

## Civil Rights Update

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# Your Qualified Immunity Defense was Denied at Summary Judgment. Will the Court of Appeals Have Jurisdiction Over Your Interlocutory Appeal?

A recent decision by the Seventh Circuit Court of Appeals may challenge some assumptions about when to appeal the denial of a summary judgment motion on qualified immunity grounds. In *Levan v. George*, No. 09-3223, 2010 WL 1688529 (7th Cir. Apr. 28, 2010), the Seventh Circuit dismissed an interlocutory appeal by two sheriff's deputies for lack of appellate jurisdiction. Although it is well known that interlocutory appeals on qualified immunity grounds are supposed to center on questions of law, not facts, *Levan* reasserts this maxim in a manner that may give pause to some attorneys considering their next move as they await rulings on their pending motions.

### Supreme Court Precedent

Interlocutory appeals of the denial of summary judgment on qualified immunity grounds were specifically permitted by *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985), which recognized that orders denying qualified immunity fall within a small class of decisions that should not be deferred until final judgment. This rule acknowledges that qualified immunity is an "entitlement not to stand trial or face the other burdens of litigation," and "is effectively lost if a case is permitted to go to trial." *Mitchell*, 472 U.S. at 526. A district court's denial of a claim of qualified immunity is thus considered a "final decision" under the collateral order doctrine and within the appellate courts' jurisdiction pursuant to 28 U.S.C. § 1291. *Id.*

This doctrine has a significant caveat, however: fact-based disputes generally do not allow for appellate jurisdiction. Ten years after *Mitchell*, the Supreme Court in *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151 (1995), analyzed whether a district court's determination of the sufficiency of the evidence presented by a plaintiff in a qualified immunity case could be appealed. *Johnson*, 515 U.S. at 313. Although the defendants raised the defense of qualified immunity, they primarily argued that the plaintiff could not produce a "scintilla of evidence" to support his federal constitutional claims against them. *Id.* at 308. This was not a successful strategy. The district court denied the defendants' motion. The Seventh Circuit then dismissed their appeal, asserting that it lacked appellate jurisdiction over their "evidence insufficiency" argument, because it was entirely fact-based. *Id.* Citing a split in federal circuits as to "the immediate appealability of . . . 'evidence insufficiency' claims made by public official defendants who assert qualified immunity defenses," the Supreme Court granted *certiorari*. *Id.*

The unanimous Court concluded that denials of immunity claims based on the sufficiency of evidence are not “final decisions” subject to interlocutory appeal. *Id.* at 313. The Court cited three bases for its decision. First, it noted that *Mitchell*’s holding was specifically limited “to appeals challenging, not a district court’s determination about what factual issues are ‘genuine,’ ... but the purely legal issue [of] what law was ‘clearly established.’” *Id.* Consequently, the Court reasoned, the legal question of whether qualified immunity is appropriate can and should “be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.” *Id.* Second, the Court stated that “evidence sufficiency” appeals are ill-suited for interlocutory consideration because they are inexorably linked to “the fact-related legal issues that likely underlie the plaintiff’s claim on the merits.” *Id.* at 314. Finally, the Court concluded that additional considerations, such as delay, the expertise of trial courts at determining questions of fact, and the economic use of appellate resources all favor limiting qualified immunity appeals to cases presenting “neat abstract questions of law.” *Id.* at 317.

But what if a plaintiff’s version of events is directly contradicted by evidence that cannot realistically be rebutted? Need a defendant remain silent and proceed only with a legal argument? The Supreme Court recently considered this issue and created an exception to its *Johnson* holding. In *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769 (2007), the Court announced that a question of material fact must be “genuine.” The case involved a high-speed police chase in which the petitioner (the fleeing suspect) was forced off the road and injured by actions of the police. The defendant officer filed a motion for summary judgment on qualified immunity grounds. The district court denied his motion, citing “material issues of fact.” The appellate court accepted jurisdiction over his appeal, adopted the plaintiff’s version of events, and affirmed the denial of summary judgment. *Scott*, 550 U.S. at 376. Apparently, the district and appellate courts ignored a videotape of the police chase itself. The justices watched it and concluded that it “quite clearly contradict[ed] the version of the story told by respondent and adopted by the Court of Appeals.” *Id.* at 378.

