The Estate of Tony Robinson, Jr., ex rel. Personal Representative Andr...of Madison, Wisconsin et al Doc. 279 Att. 3

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE ESTATE OF TONY ROBINSON, JR.,
ex. rel. Personal Representative ANDREA IRWIN,

Plaintiff, Case No: 15-cv-502-jdp

v.

MADISON POLICE OFFICER MATTHEW KENNY,

Defendant.

MADISON POLICE OFFICER MATTHEW KENNY'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO CERTIFY APPEAL AS FRIVOLOUS

Officer Matthew Kenny, by his attorneys, Crivello Carlson, S.C., hereby submits this brief in opposition to the plaintiff's motion to certify Officer Kenny's appeal as frivolous. For the reasons detailed further below, Officer Kenny respectfully requests that the Court not certify the appeal as frivolous and to allow Kenny to obtain appellate review of the denial of qualified immunity in advance of trial.

INTRODUCTION

On February 13, 2017, the Court entered its Opinion and Order denying the motion for summary judgment filed by Officer Kenny. [Docket 236.] Officer Kenny had sought dismissal of the Fourth Amendment claim against him based, *inter alia*, on the defense of qualified immunity. The Court denied summary judgment and concluded that Officer Kenny was not entitled to qualified immunity. In doing so, the Court stated that "[t]he same factual disputes that preclude summary judgment on plaintiff's Fourth Amendment claim against Kenny also preclude summary judgment on Kenny's qualified immunity defense." [Dkt. 236, p. 43.]

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The Court noted the facts in dispute which it decided precluded summary judgment in favor of Officer Kenny on either the Fourth Amendment claim or the qualified immunity defense:

> Plaintiff disputes Kenny's account and offers an alternative one, relying on the dash cam video and testimony by forensic experts. The dash cam video shows that <u>Kenny fired all seven shots from the bottom of the stairs; if Robinson did attack Kenny at the top of the stairs, Kenny did not shoot him then or there</u>. According to plaintiff's forensics experts, <u>Kenny likely fired three shots at Robinson from the bottom of the stairs, as Robinson came down the stairs</u>. <u>Kenny likely hit Robinson with three non-fatal shots first, from more than three to four feet away</u>. According to plaintiff, the dash cam video demonstrates that <u>Kenny was not flailing or falling down the stairs as he fired his weapon; he was perfectly controlled and on his feet, until he lunges to avoid tripping on Robinson as Robinson falls</u>. <u>Kenny fired his fourth, fifth, and sixth shots close to Robinson's body, within three to four feet</u>. <u>Kenny continued to back out of the door and fired his seventh and final shot from the front porch, as Robinson was lying on the stairs</u>.

[Dkt. 236, p. 7] (emphasis added).

Officer Kenny filed his Notice of Appeal seeking appellate review of the denial of qualified immunity on February 15, 2017, [Dkt. 258], thereby divesting this Court of jurisdiction. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-526 (1985). Officer Kenny filed his appeal intending to seek appellate review of the qualified immunity determination based on the fact-pattern outlined by this Court.

While the ink was still drying on Officer Kenny's Notice of Appeal, the plaintiff filed its motion to certify Officer Kenny's appeal as frivolous. [Dkt. 259.] In its motion the plaintiff asserts that Officer Kenny's appeal is frivolous because the Court denied Officer Kenny qualified immunity on the basis of disputed facts, which necessarily implicates the question of whether the Seventh Circuit Court of Appeals has jurisdiction over this appeal. *See* [Dkt. 259, p. 3.]

However, it is well settled that the mere existence of disputed facts is not a sufficient basis for the denial of qualified immunity or appellate review of the denial of qualified immunity. *See, e.g. Behrens v. Pelletier*, 516 U.S. 299, 312-313 (1996) ("[d]enial of summary judgment often includes a determination that there are controverted issues of material fact and *Johnson* surely does not mean that every such denial of summary judgment is non-appealable.").

Just last month, the Supreme Court of the United States held:

> In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to society as a whole and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.

White v. Pauly, 580 U.S. ---, 137 S.Ct. 548, 551-552 (Jan. 9, 2017) (internal quotations and citations omitted) (per curiam).

