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2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
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6
7 THOMAS CHANG, et al.,

8 Plaintiffs,

9 vs.

10 CITY OF PACIFICA, et al.,

11 Defendants.
12

Case No: C 15-4591 SBA

**ORDER SETTING BRIEFING
SCHEDULE**

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14 Plaintiffs, the survivors and heirs of decedent Errol Chang (“Errol”), bring the
15 instant wrongful death and survival action against Daly City, Pacifica, and the officers
16 allegedly involved in causing Errol’s death. Pursuant to 42 U.S.C. § 1983, the Complaint
17 alleges federal claims for excessive force and violation of substantive due process (based
18 on the interference with familial association). Plaintiffs also advance supplemental state
19 law claims for negligence (styled as causes of action for negligence and respondeat
20 superior).¹

21 On March 30, 2018, the Court granted in part and denied in part the Daly City
22 Defendants and Pacifica Defendants’ respective motions for summary judgment.² Dkt. 71.
23 The Court granted summary judgment on Plaintiffs’ excessive force claims, finding that the

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25 ¹ Plaintiffs also alleged a claim for violation of the Ralph Act, which they voluntarily dismissed.

26 ² The Pacifica Defendants are: Pacifica; Police Chief Jim Tasa; Officer Steven
27 Stump; Officer Jesus Aranda; Sgt. Victor Romero; and Cpl. William McDonald. The Daly
28 City Defendants are: Daly City; Police Chief Manuel Martinez, Jr.; Capt. Joe Spanheimer;
Capt. Daniel Steidle; Sgt. Harold Rolfes; Officer Mario Busalacchi; Officer Steven
Woelkers; and Sgt. Duane Wachtelborn.

1 shooting of Errol was justified in light of his knife attack on one of the officers. Id. at 13-
2 17. Given that determination, the Court found that Defendants’ alternative argument under
3 the doctrine of qualified immunity was moot. Id. at 30. With regard to Plaintiffs’ claim for
4 denial of substantive due process, the Court concluded that there are genuine issues of
5 material fact that preclude judgment as a matter of law. Id. at 17-26. The Court noted that
6 Defendants did not assert a qualified immunity defense as to this claim. Id. at 30. But even
7 if they had, the presence of disputed factual issues renders summary judgment based on
8 qualified immunity inappropriate. Id. at 30-31. Finally, the Court found that there are
9 genuine issues of material fact precluding summary judgment on Plaintiffs’ negligence
10 claims. Id. at 31-36.

11 Following the issuance of its summary judgment ruling, the Court set a further case
12 management conference (“CMC”) for April 26, 2018. The purpose of the CMC was to
13 reset the trial date, which had been vacated due to the pendency of the aforementioned
14 motions. Shortly before the CMC, however, Defendants moved to continue the CMC to
15 May 2, 2018, due to the unavailability of one of the Daly City Defendants’ counsel. The
16 Court granted the request. On April 27, 2018—the day after the original CMC date—the
17 Daly City Defendants and Pacifica Defendants separately filed Notices of Appeal,
18 challenging the denial of qualified immunity as to Plaintiffs’ substantive due process claim.
19 Dkt. 77, 78. Moreover, in their CMC statement filed in anticipation of the May 2 CMC,
20 Defendants provide no proposed dates for trial, asserting instead that their appeals
21 completely divest this Court of jurisdiction to proceed with any claim in this action,
22 including Plaintiffs’ state law claims. Dkt. 75 at 12; Dkt. 79 at 1. They further maintain
23 that the action is automatically stayed during the pendency of their appeals. Id.

