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REVIEW CAN WAIT: ORDERS DENYING PRO SE PLAINTIFFS' REQUESTS FOR THE ASSISTANCE OF COUNCIL SHOULD ONLY BE REVIEWED AFTER FINAL JUDGMENTS

Nicholas E. Draper*

Two correctional officers sprayed Kevin Ward with pepper spray during an altercation in which Ward refused to comply with orders.[1] The correctional officers sprayed Ward, a prisoner at the South Central Correctional Center in Licking, Missouri, multiple times, initially when Ward refused to allow the officers to place him in handcuffs and again after a nurse determined Ward could endure more pepper spray.[2]

Ward filed suit one month after the incident in the United States District Court for the Western District of Missouri.[3] Ward alleged that the two correctional officers and the nurse violated his civil rights by using excessive force and by failing to provide him with medical care.[4] Ward filed his complaint pro se, or without the assistance of a lawyer,[5] and asked the trial court for appointed counsel three different times.[6] There is no "constitutional or statutory right to appointed counsel" in civil cases.[7] Nevertheless, Ward requested the assistance of counsel because he said he needed "counsel to assist with preparing his case for trial" and that he could not "litigate his case without professional assistance."[8] The district court denied each request.[9] Ward appealed the denial to the United States Court of Appeals for the 8th Circuit.[10]

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* 2014 Graduate of The University of Missouri – Kansas City School of Law

[1] Ward v. Smith, 721 F.3d 940, 941 (8th Cir. 2013).
[2] *Id.*
[3] *Id.*
[4] *Id. at 942.*
[5] BLACK'S LAW DICTIONARY 1341 (9th ed. 2011).
[6] Ward, 721 F.3d at 942.
[7] Edgington v. Mo. Dep't of Corr., 52 F.3d 777, 780 (8th Cir. 1995).
[8] Joint Appendix of Record, *supra* note 9, at 79.
[9] Joint Appendix of Record, *supra* note 9, at 83, 1016, and 1057.
[10] Joint Appendix of Record, *supra* note 9, at 19.

Because Ward's civil rights case is still pending in district court, his appeal is considered an interlocutory appeal. Ward's particular interlocutory appeal exemplifies how such interlocutory appeals are not treated the same in the Eighth and Tenth Circuits. In fact, the Eighth Circuit is one of only three circuits that allow immediate review of orders denying the assistance of counsel.[11] Generally, appellate courts can only hear final judgments.[12] But the Eighth Circuit says these interlocutory appeals satisfy the collateral order exception[13] to the final judgment rule and thus can be heard immediately. The Tenth Circuit, however, finds that interlocutory appeals from orders denying the assistance of counsel are not immediately reviewable and can be effectively heard in conjunction with an appeal from a final judgment.

This Note will examine the divergent approaches taken by the Eighth and Tenth circuits and evaluate the rationale behind the majority and minority views. The first section of this Note will describe the final judgment rule and the collateral order exception to the final judgment rule. The second section will explain and evaluate the differing views in the Eighth and Tenth circuits about whether appeals from orders denying the assistance of counsel satisfy the collateral order exception by examining each element of the collateral order exception in detail. The third section will conclude that the majority approach is the correct position.

I. FINAL JUDGMENT RULE AND COLLATERAL ORDER EXCEPTION

Appellate courts have jurisdiction of appeals from all final decisions of district courts.[14] A decision is not considered final unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[15] The final judgment requirement represents the "strong congressional policy against piecemeal reviews" and it prevents "obstructing or impeding an ongoing judicial proceeding by interlocutory appeals."[16] This requirement also "promotes judicial efficiency and hastens the ultimate termination of litigation."[17]

Yet a Court of Appeals can review some interlocutory appeals that fall into a "small class" of orders with that are separable from and collateral to the principal claim asserted in the action.[18] These orders are considered "too important to be denied review and too independent of the cause itself to require

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[11] Ward v. Smith, 721 F.3d 940 (8th Cir. 2013). This per curiam decision acknowledged that most circuits find orders denying the assistance of counsel are not immediately appealable and noted that a majority of the Eighth Circuit would join the majority position. But because only a three-judge panel heard Ward's appeal, the panel felt inclined to follow circuit precedent because only the court en banc may overrule Eighth Circuit precedent.

[12] 28 U.S.C. § 1291 (2013).

[13] *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (outlining the collateral order exception to the final judgment rule).

[14] § 1291.

[15] Cunningham v. Hamilton Cnty., Ohio, 527 U.S. 198, 204 (1999).