For the reasons detailed below, Officer Kenny's appeal is not frivolous and the Seventh Circuit Court of Appeals has jurisdiction of this appeal. While a court may be asked to revisit the question of qualified immunity at the close of evidence at trial, the defense of qualified immunity is lost once a trial begins. *Id.* ("like an absolute immunity, [qualified immunity] is effectively lost if a case is erroneously permitted to go to trial."); *see also Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("it makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one.").

ARGUMENT

I. LEGAL STANDARD FOR CONSIDERING WHETHER AN APPEAL IS FRIVOLOUS.

With the filing of the Notice of Appeal and pursuant to the protocols of the Seventh Circuit Court of Appeals, jurisdiction of the claim against Officer Kenny has been transferred to the Seventh Circuit Court of Appeals and the underlying matter should be stayed until the

Seventh Circuit's mandate is issued. *Apostol*, 870 F.2d at 1339. In order to transfer jurisdiction back to this Court, it is the Plaintiff's burden to obtain a determination that the appeal is frivolous. *Id.*

In *Apostol*, the Seventh Circuit Court of Appeals held that district court judges could certify a *Forsyth* collateral order appeal as frivolous ***only*** if the defendant's "claim of immunity is a 'sham'" and the "disposition is so plainly correct that nothing can be said on the other side." *Id*. Recognizing the extraordinary nature of such a certification, the Seventh Circuit cautioned district courts that this "power must be used with restraint." *Id*. at 1339. The Seventh Circuit has also recognized that a defendant's right to appeal a qualified immunity defense under *Forsyth* "would be eviscerated if district courts, cloaked with the authority of *Apostol*, could too easily certify even potentially meritorious appeals as frivolous." *McGrath v. City of Gary*, 976 F.2d 1026, 1030 (7th Cir. 1992).

II. LEGAL STANDARD FOR APPELLATE JURISDICTION OVER AN APPEAL BASED ON THE DENIAL OF QUALIFIED IMMUNITY.

In cases where a summary judgment motion based on a claim for qualified immunity is denied, such denials "generally fall within the collateral order doctrine." *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2019 (2014) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 671-672 (2009)). The general rule that only final orders pursuant to 28 U.S.C. § 1291 are immediately reviewable does not apply to the denial of qualified immunity because "qualified immunity is an immunity from suit rather than a mere defense to liability." *Id*. (*quoting Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). If qualified immunity applies to an officer's conduct, "the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

There are limits to appellate review of the denial of qualified immunity. In *Johnson v. Jones*, the Supreme Court held that appellate courts did not have jurisdiction to review denials of qualified immunity to decide questions of "evidence sufficiency." 515 U.S. 304, 309, 313 (1995). Stated differently, appellate courts do not have jurisdiction to determine "which facts a party may, or may not, be able to prove at trial." *Id.* at 313.

However, since *Johnson*, both the Supreme Court and the Seventh Circuit Court of Appeals have correctly recognized that a district court's finding that factual disputes prevented summary judgment "does not always preclude appellate review." *Behrens*, 516 U.S. at 312-313; *Sallenger v. Oakes*, 473 F.3d 731, 738 (7th Cir. 2007).

In *Behrens*, the United States Supreme Court granted certiorari after a district court certified an appeal as frivolous and the Ninth Circuit Court of Appeals dismissed the appeal for want of jurisdiction. *Behrens*, 516 U.S. at 305. The Supreme Court explained its ruling in *Johnson* and held that the "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that every such denial of summary judgment is non-appealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case." *Id.* at 312-313.

