THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

DEBORAH JOHNSON, individually, and as Administratrix of the Estate of Michael Lamount Simmons, deceased, and on behalf of Bashir Simmons and Sahday Simmons, the minor children of decedent and Shantae N. Johnson Plaintiffs, v. STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY; NEW JERSEY STATE POLICE; SUPERINTENDANT OF NEW JERSEY STATE POLICE, CAPT. JOSEPH R. FUENTES; SUPERINTENDENT OF NEW JERSEY STATE POLICE, LT. COL. FREDERICK MADDEN; SGT. TROOPER DANIEL ELLINGTON, Badge No. 0000; and TROOPER JOHN HAYES, Badge No. 0000, TROOPER STEVEN SHEEHAN, Badge No. 0000, i/j/s Defendants.	:	CIVIL ACTION NO. 03-1538 (JHR)

PLAINTIFF'S MOTION TO SET ASIDE DEFENDANTS' NOTICE OF APPEAL

Plaintiff Deborah Johnson hereby moves this Honorable Court to set aside the Notice of Appeal filed by defendants in the above matter, and in support thereof, asserts the following:

1. This matter arises from the shooting death of Michael Simmons by the New Jersey State Police.

2. At the conclusion of discovery, defendants filed a Motion for Summary Judgment, alleging, *inter alia*, qualified immunity for the individuals involved in the shooting death of Michael Simmons.

3. After all briefs had been filed, counsel for the parties appeared for oral argument on March 21, 2007, before the Honorable Joseph H. Rodriguez, United States District Judge.

4. Judge Rodriguez rendered hi opinion March 29, 2007. A true and correct copy of the Court's ruling in this matter is attached as Exhibit "A".

5. In addition to other rulings, the Court's Opinion denied the defendants' Qulified Immunity claim, stating that "there remain genuine issues of material fact precluding this Court from determining whether [defendant] Ellington's use of force was objectively reasonable under the circumstances." *See*, Exhibit "A", at page 9.

6. The Court also held that "[T]here remain genuine issues of material fact as to whether the Defendants acted in an objectively reasonably fashion and properly implemented policies and procedures in ordering Simmons out of the car (Third Count), and there are significant issues to be resolved by the fact-finder as to whether Simmons rights were violated by the Defendants allegedly withholding medical treatment after the shooting (Eighth Count)." *See*, Exhibit "A", at page 9.

7. By Order dated April 3, 2007, this matter is now scheduled to come before Magistrate Judge Donio on May 9, 2007, at 10:00 A.M. A true and correct copy of the Court's Scheduling Order is attached as Exhibit "B".

8. On April 30, 2007, defendants filed a Notice of Appeal with this Court. A true and correct copy of the Notice of Appeal is attached as Exhibit "C". The Notice seeks review by the Third Circuit of this Court's denial of Summary Judgment.

9. The Notice of Appeal should be set aside because (a) defendants failed to file a Petition for Permission to have an interlocutory matter addressed by the Appellate Court prior to trial, as required by F.R.A.P. 5, and (b), the trial Court's decision turned on a matter of fact, and not law, and is, therefore, not immediately appealable, according to the Supreme Court's holding in *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995).

COUNT I
(Failure to Comply with Procedure)

10. The Federal Rules of Appellate Procedure include clear instructions about the methods and requirements for filing appeals. According to the Rules, any appeal taken by permission must be preceded by a Petition for Permission to Appeal filed with the Clerk of the Circuit Court. *See*, F.R.A.P. 5(a).

11. The Federal Rules of Appellate Procedure indicate that the Petition is to be filed within the same period as a Notice of Appeal for appeals as taken by right. *See*, F.R.A.P. 5(a)(2).

12. According to the Rules, the Petition for Permission must have been filed within 30 days after the date of the District Court's Order denying Summary Judgment.

13. Thirty days after the date on which the Order appealed from was entered (March 29, 2007) would be Saturday, April 28, 2007.

14. To date, no Petition for Permission has been filed by defendants with any Court, and any filing made now would be barred as untimely.[1]

15. Since the defendants have failed to file the required Petition for Permission, their Appeal should be set aside.

WHEREFORE, Plaintiff respectfully requests that this honorable Court set aside the Notice of Appeal filed by defendants and permit the final Pretrial Conference to go forward as scheduled so that a trial date may be set.

