

IN THE
SUPREME COURT OF THE UNITED STATES

No. 10-114

RICKY D. FOX,
Petitioner,

v.

BILLY RAY VICE and the TOWN OF VINTON, LOUISIANA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**RESPONSE TO THE COURT'S MARCH 4, 2011, ORDER BY
RESPONDENTS AND PROSPECTIVE RESPONDENT**

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Respondents, including Judy Ann Vice, as Executrix of the Estate of Billy Ray Vice, who is filing today an unopposed motion for substitution, respectfully submit this brief in response to the Court's March 4, 2011, Order directing the parties to address the significance of the death of respondent Billy Ray Vice.

STATEMENT

1. In 2005, petitioner Ricky Fox filed suit in Louisiana state court against Vice and respondent Town of Vinton, Louisiana, alleging claims under 42 U.S.C. § 1983 arising out of the election of Vinton's chief of police.¹ Vice was the incumbent police chief; Fox, his opponent. In his complaint, Fox alleged that Vice had mailed an anonymous letter to Fox, which threatened to reveal embarrassing information about Fox's career as a state trooper. Fox also alleged that Vice had staged an incident at a high school basketball game, which resulted in an allegation that Fox had uttered a racial slur. Fox won the election. Vice was later convicted of extortion in connection with the anonymous letter.

2. The case was removed to federal court. Respondents Vice and the Town of Vinton were defended by separate counsel. Counsel for Vice were retained by Shelter Insurance Co. ("Shelter"), which carried Vice's homeowner's insurance policy; Shelter defended Vice under a reservation of rights. The district court ultimately dismissed Fox's Section 1983 claims

¹ The background of this litigation is set forth more fully in respondents' brief on the merits. See Resp. Br. 3-13.

with prejudice on respondents' motion for summary judgment. The district court subsequently determined that Fox's claims were frivolous, and that respondents were entitled to prevailing party attorney's fees under 42 U.S.C. § 1988(b). The district court stated that Fox's complaint included "allegations that could be characterized as state law tort claims, but plaintiff did not make these allegations separate from his § 1983 claim." Pet. App. 32a. The district court declined to exercise supplemental jurisdiction over such claims and remanded the remainder of the case to Louisiana state court. The district court awarded \$32,868.00 to respondent Town of Vinton, and \$15,183.00 to respondent Vice. The Fifth Circuit affirmed.

3. Fox filed a petition for a writ of certiorari on July 15, 2010. Vice died on August 26, 2010. Respondents filed their brief in opposition on August 27, 2010.² Fox filed his reply brief on September 7, 2010. This Court granted certiorari on November 1, 2010.

In December, the undersigned counsel of record and counsel for petitioner exchanged e-mails discussing the fact of Vice's death. The undersigned counsel of record gave comments on petitioner's draft suggestion of death but noted that he was still awaiting comments from his clients and

² The undersigned counsel of record and Messrs. Heytens, Ortiz, and Elwood did not begin their representation in this case until after the Court granted certiorari. The additional undersigned counsel prepared the brief in opposition, but none was aware of Vice's death when that brief was printed and filed one day later.

co-counsel. There was no further communication between the parties' counsel on this matter.

Fox filed his opening brief on the merits on December 23, 2010. The brief noted that Vice

passed away on August 26, 2010, during the pendency of this action. His name remains in the caption because no representative has come forward as yet to substitute as a party in either [his official or individual] capacity. Whether or not a party enters the case to substitute, this case remains alive because Petitioner still owes fees to the Town of Vinton.

Pet. Br. ii. The same day, Fox filed a letter with the Clerk of Court "suggest[ing] upon the record, pursuant to Supreme Court Rule 35, the death of Respondent Billy Ray Vice on August 26, 2010 during the pendency of this action." Fox explained that, although "[n]o representative of the deceased Respondent has come forward for substitution as a party," "the case is still alive because Petitioner remains burdened by the order requiring him to pay attorneys' fees, and one or more Respondents seek to collect those fees." Fox also stated that "the Court need not substitute any party for the time being."

Respondents filed their brief on the merits on January 31, 2011. That brief also noted (at 5 n.4) that "Vice died on August 26, 2010." Fox filed his reply brief on March 2, 2011. That brief did not discuss the fact of Vice's death or suggest that the case with respect to Vice should abate.

