The Estate of Tony Robinson, Jr., ex rel. Personal Representative Andr...of Madison, Wisconsin et al Doc. 279 Att. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE ESTATE OF TONY ROBINSON, JR.,
Ex. Rel. Personal Representative
ANDREA IRWIN,

Plaintiff,

v.

THE CITY OF MADISON, WISCONSIN,
MADISON POLICE OFFICER MATTHEW KENNY,

Defendants.

No. 15-CV-502

Hon. Judge Peterson

**PLAINTIFF'S MOTION TO CERTIFY
DEFENDANT KENNY'S QUALIFIED IMMUNITY APPEAL AS FRIVOLOUS**

Plaintiff, Andrea Irwin, as personal representative of the Estate of Tony Robinson Jr., by and through her undersigned counsel, respectfully moves this Court for an order certifying Defendant Kenny's qualified immunity appeal as frivolous and in support states as follows:

Introduction

On February 13, 2017, the Court denied Defendant Officer Kenny's motion for summary judgment, finding that factual disputes precluded entry of judgment in Kenny's favor on Plaintiff's Fourth Amendment claim and on Kenny's affirmative qualified immunity defense. Dckt. 236. Trial is scheduled to begin in less than two weeks, and Plaintiff is looking forward to her day in court.

With trial looming, Kenny seeks to indefinitely postpone a jury's consideration of the claims against him by filing a notice of interlocutory appeal

Dockets.Justia.com

from this Court's denial of summary judgment. Dckt. 258. The appeal is frivolous. It is *impossible* to accept Plaintiff's version of the facts, as Kenny must, and find that he is entitled to qualified immunity. There is no doubt that this is Kenny's burden. *See Scott v. Harris*, 550 U.S. 372, 378 (2007) (At summary judgment, "courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts."); *Weinmann v. McClone,* 787 F.3d 444, 449 (7th Cir. 2015) ("Our task is to determine, under [Plaintiff's] version of the facts, if [the Defendant Officer] was objectively reasonable in his belief that his life was in danger.").

And, there is no doubt that Kenny's motion for summary judgment fails to accept Plaintiff's facts, particularly about what happened in the stairwell. Kenny claims he announced "Madison Police"; Plaintiff contends he did not. Kenny claims he heard noises in the stairwell; Plaintiff contends it was quiet when he was in the stairwell. Kenny claims he was in "close combat" with Robinson at the top of the stairs; Plaintiff claims, that Robinson fell down the stairs, as Kenny was at the base of the stairs and started shooting from there. Kenny claims that Robinson was "aggressing" toward him during all seven shots; Plaintiff claims, as the dash cam video illustrates, Robison was not (and could not have been) so aggressing. Indeed, Kenny's has conceded that accepting Plaintiff's facts means summary judgment would be improper. Dkt. 150, at 10. At core, Kenny's claim is that the Court must accept his story of the events, and ignore (or exclude) all of the evidence

undermining his account.

But, this sort of argument is not permissible for a narrow interlocutory appeal in the federal courts. An argument about whose story to believe, and what the evidence shows should be made to the jury, not the Court of Appeals. *See Johnson v. Jones*, 515 U.S. 304 (1995); *Whitlock v. Brueggemann*, 682 F.3d 567, 574 (7th Cir. 2012) (rejecting the argument that the court of appeals should be allowed to second guess whether the district court cited enough evidence in the summary judgment record to conclude that a trial was warranted); *Jones v. Clark*, 630 F.3d 677, 680 (2011) (a qualified appeal can happen only where defendants accept plaintiff's version of the facts, but the court will reject "back-door effort[s] to contest the fact," and an appeal from a denial of qualified immunity cannot be used as an early way to test the sufficiency of the evidence to reach the trier of fact").

As such, this Court should certify the appeal as frivolous under *Apostol v. Gallion*, 870 F.2d 1335, 1338-40 (7th Cir. 1989), because all the arguments Officer Kenny can make on appeal involved a dispute about the facts, and the Seventh Circuit lacks jurisdiction to consider such questions. Appellate jurisdiction over interlocutory, qualified-immunity appeals is limited to purely legal arguments. Under these circumstances, the Court can and should certify Kenny's jurisdiction-wanting appeals as frivolous so that this case may proceed to trial on February 27, 2017 as scheduled.

