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Surviving Interlocutory Appeals: Trial Lawyer Edition

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Transcription:

And this presentation is about trial lawyers doing too many things at once in the context of civil rights and §1983 in many cases. I think that I'm actually, let me just get a sense of are you, are most of the audience, trial lawyers who are doing civil rights cases? Or are you guys just doing other types of cases? OK, so most of my practice is actually §1983 litigation. I do exclusively police misconduct cases against federal and state law enforcement. And I'm a member of the National Police Accountability Project, NPAP, which is all trial lawyers who focus on police misconduct. And I think one of the most difficult and challenging areas of this of this practice of law, when you are suing cops, which is mostly my work—you are dealing with qualified immunity and interlocutory appeals. And the reason qualified immunity is wreaking havoc on the plaintiffs' ability to recover, or even to have a day in court, is because of interlocutory appeals.

So. The written materials[1] that are going to be handed out to you actually have a pretty lengthy outline that I drove going through the Supreme Court case law and the development of interlocutory appeal, actually the development of qualified immunity and then interlocutory appeals. But I'll go through it really briefly, since some of you might not practice in this area of law exclusively. So, because of qualified immunity, there is the right to interlocutory appeals and that was established very recently in 1985. The scope of the interlocutory appeal is supposed to relate to denials of qualified immunity. So it's supposed to be an exclusively, discrete legal issue that is being addressed on interlocutory appeal. They're supposed to be dealing with issues of law, right? So qualified immunity has two prongs. There is the prong of unconstitutional conduct: was the defendant, the officer, committed an unconstitutional act? The second thing is what you hear about all the time: clearly established law. Was the constitutional right of the plaintiff clearly established at the time the officer committed the conduct? So this is brought up in in two dispositive areas in terms of being in practice. It is brought up during motions to dismiss, and it's brought up again during summary judgment.

Government officials, unlike everybody else, have the right to immediately appeal a denial of Qualified Immunity. So if you are dealing with a 12(6) motion[2] and the judge denies Qualified Immunity to government officials, that government official has the right to an immediate interlocutory appeal. Let's say you win that, and you come back, then if you engage in discovery for the next two years and then you go to summary judgment. And the trial judge, or the District Court judge, again denies qualified immunity to the government official, they can again file an interlocutory appeal on the issue of denial and qualified immunity. So, it becomes for trial lawyers that are doing this, it becomes extremely expensive, extremely burdensome. And quite frankly, it's soul crushing at times, because you have spent years of hard work, money, time, and effort

[1] See appendix
[2] Fed. R. Civ. P. 12(b)(6)

litigating a case, retraumatizing your client by forcing them to relive the abuse and the violence that they encountered. And then you go through, and you get to the appellate court, and then you are told that there is no clearly established law or that the officer's conduct was somehow reasonable in some way.

So I wanted to talk about a case called *Thomas v. Dillard*,[3] which is one of our cases. This was the case of Correll Thomas, a young black man. He was stopped and frisked because officers suspected that he had been involved in some sort of battery. When he refused to consent to a search of his person, the officer tased him.[4] We go through discovery, we get the summary judgment, and on summary judgment the District Court Judge actually granted the plaintiff's partial motion for summary judgment on liability. Saying yes, what the officer did under the circumstances was unconstitutional. So what does the officer do, his name is Dillard? He goes to the Ninth Circuit and we're on interlocutory appeal. He appeals the denial of qualified immunity. This is in the Ninth Circuit. It is actually shortly after the Supreme Court had issued an opinion called *Sheehan*[5]. Before the Ninth Circuit, the Ninth Circuit reverses everything, they say no, actually, Officer Dillard is entitled Qualified Immunity because there was no clearly established right that Correll Thomas had to refusing to consent to search of as a person, and there was no clearly established law telling officers that he could not tase Correll Thomas in that moment.[6] So after years of money, sweat, tears, the case is gone. And worse than that, that is a message that is being sent to Correll Thomas. That this legal doctrine, out of the blue, can deprive him of a constitutional right.

So what I want to talk about today is how you can deal with interlocutory appeals as a §1983 lawyer, as a trial lawyer. Because most of us are not appellate lawyers, we are running busy civil litigation practices at the same time and we've got a lot going on. So I know I'm short on time, so I'm going to try and actually go straight to the kind of a big thing. We're going to talk about frivolous appeals. There is a mechanism for you to file a motion to certify an interlocutory appeal as frivolous. There's a lot of case law in this presentation and there's a lot of case law in the material, so I'm just going to go quickly and explain what that means. Interlocutory appeals are only supposed to address this discrete legal issue, right? It's only supposed to address qualified immunity. It's not supposed to address-- it's not supposed to use, a vehicle used to deal with issues of disputed fact or issues of evidentiary sufficiency. The case that Congresswoman Jackson-Lee was referring to *Tolan v. Cotton*, that's a case that comes out of the Fifth Circuit and deals with an incident that occurred in Texas.[7]

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[3] *Thomas v. Dillard*, 818 F.3d 864 (9th Cir. 2016).
[4] *Id* at 873.
[5] *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600 (2015).
[6] *Thomas*, supra note 3, at 886-888.
[7] *Tolan v. Cotton*, 572 U.S. 650 (2014)("*In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party*, (citing, Anderson, 477 U. S. 242 at 249 (1986).

