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Civil Rights Update

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The Seventh Circuit's Footnotes Question the Failure to Raise Available Immunities

Experienced civil rights practitioners frequently defend their cases based upon the strongest possible argument: that no constitutional or state law tort occurred in the first place. If applicable, this is always an argument that should be made. Even if counsel believe they possess a "slam dunk" argument, however, the failure to raise and support the immunities afforded to state actors may have dire consequences. The United States Court of Appeals for the Seventh Circuit's recent holding in *Hawkins v. Mitchell*, 756 F.3d 983 (7th Cir. 2014), should serve as a lesson for all of us.

The opinion opens on an ominous note, stating: "We review summary-judgment and trial rulings on several causes of action against police who did not claim immunity under federal or state law." *Hawkins*, 756 F.3d at 987. After telegraphing the lesson ahead, the court reviews the facts of the underlying incident in detail.

Facts and Procedural History

The case involves a domestic dispute that erupted late on a Saturday night in May 2008. Sarah Bumgarner called 9-1-1 from outside William Hawkins' house in Champaign, Illinois. *Id.* The police dispatcher characterized the incident as a heated argument fueled by alcohol. Two police officers—Rodney Mitchell and James Bowersock—responded to the call. Officer Mitchell arrived at the scene first, at which time he encountered Bumgarner outside, shouting at Hawkins about her keys. *Id.* at 988. Clothing was scattered around the yard. According to Officer Mitchell, Hawkins screamed back at Bumgarner from his back porch, stepped into the house, and slammed the door. Hawkins remembered the scene quite differently, stating that he was in bed asleep when the officer arrived. *Id.* In any event, Bumgarner apologized to Officer Mitchell for calling the police, but reiterated to him that she needed her keys. Consistent with Officer Mitchell's observations, she admitted that she was uninjured. She also related that she and Hawkins did not have a physical altercation. Although she made no allegation that Hawkins was violent or threatening that evening, she told Officer Mitchell that Hawkins "gets violent sometimes." *Id.*

Officer Mitchell decided to help Bumgarner retrieve her keys. He knocked on Hawkins' door. Hawkins answered it, yelled "I don't need to talk to you!" and tried to close it. Officer Mitchell blocked the door with his foot, entered the residence, and began questioning Hawkins. *Id.* Hawkins promptly called his attorney. With his attorney coaching him by phone, Hawkins confirmed that Officer Mitchell did not have a warrant and that he was not then placing Hawkins under arrest. *Id.* Per his attorney's advice, Hawkins repeatedly told Officer Mitchell to get out of his house. *Id.* Officer Mitchell remained,

however, and motioned for the newly-arrived Officer Bowersock to join him inside the residence. Officer Bowersock told Hawkins that the officers were investigating a domestic call and that he had to put down the phone. *Id.* Hawkins did not obey, at which time Officer Bowersock commanded him to get off the phone or "be arrested." *Id.* When Hawkins again refused to comply, Bowersock and Mitchell grabbed Hawkins' wrists to effectuate his arrest. Hawkins resisted, and in the resulting struggle the three fell to the floor. *Id.* Hawkins was allegedly injured in the scuffle. *Id.* at 989.

Hawkins sued the officers pursuant to § 1983 and state law. *Id.* The district court reviewed cross-motions for summary judgment and held in the officers' favor on Hawkins' claims of illegal seizure under the Fourth Amendment, arrest in retaliation for speech under the First Amendment, and "false imprisonment/locomotion" under Illinois common law. *Id.* The remaining claims—for excessive force under the Fourth Amendment and a common law claim of "wilful and wanton battery"—proceeded to trial. *Id.* During trial, the court instructed the jury that "[t]he lawfulness of Defendants' entry into Plaintiff's home or his arrest [was] not an issue." *Id.* at 990. The jury returned a verdict in favor of the officers. *Id.*

The Court's Pre-Discussion Footnote

Before beginning its analysis, the Seventh Circuit panel unusually placed a footnote right after its heading for "Discussion." It states, in full:

> When, as here, police officers are sued under 42 U.S.C. § 1983 for allegedly violating constitutional rights, qualified immunity often proves to be the decisive rule of law. *Cf. Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (allowing courts to dispose of claims against public officials for violating constitutional rights without considering whether a right was violated, by determining that it was in any event not "clearly established"). This opinion does not address qualified immunity in substance, however, because Mitchell and Bowersock did not discuss it on appeal. And, while "[w]e can 'affirm on any ground supported in the record, so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue,'" *Thayer v. Chiczewski*, 705 F.3d 237, 247 (7th Cir. 2012) (quoting *Peretz v. Sims*, 662 F.3d 478, 480 (7th Cir. 2011)), the officers' briefing in the district court did not ensure the fulfillment of those criteria with respect to qualified immunity.

