IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Nos. 92-7675 &
93-7684
Summary Calendar

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STEPHANIE LATOYA MAGEE, ETC.,

Plaintiff-Appellee,

versus

DONALD CABANA, Individually, Etc., ET AL.,

Defendants,

LEVON JACKSON, Individually, and
VIRGINIA WRIGHT, Individually,

Defendants-Appellants.

* *

IVORY BELL BANKSTON,

Plaintiff-Appellee,

versus

DONALD CABANA, Individually, Etc., ET AL.,

Defendants,

LEVON JACKSON, Individually, and
VIRGINIA WRIGHT, Individually,

Defendants-Appellants.

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Appeals from the United States District Court for the
Northern District of Mississippi
(CA GC88-5-D-0/GC88-9-D-0, 4:88-CV-5 c/w 4:88-CV-9)

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(August 22, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

These are consolidated appeals by defendants in consolidated 42 U.S.C. § 1983 damage suits in which judgment on the verdict was rendered for plaintiffs ($2,500 for one plaintiff, $5,000 for the other) on account of a strip search performed on them when they went to the Mississippi penitentiary to visit an inmate there who was the son of one plaintiff and the father of the other. Our cause No. 92-7675 is the appeal of the judgment on the merits. Our No. 93-7684 is the appeal of the award of attorney's fees to plaintiffs.

In the merits appeal, defendants complain only that the trial court erred in refusing their requested jury instructions on qualified immunity and in failing to modify the pretrial order to include that defense. The district court denied the requested instructions, ruling that defendants had waived the defense of qualified immunity, that no motion to amend the pretrial order had been made, as indeed none had been or ever was, and that "in the event the Court permitted an amendment of the pretrial order at this juncture [just before the case was submitted to the jury] it would be totally unfair and unjust to the plaintiffs, who have relied on this order."

The record in this case precludes any conclusion that the

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court abused its discretion in this respect.

The magistrate judge issued an order in this case on February 19, 1988, requiring defendants, who were represented by counsel and had pleaded "immunity," to file a motion for summary judgment on that basis within eleven days, and providing that if they did not do so "they will be deemed to have abandoned their immunity defense." No such motion, nor any for an extension or modification of the February 19, 1988, order, having been filed, on September 22, 1988, the magistrate judge entered an order that, defendants having failed to comply with the February 19 order, "they are hereby deemed to have abandoned their immunity defense." No appeal was taken from this order to the district court within the ten days authorized by FED. R. CIV. P. 72 and the local rules.

On July 27, 1989, a pretrial conference was held before the magistrate judge, as a result of which a pretrial order was prepared and signed by the attorneys and the district judge and filed April 23, 1990. This order does not list immunity or qualified immunity as an issue or defense.

On September 3, 1990, defendants, represented by new counsel who came into the case April 27, 1990, filed a motion to set aside the September 22, 1988, order and grant them summary judgment based on qualified immunity. The district court, in January 1991, denied the motion. It held it was an untimely attempt to appeal the September 22, 1988, order; that the February 19, 1988, and September 22, 1988, orders were within the magistrate judge's discretion; and that no explanation had been offered for the failure to comply with the February 19, 1988, order. We observe

that that is still the case to this date. The district judge further stated that plaintiffs' counsel had filed an affidavit stating that at a preliminary pretrial conference before the magistrate judge on July 5, 1989, defense counsel informed the magistrate judge with respect to qualified immunity that "the failure to assert that defense was not inadvertent." We observe that this has not, to this date, been disputed or questioned. The district court also noted that the motion for summary judgment was late, as the cutoff for filing dispositive motions had been fixed as April 9, 1989.

Defendants appealed to this Court, which on October 1, 1991, dismissed the appeal stating "The appeal is DISMISSED. See *Edwards v. Cass County, Texas*, 919 F.2d 273 (5th Cir. 1990)."

The case was set for jury trial June 25, 1992. On June 24, plaintiffs filed a motion *in limine* to, *inter alia*, exclude any issue of qualified immunity. At the beginning of trial, the district judge carried this motion with the case. When defendants unsuccessfully made a trial motion for judgement as a matter of law on the basis of qualified immunity, plaintiffs' counsel argued he was "stunned," in light of the September 22, 1988, and January 1991 orders and the fact that it was not in the pretrial order. At the conclusion of the evidence, defendants requested qualified immunity instructions. Plaintiffs' counsel objected for the same reasons, and stated that when he and co-counsel had talked about the case and "talked about the immunity and the statement has been every time, Well, that's out. There's no need to worry about that." As noted, the district court denied the requested instructions for the

reasons previously stated herein.

Plainly, qualified immunity is a defense subject to waiver, including waiver by failure to appeal an adverse magistrate judge's ruling. *See Martin v. Thomas*, 973 F.2d 449, 459 (5th Cir. 1992). A defense, though pleaded, is waived by failure to include it in the pretrial order, which controls the course and scope of the trial. *See Valley Ranch Dev. Co. v. FDIC*, 960 F.2d 550, 554 (5th Cir. 1992). Here there is still no explanation for the failure to comply with the magistrate judge's February 19, 1988, order, or for the failure to appeal the September 22, 1988, order, or for the failure to seek an amendment to the pretrial order. *See Automated Medical Lab, Inc. v. Armour Pharmaceutical Co*., 629 F.2d 1118, 1123 (5th Cir. 1980). The qualified immunity issue was not tried by consent, so *Wallin v. Fuller*, 476 F.2d 1204 (5th Cir. 1973), is not on point. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1369 n.36 (5th Cir. 1983); *Trinity Carton Co. v. Falstaff Brewing Corp*., 767 F.2d 184, 192-193 (5th Cir. 1985).

Our citation of the *Edwards* case on the prior appeal herein is of no help to appellants. They rely on the statement in *Edwards* that "defendants may assert qualified immunity at trial." *Id*., 919 F.2d at 277. We did not cite that remark or page of *Edwards*. More importantly, *Edwards* did not involve orders comparable to those of February 19 and September 22, 1988, here; nor did it involve a pretrial order which did not include qualified immunity, and as to which no motion to amend was filed, as here. Of course, absent special circumstancesSQsuch as, here, the orders of February 19 and September 22, 1988SQthe failure to file (or timely file) a motion

for summary judgment does not of itself preclude assertion of a defense at trial. That is all we were saying in *Edwards*.

The judgment on the merits is affirmed.

As to the attorney's fees issue, appellants question only entitlement to fees, not the amount awarded. Since plaintiffs sought only damages, were awarded substantial real (not nominal) damagesSQalbeit in an amount far, far less than claimedSQand prevailed on all issues as against appellants, the district court did not abuse its discretion in awarding plaintiffs attorney's fees. We note that only a comparatively modest amount of fees ($12,716.50 plus $2,098.21 expenses) was awarded ($64,145 in fees alone was sought). The award of attorney's fees is also affirmed.

AFFIRMED