No. 10-114

Supreme Court, U.S.
FILED
SEP 7 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

—v.—

BILLY RAY VICE, Chief of Police for the Town of Vinton;
TROY CARY, Policeman for the Town of Vinton;
TOWN OF VINTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

J. STEVEN BROUSSARD
RANDALL E. HART
BROUSSARD & HART, LLC
1301 Common Street
Lake Charles, Louisiana 70601
(337) 439-2450

E. JOSHUA ROSENKRANZ
Counsel of Record
LISA T. SIMPSON
SIDDHARTHA M. VENKATESAN
REBECCA L. MROZ
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner Ricky D. Fox

Blank Page

TABLE OF CONTENTS

PETITIONER'S REPLY 1

I. Respondents Cannot Reconcile The Disparate Results Reached By The Circuits 2

II. Respondents Mischaracterize This Court's Precedent And Fail To Engage The Issue On Which Circuits Are Split 6

III. Respondents Mischaracterize Mr. Fox's Action, Which Is A Strong Vehicle For Certiorari On This Important Issue 9

CONCLUSION 12

TABLE OF AUTHORITIES

FEDERAL CASES

Balmer v. *HCA, Inc.*,
423 F.3d 606 (6th Cir. 2005) 6

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 7, 8, 11

Colombrito v. *Kelly*,
764 F.2d 122 (2d Cir. 1985) 3, 5

Curry v. *A.H. Robins Co.*,
775 F.2d 212 (7th Cir. 1985) 4, 5

Hensley v. *Eckerhart*,
461 U.S. 424 (1983) 3, 7, 8, 9

Lotz Realty Co. v. *HUD*,
717 F.2d 929 (4th Cir. 1983) 3, 4

Quintana v. *Jenne*,
414 F.3d 1306 (11th Cir. 2005) 4, 5, 6

Tutor-Saliba Corp. v. *City of Hailey*,
452 F.3d 1055 (9th Cir. 2006) 3, 4, 5, 6

United States Steel Corp. v. *United States*,
519 F.2d 359 (3rd Cir. 1975) 8

Ward v. *Hickey*,
96 F.2d 448 (1st Cir. 1993) 4, 5

STATE CASES

A. Copeland Enterprises Inc. v. Slidell Memorial Hosp.,
657 So. 2d 1292 (La. 1995) 11

Cox v. W.M. Heroman & Co., Inc.,
298 So. 2d 848 (La. 1974) 10

State v. Vice,
2008 WL 5169955 (La. App. 3d Cir. 2008)..... 10

FEDERAL STATUTES

42 U.S.C. § 1983 ..... 5, 9, 11

42 U.S.C. § 1988 .....passim

MISCELLANEOUS

H.R. REP. NO. 94-1558 (1976) 8

Blank Page

PETITIONER'S REPLY

In seeking to justify the decision reached by the Court of Appeals, Respondents avoid the circuit split issue presented by Mr. Fox regarding when and whether to award attorney's fees to partially prevailing defendants. Instead, Respondents rely on fragments of the lower court's opinion that bear on different parts of the attorney's fees analysis not relevant to the question presented in this petition. Respondents also attempt, and fail, to show that no split exists on this question, an impossible feat given the disparate results reached by eight circuits on the issue. Respondents' best retort for this deep split, which has been acknowledged by the circuits, is that the attorney's fees analysis turns on its facts, an uncontroversial statement that does not harmonize the split that has formed among the circuits.

Respondents also mischaracterize Mr. Fox's action, claiming that an action that began in state court, makes certain assertions that cannot be federal claims, and is set to be tried in state court did not significantly involve state law claims. This absurd overreaching no doubt stems from Respondents' recognition of the fundamental unfairness that Mr. Fox is faced with as a consequence of the Court of Appeals' decision below. In reality, Mr. Fox, an individual with limited means who has been victimized by the bad acts of Respondents, now finds himself facing a massive legal bill for Section 1988 attorney's fees on top of his own considerable and ongoing legal expenses in prosecuting a meritorious action to remedy the wrongs caused by Respondents. This result is

contrary to congressional design, as expressed in the legislative history of 42 U.S.C. § 1988 and this Court's precedent, both of which emphasize the importance of preserving judicial access for civil rights plaintiffs.

Certiorari should be granted to harmonize the disparate results reached by the circuits on this important question and to redress the harm to Mr. Fox caused by the Court of Appeals' legal errors below.

I. Respondents Cannot Reconcile The Disparate Results Reached By The Circuits.

The circuits are deeply split on whether and under what circumstances a plaintiff may be ordered to pay attorney's fees to a partially prevailing defendant under Section 1988. Pet. at 13-18. Two circuits award attorney's fees for any frivolous Section 1988 claims, even where these claims are interrelated with the plaintiff's non-frivolous claims, while three circuits award attorney's fees only where the plaintiff's frivolous and non-frivolous claims are distinct. Two other circuits award attorney's fees where the plaintiff's frivolous claim is a "significant" issue in the overall litigation, and one circuit awards attorney's fees only where an entire *action* is deemed frivolous. This split will lead to irreconcilable results going forward if certiorari is not granted.

