PLEADINGS AND MOTIONS PRACTICE: PUTTING THE PLAINTIFFS ON TRIAL

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A. INTRODUCTION

For some, the litigation process can be a very daunting, and even intimidating, process. Suddenly, your municipal and police officer clients are accused of a myriad of constitutional and state law violations. You immediately have to decipher between the obviously frivolous claims (i.e., those alleging "false arrest" when the plaintiffs were never even detained much less arrested) and those requiring more in-depth legal analysis. You panic as you anticipate a never-ending period of discovery, motions, trials and appeals. Suddenly, you are faced with critical decisions regarding how best to proceed and, worse yet, how to prevail without exhausting your already-limited government resources.

While your instinct may be to sit back and force the plaintiffs to prove their case (or, worse yet, settle under the weight of the mounting pressure), such an approach would only empower already-litigious plaintiffs. It would also encourage the plaintiffs to seek an advantage by attempting to try their case in the media (a.k.a. the court of public opinion), where the rules of evidence and civility do not control. However, a more aggressive approach at the onset of litigation can not only make it more difficult for plaintiffs to shape the case, but it can put the plaintiffs on the defensive.

B. PRE-TRIAL MOTIONS

The first major decision you have after receiving the complaint is how best to respond. In reviewing the complaint, you immediately notice that it is wrought with a series of self-serving conclusory claims unsupported by the law. Do you file an Answer, allow discovery to commence and wait until the Motion for Summary Judgment stage to resolve these issues *or* do you file a Motion to Dismiss? While filing an Answer is certainly not as time-consuming as filing a long detailed motion; you will save time in the long run and immediately force the plaintiffs to defend the viability of their claims. Filing a Motion to Dismiss is the first act of attacking the complaint and disposing of any frivolous claims.

Federal Rule of Civil Procedure ("FRCP") 12(b) authorizes a party to answer a complaint by answer *or* by motion. The grounds for filing a Motion to Dismiss include:

- Lack of subject-matter jurisdiction
- Lack of personal jurisdiction
- Improper venue
- Insufficient process
- Insufficient service of process
- Failure to state a claim upon which relief can be granted
- Failure to join a party under Rule 19

Filing a Motion to Dismiss will not automatically stay discovery; however, most judges will likely grant a stay during the pendency of the motion so that the defendant does not unnecessarily incur

expenses to defend meritless claims. Thus, out of an abundance of caution, you should file a Motion to Stay Discovery during the pendency of the motion. A Motion to Dismiss, even if not granted in its entirety, will also be instrumental in limiting the number of claims and/or parties in the lawsuit as most plaintiffs tend to "throw in the kitchen sink" when filing suit.

1. Filing a Motion to Dismiss Under FRCP 12(b)(6) After Iqbal and Wombley: When Vague Just Isn't Good Enough

Most plaintiffs filing suit believe it is sufficient to include a series of self-serving conclusory allegations that your police officer client has violated their constitutional rights or that your municipal client has violated a custom, policy or practice that was the moving force behind the alleged constitutional violation. Indeed, FRCP 9(b) only requires specificity when alleging fraud or mistake. However, while specificity is not generally required when asserting allegations in other cases, plaintiffs cannot merely allege that an officer "violated their constitutional rights" or that the municipality had "a custom, policy or practice that was the moving force behind the alleged constitutional violation" without setting forth specific facts supporting those contentions.

In *Conley v. Gibson*,[1] Justice Hugo Black, writing the opinion of the Court, pointed out that a complaint need only provide a party with "fair notice" of the grounds entitling them to relief. Under this standard, a complaint should not be dismissed unless there is "no set of facts" under which a plaintiff could recover. This standard allowed plaintiffs to survive a motion to dismiss whenever there was a possibility that they could discover facts, not yet disclosed, that would later entitle them to recovery.