Hawkins, 756 F.3d at 990 n.3. Is the purpose of the footnote merely to explain to the reader that the court's opinion will not follow the ordinary pattern for these types of cases? Or is it intended as an admonishment? Given the additional footnotes that follow, it is clear that the court was sending a message.

The Court's Substantive Analysis (and More Footnotes)

The court first analyzed the plaintiff's Fourth Amendment "illegal seizure" claim, and in so doing, it reviewed the well-worn principles announced in *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") and *Payton v. New York*, 445 U.S. 573, 586 (1980) ("searches and seizures inside a home without a warrant are presumptively unreasonable."). *Id.* at 991-92. The court explained that, regardless of this high level of constitutional protection, the Fourth

Amendment will give way when there exist "exigent circumstances," such as when officers must enter "to render emergency assistance," "to protect an occupant from imminent injury," or "to prevent the imminent destruction of evidence." *Id.* at 992 (collecting cases). Officers Mitchell and Bowersock argued that their entry into the home was justified due to the presence of two exigencies: the need to prevent imminent serious injury and the need to question Hawkins about the situation. *Id.* at 993. The second basis was immediately brushed aside by the court as a nonstarter. The officers' wish to question Hawkins was simply not an exigency (a compelling need for official action with no time to secure a warrant); it amounted to nothing more than an "ordinary investigation of possible crime." *Id.* (quoting *United States v. Venters*, 539 F.3d 801, 807 (7th Cir. 2008)). With respect to the officers' supposed need to render "emergency assistance," the court found no such emergency. Officer Mitchell knew better; after all, while outside and safely away from Hawkins, Bumgarner assured Mitchell that no physical attack had taken place, and his own observations confirmed her assurances that she was not injured. *Hawkins*, 756 F.3d at 993. She even apologized for calling 9-1-1 in the first place, since all she really wanted was her keys. With these facts before it, the court ruled that Officer Mitchell's nonconsensual and warrantless entry into the home was objectively unreasonable. *Id.* Thus, his seizure of Hawkins constituted a violation of the Fourth Amendment. *Id.*

Given Officer Mitchell's presence inside the house at the time of his arrival, Officer Bowersock initially possessed "a reasonable basis to act as though he had consent or exigency," in the court's view. *Id.* at 994. This, however, soon wore off as the circumstances (no weapons, threats, or physical aggression from Hawkins) should have reasonably caused Officer Bowersock "to ask Mitchell why they were inside and to recognize the absence of any possible justification for staying." *Id.* According to the court, Officer Bowersock's continued presence inside the home and his seizure of Hawkins was unconstitutional as a matter of law. *Id.* As the court reached this conclusion, it added another footnote declaring, "It is significant to this discussion that Bowersock has not sought qualified immunity." *Id.* at 994 n.6.

Although it does not seem likely for Officer Mitchell, would qualified immunity have saved Officer Bowersock from this claim? It seems quite possible, particularly in light of the court's footnote. The court would have had to consider whether, on this night of the incident, the contours of Hawkins' right to be free from an illegal seizure were sufficiently clear such that every reasonable officer in Officer Bowersock's position would have understood that remaining within a residence initially entered by a fellow officer in those circumstances, and effecting the occupant's arrest, violated that right. *See White v. Stanley*, 745 F.3d 237, 241-42 (7th Cir. 2014) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). Although future officers faced with the same situation are now "on notice" for qualified immunity purposes through the opinion in this case, it seems evident that Bowersock possessed a fair chance of surviving the "clearly established" prong of the qualified immunity analysis, had he pursued it as a defense. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Having completed its Fourth Amendment analysis, the court turned its attention to Hawkins' state law false imprisonment claim. *Hawkins*, 756 F.3d at 994. The officers argued that they possessed probable cause to arrest Hawkins for theft of Bumgarner's keys or for disorderly conduct. *Id.* Probable cause operates as an absolute bar to a claim of false imprisonment. *Id.* (quoting *Poris v. Lake Holiday Prop. Owners' Ass'n*, 2013 IL 113907, ¶ 63). The court again commented on the officers' defensive strategy in footnotes. Two of the footnotes addressing the pending state law claims remind the reader that "Illinois' Local Governmental and Governmental Employees Tort Immunity Act would typically be under consideration" in a case like this, had the officers raised it as a defense. *Id.* at 991 n.4; 994 n.8. Probable cause to arrest Hawkins for theft did not exist, according to the court, because "[w]ithout any accusation of theft, an intoxicated 9-1-1 caller's request for assistance in retrieving her keys from

