**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

JEREMY C. MYERS,

**Appellant,**

Case Nos. 12-1482 and 12-1487

v.

BRIAN KOOPMAN,

**Appellee.**

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**On Appeal from the United States District Court**
**For the District of Colorado**
**The Honorable Judge Robert E. Blackburn**
**D.C. No. 09-CV-02802-REB-MEH**

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# APPELLEE'S REPLY BRIEF

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Respectfully submitted,

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**ORAL ARGUMENT IS REQUESTED**
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# I. INTRODUCTION

Defendant-Appellee Brian Koopman ("Koopman"), by and through his attorneys, Wick & Trautwein, LLC, in accordance with Rule 28.1(c)(4) of the Federal Rules of Appellate Procedure, hereby submits his Reply Brief, limited to the issues presented by the cross-appeal.

First, Plaintiff-Appellant Jeremy C. Myers' ("Myers") mootness argument with respect to the issues raised in the cross-appeal is misplaced and without merit. Koopman is entitled to argue alternative grounds supporting the district court's judgment in his favor whether or not his cross-appeal is jurisdictionally well-grounded and despite Myers' mootness argument.

Second, Myers' failure to address the merits of Koopman's qualified and absolute immunity arguments or Koopman's absence of malice argument, all of which provide alternative grounds in support of the district court's judgment, constitutes a forfeiture or waiver of such arguments, thereby effectively conceding that the judgment should be upheld on these alternative grounds.

# II. ARGUMENT

## A. Koopman Is Entitled To Argue Alternative Grounds Supporting The District Court's Judgment In His Favor Whether Or Not His Cross-Appeal Is Jurisdictionally Well-Grounded And Despite Myers' Mootness Argument

Myers argues in Appellant's Response and Reply to Appellee's Principal and Response Brief ("Response and Reply") that the district court committed no error in denying Koopman's motion for summary judgment as to qualified immunity on mootness grounds when that court simultaneously dismissed with prejudice all charges being asserted in the case. Myers further argues that absolute immunity is likewise moot. Myers fails to address Koopman's argument that the record conclusively demonstrates that malice is lacking as a matter of law. Myers' mootness argument is misplaced and lacks merit.

"A case becomes moot 'if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party.'" *U.S. v. DeVaughn,* 694 F.3d 1141, 1157 (10th Cir. 2012) (quoting *Church of Scientology v. United States,* 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992)) (internal quotations marks omitted). "[A] case is not moot when 'we have the power to grant a legally cognizable remedy requested by a party.'" *DeVaughn,* 694 F.3d at 1157. "Determining whether a claim is in fact barred . . . is squarely within an appellate court's jurisdiction." *Id.*

Therefore, while the district court did refer to Koopman's motion for summary judgment based upon qualified immunity as "moot" when it entered judgment for Koopman by granting his motion for judgment on the pleadings, the

mootness doctrine does not preclude this court from considering the qualified and absolute immunity defenses as alternative grounds supporting the district court's judgment in Koopman's favor whether this court considers Koopman's qualified and absolute immunity arguments as part of his cross-appeal or simply as alternative grounds supporting the district court's judgment as part of the primary appeal. *See DeVaughn, supra.* We next turn to considering these alternative methods by which this court may and should consider the qualified and absolute immunity defenses.

### *1. Qualified and absolute immunity constitute exceptions to the general rule that a party cannot appeal from a judgment in its favor.*

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.") (internal quotations marks omitted).

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 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.

***2. Alternatively, Koopman is entitled to argue alternative grounds supporting the district court's judgment in his favor, including the***

***defenses of qualified and absolute immunity and the defense of absence in the record of evidence of malice, within the context of the principal appeal, even if this court lacks jurisidiction over the cross-appeal.***

Alternatively, if this court is inclined to dismiss Koopman's cross-appeal for lack of jurisdiction, it should nevertheless permit him to argue alternative grounds supporting the district court's judgment in his favor, including the defenses of qualified and absolute immunity and the defense of absence in the record of evidence of malice, within the context of Myers' appeal. *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."); *Brecek & Young Advisors, Inc. v. Lloyds of*

*London Syndicate 2003,* ___ F.3d ___, 2013 WL 1943338 C.A. 10 (Kan.) ("'[A]n appellee is generally permitted to defend the judgment won below on any grounds supported by the record without filing a cross appeal.'"); *Ute Distrib. Corp. v. Sec'y of Interior,* 584 F.3d 1275, 1282 (10th Cir. 2009) ("An appellee may . . . 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 . . . .") (internal quotations marks omitted).

None of the cases cited in Myers' VI. ARGUMENT section of his Response and Reply, at pp. 16-20, dealt with the present situation 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 therein undermines Koopman's entitlement to argue qualified and absolute immunity as alternative grounds to support the district court's judgment even if Koopman's cross-appeal is dismissed. In like manner, none of the cases relied upon by Myers involved a situation like here where the record demonstrates a total lack of evidence of malice on Koopman's part that is an essential element of the sole claim of malicious prosecution, which absence of malice constitutes yet another alternative ground supporting the district court's

judgment in Koopman's favor whether or not this court has jurisdiction over the cross-appeal.

*Whitemore v. Arkansas,* 495 U.S. 149 (1990), cited by Myers, involved a death penalty appeal and merely stands for the proposition that Article III gives federal courts subject matter jurisdiction over cases and controversies. There is no denying that Koopman's cross-appeal presents a true case and controversy even if the arguments raised therein are considered merely as alternative grounds to support the district court's judgment within Myers' principal appeal. The same analysis applies to distinguish *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67 (1983).