Respondents fail to offer any unifying legal model rationalizing the disparate results reached by the circuits, arguing instead that the circuits' decisions

turn on the underlying facts. Opp. at 17-22. This is an unhelpful observation, as *all* attorney's fees determinations will turn on their facts. Furthermore, Respondents' argument ignores the rules that each circuit has announced in reaching their individual conclusions regarding when attorney's fees awards are appropriate to partially prevailing defendants. It also disregards the fact that other circuits, including the Court of Appeals in this case, have recognized the existence of a circuit split on this issue. *See* Pet. App. at 10a; *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1063-64 (9th Cir. 2006).

Respondents attempt a meritless case-by-case analysis of the various circuits' decisions in an effort to show that they do not address the issue identified by Mr. Fox. For example, Respondents claim that two cases, *Colombrito v. Kelly*, 764 F.2d 122 (2d. Cir. 1985), and *Lotz Realty Co., Inc. v. HUD*, 717 F.2d 929 (4th Cir. 1983), "do not even address a determination of the amount of attorney fees, much less adopt new rules for determining attorney fees." Opp. at 17. Respondents' focus on the determination of the *amount* of fees is misplaced, as the split at issue centers on when and whether it is appropriate to award *any* fees to partially prevailing defendants in the first place. Both *Colombrito* and *Lotz* address this question. In *Colombrito*, the Second Circuit cited this Court's decision in *Hensley* in holding that since the plaintiff's arguably frivolous and non-frivolous claims were "closely intertwined," attorney's fees should not be awarded to the defendant. 764 F.2d at 132. Conversely, in *Lotz*, the Fourth Circuit held that attorney's fees may be

awarded to a partially prevailing defendant where a "significant" issue is resolved in its favor. 717 F.2d at 931.

Respondents' analysis of the remaining cases cited by the petition in support of the circuit split is equally incorrect. As Respondents openly recognize, in *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the First Circuit found that the lower court erred in denying the defendant's request for attorney's fees due to the "interrelatedness" of the plaintiff's frivolous and non-frivolous claims. Opp. at 18-19. This finding is in direct conflict with the holdings of several other circuits, and the fact that the court remanded the case for the district court to make additional findings on the issue of frivolousness does not lessen its significance. Respondents also attempt to distinguish *Curry v. A.H. Robins Co.*, 775 F.2d 212 (7th Cir. 1985), by arguing that it has "peculiar facts." Opp. at 20. Respondents fail to show that *Curry* is "peculiar" for the purposes of the issue presented, given that the case involved two non-frivolous claims dismissed on statute of limitations grounds and a third claim found to be frivolous. The Seventh Circuit affirmed a fee award under these circumstances, finding that "[t]o be a prevailing party under § 1988, a party 'need not prevail on all issues if a significant one is resolved' in its favor.'" *Curry*, 775 F.2d at 219 (internal citations omitted).

Respondents' characterizations of *Quintana v. Jenne,* 414 F.3d 1306 (11th Cir. 2005), and *Tutor-Saliba Corp. v. City of Hailey* fare no better, particularly given that both of these recent cases

explicitly acknowledged the holdings of other circuits in taking a position on this split. Respondents assert that these cases did not establish any "new rule[s]" and "addressed facts in which the plaintiff's claims happened to be distinct." Opp. at 19. This is precisely why these cases matter, since they both involved multi-claim actions where the circuits awarded defendants their fees for frivolous claims because these claims were not interrelated with non-frivolous claims. In *Quintana*, the Eleventh Circuit stated that it was deciding the issue of "whether attorney's fees may be awarded to a defendant in a Title VII action when a frivolous claim is joined with an unsuccessful claim that is not frivolous." 414 F.3d at 1311. The court was "informed and persuaded" by the First Circuit's decision in *Ward* and the Seventh Circuit's decision in *Curry*, and ultimately held that since the plaintiff had distinguished his frivolous claim from his non-frivolous claim, attorney's fees for the frivolous claim would be appropriate. *Id.* at 1312.

