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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT VOSKANYAN, Plaintiff-Appellee, v. UPCHURCH, Deputy; et al., Defendants-Appellants.	No. 21-55333 D.C. No. 2:15-cv-06259-MWF-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted June 17, 2022
Pasadena, California

Before: RAWLINSON and CHRISTEN, Circuit Judges, and BENNETT,** District Judge.
Concurrence by Judge CHRISTEN.

This interlocutory appeal addresses the denial of qualified immunity in a civil rights action by Plaintiff-Appellee Robert Voskanyan ("Voskanyan") against thirty-two Defendant-Appellants who were employed as officers, nurses, and doctors at

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

the Los Angeles Men's Central Jail ("MCJ"), where he was held as a pretrial detainee in 2015 and 2016. Voskanyan filed suit under 42 U.S.C. § 1983, alleging violations of his constitutional rights to adequate medical care and protection from violence at the hands of other inmates. We **DISMISS** this appeal for lack of jurisdiction.

Voskanyan was booked into the Men's County Jail in late June 2015 following an arrest for carjacking and kidnapping. On July 7, 2015, Voskanyan alleges that he was assaulted by 30 to 40 inmates. According to Voskanyan's verified Fourth Amended Complaint,[1] three Appellants witnessed this assault from an observation booth and declined to intervene, to activate their alarms, or to assist in the aftermath. Voskanyan suffered wide-ranging symptoms including a bloody nose, a swollen face, severe stomach pain, rectal bleeding, a damaged jaw and fractured teeth, and pain in his shoulder and ribs. He was rescued by his brother, a fellow MCJ inmate, and ultimately checked into the prison's medical clinic. Voskanyan offers a litany of detailed factual allegations that he was denied medical care, harassed, and mistreated in the following months.

This Court generally has "no jurisdiction to hear interlocutory appeals from the denial of summary judgment." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 944 (9th Cir. 2017). As a narrow exception to that rule, this Court has limited

[1] "[A] verified complaint may serve as an affidavit for purposes of summary judgment if it is based on personal knowledge and if it sets forth the requisite facts with specificity." *Moran v. Selig*, 447 F.3d 748, 759 n.16 (9th Cir. 2006).

jurisdiction "over the interlocutory appeal of a denial of qualified immunity, 'to the extent that it turns on an issue of law.'" *Villanueva v. California*, 986 F.3d 1158, 1164–65 (9th Cir. 2021) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Accordingly, this Court "may exercise jurisdiction by 'construing the facts and drawing all inferences in favor of Plaintiffs, to decide whether the evidence demonstrates a violation by [Defendants], and whether such violation was in contravention of federal law that was clearly established at the time.'" *Id.* at 1165 (quoting *Pauluk v. Savage*, 836 F.3d 1117, 1121 (9th Cir. 2016)). "The officials must present the appellate court with a legal issue that does not require the court to 'consider the correctness of the plaintiff's version of the facts.'" *Cunningham v. City of Wenatchee*, 345 F.3d 802, 807 (9th Cir. 2003) (quoting *Johnson v. Jones*, 515 U.S. 304, 312 (1995)).

Although Appellants briefly argue that their conduct does not violate clearly established law, they do so exclusively by asking this Court to take *their* version of the facts as true and arguing that *this* version of events does not violate Voskanyan's clearly established constitutional rights. For example, Appellants argue there is "no foundation" for Voskanyan's claim that the custody defendants knew of the assault and failed to intervene, and no authority for the proposition that officers may violate a detainee's right to be free from violence without prior knowledge of the incident. Likewise, Appellants insist that Voskanyan's allegations of inadequate medical care

are legally inapposite in light of the prison medical records and expert declaration that were excluded by the district court.