There is also well-established precedent of the courts of appeals deciding appeals even if the court ultimately concludes that issues of material fact prevent a finding of qualified immunity. In *Weinmann*, the Seventh Circuit Court of Appeals ultimately concluded that the "existence of a factual dispute about the circumstances surrounding McClone's decision to fire on Jerome precludes a ruling on qualified immunity at this point." 787 F.3d at 451. However, despite that finding, the Seventh Circuit did <u>not</u> indicate that the appeal was frivolous or even

that it lacked jurisdiction. In fact, the Seventh Circuit ruled the opposite: "He [the officer] has taken an interlocutory appeal from [the summary judgment] order, as he is permitted to do." *Id.* at 446, *citing Forsyth*, 472 U.S. at 525-526. Despite the existence of factual disputes, the Seventh Circuit went on to describe its jurisdiction as follows:

> [W]e have jurisdiction pursuant to 28 U.S.C. § 1291 over this appeal only insofar as we may review the district court's determination that genuine issues of fact preclude the resolution of [the officer's] qualified immunity defense; if we were to find no such factual issues, we would also be entitled to review the denial itself.

Weinmann, 787 F.3d at 447.

Through this appeal, Officer Kenny seeks appellate review of purely legal issues. In considering this appeal, the Seventh Circuit will not be asked to and will not need to weigh any questions of evidence sufficiency. For purposes of the appeal, Officer Kenny acknowledges, as he must under the law, the disputes of fact identified by this Court. Contrary to the Plaintiff's argument in its most recent Motion, Officer Kenny has argued that summary judgment was appropriate, even when resolving factual disputes in the Plaintiff's favor. *See, e.g.* Docket No. 259, pp. 8-10.

As indicated by the Court in its recitation of those disputed facts, while the parties may dispute the location of Kenny when he fired shots at Tony Robinson and the trajectory and distance from Kenny upon firing, even when assuming these facts in the plaintiff's favor on summary judgment, as the summary judgment standard requires, this case warrants appellate review on the question of qualified immunity.

III. THE APPEAL IS NOT FRIVOLOUS BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS HAS JURISDICTION OVER THE DENIAL OF QUALIFIED IMMUNITY IN THIS CASE.

A district court's conclusion that an appeal is frivolous is an extraordinary finding. In *Apostol*, the Seventh Circuit Court of Appeals held that district court judges could certify a *Forsyth* collateral order appeal as frivolous only if the defendant's "claim of immunity is a 'sham'" and the "disposition is so plainly correct that nothing can be said on the other side." *Id*. The appeal filed by Officer Kenny is in no way a sham. While Kenny does not anticipate that this Court will reconsider its summary judgment ruling, Kenny does have viable legal arguments on the appeal of the denial of qualified immunity. Moreover, his arguments certainly do not amount to a "sham."

A. Qualified Immunity Standard

The question of whether immunity attaches is a question of law and is always one for judicial determination, even though pertinent facts may be in dispute. *Rakovich v. Wade*, 850 F.2d 1180, 1202 (7th Cir. 1998), (*en banc*), *cert. denied,* 488 U.S. 968 (1998). Qualified immunity shields government officials from civil liability unless the official violated a statutory or constitutional right that was clearly established right at the time of the challenged conduct. *Pearson v. Callahan*, 555 U.S. 223, 235 (2009). To be "clearly established," a right must be sufficiently clear "that every reasonable official would [have understood] that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In other words, existing precedent must have placed the statutory or constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). A plaintiff most commonly may demonstrate the existence of a clearly established right by identifying a closely analogous case that had decided that the conduct was forbidden. *Forman v. Richard Police Department*, 104 F.3d 950, 958 (7th Cir. 1997). The

Seventh Circuit Court of Appeals ultimately reviews the denial of qualified immunity *de novo*. *Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir. 1993).

The Seventh Circuit Court of Appeals recently reiterated the need to identify the relevant constitutional right in a fact-specific context to avoid "convert[ing] the rule of qualified immunity…into a rule of virtually unqualified liability simply by alleging a violation of extremely abstract rights." *White v. Stanley*, 745 F.3d 237, 241 (7th Cir. 2014) (*quoting Anderson*, 483 U.S. at 639). The Seventh Circuit also recognized that "[q]ualified immunity is supposed to protect officers in the close case, and it therefore must apply to the officer's snap judgment in a legally hazy area." *White*, 745 F.3d at 241 (*citing Stanton v. Sims*, 134 S.Ct. 3, 7, (2013) (per curiam)).

