

**ARKANSAS COURT OF APPEALS**

DIVISIONS I &amp; IV

No. CA12-22

ROBERT SULLIVAN, MAYOR; CITY  
OF McRAE, ARKANSAS; WAYLAND  
BRADFORD, ET AL.

APPELLANTS

V.

MARY CONEY

APPELLEE

Opinion Delivered December 5, 2012

APPEAL FROM THE WHITE  
COUNTY CIRCUIT COURT  
[CV-09-231]HONORABLE THOMAS MORGAN  
HUGHES, III, JUDGE

REVERSED AND REMANDED

**DAVID M. GLOVER, Judge**

Mayor Robert Sullivan appeals from the trial court's specific denial of the portion of his motion for summary judgment that asserted Mary Coney's claims for damages were barred by the doctrine of qualified immunity. Denials of summary judgment are not usually final and appealable; however, Arkansas Rule of Appellate Procedure 2(a)(10) allows for an appeal to be taken from an order denying a motion for summary judgment based on the defense of sovereign immunity or the immunity of a government official. The rationale justifying an interlocutory appeal is that the right to immunity from suit is effectively lost if the case is allowed to proceed to trial. *Simons v. Marshall*, 369 Ark. 447, 255 S.W.3d 838 (2007). Both the mayor's answer to the complaint and his motion for summary judgment contended in part that he was entitled to qualified immunity. Following a hearing on the motion for summary judgment, the trial court specifically

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denied Sullivan's assertion of qualified immunity but did so without ruling on the merits of the issue. We hold that the court erred in denying the claim for qualified immunity without deciding the merits, and we reverse and remand with instructions to the trial court to rule on the merits of the qualified-immunity issue.

Mary Coney served as police chief for the City of McRae, Arkansas, and Sullivan served as its mayor. According to depositions and other evidence presented in the summary-judgment process, Sullivan claimed that he fired Coney for insubordination and falsified "fire runs." Coney claimed that she was, instead, fired for refusing to arrest an individual as ordered by Sullivan and that she refused to do so because the city attorney advised her to have the issue decided by the city council. Coney filed a complaint in response to her firing, alleging violation of the Arkansas Freedom of Information Act, entitlement to a public hearing before the city council, violation of the Arkansas Whistle Blower Act, entitlement to continuing health-care benefits, and continued expectation of employment as police chief and code-enforcement officer.

In his motion for summary judgment and supporting brief, Sullivan argued that he was entitled to summary judgment not only on the merits of Coney's claims but also based upon the doctrine of qualified immunity. At the hearing on the motion for summary judgment, however, the focus of attention was on the facts of the case and in determining whether there were any factual disputes. No argument concerning qualified immunity was made at the hearing. At the end of the hearing, the trial court denied the motion for

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summary judgment, finding that there were enough factual disputes to warrant having a trial on Coney's claims.

The mayor's counsel then stated his intention to pursue an interlocutory appeal based on the issue of qualified immunity. The trial court responded "that wasn't discussed today . . . . I know it's in your motion. We just didn't—it wasn't brought up." The trial court then stated, "Well, Counsel, do you want to make an argument today?" The mayor's counsel responded, "Well, I mean, it—" And the trial court interjected, "It wasn't—I've ruled based on what was argued today." Counsel for the mayor then said, "Well the—the argument is that the Mayor—" And the court said, "I tell you what, Gentlemen, I've made my ruling." The trial court's order denying summary judgment with respect to qualified immunity provides: "Mayor Sullivan's motion for summary judgment based on qualified immunity was not argued during the hearing and is hereby denied." Sullivan's interlocutory appeal arises from this order.

