IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JEREMY C. MYERS, Appellant/Cross-Appellee,	
v.	Case No. 12-1487
BRIAN KOOPMAN, Appellee/Cross-Appellant.	

APPELLEE/CROSS-APPELLANT'S RESPONSE TO APPELLANT/CROSS-APPELLEE'S MOTION FOR DISMISSAL OF CROSS-APPEAL FOR LACK OF JURISDICTION

Appellee/Cross-Appellant Brian Koopman ("Koopman"), by and through his attorneys, Wick and Trautwein, LLC, hereby responds as follows in opposition to Appellant/Cross-Appellee's Motion for Dismissal of Cross-Appeal for Lack of Jurisdiction ("Motion"):

ADDITIONAL FACTS

In addition to those assertions of "Facts" set forth in the Motion, Koopman makes note of the fact that he has cross-appealed on the basis of qualified and absolute immunity as alternative grounds supporting the district court's judgment in Koopman's favor should this Court be inclined to find any reversible error in the lower court's judgment that was based exclusively on statute of limitations and constitutional analysis grounds.

RELEVANT LAW AND ANALYSIS

While it is true that a party generally cannot appeal from a judgment in its favor, "[e]xceptions to this general rule exist, however." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001). Such an exception includes a situation where, due to unique circumstances, the prevailing party below and on primary appeal has standing to pursue a cross-appeal to avoid future litigation costs. *Id.* at 1276; *Jarvis v. Nobel/Sysco Food Services Co.*, 985 F.2d 1419, 1424-25 (10th Cir. 1993) (relying upon *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166 (1980) to permit a cross-appeal that would grant the cross-appellant the requisite stake in the appeal where avoiding a re-filing of a claim in state court would substantially reduce that cross-appellant's future litigation costs).

According to *Roper*,

> "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III."

44. U.S. at 334, 100 S.Ct. at 1171-72. The *Roper* Court also noted that "policy reasons" justified the Court considering the procedural question of sufficient importance to allow an appeal. *Id.* at 335, 100 S.Ct. at 1172 n.7."

Koopman asserted in the court below entitlement to qualified and absolute immunity in a post-discovery motion for summary judgment. The district court never reached those immunity defenses given its resolution of the case on alternative grounds. However, should this Court reverse and remand the case to the district court, Koopman would face burdens of litigation that he would not necessarily face were this Court to permit his cross-appeal in order that this Court may decide the purely legal issues connected to the qualified and absolute immunity defenses. "[Q]ualified immunity—which shields Government officials 'from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights,'—is both a defense to liability and a limited 'entitlement not to stand trial *or face the other burdens of litigation.*'" *Ashcroft v. Iqbal*, ___ U.S. ___ 129 S.Ct. 1937 (1945-46) (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (emphasis added)). It is well established that courts are to determine qualified and absolute immunity issues at the earliest stages possible of litigation in order to avoid burdening government officials with unnecessary litigation. *See, e.g.*, *Gross v. Pirtle*, 245 F.3d 1151, 1155 (10th Cir. 2001) ("[C]ourts should resolve the 'purely legal question,' . . . raised by a qualified immunity defense "'at the earliest possible stage in litigation."'")

Therefore, under these unique circumstances, Koopman has standing consistent with the precepts of Art. III to pursue his cross-appeal in order to seek a judicial resolution by this Court of his entitlement to qualified and absolute immunity in the event this Court were otherwise inclined to reverse and remand the case to the district court with instructions to reinstate Appellant/Cross-Appellee Jeremy C. Myers' ("Myers") sole claim of §1983 malicious prosecution. This procedural handling of the case would satisfy the public policy considerations that undergird the dual principles that qualified immunity is a limited entitlement not to face burdens of litigation and that purely legal questions in connection with the qualified immunity defense should be resolved at the earliest possible stage in litigation.

Alternatively, if the Court is inclined to dismiss Koopman's cross-appeal, it should nevertheless permit him to argue alternative bases supporting the district court's judgment in his favor, including the defenses of qualified and absolute immunity. *See United States v. American Ry. Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 564 (1924). According to *American Ry. Express Co.*,

> "[i]t is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought there by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary,

> whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

Accord, Helverng v. Pfeiffer, 302 U.S. 247, 250-51, 58 S.Ct. 159, 160 (1937) ("While a decision below may be sustained, without a cross-appeal, although it was rested upon a wrong ground . . . , an appellee cannot without a cross-appeal attack a judgment entered below."); *Chouinard v. Chouinard*, 568 F.2d 430, 433 (5th Cir. 1978) ("If the appellee is fully satisfied with the judgment actually rendered, he need not cross appeal, even though he wishes to argue on appeal, in support of the judgment, that the district court erred regarding particular rulings or the reasons for the judgment . . . That is the situation here, for defendants are urging an alternative theory in support of a judgment favorable to them.") (citations omitted).

