

# Michigan Journal of Race and Law

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Volume 21

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2016

## Making a Buck While Making a Difference

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### Recommended Citation

Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251 (2016). Available at: <https://repository.law.umich.edu/mjrl/vol21/iss2/5>

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## MAKING A BUCK WHILE MAKING A DIFFERENCE

*Alphonse A. Gerhardstein\**

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## INTRODUCTION

*My son was unarmed. He was going to head off to college in two weeks. I thought Tasers were non-lethal. This makes no sense. His brother and sister are in shock.*

— Travonna Howard<sup>1</sup>

It is not right for children to die before their parents. It is not right for peaceful, unarmed citizens to die at the hands of the police. In my civil rights practice, I have met many mothers, fathers, and family members who are struggling to recover after a law enforcement officer caused the death of their loved one. Sure, they want fair compensation. But money does little to reduce their loss or make the grief more bearable. They often want to do something that will ensure that their loved one did not die in vain. They want to prevent other families from suffering the same loss.

This Article will show that even without standing to seek injunctive relief, these plaintiffs can indeed secure significant reform. This Article will also share suggestions for the practitioner on how to litigate these cases economically and efficiently. Part I explores avenues for relief other than compensatory and punitive damages. Part II shares language to include in retainer agreements to encourage clients to share any settlement they reach with the public to increase awareness of police misconduct. Part III explains that researching local police policies and practices helps to inform where meaningful opportunities for reform exist. Part IV then provides examples of resolutions that require the officers involved and their supervisors to personally engage with the victims' families or that commemorate victims in their respective communities. Finally, Part V reviews techniques for case selection, case theory, and working within a budget so the small office practitioner can make enough money to carry the work forward.

### I. PLAINTIFFS WANT AND DESERVE MORE THAN MONEY

Many believe that large verdicts or settlements act as deterrents and help to prevent future abuses. However, because most municipalities and counties are insured, the settlement payments are not made by the officers, supervisors, or even departments responsible for misconduct. Many of-

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1. Statement of Travonna Howard to the author after her 18-year-old son was tased on the campus of the University of Cincinnati on August 6, 2011.

ficers never learn that cases against them were settled and that money was paid. Moreover, any settlement agreement typically contains a “no admission of liability” term. In cases that go to trial, we have to explain to the family that they have no standing to seek injunctive relief.<sup>2</sup> If the case is tried, the only thing on the verdict form is a line for a monetary award. As a result, if the jury awards compensatory damages, the wrongdoers may never experience any personal consequences and the deterrence effect is severely limited. A punitive damage award may have impact, but even that is extremely rare.

Should we be satisfied by simply explaining to these families what we *cannot do* with their lawsuit, or should we seek out the full relief the family really wants? In my practice, I encourage clients to seek apologies and targeted reforms as part of their settlement demands. This can be done either before trial or, if the case is tried, it can be revisited after trial as a way to resolve the case without a lengthy appeal.

## II. START WITH THE RETAINER AGREEMENT

I begin discussing needed reforms with my clients before we enter into the retainer agreement. My firm’s retainer agreement includes the goal of our work: to seek “fair compensation and appropriate reforms.” The first step in this regard is to discourage confidentiality clauses in order to share the outcome of any settlement with the community.

Our standard retainer agreement achieves this by containing language similar to the following:

*No confidentiality clauses.* Attorney and client agree that this civil rights claim is brought in part to improve treatment of all persons by government officials and others in positions of power. The efforts of government officials and other defendants to keep secret their wrongful conduct often impacts others by covering up the conduct and remedy obtained. This eliminates or reduces the deterrent effects of the lawsuit. For this reason the Attorney recommends that client not enter into settlement agreements containing a confidentiality clause.

This provision sets the expectation that confidentiality clauses will be opposed in all but limited circumstances to better serve the overarching policy concerns behind our cases.

Our cases and their resolution can only make a difference going forward if the community is educated about the problem and how it was resolved. This educational process often includes a press statement that the plaintiff and the defendant issue together or a frank discussion with the

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2. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (finding that federal courts may not enter injunctive relief without a showing that alleged unconstitutional practices are likely to be visited in future on plaintiff).

defense attorney about how the settlement will be shared with the press and the broader community. In some instances, the defendant is a unit of government and is prohibited from entering into secret settlements. Some plaintiffs will have personal reasons for keeping monetary awards private. Even when a settlement amount must be kept private, we can make strides toward reform by publicly discussing the noneconomic terms of the agreement.

Many clients view a settlement as a loss—not vanquishing the defendant in court is viewed as not securing justice. Those clients benefit from a dialogue about goals for the case beyond retribution. Clients can develop a broader notion of a fair settlement—one that helps them ensure the abuse will not happen again. That includes structural and other reforms. Clients need to be assured that if negotiations do not achieve a fair settlement, then a trial will be demanded and the fight is on.

Once the client is informed about this broader rationale behind settlements, the attorney and client can continue to think about the opportunity to effectuate change through settlement while the case is being litigated. We flag this in the introduction to our complaints by stating that one purpose in bringing the lawsuit is to deter future civil rights violations.<sup>3</sup>

### III. REFORM TERMS

The most effective reform proposals are well researched and grounded in best-established practices. For example, my firm has promoted Taser reforms for many years. In 2012, we surveyed all forty-seven law enforcement agencies in Hamilton County, Ohio, and issued a white paper<sup>4</sup> identifying deficiencies in local Taser policies. The paper included a detailed list of recommendations specific to each agency.<sup>5</sup> The Hamilton County Chiefs Association responded, agreeing with many of the recommendations and encouraging local agencies to adopt them.<sup>6</sup> That exchange between my firm and the Chiefs Association accomplished more Taser reform than several cases combined, but it was only possible because my firm had a track record of pursuing Taser issues.

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3. The reform language in the introduction is crafted to make it clear that we are not seeking formal injunctive relief if there is no basis for such relief, as we do not want to trigger unnecessary motion practice.

4. Alphonse A. Gerhardstein & Jennifer L. Branch, *Taser Risks in Hamilton County Ohio*, GERHARDSTEIN & BRANCH (Oct. 1, 2012), [http://www.gbfirm.com/litigation/documents/54\\_TaserRisksReport.pdf](http://www.gbfirm.com/litigation/documents/54_TaserRisksReport.pdf).

5. *See id.*

6. Alphonse A. Gerhardstein & Jennifer L. Branch, *Chiefs of Police Respond to Taser Risk Report: Recommend Policy Reforms*, GERHARDSTEIN & BRANCH, <http://www.gbfirm.com/656/>.

A. *Investigating Local Police Policies and Practices*

The Taser report and accompanying advocacy were grounded in many of our previously litigated cases and included observations from our expert witnesses over the years.<sup>7</sup> Although we are not against all Taser use, we saw repeated instances of Taser abuse through unnecessary chest shots, extended trigger pulls, and other deployment errors. This motivated us to investigate local Taser policies and offer our suggestions for reform.

Working on several Taser cases provided the opportunity to accomplish reform in Taser training and policy. One case involved Everett Howard Jr., an 18-year-old Black summer enrichment program student at the University of Cincinnati.<sup>8</sup> On August 6, 2011, Everett was ordered to “get on the ground.”<sup>9</sup> The unarmed Black male did not move quickly enough to satisfy the campus police officer, and Howard was then tased in the chest.<sup>10</sup> He died at the scene.<sup>11</sup> While the case was pending, the University’s police suspended the use of Tasers on campus.<sup>12</sup> The case was settled, and Howard’s family received \$2 million in compensation.<sup>13</sup> In addition to monetary relief, the University agreed to consult Everett’s family and the public as a whole regarding suggestions for Taser policies and training before reissuing Tasers to UC Police Department officers.<sup>14</sup> The University also consulted with the family about commemorating Everett’s life, and together they agreed on a memorial bench and plaque that was installed on campus.<sup>15</sup> Finally, the University President provided a personal apology to the family.<sup>16</sup>

The family of Corey McGinnis also sought compensation and Taser reform after his death.<sup>17</sup> After playing basketball with his two teen sons and nephew, McGinnis was involved in an altercation with police that resulted

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7. See Gerhardstein & Branch, *supra* note 4.

8. Camille Mann, *Student Everett Howard tasered by campus police at University of Cincinnati*, CBS NEWS (Aug. 8, 2011, 12:32 PM), <http://www.cbsnews.com/news/student-everette-howard-fatally-tasered-by-campus-police-at-university-of-cincinnati/>.

9. Complaint at ¶ 21, Howard v. Haas, No. 1:12-CV-00586 (S.D. Ohio Aug. 2, 2012).

10. *Id.* at ¶¶ 25-29.

11. *Id.* at ¶ 30.

12. Mann, *supra* note 8.

13. Alphonse A. Gerhardstein & Jennifer L. Branch, *UC Taser Case Settled: \$2 Million Plus Taser Reforms*, GERHARDSTEIN & BRANCH, <http://www.gbfirm.com/uc-tase-case-settled-2million-plus-taser-reforms-2/>.

14. *Id.*

15. *Id.*

16. *Id.*

17. Alison Montoya, *Family settles lawsuit with NCH police for man’s stun gun death: Settlement gives family \$650,000*, WLWT CINCINNATI (June 26, 2014, 11:55 PM), <http://www.wlwt.com/news/family-settles-lawsuit-with-nch-police-over-mans-stun-gun-death/26675670>.

in a Taser deployment to his chest.<sup>18</sup> His family received \$650,000 in compensation and the following reforms were implemented:

- amending the police Taser policy to reflect the manufacturer's preferred target zone;
- grading officer examinations taken during Taser training;
- conducting competent use of force investigations following Taser deployments;
- taking reasonable efforts to participate in a national registry regarding Taser impact if one is established; and
- implementing the reforms through a neutral expert with input from plaintiff's counsel.<sup>19</sup>

Another case challenged a Taser chest deployment with an extended trigger pull. David Nall was unarmed, in his apartment when tased, and suffered loss of respiration and then heart function leading to brain damage.<sup>20</sup> He will have severely limited cognition for the rest of his life.<sup>21</sup> His case settled for \$2.25 million along with a review of the city Taser policy and training.<sup>22</sup> The agreement also provided that Nall's tasing would be used as a case study for officers during in-service training.<sup>23</sup>

Another important public reform resulted from a wrongful conviction case.<sup>24</sup> Michael Green was convicted of a rape he did not commit.<sup>25</sup> He was exonerated by DNA evidence.<sup>26</sup> His conviction was based in part on misleading testimony the state's expert gave.<sup>27</sup> Green was convinced that the abuse that led to his false conviction for rape also caused others to be improperly convicted.<sup>28</sup> As a condition of his settlement he insisted that

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18. Julie O'Neill, *North College Hill police officer, police department sued in Taser-related death*, WCPO CINCINNATI (July 10, 2013, 11:10 AM), <http://www.wcpo.com/news/local-news/north-college-hill-police-officer-sued-in-taser-related-death>.

19. *North College Hill Settles Taser Lawsuit with McGinnis Family*, GERHARDSTEIN & BRANCH (June 26, 2014), <http://www.gbfirm.com/north-college-hill-settles-taser-lawsuit-with-mcginnis-family/>.