We begin by clarifying that our jurisdiction to hear this appeal is limited to the issues involving qualified immunity. Ark. R. App. P.–Civ. 2(a)(10). Because the trial court refused to address the merits of Sullivan's assertion of qualified immunity, we have nothing to review concerning the merits of this defense. What we are empowered to review, however, is the trial court's denial of the portion of the motion for summary judgment that was based upon the qualified-immunity defense. In asserting our jurisdiction in this regard, we distinguish our supreme court's case of *Arkansas Lottery Commission v. Alpha Marketing*, 2012 Ark. 23, \_\_\_ S.W.3d \_\_\_. In *Alpha Marketing*, the

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supreme court dismissed the appeal without prejudice because the circuit court did not rule on the sovereign-immunity issue. In that case, an argument was made to the trial court at the hearing, but the parties failed to obtain a ruling on the issue. The supreme court explained that the absence of an express ruling was fatal to an interlocutory appeal. Here, in contrast, the trial court made an express ruling in Paragraph 5 of its order, “Mayor Sullivan’s motion for summary judgment based on qualified immunity was not argued during the hearing and is hereby denied.” With that express ruling on the issue of qualified immunity, we are empowered to review the trial court’s decision.

Here, the trial court denied the qualified-immunity portion of the motion because it was not argued at the hearing, even though the trial court acknowledged that the issue was contained in the motion for summary judgment that was before him for a ruling. Rule 56 of the Arkansas Rules of Civil Procedure defines the manner in which motions for summary judgment may be brought before the trial court for decision. Nothing in Rule 56 requires that an issue raised in the motion and supporting brief also be orally argued to the trial court in order to obtain a ruling on the merits. The qualified-immunity defense was asserted in the mayor’s answer; it was argued in the motion for summary judgment and in the supporting brief; counsel alerted the trial court at the hearing that he intended to take an interlocutory appeal on the qualified-immunity issue; and the trial court half-heartedly offered counsel an opportunity to argue the issue at the hearing, but then essentially cut him off twice when he attempted to do so. We hold that the trial court erred in refusing to address the merits of the qualified-immunity issue based on the

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position that it was not argued at the hearing. We therefore reverse and remand this case to the trial court with instructions to address the merits of the qualified-immunity issue.

Reversed and remanded.

PITTMAN, GLADWIN, ROBBINS, and MARTIN, JJ., agree.

VAUGHT, C.J., dissents.

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LARRY D. VAUGHT, Chief Judge, dissenting. The majority holds that the trial court specifically ruled on the issue of qualified immunity, but reverses and remands for the trial court to rule on the issue of qualified immunity. I find that reasoning to be illogical. Without an order on the merits of qualified immunity, we have no jurisdiction. I would dismiss the appeal.

It is apparent from the colloquy set out in the majority opinion that the trial court did not make an oral ruling on the qualified-immunity question at the hearing. In fact, the trial court specifically refused to make the ruling. In the written order from which Sullivan appeals, it does state that “Mayor Sullivan’s motion for summary judgment based on qualified immunity was not argued during the hearing and it is hereby denied.” The only logical conclusion to be drawn from that statement is that there is no ruling on the merits of qualified immunity.

Our supreme court recently held that “[i]t is axiomatic that, without a ruling on the sovereign-immunity issue, there can be no interlocutory appeal.” *Ark. Lottery Comm’n v.*

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*Alpha Mktg* 2012 Ark. 23, at 6, \_\_\_ S.W.3d \_\_\_, \_\_\_. I would hold that refusing to rule on the merits is equivalent to not ruling at all for purposes of establishing jurisdiction. The appropriate disposition is dismissal of the appeal.

However, even if we consider the order to be an appropriate denial of summary judgment based on qualified immunity, the disposition of the majority is not correct. The majority correctly sets out that the issue of qualified immunity was raised and briefed in the motion for summary judgment. Both parties have fully briefed the issue before this court. Therefore, if we have jurisdiction to hear the appeal by means of the trial court's order denying summary judgment, then we should address the merits of the claim and affirm or reverse on the merits. I simply cannot agree to reverse a court's order and remand it back to decide the very issue that had to have been decided for us to have jurisdiction in the first place. I would dismiss.

*M. Keith Wren*, for appellant.

*Robert A. Newcomb*, for appellee.