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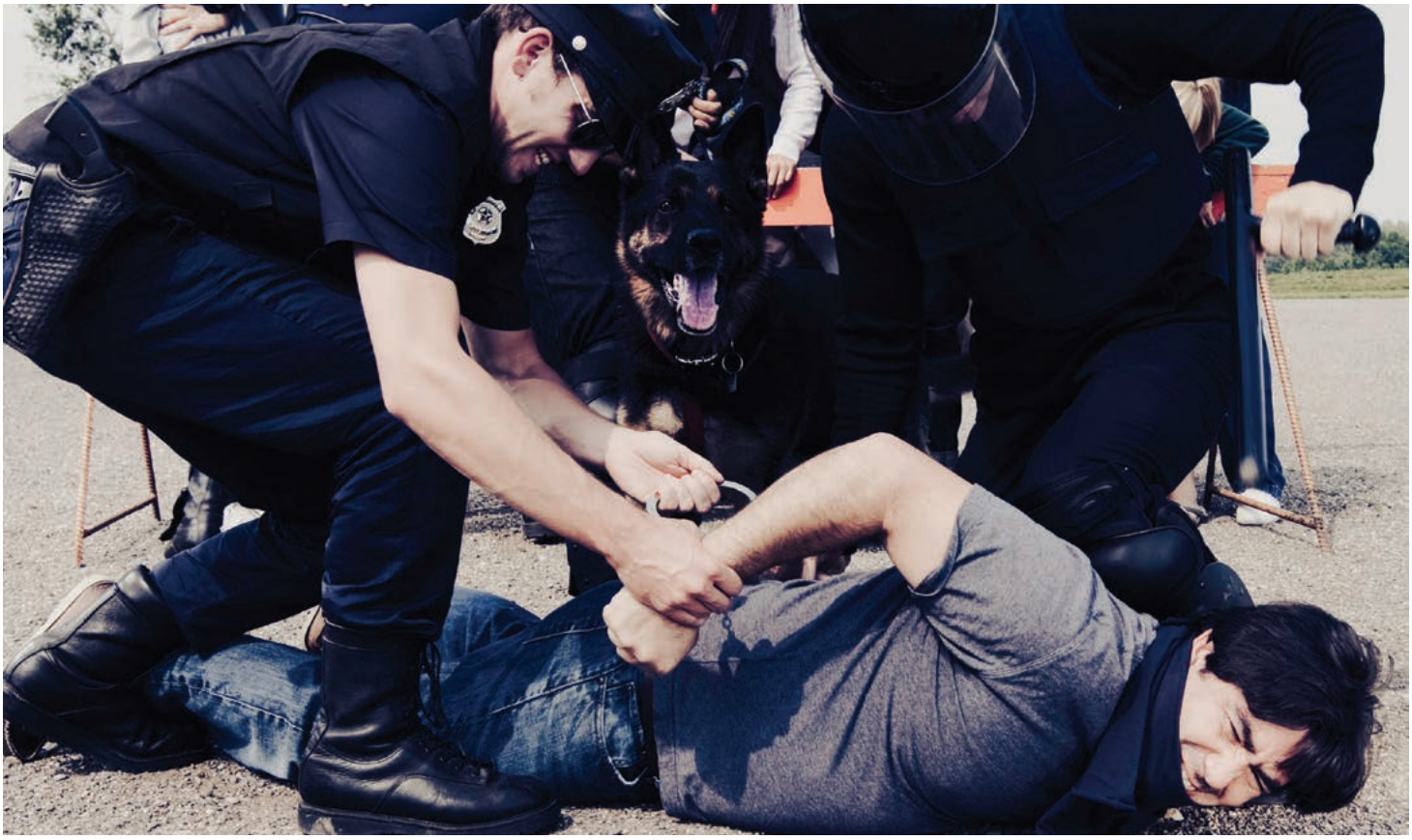

Interlocutory appeals in police excessive-force cases

FEDERAL INTERLOCUTORY APPEALS OF SUMMARY JUDGMENT BROUGHT BASED UPON THE QUALIFIED-IMMUNITY DEFENSE

Congratulations! You have successfully defeated the defendant officer's motion for summary judgment in an excessive-force case. Now you can shift your focus to trial. Not so fast.