20. Tracey Read, *Painesville police Taser lawsuit case to go to jury trial*, THE NEWS-HERALD (Jan. 21, 2014, 12:01 AM), <http://www.news-herald.com/article/hr/20140121/NEWS/140129900>.

21. *Goodwin v. City of Painesville*, 781 F.3d 314, 320 (6th Cir. 2015).

22. *Painesville Tasing Case Settles for \$2.25 Million and Improved Policing*, GERHARDSTEIN & BRANCH (Oct. 20 2015), <http://www.gbfirm.com/painesville-tasing-case-settles-for-2-25-million-and-improved-policing/>.

23. *Id.*

24. *Michael Green*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/michael-green> (last visited Feb. 1, 2016).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

there be a forensic audit completed of all similar cases in Cleveland, Ohio.<sup>29</sup>

B. *Apologies, Monuments, and Terms that Result in Personal Engagement*

1. *Apologies*

Some clients do not welcome apologies, but others view them as a very important personal statement. A sincere apology acknowledges the pain suffered by the plaintiff. A sincere apology treats the plaintiff with dignity.<sup>30</sup> In one case a city manager, David Krings, started a mediation with my client by apologizing for the conduct of his SWAT team. They had forcibly extracted the woman and her two daughters from their vehicle and held them at gunpoint in a terrifying stop completely unsupported by probable cause. He made it personal by stating that he would be horrified to have his daughter treated in this manner. My client was moved by his sincere words, and the case was much easier to resolve as a result. The settlement not only included compensation but also a commitment to train the SWAT team on probable cause and to ensure that they followed the law in future stops.

2. *Officer Training*

Carrie Culberson was murdered by her boyfriend, Vincent Doan.<sup>31</sup> He also hid Carrie's body, which has not been recovered to this day.<sup>32</sup> Her family sued the local police chief for failing to protect her body when it was secreted in a local pond.<sup>33</sup> After a \$3.75 million verdict, the case was settled.<sup>34</sup> One term of the settlement provided for the institution of a countywide protocol for domestic violence prevention and response training.<sup>35</sup> The defendants also agreed to ensure that regular in-service training was provided to officers to keep the new system in place.<sup>36</sup>

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29. *Id.*

30. See Alphonse A. Gerhardstein, *Can Effective Apology Emerge Through Litigation?*, 72 LAW AND CONTEMPORARY PROBLEMS 271, 276 (2009); Alphonse Gerhardstein & David Krings, *Uncomfortably True, Police Misconduct Cases, Keys to Appropriate Methods of Resolution*, PUBLIC MANAGEMENT 10, 11 (2012).

31. Kimball Perry, *Dog bites off nose of murderer Vince Doan*, CINCINNATI.COM (Mar. 5, 2015, 2:20 PM), <http://www.cincinnati.com/story/news/2015/03/05/murderer-vince-doan-wins-taxpayer-money-dog-nites-nose/24445467/>.

32. *Id.*

33. Janise Morse, *Carrie's relatives win \$3.75M award: Jury cites conduct of Blanchester's police chief*, THE CINCINNATI ENQUIRER (Feb. 2, 2001), [http://www.enquirer.com/editions/2001/02/02/loc\\_carries\\_relatives.html](http://www.enquirer.com/editions/2001/02/02/loc_carries_relatives.html).

34. *Id.*

35. Settlement Agreement and Mutual General Release at 4-6, *Culberson v. Doan*, No. C-1-97-965 (S.D. Ohio July 3, 2001), <http://www.gbfirm.com/litigation/documents/Culberson%20settlement%20agreement.pdf>.

36. *Id.* at 6.



Since government training is often a passive experience where officers simply watch a presentation, it is important to advocate for training that is graded and that helps officers become proficient with the task at issue, such as that achieved in the *McGinnis* Taser case described above.

### 3. *Monuments and Plaques*

The reform pursued should be tied to the case, and the client should be allowed as much creativity as possible. The important work of protecting the safety of vulnerable citizens should never become routine. Visual memorials can help remind officers of their profound duties. For example, after repeated abuse, Suzie Thompson finally called the Warren County, Ohio Sheriff and had her boyfriend arrested.<sup>37</sup> Even from jail he called and threatened to kill her.<sup>38</sup> Thompson reported these threats and filed charges against her former boyfriend, seeking a temporary restraining order against him.<sup>39</sup> Unfortunately, the Sheriff included her former boyfriend in a holiday furlough program.<sup>40</sup> Eligibility was based on his status as a compliant jail inmate.<sup>41</sup> He was released on furlough and immediately proceeded to the Thompson home and murdered Suzie.<sup>42</sup> The settlement between the family and the Sheriff included a granite memorial quarried from the hometown region of the family in Quebec, Canada.<sup>43</sup> The memorial was dedicated to all victims of domestic violence and was installed across from the entrance to the Sheriff's Department.<sup>44</sup>

In another case the Hamilton County, Ohio, coroner permitted a commercial photographer to photograph bodies in the morgue after placing various props on the bodies.<sup>45</sup> The settlement of the substantive due process case by the families included payment of \$8 million, destruction of all images created by the photographer, an apology from the County, and the installation of a plaque in a prominent place that reminds the morgue staff to be vigilant in their duty to protect the bodies entrusted to their

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37. Sheila McLaughlin, *Victim's family wants to know why justice system failed: Lebanon woman killed by furloughed prisoner*, The Cincinnati Enquirer (July 17, 2000), [http://enquirer.com/editions/2000/07/17/loc\\_victims\\_family\\_wants.html](http://enquirer.com/editions/2000/07/17/loc_victims_family_wants.html).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Laura Pulfer, *Suzie Thompson: Promise carved in stone*, The Cincinnati Enquirer (Oct. 25, 2001), [http://enquirer.com/editions/2001/10/25/loc\\_pulfer\\_suzie.html](http://enquirer.com/editions/2001/10/25/loc_pulfer_suzie.html).

44. *Id.*

45. Plaintiff's Memorandum in Support of Class Action Settlement of Injunction Claims and Response to Objections at 5-6, *Chesher v. Neyer*, No. C-1-01-566 (S.D. Ohio Oct. 8, 2007), [http://www.gbfirm.com/litigation/documents/23\\_473-Pltfmemoinsupportofsettlement.pdf](http://www.gbfirm.com/litigation/documents/23_473-Pltfmemoinsupportofsettlement.pdf).

care.<sup>46</sup> Similar plaques have been installed in jails as part of settlements for jail suicides or other jail death cases due to inadequate medical care.

#### 4. *Sharing Experiences*

Another very effective technique can be including personal encounters in a settlement. I have my clients attend all depositions so they meet everyone involved. Some settlements also include an opportunity for the client and appropriate defendants to meet one-on-one or with their attorneys to voice how they felt as a result of the treatment they or their loved ones received and what they hope to see changed going forward. In one racial profiling case, for example, this meeting made a big difference. The victims shared their experience undergoing a discriminatory traffic stop where the officer ordered the couple to leave their car and submit to drug-sniffing dogs. The husband and wife were very emotional as they recounted to the officers how it felt to be publicly humiliated, standing for twenty-five minutes outside their car, clearly accused of drug dealing. The officers were moved by the personal story of the victims and apologized sincerely. These victims were also able to talk extensively with the police chief who was implementing policy changes to prevent such stops in the future.

More recently, the settlement reached between the University of Cincinnati and the family of Samuel DuBose utilized many of the settlement terms described in this section. DuBose was shot and killed during a traffic stop by a University of Cincinnati police officer.<sup>47</sup> The officer, Ray Tensing, was indicted for murder and is currently awaiting trial.<sup>48</sup> In addition to \$4.85 million in financial compensation for DuBose's death, the settlement included several non-economic terms: a personal apology from the university president, a memorial on campus commemorating Samuel DuBose, and tuition and fee waiver for all twelve of DuBose's children who qualify for admission to the University.<sup>49</sup> DuBose's family was also invited to attend and participate in the Community Advisory Committee meetings to offer their input on necessary and comprehensive police reform so that such abuses can be prevented in the future and other families will not have to experience the harm that they suffered.<sup>50</sup>

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46. *Id.* at 1-2, 11-12.

47. *Press Release: DuBose Family and the University of Cincinnati Reach Settlement Worth 5.3 Million and Participation in Police Reforms*, GERHARDSTEIN & BRANCH (Jan. 18, 2016), <http://www.gbfirm.com/dubose-family-and-the-university-of-cincinnati-reach-settlement/>.

48. *Tensing Pleads Not Guilty In DuBose Murder; Hit With \$1 Million Bond*, WVXU (Jan. 8, 2016), <http://wvxu.org/post/tenzing-pleads-not-guilty-dubose-murder-hit-1-million-bond-0>.

49. *Dubose Family*, *supra* note 47.

50. *Id.*

## IV. LITIGATING EFFICIENTLY AND ECONOMICALLY

A. *Problems Litigation Can Solve*

Since there is no significant political lobby to promote prisoner rights or the rights of suspects, civil rights litigation is the only reliable vehicle for preserving the rights of persons subjected to arrest without probable cause, excessive force, denial of medical care while in custody, and other abuses imposed by state actors. Nevertheless, it is important to investigate and frame the case in a manner that will promote a positive outcome. Principles most recently promoted by Don Keenan and David Ball correctly guide plaintiffs' attorneys away from ineffective appeals for sympathy and toward arguments that appeal to themes that better resonate with jurors.<sup>51</sup> For example, the notion that correction officers and police must follow rules when they hold others in custody has ready analogies to nursing home attendants who care for the elderly and bus drivers and teachers who care for children. Jurors want the elderly and children to be safe. Jurors will get engaged when they see they are helping create a system where people who exercise power are held accountable. This is particularly true when the jurors learn that the police officer was not criminally charged or disciplined even though rules were broken. Those facts will help jurors perceive how important and relevant the civil rights claims of the plaintiff are to their own lives. Selecting cases and framing them in this fashion should result in better outcomes for plaintiffs.

## 1. Pre-Filing Investigation

Not every problem can be solved through litigation. Pre-filing investigation will ensure that the problem is appropriate for court and that the facts will likely lead to a verdict for the plaintiff. There are a variety of tools that can be utilized to evaluate whether litigation is appropriate at this stage:

Public records requests can be used to obtain body- and cruiser-cam videos, incident reports, statements, narratives, investigations (including from third-party agencies), Emergency Medical Services reports, 911 calls, Computer Aided Dispatch (CAD) records, daily activity reports, citizen complaint records, photos, personnel files, policies and procedures, and officer training records from police departments.

Records can also be requested from sheriff's offices in custodial abuse cases. These records include inmate medical records, booking/intake sheets, housing assignments, disciplinary and training records of the staff members involved in the incident, relevant policies and procedures, log books, observation records, and a staff roster.

A private investigator can be retained in appropriate cases and her interviews, photos, and diagrams can be utilized to frame the case.

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51. See generally Don Keenan & David Ball, REPTILE, THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION.

Experts in the fields of corrections, police practices, and medicine can also be consulted early in the case to assess whether the challenged conduct violated professional standards of care.

Litigation management software can be used to organize your case materials. It is especially helpful to have all documents scanned, numbered, and summarized, making for instant recall of all important facts.

