[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-12425

Non-Argument Calendar

REBECCA BRIDGES,
As personal representative of the estate of Cody Healey, deceased, for the benefit of his survivors and estate,

Plaintiff-Appellee,

versus

DAVID MORGAN, et al.,

Defendants,

JOHN BEARD,
ERIC ANDERSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:18-cv-00406-RV-HTC

Before ROSENBAUM, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

Escambia County Sheriff's Deputies Eric Anderson and John Beard appeal the denial of their request for qualified immunity at summary judgment on 42 U.S.C. § 1983 claims that they used excessive force against and failed to render aid to Cody Healey, resulting in his death. Because the deputies' arguments hinge on an evidentiary ruling regarding the admissibility of a hearsay statement, which we lack interlocutory jurisdiction to review, we dismiss the appeal for lack of jurisdiction.

I.

On the morning of December 1, 2014, Deputies Anderson and Beard responded to reports that an individual without pants was behaving erratically near an elementary school. According to the reports, the individual was yelling obscenities, twirling around, running into and banging on cars and trees, rolling on the ground, doing back flips, and jumping into bushes. The individual, later

identified as Healey, refused to comply with the deputies' commands and resisted their attempts to take him into custody. After a prolonged struggle, during which the deputies repeatedly deployed a Taser and used open-hand techniques, the deputies eventually secured Healey with handcuffs and leg shackles.

While he was detained on the ground, Healey began to have trouble breathing and went into cardiac arrest. At some point—when exactly is disputed—the deputies called EMS, and CPR was performed after Healey stopped breathing. Then, after his breathing and vitals were restored, Healey was taken to the hospital. He was placed on life support, but, tragically, he died two weeks later at the age of 28.

II.

Following Healey's death, his widow, Rebecca Bridges, as personal representative of Healey's estate, filed a lawsuit in state court against Deputies Anderson and Beard in their individual capacities and the Sheriff of Escambia County in his official capacity. The defendants removed the case to federal court and, following several amendments to the complaint, ultimately moved for summary judgment. As relevant here, Anderson and Beard asserted the defense of qualified immunity against Bridges's § 1983 claims that they (1) used excessive force against Healey, who posed no threat to the officers or others, when they tased him repeatedly, placed significant body weight on him to restrain him, and hobble-tied him; and (2) failed to render aid to Healey once he began to have a medical emergency.

One of the central disputes at summary judgment concerned whether the district court could rely on a four-page written statement prepared by an eyewitness, Katrina Gardner, shortly after the events at issue. The court summarized the statement as follows:

> Gardner wrote that at no point during the scuffle did Healey try to punch, kick, or hurt the two deputies in any way. According to Gardner, Healey was just rolling around on the ground in a straight line, counting one through four, and not hurting anybody. Nevertheless, she says that Deputy Beard repeatedly tased him, during and after which she watched Deputy Anderson (who was a foot taller and weighed almost 200 lbs more than Healey) sit on him until he was handcuffed and "hobble-tied," and they left him face down in that position for several minutes, at which point he became limp and his face turned purple. Gardner claims that she repeatedly told the deputies that Healey was unresponsive, but they ignored her and just left him there face down on the ground. She states that even after Healey had turned "completely purple" and lifeless, they never tried to perform CPR on him. Instead, she claims that after Healey had lost his pulse one of the deputies just "used his foot and pushed his lifeless body over" in order to untie him, but neither of them implemented life-saving

> measures until after the EMTs arrived several minutes later.

The statement contradicted the deputies' testimony on certain details about the encounter, including whether Healey used force against the deputies and whether the deputies delayed in rendering aid to Healey despite his obvious need. Although Gardner was deposed for this case, she did not provide testimony about the incident, variously claiming that she could not recall certain details, that it was too traumatic for her, or that she feared retaliation from the Sheriff's Office.

Viewing Gardner's written statement as likely "dispositive" for summary judgment, the district court requested supplemental briefing on whether it was admissible. Bridges said it was; the deputies said it was not. Ultimately, the district court found that the written hearsay statement was admissible as a recorded recollection under Rule 803(5), Fed. R. Evid. And based on the written statement, the court determined that there were genuine issues of material fact that precluded summary judgment, though it stressed that Bridges had "only just barely survived summary judgment." Anderson and Beard appeal.

III.

