

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34340

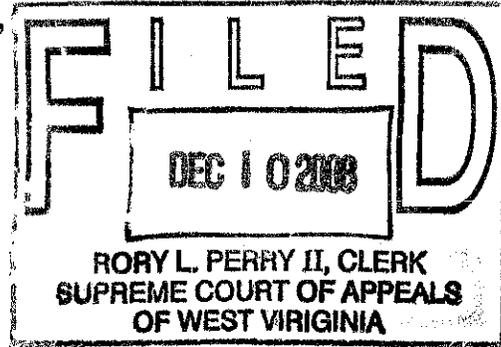
EUNA ROBINSON,

Plaintiff,

v.

JAMES PACK,

Defendant.



Kanawha County Civil Action No.: 03-C-847
Honorable Paul Zakaib

REPLY TO RESPONSE BRIEF OF EUNA ROBINSON
ON CERTIFIED QUESTIONS

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I. INTRODUCTION

Rather than briefing the issues presented in the certified questions, Plaintiff Euna Robinson [Robinson] attempts to argue the merits of Chief Deputy James Pack's defenses. As opposed to addressing whether or not a governmental official is entitled to an immediate appeal of a denial of a motion for summary judgment predicated upon qualified immunity, Robinson asserts that Chief Deputy Pack is not entitled to qualified immunity. Rather than examining whether or not subjective motivation is relevant to analyzing the reasonableness of an entry into a residence, Robinson ignores her state constitutional claims and maintains that such evidence is relevant to her *other, non-constitutional* claims. As to the third and final certified question, pertaining to the appropriate standard of liability for a supervising police officer, Robinson fails to argue on behalf of any specific standard, asserting that she can satisfy "virtually any standard the Court could impose."

The trial court certified critical questions of law to this Court for resolution. Chief Deputy Pack submits that Robinson should not be permitted to obscure those issues with arguments regarding the merits of her case.¹ Indeed, should this Court answer the initial question in the affirmative, and permit an immediate appeal of the denial of summary judgment, all parties would be afforded the opportunity to brief the merits of Chief Deputy Pack's defenses.

At this juncture, however, the issues are:

¹ Ample evidence of Robinson's attempt to avoid the actual issues before this Court are her repeated references to her alleged "psychiatric impairment" and her alleged inability to consent. *See, e.g.*, Response at 1. In her initial Complaint, Robinson alleged that she "was unable to give the requisite consent for sexual conduct." [Complaint at ¶ 7]. Subsequently, Robinson filed an "Amended Complaint" which *specifically removed* the allegation that she "was unable to give the requisite consent for sexual conduct." Rather, the Amended Complaint states that "beginning on or about March 9, 2001, and on at least nineteen (19) separate occasions ending on or about October 26, 2001, the individual Defendants. . . engaged in sexual acts with Plaintiff." [Amended Complaint at ¶ 4]. Discovery was not had on the issue of consent for that reason and Robinson, who initiated this litigation without benefit of a guardian or conservator, must be precluded from relying upon such a theory.

- a. Is a government official entitled to an immediate appeal of the denial of a motion for summary judgment that is based upon qualified immunity?
- b. Are the alleged subjective motivations of a police officer relevant to an analysis of the reasonableness of an entry into a residence, the detention of the occupant of the residence, and the alleged use of force upon the occupant?
- c. Is a supervising police officer civilly liable for the alleged wrongful conduct of his or her subordinate officers?

[Certification Order at 1]. The Honorable Paul Zakaib answered each question in the affirmative. Chief Deputy Pack asks that this Court answer the initial question, as to appealability, in the affirmative. The Defendant submits, however, that the question of law pertaining to the motivations of a law enforcement officer must be answered in the negative in order to maintain the well-settled objective test for the application of qualified immunity. Finally, Chief Deputy Pack asks that the supervisory liability question be reformulated to ask “Under what standard can a supervising police officer be found civilly liable for the alleged wrongful conduct of his subordinate officers?” The Defendant asks that the response to the reformulated question be no less than the deliberate indifference standard applied by the Fourth Circuit Court of Appeals.

II. DISCUSSION OF LAW

A. AT ISSUE IS THE APPEALABILITY OF A DENIAL OF SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY, NOT THE APPLICABILITY OF QUALIFIED IMMUNITY.