Similarly, in *Tutor-Saliba*, the Ninth Circuit recognized that it was resolving "an issue of first impression in [the] circuit" as to "whether attorney's fees may be awarded to a defendant in a § 1983 action when frivolous claims are joined with claims that are not frivolous." 452 F.3d at 1063. The court cited the Second Circuit's decision in *Colombrito* in observing that "[s]ome circuits have concluded that, where a plaintiff's frivolous and non-frivolous claims are sufficiently *intertwined*, the defendant cannot recover attorney's fees for the time spent defending against the frivolous claims." *Id.* It contrasted this position with the First Circuit's decision in *Ward*,

noting that "[o]ther circuits, however, have permitted an award of attorney's fees for defending against frivolous claims even where frivolous and non-frivolous claims are interrelated." *Id.* The court ultimately sided with the Eleventh Circuit's reasoning in *Quintana* in holding that "because [plaintiff's] constitutional claims were sufficiently distinct from his statutory claims, the district court was in a position properly to weigh and assess the amount of fees attributable to [plaintiff's] frivolous claims." *Id.* at 1064.[1]

In short, the circuits themselves have recognized that a patchwork of legal rules has developed on the question of when it is appropriate to award attorney's fees to partially prevailing defendants under Section 1988. These rules will lead to disparate results on this important federal question going forward unless this Court resolves the split.

II. Respondents Mischaracterize This Court's Precedent And Fail To Engage The Issue On Which Circuits Are Split.

Mr. Fox showed in his petition that both Congress and this Court have found that civil rights defendants are in a different position than civil rights plaintiffs for attorney's fees purposes. Pet. at

---

[1] Respondents do not challenge Mr. Fox's reading of the Sixth Circuit's decision in *Balmer v. HCA, Inc.*, 423 F.3d 606 (6th Cir. 2005), which held that attorney's fees may never be awarded to defendants where the plaintiff has asserted at least one non-frivolous claim. *Id.* at 616-17.

4-10, 18-23. As a consequence, attorney's fees should be awarded sparingly to civil rights defendants under Section 1988, and not in an action that includes meritorious, interrelated claims along with Section 1988 claims. Such an action is not "frivolous" under this Court's decision in *Christiansburg* and its progeny.

Respondents attempt to sidestep this issue by arguing that the Court of Appeals appropriately applied this Court's precedent in considering the existence of Mr. Fox's interrelated claims in the context of the Lodestar reasonableness analysis for attorney's fees. *See, e.g.*, Opp. at 10, 13, 22-24. This argument does not make good sense, as the question of the amount of attorney's fees awardable to defendants comes only *after* the determination of whether fees should be awarded at all. The fact that the Court of Appeals may have considered (and disregarded) the existence of interrelated claims at the Lodestar stage of its attorney's fees analysis has no bearing on whether it answered the threshold question of whether fees should be awarded at all.

In arguing in support of the Court of Appeals' decision, Respondents also rely on fragments taken from this Court's precedent and the legislative history and claim that they state a policy of protecting civil rights defendants from frivolous lawsuits. Opp. at 11-14. Respondents mischaracterize Congress' emphasis in enacting Section 1988, which was on civil rights *plaintiffs*, not defendants. As this Court stated in *Hensley*, the purpose of Section 1988 was "to ensure 'effective access to the judicial process' for persons with civil

rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. REP. NO. 94-1558, at 1(1976)). While Congress acknowledged that awarding attorney's fees to defendants under Section 1988 may be appropriate in some instances, it noted with approval that "courts have developed a different standard for awarding fees to prevailing defendants because they do 'not appear before the court cloaked in a mantle of public interest.'" H.R. REP. NO. 94-1558, at 6 (1976) (quoting *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975)).

Moreover, Respondents do not seriously attempt to reconcile the Court of Appeals' holding with this Court's decisions in *Christiansburg* and *Hensley*. In *Christiansburg*, this Court determined that the plaintiff's claims were *not* frivolous, despite the fact that the statutory language enabling the Title VII lawsuit at issue did not apply to the claim at issue. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423-24 (1978). Unlike the plaintiff in *Christiansburg*, Mr. Fox's claim was grounded in facts showing meritorious violations of his rights and was found to be frivolous only after extensive fact discovery had been developed in litigation. Pet. App. at 3a. Thus, when determining whether Mr. Fox's claim was "frivolous," the Court of Appeals failed to recognize the high bar set by this Court in *Christiansburg*.

The Court of Appeals also neglected *Hensley* in failing to consider Respondents' overall success in Mr. Fox's suit prior to awarding fees. In *Hensley*, this Court directed that where a prevailing plaintiff's

claims are interrelated, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended in the litigation." 461 U.S. at 434-35. The Court of Appeals in this case failed to analyze the defendants' overall success in the suit. Instead, the court awarded Respondents attorney's fees for substantially *all* of their efforts in the litigation below, failing to undertake any effort to segregate expenses associated with Mr. Fox's non-Section 1983 claims. App. at 28a-30a, 32a-33a.

Respondents cannot reconcile the Court of Appeals' conclusions with this Court's precedent or the legislative history of Section 1988. Thus, this Court should grant certiorari to correct the error below.