[16] United States v. Nixon, 418 U.S. 683, 690 (1974).

[17] *Id.*

[18] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

that appellate consideration be deferred until the whole case is adjudicated."[19] For an order to come within this small class, the order must (1) conclusively determine the disputed question, (2) resolve an "important issue completely separate from the merits of the action," and (3) be "effectively unreviewable on appeal from a final judgment."[20] In other words, an order must be considered the final rejection in the trial court of a claimed right "where denial of immediate review would render impossible any review whatsoever."[21] In order for an appellate court to review an interlocutory appeal, it must find that the appeal satisfied the three required elements of the collateral order exception. It is in this determination where the Eighth and Tenth circuits differ.

II. DIFFERING EIGHTH/TENTH CIRCUIT VIEWS

A. First Element

Both the Eighth and Tenth circuits do not discuss at length whether orders denying counsel conclusively determine the disputed question and therefore satisfy the collateral order exception's first element. The principal Eighth Circuit case discussing this issue, *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984), only mentions that a district court's order denying a motion satisfies the first element because it "conclusively determine[s] the disputed question. . . ."[22]

The other two circuits that agree with the Eighth Circuit, the Fifth Circuit and the Federal Circuit, provide much more insight. The Fifth Circuit determines that a denial conclusively determines the question of appointment because "if a defendant after denial of the motion chooses to go forward with his claim, he must do so without the assistance of appointed counsel."[23] The Federal Circuit was more forceful. It stated that after a district court denied a motion for appointed counsel, "the disputed question was conclusively answered, and the answer would, by its nature, govern all further proceedings."[24]

Like the Eighth Circuit, the Tenth Circuit does not explicitly address the first element of the collateral order exception at length, and even concedes that the denial of a motion for the assistance of counsel may conclusively determine the disputed question.[25] Other majority circuits, however, provide greater insight. The First Circuit finds that a denial does not conclusively determine the disputed question because a district court can subsequently revise a denial of the appointment of counsel "where a possibly meritorious case appears to be

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[19] *Id.*
[20] Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).
[21] Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981).
[22] Slaughter v. City of Maplewood, 731 F.2d 587, 588 (8th Cir. 1984) (simply quoting the collateral order exception's three elements as outlined in *Coopers & Lybrand*, 437 U.S. at 468).
[23] Robbins v. Maggio, 750 F.2d 405, 412 (5th Cir. 1985).
[24] Lariscey v. United States, 861 F.2d 1267, 1269 (Fed. Cir. 1988).
[25] Cotner v. Mason, 657 F.2d 1390, 1391 (10th Cir. 1981).

developing."[26] Likewise, the Fourth Circuit notes that even though a denial may make the litigation more burdensome for the pro se plaintiff, the denial does not end the case on the merits and a district court judge is free to reconsider appointing counsel in the future "as facts and circumstances dictate."[27] The D.C. Circuit explains that district judges "often postpone the appointment decision until after dispositive motions as a means of weeding out frivolous or unmeritorious cases."[28] District judges also may initially deny a motion to appoint counsel at the motion to dismiss stage because they feel they can adequately rule on the pleadings produced by a plaintiff but later may decided to appoint counsel "to ensure the development of a record adequate for summary judgment or trial."[29]

Even though the Eighth and Tenth Circuits are largely silent on whether the first element of the collateral order exception is satisfied, the majority approach is the correct one. District judges are free to reconsider the denial of a motion for the assistance of counsel should it become clear that a pro se plaintiff cannot adequately pursue his case on his own. Kevin Ward, for example, requested assistance three times, showing that an initial denial does not conclusively determine the disputed question. As a result of this possibility, orders denying the assistance of counsel do not satisfy the collateral order exception's first element.

B. Second Element

Like the first element, the Eighth and Tenth circuit do no devote much time to explaining the second element, which is whether denials of counsel resolve an important issue completely separate from the merits of the overall action. The Eighth Circuit simply states that orders denying the assistance of counsel satisfy the second element of the collateral order exception by citing the necessary elements from *Coopers & Lybrand*.[30] Yet the Federal Circuit supplies more analysis, finding that a decision not to appoint counsel for a pro se plaintiff does not "enmesh [the court] in the factual and legal issues comprising the plaintiff's cause of action."[31] The Fifth Circuit agrees, albeit succinctly, that a district court's decision not to appoint an attorney for a pro se plaintiff is "collateral to the merits of the case,"[32] satisfying the second element.