## 2. Case Selection and Getting Started

Once the issue has been thoroughly investigated, it is time to make a decision about taking the case. Consider the client's goals. These probably fall under two categories: fair compensation and preventing future abuse. You should let clients know that a lawsuit is simply one way to solve their problems, and it can end in either a settlement or a verdict. Prepare the client for both. If the client has specific goals in mind, not just the abstract notion of "winning," then a settlement can be an opportunity to gain fair compensation and achieve needed reforms through noneconomic terms.

Frame the complaint narrowly. Do not include a specific dollar amount in the complaint, unless and to the extent that it is required for jurisdictional purposes. Adding high dollar figures can make any resulting verdict or settlement look like a loss. Additionally, do not feel the need to make claims based on everything the client alleges. Rather, you should frame the suit based on the strongest facts, provable injuries, and favorable case law. Use the complaint to tell a compelling story, and include an introduction that the press can use to share the story.<sup>52</sup> Explain to your client that although some matters might not be addressed in the complaint—i.e., that the officer was rude—they can be incorporated into the story you tell at trial. Finally, it is important to make sure that your client reads the complaint before it is filed and agrees to its scope and accuracy.

When evaluating claims and potential liability, remember that tort "reform" does not apply to § 1983 claims because of the Supremacy Clause.<sup>53</sup> This means that joint and several liability will apply,<sup>54</sup> not comparative negligence.<sup>55</sup>

When you select defendants, make sure you are suing defendants that are either insured or have resources to pay a judgment. If the individual defendants were discharged and will not be indemnified or covered by the entity, then take care to ensure that you will be able to collect any award from them. Obtaining a judgment against a defendant who cannot pay will not solve the client's goal of receiving fair compensation. When selecting

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52. See *infra* Appendix I: Sample Complaint Introduction.

53. U.S. CONST. art. VI, cl. 2.

54. *Weeks v. Chaboudy*, 984 F.2d 185, 188 (6th Cir. 1993).

55. *Quezada v. Cnty. of Bernalillo*, 944 F.2d 710 (10th Cir. 1991); *McHugh v. Olympia Entertainment*, 37 Fed. App'x 730 (6th Cir. 2002).

defendants, also remember to carefully review the prospects for entity liability as well as individual liability.

### B. § 1983 and Wrongful Death Claims

Consider a lawsuit where the constitutional violation caused the death of the plaintiff's family member. Generally, a § 1983 claim is brought as a survival action and a state law wrongful death claim supports the claim for damages for the heirs based upon the death itself. The measure of the constitutional injury is the pain and suffering endured by the decedent from the onset of the civil rights violation until the moment of death. However, if state law deprives the plaintiff family members of a meaningful remedy for the death itself, there are arguments permitting § 1983 to trump those restrictions and provide for a full remedy including conscious pain and suffering, loss of life, and punitive damages.<sup>56</sup> Treatment of the civil rights claim when the conduct has resulted in death varies greatly in different states, so this is important to understand before filing. For example, counties in Ohio are immune from state law claims based on injuries incurred in jails.<sup>57</sup> But a sheriff is *not* immune if his or her conduct or supervision was reckless and proximately caused the injury.<sup>58</sup> Thus, to ensure a proper defendant under the state law wrongful death claim, the sheriff should be sued instead of the county.

#### 1. Private Actors as Civil Rights Defendants

While public policies may not be well served by outsourcing government services, private actors are actually easier to sue than government officials. For instance, state and local governments have outsourced medical care in many of their jails and prisons, and inadequate medical care is a common reason why private defendants are sued.<sup>59</sup>

First, private defendants acting under color of state law are generally not entitled to qualified immunity<sup>60</sup> or to governmental immunity under most state laws.<sup>61</sup> Second, private defendants typically have insurance;

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56. See generally *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985).

57. R.C. § 2744.02(A); R.C. § 2744(B)(4).

58. R.C. § 2744.03(A)(6)(b).

59. See e.g. *Stojcevski v. County of Macomb*, 2015 WL 6885751 (E.D. Mich. 2015) (plaintiff sued jail's private medical provider and provider's employees); *Sullivan v. Correctional Medical Services, Inc.*, No. 2:08-CV-186, 2008 WL 4899430 (W.D. Mich. 2008) (plaintiff sued private entity that contracted with state to perform medical services at prison); *Turner v. Frey*, 166 F.3d 1215 (6th Cir. 1998) (plaintiff sued private health services provider at jail but settled claims); *Davis v. Roane County, Tennessee*, No. 3:12-CV-634-TAV-CCS, 2016 WL 125497 (E.D. Tenn. 2016) (plaintiff sued private medical services provider); *Gordon v. Mohr*, No. 3:14 CV 2105, 2015 WL 4275547 (N.D. Ohio 2016) (plaintiff sued private corporation providing medical care to prisoners).

60. *Richardson v. McKnight*, 521 U.S. 399 (1997).

61. Under Ohio law, political subdivisions are immune to tort liability under R.C. § 2744.02(A)(1), and employees of the political subdivision are immune unless they acted with

therefore, awards can be collected from them. In turn, they are responsive to strong claims.

The presence of a private actor requires that careful thought be given to strategy. In one case, my firm sued the regional tactical team known as Allied Special Operations Response Team (ASORT), whose members were officers from several municipalities.<sup>62</sup> The Court accepted our argument that ASORT was like a volunteer fire department, a private unincorporated association under Ohio law.<sup>63</sup> As such, ASORT could be sued as a state actor under § 1983 although it was not a governmental unit under the state immunity statute.<sup>64</sup> This made ASORT not only a good § 1983 target but also a proper defendant for our claim of wrongful death and other state torts. This strategic move proved successful because a municipality cannot be sued for an intentional tort under Ohio law.<sup>65</sup>

In another case, *Lowe v. Cuyahoga County*, we sued the County, sheriff, civil servants, and a private company and its contract doctors who provided medical care at the Cuyahoga County jail in Ohio.<sup>66</sup> The terms of the contract for services did not set a constitutional standard, but the County's failure to enforce those terms was helpful in telling the story of a lack of accountability.

## 2. Avoiding Qualified Immunity Delays

In almost every case litigated against government officials under §1983, dispositive motions and appeals based on qualified immunity arise. The goal of this section is not to describe the various ways to respond to the merits of a qualified immunity claim. Rather, the goal is to demonstrate how plaintiffs can minimize the delay triggered by defense motions asserting qualified immunity (QI). The discussion below describes the affirmative defense, covers strategies to avoid its assertion, and details motion practice for QI appeals.

Qualified immunity is a judicially created defense unique to cases brought under § 1983. The defense is available only to individuals, not to

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malicious purpose, in bad faith, or in a wanton or reckless manner under R.C. § 2744.03(A)(6)(b). Because these statutes only apply to political subdivisions and their employees, the immunity does not extend to private defendants.

62. Report and Recommendation at 2 n.2, *Rush v. City of Mansfield*, No. 1:07CV1068 (N.D. Ohio May 20, 2009), [https://www.gpo.gov/fdsys/pkg/USCOURTS-ohnd-1\\_07-CV-01068/pdf/USCOURTS-ohnd-1\\_07-CV-01068-3.pdf](https://www.gpo.gov/fdsys/pkg/USCOURTS-ohnd-1_07-CV-01068/pdf/USCOURTS-ohnd-1_07-CV-01068-3.pdf) ("ASORT stands for 'Allied Special Operations Response Team,' a tactical team formed by the Richland County Chiefs of Police Association.").

63. *Id.* at 10-22.

64. *Id.* at 12, 22.

65. See *Rush v. City of Mansfield*, 771 F. Supp. 2d 827, 874-75 (N.D. Ohio 2011) (analyzing R.C. § 2744.02).

66. *Lowe v. Cuyahoga Cnty./Bd. of Cnty. Commissioners*, No. 1:08-CV-01339 (N.D. Ohio Dec. 8, 2011).

entities such as cities or counties.<sup>67</sup> The Supreme Court has created a two-tiered test to determine whether defendants are entitled to qualified immunity.<sup>68</sup> First, do the facts alleged show the defendant's conduct violated a constitutional right?<sup>69</sup> If that question is answered affirmatively, then we move to the second inquiry, whether the right allegedly violated was clearly established when the violation occurred.<sup>70</sup> The order for answering these questions was recently relaxed by the Court, but the essential questions related to qualified immunity remain unchanged.<sup>71</sup> Again, does the plaintiff claim facts that describe a violation of a constitutional right? Was that right clearly established on the date of the defendant's conduct?

Qualified Immunity can be invoked early, even in a motion to dismiss directed at the complaint.<sup>72</sup> A defendant who is denied qualified immunity may file an interlocutory appeal.<sup>73</sup> The plaintiff's challenge, then, is to structure the case to proceed through discovery and trial without the interruption of an interlocutory appeal (and the related twelve-month delay). Interlocutory appeals cause witnesses' memories to fade or disappear and delay resolution to a plaintiff who is stressed because of the violation and the litigation.

The best way to defeat a QI appeal is moving to dismiss the appeal in circuit court and framing the resolution of the case as dependent on contested facts. Contested facts will defeat interlocutory appellate jurisdiction.<sup>74</sup> This may be impossible if the plaintiff has not been able to conduct

67. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ("Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official."). Municipal liability, on the other hand, is governed by *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Under *Monell*, municipal liability is limited not by the availability of immunities, but by the requirement that a municipal policy or custom must be responsible for the constitutional violation. *Id.* Merely employing a constitutional wrongdoer will not create liability, as there is not respondeat superior liability in such instances. *Id.*

68. *Saucier v. Katz*, 533 U.S. 194 (2001).

69. *Id.* at 201.

70. *Id.*

71. *See Pearson v. Callahan*, 555 U.S. 223 (2009).

72. The Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

73. *Mitchell*, 472 U.S. at 526-27.

74. *Johnson v. Jones*, 515 U.S. 304, 317 (1995); *Carter v. City of Wyoming*, No. 07-2296, 2008 WL 4425986, at \*2 (6th Cir. Oct. 1, 2008); *see also Younes v. Pellerito*, 739 F.3d 885, 890 (6th Cir. 2014) (dismissing appeal because triable issue remained as to facts, including whether arrestee was intoxicated and whether he lunged at officers); *Carlson v. Fewins*, No. 11-1062, 2012 WL 738734, at \*2 (6th Cir. 2012) (finding lack of jurisdiction over deputy's appeal from denial of qualified immunity, where appeal was based on disputed facts and simply asked the court to believe his version of events); *Bomar v. City of Pontiac*, 643 F.3d 458, 462 (6th Cir. 2011) (finding lack of jurisdiction over appeal of denial of summary judgment on excessive force claim on basis that factual issues existed as to whether arrestee was sufficiently restrained);

discovery before the defense moves for dismissal based on QI. Early motions are permitted because QI is supposed to be immunity from suit, not just immunity from liability.<sup>75</sup> To prevent this problem from arising, plaintiff's counsel should gather incident reports, personnel files, photographs, videos, statistics, and any other relevant public records to develop the factual basis for the claim. In addition, in limited instances courts may allow for limited discovery directed to the issue of qualified immunity, even at that early stage.<sup>76</sup>

The plaintiff's counsel must be aware that the very effort to dismiss a QI appeal may cause the appeal to last longer than it would otherwise last. At least in the Sixth Circuit, there will be no merits briefing until a motion to dismiss the appeal is ruled on by a motions panel.<sup>77</sup> This means plaintiffs should not file motions to dismiss in questionable cases. Instead, only where it is very clear that contested facts defeat QI should such a motion be filed.

