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.

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

APPELLEE'S PETITION FOR PANEL REHEARING

Respectfully submitted this 2nd day of January, 2014.

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Appellee Brian Koopman ("Koopman"), by and through his attorneys,

WICK & TRAUTWEIN, LLC, for his Petition for Panel Rehearing, states:

I. POINTS OF LAW OR FACT THE COURT HAS OVERLOOKED OR MISAPPREHENDED

A. The court overlooked that Koopman first raised his immunity and lack of malice arguments, as support for affirmance, in Appellee's Principal and Response Brief.

B. Alternatively, the marshalling and order of Koopman's arguments on appeal were dictated by Fed.R.App.P. 28.1 involving a cross-appeal thereby removing this case from application of the general discretionary rule that arguments and issues raised for the first time in a reply brief are deemed waived.

C. Alternatively, Koopman's immunity and lack of malice arguments as support for affirmance, if, *arguendo,* first raised "as such" in his reply brief, falls within recognized exceptions to the rule against new arguments in a reply, such as where a court of limited jurisdiction must first decide whether it has constitutional and statutory authority to hear the dispute, or under the "plain error" doctrine.

II. ARGUMENT

A. The court overlooked that Koopman first raised his immunity and lack of malice arguments, as support for affirmance, in Appellee's Principal and Response Brief.

The court, in its opinion filed December 20, 2013, declined to consider Koopman's immunity arguments[1] as alternative grounds for affirmance because,

[1] The declination evidently also extended to Koopman's lack of malice argument although not specifically mentioned in the court's opinion.

according to the court's opinion, Koopman "did not propose them as such until his reply brief." *Myers v. Koopman,* ___ F.3d ___, n. 6 (10th Cir. 2013). However, the court overlooked and misapprehended that Koopman actually first raised his immunity and lack of malice arguments, as alternative support for affirmance, in Appellee's Principal and Response Brief [Document: 01019036686, filed 04/15/2013]. For instance, in the section of said brief captioned "V. SUMMARY OF THE ARGUMENTS," Koopman argued that he was "nevertheless entitled to qualified immunity – as an *alternate ground supporting the district court's decision* . . . " (emphasis added), and that "[a]lternatively, Myers cannot, based upon the undisputed facts, prove that Koopman acted with malice . . . ," and that "Koopman is entitled to absolute immunity as a matter of law in connection with his testimony at Myers' criminal preliminary hearing." Appellee's Principal and Response Brief at 7.

Next, in the section of Appellee's Principal and Response Brief in which Koopman was permitted and directed by Fed.R.App.P. 28.1(c)(2) to submit a brief in the cross-appeal and respond to the principal brief in the appeal, Koopman argued at length why the law was not clearly established during the relevant time frame 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, Appellee's Principal and Response Brief at 15-26; that Koopman was entitled to qualified immunity as a matter of law based upon the undisputed fact that Appellant Jeremy C. Myers ("Myers") cannot prove that Koopman acted with malice, *id.* at 26-29; and that Koopman is entitled to absolute immunity in connection with his testimony at Myers' criminal preliminary hearing, *id.* at 30-31. After having fleshed out these arguments in depth, Koopman concluded Appellee's Principal and Response Brief with the following clearly-articulated conclusionary argument:

> "The district court's orders granting Koopman judgment on the pleadings and entering final judgment in favor of Koopman should be affirmed. *Alternatively, if there exists a basis for reversing said orders, the court should determine as a matter of law that Koopman is nevertheless entitled to qualified and absolute immunity, where applicable, and therefore affirm the district court's Final Judgment in favor of Koopman on these alternative grounds.*" *Id.* at 32 (italics and underlining added).

Read in its entirety, Appellee's Principal and Response Brief clearly and adequately raised and asserted Koopman's immunity and lack of malice arguments as alternative grounds for affirmance. This is therefore not a circumstance where a party raised an issue for the first time on appeal in a reply brief. *See M.D. Mark, Inc. v. Kerr-McGee Corp.,* 565 F.3d 753, 768 n. 7 (10th Cir. 2009); *Wheeler v. Commissioner of Internal Revenue,* 521 F.3d 1289, 1291 (10th Cir. 2008) (citing *Hill v. Kemp,* 478 F.3d 1236, 1250 (10th Cir. 2007), *cert. denied,* 552 U.S. 1096,

128 S.Ct. 873, 169 L.Ed.2d 725 (2008), 552 U.S. 1096, 128 S.Ct. 884, 169 L.Ed.2d 725 (2008)).

Recognizing that "not all legal arguments bearing upon the issue in question will always be identified by counsel," *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983), this court is not precluded from "supplementing the contentions of counsel through [its] own deliberations and research . . . ." *Headrick v. Rockwell International Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994)(quoting *Carducci,* 714 F.2d at 177). Thus, the fact that Koopman, in his reply brief, more thoroughly provided citation to legal authorities supporting his alternative bases in support of affirmance does not nullify the fact that he first adequately raised these arguments in Appellee's Principal and Response Brief.

