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PRELIMINARY MEMORANDUM

September 30, 1985 Conference — Petition for Rehearing
Summer Rehearing List 1, Sheet 1

No. 83-1919 CFX

CITY OF OKLAHOMA CITY (§1983 defendant) — Cert to CA10 (Barrett, Doyle, Seymour)

v.

TUTTLE (§1983 plaintiff) — Federal/Civil — Timely

SUMMARY: Respondent seeks rehearing for purposes of deleting a passage in the Court's decision in City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985), concerning whether an objection was raised below and for obtaining a remand to CA10 for further proceedings.

FACTS, HOLDING BELOW, AND THIS COURT'S DECISION: The factual background of the case is summarized in the attached pool memo and the

Court's opinion. In brief, resp obtained a jury verdict in her favor on a §1983 claim against petr and the CA10 affirmed. The Court reversed in City of Oklahoma City v. Tuttle, supra, concluding that proof (of) a single instance of unconstitutional activity is not sufficient to impose civil rights liability on a city under Monell unless proof of the incident includes proof that it was caused by an existing municipal policy. (Per Justice Rehnquist with the Chief Justice and two justices concurring and three justices concurring in the judgment.) In the portion of the opinion relevant here, which was subscribed to by seven justices (Justice Stevens dissented; Justice Powell did not participate), the Court discussed whether review of the issue was proper. In this Court, resp had argued that petr had not objected specifically in the DC to the jury instructions relating to whether a single incident can be the basis for liability under §1983. (It is unclear from the record whether this assertion is true.) Under Fed. R. Civ. P. 51, an error cannot be alleged unless a specific objection is made to the jury instruction before the jury retires. Accordingly, resp had argued, the single-incident issue was not properly before this Court. The Court rejected resp's argument. The Court stated that "it seems clear" that resp had not raised this objection in the CA10. The Court further noted that resp had not raised the argument in her brief in opposition to the petition for certiorari, although she had raised it in one sentence in her brief on the merits, at oral argument, and in a supplemental post-argument brief on the question. The Court therefore held that resp had waived any objection she might have to review of the issue in this Court: "Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented

in the petition. Nonjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." 105 S. Ct. at 2432.

CONTENTIONS: Resp contends that the Court incorrectly concluded that she had not raised the failure-to-object point below in the CA10. The sentence that resp seeks rehearing on is: "The [city's single incident] claim was rejected on the merits, and the Court of Appeals' opinion does not even mention the requirements of Rule 51, so it seems clear that respondent did not refer to the Rule below." 105 S. Ct. at 2432. Resp argues in her petition for rehearing that she raised the point in the CA10 and appends to her petition an order with attached exhibits from the CA10 panel that decided the case. The order and exhibits state that Judge Seymour's notes from the oral argument "reflect that resp's counsel did in fact assert at oral argument that the City insufficiently objected to the instruction at trial," that Judge Barrett's notes reflect that "[c]ounsel did not ... refer to the 'single incident' defense," and that Judge Doyle "endorses the work of both Judge Seymour and Judge Barrett." Apparently the CA10 does not record or otherwise memorialize oral arguments. There is no mention in the order of whether the objection was raised in resp's brief before the CA10. (I have requested the briefs to check this point.) Resp asks the Court to delete the sentence in its opinion referring to whether the failure-to-object point was raised in the CA10 and to remand for determination of all issues relating to the point.

DISCUSSION: I recommend denial. The CA10 itself has not concluded that resp raised the issue below: Only one judge is willing to state

that he agrees with resp on this point. Moreover, if the issue actually was raised below, the CA10 was required to reach it first before turning to the substantive issue of whether the jury instructions properly stated the law. The Rule provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto ...." The CA10 has held that in the absence of an objection, the Rule "precludes consideration of the instruction." Union Pacific Railroad Co. v. Lumbert, 401 F.2d 699, 702 (CA10 1968). Thus, the Court's statement that, in light of the fact that the CA10 reached the merits, "it seems clear that respondent did not refer to [Rule 51] below" is entirely appropriate. To the extent that there is an error in this case, it is the CA10's. Finally, nothing in the Court's opinion would preclude the CA10 from rectifying this possible error when the case is returned to it. The Court did not actually reach the question of whether resp had raised the failure-to-object point below; rather it held only that the argument was waived here. If resp has lost her opportunity to raise this argument, it is not as a result of any action by the Court.

I recommend denial.

There is no response.

August 5, 1985 Cassell No op in petn

Resp. does not seek rehearing on holding that single issue instruction was reversible error. Rather, resp wants CA10 to rehear question of whether petr presented sufficient Rule 51 objection and whether resp. adequately preserved that issue in CA10. One of Resp's failure to present this argument in her brief in opposition to petition for cert. counsels against granting rehearing, notwithstanding the notes made at argument by one CA10 judge.

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