Typically, when the district court has determined the parties' evidence presents genuine issues of material fact, such determinations are not reviewable on interlocutory appeal. (See *Lee v. Gregory* (9th Cir. 2004) 363 F. 3d 931, 932.)

But in excessive-force cases brought under 42 U.S.C section 1983, an officer has the immediate right to appeal a summary judgment that has been denied as to the officer's qualified-immunity defense. This is because qualified immunity provides "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated a clearly established law." (*Horton v. City of Santa Maria* (9th Cir 2019) 915 F.3d 592, 603 fn. 10.)

This procedural tactic results in a significant advantage to the defendant officers by delaying, and potentially defeating, the plaintiff's claims. This is because although the immediate appeal "protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system…Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take [immediate] appeals for tactical as well as strategic reasons…" (*Rivera-Torres v. Ortiz Velez* (1st Cir. 2003) 341 F.3d 86, 93 quoting *Apostol v. Gallion* (1985)

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870 F. 2d 1335,1338-39.) The *Apostol* court also observed that the downside to such appeals include the fading of memories and challenges for the courts, even though most appeals end in affirmance.

Defendant officers therefore have strategic reasons for bringing interlocutory appeals even where the district court's decision denying summary judgment is likely to be affirmed. As discussed below, there are some counter-tactics that may be used by plaintiffs where such appeals lack all merit and thus can be subject to dismissal because the district court deems them frivolous. Initially, it is also worth noting that while defendant officers may bring interlocutory appeals, municipalities sued under section 1983 are not entitled to immunity, qualified or otherwise. (*Horton v. City of Santa Maria* 915 F.3d at 603.)

This article addresses issues raised by federal interlocutory appeals of orders denying summary judgment brought by individual officers based upon the qualified immunity defense.

The qualified immunity defense and summary judgment

The Fourth Amendment provides that: "'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

In excessive-force cases, the plaintiff must prove that an officer, acting under color of law, deprived a person, of any rights, privileges, or immunities secured by the Constitution and laws…" (42 U.S.C. § 1983.) Claims of excessive force "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." (*Graham v. Connor* (1989) 490 U.S. 386, 388.) On summary judgment, defendants bear the burden of establishing that there is no genuine issue of material fact and the affirmative defense of qualified immunity is established as a matter of law. (*Crawford-El v. Britton* (1998) 523 U.S. 574, 587.)

"The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all* the relevant circumstances. " (*Smith v. Hemet* (2005) 394 F. 3d 689, 701.)

Qualified immunity is an affirmative defense that must be pleaded in the answer. (*Siegert v. Gilley* (1991) 500 U.S. 226, 231.) However, "[D]efendants may raise an affirmative defense for the first time in a motion for summary judgment only if the delay does not prejudice the plaintiff." (*Magana v. Commonwealth of N. Mariana Islands* (9th Cir.1997) 107 F.3d 1436, 1446.)

On review of a summary-judgment order, the court determines, "whether the defendant[s] would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor." (*Karl v. City of Mountlake Terrance* (9th Cir. 2012) 678 F.3d 1062, 1068.)

Neither the Supreme Court nor the Ninth Circuit has set out a fixed set of factors for courts to consider in examining the totality of the circumstances, and both have indicated that there are no *per se* rules in the Fourth Amendment excessive-force context; instead, courts "must still slosh [their] way through the fact bound morass of 'reasonableness.'" (*Scott v. Harris* (2007) 550 U.S. 372, 383.) That said, the factors set forth by the Supreme Court in *Graham v. Connor* (1989) 490 U.S. 386, 396 are routinely cited as, "(1) the severity of the crime; (2) whether the suspect posed an immediate threat to the officers' or public's safety; and (3) whether the suspect was resisting arrest or attempting to escape."