And so, what cases like *Johnson v. Jones*[8] and *Tolan v. Cotton* from the Supreme Court stand for the proposition that they stand for, is that on interlocutory appeal a defendant officer can't challenge things that require resolution of disputed issues of fact. The Appellate Court can’t reweigh the evidence. It can’t resolve factual disputes in favor of the defendant officer. So what that has caused, is there is now a process in most circuit courts of appeal to have the District Court certify interlocutory appeal as frivolous. If you can't convince your district court to do that, what you can do is you can move to dismiss the appeal as lack of jurisdiction before the Circuit Court of Appeals.

There is actually recent case law that is in the material that discusses dismissals of interlocutory appeals for lack of jurisdiction because we all dealt with really extensive disputed areas of fact. We dealt with issues of evidentiary sufficiency. So, there's a recent Ninth Circuit case, there’s a recent Sixth Circuit case, a Seventh Circuit case that just came out. There are opportunities for you to dismiss an interlocutory appeal for lack of jurisdiction.

But. We're going to get to the next problem. Most district courts and circuit courts of appeal are very reluctant to do this because there is a message coming from the very top and from the very top we mean the Supreme Court. The Supreme Court has consistently in the past more than 10 years, really, whenever they dealt with qualified immunity, they have consistently construed things in favor of the defendant officer, right? They have been big proponents of qualified immunity and they have repeatedly reversed the Ninth Circuit in particular when the Ninth Circuit has denied qualified immunity. So everybody's nervous about this issue. Everyone treads really lightly.

If you were on interlocutory appeal, you're probably going to actually deal with the appeal. What do you do? Factual disputes. This is where your chances of overcoming interlocutory appeal are the greatest because if there's a factual dispute, you’ve given that the appellate court a way of denying the interlocutory appeal, sending you back to the trial court and getting your client his or her day in court. So the best way to do this is to. Well, this is what I've done. Number one, is I've anchored the case in an issue of that's fairly uncontroversial or that's clearly established because of extensive criminal case law. Right. So we're talking about the Fourth Amendment search and seizure issues, things that in the course of criminal case law have developed and there is a lot of case law backing it. Once we've anchored our constitutional right or issue in something that has a lot of case law —something that seems fairly clearly established—we've gone through and develop factual disputes during discovery. We are using video evidence, percipient witness testimony, defendant officer deposition, to develop as many factual disputes as we can.

In the material that hopefully they provided, or it will be provided there is, what I've done is I've listed a series of cases from all sorts of circuits—Fourth Circuit, Tenth Circuit, Seventh Circuit, Ninth Circuit—that talks about video evidence. And there is, there are quite a few cases in different circuits that say that if the video evidence can and should be construed in the light most favorable to the plaintiff on summary judgment. So if you have video evidence, you want to argue that strongly that inference has to be drawn in favor of the plaintiff and that a reasonable jury could view that evidence in favor of the plaintiff. And that's how you want to try to get around a sticky

[8] *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

qualified immunity issue. So that's what you're going to do and you're going to talk about factual disputes whenever possible. You're going to develop a trial court record that has a lot of factual disputes, and you sometimes may want to couch things in terms of proximate causation. Proximate causation it's an issue of fact for the most part.

And then, I've listed a case called the *Estate of Kevin Brown v Lampert*.[9] It is one of our cases, and this is a case where I had to deal with an interlocutory appeal. And then had to deal with a cert petition to the Supreme Court and we still went to trial. And this was a really unusual case. This was a case about semen in the crime lab. And what had happened was our plaintiff, well our decedent, Kevin Brown, he had committed suicide. Use to be a former crime lab analyst at the San Diego Police Department and some of his sperm was found on material from a cold case homicide on a vaginal swab from a victim in a cold case homicide. And so he became, Kevin became the prime suspect in the criminal investigation. And during the investigation he committed suicide.[10]