None of the cases cited by Myers in his Motion dealt with a situation like here involving qualified and absolute immunity as alternative grounds supporting dismissal of the lawsuit and judgment in Koopman's favor, and are therefore distinguishable. Further, none of the cases cited by Myers in his Motion undermine Koopman's entitlement to argue qualified and absolute immunity as

alternative grounds to support the district court's judgment even if a cross-appeal is not permitted.

Finally, Myers' Motion fails to comply with 10th Cir. R. 27.2(A)(3)(a) that requires a party filing a motion to dismiss the entire case for lack of appellate jurisdiction to file such motion within fourteen days after the notice of appeal is filed, unless good cause is shown. Koopman's Notice of Cross-Appeal was filed December 7, 2012 [Doc. No. 255]. Myers' Motion was filed in this Court on January 8, 2013.

CONCLUSION

WHEREFORE, Koopman respectfully requests that Myers' Motion be denied. This Court has jurisdiction to decide the cross-appeal involving purely legal issues pertaining to qualified and absolute immunity as an exception to the general rule disallowing a party to appeal from a judgment in its favor. Alternatively, should the Court decide to dismiss the cross-appeal for lack of jurisdiction, Koopman requests the Court expressly recognize his entitlement to argue qualified and absolute immunity as alternative grounds supporting the district court's judgment as part of Koopman's response brief to the primary appeal.

DATED this 30th day of January, 2013.

WICK & TRAUTWEIN, LLC

This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by Kent N. Campbell is on file at the offices of Wick & Trautwein, LLC

By: *s/Kent N. Campbell*

Kent N. Campbell
Wick & Trautwein, LLC
PO Box 2166
Fort Collins, CO 80522
(970) 482-4011
kcampbell@wicklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2013, I electronically filed the foregoing APPELLEE/CROSS-APPELLANT'S RESPONSE TO APPELLANT/ CROSS-APPELLEE'S MOTION FOR DISMISSAL OF CROSS-APPEAL FOR LACK OF JURISDICTION using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

Randall R. Meyers, Esquire
Law Office of Randall R. Meyers
425 W. Mulberry Street, Ste. 201
Fort Collins, CO 80521
randy.myers@att.net
Attorney for Appellant

Joseph P. Fonfara
Fonfara Law Offices
311 East Mulberry Street
Fort Collins, CO 80524
flo@frii.com
Co-counsel for Appellant

s/Jody L. Minch
Legal Assistant to Kent N. Campbell
323 S. College Avenue, #3
Fort Collins, CO 80524
(970)482-4011
jminch@wicklaw.com

FILED
United States Court of Appeals
Tenth Circuit

January 18, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEREMY C. MYERS,

Plaintiff - Appellant/
Cross-Appellee,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police Department, in his individual capacity,

Defendant - Appellee/
Cross-Appellant.

Nos. 12-1482 & 12-1487

ORDER

These matters are before the court on "Appellant-Cross Appellee's Motion for Dismissal of Cross Appeal for Lack of Jurisdiction." Briefing on the merits is tolled pending further order of the court. *See* 10th Cir. R. 27.2(C). Within 14 days of the date of this order the appellee/cross-appellant shall file and serve a response to the motion.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEREMY C. MYERS, Appellant/Cross-Appellee,	
v.	Case No. 12-1487
BRIAN KOOPMAN, Appellee/Cross-Appellant.	

APPELLANT-CROSS APPELLEE'S MOTION FOR DISMISSAL OF CROSS APPEAL FOR LACK OF JURISDICTION

COMES NOW appellant-cross appellee Jeremy C. Myers, by and through attorneys of record Randall Meyers and Joseph P. Fonfara, to move that a cross-appeal filed by Brian Koopman be dismissed in view of the lower court's dismissal with prejudice of the underlying case therefore establishing that no further or greater relief could be granted to Koopman. He shows in support thereof that:

OPPONENT'S POSITION PURSUANT TO 27.3(C)

Appellee/Cross-Appellant Brian Koopman has stated through counsel his belief in the appropriateness of his cross-appeal and that he is in opposition to Appellant/Cross-Appellee Jeremy Myer's efforts to have it dismissed.

FACTS

This matter stems from a malicious prosecution based on Appellee/CrossAppellant Brian Koopman's willful violation of Myers' fourth and fourteenth amendment rights arising through Koopman's filing of a false affidavit in support of an arrest warrant that resulted in Myers' arrest, detention, and subsequent prosecution. The prosecution ultimately dropped its criminal complaint against Appellant Myers as being unfounded thereby causing its dismissal by the state trial court following which Appellant Myers pursued a federal civil action. This latter action has been subsequently dismissed on grounds that are now being appealed. Koopman, however, had filed motions for summary judgment in the civil case that were yet pending as of the entry of dismissal. The lower court then simultaneously dismissed these motions on mootness grounds. Plaintiff Myers, as a result of his case being dismissed, no longer had a vehicle for relief and Koopman no longer had resultant jeopardy.