24 Under 28 U.S.C. § 1291, circuit courts generally lack jurisdiction to hear
25 interlocutory appeals from the denial of summary judgment. Isayeva v. Sacramento
26 Sheriff’s Dep’t, 872 F.3d 938, 944 (9th Cir. 2017). “But an exception arises where the
27 movant was denied summary judgment based on qualified immunity.” Id. “[A] district
28 court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law,

1 is an appealable ‘final decision’ within the meaning of 28 U.S.C. § 1291 notwithstanding
2 the absence of a final judgment.” Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). As such,
3 “a *proper* appeal from a denial of qualified immunity automatically divests the district
4 court of jurisdiction to require the appealing defendants to appear for trial....” Chuman v.
5 Wright, 960 F.2d 104, 105 (9th Cir. 1992) (emphasis added).³ Nonetheless, “[s]hould the
6 district court find that the defendants’ claim of qualified immunity is frivolous or has been
7 waived, the district court may certify, in writing, that defendants have forfeited their right
8 to pretrial appeal, and may proceed with trial.” Id.

9 A qualified immunity claim may be certified as frivolous if it is “so baseless that it
10 does not invoke appellate jurisdiction.” Marks v. Clarke, 102 F.3d 1012, 1017 n.8 (9th Cir.
11 1996). An appellate court lacks jurisdiction over an appeal based on qualified immunity
12 where the district court’s decision is predicated on a disputed factual record. Johnson v.
13 Jones, 515 U.S. 304, 319-20 (1995) (“[A] defendant, entitled to invoke a qualified
14 immunity defense, may not appeal a district court’s summary judgment order insofar as that
15 order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for
16 trial.”); George v. Morris, 736 F.3d 829, 836 (9th Cir. 2013) (“Any decision by the district
17 court ‘that the parties’ evidence presents genuine issues of material fact is categorically
18 unreviewable on interlocutory appeal.”) (quoting in part Eng v. Cooley, 552 F.3d 1062,
19 1067 (9th Cir. 2009)). Here, the Court found that “there are factual disputes present that
20 render summary judgment based on qualified immunity inappropriate.” Dkt. 71 at 31
21 (citation omitted). In view of that finding, Defendants’ appeal may not be “proper.”

22 Appellate jurisdiction also may be lacking where a claim of qualified immunity has
23 been waived. See Summe v. Kenton Cnty. Clerk’s Office, 604 F.3d 257, 269-70 (6th Cir.


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25 ³ Defendants’ contention that their appeals automatically divest the Court of
26 jurisdiction over Plaintiffs’ state law claims is incorrect. Nelson v. City of Davis, 685 F.3d
27 867, 875 n.2 (9th Cir. 2012) (defendant’s appeal on qualified immunity grounds did not
28 vest appellate court with jurisdiction to review the denial of summary judgment as to the
state law claims). Therefore, even if the Court were divested of jurisdiction over the
Plaintiffs’ remaining federal claim, the case continues to proceed as to the state law claims.
To hold those claims in abeyance, Defendants must first file a stipulation or motion to stay,
which they have yet to do.

1 2010) (defendant waived qualified immunity defense on appeal by virtue of having failed to
2 raise the defense in his summary judgment motion); see also Indep. Towers of Washington
3 v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) (holding that issues that are not
4 “specifically and distinctly” presented in a party’s moving papers are deemed to have been
5 waived). In their motion papers, Defendants expressly raised a qualified immunity defense
6 to Plaintiffs’ excessive force claims, but did not raise such a defense with respect to the
7 claim for substantive due process. As such, for purposes of the summary judgment
8 proceeding, Defendants’ ability to challenge the Court’s ruling may be deemed to have
9 been waived.

10 In view of the foregoing, IT IS HEREBY ORDERED THAT Defendants shall show
11 cause why their appeals from the Court’s summary judgment ruling should not be certified
12 as frivolous and/or waived. Defendants shall jointly file a single response, not to exceed
13 ten pages, by no later than May 22, 2018. Plaintiffs shall file their response, not to exceed
14 ten pages, by no later than May 30, 2018. The parties’ briefs shall include a table of
15 contents and table of authorities, which will not be counted against the ten page limit.

16 IT IS SO ORDERED.

17 Dated: 5/14/18


SAUNDRA BROWN ARMSTRONG
Senior United States District Judge

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