Procedural Background

Defendant Madison Police Officer Matthew Kenny filed a motion for summary judgment in this case, arguing that he was entitled to judgement as a matter of law on Plaintiff's Fourth Amendment claim. Dckt. 63. In support, Kenny argued that there was no genuine issue of material fact as to what occurred in the stairwell at 1125 Williamson Street when he fired seven shots and killed Tony Robinson, Jr. *Id.* Kenny took the position that the Court must credit his story that Robinson aggressively attacked him, which would make Kenny's decision to use deadly force reasonable as a matter of law. *Id.* at 8-9. Urging the Court to adopt his version of the facts, Kenny also asked the Court to find that he was entitled to judgement in his favor on qualified immunity. *Id.* at 16-21.

In response, Plaintiff set forth evidence amassed during discovery illustrating that Kenny's account of what happened was false and argued that fact issues precluded the entry of summary judgment in Kenny's favor, both on Plaintiff's Fourth Amendment claim and on Kenny's qualified immunity defense. Dckt. 130. Plaintiff Response to Kenny's Proposed Findings of Fact, illustrated, at great length, the numerous hotly contested facts. Dckt. 131. Plaintiff also proffered her own version of events, though her facts, which Defendants hotly disputed. Dkt. 148. One fact is undisputed: Kenny's statements about what happened, and what he observed in the stairwell, have changed overtime. All of the facts in Kenny's "snapshot" are false, for example. Nonetheless, in his reply brief on the summary judgment motion, Kenny persisted in his argument that the evidence Plaintiff

adduced was insufficient to create a genuine issue of material fact as to what happened in the stairwell at 1125 Williamson Street. *See e.g.*, Dckt. 150 at 1 ("[T]he story told by the Plaintiff in response to summary judgment is pure fiction and not supported by evidence in the record."); *id.* at 2 ("The response brief tells a tale of a police officer entering a stairwell and firing his weapon at an unarmed man without provocation; however, that story is wholly lacking evidentiary support."); *id.* at 7 ("The Plaintiff cannot genuinely dispute Officer Kenny's testimony that prior to the shooting, at or near the top of the stairs, Mr. Robinson violently assaulted him, to the point that Officer Kenny lost his balance on the stairwell and feared that he would lose consciousness and potentially be disarmed."); *id.* at 15 ("In opposing Officer Kenny's qualified immunity defense, the Plaintiff relies entirely on the assertion that qualified immunity should not be granted when there are disputes of material fact. However, as addressed above, the disputes of fact in this case are not genuine or material.").

At no point in the summary judgment briefing did Kenny argue that he was entitled to qualified immunity on Plaintiff's version of the facts. See Dckt. 63 (Kenny's opening brief); 150 (Kenny's reply brief). Instead, he actually conceded that if Plaintiff's facts were accepted, summary judgment would be improper. Dckt. 150, at 10.

The Court denied Kenny's motion, finding that Plaintiff had adduced sufficient evidence to create a genuine issue of material fact as whether Kenny's use of deadly force was reasonable. Dckt. 235 at 41-43. As to Kenny's assertion of

qualified immunity, the Court observed, "Kenny's motion for summary judgment on his qualified immunity defense depends on facts that are far from undisputed and asks the court to draw inferences in *his* favor." *Id.* at 43. As the Court explained, Kenny sought qualified immunity based on his version of the facts, but Plaintiff had presented an alternative version of facts, under which Kenny would not be entitled to qualified immunity. *Id.* at 43-44. The Court went on to reason:

> [W]hether Robinson had a clearly established Fourth Amendment right not to be seized through the use of deadly force depends on what happened between him and Kenny in the stairwell. Robinson had "a constitutional right not to be shot on sight if he did not put anyone else in imminent danger or attempt to resist arrest for a serious crime." *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015). Factual disputes preclude a determination of whether a clearly established constitutional right was at stake at the time of the shooting. *See id.* at 451 (affirming denial of summary judgment on qualified immunity issue where there was "a factual dispute about the circumstances surrounding [the officer's] decision to fire on [the victim]"). The court must deny Kenny summary judgment on his qualified immunity defense.

Id. at 44. Defendant Kenny subsequently filed a notice of appeal.

