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DISTRICT IV

December 22, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2250-AC Jeremy Ryan v. Mike Huebsch (L.C. # 2011CV4913)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Several state officials appeal from an order striking their motion for summary judgment that was based on qualified immunity grounds. Pursuant to this court's order of October 7, 2014, the parties have submitted briefs and we advanced submission under WIS. STAT. RULE 809.20 (2011-12).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

We will not describe the full procedural history here. Most recently, after remittitur from the first appeal, the circuit court issued a scheduling order; the defendant state officials filed a motion for summary judgment on qualified immunity grounds; the plaintiffs moved to strike that motion; and the circuit court granted the motion to strike. We granted leave to appeal that nonfinal order.

The plaintiffs, as respondents in this appeal, argue that the state officials "waived" their qualified immunity by not arguing in support of that theory when they were respondents in the first appeal. Because the plaintiffs appear to be arguing that the officials lost that right by failing to timely assert it, rather than that the officials intentionally relinquished or abandoned that right, the correct term appears to be "forfeiture," not "waiver." *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Whether to apply forfeiture is a discretionary determination for this court. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

The plaintiffs may or may not be correct that the state officials' failure to make a significant argument for qualified immunity in the first appeal provides a legal basis for forfeiture. However, we decline to apply forfeiture in this case. It was not our intent in the first appeal to preclude the state officials from further litigation on qualified immunity, despite their failure to argue significantly in support of that doctrine at that time. Our goal was only to try to return the case to what we believed was a more legally accurate track.

We turn now to the circuit court's decision to strike the state officials' summary judgment motion. As part of its decision, the circuit court expressed the view that our opinion in the first appeal barred it from further addressing qualified immunity on summary judgment.

Although we already discussed that point in our order of October 7, 2014, we repeat it here for the sake of completeness: our opinion in the first appeal did not bar the circuit court from hearing a new or renewed motion for summary judgment on qualified immunity, but also did not require the court to do that. The opinion explained three analytical errors that the plaintiffs claimed on appeal had been made by the circuit court in dismissing their case, which were not disputed by the state officials, and which we agreed had occurred. In discussing these errors, we attempted to steer the parties and the circuit court towards what we regarded as a correct view of the claim before the court and of the law that applies to it. We did not express any opinion about what the next procedural steps should be, and we do not believe that the analysis we set forth compels or prevents any particular procedure.

As to the remainder of the circuit court's reasons for striking the officials' summary judgment motion, the officials argue that the circuit court committed a legal error by concluding that enforcement of its scheduling order can take a higher priority than deciding a summary judgment motion based on qualified immunity. The officials appear to argue that a court must decide such a motion whenever it might be filed, regardless of any scheduling order. However, the officials cite no direct authority, or evidence of meaningful support, for that proposition. Their argument relies only on general statements of law about the nature of qualified immunity.

In response, the plaintiffs cite federal case law holding that summary judgment motions based on qualified immunity may properly be rejected if they are not filed within the time set by a scheduling order. *See* ***Kennedy v. City of Cleveland***, 797 F.2d 297, 301 (6th Cir. 1986); ***McElroy v. City of Macon***, 68 F.3d 437, 438 (11th Cir. 1995). In reply, the officials assert that this case law is premised on the defendants being provided with a reasonable opportunity to file such a motion, and the officials assert that they did not have such an opportunity here. The

officials thus appear to retreat from their blanket position that qualified immunity motions must always be decided regardless when filed. Instead, the officials' response to ***Kennedy*** assumes that the specific facts of this case should be considered and weighed.

In light of the officials' failure to support their blanket rule, and their implicit concession that the question under ***Kennedy*** is whether the defendants had a reasonable opportunity to pursue qualified immunity, we will next address whether they had a reasonable opportunity in this case.

The officials argue that they were not provided with a sufficient opportunity because the scheduling order that the circuit court entered after remittitur did not provide such an opportunity, and because the court did not respond to their letter, sent shortly after the scheduling conference, asking the court to set a date for such a motion. For the reasons that follow, we are not persuaded.

We first clarify that there is no question about whether the officials had an opportunity to present their defense of qualified immunity *before the first appeal*. The scheduling order provided that opportunity, and the officials filed such a motion, which eventually led to the circuit court decision we reversed. Accordingly, the officials' current argument is directed only at whether they had a sufficient opportunity to pursue qualified immunity after remittitur of the first appeal.

As another initial point, we observe that it is not obvious to us that the officials were required to file a new summary judgment motion after remittitur to continue pursuing their qualified immunity defense. As we described in our opinion in the first appeal, the circuit court reconceptualized the case in certain ways, and then made its ruling based on the court's new

conceptions. In our opinion, we held that the court's reconceptualization was in error. However, we declined to decide what the correct summary judgment result should be on qualified immunity and other matters. Thus, it appears that no court has ever decided the officials' original summary judgment motion, *in the form that it was conceived and initially argued by the officials*. The officials' argument before the circuit court on the motion to strike shows that they agree with this assessment, and that this is why the officials eventually refiled essentially the same motion after remittitur. It may be reasonable to conclude that, after remittitur, the original motion remained open and pending before the circuit court.

That said, we do not believe it is necessary for us to decide whether a new summary judgment motion was required, or whether a simple letter or other request would have sufficed to revive the original motion. Regardless of the method, it seems beyond dispute that, after remittitur, the officials had an obligation to take *some* kind of action to press forward with their qualified immunity defense. They have not cited any law to the effect that the circuit court was required to "offer" such an opportunity, such as in a scheduling order, even if not requested by the party. Because it is not entirely clear what specific procedural device might have been appropriate, for purposes of simplicity we will use the more generic term "renewed qualified immunity defense" to refer to this concept.