The Tenth Circuit offers little analysis regarding the second element, again simply stating that a denial of the assistance of counsel "arguably" satisfies

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[26] Appleby v. Meachum, 696 F.2d 145, 147 (1st Cir. 1983) (quoting Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963)).
[27] Miller v. Simmons, 814 F.2d 962, 965 (4th Cir. 1987); *accord* Holt v. Ford, 862 F.2d 850, 852 (11th Cir. 1989) ("denial of appointed counsel usually indicates "nothing more than that the district court is not completely confident of the propriety of [court appointed counsel] at that time"), Henry v. City of Detroit Manpower Dept., 763 F.2d 757 (6th Cir. 1985) ("orders denying appointment of counsel should be presumed tentative").
[28] Ficken v. Alvarez, 146 F.3d 978, 981 (D.C. Cir. 1998).
[29] *Id.* at 981.
[30] *Slaughter*, 731 F.2d at 588.
[31] *Lariscey*, 861 F.2d at 1269-70.
[32] *Robbins*, 750 F.2d at 412.

the second element.[33] The Third Circuit, however, provides a compelling case for why orders denying the assistance of counsel are not completely separate from the merits of an action. A pro se plaintiff denied the assistance of counsel "may only succeed on appeal if he can show that the absence of appointed counsel has so prejudiced him that its denial amounts to an abuse of discretion on the part of the trial judge," a determination which the appellate court cannot make "without delving into the substance of the case."[34] Likewise, the discretion exercised by the district court "cannot be fairly and adequately assessed until the substance of the entire case is known."[35] Since the district court naturally must consider the merits of the plaintiff's claim and whether it is "so complex as to warrant the assistance of counsel," an appellate court also would have to assess those decisions, thereby enmeshing itself into the substantive issues of the case.[36]

The majority approach, again, is the proper one. The court in *Coopers & Lybrand* cautioned against appellate courts delving into the merits of a case when immediately reviewing interlocutory appeals because it did not want the appellate court to decide substantive issues before the trial court. Orders denying the assistance of counsel necessarily will enmesh appellate courts in the legal and factual issues of a case because they will have to determine whether a case is so complicated that a pro se plaintiff cannot proceed with the help of a lawyer. Because, among other tings, the initial complaint will have been drafted by the pro se plaintiff and likely will not contain enough information to determine whether the assistance of counsel is warranted, appellate courts will be required to probe into the merits of the action, something the second element of the collateral order exception expressly forbids.

C. Third Element

The core disagreement between the Eighth and Tenth circuits occurs in discussing the doctrine's third element, which is whether orders denying counsel are effectively unreviewable on appeal from a final judgment. The Eighth Circuit's finds that orders denying assistance are immediately appealable because they may cause irreparable harm upon appeal from a final judgment.[37] The Eighth Circuit quotes the Fifth Circuit to support this proposition. The Fifth Circuit determines that denials of requests for assistance of counsel are unreviewable because "the decision to deny the assistance of an appointed attorney to a layman unschooled in the law in an area as complicated as the civil rights field is truly too important to be deferred until a resolution on the merits can be had . . . [because a pro se plaintiff] likely has little hope of successfully prosecuting his case to a final resolution on the merits."[38]

The Tenth Circuit strongly disagrees with this proposition, finding that an order denying the appointment of counsel is fully reviewable after a final

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[33] *Cotner*, 657 F.2d at 1391.
[34] Smith-Bey v. Petsock, 741 F.2d 22, 25 (3d Cir. 1984).
[35] *Simmons*, 814 F.2d at 966.
[36] *Holt*, 862 F.2d at 853.
[37] *Slaughter*, 731 F.2d at 589.
[38] *Id.* (quoting Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir.1977)).

judgment because "the only burden from reversal is a new trial, with appointed counsel."[39] The Tenth Circuit also disagreed with the proposition that such orders should be immediately appealable in order to have any benefit for the pro se plaintiff, stating that many pre-trial orders are not immediately appealable and can be fully remedied by an appellate court after a final judgment.[40] The majority of circuits share this view. The First Circuit found that pro se plaintiffs are not a "frail class of litigants" and should be expected to pursue their cases long enough to raise the denial of appointment of counsel in an appeal from a final judgment.[41] The Fourth Circuit deemed it reasonable for a pro se litigant, who has the ability to perfect an immediate appeal from an order denying the appointment of counsel, to be equally capable of raising the issue on an appeal from a final judgment.[42]

The Eighth Circuit's reasoning that orders denying assistance will irreparably harm pro se plaintiffs underestimates and misconstrues their abilities. Pro se plaintiffs are just as capable of filing appeals at the end of their cases as they are when their motions to appoint counsel are denied. To reach the stage in which an appeals court must decide whether to review an order denying appointment, a pro se plaintiff must have successfully (1) filed a complaint; (2) filed a motion to appoint counsel accompanied with suggestions in support of that motion; and (3) filed an appeal from a district judge's order denying the appointment of counsel. An interlocutory appeal filed after a district court denies appointment is no different than the same appeal filed after a final judgment. If an appellate court does not immediately review denials of counsel, there is no reason to believe pro se plaintiffs are incapable of filing an appeal after a final judgment.

