[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-15551

D.C. Docket No. 2:10-cv-03314-AKK

J.W.,
by and through his next friend, Tammy Williams,
G.S.,
by and through her next friend, LaTonya Stearns, et al.,

Plaintiffs-Appellees,

versus

A. C. ROPER,
in his individual and official capacity as Chief
of the Birmingham Police Department,
J. NEVITT,
Officer, in his individual capacity, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(September 19, 2013)

Before MARTIN and BLACK, Circuit Judges, and EDENFIELD, District Judge.

PER CURIAM:

Birmingham Police Chief A.C. Roper and several individual School Resource Officers appeal the district court's partial denial of their motion for summary judgment. On appeal, Chief Roper argues he is not liable in his official capacity under 42 U.S.C. § 1983. The individual Resource Officers argue (1) they are entitled to qualified immunity against Plaintiffs' § 1983 constitutional claims, (2) they are entitled to state-agent immunity against Plaintiffs' state-law outrage claims, and (3) even if they are not entitled to state-agent immunity, Plaintiffs' outrage claims are meritless and should not survive summary judgment. We affirm the district court's decision that the Resource Officers are not entitled to qualified immunity, and dismiss the remaining claims for lack of appellate jurisdiction.[1]

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Plaintiffs' only remaining claim against Chief Roper alleges that he is liable in his official capacity because the Birmingham Police Department's policy and custom on the use of mace in Birmingham schools caused their constitutional injuries.[2] The district court concluded the Plaintiffs' allegations and supporting evidence created a genuine issue of material fact on this issue, and therefore Chief Roper was not entitled to summary judgment. Roper contends the district court erred because the Plaintiffs' § 1983 claims are meritless and cannot establish his official liability.

For several reasons, we do not have jurisdiction over Roper's claims at this interlocutory stage. *See, e.g., R*

subject to interlocutory review because "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment").

Moreover, this Court does not have pendent-

policies is not pertinent to determining whether the Officers acted within their discretionary authority. After all, a mace policy could be constitutional, and yet an individual officer could still violate a student's constitutional rights or act outside the policy's terms. Vice versa, a mace policy could be unconstitutional on its face, and yet an individual officer could still behave constitutionally and do so within his discretionary authority. Therefore, Roper's official-capacity appeal is not "inextricably intertwined" with the Officers' qualified-immunity appeals. *Cf. Bryant v. Jones*, 575 F.3d 1281, 1301–02 (11th Cir. 2009) (holding that a question of "issue preclusion" was "inextricably intertwined" with qualified-immunity issues "because resolution of the preclusion issue in favor of the defendants w[ould] necessarily dispense of any need to pass on the immunity issues").

Indeed, Roper's jurisdictional argument is foreclosed by our decision in *Jones*. *See* 174 F.3d at 1293. Just as in this case, *Jones* involved separate

Jones, no other issue is necessarily shared among the claims. Therefore, like *Jones*, Roper's official-capacity appeal is not inextricably intertwined with the Officers' qualified-immunity appeal.

Accordingly, we do not have pendent-party appellate jurisdiction over Roper's official-capacity appeal. Such a claim is merely a defense to liability, which is generally not subject to interlocutory review. *See Mitchell*, 472 U.S. at 526–30. Also, Roper's appeal is not inextricably intertwined with the other defendants' qualified-immunity appeals, because resolving Roper's claim would not "necessarily dispense of any need to pass on the immunity issues." *Cf. Bryant*, 575 F.3d at 1301–02.

B. The Resource Officers' State-law Claims

The record makes clear we do not have appellate jurisdiction at this stage over the Officers' state-law claims. On appeal, the Resource Officers make two arguments involving state law. First, the Officers contend they are entitled to state-agent immunity against the Plaintiffs' outrage claims under Alabama law. Second, the Officers contend that, even if they are not immune from suit under state law, the Plaintiffs' outrage claims are meritless. Based on these arguments, the Officers ask us to both reverse the district court and direct it to enter summary judgment in their favor.

Regardless of whether the Officers' claims are correct or incorrect, we do not have jurisdiction over their state-law appeals.[4] Ordinarily, we have appellate jurisdiction over only "those judgments, orders, or portions thereof which are specified in an appellant's notice of appeal." *Hill v. BellSouth Telecomms., Inc.*,

the adverse party. *Id.* Second, we may review unspecified issues when they are "inextricably entwined" with specified issues. *Id.*

In this case, the Officers' unspecified state-law claims satisfy neither criterion for review. The Officers' intent to appeal the state-agent immunity and outrage issues was not apparent. *See id.* Rather, "by specifically listing only" one part of a multi-issue district court order, the Officers conveyed an "intent *not* to appeal" other unspecified issues and rulings. *See Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374 (11th Cir. 1983) (emphasis in original).

Additionally, the state-law issues are not inextricably entwined with qualified immunity. Qualified immunity and Alabama's outrage tort, for example, share no common questions of law. *Compare Hope*, 536 U.S. at 736–41 (outlining the elements of qualified immunity), *with Green Tree Acceptance, Inc. v. Standridge*, 565 So. 2d 38, 44 (Ala. 1990) (outlining the elements of outrage Com A.Ii o aysu.00

2d 1276, 1281 (Ala. 2008). Because we need not reach that distinctive question in

damages from the Resource Officers under § 1983: K.B., B.D., T.L.P., T.A.P., B.J., and G.S.[6] The facts set out by the district court accurately represent the record on summary judgment, and viewing those facts in the light most favorable to the Plaintiffs, we affirm the district court's denial of qualified immunity. *See, e.g.*, *Vinyard v. Wilson*, 311 F.3d 1340, 1347–55 (11th Cir. 2002).

Only one of the macings requires additional discussion. With regard to Officer Clark, the denial of qualified immunity is based on the second macing of G.S. Viewing the facts in the light most favorable to G.S., Officer Clark maced G.S. a second time when she was incapacitated, non-resistant, and writhing in pain on the ground.[7] Although the first macing was reasonable due to G.S.'s initial resistance, that resistance does not shield Officer Clark from liability when he used force after the resistance and risk of flight was over. *Cf. Gray v. Bostic*, 458 F.3f 0.00 0 Td gr

denial of qualified immunity to Officer Clark, as well as the other Resource Officers.

III. CONCLUSION

We **AFFIRM** the district court's denial of the Resource Officers' motion for qualified immunity, and **DISMISS** Chief Roper's appeal, as well as the Officers' state-law appeals, for lack of appellate jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Atlanta, Georgia 30303

John Ley
Clerk of Court

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September 19, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 12-15551-DD
Case Style: J.W., et al v. A.C. Roper, et al
District Court Docket No: 2:10-cv-03314-AKK

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursu

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

Pursuant to Fed.R.App.P. 39, costs taxed against appellants.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call