No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,
Petitioner,

vs.

JAMES H. PRAPROTNIK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A Verdict against the City is not inconsistent with a verdict in favor of three individual defendants where the jury could have found that the actions of municipal officials other than the individual defendants represented a government decision and caused the plaintiff's injuries.

2. The City agreed to the jury instruction delineating the standards for imposition of liability upon a municipality for the acts of its employees and is estopped from now asserting different criteria.

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STATUTORY AND PROCEDURAL PROVISIONS

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Fed.R.Civ.P. 51. Instructions to Jury: Objection

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

James H. Praprotnik filed a complaint in the U. S. District Court in February 1983 based on 42 U.S.C. §1983 and named the City of St. Louis (City) and various high City officials as defendants.[1]

Mr. Praprotnik originally filed his suit after his transfer when the Civil Service Commission refused to hear his appeal. He alleged that he was rated down, deprived of profesaional responsibilities and transferred because of his exercise of his right of appeal to the Civil Service Commission and his testimony under oath before the Heritage and Urban Design Commission, in violation of his rights under the First, Fifth and Fourteenth Amendments of the U. S. Constitution (Jt. App. 15).

The nexus of the complaint was a transfer in 1982 of Mr. Praprotnik from the Community Development Agency (CDA) to the Heritage and Urban Design Commission (HUDC).

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[1] Unless otherwise noted, the facts stated herein are cited in the opinion of the Court of Appeals.

The chain of events leading to that transfer began with an appeal by Mr. Praprotnik to the Civil Service Commission (Commission) of a fifteen day suspension imposed in April 1980 by Mr. Charles Kindleberger, Praprotnik's immediate supervisor. A few weeks prior to the suspension, Kindleberger had rated Mr. Praprotnik and recommended him for a two grade increase, based on Praprotnik's superior performance. The Commission set aside the suspension in an October 1980, decision. Later in October 1980, Praprotnik was rated again, his performance was "good" overall and he was recommended for a two-step decrease in salary grade.[2]

In October 1981, Mr. Praprotnik's performance was reviewed again and he received an "adequate" in several categories and an "inadequate" in "relationships".[3] Prior to Mr. Praprotnik's suspension appeal, he had never received a rating lower than "good" in his twelve years of City employment.

Praprotnik's appointing authority (Donald Spaid) did not agree with the Commission action of setting aside the suspension, he felt that Praprotnik had not been honest and became "down on him." (Tr. I, 54, 55)

Praprotnik was later called to appear and testify before the Heritage & Urban Design Commission (Tr. II, 4).

In response to questions from HUDC, Praprotnik testified that the Serra Sculpture had been offered to the City on prior occasions and that the City had rejected it. There was, however, a great deal of interest in the work from the Mayor's Office (Tr. II, 90). Frank Hamsher was displeased about Praprotnik's testimony before the HUDC (Tr. III, 180). The Post Dispatch Pulitzer family wanted the Serra Sculpture in-

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[2] Mr. Praprotnik appealed this rating and was awarded a one step increase.

[3] Praprotnik also appealed this rating, which appeal resulted in the "inadequate" being raised to "adequate".

stalled (Tr. III, 251) and the Mayor had made the decision to support the Sculpture (Tr. III, 180).

At HUDC, there was a vacant position of less responsibility and less salary than Mr. Praprotnik's at CDA. Frank Hamsher, then the Director of CDA, proposed that some of Mr. Praprotnik's duties be transferred and consolidated with the HUDC position, creating a position of an equivalent grade to Praprotnik's CDA position. The Director of HUDC, Henry Jackson, and Thomas Nash, Director of Public Safety, acceded to the proposal. In March of 1982, Praprotnik was called to Frank Hamsher's office and told that he was being transferred to HUDC (Tr. I, 67). Mr. Hamsher told Praprotnik that this was to be a lateral transfer of personnel and job functions (Tr. II, 68), that Praprotnik was transferred to consolidate design functions (Tr. III, 171-172). Mr. Duffe, Director of Personnel, was told by Mr. Hamsher that there would be a transfer of functions (Tr. III, 120, 126, 127). Arnold Montgomery, Director of HUDC at time of trial, testified that there was no documentation showing the transfer of functions and that he did not know of any transfer of functions (Tr. I, 154, 155). Mr. Kindleberger testified that there was no documentation of the transfer of functions (Tr. III, 246). Only the Mayor or the Board of Estimate and Apportionment could transfer functions from one appointing authority to another (Tr. II, 180) and the Mayor had the final decision (Tr. II, 185). The transfer of Praprotnik's position required a budget change which could only be made by the Board of Estimate and Apportionment consisting of the Mayor, President of the Board of Aldermen, and the Comptroller (Tr. I, 75). Witnesses testified that the Mayor of the City made the decision to transfer Mr. Praprotnik (Tr. 3-200). The Civil Service Commission refused to hear an appeal of the transfer.

