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Asserting Qualified Immunity for Private Party Defendants After *Filarsky v. Delia*

by Matthew Parks

Introduction

I admit, as a defense attorney, I relish the moment I tell a client early on in the litigation that the case against them has been dismissed. But sometimes the opposite happens and I have to try to explain to a client that all the other defendants have been dismissed except him or her. This article concerns a situation where this would happen in the past—when private parties and government employees are both named defendants in a 42 U.S.C. § 1983 case and the issue of qualified immunity is at play—and explains why, after *Filarsky v. Delia*, treating private party and public party defendants differently in a § 1983 case will be less common, despite the fact that *Filarsky* was limited to its facts.

Before *Filarsky*, courts, based on *Richardson v. McKnight,* 521 U.S. 399 (1997), did not routinely afford the same protection to the private party independently contracted with a governmental entity. While the Court in handing down *Filarsky* did not overturn *Richardson* (as requested by DRI in an amicus brief), the Court handed down a helpful decision that is, in hindsight, very favorable to defendants.

The *Filarsky* Case

Steve Filarsky, an attorney, was hired in 2006 to interview a firefighter, Nicholas Delia, whom the Rialto, California, Fire Department suspected of using a purported illness to miss work while he actually performed some construction work on his home. *Filarsky v. Delia,* 132 S. Ct. 1657, 1660-61 (2012). Undercover surveillance revealed Delia purchased building materials (which Delia admitted), though he denied doing any construction. *Id.* Filarsky eventually ordered Delia to produce the building materials. *Id.* Under protest, Delia agreed, but only after Delia's attorney threatened to sue everyone involved. *Id.* Delia sued Filarsky, two fire department officials, the Fire Chief, the City of Rialto, the Fire Department, and ten unidentified individuals under 42 U.S.C. § 1983 for alleged violations of his rights under the Fourth and Fourteenth Amendments. *Id.* at 1661. The district court found all of the individual defendants were entitled to qualified immunity and granted summary judgment on the claims against them. *Id.* However, the Ninth Circuit reversed the decision that Filarsky could assert a qualified immunity defense, citing to Ninth Circuit precedent that, citing the Supreme Court's decision in *Richardson*, held an attorney was not entitled to qualified immunity. *See Delia v. Rialto,* 621 F.3d 1069, 1080 (2010). Filarsky appealed that decision to the United States Supreme Court and won 9 – 0. *See generally Filarsky,* 132 S. Ct 1657.

The Court did not hold in *Filarsky* that private parties performing a government function would always be entitled to a qualified immunity, as some hoped. Rather than overturn *Richardson*, the Court left the question of whether a private party could assert a qualified immunity open to interpretation, but at least now practitioners can ask themselves: are my clients more like *Filarsky* or are they more like the defendants in *Richardson*? In this article, we will review the *Richardson* holding and the *Filarsky* decision in order to glean some insight on when private parties enjoy a qualified immunity from § 1983 suits.

Richardson v. McKnight

Richardson, an inmate in a Tennessee prison operated by a private prison management firm, sued two employees of the private firm for depriving his constitutional rights. 521 U.S. at 401-02. The district court held the guards were not entitled to qualified immunity because they worked for a private prison. *Id.* at

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402. The Sixth Circuit affirmed and the Supreme Court affirmed as well. *Id.* The Court noted the analysis of whether the private prison guards enjoyed qualified immunity from suit looks "to both the history and to the purposes that underlie government employee liability . . . ." *Id.* at 404. After noting private prison guards' right to qualified immunity was not firmly rooted in history, the Court considered the purpose for government immunity—to guard against "unwarranted timidity" when performing a traditional governmental function. *Id.* at 404-08. In this analysis, the Court created fodder for confusion in the minds of judges confronted with private parties seeking to assert a qualified immunity defense to a § 1983 cause of action.

The Court did not apply a straightforward functional approach (i.e., if a party performs a governmental function, the party enjoys qualified immunity), and undertook a more nuanced analysis to determine if other forces served to prevent the unwarranted timidity from fully performing the duties of the job or from entering into public service that immunity guarded against. The Court held the marketplace served that role, and it mentioned performance-based contract and insurance requirements as forces at play to prevent the unwarranted timidity of those performing traditional government functions. *Id.* at 410-11. Importantly, the Court emphasized the independent nature of the prison, the fact that it was a company organized to wholesale assume the role of running the prison, and the lack of oversight or control by the government over the day-to-day operations. *Id.*

While it may not have been the intention, the decision was interpreted broadly to mean private parties hired as independent contractors to perform traditional government functions were not entitled to immunity.

***Filarsky*'s Reaffirmation of the Functional Approach**

When I saw the *Filarsky* case coming up through the ranks and the Supreme Court granted certiorari, I fully expected the Court to overturn the *Richardson* decision in a decision penned by Justice Scalia, who had dissented in *Richardson* and admonished the majority for abandoning the functional analysis in determining whether a private party enjoyed immunity. *See Richardson,* 521 U.S. at 416 (Scalia dissenting) ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions….").