Appellee-Cross Appellant Koopman has now, however, filed a cross-appeal through which he seeks a post dismissal resolution on his summary judgment motions even though a favorable result could provide him with no further or additional gain as Myers' case against him is dismissed with

prejudice. Koopman does not look toward reversing or modifying the final judgment through his cross-appeal.

RELEVANT LAW

Appellate courts generally decline to address cross-appeals that seek neither to modify nor overturn the judgment of the trial court. *See Aventis Pharma S.A. and Sanofi-Aventis U.S, LLC.v. Hospira Inc. and Apotex, Inc. and Apotex Corp. Nos. 11-1018-1047 (Fed. Cir Mar 24, 2011).* The usual practice regarding cross-appeals is to reject those that do not expand the scope of the judgment. Correspondingly, a cross appeal may properly be filed only when a party either seeks to enlarge its own rights under the judgment or to lessen or limit those granted the adversary. *Bailey v. Dart Container Corp., 292 F.3d 1360, 1362 (Fed. Circuit 2002).* To do otherwise "unnecessarily expands the amount of briefing" and gives "the appellee an unfair opportunity to file the final brief and have the final oral argument, contrary to established rules" of which neither is a fair or efficient use of the appellate process. *Bailey, 292 F.3d at 1302; Aventis.*

On the other hand, a party "may cross-appeal if adversely affected by the appealed judgment in some particular which it seeks to have modified." *Belloit Corp. v. Valmet Oy, 742 F.3d 1421, 1424 (Fed. Cir 1984).* A party

whom is not adversely affected by a judgment, however, lacks standing to appeal. *Typeright Keyboard Corporation v. Microsoft Corporation, 374 F.3d 1151 (2004); Pub. Serv. Comm'n v. Brashear Freight Lines, Inc. 306 U.S. 204, 206 (1939).* Where or when an appellant lacks standing, the appellate courts lack jurisdiction to decide his appeal. *Pub. Serv. Comm'n; See Diamond v. Charles, 476 U.S. 54, 71 (1986).* The same rule applies to cross-appeals. *Typeright.* Thus, simply stated, a cross-appeal can be properly asserted only when acceptance of the argument being advanced "would result in a reversal or modification of the judgment rather than an affirmance." *Bailey, 292 F.3d 1360 (Fed. Cir. 2002).*

A cross-appeal that merely seeks alternate grounds upon which to affirm a judgment in the event that the judgment should be successfully appealed is referred to as a conditional cross-appeal and is similarly improper. *Phillips v. AWH Corp. 363 F.3d 1207, 1216 (Fed. Cir. 2004). See The Nautilus Group v. Icon Health and Fitness, Inc.* In sum, any issue that would not alter the judgment in favor of the appellant cannot be presented as a cross-appeal. *Novartis Pharm Corp. v. Abbott Labs, 375 F.3d 1328, 1339 (Fed. Cir. 2004).*

Addressing somewhat analogous grounds, a case is considered moot when the imposition of further procedures will make no meaningful

difference. Appellate courts generally do not address moot issues. Moreover, the dismissal or denial of a motion for summary judgment is not a final order subject to appeal.

ANALYSIS

In this case, because Myers' complaint against Koopman is dismissed in its entirety and with prejudice, Koopman can achieve no greater result no matter what additional avenues he may elect to follow. A full dismissal in a defendant's favor is as good as it can get. Additional consideration of Koopman's summary judgments at this late date in the proceedings does not, and cannot, expand the judgment in his favor. Koopman consequently lacks standing for his cross-appeal thus divesting the appellate court of the jurisdiction to decide it. *Typeright; Brashear Freight Lines.* His cross-appeal should therefore be dismissed as a matter of law. *Aentis-Pharma SA; Typeright; Bailey; Brashear Freight Lines. Novartis.*

Moreover, appellant/cross-appellee Myers suffers an unnecessary adverse consequence from Koopman's improper assertion of his cross-appeal through the related costs and fees that Myers will accrue from the additional briefing that will be required needed if it is permitted to proceed. *Bailey.*

CONCLUSION

Wherefore appellee cross-appellant Brian Koopman's cross-appeal is improperly asserted such that this court is without jurisdiction to decide it, appellant/cross-appellee Jeremy Myers requests respectfully that it be consequently dismissed.

Dated this 8th day of January, 2013.

/s Randall Meyers

Randall Meyers

/s Joseph P. Fonfara

Joseph P. Fonfara

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2013, I electronically filed the foregoing APPELLANT-CROSS APPELLEE'S MOTION FOR DISMISSAL OF CROSS APPEAL FOR LACK OF JURISDICTION with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

Randall Meyers
Law Office of Randall R. Meyers
425 W. Mulberry St., Suite 201
Fort Collins, CO 80521
randy.meyers@att.net
Attorney for Plaintiff

Kent N. Campbell
323 S. College Avenue, Suite 3
Fort Collins, CO 80524
kcampbell@wicklaw.com

John R. Duval
500 East 3rd Street
Loveland, CO 80537
duvalj@ci.loveland.co.us

s/ Sheryl L. Critchfield