COUNT II
(Since the Opinion denying Summary Judgment turned on an issue of fact, it is not immediately appealable)

16. It is expected that the defendants will claim they are not obligated to file the Petition for Permission under the collateral-order doctrine announced by the Supreme Court in *Cohen v. Beneficial*, 337 U.S. 541, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949),

17. The Third Circuit upheld this right of "immediate review" in the context of a claim of qualified immunity in *Forbes v. Lower Merion*, 313 F.3rd 144 (3rd Cir. 2002).

18. In its holding, the *Forbes* opinions explicitly states that there is an exception to the rule granting immediate review in qualified immunity cases. This exception exists when the District Court's decision turns on an issue of fact and not law. *See, Id*, 313 F3rd at 147-148.

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[1] There is also an issue regarding the timeliness of the Notice of appeal that *was* filed. Counsel for defendants forwarded by fax and regular mail a Notice of Appeal that is dated April 30, 2007. Since the 30th day after the entry of the order appealed from was a Saturday, the filing is permitted on the following Monday, which was April 30. However, as of the date of this Motion, there was no indication that the Notice had been filed. Plaintiff has not been provided with a time-stamped copy and the docket entries provided by PACER show no indication that the Notice has yet been filed with the District Court.

19. The distinction that the *Forbes* opinion refers to is enshrined by the United States Supreme Court in *Johnson v. Jones*, *supra*. In that case, the summary judgment ruling which denied a claim of qualified immunity was ***not*** reviewable until after the case had gone to trial:

> [W]e hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of material fact.
>
> *Johnson, supra*, 515 U.S. at 319-320, 115 S.Ct at 2159, 132 L.Ed. at 251.

20. In the instant case, the District Court addressed the defendants' claim of qualified immunity on pages eight and nine of the opinion. *See,* Exhibit "A" at pp. 8-9.

21. The opinion begins this section by addressing the relevant law which defines when individuals are entitled to qualified immunity. After this analysis, the justification for denying summary judgment begins with this sentence: "[T]here appear to be genuine issues of material fact precluding the Court from determining whether [defendant] Ellington's use of force was objectively reasonable under the circumstances." *See*, Exhibit "A" at p. 9.

22. The Court also held that "[T]here remain genuine issues of material fact as to whether the Defendants acted in an objectively reasonably fashion and properly implemented policies and procedures in ordering Simmons out of the car (Third Count), and there are significant issues to be resolved by the fact-finder as to whether Simmons rights were violated by the Defendants allegedly withholding medical treatment after the shooting (Eighth Count)." *See*, Exhibit "A", at p. 9.

23. It is clear from the above discussion that the District Court's decision on qualified immunity turned on an issue of fact, namely that there remain genuine issues of ***fact*** which must be resolved at trial.

24. Thus, according to the Supreme Court in *Johnson*, the appeal of the District Court's denial of Summary Judgment on the issue of qualified immunity must wait until after trial.

WHEREFORE, Plaintiff respectfully requests that this honorable Court set aside the Notice of Appeal filed by defendants and permit the final Pretrial Conference to go forward as scheduled so that a trial date may be set.

LAW OFFICE OF JOSEPH M. MARRONE

Date: May 2, 2007

By: /s/ Michael D. Pomerantz

Michael D. Pomerantz, Esq.
Law Offices of Joseph Marrone
1525 Locust Street, 12th Floor
Philadelphia, PA 19102
(215) 732-6700
Attorney for Plaintiff

THE UNITED STATES DISTRICT
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DEBORAH JOHNSON, individually, and as Administratrix of the Estate of Michael Lamount Simmons, deceased, and on behalf of Bashir Simmons and Sahday Simmons, the minor children of decedent and Shantae N. Johnson Plaintiffs, vi. STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY; NEW JERSEY STATE POLICE; SUPERINTENDANT OF NEW JERSEY STATE POLICE, CAPT. JOSEPH R. FUENTES; SUPERINTENDENT OF NEW JERSEY STATE POLICE, LT. COL. FREDERICK MADDEN; SGT. TROOPER DANIEL ELLINGTON, Badge No. 0000; and TROOPER JOHN HAYES, Badge No. 0000, TROOPER STEVEN SHEEHAN, Badge No. 0000, i/j/s Defendants.	:	CIVIL ACTION NO. 03-1538 (JHR)