Neither argument properly invokes this Court's interlocutory jurisdiction. These "*fact*-related dispute[s] about the pretrial record" ask this Court to "consider the correctness of the plaintiff's version of the facts," and are accordingly beyond the scope of this interlocutory appeal. *Cunningham*, 345 F.3d 806–07 (quoting *Johnson*, 515 U.S. at 312). Although "this Court is not precluded from reviewing [an order denying summary judgment based on qualified immunity] on appeal merely because some of the facts are disputed[,] . . . we assume the version of the material facts asserted by the non-moving party to be correct" when evaluating issues of law. *Jeffers v. Gomez*, 267 F.3d 895, 905 (9th Cir. 2001) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1195 (9th Cir. 2000)) (emphasis omitted).

Additionally, we lack interlocutory jurisdiction to evaluate the district court's exclusion of prison medical records and an expert report authored by Dr. Teophilov. "A defendant cannot inject into an interlocutory appeal issues that are otherwise not immediately appealable." *P.B. v. Koch*, 96 F.3d 1298, 1304–05 (9th Cir. 1996) (quoting *Allen v. Sakai*, 48 F.3d 1082, 1085 (9th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995)). This Court has long held that "no interlocutory appeal of a pretrial ruling on the admissibility of evidence is available." *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1342 (9th Cir. 1985); *see, e.g.*, *P.B.*, 96 F.3d at 1304 (declining

to review appellants' argument "that the district court improperly denied defendants' motions to strike" when addressing denial of qualified immunity). Any review of these preliminary rulings would be premature, as "the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling" at trial. *McSherry v. City of Long Beach*, 423 F.3d 1015, 1022 (9th Cir. 2005) (quoting *Luce v. United States*, 469 U.S. 38, 41–42 (1984)). Accordingly, we lack jurisdiction over this appeal and do not address the merits of Appellants' arguments.[2]

DISMISSED.

[2] At oral argument, Appellants claimed that this Court's decision in *Sandoval v. City of San Diego* grants us jurisdiction to address the district court's evidentiary rulings on interlocutory appeal. 985 F.3d 657 (9th Cir. 2021). This argument is inapposite, as *Sandoval* dealt with a direct appeal from the grant of summary judgment, not an interlocutory appeal from the denial of summary judgment. *See id.* at 665 ("We have jurisdiction under 28 U.S.C. § 1291."). Accordingly, *Sandoval* does not speak to the jurisdictional issues now before us.

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CHRISTEN, Circuit Judge, concurring in the judgment.

I concur with my colleagues' decision that we must dismiss this appeal for lack of jurisdiction. I write separately because I do not agree with the blanket rule described by my colleagues: that we lack jurisdiction to consider all evidentiary rulings made in the context of a district court's denial of summary judgment on qualified immunity grounds.

Pursuant to the collateral order doctrine, "we have jurisdiction over the interlocutory appeal of a denial of qualified immunity, 'to the extent that it turns on an issue of law.'" *Villanueva v. California*, 986 F.3d 1158, 1164 (9th Cir. 2021) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). When we exercise this limited form of jurisdiction we must construe the facts and draw all inferences in favor of the non-moving party. *See id.* at 1165. As with an appeal of any summary judgment ruling, we can only conduct a proper review if we know what evidence was within the district court's purview when it ruled on the summary judgment motion. *See Est. of Anderson v. Marsh*, 985 F.3d 726, 735 (9th Cir. 2021) (W. Fletcher, J., dissenting) ("[T]he district court views disputed evidence in [qualified immunity] cases in the light most favorable to the plaintiff, just as it does in other summary judgment cases."); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) (observing that a "district court's ruling on a motion for summary

judgment may only be based on admissible evidence") (citing *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)); *Morrison v. Char*, 797 F.2d 752, 757 (9th Cir. 1986) ("[T]he appellate court, on review of a grant or denial of a motion for summary judgment, may 'consider only those papers that were before the trial court.'" (quoting 10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 10 *Federal Practice and Procedure* § 2716, at 650–51 (2d ed. 1983))).