If the dismissal of a QI appeal is pursued, plaintiff's counsel should also consider filing a motion to preserve the trial date and urging the district court to proceed with the scheduled trial or other proceeding if the QI claim is frivolous.<sup>78</sup> That will encourage a prompt trial on the merits and, ideally, a prompt resolution to the case.

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Thompson v. Grida, 656 F.3d 365, 368 (6th Cir. 2011) (dismissing appeal because officers asserted their version of the facts was true and arrestee contested those facts); Mosser v. Watson, No. 11-3558 (6th Cir. June 20, 2011); Lindsly v. Worley, No. 10-3630, 2011 WL 1838584, at \*3 (6th Cir. May 13, 2011) (finding contested facts that prevented QI appeal despite video evidence); Hanson v. City of Fairview Park, No. 08-4238, 2009 WL 3351751, at \*5 (6th Cir. Oct. 20, 2009) ("The fact-bound nature of an excessive force claim makes our inquiry even more problematic."); Fink v. City of Hamilton, No. 09-3662, 2009 WL 1444556, at \*18 (6th Cir. May 21, 2009); Kies v. City of Lima, 612 F.Supp.2d 888, 898 (6th Cir. 2009); Whittie v. Doyle, Nos. 05-2067, 05-2276, 2007 WL 627863, at \*3 (6th Cir. Mar. 1, 2007) (explaining that determinations of evidentiary sufficiency are not immediately appealable merely because they happen to arise in a QI case); Gregory v. City of Louisville, 444 F.3d 725, 742 (6th Cir. 2006) ("[T]he determination that there exists a triable issue of fact cannot be appealed on an interlocutory basis, even when that finding arises in the context of an assertion of qualified immunity."); Strutz v. Hall, No. 04-1451, 2005 WL 451786, at \*2 (6th Cir. Feb. 25, 2005) ("We conclude that the resolution of this case hinges on a question of fact, not a question of law or a mixed question of law and fact."); Ellis v. Washington Cnty., 198 F.3d 225, 229 (6th Cir. 1999) (dismissing appeal because there was a factual dispute, established by hearsay, whether defendant's actions were deliberate indifference); Hoard v. Sizemore, 198 F.3d 205, 219 (6th Cir. 1999) (finding lack of jurisdiction on qualified immunity appeal because the district court determined that a genuine issue of material fact remained as to what motivated constructive discharge).

75. *Mitchell*, 472 U.S. at 526.

76. See *Anderson v. Creighton*, 483 U.S. 635 (1987) (remanding qualified immunity issue for discovery); see also *infra* Appendix II: Court Order Granting Limited Discovery for Response to Summary Judgment Motion.

77. See, e.g., Op. at 4 n.2, *In re BLI Farms*, No. 05-2292 (6th Cir. Oct. 13, 2006), <http://www.ca6.uscourts.gov/opinions.pdf/06a0376p-06.pdf>.

78. See authorities collected in Appendix III: Sample Motion to Preserve Trial Date.



However, if this first avenue is not possible, there are alternatives. If a solid entity liability case has been developed (e.g., based on improper policies or failure to train), plaintiff's counsel can dismiss the individual defendants and simply proceed against the entity. This strategy denies to the defense any basis for an appeal but eliminates potential defendants for the jury to hold accountable. Even though the case may already be on appeal, the circuit court can remand the case for defendants to be dismissed if the plaintiff secures from the district court a statement that the district court intends to grant the plaintiff's motion to dismiss the individuals if the case is indeed remanded as the plaintiff requested.<sup>79</sup>

A similar tactic is to dismiss defendants entitled to QI but retain claims pending against private individual defendants who acted under color of state law, such as prison medical service providers, as these individuals are generally not entitled to QI.<sup>80</sup> This strategy should be utilized if you are well positioned to focus the case on the conduct of private individual defendants.

### C. Litigation Tips

This section provides the civil rights litigator with several practical ideas for improving effective case presentations, as through the use of video, deposition strategies, voir dire techniques, and settlement ideas.

#### 1. The Power of Video

Use *Ashcroft v. Iqbal* to your advantage. Many defendants file motions to dismiss, claiming the civil rights plaintiff fails to state a "plausible claim" under § 1983, warranting dismissal of the suit under *Iqbal*. When possible, my colleagues and I attach video evidence to the complaints we file to anticipate and short-circuit this move.<sup>81</sup> We cite *Ashcroft v. Iqbal* as our basis<sup>82</sup> and the Supreme Court's ringing endorsement of video evidence in *Scott v. Harris*.<sup>83</sup> It is important to videotape all important depositions. The results can be game changing.<sup>84</sup> Many local rules permit videotaped depo-

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79. See *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976); Motion for Order in Support of Remand, *Kies v. City of Lima, Ohio*, No. 3:07-CV-01258 (N.D. Ohio Mar. 19, 2009).

80. See *Richardson v. McKnight*, 521 U.S. 399 (1997).

81. See *infra* Appendix I: Sample Complaint Introduction.

82. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

83. *Scott v. Harris*, 550 U.S. 372 (2007); see, e.g., *Jackson v. Hamilton Cnty., Ohio*, No. 1:08-CV-00203 (S.D. Ohio) (attaching video of defendant discharging pepper ball gun at plaintiff to memorandum); *Peabody v. Perry Township, Ohio*, No. 2:10-CV-01078 (S.D. Ohio) (attaching video of defendant tasing plaintiff at top of fence to complaint).

84. See, e.g., *Lowe v. Cuyahoga Cnty./Bd. of Cnty. Commissioners*, No. 1:08-CV-01339 (N.D. Ohio) (psychiatrist admitting that the failure to administer drug caused plaintiff to experience withdrawal and caused his death); *Jennings v. City of Lima*, No. 3:08-CV-01868 (N.D. Ohio) (SWAT training officer explaining difference between objective and subjective standard regarding use of force and later portraying conduct of deceased); *Gray v. Village of*

sitions upon agreement of parties.<sup>85</sup> We often record the depositions ourselves and give the opposing counsel a copy of each deposition DVD. We only use a professional videographer for the most important witnesses in order to cut down on costs. The recorded depositions are valuable aids both at trial and in mediation presentations. In our experience, we have found that it is worth the cost. We also have a court reporter transcribe depositions. Sometimes we even “synch” the written deposition transcript to the video in order make the point even stronger.

## 2. Deposition Goals

Develop specific goals for each deposition you conduct. With a thorough fact investigation prior to filing the complaint and a thorough document production after filing, the plaintiff’s theory of the case should be well developed before depositions begin. In cases involving jail or prison conditions or those involving contact with law enforcement, it may be helpful to start depositions with a “jail 101” witness to explain how a particular jail operates or a “police 101” witness to explain how a police department operates. Sometimes the defendant organization is so confusing or its operations are so dispersed that a Rule 30(b)(6) deposition is needed to sort out where the power lies.<sup>86</sup> When you depose the defendants, be sure to include a portion that is essentially cross examination to capture any admissions. This often involves getting a defendant to agree to rules that should be followed when using force or engaging in the conduct at issue and then applying those rules to the facts of the case at hand.

Attached is a portion of a deposition of Defendant Steve Koebel in *Gray v. Village of Middleport*.<sup>87</sup> He shot the unarmed plaintiff, James Gray, in the face after commanding the drunk and staggering Gray to show his hands, turn around, and get down on the ground all at once.<sup>88</sup> When Gray complied with one of the three commands and turned around, he was shot.<sup>89</sup> This deposition excerpt simply commits Koebel to the reasonable

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Middleport, Ohio, No. 2:09-CV-00868 (S.D. Ohio) (police chief explaining that he “never got around to performance evaluations”).

85. For example, the District Court of the Northern District of Ohio allows for, and even encourages videotaped depositions. See N.D. Ohio R. 32.1, [http://www.ohnd.uscourts.gov/assets/Rules\\_and\\_Orders/Local\\_Civil\\_Rules/Rule321.pdf](http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/Rule321.pdf).

86. In depositions under Federal Rule of Civil Procedure 30(b)(6), the defendant must designate a person who can explain facts related to issues that are important to a case such as the system for use of force investigations. See Fed. R. Civ. Pro. 30(b)(6).

87. See *infra* Appendix IV: Sample Deposition Questioning.

88. Plaintiff’s Memorandum in Response to Motions for Summary Judgment by Defendants Koebel and Village of Middleport at 1-3, *Gray v. Village of Middleport*, No. 2:09-CV-868 (S.D. Ohio Feb. 21, 2011), [http://www.gbfirm.com/litigation/documents/50\\_48-MemoinOpptoMSJ.pdf](http://www.gbfirm.com/litigation/documents/50_48-MemoinOpptoMSJ.pdf).

89. *Id.*

rules police officers should follow when confronting a suspect one-on-one.<sup>90</sup>

### 3. Voir Dire and Argument Strategies

In *Meyer v. McNicholas*, the plaintiff was a sex offender who was assaulted by several men in prison without sustaining any serious physical injuries.<sup>91</sup> The defendant was a retired matronly former sergeant who failed to remove the perpetrators from the prison unit after she was told of their threat.<sup>92</sup> The goal of voir dire in this case was to challenge for cause every jury panel member who could not envision awarding damages to a prisoner and sex offender plaintiff. It is not unusual with this type of voir dire to get eight to ten panel members struck for cause.

The closing argument in *Meyer* is also attached, as it was drafted with Keenan and Ball's principles in mind.<sup>93</sup> The jury proceeded to return a \$40,000 verdict in favor of the plaintiff.<sup>94</sup>

### 4. Approaching Settlement

This Article started by describing noneconomic terms that can help individual cases have an impact beyond the plaintiff(s) in the case. But successful settlements like this do not just happen; they are the product of thorough preparation. Generally, a settlement proposal is not likely to have much impact until discovery is completed, the plaintiff's expert report has been filed, and the defendants have secured their expert report and filed their motion for summary judgment. There may be cases in which an early settlement is possible because the failure to settle will cost the defendants large legal fees even though the plaintiff does not have substantial injuries. In such cases, it is key to propose an early settlement.

We put together a video that tells the story of the case in a "60 Minutes" style, so defendants and other viewers are hit with one uncontroverted fact after another. There is little argument in the narration. The visuals and story all line up to form a compelling narrative. Then we negotiate fair compensation first. When agreement is reached or close on that front, we remind the defendant of our noneconomic proposals and wrap all of the terms together as a single package. This negotiation sequence is important because we do not want to trade client compensation for the reform terms.

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90. See *infra* Appendix IV: Sample Deposition Questioning.

