No. 19- _____

In The
Supreme Court of the United States

Steven E. Greer, MD

Petitioner,

vs.

Dennis Mehiel, Robert Serpico,
The Battery Park City Authority

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

The Lozman question

Did the lower courts misapprehend, then ignore completely on appeal, Lozman v. City of Riviera Beach, Fla., 13 8 S. Ct. 1945 (2018) in denying the Rule 60 motion and appeal? Was Greer v Mehiel indeed remarkably similar to Lozman, and therefore the probable cause defense should not have defeated the two First Amendment retaliation claims (i.e. that Greer's rights to petition and to report in the press were violated as well as being retaliated against via eviction)?

The Monell question

Respondent Dennis Mehiel, who was both the CEO and Chair of the Board of the Battery Park City Authority ("BPCA") at the time, was considered by the lower courts as not having "final policymaking authority"? Did the lower courts misapprehend Monell v. Dept. of Soc. Srvcs. of the City of NY, 436 U.S. 658 (1978) and set a dangerous precedent making it virtually impossible for a citizen to sue a government agency unless the board meets and publicly agrees to violate a constitutional right?

Related, if an individual respondent is removed during early stages of motion to dismiss, as Mr. Mehiel was in this case, but then later admits under oath to the acts that violated the First Amendment, should the courts ignore that evidence?

List of Parties

The *pro se* Petitioner is Steven E. Greer, MD, who is a doctor as well as a member of the press.

The Respondents are The Battery Park City Authority ("BPCA"), a public benefit corporation of the State of New York, as well as Dennis Mehiel, the former CEO and Chair of the Board of the BPCA, and Robert Serpico, the former CFO and acting President of the BPCA. (The other real estate owner defendants in the lower courts were removed as part of a settlement agreement.)

Statement of Proceedings

- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered August 6, 2015 (ECF 4)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered February 24, 2016 (ECF 138)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered February 24, 2016 (ECF 138)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered September 30, 2016 (ECF 177)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered March 29, 2018 (ECF 433)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered January 31, 2019 (ECF 485)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered January 31, 2019 (ECF 485)
- *Greer v Mehiel* --- Fed.Appx. ----, 2020 WL 1280679 2d Cir. Order entered March 17, 2020

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Cases

Statutes

Petition for a Writ of Certiorari

Steven E. Greer, MD, *pro se* respectfully petitions this court for a *writ of certiorari* to review the judgment of The United States Court of Appeals for the Second Circuit.

Opinions Below

The decision by The United States Court of Appeals for the Second Circuit denying Dr. Greer's direct appeal is reported as Greer v Mehiel --- Fed.Appx.---, 2020 WL 1280679 (2d Cir. Mar. 17, 2020).

The United States District Court for the Southern District of New York ("SDNY") denied Dr. Greer's motion for summary judgment, instead awarding the defendants summary judgment on March 29, 2018. The jury trial requested was never allowed to transpire. That order is attached in the Appendix B ("App.") at 12a.

After the summary judgment decisions, the SDNY then denied on January 31, 2019 Dr. Greer's Rule 60 motion that was primarily based on the newly created Lozman v. City of Riviera Beach decision that did not exist at the time of summary judgment. That order is attached in the Appendix C ("App.") at 38a.

Dr. Greer appealed to the Second Circuit, which affirmed the lower court decisions. That order is attached in the Appendix A ("App.") at 1a.

Jurisdiction

Dr. Greer's appeal to the Second Circuit was denied on March 17, 2020. Dr. Greer invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within 90-days of the Second Circuit's judgment.

Constitutional Provisions Involved

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

In the recent decision rendered on Lozman v. City of Riviera Beach, this Court further defined the powers of the First Amendment. It was held that a pretext of probable cause was not enough to defeat a First Amendment.

Mr. Lozman was an activist in Florida who had been evicted and then arrested by the local city government in retaliation for his peaceful petitioning at a public meeting during is allotted speaking time. In Greer v. Mehiel, Dr. Greer was not arrested by the BPCA (although arrest was threatened) but rather barred from future public meetings as well as evicted, all in retaliation for his news reporting on the BPCA. His exclusive stories had contributed to the ouster of several high-ranking officials of the BPCA, which was the local government body akin to the City of Riviera Beach in Lozman. Greer alleged that he too was evicted like Lozman, (i.e. one of the Retaliation claims), as well as prevented from attending public BPCA board meetings (i.e. the Equal Access claim, which was also a Retaliation claim.), similarly to Mr. Lozman being arrested during a public meeting.

The BPCA used a probable cause defense in both claims and succeeded in summary judgment, despite ample evidence that raised genuine disputes of material facts. The judge usurped a jury.

Since Greer was filed in 2015, every one of the individual defendants has been ousted from the BPCA. In fact, the entire Mehiel BPCA administration, including two different in-house chief legal counsel, has been removed, with some being clearly fired while others were allowed to "retire"

Several other federal lawsuits against the BPCA filed by other BPCA employees allege the same pattern of retaliation as in Greer. Greer argued in the lower courts that retaliation is the modus operandi of the BPCA.