Citing no common law authority, Robinson purports to argue that “[a] governmental official is not entitled to an immediate appeal of the denial of a motion for summary judgment that is based upon qualified immunity.” [Response at 10]. What Robinson actually asserts is that Chief Deputy Pack has no “legal basis for which the Defendant is entitled to qualified

immunity.” *Id.* Respectfully, Robinson’s argument is appropriate for an appeal, should this Court determine one appropriate, not a certified question review.

Chief Deputy Pack in no way disputes this Court’s ability to review not only the questions presented, but also “the appropriateness of the order giving rise to the appeal.” *See, e.g.,* 2A Ill. Law and Prac. Appeal and Error § 428 (footnote omitted). However, the applicability of the doctrine of qualified immunity to Robinson’s claims has not been briefed herein. This Court has declined to address issues under similar circumstances. *See, e.g., Taylor v. Nationwide Mut. Ins. Co.*, 214 W.Va. 324, 589 S.E.2d 55, n. 17 (2003) (“we are not addressing and will leave for another day the issue . . . inasmuch as that issue was not included in the certified question and was not briefed or argued in this case.”). As this Court stated in *T. Weston, Inc. v. Mineral County*, 219 W.Va. 564, 638 S.E.2d 167, 172 (2006), “[w]e decline to address this issue. This District Court has certified a narrow question of state law to this Court . . . We were not asked to give meaning to any other statutes, nor do we have an adequate record or basis to address speculative and complex questions regarding issues collateral to the certified question.”

Indeed, other jurisdictions expressly hold that “[t]he questions certified define the scope of the decision by the answering court, since the court does not answer questions which are not asked.” 6 Okla. Prac., Appellate Procedure § 23:13 (2008 ed.) (citations omitted). As an Illinois Court succinctly stated, “[o]ur responsibility . . . ‘is to answer the certified question rather than to rule on the propriety of the parties’ claims.’” *State ex rel. Beeler Schad and Diamond, P.C. v. Ritz Camera Centers, Inc.*, 377 Ill.App.3d 990, 878 N.E.2d 1152, 316 Ill.Dec. 128, 134 (2007) (quoting *In re Estate of Williams*, 366 Ill. App.3d at 748, 304 Ill.Dec. 547, 853 N.E.2d at 82).

The question of law this Court agreed to answer asks “Is a government official entitled to an immediate appeal of the denial of a motion for summary judgment that is based upon qualified immunity.” [Certification Order at 1]. As commentators have noted, “[q]ualified immunity is more than an ordinary defense at trial; it comprises the right to avoid a trial of legal claims entirely. The final judgment rule, however, would disallow review of a trial court’s order denying a public official’s entitlement to qualified immunity because it is interlocutory in nature. As such, adherence to the final judgment rule would impinge on the right to avoid trial conferred by qualified immunity. The controversy of whether such defenses are immediately appealable thus stems from the clash of the doctrines of immunity and finality.” Charles H. Googe, Jr., “Qualified Immunity and Interlocutory Appeal: Is the Protection Lost When Legal and Equitable Claims Are Joined?”, 87 Colum. L. Rev. 161, 165 (1987) (footnotes omitted). The trial court answered the appealability question in the affirmative and Chief Deputy Pack respectfully asks this Court do the same in order to effectuate the purpose of the doctrine of qualified immunity.

B. SUBJECTIVE MOTIVATIONS ARE IRRELEVANT WITH REGARD TO CONSTITUTIONAL CLAIMS, INCLUDING THE STATE CONSTITUTIONAL CLAIMS PURSUED BY ROBINSON.

Throughout her Response brief, Robinson challenges Chief Deputy Pack’s references to decisions of this Court, and the federal courts, developed in § 1983 litigation. *See, e.g.*, Response at 2 (“[t]he issues presented in the *Brief of James Pack on Certified Questions* are only relevant in a § 1983 cause of action.”); *Id.* at 3 (“[t]he issues presented in the *Brief of James Pack on Certified Questions* would be more appropriately resolved by this Honorable Court when addressing a § 1983 action, which is not at issue in this case.”); *Id.* at 9 (“cannot be succinctly summarized and dismissed under the guise of a § 1983 action. The *Amended Complaint* does not include a federal § 1983 cause of action.”); *Id.* at 11 (“This is not a § 1983 action. . . .”); *Id.* at 13

(“This is not a § 1983 action. . . .”); *Id.* (“[a]ll of the cases cited by opposing counsel are federal § 1983 actions. . . .”); *Id.* at 15 (“This case should not be summarily dismissed under the guise of a § 1983 action. The *Amended Complaint* does not include a federal § 1983 cause of action.”); *Id.* at 17 (“would be more appropriately resolved by this honorable Court when addressing a § 1983 action, not this case.”); *Id.* (“This case should not be summarily dismissed under the guise of a § 1983 action.”).

