
RECORD NO. 18-1524
(3:17-cv-01426-MBS-SVH)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TWANDA MARSHINDA BROWN; SASHA MONIQUE DARBY; CAYESHIA CASHEL JOHNSON; AMY MARIE PALACIOS; NORA ANN CORDER; and XAVIER LARRY GOODWIN and RAYMOND WRIGHT, JR., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

GARY REINHART, in his individual capacity; REBECCA ADAMS, in her official and individual capacities as the Chief Judge for Administrative Purposes of the Summary Courts in Lexington County and in her official capacity as the Judge of the Irmo Magistrate Court; BRYAN KOON, in his official capacity as the Lexington County Sheriff,

Defendants-Appellants,

and

LEXINGTON COUNTY, SOUTH CAROLINA; ROBERT MADSEN, in his official capacity as the Circuit Public Defender for the Eleventh Judicial Circuit of South Carolina; ALBERT JOHN DOOLEY, III, in his official capacity as the Associate Chief Judge for Administrative Purposes of the Summary Courts in Lexington County,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

REPLY BRIEF OF APPELLANTS

William H. Davidson, II
Kenneth P. Woodington
DAVIDSON, WREN & PLYLER, P.A.
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellants

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STATEMENT

Plaintiffs-Appellees have written a 56-page brief in defense of the very brief conclusion in the order below that declined to hold Defendants-Appellants absolutely immune from Plaintiffs' damage claims. Plaintiffs rely heavily, and indeed almost exclusively, on only one case, *Al Shimari v. CACI Intern, Inc.*, 679 F.3d 205 (4th Cir. 2012), the only case cited by the district court in support of its terse conclusion. Plaintiffs cite *Al Shimari* at least 18 times. But no matter how many times they cite *Al Shimari*, it is fundamentally different from this case, because it involved the fact-intensive issue of whether private government contractors are immune from suit when (a) exercising discretion and (b) acting within the scope of their employment. Here, on the other hand, the primary if not only question is whether incarcerations ordered by judges in criminal cases were judicial acts, a question that answers itself. This plain difference between *Al Shimari* and the present case provides a complete response to practically all of Plaintiffs'' arguments, both as to appealability and as to the merits.

Plaintiffs also overlook both the rules and the record in (a) erroneously arguing that a Rule 12(b)(6) argument must be made by a motion to dismiss, when the rules clearly provide otherwise, and (b) in contending that Defendants did not raise the *Iqbal* and *Twombly* arguments below, when in fact Defendants did do so,

citing and quoting the same six cases in both the district court and in the Brief of Appellants.

Finally, while the issue is not relevant to the present appeal, Plaintiffs overstate and misstate the nature of this case. They claim to be "victims of a modern-day debtors' prison," Br. of Appellees at 2, when in fact that Dickensian description does not apply in the criminal context. The Supreme Court held long ago that statutes prohibiting imprisonment for debt

> were not intended to take away the right to enforce criminal statutes. . . . It was not the purpose of this class of legislation to interfere with the enforcement of . . . penal statutes . . .[;] such laws are rather intended to prevent the commitment of debtors to prison for liabilities arising upon their contracts.

Freeman v. United States, 217 U.S. 539, 544 (1910).

ARGUMENT

1. An immediate appeal of the denial of absolute immunity is appropriate in this case when there is no factual dispute that Plaintiffs were incarcerated solely as a result of judicial decisions.

There can be no doubt that Plaintiffs were incarcerated as a result of the individual sentencing decisions and enforcement decisions of county magistrates. Plaintiffs continue to speculate that there were "unwritten policies" that lay behind their incarcerations. But even if such policies existed, which Defendants again deny, the judicial action of an incarceration order in each criminal case was still required to effectuate the alleged policies. An unwritten general policy, even if it had existed, cannot effect an incarceration. It takes a judicial decision to do that.

As the Magistrate Judge correctly and succinctly held, the challenged actions of the magistrates were decisions "that affect[ed] the adjudication of a criminal proceeding," and that could "only be made by a judge." J.A. 548. As such, they involved judicial actions that were protected by judicial immunity. There is no factual issue with regard to this, because Plaintiffs cannot prove any set of facts that would overcome the fact that their incarcerations were the direct result of judicial actions taken by judicial officers. The district court was in error in its conclusory holding that factual issues existed as to whether the actions were administrative or judicial.