91. See *infra* Appendix V: Sample Voir Dire.

92. *Id.*

93. See generally Ball & Keenan, *supra* note 47; see also *infra* Appendix VI: Sample Closing Argument.

94. Order, *Meyer v. Barbara McNicholas*, 2:07-CV-1253 (S.D. Ohio Dec. 12, 2007).

D. *Attorney's Fees in Civil Rights Cases*

Attorney's fees in civil rights cases are authorized by 42 U.S.C. § 1988.<sup>95</sup> If the plaintiff is the prevailing party, the court can award fees against the losing defendant. This is contrary to the traditional American rule, whereby parties are responsible to pay their own attorneys regardless of the outcome. However, in the interest of justice, § 1988 was established to allow those who could not otherwise afford legal representation to protect their civil rights and to encourage attorneys to take civil rights cases they could not otherwise afford to take.<sup>96</sup> Because civil rights work often involves vulnerable clients who cannot afford the costs of representation, this helps fuel the work of civil rights attorneys. And since fees are only awarded when the client prevails, even the most diligent attorney will lose cases and will get no fees. This is a part of the life of a civil rights attorney, and for this reason, it is important to know what to expect from this process.

## 1. Prevailing Party

To be entitled to attorney's fees, the plaintiff must "prevail."<sup>97</sup> A plaintiff prevails when he succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."<sup>98</sup> This means that the plaintiff need not prevail on every issue. However, when the plaintiff does not prevail on a claim unrelated to the successful claim, the hours spent on the unsuccessful claim are excluded from the calculation of fees.<sup>99</sup> But where the claims are related, a plaintiff who has won "substantial" relief should not have his attorney's fee reduced because the court did not adopt each claim raised.<sup>100</sup> A mathematical comparison of the successful issues versus the issues raised was rejected in *Hensley v. Eckerhart*, instead courts have been granted discretion to make an "equitable judgment."<sup>101</sup>

Importantly, a plaintiff prevailing through settlement rather than litigation does not bar a fee award.<sup>102</sup> In *Johnson v. Jago*, the Sixth Circuit established the test for determining whether a plaintiff is a prevailing plain-

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95. The Civil Rights Attorney Fee Act of 1976, 42 U.S.C. § 1988 (providing for fee award to prevailing party in actions under §§ 1981, 1982, 1983, 1985, Title VI, IX, XX).

96. Melissa Ibrahim, Note, *Bills, Bills, Bills: The Effect of a Rejected Settlement on Attorney's Fees Under the Civil Rights Attorney's Fees Award Act of 1976*, 36 Cardozo L.R. 1987, 1992 (1988). The Fair Housing Act also provides for attorneys' fees to prevailing plaintiffs. 42 U.S.C. § 3613(c)(2).

97. 42 U.S.C. § 1988 (2012).

98. *Hensley v. Eckerhart*, 461 U.S. 424, 441 (1983).

99. *Id.* at 424.

100. *Id.* at 436.

101. *Id.* at 436 n.11, 437.

102. *Maher v. Gagne*, 448 U.S. 122, 123 (1980).

tiff when the case is settled.<sup>103</sup> The court said that to qualify as a “prevailing party” a plaintiff must show two things.<sup>104</sup> First, the plaintiff “must demonstrate that his or her lawsuit was causally related to securing the relief obtained.”<sup>105</sup> Second, the plaintiff “must establish some minimum basis in law for the relief secured.”<sup>106</sup>

If the lawsuit did not end in a judgment on the merits or in a settlement, but rather served as a “catalyst” for voluntary change on the part of the defendant, attorney’s fees are usually not available.<sup>107</sup> However, if the plaintiff personally receives a substantial benefit from the voluntary action, such as the changing of an unconstitutional program or policy directly impacting the plaintiff, fees may still be awarded.<sup>108</sup>

With respect to obtaining fee awards, it is also important for plaintiff’s counsel to sue the proper defendants. While the Eleventh Amendment does not prevent attorney’s fees from being awarded against the state,<sup>109</sup> suits brought only against government officials in their personal capacities cannot lead to fee awards against the governmental entities.<sup>110</sup> Liability on the merits and responsibility for the fee award go hand in hand.

## 2. Determining the Award Amount

The fee applicant bears the burden of establishing entitlement to an award and must provide the court with records of the time billed, with sufficient detail to enable the court to identify distinct claims.<sup>111</sup>

The fee must then be calculated, starting with a determination of the reasonable hours expended multiplied by a reasonable hourly rate.<sup>112</sup> If the plaintiff is successful with regard to some claims but not others, the hours spent on the unsuccessful claims may not be compensated if they were unrelated to the successful claims or were not reasonably expended in pursuit of the ultimate result achieved.<sup>113</sup> Moreover, exceptional success supports an enhanced reward.<sup>114</sup>

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103. Johnson v. Jago, 691 F.2d 283, 286 (6th Cir. 1982).

104. *Id.*

105. *Id.*

106. *Id.*

107. Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep’t of Health and Human Res., 532 U.S. 598, 598 (2001).

108. Othen v. Ann Arbor School Bd., 699 F.2d 309, 313 (6th Cir. 1983).

109. Hutto v. Finney, 437 U.S. 678, 679 (1978).

110. Kentucky v. Graham, 473 U.S. 159, 160 (1985).

111. Hensley v. Eckerhart, 461 U.S. 424, 437 (1982); *see also* Imwalle v. Reliance Med. Products, 515 F.3d 531, 553 (6th Cir. 2008) (discussing how detailed attorney hours must be).

112. *Imwalle*, 515 F.3d at 551. This is sometimes referred to as the “lodestar.” *See* Northcross v. Bd. of Ed. of Memphis Sch., 611 F.2d 624, 642 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

113. *Hensley*, 461 U.S. at 440.

114. *Id.* at 435; *see also* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 554 (2010).

The fee award may also compensate the hours expended by paralegals, law clerks, and recent law school graduates, at prevailing rates.<sup>115</sup>

Under the Prison Litigation Reform Act (PLRA), attorney's fees in prisoner cases are awarded at 150 percent of the amount authorized by the Judicial Council.<sup>116</sup> Effective January 1, 2015, the authorized rate is \$127. This makes the PLRA rate  $\$127 \times 1.5 = \$190.50$ .<sup>117</sup>

### 3. Multipliers

The amount of the lodestar—the reasonable hours expended multiplied by the reasonable hourly rate—can be increased by a multiplier for superior performance, but only in extraordinary circumstances.<sup>118</sup> In *Barnes v. City of Cincinnati*, a multiplier of 1.75 was applied to the calculation of attorney's fees.<sup>119</sup> My firm brought this case on behalf of a transgender employee facing employment discrimination.<sup>120</sup> At the time we brought the case, the Sixth Circuit did not recognize gender identity as a protected class under Title VII. Our success in such a challenging situation, considering the novelty and difficulty of the question, the immense skill required to conduct the case properly, the extraordinary result achieved, and the highly controversial nature of case, made the multiplier appropriate.<sup>121</sup>

### 4. Prevailing Defendant

Unlike a prevailing plaintiff, a prevailing defendant will not usually be entitled to attorney's fees. Fee awards to plaintiffs effectuate congressional policy and punish violators of federal law. These considerations are absent when defendants prevail, so fees will only be awarded to defendants when the action brought was frivolous, unreasonable, or groundless or when the plaintiff continued to litigate after it clearly became so.<sup>122</sup>

### 5. When to File for Fee Awards

The Federal Rules of Civil Procedure specify that a motion for attorney's fees be filed no later than fourteen days after the entry of judgment.<sup>123</sup> However, if there is a local district court rule, that rule will apply

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115. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 275 (1989).

116. *Hadix v. Johnson*, 398 F.3d 863 (6th Cir. 2005).

117. *Chapter 2, 230: Compensation and Expenses of Appointed Counsel*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses>.

118. *Perdue*, 559 U.S. at 546.

119. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

120. *Id.*

121. *Id.* at 746.

122. *Christiansburg Garment v. EEOC*, 434 U.S. 412, 422 (1978).

123. Fed. R. Civ. P. 54(d)(2)(B), *Timing and Contents of the Motion* (Dec. 1, 2009) ("Unless a statute or a court order provides otherwise, the motion must: (i) be filed no later than

instead.<sup>124</sup> For example, the Southern District of Ohio gives forty-five days to file a motion for attorney's fees.<sup>125</sup>

## 6. Costs

Costs are also available under § 1988.<sup>126</sup> This includes the out-of-pocket expenses normally charged to fee-paying clients, such as copying, paralegal hours, travel, and telephone calls.<sup>127</sup> The statutory text was amended to allow courts to include expert witness fees, stating that in “awarding an attorney’s fee . . . the court, in its discretion, may include expert fees as part of the attorney’s fee.”<sup>128</sup>

## 7. Rule 68

If a defendant makes a reasonable settlement offer under Federal Rule of Civil Procedure 68, and the plaintiff rejects it, the plaintiff takes the risk of paying the costs that the defendant incurs in continuing with the litigation.<sup>129</sup> If the plaintiff ultimately receives a judgment less favorable than the unaccepted offer, the plaintiff becomes responsible for those additional costs.<sup>130</sup> If the judgment is better than the offer, however, the plaintiff is not responsible for those costs.<sup>131</sup> This is designed to encourage plaintiffs to take reasonable settlement offers.

The rule includes “costs,” so when attorney’s fees are considered a part of costs (as they are under most statutes providing for attorney’s fees), then attorney’s fees are included as costs under Rule 68.<sup>132</sup> If a plaintiff rejects a reasonable settlement offer, receives a less favorable judgment, and pays for the post-offer costs of the defendant, that plaintiff cannot receive

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14 days after the entry of judgment; (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award; (iii) state the amount sought or provide a fair estimate of it; and (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.”).

124. *White v. New Hampshire Dep’t of Emp. Servs.*, 455 U.S. 445, 454 (1982).

125. S.D. Ohio Local Rule 54.2 (2014) (“Motions for attorney fees under Fed. R. Civ. P. 54 must be filed not later than forty-five days after the entry of judgment.”).

126. *Northcross v. Bd. of Educ. Memphis City Sch.*, 611 F.2d 624, 633 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *see also* 42 U.S.C. § 1988(c) (2012).

127. *Northcross*, 611 F.2d at 639.

128. 42 U.S.C. § 1988(c).

129. Fed. R. Civ. P. 68(d).

130. *Id.* (“Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.”).

131. *Id.*

132. *Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994) (Rule 68 does not apply to attorney fees in FLSA case where statutory fees are in addition to costs instead of “as costs.”).

post-offer attorney's fees from the defendant.<sup>133</sup> The plaintiff remains eligible to receive attorney's fees incurred prior to the offer.<sup>134</sup>

This rule is inapplicable when the plaintiff loses, as it assumes that a judgment is made in favor of the plaintiff.<sup>135</sup>

## 8. Appeal

There are three issues to consider with regard to appeals. The first is the impact of an unresolved question of attorney's fees on the ability to appeal. The second is how to review the award of attorney's fees on appeal. The third concerns frivolous appeals. The first question was addressed in *Budinich v. Becton Dickinson and Co.*, in which the Supreme Court implemented the uniform rule that an unresolved issue concerning attorney's fees for the litigation in question will not prevent judgment on the merits from being final for the purposes of appeal.<sup>136</sup>

When an award of attorney's fees is appealed, the general rule is that the proper standard of review is abuse of discretion.<sup>137</sup> In the Sixth Circuit, there is also a three-tier standard of review for determining the reasonableness of the hours billed. In *Wooldridge v. Marlene Industries Corp.*, the court stated that the "clearly erroneous" standard applies to the review of a district court's determination that a prevailing plaintiff's attorney has or has not worked the billed hours.<sup>138</sup> When reviewing legal questions concerning the relationship of hours billed to the issues on which the plaintiff prevailed, the court of appeals should determine whether the district court erred.<sup>139</sup> When looking at whether the party used poor judgment in billing the hours spent on the case, the court should look to see whether the district court "misapplied the reasonable practices of the profession."<sup>140</sup>

Finally, a court may award double costs and attorney's fees under Rule 38 of the Federal Rules of Appellate Procedure for frivolous appeals.<sup>141</sup>

## 9. Miscellaneous

A couple of final notes on attorney's fees are useful at this point. Firstly, the standards used are considered generally applicable in all cases where Congress has authorized attorney's fees. This means that precedent

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133. *Marek v. Chesny*, 473 U.S. 1, 12 (1985).