Perhaps the only thing as prevalent as Robinson’s attempt to distance herself from federal civil rights suits are her references to her *state civil rights* claims. *See, e.g.*, Response at 2 (The *Amended Complaint* in this case alleges various West Virginia constitutional and state tort claims. . . .”); *Id.* at 8 (“an *Amended Complaint* was filed . . . alleging various West Virginia constitutional . . . claims . . . and violation of the Constitution of West Virginia Article III, §§ 1, 4, 5, 6, 10 and 14. . . .”); *Id.* at 9 (“The *Amended Complaint* alleges various West Virginia state tort and state constitutional violations.”); *Id.* at 13 (“The *Amended Complaint* in the present case alleges various West Virginia constitutional and state tort claims. . . .”); *Id.* at 15 (“The *Amended Complaint* alleges various West Virginia state tort and constitutional violations.”); *Id.* at 17 (“and violation of the Constitution of West Virginia Article III, §§ 1, 4, 5, 6, 10 and 14. . . .”).

Indeed, the most telling reference in Robinson’s brief states “The issues presented in the *Brief of James Pack on Certified Questions* would be more appropriately resolved by this honorable Court when addressing a § 1983 action, not this case. The *Amended Complaint* in this case alleges various West Virginia constitutional . . . claims” [Response at 17]. Clearly, Robinson fails to recognize this Court’s routine reliance upon federal civil rights law when ruling upon state constitutional issues. For example, in *State v. Jones*, 193 W.Va. 378, 456 S.E.2d 459, n. 6 (1995), this Court stated:

This Court has traditionally interpreted this section in harmony with federal case law construing the Fourth Amendment to the United States Constitution. *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973).

Likewise, in *Shelby J.S. v. George L.H.*, 181 W.Va. 154, 381 S.E.2d 269 (1989), this Court examined a constitutional equal protection claim. The *Shelby* Court stated, “ ‘[i]n considering our own equal protection principles under Article VI, Section 39 of the West Virginia Constitution, we have obtained guidance from federal cases interpreting the equal protection mandate of the Fourteenth Amendment to the United States Constitution which is applicable to state actions.’” *Id.* at 272 (citations omitted).

Although almost unrecognizable from Robinson’s brief, the issue herein is whether or not “the alleged subjective motivations of a police officer” are “relevant to an analysis of the reasonableness of an entry into a residence, the detention of the occupant of the residence, and the alleged use of force upon the occupant”. [Certification Order at 1]. The trial court asked this question as to Robinson’s *state constitutional claims*; the co-existence of state *common law tort* claims does not make the constitutional analysis any less necessary.² As with other Fourth Amendment state constitutional issues, Chief Deputy Pack asks this Court to adopt federal constitutional analysis which holds that “[a]n assertion of qualified immunity may not be defeated by evidence that the defendant’s allegedly wrongful conduct was malicious or otherwise improperly motivated; evidence concerning the defendant’s intent, although it may be necessary to the establishment of the plaintiff’s affirmative case, is irrelevant to the issue of qualified

² Regardless, qualified immunity was designed as a “standard for a public official . . . to encompass *all types of public official liability, not just the range of cases covered by Section 1983 suits.*” *Clark v. Dunn*, 195 W.Va 272, 465 S.E.2d 374, 379 (1995) (quoting *Chase Securities*, 424 S.E.2d at 599) (emphasis added). Plaintiff’s position is, therefore, not well-taken.

immunity.” 15 Am.Jur.2d *Civil Rights* § 122 (citing *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), on remand to, 1998 WL 633836 (D.C. Cir. 1998)).

This Court has instructed that West Virginia law requires the same *objective* test be applied to determine the existence of qualified immunity. Like the federal courts, this Court should not permit a *subjective* examination of motive and intent to defeat that objective test. Accordingly, Chief Deputy Pack asks that this Court answer the second question of law in the negative.