Though no party raises the issue, we have an obligation to consider our appellate jurisdiction *sua sponte*. *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814, 818 (2010). That is, "we are required to explore whether we have jurisdiction to entertain

this interlocutory appeal before we may proceed to the merits." *Hall v. Flournoy*, 975 F.3d 1269, 1274 (11th Cir. 2020).

Ordinarily, an order denying qualified immunity is immediately appealable as a final, "collateral order." *Id.* at 1274–75. That's because (again, ordinarily) it conclusively resolves the question of whether a government official has immunity from suit, which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985).

The Supreme Court, however, has drawn a distinction between "legal" and "factual" appeals in qualified-immunity cases. *See Johnson v. Jones*, 515 U.S. 304, 313–15 (1995). That distinction stems in part from the collateral-order doctrine itself, which requires that the issue on appeal be distinct from the merits of the plaintiff's claim. *Id.* at 314–15; *see also Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996) (clarifying *Johnson*).

"[W]hen legal questions of qualified immunity are raised—either to determine whether any constitutional right was violated or whether the violation of that right was clearly established—interlocutory appellate jurisdiction exists," because those issues are considered to be "conceptually distinct from the merits of the plaintiff's claim." *Hall*, 975 F.3d at 1275–76 (quotation marks omitted); *Koch v. Rugg*, 221 F.3d 1283, 1296 (11th Cir. 2000) ("The denial of qualified immunity is purely legal where it concerns only the application of established legal principles to a given set of facts, which enables appellate jurisdiction." (quotation marks omitted)). We also may review "evidentiary sufficiency issues that are part and

parcel of the core qualified immunity issues, i.e., the legal issues." *Koch*, 221 F.3d at 1296.

"But if the only question before the appellate court is a factual one, review must wait for a later time." *Hall*, 975 F.3d at 1276. If the appeal simply "involve[s] the determination of facts a party may, or may not, be able to prove at trial," we lack jurisdiction. *Koch*, 221 F.3d at 1296. So when there is no core qualified-immunity issue to review, "we cannot review a trial court's determination of the facts alone at the interlocutory stage." *Hall*, 975 F.3d at 1277.

Here, we conclude that we lack jurisdiction because the deputies essentially present a factual challenge to the denial of qualified immunity. A close review of their briefing shows why.

The vast majority of the deputies' initial briefing regarding the § 1983 claims is devoted to two main arguments.[1] First, they argue they were entitled to qualified immunity based on a

[1] The deputies also challenge the denial of sovereign immunity under Florida state law, but they invoke this Court's pendent jurisdiction over that issue, which they say is inextricably intertwined with the denial of qualified immunity. "Pendent appellate jurisdiction is present when a nonappealable decision is inextricably intertwined with the appealable decision or when review of the former decision [is] necessary to ensure meaningful review of the latter." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009) (quotation marks omitted). Because we conclude that we lack jurisdiction to review qualified immunity, we likewise lack pendent jurisdiction to review sovereign immunity.

construction of the record that excludes Gardner's written statement.[2] But their arguments in this regard are consistent with the district court's decision. As we explained above, the court found that Bridges "just barely survived" summary judgment due solely to Gardner's written statement, which the court viewed as "dispositive." Arguing that summary judgment was appropriate if we exclude that statement does nothing to convince us that the court improperly denied qualified immunity. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) (stating that, to obtain reversal, the "appellant must convince us that every stated ground for the judgment against him is incorrect").

Second, the deputies contend that the district court erred in granting summary judgment based on Gardner's written statement because, in their view, that statement was inadmissible hearsay. But that argument is not one we have interlocutory jurisdiction to review since it merely concerns the "facts a party may, or may not, be able to prove at trial." *Koch*, 221 F.3d at 1296. Whether the

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[2] Unlike Anderson's initial brief, Beard's initial brief includes a summary of Gardner's written statement. In the argument section of his brief related to qualified immunity, however, Beard repeatedly relies on facts inconsistent with that statement. *Compare, e.g.*, Beard Initial Br. at 35–36 ("Healey was physically assaulting Anderson and Beard throughout this encounter multiple times."), *and id.* at 40–42 ("Once Healey's complexion changed, they removed the restraints and Beard checked for, and found, his pulse."), *with* Doc. 113 at 4 ("Gardner wrote that at no point during the scuffle did Healey try to punch, kick, or hurt the two deputies in any way."), *and id.* ("Gardner claims that she repeatedly told the deputies that Healey was unresponsive, but they ignored her and just left him there face down on the ground.").