Similarly, *Han v. Mulllin,* 327 F.3d 1177 (10th Cir. 2003) and *Smith v. Plati,* 258 F.3d 1167 (10th Cir. 2001) are easily distinguishable. In *Han,* the court held that a death penalty prisoner's execution rendered his appeals moot, given that the deceased death row inmate lacked a legally cognizable interest in the outcome. In *Smith,* re-litigation was barred by the doctrine of *res judicata.* Here, in contrast, Koopman definitely has a legally cognizable interest in the outcome of the principal and cross-appeals, and death and *res judicata* are not implicated.

Contrary to Myers' arguments otherwise, Koopman is *not* asking for this appellate court to rule directly on his motion for summary judgment, thus side-

stepping the district court. Instead, Koopman asks this court to uphold the district court's judgment of dismissal on purely legal grounds – qualified and absolute immunity – that, as argued in Koopman's Principal and Response Brief, do not require a remand to consider. In like manner, Koopman asks this court to uphold the lower court's judgment of dismissal on the alternative and purely legal basis that the record below reveals a complete absence of evidence of malice on Koopman's part which this court is capable of deciding defeats the malicious prosecution claim as a matter of law due to the absence of evidence of an essential element of the claim.

**B. Myers' Failure To Address The Merits Of Koopman's Qualified And Absolute Immunity Arguments And Koopman's Absence Of Malice Argument, All Of Which Provide Alternative Grounds In Support Of The District Court's Judgment, Constitutes A Forfeiture Or Waiver Of Myers' Opposition On The Merits**

Myers' failure to address the merits of Koopman's qualified and absolute immunity arguments and Koopman's absence of malice argument, all of which provide alternative grounds in support of the district court's judgment, constitutes a forfeiture or waiver of Myers' opposition to these arguments on the merits. *See United States v. Almaraz,* 306 F.3d 1031, 1041 (10th Cir. 2002) ("[A]rguments not briefed on appeal are waived."); *accord, Fomby v. Jones,* 486 Fed.Appx. 747, 748 (10th Cir. 2012) (unpublished). "The court will not consider such 'issues averted to

in a perfunctory manner, unaccompanied by some effort at developed argumentation.'" *U.S. v. Wooten,* 377 F.3d 1134, 1145 (10th Cir. 2004); *Almaraz,* 306 F.3d at 1041 (applying "settled appellate rules that issues averted to in a perfunctory manner unaccompanied by some effort at developed argumentation, are deemed *waived.*") (emphasis in original) (citing *Femeder v. Haun,* 227 F.3d 1244, 1255 (10th Cir. 2000)).

Myers, in his Response and Reply, rests his arguments against qualified and absolute immunity solely on his contentions that those issues are moot and that the court lacks jurisdiction over the cross-appeal. Myers completely fails to address the alternative argument set forth in Appellee's Principal and Response Brief that even if the court lacks jurisdictions over the cross-appeal, the court should nevertheless decide as a matter of law that Koopman is entitled to qualified and absolute immunity, where applicable – as alternative grounds supporting the district court's decision – because (1) the law was not clearly established in September-November 2007 that the Fourth Amendment's right to be free from unreasonable seizures provided a Constitutional basis for a §1983-based malicious prosecution claim within the factual context of this case; (2) the law was not clearly established in September-November 2007 that Fourteenth Amendment procedural due process protection supports a §1983 malicious prosecution claim

within the factual context of this case;[1] and (3) Koopman is entitled to absolute immunity as a matter of law in connection with his testimony at Myers' criminal preliminary hearing, *see Rehberg v. Paulk,* ___ U.S. ____, 132 S.Ct. 1497 (2012). Neither has Myers briefed Koopman's alternative argument that Myers cannot, based upon the undisputed factual record, prove that Koopman acted with malice, thereby constituting yet another alternative basis supporting the district court's judgment even if this court lacks jurisdiction over the cross-appeal.

The aforementioned failures by Myers to develop any argumentation in opposition to Koopman's meritorious arguments constitutes either a forfeiture or waiver of Myers' opposition to these points of contention, by which Myers effectively concedes their merit. *See Femeder,* 227 F.3d at 1255 ("'Failure to press a point (even if it is mentioned) and to support it with proper argument and authority forfeits it . . . .'"); *U.S. v. Games-Perez,* 695 F.3d 1104, 1110 (10th Cir. 2012) (unintentional failure to develop arguments amounts to forfeiture; intentional failure to develop arguments constitutes waiver); *U.S. v. Chaco,* 2013 WL 1297392 C.A. 10 (N.M.) (unpublished) (when an issue has been waived, the appellate court does not review it; when an issue has been forfeited, the appellate court may

[1] Instead, no such constitutional basis exists where there is an adequate post-deprivation remedy at law, as is the case here where Colorado recognizes a common law tort claim of malicious prosecution. *See, e.g., Hewitt v. Rice,* 154 P.2d 408, 411 (Colo. 2007).

review it for plain error) (citing *United States v. Cruz-Rodriguez,* 570 F.3d 1179, 1183 (10th Cir. 2009)).

## III. CONCLUSION

The district court's order dismissing Myers' Fourth Amendment and Fourteenth Amendment malicious prosecution claim should be affirmed on the basis that Koopman is entitled to qualified and absolute (in connection with testimony at Myers' criminal preliminary hearing) immunity as a matter of law within the factual context of this case as alleged, and, alternatively, on the basis that Myers cannot, based upon the undisputed facts in the record, prove that Koopman acted with malice, as alternative legal grounds supporting the district court's judgment.

Respectfully submitted this 3rd day of June, 2013.

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I hereby certify that on June 3, 2013, I electronically filed the foregoing **APPELLEE'S REPLY BRIEF** using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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