III. Respondents Mischaracterize Mr. Fox's Action, Which Is A Strong Vehicle For Certiorari On This Important Issue.

As described in Mr. Fox's petition, the facts of this case present a compelling setting for resolution of the question that has split the circuits. Pet. at 10-13. Mr. Fox is the prototypical "private attorney general" contemplated by 42 U.S.C. § 1983 who in good faith brought an action against Respondents after suffering as the target of their extortion scheme. After voluntarily conceding his federal claim, Mr. Fox was slapped with more than $50,000 in attorney's fees, even though he continues to maintain valid state law claims that were remanded and are set to be tried.

Respondents' attempts to diminish Mr. Fox's case are unfounded and unsupported by the record. As the Court of Appeals recognized, Mr. Vice was tried and found guilty of extortion in state criminal court on the same set of facts alleged in Mr. Fox's civil case, and discovery in the civil case produced evidence of Mr. Vice's participation in the filing of a false police report. *See* Pet. App. at 3a. Respondents do not deny these facts, but instead point out that Mr. Vice's conviction "was subject to appeal at the time of this civil proceeding." Opp. at 7. The significance of this detail is unclear, and in any case, Respondents fail to mention that Mr. Vice's conviction has now been affirmed. *See State v. Vice*, 2008 WL 5169955 (La. App. 3d Cir. 2008).

Respondents mischaracterize several other facts regarding Mr. Fox's action against them. Most significantly, Respondents repeatedly contend that Mr. Fox's state law claims were raised "at the last minute." *E.g.,* Opp. at 1, 6-7, 21-22, 24. This is simply untrue. As reflected in the petition for damages attached to Respondents' brief as Appendix A, Mr. Fox brought this action in Louisiana *state* court. Opp. App. at 1b. It was *Respondents* who later removed the action to federal court. Pet. App. at 23a. Mr. Fox's initial petition for damages alleged all of the facts giving rise to his action, which is all that is necessary under Louisiana state civil procedure. *See Cox v. W.M. Heroman & Co., Inc.*, 298 So. 2d 848, 855 (La. 1974) ("So long as the Facts constituting the claim or defense are alleged or proved, the party may be granted any relief to which he is entitled under the fact-pleadings and evidence; the 'theory of the case' is abolished as a pleading

requirement or restriction.") (overruled on other grounds, *A. Copeland Enterprises Inc. v. Slidell Memorial Hosp.*, 657 So. 2d 1292 (La. 1995)).

Indeed, pursuant to Louisiana procedure, Mr. Fox stated a claim for all state law torts and constitutional claims supported by the alleged facts at the outset of this action. At no time did Mr. Fox file an amended petition for damages that suddenly inserted state law claims. As recognized by the Court of Appeals and both magistrate judges in this case, Mr. Fox's original petition for damages "claim[ed] federal and state causes of action." *Id.* at 3a, 21a, 38a. Paragraph 14 of the petition for damages clearly shows that Mr. Fox pled his Section 1983 claim "[i]n the alternative" to his state law claims, which included causes of action for extortion, intentional infliction of emotional distress, and defamation. Opp. App. at 5b. It is difficult to believe that Respondents seriously understood that Mr. Fox did not allege state claims from the outset, given that this action commenced in state court and was subsequently remanded to state court for trial on the state claims supported by Mr. Fox's originally pled facts in his petition.

Lastly, Respondents make much of the fact that Mr. Fox eventually conceded his federal claim after 18 months of discovery, suggesting that this proves he had no reason to assert this claim in the first place. Opp. at 7-9. This assumption is unfounded and has been rejected by this Court. *See Christiansburg*, 434 U.S. at 421-22 (courts should "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a

plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation"). Indeed, the fact that Respondents had to engage in intensive fact discovery for 18 months before attempting to show these claims were frivolous undermines their argument that these claims were frivolous from the start. Moreover, Mr. Fox's decision to voluntarily concede this claim after determining it was meritless is an action that should be *encouraged*, not deterred, among civil rights plaintiffs. Pet. at 21-22.

Respondents' suggestion that Mr. Fox's case exemplifies the dangers of allowing a plaintiff to avoid attorney's fees by "bootstrapping a state tort law claim to its suit" makes no sense, given that if a defendant shows that an entire action is frivolous, they can recover their attorney's fees. In reality, Mr. Fox's action involves a resource-constrained plaintiff exploring all legal theories (many of which are meritorious) supported by an underlying wrong perpetuated by Respondents. This is something that Congress sought to encourage through Section 1988, not deter. Pet. at 21.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
Lisa T. Simpson
Siddhartha M. Venkatesan
Rebecca L. Mroz
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

J. Steven Broussard
Randall E. Hart
Broussard & Hart, LLC
1301 Common Street
Lake Charles, LA 70601
(337) 439-2450

Counsel for Petitioner Ricky D. Fox

September 7, 2010

Blank Page