Argument

Under *Apostol v. Gallion*, district courts should protect the "legitimate interests of other litigants and the judicial system" from doomed, qualified immunity appeals by certifying them as frivolous. 870 F.2d 1335, 1338-40 (7th Cir. 1989). That certification allows the case to proceed while, absent certification, the notice of appeal would deprive the district court of jurisdiction and, in effect, postpone the upcoming trial indefinitely. *Id.*

This Court should deem Kenny's appeal frivolous because the Seventh Circuit lacks jurisdiction to hear it. When it comes to appeals of orders denying summary judgment based on qualified immunity, appellate jurisdiction is limited to arguments raising legal issues. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Jones v. Clark*, 630 F.3d 677, 679-80 (7th Cir. 2011) ("a qualified-immunity appeal must focus exclusively on legal questions about immunity, rather than factual disputes tied up with the merits of the case"); *see also Huff v. Reichert*, 744 F.3d 999, 1004-05 (7th Cir. 2014) (holding that the court lacked jurisdiction to even consider the defendant's arguments about the factual record during qualified-immunity appeal); *Whitlock v. Brueggemann*, 682 F.3d 567, 574 (7th Cir. 2012) (rejecting the argument that the court of appeals should be allowed to second guess whether the district court cited enough evidence in the summary judgment record to conclude that a trial was warranted); *Hill v. Coppelson*, 627 F.3d 601 (7th Cir. 2010) (dismissing immunity appeal for lack of jurisdiction where resolution of legal issues required revisiting district court's determination of the facts); *Levan v. George*, 604 F.3d 366 (7th Cir. 2010) (dismissing immunity appeal that presented both "factual determinations" and "the legal issue of qualified immunity" because it was "nearly impossible to sever the two questions"); *Villo v. Eyre*, 547 F.3d 707, 711-12 (7th Cir. 2008) (dismissing immunity appeal for lack of jurisdiction and explaining that the Court "ha[s] not hesitated to dismiss interlocutory appeals where the defendant interposes factual issues in the appeal"). Practically speaking, this means that Kenny can make only two types of qualified immunity arguments on appeal. He can

argue (1) that, even if everything went down how the plaintiff says it did, there was no constitutional violation as a matter of law or (2) that, even if the plaintiff's version of events adds up to a constitutional violation, the right violated was not clearly established. *See Jones*, 630 F.3d at 680–81. Those are the only appealable legal questions properly up for grabs on an interlocutory appeal, and Kenny can make neither of them on appeal.

Fact-driven arguments are off limits. *Id.* As the authorities above, and others additionally, have explained, Kenny cannot argue that Plaintiff's evidence is insufficient to allow a reasonable trier of fact to find a constitutional violation. *See e.g.*, *Gutierrez v. Kermon*, 722 F.3d 1003, 1009 (7th Cir. 2013) (appellate court can consider only abstract legal questions on appeal from denial of defense of qualified immunity; it may not decide whether district court erred in finding that genuine dispute of material fact existed); *Via v. LaGrand*, 469 F.3d 618, 624 (7th Cir. 2006) ("[T]his court lacks interlocutory jurisdiction to review the record to determine whether the district court erred in finding that a genuine issue of material fact exists."). And, critical here, Kenny cannot dodge the jurisdictional bar by couching factual arguments in legal terms: "where the defendants say that they accept the plaintiff's version of the facts, we will take them at their word and consider their legal arguments in that light. If, however, we detect a back-door effort to contest the facts, we will reject it and dismiss the appeal for want of jurisdiction." *Jones*, 630 F.3d at 680. The hallmark of this back-door maneuver is a defendant arguing qualified immunity without accepting the plaintiff's version of events. *See id.*

That's exactly what we have here. Officer Kenny must attempt to make backdoor arguments on appeal because backdoor arguments are all he made to this Court, meaning all other arguments are waived. Officer Kenny argued qualified immunity to this court by arguing that, under *his* version of the facts, no clearly established right was violated. None of Officer Kenny's arguments genuinely accepted the plaintiff's version of the facts or made other arguments. Accordingly, the back-door arguments Kenny made to this court are the only arguments that would not be deemed waived if made on appeal. *Hutt v. AbbVie Products LLC*, 757 F.3d 687, 695 (7th Cir. 2014) (arguments not made below are waived on appeal). In short, Kenny's appeal is frivolous because the only arguments for which appellate jurisdiction obtains are waived and the only arguments that aren't waived fail on jurisdiction.

