Holland & Hart

In a Pointed Decision, the Tenth Circuit Addresses Waiver in the Context of Qualified Immunity



Christopher Jackson

Partner
303.295.8305
Denver
cmjackson@hollandhart.com



Jessica Smith

Partner
303.295.8374
Denver
jjsmith@hollandhart.com

Insight — July 26, 2024

Law.com

In Sanchez v. Guzman, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's decision to grant qualified immunity in a Section 1983 excessive-force claim. In doing so, the court emphasized that litigants can waive a winning argument if they fail to properly prosecute their appeal.

In *Sanchez v. Guzman*, No. 22-1322, 2024 U.S. App. LEXIS 15756 (10th Cir. June 28, 2024), the Tenth Circuit took up the appeal of a district court order granting qualified immunity to several defendant police officers for an excessive-force claim under Section 1983. The appellate court affirmed the decision below, holding that the plaintiffs had "effectively waived" many of their arguments by failing to "defined the operative factual universe" used to determine whether the relevant law was clearly established. The *Sanchez* decision offers insights into the structure of a qualified immunity appeal, and also underscores the point that appellants must be mindful of the way they present their appeal.

Case Background and Procedural History

The appeal involved an excessive-force lawsuit brought under 42 U.S.C. Section 1983 against several Littleton and Englewood police officers. The underlying facts were disputed by the parties. Plaintiffs claimed that the defendants fired 66 bullets into their motionless car while they posed no threat, and in doing so killed one plaintiff and severely injured the other two. The defendants, in contrast, contended that the plaintiffs fled the scene of an armed carjacking in a stolen vehicle, led the police on a high-speed chase, and repeatedly used their vehicle as a weapon against the officers.

The plaintiffs filed suit, and after discovery, the defendants moved for summary judgment, arguing that they were entitled to qualified immunity. The motion was referred to the magistrate judge. The magistrate reviewed the record and laid out its factual findings; it then recommended that the district court grant the plaintiffs' motion. The district court agreed. In doing so, the court summarized the magistrate's factual findings: While on duty, the defendant-officers received a report that a Chevy Malibu had been carjacked by four people. According to the report, one of the suspects was armed and had fired at least one short. The officers observed a Malibu,

with the three plaintiffs inside, driving on the road. The Malibu was moving very fast—at least 75 miles per hour—and was running red lights and weaving between lanes. The police attempted to stop the car several times by performing a pursuit intervention technique or "PIT" maneuver. And while the Tenth Circuit's opinion doesn't provide much detail, at some point in the course of the chase, the defendants shot the plaintiffs, one fatally. After summarizing these facts, the district court concluded that the plaintiffs "could not carry their burden of establishing that the defendants violated clearly established constitutional law."

The Qualified Immunity Appeal

Qualified immunity "shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," (quoting *Estate of Smart ex rel. Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020)). When a defendant raises a qualified immunity defense, it creates a presumption that the defendant is immune from the lawsuit. To overcome this presumption, a plaintiff bears the burden of proving a constitutional right that was clearly established at the time of the violation. This case is about the second prong of qualified immunity—whether the right was clearly established at the time of the alleged violation.

As the Tenth Circuit recounted, federal courts have long grappled over how closely an earlier published decision must fit to the case at bar to demonstrate that the right at issue was clearly established for purposes of qualified immunity. In that vein, the court noted that in the last few years, the Supreme Court has issued a number of opinions reversing a lower court on the basis that "'clearly established law' should not be defined 'at a high level of generality." Id. at *12 (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017)). Requiring a higher degree of specificity "is 'especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant doctrine, here excessive force, will apply to the factual situation the officers confronts,'" (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). Notably, the Tenth Circuit acknowledged—as it has several times before in earlier opinions—that its precedent adopting a "sliding scale" approach to clearly established law has been called into question by subsequent case law. But the court declined to decide whether that precedent had in fact been overruled.