The Ninth Circuit has identified several other factors that may be relevant, including: (1) failure to warn (2) other available tactics (3) the degree of force used relative to the facts and circumstances presented. (*Bryan v. MacPherson* (2010) 630 F.3d 805.) The Court "must assess the severity of the intrusion on the individual's Fourth Amendment rights by evaluating 'the type and amount of force inflicted.'" (*Espinosa v. City and County of San Francisco* (9th Cir. 2010) 598 F.3d 528, 537.)

Given complicated fact patterns, a litigant who brings an excessive-force case in the first instance will presumably be in a position to raise triable issues of fact as to the reasonableness of the force used. Consequently, because such cases almost always turn on a jury's credibility determinations, the reasonableness of force used is ordinarily a question for the jury. "This is because such cases almost always turn on a jury's credibility determinations." (*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 701.)

As further explained in *Torres v. City of Madera* (2011) 648 F. 3d 1119, 1125, "[b]ecause the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, … summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly."

Ordinarily, where a plaintiff has satisfied the district court that triable issues of fact preclude summary judgment, appellate review is unavailable. However, a special "cut out" for section 1983 cases permits defendant officers who have been denied summary judgment to challenge the district court's denial of summary judgment on grounds of qualified immunity by the procedural mechanism of an interlocutory appeal.

What is qualified immunity?

The qualified-immunity defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (*Behrens v. Pelletier* (1996) 516 U.S. 299, 305 [quoting *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818].) "Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (*White v. Pauly* (2017) 137 S.Ct. 548, 551.) "In other words,

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immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"

Saucier v. Katz (2001) 533 U.S. 194, set forth a mandatory two-step protocol wherein the courts would first determine whether (1) under the facts, the violation of a constitutional right occurred; and (2) whether the constitutional right was clearly established at the time of the alleged violation. (*Saucier v. Katz* (2001) 533 U.S. 194.)

But *Pearson v. Callah* (2009) 555 U. S. 223, revisited *Saucier* and held that the two-step protocol need not be followed and that the court could find that the constitutional right was not clearly established at the time of the violation without addressing whether there had actually been a violation of constitutional right. *Consequently, even if a plaintiff establishes triable issues of fact as to whether a violation of constitutional right occurred, a defendant officer can nonetheless defeat liability by demonstrating that the alleged violation was not clearly established when the violation occurred.*

As discussed above, the violation of a constitutional right often implicates factual issues that afford a basis to oppose summary judgment. But defeating summary judgment based upon the existence of a clearly established right may prove more challenging, especially in light of recent case law. Indeed, the Supreme Court has recently taken a particular interest in reviewing the denial-qualified immunity. This is because the Court believes that "qualified immunity is important to society as a whole…" (*Ibid*.)

What is a clearly established right?

A government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t] he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." (*Anderson v. Creighton* (1987) 483 U.S. 635, 640; see also, *Isayeva v. Sacramento Sheriff's Department* (2017) 872 F. 3d 938.)

In *Kisela v. Hughes* (2018) 138 S.Ct. 1148, the Supreme Court reversed a Ninth Circuit decision that had reversed the district court's grant of summary judgment on grounds of qualified immunity. In *Kisela*, plaintiff was wielding a large kitchen knife and had taken steps toward another woman standing nearby. The police officers, who had heard that a woman was engaging in erratic behavior on the radio, shot the plaintiff shortly after their arrival. Before firing shots, they repeatedly asked her to drop the knife. On these facts, the Supreme Court reversed the Ninth Circuit, finding that there wasn't sufficient case law addressing the fact pattern at issue to conclude that a reasonable officer would know that shooting under such circumstances violated a clearly established right.

As explained by the Supreme Court, "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." [Citations]. Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. [Citations]. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful." (*Id.* at p. 1152.)