The case against respondents in state court remains pending in the 14th Judicial District Court (Parish of Calcasieu, Louisiana). On December 21, 2010, Fox filed a motion in that action seeking to substitute Judy Ann

Vice, as Executrix of the Estate of Billy Ray Vice, for the deceased. The court granted Fox's motion the same day.³

RESPONSE TO THE COURT'S ORDER

A. The Court Should Order Substitution Of Vice's Estate For Vice In His Individual Capacity; Alternatively, The Writ of Certiorari Should Be Dismissed As To Vice

1. This Court's Rule 35.1 provides for the voluntary substitution of an "authorized representative" of a party in the event of the party's death. It states that "[i]f the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time." If the respondent makes a motion to substitute a representative for the petitioner but the representative does not appear within a specified period of time, the petition for a writ of certiorari is to be dismissed. If the petitioner makes a motion to substitute a representative for the respondent but the representative does not timely appear, the petitioner "is entitled to proceed as in any other case of nonappearance by a respondent or appellee."

Rule 35.1 also provides that, "[i]f the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate." As of February 27, 2011, more than six months have passed since Vice's death. As the Court recently reaffirmed, however, that time period is not jurisdictional, and substitution beyond the six-month time

³ Mrs. Vice was appointed Executrix by the state district court on or about December 13, 2010.

period is permissible. *Riegel v. Medtronic, Inc.*, 552 U.S. 804 (2007) (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 537 U.S. 1042 (2002); *Schacht v. United States*, 398 U.S. 58, 63-64 (1970)). The Court so ordered in *Riegel* even though—unlike here—the *petitioner* was both the deceased party and the party seeking substitution, the motion to substitute was opposed, and the petitioner had died more than a year and a half *before* the filing of the petition for a writ of certiorari.

2. The Court should direct the substitution of Judy Ann Vice, Executrix of the Estate of Billy Ray Vice, for Vice in his individual capacity. The undersigned counsel of record and Messrs. Heytens, Ortiz, and Elwood are authorized to represent Town of Vinton and now the estate in the proceedings before this Court; Messrs. Ieyoub and Guidry are now authorized to represent the estate before this Court; and Messrs. Stamey and Miller represent the Town of Vinton. All respondents and the estate's Executrix join in seeking this substitution. A motion to that effect has been filed along with this letter brief. Counsel for petitioner Fox has stated that Fox does not oppose that motion.

Substitution will fully preserve the rights of all parties and will result in no prejudice to either side. Before his death, Vice obtained a final judgment awarding him fees, and that judgment was affirmed on appeal. Vice's estate continues to have a claim to that fee award, as does (derivatively) the insurance company that defended Vice in this action under

a reservation of rights. Thus, Vice's death does not moot this case; the dispute over the fee award is very much ongoing. In other words, this is not an instance in which the party's death automatically eliminates the underlying case or controversy: The insurance company is out of pocket for fees that the lower courts have ruled are recoverable, and petitioner is under a final judgment requiring him to pay those fees. Substitution will permit this Court to review that dispute without prejudice to either side.⁴

In the circumstances presented here, it was petitioner's duty, not respondents', to seek substitution. Although the parties agree that the Court should grant substitution and the case should proceed without adverse consequences to either petitioner or respondents from failure to meet the six-month deadline, if the Court disagrees then it is petitioner who should bear any consequences, as explained below.

Because the controversy between petitioner and respondent Town of Vinton indisputably persists, substitution would not require the expenditure of any additional resources on the part of this Court. Mootness, then-Justice Rehnquist once observed, should lead to "[e]xposure" to financial "penalties" only when "a clear authorization by Congress or settled precedent of this Court" compels such exposure. *Alioto v. Williams*, 450 U.S. 1012, 1013-1014

⁴ The undersigned counsel of record and Messrs. Heytens, Ortiz, and Elwood are serving *pro bono* and will not (and never have intended to) seek a fee award for their work on this matter. The undersigned counsel for Mr. Vice and the estate likewise will not seek fees for their work in this Court on this matter. Accordingly, there is no possible prejudice to petitioner in allowing substitution and the continued litigation of this controversy.

(1981) (dissenting from denial of certiorari). Depriving a deceased litigant (and his attorneys) of already-awarded fees because of mootness-related concerns, no less than awarding fees against a party deprived of an appeal because of mootness, is a step that should be taken only for the most compelling of reasons—reasons totally absent here with respect to respondents.

3. If the unopposed motion for substitution is *not* granted, the Court should (a) vacate the order granting the petition for certiorari, and (b) dismiss the writ of certiorari with respect to Vice individually. That is the course of action this Court has taken when an abatement occurs as a consequence of the death of the respondent. See, *e.g.*, *Mintzes v. Buchanan*, 471 U.S. 154 (1985) (per curiam) (vacating order granting certiorari and dismissing petition but not vacating court of appeals decision where respondent died after the grant of certiorari) (citing *Warden v. Palermo*, 431 U.S. 911 (1977)). If substitution is not granted, there is no good reason to depart from that practice here.