Moreover, the policy arguments supporting the rule against entertaining new arguments in a reply do not support the court's application of such rule in this case to decline to consider Koopman's immunity and lack of malice arguments. These policy arguments are summarized as follows in *Hill,* 478 F.3d at 1251:

> "As we have explained, the reasons for our rule are two-fold: 'First, to allow an appellant to raise new arguments at this juncture would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response . . . . Secondly, it would also be unfair to the court itself, which, without the benefit of a response from appellee to an appellant's late-blooming argument, would run the risk of an improvident or ill-advised opinion, given our dependence as an Article III court on the adversarial process for sharpening the issues for decision.'"

Here, instead, Myers had a full and fair opportunity to respond to the alternative affirmance arguments set forth in Appellee's Principal and Response Brief. *See* Fed.R.App.P. 28.1(c)(3) ("**Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal."). Second, this order of briefing as spelled out in Rule 28.1 eliminates any risk of an improvident or ill-advised opinion by the court on the alternative grounds of affirmance issues had Myers elected to argue against them in his Appellant's Response and Reply Brief [Document 01019056702, filed 05/17/2013].[2]

Accordingly, the court is respectfully requested to rehear and consider Koopman's immunity and lack of malice arguments as alternative grounds for affirmance.

B. Alternatively, the marshalling and order of Koopman's arguments on appeal were dictated by Fed.R.App.P. 28.1 involving a cross-appeal thereby removing this case from application of the general discretionary rule that arguments and issues raised for the first time in a reply brief are deemed waived.

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[2] Instead, as argued in Appellee's Reply Brief [Document: 01019065456, filed: 06/03/2013], at 9-12, Myers' failure to address the merits of Koopman's qualified and absolute immunity arguments and Koopman's absence of malice argument – all of which were first raised in Appellee's Principal and Response Brief – constituted a forfeiture or waiver of Myers' opposition to those arguments on the merits.

As argued above, briefing in this cross-appeal was governed by Fed.R.App.P. 28.1. Pursuant to that rule, the marshalling and order of arguments within the respective principal, response and reply briefs rendered it impractical for Koopman to delve more deeply into the alternative arguments in support of affirmance than was already done in Appellee's Principal and Response Brief until Myers challenged in Appellant's Response and Reply Brief this court's jurisdiction over the cross-appeal. That jurisdictional challenge – first raised in Appellant's Response and Reply Brief [Document: 01019056702, filed 05/17/2013] – provided the first meaningful opportunity for Koopman to argue in greater depth than had already been done in Appellee's Principal and Response Brief the reasons why this court should affirm the district court's dismissal of the Fourth Amendment-based §1983 malicious prosecution claim for reasons of immunity and absence of malice even if the court lacked jurisdiction over the cross-appeal.

In other words, according to Rule 28.1's specification of the order and content of briefs in cross-appeals, Koopmans' first opportunity to address alternative bases supporting affirmance, *as against the opposing party's argument that the court lacked jurisdiction over the cross-appeal*, was in Appellee's Reply Brief. *See* Fed.R.App.P. 28.1(c)(4). Although styled, as required by Fed.R.App.P.

28.1(c)(4), as a "reply" brief, the arguments addressing alternative reasons supporting affirmance *if no jurisdiction exists over the cross-appeal* are actually "response" and not "reply" arguments, given the briefing sequence and content mandated by Rule 28.1.

The rule in this circuit that a party waives issues and arguments raised for the first time in a reply brief is described as a "general rule." *M.D. Mark, Inc., supra,* 565 F.3d at 768 n.7; *accord, Wheeler,* 521 F.3d at 1291 ("issues raised by an appellant for the first time on appeal in a reply brief are *generally* deemed waived") (emphasis added). This denotes that the rule is discretionary. Indeed, the rule is subject to certain exceptions as more fully discussed in Section C below.

