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Interlocutory Lockout: When the Court Prevents an Immediate Appeal of Qualified Immunity

THE BUMPY ROAD TO MSJ/MTD WITH DIVERGENT FACTS IN QUALIFIED IMMUNITY MOTIONS

In many cases where individual defendants are named, and federal claims are asserted, the defense will either file a Motion to Dismiss or a Motion for Summary Judgment, or both, based upon the defense of qualified immunity.

Under Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movement is entitled to judgment as a matter of law". The burden is on the moving party to show that there are either no disputed facts, no genuinely disputed facts, or that the plaintiff's assertion of the facts are not admissible or supportable. The party opposing the motion will attempt to defeat the motion, at least in part, by arguing there are material issues of fact, which should be decided by a jury, not the judge, and that the motion should fail.

The Rule does address factual issues or the lack of facts. It states that when facts are unavailable to the non-moving party to respond to a filed motion, the court may either defer considering the motion or deny it, allow time to obtain affidavits or declarations or take discovery or issue any other appropriate relief." Additionally, if a party fails to properly support a statement of fact or contradict another's party's assertion of fact, the court "may give an opportunity to properly support or address the fact, consider the fact undisputed for purposes of the motion, grant summary judgment if the motion and supporting materials—including the facts considered undisputed-show that the movant is entitle to it, or issue any other appropriate relief."

Qualified immunity is an exception to the general rule that denials from motions to dismiss and summary judgements are not immediately appealable. In *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806 (1985), the Supreme Court held that when Motions to Dismiss or Motions for Summary Judgment were denied based upon the defense of qualified immunity, the defendant,

had the right to an immediate, interlocutory appeal to the appellate court. Thus, a district court's denial of a qualified immunity motion based upon legal issues is considered a "final decision" under the collateral order doctrine, which falls under the jurisdiction of the appellate court under 28 U.S.C. Section 1291.

However, crafting a motion for summary judgment or motion to dismiss based upon qualified immunity, especially in excessive force cases and denial of medical care cases can be difficult. Many times, there are differing accounts of what occurred at the scene and the encounter may not have been captured on video. However, despite the fact-intensive nature of these particular cases, defendants have had success in appellate review of these motions. Recent appellate court opinions analyzing qualified immunity have trended favorably to law enforcement and expanding the reach of qualified immunity.

However, the general rule remains that courts can only decide issues of law. That leaves a few options in cases where there are likely divergent facts. Defendants can use a few strategies to overcome this hurdle that are not unlike the strategies employed in all summary judgment motions. The defense and base its qualified immunity motion analysis entirely on the facts as articulated by the Plaintiff. However, if Plaintiff's factual summary includes false statements that are relevant to the actions taken by officers, this strategy can be problematic. A second option is to primarily rely upon the facts as presented by the Plaintiff and argue that any divergent facts are either not "material" to the qualified immunity analysis. Another strategy with the facts that are at odds is to argue that the plaintiff's version is so lacking support that it cannot be supported by the record. Fourth, with a carefully drafted motion and prepared deposition questions and answers, defense counsel may be able to craft a set of facts that show the Plaintiff did not present facts on the issue and thus the defendant's version should be accepted.

DEAD-END ROAD? WHEN THE DISTRICT COURT FINDS FACTUAL ISSUES ON MSJ'S FOR QUALIFIED IMMUNITY?

Despite careful preparation, depositions, and drafting, what if the district court disagrees and finds that there are fact disputes or that the fact disputes are indeed "material"? The defense now has two options: (1) accept the ruling of the district court and (a) attempt to settle the matter or (b) proceed with discovery and trial. Then move for a direct verdict at the close of plaintiff's case and/or defendant's case. If the matter proceeds to the jury and they do not return with a defense verdict, the defense can then try to appeal the qualified immunity motion at that time. However, this comes after much expense and very public verdict; or (2) appeal the district court decision to the court of appeals regardless and attempt to challenge the ruling of the district court.

This is a challenging appeal to make and proceeding may be a difficult sell to the client and carrier. However, there is that chance that the appellate court will hear the merits of the appeal and reverse the district court, and the entire case or at least the federal claims could be

dismissed, which makes the appeal worthwhile. But proceeding with an appeal is not without some hurdles and potential challenges. First, the district court itself may (or plaintiff may push to) certify an appeal as frivolous. Such a ruling is problematic from two standpoints. At a base level, it allows a district court to retain jurisdiction. *See Chuman v. Wright*, 960, F.2d 104,105 (9th Circuit 1997) (if there is no written certification made by the district court, then the district court is not automatically divested of jurisdiction of the case if an appeal is made). The retention of jurisdiction by the district court and a certification of frivolity presents a two-fold problem for the defense. First, this means there is limited basis, if no basis at all to obtain a stay of the underlying proceedings at the district court. With the volume of appeals in the appellate courts, it is not unusual to obtain a ruling only weeks before a scheduled trial date. This means the case will simultaneously be proceeding on two tracks—one to trial and the other to the court of appeals—at the same time. Both require a tremendous amount of time and attention and proceeding with both can be challenging. Second, there is a potential for an award of sanctions if the appeal is determined to be frivolous and the appellate court declines jurisdiction. *See generally Baulch v. Johns,* 70 F.3d 814 (5th Circuit 1995) (awarding sanctions for a frivolous appeal for qualified immunity factual issues under USC Section 1927).