Simple and effective review is available to a pro se litigant upon a final judgment because most cases terminate at the dispositive motion stage.[43] Recent statistics show that very few cases reach the trial stage even though more cases are being filed each year.[44] Because appellate courts likely will be reviewing dismissals of complaints or summary judgment orders in a pro se case, the court will have little difficulty assessing "any prejudice resulting from the denial of counsel" and can fashion an equally appropriate remedy.[45] "Instead of having to retry a case, the appeals court simply sets aside the order granting the dispositive motion and remands with directions to appoint counsel."[46]

If being denied counsel prejudices a pro se plaintiff, it may be difficult for the appellate court to discover the prejudice because it will be reviewing a trial

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[39] *Cotner*, 657 F.2d at 1392.
[40] *Id.* (discussing how *Firestone* ruled that orders denying a motion to disqualify counsel were not immediately reviewable by an appellate court).
[41] *Appleby*, 696 F.2d at 146.
[42] *Simmons*, 814 F.2d at 967.
[43] *Ficken*, 146 F.3d at 982–83 (referring to data from the Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 1997, at 153 (1998)).
[44] Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 2011, at 128–29 (2012). From Fiscal Year (FY) 2007 to FY 2011, the number of civil cases filed increased 11 percent and the number of civil rights cases increased 14 percent. Yet only 1.1 percent of 302,922 total cases reached trial in the 12-month period ending September 30, 2011.
[45] *Ficken*, 146 F.3d at 983.
[46] *Id.*

court record that has been developed by the pro se plaintiff. But while this possibility explains the potential difficulty facing the appellate court, it does not explain how immediate review is effective but review after a final judgment is not. A pro se plaintiff also will not solely develop the record below. Because most pro se cases end at the dispositive motion stage, the appellate court will be able to review suggestions supporting the dispositive motion, which will be filed by lawyers opposing the pro se plaintiff. The appellate court will be able to determine from these documents whether prejudice has occurred.

This review, however, will necessarily involve delving into the merits of a case to determine if prejudice truly does exist. But examining the merits can occur only after a final judgment has been reached because the collateral order exception's second element forbids appellate courts from enmeshing themselves into the substantive issue of a case during an interlocutory appeal. Indeed, if immediate review is somehow deemed more appropriate to determine if the pro se plaintiff has been subjected to prejudice by not receiving counsel, that decision could only come from a full review of the record that assesses a case's substantive issues and whether a pro se plaintiff can adequately present them without counsel. The only effective review, then, can occur after a final judgment because the appellate court can evaluate the entire record to determine if prejudice exists.

III. CONCLUSION

Pro se plaintiffs like Kevin Ward undoubtedly would benefit from the assistance of counsel. But that fact alone does not warrant immediate review of orders denying motions for assistance because such orders do not satisfy the three elements of the collateral order exception. Orders denying requests for counsel do not conclusively determine the disputed question because district judges can re-evaluate previous denials and pro se plaintiffs are free to re-file motions for the assistance of counsel as their case progresses. Such orders also do not resolve important issues completely separate from the merits of the action because appellate judges will have to delve into the substantive legal and factual issues of the suit in order to determine whether counsel is needed to assist the pro se plaintiff. This type of review essentially enmeshes an appellate court in a review of the pro se plaintiff's claim, something that *Cohen* strictly forbids. Finally, orders denying the assistance of counsel are effectively reviewable upon appeal from a final judgment because pro se plaintiffs are more than capable of filing such appeals when their cases are over.

The Eighth Circuit has concluded that the third element of the collateral order exception is satisfied by orders denying the assistance of counsel. As a result, it decided that it had jurisdiction to immediately review Ward's appeal from such an order. The Eighth Circuit's reasoning, however, is flawed, and it even acknowledged as much in its opinion.[47] Therefore, the Eighth Circuit should convene en banc at the next available opportunity and switch to the majority view, which holds that orders denying the assistance of counsel are not

[47] Ward v. Smith, 721 F.3d 940 (8th Cir. 2013).

immediately reviewable under the collateral order exception to the final judgment rule.