Shortly after the summary judgment decisions in Greer, the Lozman decision was rendered by this Court in June of 2018. Dr. Greer promptly filed a Rule 60 motion primarily based on Lozman, as well as the fact that Mehiel had by that time admitted under oath that he ordered the actions that violated Dr. Greer's right to equal access (Mehiel and Serpico were both removed as defendants early in the motion to dismiss stage).

The district court misapprehended Lozman, Greer argues, and denied the Rule 60 motion. Later, in the appeals court, despite Lozman comprising a large portion of the Dr. Greer's briefs and oral argument, that court completely ignored Lozman, not mentioning it once in the summary order and decision that denied Dr. Greer on appeal.

The appeals court also denied Dr. Greer on the Equal Access claim. It sided with the district court, which used Monell v. Dept. of Soc. Srvcs. of the City of NY, 436 U.S. 658 (1978) and progeny cases to reason that the BPCA was not liable for the actions of Mr. Mehiel, even though he admitted to singling out Dr. Greer and barring him from public meetings, because Mr. Mehiel, who was both the CEO and Chair of the Board, lacked "final policymaking authority" for the BPCA. Those decisions now set a precedent making it virtually impossible to sue a government body.

Reasons for Granting the Writ

A. The First Amendment has never been in more jeopardy than it is today. To defend the First Amendment and new Lozman case law, this Court should review the decisions of the lower courts. The appeals court ignored completely the Lozman argument, not referencing it whatsoever in the summary order.

As previously explained, the case of Lozman v. City of Riviera Beach, Fla., 13 8 S. Ct. 1945 (2018) is remarkably similar to Greer not only in the actual series of events but also in the law. This Court held that a plaintiff need not prove the absence of probable cause when suing a government body (as opposed to an individual employee of the government), for retaliation. In Lozman, probable cause did not defeat Mr. Lozman's First Amendment claim against the City of Riviera Beach.

In Greer, the government of the BPCA was sued for violating Dr. Greer's First Amendment rights. His complaint alleged that the BPCA denied him equal access to public meetings and also colluded with the private real estate defendants in a retaliatory eviction scheme.

The BPCA successfully defended against Dr. Greer's retaliatory eviction claims in district court by arguing that probable cause for eviction existed (i.e. that he failed to pay rent on time, which was thoroughly refuted by Greer). The appeals court affirmed the decision and also used a probable cause reasoning,

> "...the evidence that defendants would have "taken exactly the same action absent [an] improper motive," *Coughlin*, 344 F.3d at 288 -- *i.e.*, declined to renew Greer's lease regardless of his blog posts -- was overwhelming."

However, Lozman makes both lower court decisions now bad law since probable cause cannot defeat a First Amendment retaliation claim.

For the Equal Access retaliation claim, the BPCA won in summary judgment after the district court volunteered a defense using Monell that the BPCA never used in their own briefs. In a rather convoluted manner of reasoning, the court ruled that the denial of access to a member of the press (i.e. Dr. Greer) to the public BPCA board meetings was not caused by official policy because the CEO and Chair of the Board, Mr. Mehiel, lacked "final policymaking authority". Had the actual merits of the claim been addressed (i.e. that Dr. Greer was not allowed into the meetings due to retaliation by the BPCA), a jury could well have determined that the BPCA retaliated and that it was indeed official policy. Therefore, Lozman would have been the governing law guiding the jury had the lower court not usurped a jury with summary judgment.

In Lozman, this Court assuaged concerns that a flood of lawsuits against high-level government officials would ensue because the ruling narrowly applied to lawsuits against cities. To that point in Greer, the defendants never argued and the lower courts also never ruled that Mr. Serpico, who was the

President and Chief Financial Officer of the BPCA at the time as well as the chief architect of the retaliatory eviction collusion scheme, lacked official policymaking authority or that the BPCA was not acting under official policy. Therefore, Lozman law applied. For the Equal Access claim, because Mr. Mehiel was removed as a defendant, Dr. Greer was only suing the BPCA, thus again making Lozman the governing law.

In Greer as in Lozman, the protected speech predated the retaliation by many months, thus eliminating concerns about causation between retaliatory animus and the retaliation. In other words, the BPCA decision to bar Dr. Greer from meetings was premeditated and orchestrated by several senior BPCA officials, at the instruction of Mr. Mehiel, well in advance of the first time that Dr. Greer was barred from several meetings.

The use of Lozman in Greer was not just as a minor footnote but rather as the primary basis of the Rule 60 motion in the district court and the appeal. However, the appeals court ignored Dr. Greer's argument and made no reference whatsoever to Lozman in the 11-page summary order.

Greer is possibly the first case to use Lozman in the appeals courts. Therefore, the impact of that case law on the lower courts has yet to be felt given that Greer's use of Lozman was ignored by the appeals court.

B. To reverse a dangerous precedent, this Court should review the application of Monell by the lower courts that now makes it virtually impossible to sue a government entity.