More recent Ninth Circuit decisions have discussed the "clearly established" requirement, explaining that case law need not be directly on point to be clearly established, "But existing precedent "must have placed the statutory or constitutional question beyond debate." [Citations] In other words, 'immunity protects all but the plainly incompetent or those who knowingly violate the law.' [Citation] To deny immunity, we must conclude that every reasonable official would have understood, beyond debate, that the conduct was a violation of a constitutional right. [Citation]" (*Martinez v. City of Clovis* (December 4, 2019) 943 F.3d 1260, 1275.)

The *Martinez* decision further explained that the court begins its determination as to whether the law is clearly established by first looking to Supreme Court and then Ninth Circuit cases. Short of binding precedent, "we look to whatever decisional law is available ... including decisions of state courts, other circuits, and district courts." (*Ibid.*) The precedent must be "'controlling' – from the Ninth Circuit or the Supreme Court – or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." Thus, it is extremely important to try to mirror the facts of your case to existing precedent when opposing a summary judgment based on qualified immunity.

In sum, qualified immunity may be established either by facts showing that excessive force was not used *or* by showing that the officers would not have been put on notice of "clearly established" precedent that the use of force under the circumstances presented, would be known by the officers to be excessive.

Right to appeal denial of summary judgment by way of interlocutory appeal

In *Mitchell v. Forsyth* (1985) 472 U.S. 511, the Supreme Court recognized the right of a defendant to bring an interlocutory appeal arising from the denial of a motion for summary judgment based upon the qualified-immunity defense. The standard of review on the appeal is de novo. The Ninth Circuit's "interlocutory jurisdiction to review a denial of qualified immunity is limited exclusively to questions of law." (*Norwood v. Vance* (9th Cir. 2010) 591 F.3d 1062, 1075.) If the district court denied qualified immunity because there remain genuine issues of material fact, the Ninth Circuit lacks jurisdiction to hear the appeal.

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Thus, as noted above, the Court of Appeal must resolve all factual disputes and draw all reasonable inferences in plaintiff's favor. (*Karl v. City of Mountlake Terrance* (9th Cir. 2012) 678 F. 3d 1062, 1068.) Having done so, the Court of Appeals' task in an interlocutory appeal is to determine whether the defendant officer's use of force violated a clearly established law.

Ways to challenge the appeal

Bring a motion to certify the appeal as frivolous

When the defendant officer files an interlocutory appeal, the plaintiff may file a motion with the district court asking the district court to certify the appeal as frivolous. A finding that an appeal is frivolous would not divest the district court of jurisdiction.

"An appeal is frivolous if it is 'wholly without merit.'" (*United States v. Kitsap Physicians Serv.* (9th Cir. 2002) 314 F.3d 995, 1003 n.3.) "[A] frivolous qualified immunity claim is one that is unfounded, 'so baseless that it does not invoke appellate jurisdiction. ...'")." (*O'Connell v. Smith* 2014 WL 12819563.)

In the context of qualified immunity, an appeal can be frivolous if: (1) it is based on disputed facts; (2) the qualified-immunity defense was waived; or (3) no reasonable officer could believe that his or her conduct was lawful. (*Chuman v. Wright* (1992) 960 F. 2d 104.) However, in the absence of such certification, *Chuman* held that the district court was automatically divested of jurisdiction to proceed with trial pending appeal.

While a motion seeking dismissal of an interlocutory appeal is an available procedural tool, dismissal by such means is challenging. For instance, in *Isayeva* (2017) 872 F. 3d 938, while the district court granted plaintiff's ex parte application to deem the appeal frivolous, the Ninth Circuit held that it did have jurisdiction to hear the appeal because the district court's finding of triable issues did not preclude an appeal on the issue of whether the officers violated a clearly established right when considering all the facts in the light most favorable to the plaintiff.