C. IN ORDER TO ESTABLISH THAT A SUPERVISING POLICE OFFICER IS LIABLE FOR THE ALLEGEDLY WRONGFUL CONDUCT OF HIS OR HER SUBORDINATE OFFICERS THE CLAIMANT MUST ESTABLISH THE SUPERVISING OFFICER’S “DELIBERATE INDIFFERENCE.”

The final question for which the trial court sought this Court’s guidance asks “Is a supervising police officer civilly liable for the alleged wrongful conduct of his or her subordinate officers?” [Certification Order at 1]. Chief Deputy Pack has asked this Court to reformulate that question because an affirmative answer, such as that provided by Judge Zakaib, does not resolve the issues before the trial court. Understanding that supervisory liability may be a viable theory in some contexts, albeit under stringent standards of proof, Chief Deputy Pack asks that the supervisory liability question be reformulated to ask “Under what standard can a supervising police officer be found civilly liable for the alleged wrongful conduct of his subordinate officers?”

Robinson’s response on this issue is perplexing, at best. Robinson concludes that her factual allegations “if proven . . . would meet virtually any standard the Court could impose.” [Response at 17]. Chief Deputy Pack respectfully submits that the standard this Court should impose should be no less than the deliberate indifference standard applied by the Fourth Circuit Court of Appeals. A contrary decision would render law enforcement subject to one standard in

federal court, and an entirely different standard across the street in circuit court, for the same alleged acts or omissions.

Thus, Chief Deputy Pack, again, urges this Court to take guidance from the federal courts, as it has in the past, and adopt the standard established by the Fourth Circuit Court of Appeals. The Fourth Circuit addressed the issue in *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994). At issue in *Shaw* was the potential liability of a state trooper's supervisors. The Court recognized that supervisory liability "ultimately is determined 'by pinpointing the persons in the decisionmaking chain whose *deliberate indifference* permitted the constitutional abuses to continue unchecked.'" *Id.* at 798 (citing *Slakan*, 737 F.2d at 376) (additional citations omitted) (emphasis added).

Robinson seems confident that she can demonstrate liability under any standard of proof. Respectfully, Chief Deputy Pack submits that, if he should be subject to any liability for the actions of the other officers at the Plaintiff's home, given that he did not seize or detain Robinson, that standard should not be any less stringent than that imposed by the federal courts, deliberate indifference.³ Accordingly, the Defendant respectfully requests that the certified question be reformulated and the response to the reformulated question is no less than the deliberate indifference standard applied by the Fourth Circuit Court of Appeals.

III. CONCLUSION

Robinson wants to pursue constitutional claims, yet not have constitutional standards applied. Robinson wants this Court to find qualified immunity is not immediately appealable, while at the same time ruling that the doctrine is inapplicable herein. Robinson wants this Court

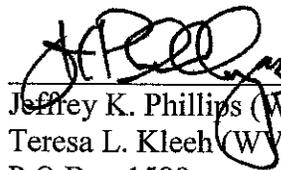
³ Chief Deputy Pack believes the evidence before the trial court in no way establishes a *prima facie* case of deliberate indifference.

to disregard the federal standard for supervisory liability, yet offers no alternative standard and argues that she can sustain any standard adopted.

Chief Deputy Pack respectfully submits that the initial certified question should be answered in the affirmative, allowing immediate appeal, at which time Robinson can more appropriately challenge the Defendant's reliance upon the doctrine of qualified immunity. The Defendant further submits that the second question must be answered in the negative because Robinson's state constitutional claims should be analyzed under constitutional standards, not state tort standards. Finally, Chief Deputy Pack asks that this Court adopt a deliberate indifference standard for supervisory liability in the law enforcement context.

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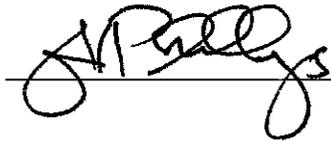
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CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of December, 2008, I caused service of the foregoing **REPLY TO RESPONSE BRIEF OF EUNA ROBINSON ON CERTIFIED QUESTIONS** to be made upon counsel of record by depositing true and accurate copies of the same in the regular course of the United States mail, postage prepaid, in envelopes addressed as follows:

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A handwritten signature in black ink, appearing to read 'Mark Hobbs', is written over a horizontal line.

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