Supreme Court of Florida

TUESDAY, SEPTEMBER 8, 2020

CASE NO.: SC20-985

REPRESENTATIVE GERALDINE F. THOMPSON, ETC. vs.	GOVERNOR RON DESANTIS, ET AL.
Petitioner(s)	Respondent(s)

Representative Geraldine Thompson asks this Court to either (1) grant rehearing of our August 27 decision denying her petition or (2) allow her to amend the petition. Thompson remains committed to challenging Governor DeSantis's appointment of Judge Renatha Francis to this Court, on the ground that Francis was constitutionally ineligible at the time of her appointment and remains so now. What is new is Thompson's requested relief.

Thompson's initial petition asked us to require the judicial nominating commission to certify a new slate of constitutionally eligible nominees and then direct the Governor to make an appointment from that new list. We deemed such relief legally unavailable and denied Thompson's petition. In her motion for rehearing or for permission to amend, Thompson seeks different relief: she asks that we require the Governor to make an immediate appointment from among the seven remaining, constitutionally eligible nominees whom the JNC certified to the Governor on January 23, 2020. Abandoning her earlier focus on securing the

appointment of a constitutionally eligible African-American candidate, Thompson now maintains that she "opposes any decision which permits the Governor to unlawfully appoint a constitutionally-unqualified candidate to the Florida Supreme Court."

We deny Thompson's motion for rehearing, because she has not shown that our decision overlooked or misapprehended any relevant points of law or fact. *See* Fla. R. App. P. 9.330(a)(2)(A). However, we grant Thompson's motion to amend her petition, and we order the Governor to show cause why the amended petition should not be granted.

Analysis

Thompson's request to amend her petition is governed by Rule of Appellate Procedure 9.040(d). In pertinent part that rule says: "At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits." The rule's committee notes, which we deem persuasive but not binding, say that "[a]mendments should be liberally allowed under this rule, including pleadings in the lower tribunal, if it would not result in irremediable prejudice."

This is an original proceeding. Therefore, our understanding of the meaning and application of rule 9.040(d) is informed by the jurisprudence surrounding the rule's similarly worded counterpart in the rules of civil procedure, rule 1.190(e). Florida courts applying rule 1.190(e) long ago established that the public policy of our state favors the liberal amendment of pleadings and that "courts should resolve all doubts in favor of allowing the amendment of pleadings to allow cases to be decided on their merit." *Newberry Square Fla. Laundromat, LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.*, 296 So. 3d 584, 588 (Fla. 1st DCA 2020) (quoting *Sorenson v. Bank of N.Y. Mellon as Tr. for Certificate Holders CWALT, Inc.*, 261 So. 3d 660, 663 (Fla. 2d DCA 2018)). Another guiding principle is that "[t]he primary consideration in determining whether a motion for leave to amend should be granted is whether the opposing party would be prejudiced by the amendment." Philip J. Padovano, *Florida Civil Practice* § 7:10 n.16 (2020 ed.).

We believe that the interests of justice favor allowing Thompson to amend her petition. The Governor does not argue that allowing the amendment would cause him any prejudice, and we see none. Nor is this a case where Thompson has abused the privilege to amend or where an amendment would be futile. *See*

Newberry, 296 So. 3d at 589 (identifying these as standards for evaluating leave to amend). And finally, to the extent that Thompson's petition implicates both a public right and the institutional integrity of this Court, allowing an amendment would serve the public interest. To deny Thompson's request to amend in these circumstances would not be a proper exercise of our discretion.

The arguments against allowing an amendment are unpersuasive. The Governor first maintains that the request for amendment "falls outside the bounds of" rule 9.040(d). Focusing on the text's reference to amendment "so that [the proceeding] may be disposed of on the merits," the Governor claims that an amendment should not be allowed because this Court's decision already addressed the merits of Thompson's petition. The Governor cites no case law supporting this interpretation of the rule.

We do not see an inconsistency between the text of rule 9.040(d) and allowing Thompson to amend her petition. Thompson's initial request for legally unavailable relief *prevented* this Court from possibly ruling consistent with Thompson's meritorious constitutional claims. Permitting an amendment now would thus further the rule's textually expressed purpose of allowing this Court to dispose of Thompson's claims on the merits. While the Governor understandably

questions the *timing* of Thompson's request to amend, that concern goes to whether the request causes prejudice or abuses the privilege to amend. Both factors are absent here. *Cf. Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 870 (Fla. 2d DCA 2010) (absent prejudice, abuse of privilege, or futility, leave to amend may be granted even after hearing and ruling on summary judgment).

The Governor also argues that the request to amend "offends traditional notions of judicial estoppel and the like" and violates the "election of remedies doctrine." Application of judicial estoppel involves many conditions. But "[a]t its core [the doctrine] requires a showing that a litigant successfully maintained a position in one proceeding while taking an inconsistent position in a later proceeding, and that the other party was misled and changed its position in such a way that it would be unjust to allow the litigant to take the inconsistent position." *Crawford Residences, LLC v. Banco Popular N. Am.*, 88 So. 3d 1017, 1020 (Fla. 2d DCA 2012). This clearly does not describe the circumstances here. As for the election of remedies doctrine, its role is to "prevent double recoveries for a single wrong." *Holmes Reg'l Medical Ctr., Inc. v. Allstate Ins. Co.*, 225 So. 3d 780, 787

(Fla. 2017) (quoting *Liddle v. A.F. Dozer, Inc.*, 777 So. 2d 421, 422 (Fla. 4th DCA 2000)). This too is inapposite.

Conclusion

Thompson's motion for rehearing is denied. Her motion for leave to amend is granted. In light of the legal analysis in our August 27 decision and the authority of *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009), the Governor is ordered to show cause why he should not be required immediately to fill the vacancy in office of justice of the supreme court by appointing a candidate who was on the JNC's certified list of January 23, 2020, and is now constitutionally eligible for appointment. The Governor shall respond by Wednesday, September 9, 2020. If Thompson chooses to reply, she must do so by Thursday, September 10, 2020.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

dl
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