BRIEF IN SUPPORT OF MOTION TO SET ASIDE
DEFENDANTS' NOTICE OF APPEAL

I. Introduction

This matter is before the Court as a result of the defendants' erroneous filing of a Notice of Appeal on April 30, 2007. The Notice of Appeal follows the District Court's Order and Opinion denying defendants' claim for Summary Judgment based on qualified

immunity. Since (a) the defendants have not filed the proper Petition for Permission to have this interlocutory appeal heard by the Third Circuit and (b) this matter is not immediately appealable because the District Court's decision turned on an issue of fact, the Appeal should be set aside and the matter should be permitted to proceed to trial.

II. Procedural Background

This lawsuit was initiated by the filing of a Complaint with the District Court on April 9, 2003, over four years ago. Since that time, the parties have engaged in discovery and filed various motions for summary judgment and partial summary judgment. The defendants' last Motion for Summary Judgment was the subject of oral argument before the Honorable Joseph H. Rodriguez on March 21, 2007. The Court issued its Order and Opinion (attached as Exhibit "A") on March 29, 2007. Thereafter, the case was scheduled for a Final Pretrial Conference by means of a Scheduling Order dated April 3, 2007, and signed by Magistrate Judge Ann Marie Donio (attached as Exhibit "B"). The Scheduling Order indicates that the Final Pretrial Conference will take place on May 9, 2007. At that time, it is anticipated that the Court will assign a trial date.

On April 30, 2007, defendants filed a Notice of Appeal, directing that the Third Circuit immediately review the District Court's denial of defendants' qualified immunity claim. With the Notice of Appeal, defendants seek to delay the trial of this matter indefinitely. Plaintiff now files this Motion to Set aside the Notice of Appeal for the within stated reasons.

III. Argument

The defendants' Notice of Appeal should be set aside for two reasons: (1) the District Court's March 29, 2007, order does not dispose of the entire case and, thus, the defendants must first obtain permission for their appeal; and (2) when the summary judgment is denied on the claim of qualified immunity, and that decision turns on an issue of fact, the appeal must wait until after the trial is complete.

A. The Defendants' Failure to File A Petition For Permission To Appeal Is A Violation Of The Federal Rules Of Appellate Procedure

The Federal Rules of Civil Procedure provide clear guidance and instruction as to how an appeal is to be accomplished. An interlocutory appeal requires permission of the Third Circuit, and that permission is only granted following the filing of Petition for Permission to Appeal, pursuant to F.R.A.P. 5. That rule provides that the Petition is to be filed within the time allowed by statute, or within the time allowed for an Appeal as of right. *See*, F.R.A.P. 5(a)(2). In the instant case, that would mean the thirty days permitted by F.R.A.P. 4 (since there is no statute governing this interlocutory appeal), or before April 30, 2007. To date, no Petition, as required by F.R.A.P. 5, has been filed by the defendants.

The defendants' failure to file is jurisdictional and automatically invalidates the Third Circuit's ability to review this matter. *See, e.g., Hanson v Hunt Oil Co*., 488 F.2d 70 (8th Cir. 1973); *Inmates of Allegheny County Jail v Wecht,* 873 F.2d 55, (3rd Cir. 1989). Although the defendants managed to file their Notice of Appeal (as distinguished from a Petition for Permission) on April 30, 2007, that is not a sufficient substitute for failure to file the Petition. *See*, *Aucoin v Matador Services, Inc.*, 749 F.2d 1180 (5th Cir. 1985) (In

absence of timely request for permissive appeal under Rule 5(a), Rules of Appellate Procedure, Court of Appeals lacks jurisdiction to consider granting discretionary appeal; notice of appeal filed in District Court without statement of basis for discretionary appeal is not adequate request under Rule 5.