134. *Id.*

135. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 350-52 (1981).

136. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988).

137. *See Evans v. Jeff D.*, 475 U.S. 717, 738 (1986); *Blum v. Stenson*, 465 U.S. 886, 900 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

138. *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1175 (6th Cir. 1990).

139. *Id.*

140. *Id.*

141. *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526, 531 (6th Cir. 1995).



from a § 1983 case where attorney's fees were awarded under § 1988 will be equally applicable to a Title VII case for the purpose of attorney's fees.<sup>142</sup> Secondly, the time spent collecting a judgment obtained against the defendant is also subject to the attorney's fee provisions, and fees may be awarded for that time.<sup>143</sup>

#### E. *Cases Appropriate for Injunctive Relief*

My firm is very active in lawsuits that seek injunctive relief, such as litigation challenging racial profiling and excessive force,<sup>144</sup> unconstitutional prison conditions,<sup>145</sup> abortion restrictions,<sup>146</sup> and marriage restrictions.<sup>147</sup> We just completed an eight-year effort to reform the state juvenile prison system in Ohio with excellent results.<sup>148</sup> Whenever there is a basis to seek injunctive relief, doing so is more effective and enforceable than seeking noneconomic terms in private settlement agreements. Injunctions can be enforced with contempt motions, which is often necessary when government officials lose their will to cooperate.<sup>149</sup> But if an injunction is not feasible, the tools discussed in this Article for developing meaningful noneconomic terms are available.

### CONCLUSION

Individual actions, such as the ones discussed in this Article, provide an important way to push defendants toward reform and give clients an additional legacy for their loved ones. I have pursued noneconomic relief for most of my thirty-nine years as a litigator. Very early on, I realized that if we limit our relief to money, no wisdom or real change is likely to come about. Indeed, we enable the abuses, instead of doing something to stop them, as a monetary award may simply be viewed as the cost of doing business. As a result of pursuing a case strategy mindful of reform opportunity, my colleagues and I have accomplished some very real changes,

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142. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1982).

143. *Balark v. Curtin*, 655 F.2d 798, 803 (7th Cir. 1981).

144. *See, e.g., Tyehimba v. City of Cincinnati*, No. C-1-99-317 (S.D. Ohio 2002); *Matje v. Leis*, 571 F.Supp. 918 (S.D. Ohio 1983).

145. *See, e.g., McCullum v. Butler Cnty.*, No. 1:08-CV-00387-HJW (S.D. Ohio 2008); *Aldini v. Johnson*, No. 3:07-CV-00183-TMR (S.D. Ohio 2007); *Tolar v. Richland Cnty.*, No. 1:14-CV-00517 (N.D. Ohio 2014).

146. *See, e.g., Planned Parenthood Sw. Ohio v. Hodges*, No. 1:15-CV-568, (S.D. Ohio 2015) (currently pending before the Southern District of Ohio District Court); *Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406 (6th Cir. 2008); *Women's Med. Prof'l Corp. v. Baird*, 2008 WL 545015 (S.D. Ohio 2008); *Cincinnati Women's Servs. v. Taft*, 468 F.3d 361 (6th Cir. 2006).

147. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

148. *J.P. v. Taft*, No. 2:04-CV-692 (S.D. Ohio 2010).

149. *See infra* Appendix VII: Sample Motion to Enforce a Consent Decree.

developed closer relationships with our clients, earned a reputation for transformative advocacy among defense counsel, and enjoyed a deeper sense of satisfaction with our work.

## APPENDICES

APPENDIX I: SAMPLE COMPLAINT INTRODUCTION<sup>150</sup>

This civil rights action challenges the excessive force used against Michael Kacmarik by Defendant Mitchell as well as the failure of nearby prison employees who failed to protect Mr. Kacmarik from Defendant Mitchell's cruel punishment of Mr. Kacmarik. Mr. Kacmarik is disabled and while he was incarcerated at Mansfield Correctional Institution he used a wheelchair. Even though he knew Mr. Kacmarik was disabled, Correction Officer Mitchell ordered Mr. Kacmarik to stand up and walk down the hallway into a holding cell. At the time, Mr. Kacmarik's legs were shackled together, he was handcuffed, and his handcuffs were secured to a belly chain around his waist. When Mr. Kacmarik explained he could not walk Officer Mitchell jerked him out of the chair and threw him down to the ground. Defendant Mitchell then dragged him down the hallway by his belly chain and dropped him into a cell. A supervisor and three Mansfield staff members knew Mr. Kacmarik was unable to walk, yet they watched Defendant Mitchell abuse Mr. Kacmarik and failed to intervene to protect him from harm. Defendants' actions were captured on video, a copy of which is incorporated in this complaint and filed along with the complaint.<sup>151</sup> Mr. Kacmarik brings this action to secure compensation and other relief and in the hope that this case will help prevent other abuse of disabled inmates at the Mansfield Correctional Institution.

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150. Compl. ¶ 1, *Kacmarik v. Mitchell*, No. 1:15-CV-2062 (N.D. Ohio Oct. 6, 2015).

151. The video recording was provided by the Ohio Department of Rehabilitations and Corrections in response to a public records request. Many civil complaints are now challenged as failing to state a claim under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell-Atlantic v. Twombly*, 550 U.S. 544 (2007). In response to such motions plaintiffs must demonstrate that allegations are "plausible." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570. There is no better way to demonstrate the plausibility of a fact than a video of the events in question. See, e.g., *Scott v. Harris*, 550 U.S. 372, 381 (2007) (videotape controlled over contradicting testimony); *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir. 2007) (same).

APPENDIX II: COURT ORDER GRANTING LIMITED DISCOVERY FOR  
RESPONSE TO SUMMARY JUDGMENT MOTION<sup>152</sup>

This matter is before the Court on the Motion of Defendants Jason Miller and the United States to Stay Discovery in these cases pending resolution of Officer Miller's motion to dismiss/or in the alternative for summary judgment based upon qualified immunity. (ECF #37 in Case No. 12 CV 1057 and ECF #14 in Case No. 13 CV 1522). Also before the Court is Plaintiff's Motion for Discovery under Rule 56(d), in which Plaintiff requests that the Court defer or deny Defendants' Motion for Summary Judgment to allow Plaintiff time to take discovery. (ECF #39 in Case No. 12 CV 1057)

## PROCEDURAL HISTORY

Plaintiff filed both of the actions at issue following an incident in a Wal-Mart parking lot on December 3, 2011. In that incident, Officer Jason Miller, a Strongsville Police Officer and a member of the Northern Ohio Law Enforcement Task Force ("NOLEFT"), fired ten bullets at Plaintiff when he allegedly failed to stop his vehicle and allegedly reached into his jacket following a drug deal. On April 30, 2011, Plaintiff brought a 42 U.S.C. § 1983 action against Officer Miller and the City of Strongsville alleging excessive force. (Case No. 12 CV 1057). As discovery was about to begin, Plaintiff's counsel was informed that Officer Miller was acting as a federal task force officer when he shot Plaintiff. At that point, the action was stayed and Plaintiff exhausted his administrative remedies in order to file a claim against the United States pursuant to the Federal Tort Claims Act ("FTCA"). Plaintiff filed an FTCA action against the United States on July 15, 2013 (Case No. 13 CV 1522) and amended his complaint in Case No. 12 CV 1057 which contains claims against the City of Strongsville and an individual capacity *Bivens* claim against Officer Miller. The cases have been consolidated for convenience of the parties and Court.

Officer Miller filed a Motion to Dismiss or, alternatively, motion for Summary Judgment (ECF #36) on November 15, 2013, asserting that the shooting was justified and that he is entitled to qualified immunity. He attaches a number of exhibits, including the police investigative report, to his motion along with the declaration of Lori Lee Holland to authenticate the records. These exhibits are cited throughout Officer Miller's rendition of the facts. While Officer Miller asserts that he is entitled to qualified immunity based solely upon the allegations contained in the amended complaint, the Court finds that it is only the exhibits attached to the motion which support Officer Miller's factual recitations. As such, the Court will treat Defendant's motion as a motion for summary judgment. Plaintiff

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152. Order, *McKissic v. Miller*, Nos. 1:12 CV 1057 & 1:13 CV 1522 (N.D. Ohio Dec. 20, 2013).

has filed a motion pursuant to Rule 56(d) to permit discovery before responding to Defendant's motion for summary judgment, supported somewhat belatedly, by counsel's declaration in support of why the requested discovery is necessary to respond to Defendant's Motion for Summary Judgment. While cognizant that the issue of qualified immunity should be resolved at the earliest possible point in the proceedings, it is nevertheless necessary to gather sufficient evidence in order to permit the Court to determine if a Constitutional violation occurred. Although Defendants wish the Court to make this determination based upon Officer Miller's police report, Plaintiff's declaration and the report of forensic expert David Balash, support Plaintiff's contention that there may be material questions of fact regarding some elements of Officer Miller's police report. Accordingly, Defendants' Motion to Stay Discovery (ECF #37 and #14) are DENIED and Plaintiff's Motion for Discovery under Rule 56(d) (ECF #39) is GRANTED. Plaintiff will be permitted to take the following limited discovery before responding to the Motion for Summary Judgment:

- the deposition of Officer Miller;
- the deposition of eyewitnesses to the shooting;
- the deposition of the officer(s) responsible for the crime scene investigation;
- access to unredacted contemporaneous reports by eyewitnesses; and
- access to any forensic analysis of the shooting and supporting tests done by law enforcement.

This discovery shall be completed by February 24, 2014. Plaintiff's response to the Motion for Summary Judgment shall be filed by March 24, 2014.

IT IS SO ORDERED.

APPENDIX III: SAMPLE MOTION TO PRESERVE TRIAL DATE<sup>153</sup>

## I. INTRODUCTION

This court has denied summary judgment to the two individual officers in this excessive force case. Doc. 65. Defendants in many cases have routinely taken this opportunity to file an appeal on qualified immunity and delay the case for one to two years. But an appeal on this record will not support appellate jurisdiction and therefore such an appeal should not interfere with this court's scheduling of the final pretrial and trial of the action. As set out below, the summary judgment record in this case shows that any appeal raising qualified immunity will be frivolous. This Court should use its power to declare any appeal frivolous and proceed as scheduled to trial.

## II. ARGUMENT

A. *Frivolous Appeals do not Divest the Court of Jurisdiction*

If this court certifies an interlocutory appeal as frivolous it is free to proceed with the trial while the appeal is pending. The Supreme Court approved of this practice in civil rights cases in *Behrens v. Peltier*, 516 U.S. 299, 310-311 (1996).