In Greer, the district court volunteered the use of Monell v. Dept. of Soc. Srvcs. of the City of NY, 436 U.S. 658 (1978) and progeny cases (i.e. the defendants failed to bring it up as a defense) to justify the summary judgment in favor of the BPCA. By first incorrectly removing the individual defendants, Mehiel and Serpico, early in the motion to dismiss stage, and then incorrectly ruling that Mr. Mehiel lacked "final policymaking authority", the lower courts allowed a rather convoluted reasoning to justify the decision in favor of the BPCA.

The case precedent standing now will forever be cited in association of Monell to mean that even the CEO and Chair of the Board of a government body cannot do anything to make a government liable, even when they admit under oath to the actions, and even when state law expressly grants them "final policymaking authority", as N.Y. Pub. Auth. Law § 1973(7) does, "[the BPCA] may delegate to one or more of its members, or to its officers, agents or employees, such powers and duties as it may deem proper."

Therefore, the lower courts have set the precedent that even the highest-ranking officials of a government entity cannot be deemed to have held "final policymaking authority" unless under rare circumstances when the board of the government meets and publicly proclaims that it approves actions that will violate the First Amendment. Of course, rarely do bad actors publicly codify malicious intent.

However, that was not the intent of this Court when it created Monell. The intent was to make it *more* possible, not *impossible*, to sue a government entity. The dangerous precedent established in Greer should be reversed.

This district court interpreted Monell in the summary judgment decision as,

> "A municipal entity can be sued under 42 U.S.C. § 1983 if its policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978). The same law applies to public benefit corporations. *See Estes-El v. State Dep't of Motor Vehicles Office of Admin. Aqjudication Traffic Violation Bureau,* 95 Civ. 3454, 1997 WL 342481, at *4 (S.D.N.Y. June 23, 1997). "Where the contention is not that the actions complained of were taken pursuant to a local policy that was formally adopted or ratified but rather that they were taken or caused by an official whose actions represent official policy, the court must determine whether that official had final policymaking authority in the particular area involved." *Jeffes v. Barnes,* 208 F.3d 49, 57 (2d Cir. 2000)."

The question then for a jury should have been to decide whether or not Mr. Mehiel, holding the joint titles of CEO and Chair of the Board, acted under official policy when ordering Dr. Greer to be denied his right to equal Access. The district court went on to

explain the guiding law that it used to address this question as,

> "Courts look to state law in determining whether the official in question possessed final policymaking authority. *Id.* The Second Circuit has "explicitly rejected the view that mere exercise of discretion [is] sufficient to establish municipal liability." *Anthony v. City of New York,* 339 F.3d 129, 139 (2d Cir. 2003). "[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988) (plurality opinion) (emphasis omitted). "Where a plaintiff relies... on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. *Jeffes,* 208 F.3d at 57-58;"

Dr. Greer then provided the aforementioned required "matter of law" that granted Mr. Mehiel official policymaking authority. N.Y. Pub. Auth. Law § 1973(7) states, "[The BPCA] may delegate to one or more of its members, or to its officers, agents or employees, such powers and duties as it may deem proper."

Dr. Greer also pointed out that, while the BPCA could have *theoretically* reviewed and overturned Mr. Mehiel's decision to violate Dr. Greer's First Amendment rights, it was standard procedure for the BPCA board only to review large contract decisions during monthly meetings. Day-to-day operating decisions were not routinely reviewed by the board, as evidenced by decades of archived video of those boards. The defense never provided evidence of the BPCA board ever "reviewing" a CEO's decision similar to the one in this case. In addition, Dr. Greer pointed to various definitions of the job title "CEO" used by Corporate America that grant "final policymaking authority" to the CEO.

Moreover, the lower courts were wrong to presume that the BPCA board was not aware of and did not approve Mr. Mehiel's decision to violate a journalist's right to equal access. Dr. Greer was not simply denied to a single public meeting. Video evidence was provided to the lower courts that Dr. Greer was kept out of several monthly board meetings and BPCA town hall meetings. A reasonable jury very well could have concluded that the BPCA board knew all about the scheme to deny Dr. Greer access and then cover it up by claiming that the board room was too full.

Although a jury should have been allowed to decide whether Mr. Mehiel held "final policymaking authority", the district court judge instead made the conclusory decision in summary judgment that,

> "There is no evidence that the officials who decided to deny Plaintiff entry to the July 2015 board meeting had final

> policymaking authority... Although, as Plaintiff points out, *see* Dkt. No. 396 (Pl. BPCA Opp.) at 11, New York law allows the BPCA board to delegate "powers and duties as it may deem proper," there is no evidence that the BPCA in fact delegated to Mehiel the power to exclude individuals from board meetings."

Dr. Greer argued this was flawed reasoning that ignored the New York law on public authorities, the precedent set by years of previous BPCA board actions, and the nature of the title CEO and Chair of Board. Instead, the district court weighed heavier a *hypothetical* scenario whereby the BPCA *could have* reviewed Mehiel's actions.

Conclusion

For the foregoing reasons, Dr. Greer respectfully requests that this Court issue a *writ of certiorari* to review the summary order and decision of The United States Court of Appeals for the Second Circuit. The lower courts ignored the Lozman law and misapplied Monell.

Respectfully submitted,

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Appendix-A: Summary Order by the 2d Cir.

19-326-cv
Greer v. Mehiel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17. day of March, two thousand twenty.