Since it is now too late for the defendants to file their Petition, and since the Notice of Appeal is not sufficient to have the interlocutory appeal heard, the Notice of Appeal should be set aside so that this matter may proceed to trial.

B. Since The Opinion Denying Summary Judgment Turned On An Issue Of Fact, It Is Not Immediately Appealable To The Circuit Court

Even if the defendants had followed the rules in requesting immediate review of the Court's denial of their Motion for Summary Judgment, that Petition would still be denied, because the District Court's decision is based on an issue of fact.

The District Court's March 29, 2007, Order and Opinion did not dispose of the entire case and, thus did not represent a "final" Order, pursuant to 28 U.S.C. § 1291, which governs the jurisdiction of the Circuit Courts of Appeal. Despite the clearly interlocutory nature of the Court's ruling, defendants have presumptuously, and without reference to *any* legal authority, filed a Notice of Appeal, taking as a given that the District Court's Order is somehow "final". This is not only outrageous; it is also a misstatement of the law.

It is expected that defendants will rely on the Supreme Court's decision *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) wherein Justice White stated that qualified immunity was more than just a defenses, but also a right "not to stand trial or face the other burdens of litigation". *Id*. 472 U.S. at 526, 105 S.Ct. at 2815,

86 L.Ed.2d at 425. In *Mitchell* the Court found that the Attorney general of the United States was entitled to qualified immunity in connection with a warrantless wiretap. The Court also held that denial of the Attorney General's Motion for Summary Judgment was immediately appealable, even though it did not dispose of the entire case.

> Accordingly, we hold that a district Court's denial of a claim of qualified immunity to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."
>
> *Id.* 472 U.S. at 530, 105 S.Ct. at 2817, 86 L.Ed.2d at 427.

The defendants should note that the above rule is explicitly qualified. For immediate appealability, ***the denial of summary judgment must be based on an issue of law***. It is beyond presumptuous that the defendants would file their Notice of Appeal when no less authority than the Supreme Court of the United States has repeatedly stated that the rule under which the defendants' Notice of Appeal is filed has qualifications and exceptions. Do the defendants not want the Court to know the law?

The qualification, as noted above, is a long standing rule of the Supreme Court. In addition to *Mitchell*, the Supreme Court has more recently repeated the rule in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), except in *Johnson*, the Court found that the denial of summary judgment was ***not*** immediately appealable, even though it involved the question of qualified immunity. The difference in *Johnson* is that the denial there was based on a genuine issue of fact. *Mitchell* concerned the application whether of the "clearly established" prong of the qualified immunity standard. *See*, *Johnson, Supra*, 515 U.S. at 311, 115 S.Ct. at 245-246, 132 L.Ed.2d at 2155. Justice Breyer, writing for a unanimous Court, went on to state the following:

> [Q]uestions about whether or not a record demonstrates whether or not a record demonstrates a "genuine" issue of fact for trial, if appealable, can consume inordinate amounts of appellate time.
>
> * * *
>
> [T]he close connection between this kind of factual issue and the factual matter that will likely surface at trial means that the appellate court, in many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about by trial testimony) to require it, once again, to canvass the record. That is to say, an interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision. See 15A Wright & Miller § 3914.10, at 664 ("If [immunity appeals] could be limited to . . . issues of law . . . there would be less risk that the court of appeals would need to waste time in duplicating investigations of the same facts on successive appeals").
>
> *Johnson, Supra*, 515 U.S. at 316-317, 115 S.Ct. 2158, 132 L.Ed.2d at 249

The above analysis highlights why the Supreme Court has repeatedly affirmed the distinction between a denial of summary judgment based on (1) questions of fact and (2) questions of law. In order to promote judicial economy and avoid subjecting both the Court and the litigants to the same proceeding over and over again, a denial of summary judgment that turns on an issue of fact, where the claim is qualified immunity, should only be reviewed ***after*** the trial. As the *Johnson* Court clearly stated:

> [W]e hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of material fact.
>
> *Johnson, supra*, 515 U.S. at 319-320, 115 S.Ct at 2159, 132 L.Ed. at 251.