In the present case, for example, the District Court appropriately certified petitioner's [qualified] immunity appeal as "frivolous" . . . This practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings. *See, e.g., Chuman v. Wright*, 960 F.2d 104, 105 (C.A.9 1992); *Yates v. Cleveland*, 941 F.2d 444, 448-449 (C.A.6 1991); *Stewart v. Donges*, 915 F.2d 572, 576-577 (C.A.10 1990); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (C.A.7 1989).

In *Yates v. Cleveland*, *supra* (cited by Supreme Court) the Sixth Circuit had an extended discussion of the potential for abuse in excessive force and other civil rights cases by defendants who file qualified immunity appeals that lack merit. The Court stated that, "[u]nfortunately, *Forsyth* appeals can be employed for the sole purpose of delaying trial." The Court noted with approval the analysis and solution proposed by the Seventh Circuit:

The Seventh Circuit has directly addressed this issue in *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir.1989), which examined the jurisdictional bases of *Forsyth* appeals from a denial of qualified immunity. In *Apostol*, Judge Easterbrook's opinion noted that a *Forsyth* appeal divests a district court of jurisdiction to conduct a trial until qualified immunity is resolved. *Id.* at 1338. How-

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153. Plaintiff's Motion to Preserve Final Pretrial and Trial Dates, *Kies v. City of Lima*, No. 3:07-CV-01258 (N.D. Ohio Mar. 16, 2009).

ever, delaying trial in order to allow a defendant to appeal a denial of qualified immunity prolongs the process, often to the disadvantage of the plaintiff:

During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined. Most deferments will be unnecessary. The majority of *Forsyth* appeals—like the bulk of all appeals—end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal. Proceedings masquerading as *Forsyth* appeals but in fact not presenting genuine claims of immunity create still further problems. *Apostol*, 870 F.2d at 1338-39. In order to prevent *Forsyth* appeals from becoming an "entitlement to block the trial," *id.* at 1339, *Apostol* makes the following suggestions (based on an analogy with double jeopardy cases): (1) allow the district court to certify an appeal as frivolous and begin the trial; or (2) expedite through summary disposition appeals in which the defendant has "wait[ed] too long after the denial of summary judgment" or "use[d] claims of immunity in a manipulative fashion[.]" *Id.* at 1339.

*Yates v. Cleveland*, 941 F.2d at 448-449 (emphasis added).

Courts continue to approve of the practice of certifying the appeal as frivolous in order to retain jurisdiction. *Davenport v. City of Columbus, GA*, 2008 WL 3871729 (M.D. Ga. Aug. 18, 2008)(trial court retained jurisdiction as attempted qualified immunity appeal is without merit); *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 94-96 (1st Cir. 2003)(acknowledging that certifying appeal as frivolous is sound practice for retaining trial jurisdiction); *Manning v. Dye*, WL 21704431 (N.D. Ill July 22, 2003)(retaining jurisdiction and holding immunity appeal to be "baseless"); *Ruffino v. Sheahan*, 61 F. Supp. 2d 767 (N.D. Ill. 1999) (holding appeal to be "frivolous") *aff'd*, 218 F.3d 697 (7th Cir. 2000); *Gilbaugh v. Balzer*, 2001 WL 34041845 (D. Ore. Sept. 6, 2001) (same); *Langley v. Adams County, Colo*, 987 F.2d 1473, 1477 (10th Cir. 1993) (describing practice for certifying immunity appeals as frivolous and allowing trial courts to retain jurisdiction); *Andre v. Castor*, 963 F.Supp. 1169 (N.D. Fla. 1997) (same).

It is clear, therefore, that the Supreme Court, the Sixth Circuit and other Courts across the country have approved of the practice of declaring a qualified immunity appeal to be frivolous and thereby retaining jurisdiction in the trial court.

B. *What is a Frivolous Qualified Immunity Appeal?*

A qualified immunity appeal based on contested facts is frivolous and does not provide a basis for an interlocutory appeal.

The Supreme Court has created a two-tiered test to determine whether or not defendants are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). The first question a court must answer is whether the facts alleged show the officer's conduct violated a constitutional right. If that question is answered affirmatively, the court must then ask whether the right alleged was clearly established when the violation was alleged to have occurred. *Id.* at 201. The order for answering those questions was recently relaxed by the Court but the essential questions related to qualified immunity remain unchanged. *Pearson v. Callahan*, 129 S.Ct. 808 (2009). While the existence of qualified immunity is typically a question of law, the task simply cannot be done so long as the facts are in dispute. In such instances immunity decisions must necessarily wait on the fact finder determinations. *Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir. 1989). When a Court denies qualified immunity because facts material to the defense are in dispute, a qualified immunity appeal does not lie. An interlocutory appeal may be taken from the district court's denial of qualified immunity only when the immunity issue can be decided on appeal as a matter of law. When denial of summary judgment is based upon a determination that there are genuine issues of material facts, an appeal cannot be taken. *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151(1995).

*Johnson* is very instructive to this Court. The plaintiff in that case alleged that he was beaten by the defendant law enforcement officers. The appellants claimed that there were insufficient facts to hold them as defendants regarding the alleged beating. The district court held that there were contested material facts and denied summary judgment. The Seventh Circuit held that it lacked jurisdiction because contested facts cannot support a qualified immunity appeal. The Supreme Court affirmed. In a unanimous decision, the Supreme Court noted that interlocutory appeals can cause harm, can make it more difficult for trial judges to do their job, and can delay proceedings and add costs. *Id.* The immunity appeals also create additional appellate court work especially when the trial, if it had just proceeded, would have eliminated the need for the appeal. *Id.* In *Johnson*, the Court held the record on summary judgment raised a genuine issue of fact whether the defendants beat or failed to protect the plaintiff and therefore no qualified immunity appeal was allowed. *Id.* at 2156.

The Supreme Court reiterated its holding a year later and narrowed qualified immunity jurisdiction to disputes "concerning an abstract issue of law relating to qualified immunity . . . typically, the issue whether the federal right allegedly infringed was clearly established." *Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S.Ct. 834, 842 (1996). In other words, if what is at issue in the appeal is nothing more than "whether the evidence could sup-



port a finding that particular conduct occurred,” there is no appellate jurisdiction because that question is inseparable from the merits of the plaintiff’s claim. *Id.*

The Sixth Circuit has followed the Supreme Court’s ruling and made it clear that there is no appellate jurisdiction over a qualified immunity appeal when the facts are in dispute. See *Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998):

We hold that in order for such an interlocutory appeal based on qualified immunity to lie, the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff’s case. Here the defendants have not so conceded the facts. The appeal should not have been filed because there is clearly a factual dispute at the heart of the qualified immunity issue, and so we dismiss this interlocutory appeal.

Recently the Sixth Circuit held that it lacked jurisdiction in a police misconduct case where the qualified immunity appeal was grounded in a factual dispute. In *Carter v. City of Wyoming*, 2008 WL 4425986 (6th Cir. Oct. 1, 2008) the plaintiff alleged that the defendants used excessive force when arresting her for disorderly conduct following an altercation at a jewelry store. The defendants’ motion for summary judgment was denied because the district court found that genuine questions of material fact existed as to whether or not a constitutional violation occurred, which precluded a finding of qualified immunity. The Defendants argued that videotape evidence directly contradicted the plaintiff’s version of the facts, and that, consequently, there was no issue of genuine fact. The Sixth Circuit rejected this argument, and found that, despite this videotape, questions of genuine fact existed, particularly with respect to conduct that allegedly occurred outside of the store and away from the video camera. As such, the Sixth Circuit found that the evidence presented by the officer “at most presented evidence that cast doubt on [Plaintiff’s] version of the facts. That is hardly enough for us to conclude that ‘no reasonable jury’ could find that [the plaintiff] was injured and it does not overcome Johnson’s prohibition on appellate second guessing of the appropriate inferences to draw from the record.” *Id.* at \*3.

Similarly, the Sixth Circuit rejected an appeal of a trial court decision denying summary judgment on the grounds that genuine issues of material fact exist in *Gregory v. City of Louisville*, 444 F. 2d 725 (6th Cir. 2006). In this case, several defendants appealed the district court’s denial of summary judgment. The court repeatedly reiterated that “the district court’s determination that there exists a triable issue of fact cannot be appealed on an interlocutory basis, even when that finding arises in the context of an assertion of qualified immunity.” *Id.* at 742.

A qualified immunity appeal was also dismissed in *Whittie v. Doyle*, 228 Fed.Appx. 512 (6th Cir. 2007). The district court held that the plaintiff had presented sufficient evidence to prove his case and that the evi-

dence creates a material question of fact as to whether or not a constitutional violation took place. The defendants then appealed. Plaintiff filed a motion to dismiss, citing *Johnson*. The appellate court granted the plaintiff's motion, finding that determinations of evidentiary sufficiency are not immediately appealable merely because they happen to arise in a qualified immunity case, and that, in this case the appellants merely raise factual arguments that take exception to the trial court's finding that the plaintiff produced sufficient evidence to resist summary judgment on the issue of qualified immunity. *Id.* at 515.

The decisions set out above follow a steady stream of consistent Sixth Circuit rulings on this issue. See *Strutz v. Hall*, 2005 WL 451786, at \*2 (6th Cir. 2005) (appeal dismissed) ("We conclude that the resolution of this case hinges on a question of fact, not a question of law or a mixed question of law and fact"); *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999) (court lacked jurisdiction on qualified immunity appeal because the district court determined that a genuine issue of material fact remained as to what motivated their constructive discharge); *Ellis v. Washington County and Johnson City, Tenn.*, 198 F.3d 225 (6th Cir. 1999) (appeal dismissed because there was a factual dispute (established by hearsay) whether defendant's actions were deliberate indifference); *Little v. Wylie*, No. 99-5545, 2000 WL 178406, (unreported) (6th Cir. 2000) appeal dismissed).

Thus, a qualified immunity appeal grounded in a fact dispute is frivolous or without merit. Such an appeal does not divest the district court of jurisdiction or vest jurisdiction in the appellate court. Such an appeal should not cause a trial to be delayed.

### C. *Is a Potential Appeal in this case Frivolous?*

Yes. The issue should be addressed based upon the summary judgment record. That record is now closed. As set out in that briefing, defendants do not concede the direct evidence and the inferences most favorable to Plaintiff Kies. This Court found numerous instances where material facts are in dispute. Doc. 65. Moreover, as this Court correctly determined, the standard for the determination of those facts is clearly established and there is no unsettled area of law that would make the conduct alleged by the plaintiff and supported by the record in this case protected under the constitution. *Id.*

This case presents an excellent opportunity to give guidance on a typical problem that arises throughout this district. Qualified immunity appeals at this late stage are almost by definition designed solely for delay. The burden of exposing the public servant to litigation has been almost completely borne by the defendants except for the trial itself. The purpose of the court-made doctrine (to relieve public servants of the burdens of meritless cases) will not be served by an appeal in this clearly jury-worthy case. Moreover, delaying the trial and waiting for plaintiff to file a motion to dismiss the appeal in the Sixth Circuit will not achieve the goal of this

motion since Plaintiff will lose his spot on this court's trial docket and wait in line for months as the Sixth Circuit grinds through its congested docket.