Because of the unique ordering of briefs as governed by Fed.R.App.P. 28.1 involving cross-appeals, and given that Koopman had in fact previously raised his immunity and absence of malice arguments as alternative grounds for affirmance prior to the filing of his reply brief, as described in Section A above, the court is respectfully requested to exercise its discretion to rehear and consider said arguments as alternative grounds for affirmance.

C. Alternatively, Koopman's immunity and lack of malice arguments as support for affirmance, if, *arguendo,* first raised "as such" in his reply brief, falls within recognized exceptions to the rule against new arguments in a reply, such as where a court of limited jurisdiction must first decide whether it has constitutional and statutory authority to hear the dispute, or under the "plain error" doctrine.

Assuming, *aruendo,* that the court is correct that Koopman – despite the arguments mentioned above that were set forth in Appellee's Principal and Response Brief – did not propose his immunity and absence of malice arguments as alternative grounds for affirmance "as such" until his reply brief, this case falls within recognized exceptions to the rule against new arguments in a reply, such as where a court of limited jurisdiction must first decide whether it has constitutional and statutory authority to hear the dispute, or under the "plain error" doctrine.

The rule against new arguments in a reply is subject to certain exceptions, *Headrick,* 24 F.3d at 1278 (citing *Herbert v. National Academy of Sciences,* 974 F.2d 192, 196 (D.C. Cir. 1992)), and "in no way forbids the court from 'supplementing the contentions of counsel through our own deliberations and research . . . .'" *Headrick, supra; accord, Hill,* 478 F.3d at 1251("Of course, our rule against entertaining new arguments in reply in no way precludes us from supplementing the contentions of counsel through our own efforts."). Because of the existence of these exceptions, "there do exist circumstances in which a court may consider, or even raise *sua sponte*, arguments ignored or left undeveloped by counsel in the first round of briefing." *Herbert,* 974 F.2d at 1992. One such exception exists where, as courts of limited jurisdiction, a circuit court is "affirmatively obliged to consider whether the constitutional and statutory

authority exist[s] for [the court] to hear each dispute put to [a court] . . . ." *Id.* Another such exception exists under the "plain error" doctrine "when a manifest injustice might otherwise result." *Id.*

These two exceptions exist under the unique circumstances of this case that was briefed as cross-appeals. First, until the court had, through briefing, been given the arguments and justifications in support of and in opposition to the cross-appeal, there was no need, or opportunity for that matter, to argue in-depth the reasons for and authorities supporting why the court should nevertheless consider alternative existing grounds in support of affirmance even if jurisdiction did not exist over the cross-appeal. Because Rule 28.1 did not permit Myers to address the cross-appeal until after the filing of Appellant's Response and Reply Brief, *see* Fed.R.App.P. 28.1(c)(3), Koopman was arguably unable to more fully develop the alternative grounds for affirmance arguments until the filing of Appellee's Reply Brief permitted by Fed.R.App.P. 28.1(c)(4). This is due to the unique briefing schedule provided in cross-appeals.

Furthermore, had this court deemed the alternative arguments in support of affirmance not sufficiently developed until the filing of Appellee's Reply Brief, the court could have permitted, and Myers could have requested, further briefs involving the cross-appeal. *See* Fed.R.App.P. 28.1(c)(5). However, neither Myers

nor the court suggested additional briefing was necessary in order to provide Myers a full and fair opportunity to respond to the more thoroughly developed arguments and citation to authorities set forth in Appellee's Reply Brief. Instead, Koopman was left to suffer the undesirable consequences of the court having overlooked that Koopman had in fact first raised such arguments in Appellee's Principal and Response Brief, and the briefing content and sequence rules set forth in Fed.R.App.P. 28.1 seemed to require Koopman further brief these issues in the manner and sequence in which he did.

Because of the required sequence and content of briefing of the jurisdictional issue in the cross-appeal, Koopman is left to suffer a manifest injustice by virtue of the court declining to consider his additional arguments in support of affirmance unless the court agrees to rehear and consider such arguments.

III. CONCLUSION

For the foregoing reasons, Koopman respectfully requests the court grant his Petition for Panel Rehearing and thereby consider his immunity and absence of malice arguments as alternative grounds for affirmance.

Respectfully submitted this 2nd day of January, 2014.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLEE'S PETITION FOR PANEL REHEARING**, as submitted in Native.pdf form via the court's ECF System, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Webroot Anti-Virus with Spysweeper, Version 7.0.8.7 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2014, I electronically filed the foregoing **APPELLEE'S PETITION FOR PANEL REHEARING** using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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