In the time since the *Johnson* decision, other courts have provided further clarification of this rule:

> If the issue on appeal is "nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision.'" *Behrens v. Pelletier*, 516 U.S. 299, 313, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996); see also *Mitchell*, 472 U.S. at 530. Therefore, to decide the availability of an appeal from the qualified immunity ruling of the district court, ***we must determine whether the trial court denied qualified immunity on the basis of an abstract issue of law or on the existence of what it perceived as genuine issues of material fact*** concerning the actions of [the parties].
>
> *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000) (Emphasis added)

Thus, all that remains is to determine whether the District Court's opinion in this matter turns on a question of fact. A review of the opinion's text shows that it clearly does.

The opinion first addresses the relevant law which defines when individuals are entitled to qualified immunity. After this analysis, the justification for denying summary judgment begins with this sentence: "[T]here appear to be genuine issues of material fact precluding the Court from determining whether [defendant] Ellington's use of force was objectively reasonable under the circumstances." *See*, Exhibit "A" at p. 9. The Court also held that "[T]here remain genuine issues of material fact as to whether the Defendants acted in an objectively reasonably fashion and properly implemented policies and procedures in ordering Simmons out of the car (Third Count), and there are significant issues to be resolved by the fact-finder as to whether Simmons rights were violated by the Defendants allegedly withholding medical treatment after the shooting (Eighth Count)." *See*, Exhibit "A", at p. 9.

The above language leaves no doubt about the basis of the District Court's decision. This is not some "abstract issue of law", as contemplated by the First Circuit in

Acevedo-Garcia. On the contrary, this is a clear example of a decision based on the facts that are in dispute. That is exactly the function of trials – to resolve those disputes.

On appeal, the only argument available to defendants is that the District Court mistakenly decided that certain facts are subject to genuine dispute. About this particular scenario, the Third Circuit, citing *Johnson*, has stated the following:

> When a defendant argues that a trial judge erred in denying a qualified-immunity summary-judgment motion because the judge was mistaken as to the facts that are subject to genuine dispute, ***the defendant's argument cannot be entertained under the collateral-order doctrine but must instead await an appeal at the conclusion of the case***.
>
> *Forbes v. Township of Lower Merion*, 313 F.3d 144, 147-148 (2002) (Emphasis added).

In light of such a clear ruling, there can be no doubt that, had the defendants bothered to file the required Petition for Permission to Appeal, the Petition that it is now too late to file, it would have been denied.

IV. Conclusion

For the foregoing reasons, plaintiff respectfully requests that this Honorable Court set aside the Notice of Appeal and permit the case to go to trial.

LAW OFFICE OF JOSEPH M. MARRONE

Date: May 2, 2007

By: /s/ Michael D. Pomerantz

Michael D. Pomerantz, Esq.
Law Offices of Joseph Marrone
1525 Locust Street, 12th Floor
Philadelphia, PA 19102
(215) 732-6700
Attorney for Plaintiff

THE UNITED STATES DISTRICT
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ORDER

AND NOW, this _____ day of _____, 2007, upon consideration of the Plaintiff's Motion to Set Aside Defendants' Notice of Appeal, and any response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED and that the Notice of Appeal filed by Defendants is set aside as null and void.

_____
J.

CERTIFICATE OF SERVICE

I hereby certify that the within Plaintiff's Motion to Set Aside Defendants' Notice of Appeal was filed electronically with the Clerk of the United States District Court for the District of New Jersey, Camden, New Jersey on May 2, 2007. I further certify that copies of the Plaintiff's Motion to Set Aside Defendants' Notice of Appeal were mailed to first class United States mail, postage prepaid, to the following:

Donna Lee Vitale, Esq.
Jasinski and Williams
819 New Road at Jackson Avenue
P.O. Box 313
Northfield, NJ 08225

Vincent J. Rizzo
Office of the Attorney General
25 Market Street
P.O. Box 112
Trenton, NJ 08625-0112

LAW OFFICE OF JOSEPH M. MARRONE

Date: May 2, 2007

By: /s/ Michael D. Pomerantz
Michael D. Pomerantz, Esq.
Law Offices of Joseph Marrone
1525 Locust Street, 12th Floor
Philadelphia, PA 19102
(215) 732-6700
Attorney for Plaintiff