Plaintiffs point to language in *Al-Shimari* holding that "A question in dispute cannot be said to have been conclusively resolved if a district court "ma[kes] clear that its decision [is] a tentative one, ... and that it might well change its mind" after further proceedings." 679 F.3d at 220, quoting *Jamison v. Wiley*, 14 F.3d 222, 230 (4th Cir.1994). Br. of Appellees at 29.[1] However, Plaintiffs' attempt to apply that language to this case is precluded by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), a case that like the present one involved an appeal from a denial of a motion for summary judgment that was based on immunity. *Mitchell* holds that

[1] In *Jamison*, the district court had ordered an evidentiary hearing be held to determine whether the putative individual defendant had been acting within the scope of his employment. In that regard, it was similar to *Al-Shimari*, which involved the need for a factual determination as to whether a governmental contractor was acting within the scope of its contract with the federal government. 679 F.3d at 220.

> the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred," it is apparent that "*Cohen [v. Beneficial Industrial Loan Corp.]*'s threshold requirement of a fully consummated decision is satisfied" in such a case.

472 U.S. at 527, quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)(emphasis in original). The claims of judicial immunity and quasi-judicial immunity presented in this case likewise involve claims of right "not to stand trial." As a result, they fall directly within the rule permitting immediate appeals of denials of such immunity claims.[2]

Plaintiffs argue that they are not challenging the judicial acts of the magistrates in sentencing them to jail time. Br. of Appellees at 36-37. That simply means that they have failed to challenge the judicial actions that caused their incarceration, and rightly so, since those judicial actions are covered by judicial immunity. By way of proving that assertion, they point out that some of the Plaintiffs were not sentenced by judges who are parties to this action. Br. of Appellees at 37 n.17. However, this choice of defendants is simply a manifestation of Plaintiffs' erroneous argument that their incarcerations were caused by policies, rather than by judicial decisions.

[2] There likewise can be no factual dispute that the only actions of the sheriff's office that affected Plaintiffs involved the enforcement of facially validly warrants.

2. The judicial decisions committing the Plaintiffs to incarceration were not administrative actions.

Try as they may, Plaintiffs cannot turn the commitment orders of the judges into administrative policies. First, as already discussed above and in Defendants' opening brief, Plaintiffs' incarcerations resulted from judicial orders. Even if unwritten policies existed, which Defendants deny, the jail sentences were imposed by judicial orders in each individual case, and not by the alleged policies. Plaintiffs have not cited any case that involved anything like the facts of the present case. In fact, the section of the Brief of Appellees (pp. 35-44) that involves judicial immunity, the main issue in this case, is largely devoid of citation of authority other than to state broad and general principles. Plaintiffs do cite *Morrison v. Lipscomb*, 877 F.2d 463 (6th Cir. 1989), a case involving an order placing a general moratorium on the adjudication of eviction cases during the holiday season, but the court noted that that order "did not alter the rights and liabilities of any parties." 877 F.2d at 466. In the present case, again, the Plaintiffs were jailed only as a result of specific orders that "alter[ed] the rights and liabilities of . . . parties."

Secondly, a review of the order appointing chief administrative judges for the magistrates' courts, Appendix 1 to Brief of Appellants, makes it clear that that order did not vest chief magistrate judges for administrative purposes with the power to make policies that would change the outcome of cases where

incarceration is possible. The scenario which Plaintiffs hypothesize is therefore a legal impossibility even if unwritten policies could impose jail sentences, which of course they cannot.

3. The actions of the sheriff's office in enforcing facially valid warrants were not administrative actions.

With regard to Sheriff Koon, Plaintiffs offer an argument similar to those they make for magistrates. They claim that absolute immunity does not attach to the sheriff's execution of facially valid warrants because he allegedly created standard operating policies for the execution of the warrants. Br. of Appellants at 43-44. However, in the end, the complained-of actions of the sheriff's office which actually affected the Plaintiffs were nothing more than the execution of facially valid bench warrants. Even assuming that that execution was systemized through "unwritten policies," a matter as to which Plaintiffs offer only unvarnished speculation, the ultimate action in each case, i.e., the execution of the warrants, was protected by quasi-judicial immunity. As Defendants have pointed out previously, the sheriff had no legal discretion not to execute the warrants, which Plaintiffs do not contend to have been facially invalid. Plaintiffs do not cite or

discuss any of the cases cited by the Magistrate Judge, J.A. 550-551, on this issue.[3] Nor do they cite or discuss the cases citied by Defendants on this issue.[4]

Finally, and as the Magistrate Judge held,

> Plaintiffs have not alleged Koon or his deputies committed any constitutional violation independently of their actions in executing court-ordered bench warrants. Plaintiffs have also failed to identify how any of Koon's alleged administrative actions deprived them of their constitutional rights.