In their appeal, the plaintiffs raised two primary arguments. First, they asserted that the district court erred in putting the burden on them to overcome qualified immunity. The Tenth Circuit disposed of that assertion quickly, noting that the Federal Reporter is "legion" with published Tenth Circuit decisions holding that the plaintiff does in fact have the burden on qualified immunity. And while there may be a circuit split on the issue, the plaintiffs' argument about controlling law in this circuit "borders on the frivolous."

The plaintiffs' second argument was that the district court erred in concluding that the plaintiffs failed to establish the clearly established prong of qualified immunity. On this issue, the plaintiffs focused on

attacking the district court's factual findings and arguing that, based on the plaintiff's version of events, the law was in fact clearly established. But the Tenth Circuit never reached the merits. Instead, the court held that the "plaintiffs have effectively waived our review of this argument by failing to define a factual universe that is supported by record evidence upon which we can perform the requisite legal analysis." "We cannot opine on whether the district court committed reversible error … without a universe of record-based facts against which to conduct a particularized assessment … ." The issue is that the first step of the inquiry in a qualified immunity appeal is for the court to set out the operative facts, construed in the light most favorable to the plaintiff as long as there is record support. If the appellate court doesn't have that narrative or "factual universe," it cannot conduct the particularized inquiry the Supreme Court requires into whether the constitutional right was clearly established. Put another way, "it is plaintiffs' version of the facts—insofar as it is supported by the summary-judgment record—that must frame the legal analysis, including the clearly established law inquiry." But if the plaintiff never supports its version of events with record citations, the appeal cannot get off the ground. And that is true even in cases like this one, where the district court denied a motion to dismiss after concluding—based on those allegations, rather than anything in the record—that the claims could proceed.

It is also worth noting that while the Tenth Circuit ultimately affirmed the decision below, it had serious "concerns about the [district] court's treatment of the facts in this case." The district court noted that it was "skeptical" about "whether the magistrate judge's extensive statement of facts was, in actuality, fully undisputed and favorable to the plaintiffs' record-based version of events—which the plaintiffs vigorously claimed it was not." Despite this skepticism, the district court nevertheless fully adopted the magistrate judge's statement of facts. This approach, the Tenth Circuit noted, "is problematic under controlling law." The district court was required to fully resolve any disputes of fact, and to do so in the light most favorable to the plaintiff. Id. In this case, the district court apparently did not do so. Though the Tenth Circuit certainly never said so, its observations about the district court order suggest that the plaintiffs' argument on clearly established law might have been a winner. That is, if the Plaintiff had adequately cited to the record to support their version of the facts, they might have been able to convince the court to reverse the judgment below. Nevertheless, "these concerns do not control the outcome" of the appeal because of the plaintiffs' "effective waiver" of their argument.

Takeaways

It might be easy to think of the Tenth Circuit's opinion as little more than an admonition that appellants must provide record support for their factual assertions. See, e.g., ("Plaintiffs did not even include a 'statement of facts' section in their opening brief."). And certainly appellants would do well to heed that advice. But the Tenth Circuit's holding extends beyond that narrow scope. *Sanchez* opens the door for appellees to argue, in any appeal, that because the appellant didn't sufficiently "define the operative universe of facts," all arguments on appeal are waived or forfeited. Moreover, the *Sanchez* opinion didn't expressly situate this rule under its

traditional waiver/forfeiture doctrine. In fact, it appeared to intentionally avoid doing so, repeatedly referencing the plaintiffs' “effective” waiver of their appellate arguments. As a result, we don't yet know all of the contours of this “effective waiver” rule or how it would apply to a case where the appellants cites to some, but arguably not all, relevant portions of the record.

Christopher Jackson and Jessica Smith are attorneys at Holland & Hart, specializing in complex commercial litigation. Jackson is an experienced appellate advocate with a strong background in complex civil trials and state government investigations. Smith leads the firm's religious institutions and First Amendment practice and handles a wide range of state and federal appeals.

Reprinted with permission from the July 26, 2024 online edition of Law.com © 2024 ALM Global Properties, LLC, All Rights Reserved. Further duplication without permission is prohibited, contact 877-256-2472 or asset-and-logo-licensing@alm.com.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.