Challenge pendent jurisdiction

Municipalities "sued under § 1983, unlike individuals, are not entitled to immunity, qualified or otherwise, and so, unlike individuals, can never be immune from trial." (*Horton v. City of Santa Maria*, 915 F.3d at 603.) Thus, municipalities do not have an immediate right to appeal the denial of a summary judgment claim in a section 1983 action. The exception to this rule, however, is when "a municipal defendant's motion for summary judgment is 'inextricably intertwined' with issues presented in the individual officers' qualified immunity appeal, [the Ninth Circuit] may exercise pendent party appellate jurisdiction." (*Ibid*.) This is a narrow concept. A claim is inextricably intertwined when "the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." (*Ibid*.)

When pursuing a section 1983 case, it is important to determine whether the municipality itself, through action or inaction, caused the constitutional injury. If you can find a way to create a triable issue of fact on the municipality's liability, you eliminate the possibility that the case will get thrown out based on lack of a clearly established right. This is because a "municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity, because even if an officer is entitled to immunity a constitutional violation might still have occurred." (*Ibid*; See also *Fairley v. Luman* (9th Cir. 2002) 281 F.3d 913, 917 ["If a plaintiff establishes, he suffered a constitutional injury *by the City*, the fact that individual officers are exonerated is immaterial to liability under § 1983."].)

Preserve the state-law claims

The doctrine of qualified immunity does not shield defendants from state-law claims. (*Cousins v. Lockyer* (9th Cir. 2009) 568 F. 3d 1063, 1072.) Thus, even where the Court of Appeals finds qualified immunity, a plaintiff would not be precluded from pursuing collateral claims that do not invoke the same constitutional standards raised by section 1983 claims. The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639.)

Other possible claims include negligence, wrongful death, battery, and an action under Civil Code section 52.1 ("the Bane Act"). It should be noted that although a Bane Act claim is not subject to a qualified-immunity defense, the elements of the excessive-force claim under 52.1 are the same as under section 1983. (*Chaudhry v. City of Los Angeles* (9th Cir. 2014) 751 F.3d 1096,1105.)

What is the import of an order reversing denial of summary judgment for the defendant officers based upon the qualified immunity defense on other claims, including those against municipalities? The answer to this question depends on the collateral claims asserted and whether they were necessarily resolved by the Court of Appeal's decision.

"[A] pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is conterminous with, or *subsumed* in, the claim before the court on interlocutory appeal – that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well." (*Huskey v. City of San Jose* (9th Cir. 2000) 204 F.3d 893, 905.)

Accordingly, even if the Court of Appeal finds that the section1983 claim against the officers is barred by the qualified-immunity defense, if such findings did not necessarily resolve the other claims against the officers or municipalities, the reversal of the denial of summary judgment as to the section 1983 claims will not necessarily prevent a plaintiff from pursuing the non-1983 claims.

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Staying state-court action

Assuming an interlocutory appeal is not frivolous, the federal or state courts will likely stay the other actions despite concerns about the prejudicial effect of such stays. As discussed in *Lum v. County of San Joaquin* 2012 WL 2090322, "In determining whether to stay proceedings pending appeal of a denial of qualified immunity, district courts must weigh the interests of the defendants claiming immunity from trial with the interest of the other litigants and the judicial system. 'During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined.' (*Apostol v. Gallion* (7th Cir.1989) 870 F.2d 1335, 1338-1339.) Nonetheless, a stay is automatic so long as the appeal is not frivolous, *Chuman v. Wright* (9th Cir. 1992) 960 F.2d 104, 105, and turns on an issue of law, *Mitchell v. Forsyth* (1985) 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411."

Assuming a state law action was already filed, under some circumstances it may be prudent to seek, or agree to a stay of the state court action pending resolution of the appeal.

Conclusion

There are significant challenges presented by interlocutory appeals in civil rights cases brought against individual officers. Plaintiffs' lawyers should be aware that defeating a summary judgment motion may only be the beginning of a long road to ultimate success. Whenever you are faced with an interlocutory appeal, you should consider the different ways that you can attack the appeal and otherwise preserve your client's rights.

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