So a lot of attorneys told us that this was kind of a loser case already because it sounded like a failure to investigate. Right? And it sounded like you were trying to sue the cops for doing a bad investigation which is not permitted. What we did is, number one, we anchored it in a criminal procedure. We made it a *Franks v. Delaware* issue.[11] These are called judicial deception cases. It's when a police officer lies to get a search warrant. So that was an area where there was a lot of case law already. Number two, we developed as many, many factual disputes during discovery as possible. And luckily there were a lot of percipient witnesses and everybody kind of gave contradictory and conflicting testimony. So that was on purpose, though. We took a lot of depositions to try to ensure that we had a record that was replete with factual disputes. And number three, we made the ultimate injury—which was the suicide—we made that a proximate causation issue. There is a Supreme Court case, very recent called *Mendez versus Los Angeles County*[12], and it talks about proximate cause in the §1983 action. And issues of proximate cause are issues of fact, those are not discrete legal issues. And that's how we dealt with the suicide.

We said that the suicide was proximately caused by the Fourth Amendment violation, which was the improper search warrant for the search of Kevin and Rebecca's home. Rebecca was Kevin's wife. So. By doing that, we were able to get past an interlocutory appeal. Because this was an area of law that was had an extensive history in criminal procedure, right? Search warrants, affidavit for search warrants, *Frank v. Delaware*, we're talking about clearly established law. This case is a little quirky because it dealt with kind of a weird DNA issue; DNA regarding vaginal swabs, semen on the swab, a practice of having semen sample stored in the lab. And that was actually what the defendants tried to use to say that they were entitled to qualified immunity, that the law wasn't clearly established.

But because there were so many factual disputes during discovery, we were able to get past that interlocutory appeal and we were able to get an effective denial of cert. Thank God the Supreme

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[9] *Estate of Kevin Brown v. Lambert*, 15-cv-1583-DMS (WVG) 2017 U.S. Dist. LEXIS 80656, 2017 WL 2291778 (2017).
[10] *Id* at 16.
[11] *Franks v. Delaware*, 438 U.S. 154 (1978).
[12] *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017).

Court didn't take up the case. So we were able to get to trial. Our client was given her day in court and she was ultimately vindicated. The jury actually awarded her 6 million dollars for the death of her husband. There is a way to do it, but it requires some careful planning. You've got to think about that inevitable qualified immunity issue. You have to think about that interlocutory appeal. And quite honestly, the possible cert petition to the Supreme Court. These are just pervasive issue in that area of law.

So we're still going to deal with a clearly established law issue and I want to talk a little bit about this, because it's interesting there's a case called *Hope v. Pelzer* and it was a case coming out of Alabama.[13] There was a prisoner, it was an 8th Amendment cruel and usual punishment case. And what happened was they would take a prisoner and they would chain him outside to a post —what they call the hitching post.[14] And the issue was whether that conduct was unconstitutional, even though there was no prior case law about it. What the Supreme Court said in *Hope v. Pelzer* is that sometimes conduct is so blatantly out outrageous that it is obviously unconstitutional.[15] Now, they said in 2002, and then we kind of walked away from that or walked it back.

But most recently in the last term, the court issued *Taylor v. Riojas*[16] which is a Fifth Circuit case. It's Fifth Circuit conditions of confinement a case for a prisoner, and the prisoner was kept in horrific conditions in his jail cell. It was unsanitary. There was no running water. There was sewage, feces, just coming up from his cell. He was sitting and standing in sewage for eight days.[17] And the Fifth Circuit granted qualified immunity and said there is no clearly established law saying that a prisoner couldn't be held in those conditions and probably the greatest, most amazing thing of all is that a conservative Supreme Court actually reversed the Fifth Circuit. Said that this was obviously unconstitutional. So this line of thought, of obvious unconstitutional misconduct, even that there was no prior case on point. It's alive and well. And actually the Eleventh Circuit addressed this recently in the Cantu case, which is a great case.[18] Cantu talks also about video evidence being construed in favor of the plaintiff.[19] So this is still a viable argument that can be made and should be made.

There's a second area that is becoming super interesting on the issue of clearly established law. Here's what it is. It's using a police agency on training materials and policy. And I know I'm sorry, I'm from the Ninth Circuit, I'm from California. Yes. We are so much more fortunate, I think in many respects, to civil rights lawyers who are litigating in the Fifth Circuit or the Eleventh Circuit, probably two of the hardest circuits. I mean, Eight Circuit is terrible as well. I get it. We are very fortunate. In the Ninth Circuit, the Ninth Circuit has allowed police training and police policies to be used as notice to the officer that his conduct is unconstitutional. So it's been used to satisfy that clearly established law prong. But there's kind of something interesting coming out of the Supreme

[13] *Hope v. Pelzer*, 536 U.S. 730 (2002).
[14] *Id* at 773.
[15] *Id*.
[16] *Taylor v. Riojas*, 141 S. Ct. 52 (2020)
[17] *Id* at 53.
[18] *Cantu v. City of Dothan*, 974 F.3d 1217 (11th Cir. 2020).
[19] *Id* at 1227-28, 1230 (11th Cir. 2020).