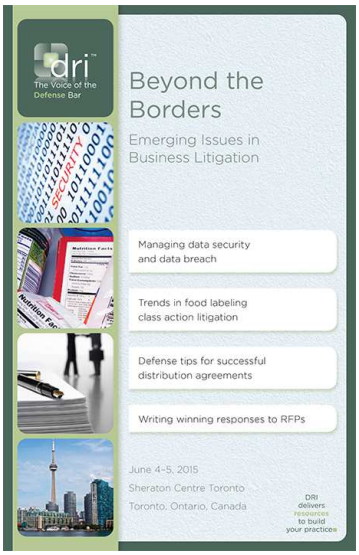
Rather than overturn *Richardson*, the Court noted that *Richardson* was a narrow decision and answered the immunity question "in the context in which it arose." *See Filarsky*, 132 S. Ct. at 1667 (citing *Richardson*, 521 U.S. at 413). So courts that had broadly interpreted *Richardson* as a change in the Supreme Court's historical use of a functionality approach in determining the applicability of a qualified immunity defense to a private party in a § 1983 case had been getting it wrong for over a decade.

Private parties do, in certain situations, enjoy qualified immunity. As defense attorneys, we must know what we can do to make our arguments more likely to succeed. I suggest using the *Richardson* and *Filarsky* cases in tandem to argue your client is more like Filarsky, and less like the *Richardson* defendants, and thus has a qualified immunity from suit. But, what differences should a defense attorney highlight? The amount of supervision and control and the scope of the governmental function being performed by the private party.

The City of Rialto hired Filarsky to work side-by-side with two fire department officials to interview Delia. Filarsky discussed his decision to order Delia to produce the construction materials beforehand and got their blessing. Arguably, there was some amount of oversight, unlike the situation in *Richardson*. The prison guards in *Richardson* did not work side-by-side with public employees or follow rules and regulations developed by the government. Rather, they were employees of a private company "systematically organized to assume a major administrative task . . ." *Filarsky*, 132 S. Ct. at 1667 (quoting *Richardson*, 521 U.S. at 413). This distinction exemplifies why Filarsky received immunity and the *Richardson* defendants did not receive immunity. The *Filarsky* case may have been decided differently if the City of Rialto had outsourced its entire human resources department and Filarsky worked for that company. Hiring a private person to work alongside public employees for a limited engagement to fill a specific need is different from hiring a company to perform an administrative function with little supervision.

Qualified Immunity for Private Parties after *Filarsky*

In *Filarsky*, the Supreme Court noted it never abandoned the history of cases prior to *Richardson* analyzing the qualified immunity question under what Justice Scalia termed the functionality approach in his dissent in *Richardson*. But it noted that the functional approach should be tempered in situations involving wholesale privatization of government functions. In *Richardson*, the defendants were prison



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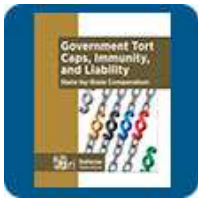

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guards. A bright line analysis under a functionality test might conclude that a prison is an arm of the state, as the state is the power that imprisons people. But, the Court in *Richardson* analyzed the function being performed by the private prison guards as one of providing a service for a fee and taking the operation of the prison out of the public realm and into the private realm—and thus not within the pale of qualified immunity.

Filarsky was a perfect case for the Court to reaffirm the functional approach. The City of Rialto hired Filarsky to investigate whether or not an employee was gaming the system and faking an alleged work-related injury. Admittedly, Filarsky was working for the City of Rialto as an independent contractor for his own private gain. But he was providing a service the City of Rialto could not afford a full-time employee to do. The City of Rialto did not need a full-time investigator, so it engaged Filarsky as an independent contractor to work side by side with city employees. By not affording Filarsky qualified immunity, the Court recognized that smaller municipalities and local government agencies would be hard pressed to find qualified persons to fill these part-time governmental roles.

Conclusion

The *Filarsky* decision is a victory for the defense bar. Courts should no longer broadly interpret *Richardson* to preclude private parties from enjoying qualified immunity. *Filarsky* strengthens the argument that private parties are entitled to qualified immunity and effectively limits *Richardson* to a specific situation. As a court has recently commented, "In practice, *Richardson v. McKnight* may be limited to situations where the government privatizes an entire function—as Tennessee did with its prison system in *Richardson v. McKnight*." *Herrera v. Santa Fe Pub. Sch.*, No. CIV 11-0422 JB/KBM, 2014 WL 4294970, at *127 (D.N.M. Aug. 29, 2014). The functional approach to the qualified immunity for private party question is still followed, but there is a nuance to remember when dealing with wholesale privatization of governmental functions. When assessing the viability of a qualified immunity defense, attorneys should consider whether the defendant (or its parent private company) was systematically organized to assume a major administrative task (like running an entire prison), with limited supervision, primarily driven by profit, and potentially in competition with others seeking to assume that administrative task. Or, was the defendant working closely with and alongside immune government employees, with some degree of supervision? Having a clear answer to these questions might result in an early dismissal and accolades from your client.

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