J.A. 551. The Brief of Appellees, pp. 42-44, makes little or no attempt to cure this identified defect.

4. Plaintiffs have failed to show that legislative immunity would not protect the magistrates or sheriff from damage actions.

Plaintiffs have alleged (with no factual support at all, as discussed elsewhere) that the chief magistrates have "established county-wide unwritten standard operating procedures. . . ." Brief of Appellees at 31. They also claim that the chief magistrates "could have" established a number of policies, but have not done so. *See, e.g.,* Br. of Appellees at 37-38. Plaintiffs deny that the claimed establishment or nonestablishment of policies was a judicial act. *Id.* at 36. They

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[3] *Valdez v. City and County of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989) (finding sheriff and deputies absolutely immune for enforcing facially valid court order); *Fowler v. Alexander*, 478 F.2d 694, 696 (4th Cir. 1973) ((finding jailer immune for confining plaintiff pursuant to order of court).

[4] *Reaves v. Rhodes*, 2011 WL 826358, at *5 (D.S.C. 2011), report and recommendation adopted, 2011 WL 812413 (D.S.C. 2011)(sheriff is absolutely immune for arresting a plaintiff pursuant to a facially valid court order, and for enforcing facially valid court orders), quoting *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir.1994).

also deny that the establishment of policies, or failure to establish them, was legislative in nature. *Id.* at 45. Defendants, on the other hand, have cited a number of cases detailing why, if the policies had indeed existed, or had failed to be enacted, the Defendants' actions or inactions in that regard would be covered by legislative immunity even if no other immunity existed. Br. of Appellants at 18-21. (Defendants reiterate that this case is controlled by the presence of judicial immunity, and that it is almost surely unnecessary even to reach the issue of legislative immunity.)

The principal argument made by Plaintiffs regarding legislative immunity is that the hypothetical policymaking by the magistrates and sheriff could not have been covered by legislative immunity because the Defendants are "non-legislators." Br. of Appellees at 47. This argument overlooks the well-established principle that absolute immunities from suit, including legislative immunity, apply to the function performed, not to the office held by the persons performing the function. *See, e.g., Forrester v. White,* 484 U.S. 219, 223–24, (1988)(court takes a "functional" approach to immunity, examining the nature of the functions with which a particular official or class of officials has been lawfully entrusted); *Supreme Court of Virginia v. Consumers Union of U. S., Inc*., 446 U.S. 719, 731, (1980)("purpose of legislative immunity is "to insure that the legislative function may be performed independently without fear of outside interference")(emphasis added).

This Court has discussed the distinction between legislative and administrative functions when the same official or official body is capable of acting in either sphere. In *Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995), it was held that

> If the underlying facts "relate to particular individuals or situations" and the decision impacts specific individuals or "singles out specifiable individuals," the decision is administrative. *Acevedo–Cordero* [*v. Cordero–Santiago*, 958 F.2d 20], 23 [1st Cir. 1992]. On the other hand, the action is legislative if the facts involve "generalizations concerning a policy or state of affairs" and the "establishment of a general policy" affecting the larger population. *Id.*

66 F.3d at 66. Plaintiffs cannot argue that the hypothetical policies "single out specific individuals." Indeed, Plaintiffs' whole point is that the magistrates and sheriff acted via "county-wide" policies, however hypothetical those policies may be. *See, e.g.,* Br. of Appellees at 35. Because Plaintiffs posit that the magistrates and sheriff acted through generalized policies, they cannot escape the principle that the making of prospective rules of general application is a function that enjoys absolute immunity from suit. Such immunity is necessary because "exposure to liability for monetary damages would unduly inhibit executive officials when carrying out the quasi-legislative act of rulemaking." *Redwood Vill. P'ship v. Graham*, 26 F.3d 839, 842 (8th Cir. 1994). And as *Redwood* and many other cases make clear, "[t]he critical inquiry is the nature of the official's function in a particular proceeding, not the identity of the actor who performed the function. 26

F.3d at 841. The chief magistrates are obviously not members of a legislative body so designated, and neither is the sheriff, but under Plaintiffs' supposed "policymaking" hypothesis, they would have been performing legislative functions and therefore would be immune as a result.