court erred in determining the admissibility of certain evidence does not go to "core qualified immunity issues"; that is, it does not concern "the application of established legal principles to a given set of facts. *See id.* at 1296–97. That the evidentiary issue arose in the context of qualified immunity is not enough. *See Behrens*, 516 U.S. at 313 ("[D]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case."); *see also Whitlock v. Brueggemann*, 682 F.3d 567, 575 (7th Cir. 2012) ("Questions of admissibility are indeed legal questions; but they are not the sort of legal questions that are sufficiently separable from the merits so as to provide us with jurisdiction in a collateral-order appeal."); *Ellis v. Washington Cnty.*, 198 F.3d 225 (6th Cir. 1999) (dismissing an interlocutory appeal under *Johnson* even though "the only factual dispute in this cases arises from the rankest type of inadmissible hearsay"). We therefore lack jurisdiction to review the standalone argument that Gardner's statement is inadmissible hearsay.

What's missing from the deputies' initial briefing is any developed argument that, even accepting as true the factual statements in Gardner's written statement, the district court still erred in denying them qualified immunity. To be sure, Anderson and Beard both make that assertion in their initial briefs. But they have failed to properly raise the issue as required by our precedent.

"[A]n appellant's brief must include an argument containing 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant

relies.'" *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009) (quoting Fed. R. App. P. 28). And "[w]e have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority." *Sapuppo*, 739 F.3d at 681; *Singh*, 561 F.3d at 1278 ("[S]imply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal."). Moreover, arguments developed for the first time in a reply brief "come too late." *Sapuppo*, 739 F.3d at 683; *see Hi-Tech Pharm., Inc. v. HBS Int'l Corp.*, 910 F.3d 1186, 1194 (11th Cir. 2018) ("[A]n appellant must directly challenge each of the district court's grounds in his initial brief; challenges that are merely hinted at or that first appear in a reply brief do not merit consideration.").

Here, the deputies' initial briefs do no more than raise the issue "in a perfunctory manner without supporting arguments and authority." *Sapuppo*, 739 F.3d at 681. Anderson's initial brief confines the issue to a footnote, simply asserting that the contents of Gardner's written statement "would support the deputies' claims to qualified and sovereign immunity" and citing certain facts that are purportedly not disputed by the statement. Anderson's Initial Br. at 75 n.315. But it does not address the facts that are disputed or develop any argument or authority to explain why those disputed facts, if resolved in Bridges's favor, still warrant qualified immunity.

Beard's initial brief offers slightly more than a footnote on the issue, but it suffers from the same essential defect as Anderson's. Like Anderson, Beard says that certain facts remain undisputed even considering the statement. Beard Initial Br. at 81. He then asserts in conclusory fashion that he is entitled to qualified immunity because "there is no clearly established law placing Beard on notice regarding his taser use, to use the force he used under these circumstances, and requirement to perform CPR or do more than call EMS." *Id.* at 81–82. But in making these assertions, Beard fails to address any of the disputed facts, to cite to any supporting authority, or to argue why the disputed facts—including whether Healey struck the two deputies in any way and whether the deputies left Healey on the ground "unresponsive for several minutes before they even checked his pulse," as Gardner claimed—warrant granting qualified immunity. *See Sapuppo*, 739 F.3d at 681. Simply asserting that he is entitled to qualified immunity, "without further argument or discussion," is not sufficient. *See Singh*, 561 F.3d at 1278.

In sum, the deputies failed to properly brief the issue of whether the district court erred in denying qualified immunity based on Gardner's statement. *See Sapuppo*, 739 F.3d at 681. To the extent the arguments are more developed in the reply briefs, those arguments "come too late." *Id.* at 683. Regarding the other issues they raise, their main qualified-immunity arguments do not address Gardner's statement and so do nothing to convince us that the court erred, and we lack jurisdiction at this time to review

whether Gardner's statement was admissible because that issue merely concerns the facts Bridges "may, or may not, be able to prove at trial." *Koch*, 221 F.3d at 1296.

For these reasons, we dismiss the appeal for lack of jurisdiction.

DISMISSED.