Finally, it is appropriate to file this motion now, even before a qualified immunity appeal is filed, in order to provide the Court the benefit of this analysis before it automatically assumes that a notice of appeal will divest it of jurisdiction. As set out above, this Court does not lose jurisdiction when a qualified immunity appeal is filed from a record such as this. The guidance of the Sixth Circuit has been provided on numerous occasions and it is certainly appropriate to rely on that guidance and preserve the final pretrial and trial dates in this case.

### III. CONCLUSION

Plaintiff respectfully requests that this Court proceed to trial as scheduled regardless of any potential qualified immunity appeal since any such appeal will necessarily be grounded in contested material facts.

APPENDIX IV: SAMPLE DEPOSITION QUESTIONING<sup>154</sup>

Q All right. We've talked about your trying to determine what a reasonable officer would do before you use force, your assessment of the suspect, the environment, and alternatives to use of force. Do you try to do that every time?

A Yes.

Q Before you use force?

A Yes.

Q And you try to do that even though you have to do this quickly, and these are split-second assessments?

A Yes.

Q And you do that because that is what you'd expect a reasonable officer to do, right?

A Yes.

Q So would you agree, everything else being equal, that an officer should not needlessly take actions that would endanger the public?

A Right.

Q And would you agree, as a general matter and everything else being equal, that an officer should not needlessly take actions that would endanger the suspect?

A Yes.

Q And would you agree, as a general matter, that if an officer has two choices and one—and everything else is equal—and one choice is safer for the public than another, you'd take the safer course, right?

A Yes.

Q And similarly, if everything else is equal, and an officer has two choices, and one is safer for the suspect than the other, you take that course, right?

A Yes.

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154. Koebel Dep. 35:3-36:12, Apr. 6, 2010, Gray v. Village of Middleport, Ohio, No. 2:09-CV-868 (S.D. Ohio), Thomas v. Village of Middleport, Ohio, No. 2:10-CV-139 (S.D. Ohio).

APPENDIX V: SAMPLE VOIR DIRE<sup>155</sup>

Members of the panel, in this case a former convict is suing a former sergeant for failing to protect him. Mr. Meyer says he warned the sergeant about inmates who were threatening him, the sergeant said those inmates would be removed from the unit, the sergeant did not remove those inmates and when Mr. Meyer came back he was attacked.

Anyone have a problem . . . with the idea that a former convict can even do this - come into court and make such accusations against his jailers?

. . .

So when the judge tells you that John Meyer has a right to be in this court and a right not to be beaten, will you follow the law and serve on this case with an open mind?

. . .

John Meyer is a sex offender - his crime is unlawful sexual conduct with a minor - he was 19 and had sex with a 14 year old - he has a son from that relationship.

How many of you are troubled by Mr. Meyer's criminal record?

. . .

Will that natural feeling of disgust or anger make it hard for you to accept that John Meyer has a right to use the courts to make these claims against an officer that they violated his constitutional rights?

. . .

You will learn that Sgt McNichols served as a correction officer for 13 years - no discipline - retired a few months after this incident - and now she has to come back and face this lawsuit claiming that she failed to protect an inmate.

Do any of you feel sympathy for her [will that feeling of sympathy make it a lot harder to be fair to John Meyer?]

. . .

Do you think Sgt McNichols should get a pass because she must have done her job OK for most of the inmates she supervised?

. . .

This is not just a swearing match between a former convict and a correction sergeant. The judge will instruct you that the Eighth Amendment to the United States Constitution imposes on correction officers this obligation to protect inmates from violence at the hands of other inmates . . . .

If you hear all of the evidence and law in this case and decide based on the evidence and law that the convict should win and that Sgt McNichols did in fact fail to protect him from attack- will you be OPEN TO AWARDING MONEY DAMAGES to the prisoner as compensation for his injuries.

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155. Ex. 8 Voir Dire, 7-12, Meyer v. McNicholas, 2:07-CV-1253 (S.D. Ohio).

. . .

Anyone here feel they would reduce a fair award because they don't want a sex offender receiving that much money?

. . .

The judge will also instruct you that if the Plaintiff wins you should also consider the physical pain and the emotional and mental harm to the plaintiff.

Is awarding [money] for emotional pain and suffering too much for anyone?

. . .

Is there anyone here who thinks that she/he cannot award punitive damages to an inmate?

APPENDIX VI: SAMPLE CLOSING ARGUMENT<sup>156</sup>

Members of the Jury, on behalf of my partner, Jennifer Branch and our client John Meyer, I want to thank you for your patience with the delays and for your careful attention to the evidence in this case.

Let's look first at the big picture:

We live in a society full of institutions. Our children are in schools and juvenile facilities. Our mentally ill citizens are in locked hospital wards. Our elderly are in retirement homes and nursing homes. And many other citizens are in jails and prisons. We love our children that we send to school. We love our parents that reside in retirement homes. We love our brothers, cousins and friends who screw up and do time in jails and prisons. We give up control when our loved ones go to these places. We expect that our loved ones will be safe. We must trust that the staff will hold them safely.

In this case inmate John Meyer put his trust in prison staff member Sgt. McNichols. He warned Sgt McNichols that he was in danger from other inmates. Sgt McNichols knew this was serious but left John housed in the same block with the threatening inmates anyway. They attacked him just as he feared. John says he is sure he warned Sgt McNichols. She says variously that, (1) he did not warn her and (2) she does not know if he warned her. When asked at one point about whether John warned her, Sgt McNichols said, "I'm not saying if he did or did not."

Within hours of the attack Lt. York's incident report put the prison on notice of John's claim that he had warned Sgt McNichols, but no one investigated. No one from the prison has ever interviewed Sgt McNichols about John's warning. With no action by the prison John turned to this court. And turned to you, the jury, the members of the community. John wants fair compensation but through the very process of bringing this case and seeking your help he wants to do his part to make sure this does not happen again in any institution in this state whether it be a school, hospital, elderly center or lock-up. Staff must protect our loved ones.

Think of it this way. Sgt McNichols is like a person operating a car. Most of the time she stops at red lights. She knows red lights are critical for safety. She knows that if she is looking at a red light oncoming cars have a green and they will be proceeding through the intersection. One day she is rushed and decides to run the red light and boom the foreseeable crash happens. That is reckless. And as we have just seen John's warning was the red light in this case. Sgt McNichols was reckless when she ignored it and John was attacked.

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156. Ex. 9, at 1, 7, Closing Argument, Meyer v. McNicholas (Aug. 19, 2009).

APPENDIX VII: SAMPLE MOTION TO ENFORCE A CONSENT DECREE<sup>157</sup>

## II. THE OHIO DEPARTMENT OF YOUTH SERVICES SHOULD BE HELD IN CONTEMPT OF THE CONSENT DECREE.

ODYS HAS FAILED TO TAKE ALL REASONABLE STEPS WITHIN ITS POWER TO COMPLY WITH THE CONSENT DECREE AND IS THEREFORE IN CONTEMPT.

It is well established that federal courts may enforce their orders through the power of civil contempt. See *Hutto v. Finney*, 437 U.S. 678, 690 (1978); *Duran v. Carruthers*, 885 F.2d 1492 (10th Cir. 1989). In this case ODYS has not complied with the consent decree of March 6, 2007; it has not adhered to this Court's clear mandate and order.

The applicable civil contempt standard was detailed by the Sixth Circuit in *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991). "The petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order." *Id.* at 707 (citing *NLRB v. Cincinnati Broze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987)). In *Glover*, the court had previously ordered the defendants to comply with various requirements in an effort to create "educational and vocational opportunities for female prison inmates comparable to those offered to male inmates," including a requirement to provide access to the courts. *Id.* at 705, 701. The court order at issue, as in the present case, was a negotiated settlement. *Id.* at 710. The defendants argued that "they [had] done all they [could] to comply with the district court's . . . orders and, therefore, should not be held in contempt." *Id.* at 708. The *Glover* court rejected this argument, emphasizing that "the test is not whether defendants made a good faith effort at compliance but whether the defendants took all reasonable steps within their power to comply with the court's order." *Id.* at 708 (citing *Peppers v. Barry*, 873 F.2d 967, 969 (6th Cir. 1989)). Indeed, "good faith is not a defense to civil contempt." *Id.*; see also *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1948) (explaining that, in a civil contempt proceeding, the defendant's subjective intent is not a factor to consider, because civil contempt serves a remedial, rather than punitive purpose).

The *Glover* court further explained, in quoting *Aspira of New York, Inc. v. Board of Education of New York*, 423 F.Supp. 647, 654 (S.D.N.Y. 1976), that the defendants were in contempt because they "fell far short of the requisite diligence." When faced with the court order, the defendants were required, yet failed, "to marshal their own resources, assert their high authority, and demand the results needed from subordinate persons and agencies in order to effectuate the course of action required by the consent decree." *Glover*, 934 F.2d at 708; see also *Bad Ass Coffee of Hawaii, Inc. v. Bad Ass Coffee Ltd. Partnership*, 95 F. Supp. 2d 1252, 1256 (D. Utah 2000)

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157. Plaintiff's Combined Motion to Show Cause Why Defendants Should Not be Held in Contempt 23-25, to Conduct Discovery, and to Enforce Provisions of the Consent Decree, J.P. v. Taft, No. 2:04-CV-692 (S.D. Ohio Oct. 7, 2010).



(employing the “all reasonable steps” test and noting that a party must be “reasonably *diligent and energetic* in attempting to accomplish what [is] ordered”) (emphasis added).

Finally, the plaintiff in a civil contempt proceeding has the initial burden to demonstrate that the defendant has not complied with the applicable court order. However, once noncompliance is shown, the burden shifts to the defendant to prove an inability to comply. As the Tenth Circuit explained in 1983:

In a civil contempt proceeding, . . . [the plaintiff] need prove only that the defendant has failed to comply with a valid court order. It need not prove that the defendant is able to comply. . . . [Once the plaintiff has met its burden,] the defendant [must produce] detailed evidence regarding his ability to comply with the order.

*Heinold Hog Market, Inc. v. McCoy*, 700 F.2d 611, 615 (10th Cir. 1983) (internal citation omitted); see also *United States v. Bryan*, 339 U.S. 323, 330–34 (1950); *NLRB v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973). “[T]he federal rule is that one petitioning for an adjudication of civil contempt does not have the burden of showing that the respondent has the capacity to comply. . . . The contrary burden is on the respondent.” *Trans Ocean*, 473 F.2d at 616 (citations omitted).

Plaintiffs respectfully request that the Court exercise its contempt power here. The unfortunate facts enumerated in this motion are clear and convincing; ODYS’s noncompliance with the March 6, 2007 consent decree constitutes contempt of this Court. The evidence previously outlined suggests that ODYS has not been diligent, has not been energetic, but rather “ha[s] displayed an evidence sense of nonurgency bordering on indifference.” See *Aspira*, 423 F.Supp. at 654. ODYS has ignored its duty to marshal resources, to assert authority, and to demand results from subordinates like Sharon Hicks. In short, ODYS has not taken all reasonable steps to comply with this Court’s order and, consequently, it should be held in contempt. As stated above, the noncompliance is clear, and thus, the burden should now shift to the Defendants to prove an inability to comply.