Finally, Defendants have previously pointed out that the absence of formal processes does not defeat a claim of legislative immunity, because it is the enactment of general, forward-looking policies, and not the nature of the processes of their enactment, that is controlling. Plaintiffs offer no effective argument to the contrary, other to reiterate their irrelevant argument that "Defendants are not legislators. . . ." Br. of Appellees at 48.

5. As Defendants contended in the district court, Plaintiffs' assertions of the existence of "unwritten policies" are so speculative that they cannot open the doors of discovery.

Plaintiffs have claimed that they need to conduct more discovery in order to collect more information about the "unwritten policies" whose existence they hypothesize. When this assertion was made in opposition to Defendants' Motion for Summary Judgment on Damages, *see* J.A. 389-393. Defendants contended in reply that Plaintiffs' Second Amended Complaint consisted only of speculation on the issue of whether the hypothetical policies actually exist, and noted the holding of *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) that "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 556 U.S. at 678-79. J.A. 530. Defendants' argument on the point in the district

court is found at J.A. 529-531. Defendants' argument on appeal, Br. of Appellants at 13-15, is virtually identical to that presented to the district court at J.A. 529-531, citing and quoting the same cases in both instances. Defendants are at a loss to see how Plaintiffs can assert that this point was argued "for the first time on appeal." Br. of Appellees at 52. Plaintiffs' counsel apparently failed to notice that the same argument, in largely the same words, was indeed made before the district court.[5]

Equally invalid and unsupported is Plaintiffs' attempt to assert that a Rule 12(b)(6) contention must be made via a motion to dismiss under that rule. Br. of Appellees at 52. However, Rule 12(h)(2) provides that the defense of failure to state a claim upon which relief can be granted can be made as late as during the trial of the case. It is therefore unsurprisingly held that "the rules allow a defendant to assert an affirmative defense that may have been suitable for Rule 12(b)(6) disposition at the summary judgment stage." *C&C Inv. Properties, L.L.C. v. Trustmark Nat'l Bank*, 838 F.3d 655, 660 (5th Cir. 2016).[6]

With regard to the merits of Plaintiffs' claims of the existence of "unwritten policies," their brief before this Court repeats the same speculations set forth in the Second Amended Complaint, which only makes the unfounded, unsupported assertion that if the cases of a number of criminal defendants were handled in the

[5] It goes without saying that if a complaint is too speculative to warrant the beginning of discovery, it fails to state a claim and the claim should be dismissed, including dismissal on summary judgment.

[6] The defense was raised in the Answers of these Defendants. J.A. 292, 324.

same way, then there must have been a policy somewhere that mandated such a result. *See, e.g.*, Br. of Appellees at 55. This allegation does not gain plausibility simply by dint of being repeated over and over again. Plaintiffs contend that their Second Amended Complaint contains "highly detailed allegations" Br. of Appellees at 51, rather than "unsupported assumptions." *Id.* at 50. But the mere repetition of supposed details cannot make up for the lack of the logical connection necessary to take the Second Amended Complaint beyond mere speculation. As this Court has repeatedly held, "the nonmoving party [in a summary judgment situation]must rely on more than conclusory allegations, mere speculation [or] the building of one inference upon another. . . ." *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013). Plaintiffs have done nothing more than this, and their speculations are insufficient even to "unlock the doors of discovery." *Iqbal*, *supra*, 556 U.S. at 678.

CONCLUSION

For the foregoing reasons, the Defendants-Appellants respectfully reiterate that this Court should reverse the order of the district court declining to dismiss the damage claims against them.

Respectfully submitted,

BY: *s/ Kenneth P. Woodington*

William H. Davidson, II
Kenneth P. Woodington
DAVIDSON, WREN & PLYLER, P.A.
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellants

August 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2018, I electronically filed the foregoing **REPLY BRIEF OF APPELLANTS** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Ms. Nusrat Jahan Choudhury, Esq.
Ms. Susan King Dunn, Esq.
Toby James Marshall, Esq.
Eric Riley Nusser
Carl Gavin Snodgrass, Esq.

DAVIDSON, WREN & PLYLER, P.A.

BY: s/ Kenneth P. Woodington
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
DAVIDSON, WREN & PLYLER, P.A.
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222; F: 803-806-8555

ATTORNEYS FOR APPELLANTS

Columbia, South Carolina

August 21, 2018

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rules of Civil Procedure 32(a)(7)(B) and Circuit Rule 32(b). The brief is proportionately spaced in Times New Roman 14-point type. According to the words processing systems used to prepare the brief, Microsoft Word, the word count of the brief is 2,978, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

Dated this 21st day of August, 2018.

s/ Kenneth P. Woodington