My colleagues conclude that we necessarily lack jurisdiction to review evidentiary rulings a trial court makes at the summary judgment stage when a defendant seeks qualified immunity. They do so based on two general principles: (1) the premise that we do not review a district court's in limine rulings on an interlocutory basis; and (2) the proposition that a defendant cannot use an interlocutory appeal to challenge issues that are otherwise not immediately appealable. I agree with both of these general principles, but I do not agree that they bar us from ever reviewing an evidentiary ruling made in the course of deciding qualified immunity at the summary judgment stage.

To begin, the underlying reason that we typically do not review in limine rulings on an interlocutory basis is because "[i]t is impossible to determine whether the [appellant] will be prejudiced by such ruling absent a trial, a ruling in the context of trial, and the return of a verdict." *Coursen v. A.H. Robins Co.*, 764 F.2d

1329, 1342 (9th Cir. 1985). In *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court explained:

> Any possible harm flowing from a district court's *in limine* ruling . . . is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the . . . proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling.

Id. at 41–42.

In contrast, when a summary judgment motion seeking qualified immunity is incorrectly denied, potential prejudice is not speculative because qualified immunity grants a defendant immunity from having to stand trial. That is precisely why we have said, "If the appeal of the denial of qualified immunity is not permitted until the final judgment, 'the immunity from standing trial will have been irretrievably lost.'" *Melnik v. Dzurenda*, 14 F.4th 981, 985 (9th Cir. 2021) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014)); *see Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (observing that the purpose of the qualified immunity doctrine is "to avoid subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery" (alteration and internal quotation marks omitted)). The first rationale my colleagues rely upon for not reviewing in limine rulings on an interlocutory basis does not hold up where qualified immunity is

denied because we need not speculate to know that a defendant who is improperly denied immunity is prejudiced.

The majority's second rationale also falters in the confines of the interlocutory review permitted in qualified immunity cases. As long as we cabin our review to resolving purely legal arguments about whether a defendant's conduct violated the Constitution or clearly established law, *see Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021), interlocutory review of a district court's evidentiary ruling does not defeat the general rule that an interlocutory appeal may not be used to challenge issues that are not otherwise reviewable.

Evidentiary rulings made as precursors to summary judgment allow the trial court to determine those facts that are contested, and those that are not, for the purpose of its legal analysis. In most cases, a reviewing court can avoid wading into the merits of evidentiary skirmishes when considering a qualified immunity ruling made at the summary judgment level because we construe disputed facts in the light most favorable to the non-moving party and assess the merits of the two-part qualified immunity test, which asks whether: (1) the defendant's conduct violated a federally protected right; and (2) the right was "clearly established" at the time of the defendant's action or inaction. *Orn v. City of Tacoma*, 949 F.3d 1167, 1174 (9th Cir. 2020). Respectfully, my colleagues overlook that not every

apparent factual dispute is sufficient to defeat summary judgment. For example, the Supreme Court and this Circuit have recognized that a genuine issue of fact does not exist where a party's assertion of fact is plainly contradicted by a video recording. *See Plumhoff*, 572 U.S. at 777 (stating, based on evidence captured by video cameras on police vehicles, that "the record conclusively disproves [the plaintiff's] claim"); *Hernandez v. Town of Gilbert*, 989 F.3d 739, 746 (9th Cir. 2021) ("[W]e are not required to accept a non-movant's version of events when it is clearly contradicted by a video in the record." (internal quotation marks and alteration omitted)). If a trial court mistakenly excludes this type of evidence at the summary judgment stage, a defendant could be wrongfully denied qualified immunity because the resulting evidentiary record would not include the evidence showing that the plaintiff's "version of events is 'blatantly contradicted by the record, so that no reasonable jury could believe it.'" *Orn,* 949 F.3d at 1171 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). For this reason, where qualified immunity is denied and an appellant argues that an erroneous in limine ruling skewed the outcome; we must review the evidentiary ruling that established the universe of facts fairly considered by the district court when summary judgment was denied.