Court yet again in this last term. There was a case called *Lombardo*[20] and it was an Eight Circuit case, it came out of the Eighth Circuit. And it's an asphyxia case a restraint asphyxia. Yeah, that is what we basically call when these officers pile on top of the individual, that's how George Floyd died. His was a restraint asphyxia case. What the Supreme Court said in Lombardo, it is kind of this vague milquetoast opinion, but it's got some parts that work for us and we got it. We got to grab whatever good language we can get run with that.

What the Supreme Court said in *Lombardo* was in addressing the first prong of qualified immunity—not the clearly established prong—but the first prong which is, is the officer's conduct unconstitutional, the court, the High Court actually said you know what you can use of agencies training materials and policy to make that determination about whether under the totality of the circumstances, the officer's conduct was unconstitutional.[21] So that just came out this term.

Very recently in the *Valenzuela*[22] case out of the Ninth Circuit. This is a Dale Galipo case, Dale Galipo achieved an extraordinary result for his clients in this case. There was a published opinion dealing with the issue of loss of life. What is the value of the loss of a human life and can you recover for that, just the loss of life alone? Can you recover for that in the Ninth Circuit that, the answer's yes in Valenzuela in a published opinion. But there was a really interesting, unpublished opinion that dealt with qualified immunity and in the context of restraint asphyxia and the use of a chokehold. And the Ninth Circuit says you know what that violates clearly established law because police agency's own policies prohibited it. So the written material actually has more cases and more case law for you to cite if you need to look at that. But, like I said this is an interesting area of law and whether we can use that to develop a clearly established law precedent to help us overcome qualified immunity.

And then finally, listen the best offense is a good defense, right? So whenever possible, these other things that have no qualified immunity. In California, we have a variety of state laws that that provide relief to victims of government misconduct. We have something called the Bane Act[23] and Unruh Act.[24] The Bane Act is essentially a §1983, the state version of a §1983. The Unruh Act is our state version of the ADA. Other states have their own laws. Luckily, fortunately for us, the Bane Act does not have a qualified immunity component, so it's something that we can plea.

And you remember that I in about our case, *Correll Thomas v. Dillard* case, where Mr. Thomas lost entire case, his entire §1983 case on interlocutory appeal because of qualified immunity. We were still able to recover a $400,000 settlement for Mr. Thomas because we had a Bane Act claim and there's no qualified immunity on the Bane Act. And for that reason, Mr. Thomas was able to get some compensation and some relief for what he suffered. So whenever possible, you have to plead those alternate claims which have no qualified Immunity. ADA[25] and Rehab Acts[26] are so

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[20] Lombardo v. City of St. Louis, 141 S. Ct. 2239 (2021)
[21] *Id* at 2241-2242.
[22] *Valenzuela v. City of Anaheim* , No. 20-55372, 2021 U.S. App. LEXIS 22914 (9th Cir. 2021).
[23] The Tom Bane Civil Rights Act, California Civil Code § 52.1 (1988).
[24] The Unruh Civil Rights Act, California Civil Code § 51 (2005).
[25] Americans with Disabilities Act.
[26] Section 504 of the Rehabilitation Act of 1973.

powerful if they have a client even… diabetes, whatever it may be. Anything that can qualify as a disability, or if there is a perception that your client was disabled, plead those ADA and rehab act claims. I think this may vary from circuit to circuit, but in the Ninth Circuit, you can get damages for an ADA violation if you're able to show deliberate indifference.

Finally, *Monell* claims: they are really hard. There's a variety of them. I won't go through all four different types of *Monell* claims. Typically they are pattern and practice cases. Is there a pervasive pattern of unconstitutional conduct by the subordinates of the municipality? If you're able to show it? Thank God there is no qualified immunity. It's difficult, but I have colleagues who have been able to win on their *Monell* claims, even when they lost because of qualified immunity on their other claims.

And finally, if you need a pleading, if you need case law, please contact me. Also, I would encourage you if you're not already members of NPAP and you do a lot of police misconduct cases, I would encourage you to look into it a NPAP membership. What we do provide are a number of series. We have a §1983 series and then something called Actionable Conduct. We have professors who are on our board who produce weekly updates about the state of qualified immunity, the state of the law in each circuit, so that it gives you an understanding of what's happening -- how the law is involving, evolving, excuse me, so that you can deal with your interlocutory appeal and hopefully have a day in court for your client. Thank you all.