District courts in this circuit have granted motions like this one, to certify such baseless interlocutory appeals as frivolous. *See e.g.*, *O'Keefe v. Schmitz*, No. 14-C-139, 2014 WL 1816922, at *2 (E.D. Wis. May 8, 2014) (qualified immunity frivolous when based upon defendants' view of the facts); *Lanza v. City of Chicago*, No. 08 C 5103, 2010 WL 5313483, at *2 (N.D. Ill. Dec. 20, 2010) (certifying defendant's immunity appeal as frivolous, disputed facts divest Seventh Circuit of jurisdiction); *Engel v. Buchan*, No. 10 C 3288, 2010 WL 5014156, at *2 (N.D. Ill. Dec. 3, 2010) (finding appeal frivolous because defendant was bound by other decision denying him qualified immunity); *Vladic v. Hamann*, No. 00 C 6739, 2002 WL 31248544, at *2 (N.D. Ill. Oct. 4, 2002) (appeal frivolous because it does not rest

on a question of law); *Vidmar v. Chicago Bd. of Educ.*, No. 98 C 0951, 1999 WL 409929, at *5 (N.D. Ill. June 7, 1999) (appeal is "so thin on the merits that it is 'frivolous"); *Carter v. O'Sullivan*, 924 F. Supp. 903, 908 (C.D. Ill. 1996) (district court certified Plaintiff's appeal as frivolous).[1]

Finally, it should also be noted that the parties are now less than two weeks away from trial. Plaintiff, her counsel, and her experts, have spent considerable time and effort ramping up for a February 27, 2017 trial date. Plaintiff's counsel has confirmed expert's availability, and they have adjusted their travel plans and even given up other work to be in Madison the week of the 27th. If the trial date is vacated, those efforts will have been wasted, and Plaintiff and her family will have to summon up their painful memories once again several months or years in the future, after Kenny loses his appeal.

"Courts are not helpless in the face of manipulation. District judges lose power to proceed with trial because the defendants' entitlement to block the trial is

[1] Plaintiff acknowledges cases in this district where courts have occasionally been reluctant to use the authority granted to them in *Apostol*. *See Estate of Heenan ex rel. Heenan v. City of Madison*, No. 13-CV-606-WMC, 2015 WL 3539613, at *2 (W.D. Wis. June 5, 2015) (citing *Jones v. Wilhelm*, No. 03-C-0025-C, 2004 WL 420147, at *2 (W.D. Wis. Feb. 24, 2004)). Nevertheless, Plaintiff submits that the circumstances of this case differ sharply from *Heenan* and *Jones.* Here, there is no *possible* way to invoke jurisdiction of the Court of Appeals and Kenny has conceded that acceptance of Plaintiff's facts would make summary judgment improper. By contrast, *Heenan* and *Jones* involved factual scenarios where, even crediting the Plaintiff's account, it was conceivably possible in some universe that defendants could convince the Seventh Circuit to find in their favor on qualified immunity (though the district found it exceedingly unlikely that would happen). But this case is different. Defendant Kenny cannot raise argument on appeal that he is entitled to immunity on Plaintiff's set of facts because he never raised it below. Kenny has forfeited that argument.

the focus of the appeal. If the claim of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks." *Apostol*, 870 F.2d at 1339. This Court can and should certify Defendant Kenny's appeal as frivolous.

Conclusion

WHEREFORE, Plaintiff respectfully requests that this Court certify Officer Kenny's appeal as frivolous and proceed with trial on February 27, 2017.

Respectfully Submitted,

By: /s/Elizabeth Mazur

Jon Loevy
Elizabeth Mazur
Anand Swaminathan
David B. Owens
LOEVY & LOEVY
311 N. Aberdeen Street, 3rd Floor
Chicago, IL 60607
Phone: (312) 243-5900

Dated: February 15, 2017.

CERTIFICATE OF SERVICE

I, Elizabeth Mazur, an attorney, certify that on February 15, 2017, I filed the foregoing response via the Court's CM/ECF system and thereby served a copy on all counsel of record.

/s/ Elizabeth Mazur