The *Conley* standard made it virtually impossible for a defendant to prevail on a Motion to Dismiss when a complaint contained nothing more than conclusory contentions. However, in 2007, in *Bell Atlantic Corp. v. Twombly*,[2] the United States Supreme Court retired the relaxed standard set forth fifty years prior in *Conley v. Gibson* that allowed often vaguely-worded complaints to proceed. In doing so, the Court distinguished between the fact specific requirements of Rule 8 and the need for more than conclusory contentions in a complaint. Specifically, the Court held that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." The Court echoed the need for more than conclusory contentions two years later in *Ashcroft v. Iqbal*.[3] Specifically, the Court stated that:

> The pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to

[1] 355 U.S. 41 (1957).
[2] 550 U.S. 544 (2007).
[3] 556 U.S. 662 (2009).

> draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.[4]

Thus, plaintiffs cannot simply include self-serving contentions without actual factual allegations supporting the claims. Consequently, a municipality/officers' first line of attack should be the complaint when it contains nothing more than conclusory contentions.

However, recently, the Eleventh Circuit loosened the pleading requirement for plaintiffs asserting a *Monell* claim against municipality in *Hoefling v. City of Miami*.[5] There, the Court stated "that identifying and proving that a final policymaker acted on behalf of a municipality is "an evidentiary standard, and not a pleading requirement." Thus, a plaintiff would not have to identify the final policy maker in the pleadings stage, which makes it far more difficult for a municipality to prevail at the Motion to Dismiss stage.

2. Motion for Summary Judgment: Getting Another Bite at the Apple.

Assuming the plaintiffs have made it past your Motion to Dismiss, the defendants still have another chance to get the case dismissed on summary judgment. Indeed, merely because the plaintiffs have survived the motion to dismiss stage does not mean that the case has merit; rather, it means that the plaintiffs have *alleged* sufficient facts to state a claim. However, at the summary judgment stage, plaintiffs must provide *evidence* to support their allegations. It is no longer enough that they have made sweeping and unsupported claims against your client. Indeed, even the *Hoefling* decision only allows the plaintiffs to survive the Motion to Dismiss stage; the Eleventh Circuit implicitly recognized that the plaintiffs must provide evidence to support their *Monell* claim to survive the Motion for Summary Judgment stage. Failure to provide evidentiary support for the allegations in the complaint provides the defendant with another opportunity to prevail without a trial.

Moreover, some plaintiffs believe that they can defeat a motion for summary judgment by simply introducing an expert report, concluding that your client violated the plaintiffs' constitutional rights or otherwise acted unreasonably. However, in *San Francisco v. Sheehan*,[6] the United States Supreme Court made clear that if the officer is otherwise entitled to qualified immunity, a plaintiff cannot "avoid summary judgment by simply providing an expert's report that an officer's conduct leading up to a deadly confrontation was unprecedented, inappropriate or even reckless." Thus, the court's focus on summary judgment will be on whether the officer meets the qualified immunity standard without regard to any "expert" report submitted by the plaintiffs.

Further, you should always keep in mind that a diligent plaintiffs' attorney may file a Motion for Summary Judgment against your client. Often time, as defense attorneys, we forget

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[4] *Id.* at 678.
[5] 2016 WL 285358 (11th Cir. January 25, 2016).
[6] 135 S.Ct. 1765 (2015).

that, unlike a Motion to Dismiss, a Motion for Summary Judgment is a litigation tool that can be used by *both* parties. While plaintiffs seldom file a motion for summary judgment, they can file a motion when the evidence establishes a matter of law the case against defendants. Moreover, it is important to note that it is not enough for the plaintiffs to rely on the *denial* of the defendants' motion does not mean the plaintiffs prevail as a matter of law. In the end, you should be mindful of the impact that evidence uncovered during discovery will have on any such motion filed by plaintiffs.

C. TRIAL MOTIONS

1. Daubert Motion: Excluding the "Non-Expert"

The admissibility of expert testimony is governed by Federal Rule of Evidence 702. Rule 702 permits testimony only by experts qualified by "knowledge, skill, expertise, training, or education," to testify "in the form of an opinion or otherwise" based on "scientific, technical, or other specialized knowledge" if that testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."[7] "In evaluating the admissibility of expert testimony, trial courts are guided by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [8]and its progeny.