This experience led the Court to proclaim: “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.* at 380. *Johnson* was not mentioned in the Court’s opinion, nor was appellate jurisdiction addressed. Nevertheless, it seems that *Harris* modified *Johnson* to allow consideration of the facts in extreme cases. See *Wysong v. City of Heath*, 260 Fed. Appx. 848, 853 (6th Cir. 2008); *Blaylock v. City of Philadelphia*, 504 F.3d 414 (3d Cir. 2007). To recognize an extreme case, appellate courts must analyze the facts presented by the parties.

### **Facts and Procedural History**

The plaintiff received a parking ticket and failed to attend a scheduled court hearing to contest the ticket. *Levan*, 2010 WL 1688529 at \*1. The court entered a default judgment against Levan, and his attorney prepared a motion to vacate the default. *Id.* Sometime later, Levan traveled to court to attend what he believed to be a hearing on his motion. *Id.* Upon entering the courtroom, he approached an Assistant Corporation Counsel and asked her about his case. She informed him that his motion was not in her file and that, consequently, it would not be heard that day. What happened next is the subject of some dispute; however, it is obvious that Levan did not like that answer. He apparently reached for the Assistant Corporation Counsel’s file, at which time she told him to keep his hands to himself. Levan then insisted the motion was in her file and demanded that it be heard. The Assistant Corporation Counsel again told Levan that it was not. A confrontation unfolded—the details of which are disputed—which caused the bailiff to radio for assistance. *Id.*

Two uniformed sheriff’s deputies responded, and the bailiff briefed them. Although Levan’s behavior at this point is vigorously disputed, it is agreed that one of the deputies warned Levan that he needed to settle down or face arrest. Levan responded that the deputy “would just have to arrest him,” at which time he stood up and put his left hand behind his back. *Id.* The deputy obliged and handcuffed Levan’s left hand, but ensuing movements by Levan, whether of a threatening nature or otherwise, resulted in the deputies forcibly cuffing his

other hand and utilizing pepper spray in the courtroom. *Id.* at \*1-2. Ultimately, Levan was charged with disorderly conduct but was acquitted following a trial. *Id.* at \*2.

Levan filed a § 1983 complaint in federal court against the Assistant Corporation Counsel, the sheriff's deputies, and others. Levan presented a laundry list of claims, including various alleged violations of his Fourth, Fifth and Sixth Amendment rights. Only the Fourth Amendment claims, however, survived to the summary judgment stage. In their dispositive motion, the deputies argued that they were entitled to qualified immunity, and thus, summary judgment. In light of a number of "genuine issues of material fact" surrounding the altercation and the propriety of Levan's arrest, the district court denied the deputies' motion. They immediately filed an appeal. *Id.* at \*2.

### **Denial of Appellate Jurisdiction and its Possible Implications**

As stated above, the Seventh Circuit dismissed the deputies' appeal in *Levan*. In so doing, it relied almost exclusively upon *Johnson*. *Levan*, 2010 WL 1688529 at \*3-4. In fact, the appellate court stated that the case "falls squarely within *Johnson*'s parameters." *Id.* at 4. More specifically, the court ruled "it is obvious to us that the separability requirement is very clearly lacking here." *Id.* No mention is made of the Supreme Court's later ruling in *Scott*.

Because of the disputed facts in *Levan*, this ultimate result seems sensible. If the circumstances of Levan's arrest are in doubt, the appellate court cannot very well make a legal determination as to the propriety of his arrest and treatment under the Fourth Amendment. But, did the appellate court take the right route? What prevented the Seventh Circuit from reaching the same result without denying appellate jurisdiction? Although it is not completely clear, it seems that the deputies' attorney did not raise the "evidence insufficiency"-type argument the Supreme Court found so problematic in *Johnson*. The Seventh Circuit panel acknowledged as much by stating that "at oral argument defendants' attorney attempted to distinguish the factual determinations from the legal issue of qualified immunity." *Id.* If the deputies' appellate brief took that tack, as well, the dismissal on jurisdictional grounds may be cause for concern for those who regularly represent public employees.

The *Levan* decision could be a signal from the appellate court that it intends to further discourage interlocutory appeals of summary judgment motions. Only time will tell. Nevertheless, practitioners challenging the district court's denial of qualified immunity at the summary judgment stage should craft their appellate arguments carefully. Unless one's case contains irrefutable evidence contradicting the plaintiff's version of events, such as was the case in *Scott*, counsel's briefs and oral arguments should accept the facts embraced by the district court (whether one agrees with them or not). Attempt to demonstrate how, in light of those facts, the court's ruling was legally incorrect. The Seventh Circuit may not be willing to tolerate a momentary foray into the factual basis of the district court's ruling, which may cause the court to dismiss otherwise persuasive arguments.

## **About the Author**

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