The officials clearly had a post-remittitur opportunity to renew their qualified immunity defense at the scheduling conference. However, they did not do that. At the later hearing on the motion to strike, counsel for the officials stated that the court had been confused about the nature of the case at the scheduling conference. At the same time, counsel admitted: "[I]t did throw me back, and then after the phone call I started thinking about it and thought, no, I should have pressed on the qualified immunity issue because we are the defendants and it's a defense and it

was my fault for that." This passage makes it clear that the officials did not renew their qualified immunity defense at the scheduling conference, at least not with sufficient clarity. We acknowledge that the officials promptly attempted to remedy this failure, but as we will explain the attempt was inadequate.

The post-remittitur scheduling conference was held on June 25, 2014. Later that day, counsel for the state officials wrote a letter to the court, which the court received that day. It is apparent from the content of the letter that counsel believed no opportunity for a summary judgment motion was provided in the schedule that had been determined at that conference. The letter began: "I am writing to seek a date by which the defendants in this matter may bring a summary judgment motion on the defense of qualified immunity." After several paragraphs, it ended: "Accordingly, defendants respectfully request that they be given a date by which to file a summary judgment motion on qualified immunity."

In response, the plaintiffs sent the court their own letter, still on the same day as the scheduling conference itself, opposing the officials' request for a summary judgment date. The next day, June 26, 2014, the court issued a scheduling order that did not set a date for summary judgment motions. The circuit court acknowledged at the later hearing that it "didn't do anything" with the state officials' letter, and "just let it sit there, seeing what would happen." Following the exchange of letters, nothing happened and the officials took no action for weeks. Seven weeks later, on August 13, 2014, the state officials filed their summary judgment motion. The plaintiffs moved to strike that motion, and the court did so.

The officials' argument that they lacked a reasonable opportunity to renew their qualified immunity defense is based in part on the court's failure to respond to their post-scheduling

conference letter. The officials assert that the circuit court later conceded that they were under "the reasonable impression" that the court's lack of response to their June 25 letter meant they were allowed to file a summary judgment motion. The officials misunderstand the court's statement. The court stated only that it was "a reasonable inference" that the officials eventually decided to file their motion because the letter was not acted on. The court's inference was a comment on the officials' thinking not on whether their action was reasonable or proper.

We understand that the absence of a substantive response by the court to the letters may have left the officials with uncertainty about what would or should happen next. Nonetheless, we see only two interpretations that the officials could reasonably have had of the situation at that time, and under either interpretation the officials failed to act reasonably to pursue their qualified immunity defense before the approaching trial date.

One interpretation is that, when the circuit court issued the scheduling order, it had already read the parties' letters and decided against allowing summary judgment motions. If the situation is interpreted this way, and the officials wanted to press their desire to renew their qualified immunity defense, it was incumbent on them to promptly seek reconsideration or amendment of the scheduling order, or to seek review by this court. If, under this interpretation, the scheduling order is seen as the court order that denied the officials an opportunity to renew their qualified immunity defense, that was the order from which they should have sought leave to appeal, not the order striking their summary judgment motion several months later.[2] However, regardless whether the officials chose to direct further inquiry to the circuit court or to seek

[2] The time to petition for leave to appeal is fourteen days. WIS. STAT. RULE 809.50(1).

review by this court, with each passing week bringing them closer to the trial date, it was incumbent on the officials *to do something other than allow seven weeks to pass* and then simply file the motion.

A second interpretation of the scheduling order is that the court had not yet seen the parties' letters when it issued the scheduling order, but that after seeing them the court might, on its own, amend the scheduling order, set a further scheduling conference, or otherwise respond. Under this interpretation, the officials could reasonably wait a short period of time to see if further court action might occur. However, again, seven weeks was not a reasonable time for the officials to let pass without further action on their part, such as sending a letter to the court requesting clarification as to whether the court had considered the earlier letters, or filing a motion to amend the scheduling order.

Thus, under either interpretation of the scheduling order, it was incumbent on the officials to act in some manner long before seven weeks had passed. Notably, once the officials did choose to act weeks later, they did not seek clarification, reconsideration, or amendment of the scheduling order, or review by this court, but instead simply filed a summary judgment motion that was not contemplated by the scheduling order.

In summary, although the scheduling order did not provide the officials with an opportunity to renew their qualified immunity defense, the officials had a reasonable opportunity to change that situation, but they squandered it by waiting too long, which brought the case closer to the agreed upon trial date, and made resolution of any summary judgment motion more difficult within the remaining time.

Accordingly, we conclude that the circuit court properly exercised its discretion in striking the summary judgment motion, which also had the effect of denying the officials' implied request to amend the scheduling order. Although we have rejected some of the court's reasoning for striking the motion, there remains a correct concept at the core of its decision, namely, that the officials' attempt to renew their qualified immunity defense came too long after it should have, too close to trial, and in conflict with the unamended scheduling order. As we discussed above and contrary to the officials' argument, the circuit court retains the ability to make reasonable scheduling decisions, even when their effect is to prevent a decision on qualified immunity before trial, so long as the officials had a reasonable opportunity to pursue qualified immunity.

We emphasize that, in reaching this conclusion, we are necessarily looking backwards to the specific circumstances at a specific point in time, that is, to the point at which the court granted the motion to strike in September 2014. Our review of the circuit court's exercise of discretion is confined to that earlier point in time. We know that circumstances have changed since then. The original trial date has passed, and other developments may also have occurred. Our decision should not be read as a conclusion that the officials permanently forfeited their right to renew their qualified immunity defense before trial. That is, our decision should not be read as indicating any opinion about what could or should happen in the future, if the officials seek to renew their qualified immunity defense after remittitur of this appeal, and before trial.

IT IS ORDERED that the order of the circuit court is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals