courts allowed "summary judgment based on a finding of fact—that the police officer reasonably believed that the suspect presented an immediate threat to his safety, which justified his use of deadly force—despite evidence in the record from which a trier of fact could infer the opposite," says Steve Finell, Santa Rosa, CA, cochair of the Appellate Rules and Statutes Subcommittee of the ABA Section of Litigation's Appellate Practice Committee.

For example, Tolan testified that "two floodlights shone on the driveway" while the lower court found the "front porch was 'dimly-lit.'" Among other disputed facts, "there is a dispute as to how calmly" Tolan's mother spoke to the police, whether she was "very agitated," as Cotton stated, or "neither 'aggravated' nor 'agitated,'" as she testified at the criminal trial.

The Court's ruling was in line with the rationale set out in a dissent issued by the appellate court. The dissent to the order denying rehearing en banc "enumerated a number of facts it felt were both in dispute and material that the Fifth Circuit panel had either dismissed as not in dispute or immaterial, but which the [Supreme] Court agreed were in dispute and material," adds Jeffrey Close, Chicago, IL, cochair of the Discovery and Motion Practice Subcommittee of the Section of Litigation's Pretrial Practice & Discovery Committee.

The Court provided a stern reminder about what a judge's role should be when deciding summary judgment motions. "The Supreme Court emphasized that a judge's function in summary judgment is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial," states Sonia O'Donnell, Miami, FL, cochair of the Section's Appellate Practice Committee. The Court also noted that judges "must credit all reasonable inferences in favor of the non-moving party and should not weigh the evidence—that is the jury's function," reports Cassandra Robertson, Cleveland,

OH, cochair of the Civil Procedure Subcommittee of the Section's Civil Rights Litigation Committee.

Highly Unusual "Simple Error Correction" Technique
The opinion issued after an extraordinarily unlikely path. "It was unusual for the decision to be decided without full merits briefing or oral argument," says Robertson. "[T]he Court decided the case upon a ground other than the question" presented, asserts Finell.

Several additional factors highlighted the decision's irregularity. A "per curium decision that grants certiorari, vacates a Court of Appeals decision, and remands the case for further consideration without even seeing briefs on the merits does not happen every day," states Finell. "The Court corrected an application of facts to well-established law, on a petition for certiorari, and enumerated its reasoning rather than simply vacating with mandate. That is not the usual role of the Supreme Court," says Close.

Justice Alito in a concurrence noted that a "very large category" of cases before the Court include challenges to the lower court's application of facts to the summary judgment standard, like *Tolan*. The opinion "set forth no new rules or standards, but merely corrected an 'error' in the Fifth Circuit's application of the summary judgment standard," says Close. The opinion "does not fit any of the usual reasons for the Court to grant certiorari that Sup. Ct. R. 10 enumerates and, to the contrary, falls within the rule's final cautionary statement" that the Court will rarely grant certiorari to correct alleged erroneous factual findings, adds Finell.

Obtaining Summary Judgment Can Be Difficult
Section leaders see *Tolan* giving pause to lawyers considering filing or having to respond to summary judgment motions. Lawyers filing motions should "consider whether you can realistically expect to prove your right to judgment as a matter of law based solely on undisputed facts," states Finell. "Lawyers are going to have to take another hard, long look at whether or not summary judgment is worth the expense and the time," says Close. While if you are opposing summary judgment, "you must be prepared to explain why there is a fact issue for the jury to resolve," concludes Robertson.

Keywords: summary judgment, Section 1983, Rule 56, qualified immunity, genuine issue as to any material fact

Related Resources

» *Tolan v. Cotton*, Docket No. 13-551 (May 5, 2014).
» Ruth Bader Ginsburg, Remarks for Second Circuit Judicial Conference, at 1–2 (June 13, 2014) (listing cases decided per curiam without briefing or oral argument).
» Jeffrey G. Close, "'Self-Serving Testimony' and Summary Judgment Standards," *Pretrial Practice & Discovery*, Vol. 22 No. 2, at 7–8 (Spring 2014).
» *Thomas v. Nugent*, Docket No. 13-862 (May 19, 2014) (per curiam) (granting certiorari, vacating judgment without briefs or oral argument, and remanding to the Fifth Circuit, citing *Tolan*).
» *Beard v. Aguilar*, Docket No. 13-677 (May 5, 2014) (Alito, J., dissenting from the denial of certiorari citing *Tolan*).
» Jonathan B. Stepanian, "Motions in Limine Held Not Dispositive," *Litigation News*, August 27, 2013.
» James A. King, "Summary-Judgment Evidence 101," *Trial Evidence* (June 19, 2013).

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