In *Daubert*, the Supreme Court made clear that prior to the admission of expert testimony, the trial court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[9] The burden is on the proponent of the expert testimony to establish the admissibility of the testimony under Rule 702 based on a preponderance of the evidence.[10] In *Kumho Tire Co. v. Carmichael*, the Supreme Court "conclude[d] that *Daubert's* general holding - setting forth the trial judge's general 'gatekeeping' obligation - applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[11] Finally, in *General Electric Co. v. Joiner*, the high court set forth an abuse of discretion standard in reviewing the decision of a district court to exclude or admit expert testimony.[12]

While the District Court has broad discretion when determining the admissibility of an expert's opinion, the District Court must still undertake a rigorous review of the expert's opinion.[13] Indeed, the 11th Circuit requires the District Court to engage in a "'rigorous three-part inquiry' assessing whether:

> the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert***;** and

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[7] Fed. R. Evid. 702.
[8] 509 U.S. 579(1993).
[9] *Daubert*, 509 U.S. at 589
[10] *See Id.* at 593 n. 10.
[11] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).
[12] *General Electric Co. v. Joiner*, 522 U.S. 136, 146.
[13] *Hendrix v. Evenflo, Inc.*, 609 F.3d 1183 (11th Cir. 2010).

(3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."[14]

2. Motion in Limine: Chipping away at the Plaintiffs' Case

While the Court may have denied your Motion to Dismiss and Motion for Summary Judgment, your case is not over. Rather, the denial of these motions merely means that the plaintiff has alleged sufficient facts in the Complaint to survive a Motion to Dismiss and alleged a dispute of material facts to survive a Motion for Summary Judgment. However, surviving these pre-trial motions does not mean the plaintiff prevails; rather, now the plaintiffs must present their case to a jury. This is where a Motion in *Limine* can be useful as it is an effective tool in limiting evidence and preventing the introduction of certain evidence at trial.

A Motion in *Limine* may seek to limit or exclude evidence relating to:

1. The criminal history of your client;
2. Your client's internal disciplinary file, especially those documents related to incidents that allegedly occurred *after* the subject incident;
3. Expert testimony, especially testimony opining on the legal issues before the jury;
4. Settlements entered into by your municipality client in which liability was not admitted; and
5. Disciplinary decisions made by unrelated agencies and departments, especially when the plaintiff cannot show that your municipal client had notice.

3. POST-TRIAL MOTIONS

Even if the jury finds against your clients and enters a judgment in favor of the Plaintiff, your job is not over. Your first remedy is to request a Judgment Notwithstanding the Verdict ("JNOV") under Rule 50 of the Federal Rule of Civil Procedure or for a Motion for a New Trial under Rule 59 of the Federal Rules of Civil Procedure. As a caveat, though, you must be sure to move for a Directed Verdict at the conclusion of the plaintiff's case and your case before moving for a JNOV.

Rule 50 and Rule 59 Motions are especially important when dealing with immunity issues, because they are issues of law to be decided by the Court. While the jury can certainly weigh in on whether, for example, your client acted with "actual malice," the ultimate decision regarding whether to grant immunity rests with the trial judge as immunity issues are *legal* questions. Further, even if the trial judge grants you a New Trial but denies your JNOV, you still have a right of immediate review of the Court's denial if it involves immunity issues. Thus, you should consider appealing the Trial Court's denial of immunity immediately before proceeding with a new trial as doing so may eliminate the need for a new trial or, at the very least, limit the issues in the new trial.

D. CONCLUSION

[14] *Id.* at 1194.

The effective handling of your case does not hinge on your ability to try your case before a jury, but rather on your pre-trial, trial and post-trial motion practice. Indeed, many cases never make into the courtroom as they are resolved in dispositive motions. Thus, it is critical that attorneys defending police office and municipal clients are well-versed on these tools as they can be instrumental in bringing about an early positive result for your client.