The cases my colleagues cite to suggest that we may never consider

evidentiary rulings on interlocutory review of a summary judgment ruling are easily distinguished. The majority cites *Coursen v. A.H. Robins Co.*, 764 F.2d 1329 (9th Cir. 1985), but it did not involve qualified immunity. The plaintiffs' lawyers in *Coursen* voluntarily sought dismissal of their case in a misguided attempt to appeal an unfavorable in limine evidentiary ruling without proceeding to trial. *Id.* at 1332, 1341. The district court characterized the dismissal as "involuntary" because the court mistakenly thought that designation would preserve the plaintiffs' ability to appeal the evidentiary ruling on an interlocutory basis. *Id.* at 1341–42. We declined to review the in limine ruling and remanded with direction for the trial court to either dismiss the case with prejudice or proceed to trial. *Id.* at 1342–43.

The majority also cites *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996), but it does not support the proposition that the exception allowing interlocutory review of a defendant's entitlement to qualified immunity does not encompass evidentiary rulings baked into the denial of summary judgment. In *P.B.*, we rejected the defendants' request for interlocutory review of a district court's denial of motions to strike certain evidence because, even without considering the challenged evidence, the district court was able to conclude as a matter of law that the plaintiffs had a clearly established right to be free from the defendant's use of

excessive force. *See id.* at 1304–05 ("The district court expressly stated that it was disregarding the challenged portions of the affidavits for purposes of its qualified immunity ruling.").

Although I do not endorse my colleagues' view that a blanket rule bars us from undertaking interlocutory review of evidentiary rulings made in the context of denying qualified immunity, I agree that we lack jurisdiction to review the district court's evidentiary rulings in this particular appeal. Voskanyan's claim against medical providers is that his constitutional rights were violated because he was denied medical care after being brutally attacked in prison. In the district court, appellants argued that scores of medical records refute Voskanyan's claim. In this way, the record in Voskanyan's case resembles cases in which video evidence allows a court to decide there is no genuine dispute of material fact. *See, e.g.*, *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014). Appellants argue that the district court incorrectly denied qualified immunity to various defendants accused of denying Voskanyan access to care because the court erroneously excluded an affidavit that purported to detail the care that Voskanyan received.

Voskanyan's complaint alleged that he was denied all medical care, but that allegation is "blatantly contradicted" by the vast medical records defendants produced. *Scott v. Harris*, 550 U.S. 372, 380 (2007). The records reflect that

Voskanyan received extensive medical care, including diagnostic tests such as electromyogram and nerve conduction studies (EMG/NCS), electroencephalography (EEG), and magnetic resonance imaging (MRI). *Cf. Est. of Anderson v. Marsh*, 985 F.3d 726, 731 n.3 (9th Cir. 2021) (recognizing a "narrow additional avenue for a defendant to argue that a plaintiff's version of the facts is blatantly contradicted by the record, so that no reasonable jury could believe it," such as when a "videotape of the events in question quite clearly contradicted the version of the story told by the plaintiff" (alteration and internal quotation marks omitted)). That said, Voskanyan also contends that defendants obstructed his ability to access adequate medical care or otherwise treated him in a way that satisfies the demanding standard for Eighth Amendment claims. The district court concluded that there were genuine issues of material fact about those allegations, and defendants made no effort to segregate actions taken by the various defendants named in Voskanyan's complaint. Had they done so, the record may have allowed the district court to rule that the conduct of at least some defendants did not rise to the level of deliberate indifference as a matter of law.

As it is, we lack jurisdiction to consider the argument appellants advance because, boiled down, appellants ask us to conclude that the evidence is insufficient to raise an issue of material fact. The narrow exception permitting

interlocutory review of qualified immunity rulings does not permit us to review the sufficiency of the evidence. *See id.* at 731 ("If the defendant argues only that the evidence is insufficient to raise a genuine issue of material fact, we lack jurisdiction.")

Because I agree we lack jurisdiction to review the district court's conclusions regarding the sufficiency of evidence, I concur in the judgment dismissing this appeal.