Third, there is an uphill battle under the applicable standard of review and deference given to the district court's decision that there were factual issues. The general rule is that an appeal is only available to review legal questions under a qualified immunity analysis. The defense has a decision that, at least according to the trial court, has factual issues involved.

POSSIBLE DETOURS

The good news is that there have been exceptions and clarifications made by the appellate courts in this area that are helpful in evaluating a further appeal in these circumstances and which involve sometimes review of the factual allegations. First, the court has held that mere sufficiency of the evidence appeals summary judgment (without an appeal of qualified immunity itself) are not subject to interlocutory appeal jurisdiction in the appellate courts. *Johnson v. Jones,* 515 U.S. 304, 115 S. Ct. 2151 (1995). However, the Court did go on to discuss two questions that arise in this analysis, even though they were not directly at issue in *Johnson*. It stated that if a district court order makes both a factual determination that a defendant may have taken a certain action and a corresponding legal determination that that action violates clearly established law, then immediate appear is available. However, the appellate court, reviewing this situation, is not required to exercise pendent jurisdiction and review the underlying facts. Instead, the appellate court can take the facts as true which were assumed by the district court decision. Thus, the review is on the order drafted by the district court. Additionally, when a district court does not state the facts it assumed when it denied the dispositive motion on qualified immunity, the appellate court must then undertake a detailed review of the record to determine the facts the district court relied upon, taking those facts in the light most favorable to the non-moving party which were likely assumed.

However, at the Motion to Dismiss stage, the court's standard was less strict. In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court held that appeals from a Motion to Dismiss based upon qualified immunity, that the appellate court can review the facts to determine if it states a "claim to relief that is plausible on its face". The facial plausibility analysis requires the court to accept a plaintiff's allegations as true, but it must look to see if there are facts that support it, not mere conclusory statements. Because this is a context-specific analysis, the courts can partake in this analysis. In short, the court can presume the veracity of the facts contained in the four corners of the complaint as provided by the plaintiff, but the court then then determine whether those pled facts plausibly give rise to any sort of relief. The *Ashcroft* court does not mention Harris (which involved review at the Motion for Summary Judgment stage) but distinguishes the holding in *Jones*.

Some courts expanded these decisions even further. The Eleventh Circuit held in *McMillian v. Johnson*, 88F.3d 1554 (11th Cir. 1996) that an appellate court could consider challenges to a district courts factual determinations when the factual issues involving the type of conduct the defendants engaged in, because it was a necessary part of the core qualified-immunity analysis.

The primary exception to an appellate review of factual issues was articulated in *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769 (2007). This case involved a high speed chase that was caught on video. The defendant officer filed a motion for summary judgment based upon qualified immunity and attached the video to the motion. Both the district court and the appellate court denied the motion finding material issues of fact. However, the Supreme Court reversed. It held that "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. At 380. Courts have been somewhat divergent in applying Harris, some strictly applying the holding and limiting it to video evidence, *see Blaylock v. City of Philadelphia*; *Mecham v. Frazier, Marvin v. City of Taylor* but the 6th and 10th circuits have had a more expansive ruling of *Scott*. In

OTHER JUDICIAL ROADBLOCKS ON THE HORIZON?

Recent Supreme Court decisions after *Scott v. Harris* have trended favorably toward the application of qualified immunity, despite negative press and public perception of law enforcement, especially in excessive force and shooting cases. There have been numerous articles circulating that challenge these rulings and the entire defense of qualified immunity in general. Some accuse appellate courts of fact-finding. Other op-ed pieces are critical about the appellate review process and that only denies of qualified immunity to individual officers make it in front of the Supreme Court.

In *Salazar-Limon v. City of Houston*, 581 U.S. ___ (April 2017), the majority denied certiorari of the 5th Circuit Court of Appeals, which affirmed the grant of summary judgment based upon qualified immunity in an excessive force shooting case. However, the dissent, authored by

Sotomayor and joined by Ginsburg were critical of alleged fact-finding by the underlying court. In *Salazar-Limon*, a Houston law enforcement officer shot the plaintiff after a traffic stop when he was attempting to walk away from a confrontation with that officer. The officer stated that Salazar-Limon turned toward him and reached for his waistband—as if for a gun—before the officer fired the shot Salzar-Limon. The issue was whether the shooting constituted excessive force. The dissent found that this was primarily a case of which story to believe and that the underlying court overstepped its mandate in the summary judgment process. The dissent found that the underling court "reached" to find undisputed facts and support the decision that the officer acted reasonably, finding that the plaintiff did not deny reaching for his waistband. The dissent ultimately concludes that "[t]his is not a case that should have been resolved on summary judgment." It continues that there is a "troubling trend" to reverse courts for wrongfully denying officers qualified immunity in use of force cases, but rarely interference when qualified immunity is applied when it should not be.