The qualified immunity defense was described in *Weinmann* as involving a "double deference" in favor of the officer: "the substantive constitutional standard protects [the officer's] reasonable factual mistakes and qualified immunity protects [the officer] from liability where [the officer] reasonably misjudge[d] the legal standard." *Weinmann*, 787 F.3d at 450 (*quoting Catlin v. City of Wheaton*, 574 F.3d 361, 369 (7th Cir. 2009).

B. The Appeal is Meritorious

Officer Kenny's appeal is not frivolous for several reasons. First, Kenny has been and continues to be prepared to have his claim for qualified immunity evaluated on the version of genuine and supportable facts that most favors the plaintiff's position. In that regard, if the qualified immunity defense is evaluated using the competent evidentiary record that best supports the plaintiff's claims, there are no factual disputes that inhibit a ruling on qualified immunity.[1] Throughout the summary judgment briefing and decision, no authority has been

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[1] The Supreme Court in *Behrens* recognized that an officer may "claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the

presented that renders the use of deadly force in the scenario that unfolded before Kenny, even as factually described by the plaintiff, "beyond debate."

Disputes of fact like those between the parties regarding the location of Officer Kenny (including the trajectory and distance from Tony Robinson when shots were fired) have not before prevented the question of qualified immunity from being reviewed on appeal. In *City and County of San Francisco v. Sheehan*, the United States Supreme Court reversed a Ninth Circuit ruling that denied qualified immunity in a deadly force case based on perceived disputes of material fact. 135 S.Ct. 1765 (2015). Importantly, for its part, the Ninth Circuit Court of Appeals denied qualified immunity and pointed to various disputes of fact regarding Sheehan's actions immediately prior to shooting, including where Sheehan was located as she was shot. *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1219-1220 (9th Cir. 2014) (overruled). Notably, despite finding these perceived disputes of fact, the Ninth Circuit Court of Appeals still exercised jurisdiction over the appeal.

However, on review, the Supreme Court found some of those disputes to be immaterial to the Fourth Amendment claim and otherwise concluded that qualified immunity should be granted "because these officers had no 'fair and clear warning of what the Constitution requires.'" *Sheehan*, 135 S.Ct. at 1778 (*quoting al-Kidd*, 563 U.S at 746).

Further, the Supreme Court in *Sheehan* again cautioned courts "not to define clearly established law at a high level of generality." *Sheehan*, 135 S.Ct. at 1776. In its Opinion here, the Court acknowledged several factual disputes regarding the bullet trajectory and distance, but did not identify (because it was not provided any by the plaintiff) any closely analogous case law

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[qualified immunity] standard…" *Behrens*, 516 U.S. at 313. Officer Kenny intends to offer the same argument on this appeal. Even assuming the facts in the light most favorable to what the plaintiff can prove, the law that existed on March 6, 2015, did not place the alleged unconstitutionality of the use of deadly force by Kenny "beyond debate."

that held Officer Kenny use of deadly force was unlawful in the wake of a physical attack, regardless of whether Kenny began shooting at the top of the stairs or at the bottom of the stairs. Instead, the Court concluded that

> whether 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. Robinsons 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).

[Dkt. 236, p. 44.]

The Defendant respectfully believes that the foregoing general conclusion by the Court is similar to what the Supreme Court cautioned against in *Sheehan*, and should not prevent Officer Kenny from exercising his legal right to obtain appellate review prior to incurring the expense, risk and disruption of trial.

CONCLUSION

This appeal is not a sham or without viable support. Accordingly, Officer Kenny respectfully requests that the Court not certify the appeal as frivolous and instead stay all trial proceedings to allow Kenny to obtain appellate review of the denial of qualified immunity in the Seventh Circuit Court of Appeals.

Dated this 15th day of February, 2017.

By: _s/ _Samuel C. Hall, Jr._______
SAMUEL C. HALL, JR.
State Bar No. 1045476
TIMOTHY M. JOHNSON
State Bar No. 1052888
Attorneys for Madison Police Officer
Matthew Kenny
CRIVELLO CARLSON, S.C.
710 N. Plankinton Avenue, Suite 500
Milwaukee, WI 53203
Phone: (414) 271-7722
Fax: (414) 271-4438
E-mail: shall@crivellocarlson.com
tjohnson@crivellocarlson.com