By that transfer, Mr. Praprotnik moved from a position of seniority in his CDA job classification to being the only employee in his HUDC classification. Henry Jackson, the

Director of HUDC, assumed what there was of Mr. Praprotnik's architectural duties which had purportedly transferred with him.

Praprotnik was given menial and clerical responsibilities which were far below his management position, i.e., mounting photographs, roll filing maps, recording complaints (Tr. 1, 77).

In November 1982, Jackson recommended that Praprotnik's position be reclassified and that his salary be decreased by one step. Jackson also rated his performance as "inadequate" overall.

Praprotnik's appeal of this rating resulted in the "inadequate" being raised to "adequate" and the pay reduction recommendation being reversed.

However, his position was reclassified to a lower grade.

In November 1982, after Praprotnik had been with the agency for approximately 6 months, Jackson also attempted to lay him off (Tr. I, 78, 79). On November 4th, 1982, Mr. Jackson, requested a lay off list from Mr. Duffe for the position of City Planning Manager (Pl. Ex. 133). On the same date, Mr. Duffe sent Mr. Jackson a layoff list naming James Praprotnik (Pl. Ex. 134), Mr. Praprotnik was the only City Planning manager at HUDC. A letter dated November 5, 1982 was drafted advising Praprotnik that he was being laid off effective November 67, 1982 (Pl. Ex. 135). This letter was never sent and Praprotnik was not aware of the fact that there had been a proposed layoff until after the lawsuit had been filed and he obtained this information through discovery (Tr. I, 78, 79).

Robert Killen, Jackson's replacement as Director of HUDC, testified that in July 1983, plans were again being formulated to lay Mr. Praprotnik off.

Mr. Praprotnik was laid off the day before Christmas Eve, 1983, and the day after he was released from the hospital following surgery. His layoff eliminated his income, voided his 500 plus hours of accumulated sick leave and his pension and vacation benefits, and cancelled his medical insurance.

He sought and was granted leave of court to amend his complaint to include his layoff.

REASONS FOR DENYING THE WRIT

1. A Verdict against the City is not inconsistent with a verdict in favor of three individual defendants where the jury could have found that the actions of municipal officials other than the individual defendants represented a government decision and caused the plaintiff's injuries.

The City seeks to have this Court hear and determine the unique set of facts comprising *Praprotnik v. City of St. Louis* with the argument that the Court of Appeals wrongfully avoided *City of Los Angeles v. Heller,* 475 U.S. ____, 89 L.Ed.2d 806 (1986) and set itself on a collision course with other circuits.[4]

Heller, supra, an opinion issued on the basis of the petition for writ of certiorari and brief in opposition thereto, does not negate the Eighth Circuit's *Praprotnik* decision; *Pembaur v. City of Cincinnati,* 475 U.S. ____, 89 L.Ed.2d 452 (1986) affirms it. *Heller* differs from *Praprotnik* in two essential ways. In *Heller,* the jury was not instructed on any affirmative defense, including good faith, on behalf of the defendants; the *Praprotnik* jury was instructed regarding affirmative defenses. Nevertheless, the *Heller* jury returned a verdict in favor of the individual defendants who represented all of the persons alleged to have committed the constitutional violation; the *Praprotnik* jury, on the contrary, was not presented with a decision on each of the individuals alleged to have participated in the systematic deprivation of Mr. Praprotnik's constitutional rights.

In *Pembaur,* the person who initiated the events which Pembaur complained of was the Hamilton County Prosecutor, the man who directed his assistant to instruct the Deputy Sheriffs to

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[4] The City cites *Hannah v. City of Overland, MO.,* 795 F.2d 1385 (1986) as a case wherein the Eighth Circuit was inconsistent with itself. However, *Hannah* was a case in which all of the individual actors in the complained of violation were defendants and in favor of whom the jury returned its verdicts.