someone else's house, coupled with an allegation of unrelated past abuse by that someone, does not amount to probable cause to arrest for stealing the keys." *Id.* at 995. As for probable cause for disorderly conduct, the court found that the diametrically opposite accounts of Hawkins' behavior at the time of Officer Mitchell's arrival (whether he was screaming from his back porch or in bed asleep) foreclosed the possibility of summary judgment in the officers' favor. With no consideration warranted for possible application of the Tort Immunity Act, the district court's ruling on this claim was reversed and remanded for a new trial. *Id.* at 999.

The court next considered whether the district court correctly entered summary judgment for the officers with respect to Hawkins' allegation that they arrested him in retaliation for "calling an attorney and for his assertion of his Fourth Amendment right to privacy of his home, in violation of the . . . First Amendment." *Id.* at 996. To establish a *prima facie* case for such a claim, a plaintiff must show that: "(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation likely to deter such activity; and (3) the First Amendment activity was at least a motivating factor in the decision to impose the deprivation." *Id.* (citing *Thayer v. Chiczewski*, 705 F.3d 237, 251 (7th Cir. 2012)). The officers argued, both at the district court level and on appeal, that "the right to contact counsel would severely hamper the ability of police officers to enforce the law." *Id.*

Having summarized the officers' argument, the court directs the reader to another footnote. *Id.* Within it, the court states:

> qualified immunity is not available to the officers as a defense, here or on remand. . . . Mitchell and Bowersock neglected to raise qualified immunity from *any* cause of action, not only here but also in the district court. . . . Finally, because Mitchell and Bowersock left qualified immunity out of their answer to the amended complaint, there is no reason to let them assert it upon remand.

Id. at 996 n.11 (emphasis in original). After this harsh warning, the court went on to reject the officers' argument as "contrary to precedent." *Id.* at 997. On a basic level, according to the court, Hawkins had a clear First Amendment right to consult with his attorney. *Id.* In addition, Hawkins' phone call was not "an act of physical resistance" required for criminal obstruction of the officers' duties. *Id.* (quoting *People v. Stoudt*, 198 Ill. App. 3d 124, 127 (2d Dist. 1990)). The court could not infer that the attorney phone call was the factor that motivated the officers to arrest Hawkins, so that specific question was returned to the district court for submission to the jury on remand. *Id.* at 997, 999.

The court's last area of analysis was the jury's verdicts on the state law "excessive force" and "wilful and wanton battery" claims. *Id.* at 997-98. Hawkins argued, *inter alia*, that the district court improperly instructed the jury that "[t]he lawfulness of Defendants' entry into [his] home or his arrest [was] not at issue" and that the erroneous summary judgment order enabled improper arguments by defense counsel during closing argument. *Id.* at 998. The court found that, given the district court's rulings on the cross-motions for summary judgment, its instructions to the jury "did fairly and accurately summarize the law." *Id.* Defense counsel's closing argument was a different story, however. According to the court, it "overwhelmingly misled" the jury, even though most of the false impressions contained within it were "consistent with the law of the case at the time." That, according to the court, "is precisely what made it futile for Hawkins to object." *Id.* at 999. The court ordered retrial of the excessive force and wilful and wanton battery claims.

Conclusion

The Seventh Circuit's *Hawkins v. Mitchell* opinion is interesting because it is really two opinions in one. While finding violations of the plaintiff's constitutional rights and possible substantiation of his state law tort claims in the body of the opinion, the court repeatedly drops footnotes chastising the officers for failing to defend themselves through the doctrine of qualified immunity and Illinois' Tort Immunity Act. The footnotes certainly make no promises but, as defense practitioners, we should heed their warnings carefully any time those defenses are available for our clients.

About the Author

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