The Court should *not* vacate the decisions of the lower courts as to Vice on the theory that the controversy is rendered “moot” by the “absence” of a party asserting Vice’s interest. (Nor is this a case of refusal by the representative to appear after timely motion, in which case petitioner would be entitled by the terms of Rule 35.1 to proceed as if there had been a “nonappearance” by Vice.) Vacatur of the decisions below would effectively

allow petitioner to obtain relief from the judgment rendered by the district court and affirmed by the court of appeals without actual review by this Court. That would be inappropriate for at least three reasons.

First, as this Court has made clear, “[i]t is petitioner’s burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur.” *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994). Here, Rule 35.1 expressly contemplates that “any * * * party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time.” Petitioner did not file such a motion, even though more than two months elapsed between Vice’s death and this Court’s grant of certiorari. Having obtained this Court’s review, petitioner then filed a suggestion of death on December 23, 2010, expressly stating that “the case is still alive” and that “the Court need not substitute any party for the time being.” At the same time, petitioner *did* file a motion for substitution in the Louisiana state court proceedings, in which (as here) he continues to seek relief after Vice’s death. “[F]airness” and “equity” are the touchstone of whether to vacate a decision below, *Bonner Mall*, 513 U.S. at 25, 26; neither principle would be served by vacating the judgment below under these circumstances.

Second, vacating the decision below with respect to Vice would be inconsistent with the structure and purpose of Rule 35.1. That rule provides that, “[i]f the representative then fails to become a party” after another party’s successful motion seeking to order substitution, “the party *so moving*, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and *if a petitioner* or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee.” S. Ct. R. 35.1 (emphasis added). Here, petitioner did not file such a motion, yet vacating the decision below as to Vice would afford him relief as if he had. The purpose of Rule 35.1 is to allow parties the means to preserve controversies from possible mootness by substitution and to encourage them to do so. It should not be read to allow a petitioner seeking this Court’s discretionary review of a judgment to obtain the same relief he would obtain through success on the merits although he has failed to take available measures to avoid mootness. Even if the Court believes respondents rather than petitioner should have moved for substitution within six months, the Rule expressly provides *either* party a means to do so. Rewarding petitioner and punishing respondents for failure to take an act *either* party could have taken (and that petitioner took in the state action) merely encourages gamesmanship.

Third, the circumstances justifying vacatur are entirely absent here. Vacatur is warranted on mootness grounds where “the rights of all parties

are preserved” and such action “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). Here, vacatur would eliminate, rather than preserve, rights as determined by two lower courts; Vice’s estate (and, derivatively, Shelter) have a claim to fees awarded by the courts below. Conversely, dismissal of the writ as to Vice would leave the parties in the same position that they were in after the judgment below was affirmed. See *Bonner Mall*, 513 U.S. at 26 (“Respondent won below.”). For the reasons stated above, substitution would be preferable, but dismissal of the writ of certiorari is far better than eliminating the judgment of two lower courts without any consideration on the merits.

B. Rule 35.3 Is Not Implicated Here

This Court’s March 4 order specifically directed the parties to address the application of Rule 35.3. That Rule addresses the death of a party sued in his official capacity and provides, in pertinent part, that “the action does not abate and any successor in office is automatically substituted as a party.” Petitioner claims to have sued Vice in both his individual and official capacities; respondents assume (but do not concede) that is so for purposes of litigation before this Court. See Resp. Br. 4 n.1. But the fee award at issue here was not to Vice in his official capacity. The lower courts separately

awarded fees to respondent Town of Vinton and to Vice's personal counsel (for the work performed by attorneys retained by Shelter).

Moreover, "when the cause of action is based upon alleged unlawful acts of the public officer, for which he or she is chargeable personally as well as officially, a successor may not automatically be substituted in the absence of allegations or facts of record showing an intent to continue the predecessor's conduct." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 944 (9th ed. 2007) (citing *Spomer v. Littleton*, 414 U.S. 514, 522 (1974)). Even assuming that petitioner adequately alleged a "policy" of unlawful conduct by Vice in his official capacity, there is no indication that Vice's successor intends to continue any such policy. Indeed, since Vice's successor as chief of police is *petitioner Fox himself*, it is difficult to see how substitution could possibly occur without destroying any case or controversy (and adversity of interests) with respect to any claim against Vice in his official capacity. See *Karcher v. May*, 484 U.S. 72, 78 (1987) ("[T]he real party in interest in an official-capacity suit is the entity represented and not the individual officeholder.").

CONCLUSION

For the foregoing reasons, the Court should order the substitution of Judy Ann Vice, Executrix of the Estate of Billy Ray Vice, for Vice in his individual capacity. Alternatively, the order granting certiorari as to Vice

should be vacated and the petition for a writ of certiorari as to Vice dismissed.

Respectfully submitted.

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