"go in and get [the witnesses]" whereupon the Cincinnati police chopped down Pembaur's inneroffice door with an axe, was not a party to Pembaur's suit. The City of Cincinnati, the County of Hamilton, Assistant Prosecutor Whalen and various others were defendants. The District Court, after trial, dismissed the complaint. Pembaur appealed the dismissal as to the City, County, and Whalen; the Court of Appeals upheld the dismissal of the County and of Whalen and reversed as to the City. Pembaur then petitioned for certiorari only as to the dismissal of the County.

This Court reversed.

In its reversal, the Court took *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978) to its next logical step.

Monell overruled *Monroe v. Pape,* 365 U.S. 167 (1961) in determining that, while a municipality could not be held liable on a respondeat superior theory, it could be held liable where the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adapted and promulgated by that body's officers. 436 U.S. at 690.

The *Pembaur* opinion refined *Monell's* definition of §1983 municipal liability. "However, as in Owen and Newport, a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. *To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983."* 89 L.Ed.2d at 463, 464.

The jury's verdict in favor of three individuals was not dispositive of the case. As in *Pembaur*, there were nonparty participants; the City remained a defendant against whom the jury properly could and did impose liability for its decision-makers' unconstitutional actions.

2. The City agreed to the jury instruction delineating the standards for imposition of liability upon a municipality for the acts of its employees and is estopped from now asserting different criteria.

The jury was instructed as follows:

"As a general principle, a municipality is not liable under 42 U.S.C. §1983 if the allegedly unconstitutional act was committed by an official high enough in the government so that his or her actions can be said to represent a government decision." (Instruction 15; A. 150; Tr.IV, 4).

The City made no objection, rather it agreed to the jury being instructed thus.

Plaintiff introduced evidence of participation by various high City officials in the fatal actsnof transferring him to an exposed position only to later lay him off from that position: the Mayor, two CDA Directors, two HUDC Directors, two CDA high administrators, and the Director of Public Safety. Not all of these individuals were named as defendants.[5]

Thus, of the officials whose actions were examined by the jury, the jury was presented with a specific question regarding only three.[6] [7]

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[5] Plaintiff filed a Motion to Add Additional Parties, the Mayor, two of his administrative aides, and the Director of Public Safety; the Motion was denied. (J.A. 233).

[6] The City continually, hopefully refers to plaintiff's transfer as being "Hamsher's decision." Hamsher was one of the three defendants in favor of whom the jury returned a verdict. However, the evidence was, as the Court of Appeals agreed, that the transfer was the decision not only of Hamsher, but also of the Mayor, Jackson, and Nash.

[7] Plaintiff's counsel, without objection, closed with an argument that: "Now, she [defendants' counsel] says maybe there are other high officials we should have brought in, that's why we sued the City of St. Louis. If other high officials did this to him, then the City is responsible." (Tr. IV, 56). After closing arguments, the Court read its instructions to the jury. (Tr. IV, 64).

The City now urges, by implication, that an instruction should have been read that liability is imposed on a city on the basis of a decision made by a city employee: 1) who was delegated the power to establish final governmental policy in the area; 2) who acted pursuant to a rule of general applicability established by official action; and 3) who acted pursuant to a formal process.

Rule 51 of the Federal Rules of Civil Procedure mandates, in part, that "...No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The City, by implication, is disobeying Rule 51 by presenting Question Two.

Failure to object in a timely manner to instructions and to thereby insure that the trial judge has an opportunity to make the corrections forecloses the raising of those contents as an issue on appeal. Rule 51, Fed. R. of Civ. Proc., *Kropp v. Ziebarth,* 601 F.2d 1348 (8th Cir. 1979), *Johnston v. Pierce Packing Co.,* 550 F.2d 474 (9th Cir. 1977), Wright & Miller, Federal Practice and Procedure: Civil §2558 (1971).[8]

The trial court instructed the jury as to the rule against which to measure municipal liability and the City cannot now propound a different standard.

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[8] For the reasons outlined in Question 1, *supra,* the concerns of *Newport v. Facts Concerts, Inc.,* 453 U.S. 247 (1981) are not applicable in this case.

CONCLUSION

For the reasons set forth above, the Petition For A Writ Of Certiorari should be denied, and this Court should refuse to issue an order reversing and remanding the judgment of the Appeals Court.

Respectfully submitted,

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