

CLAYTON HULBERT, et al.

Plaintiffs,

v.

BRIAN T. POPE, et al.

Defendants.

Civil No.: 1:18-CV-00461-SAG

APPELLEES' MEMORANDUM REGARDING JURISDICTION

Comes now the Plaintiff, and files the aforesaid memorandum, stating as follows:

I. RELEVANT FACTS AND PROCEDURAL HISTORY

This is an appeal of the District Court's memorandum opinion wherein Defendants' motion for summary judgment was denied in part and granted in part. On August 18, 2021, this Court suspended the briefing schedule and directed the parties to file memoranda addressing (1) whether this court has jurisdiction to proceed on appeal while the Defendant Pope's motion for reconsideration is pending in the District Court; and (2) whether the District Court has jurisdiction to rule on the motion for reconsideration while an appeal is pending in this court. Appellees find that this court has no jurisdiction to entertain this appeal while Defendant's motion for reconsideration is pending in the court below.

This is a civil action arising from Defendant Sergeant Brian T. Pope's ("Defendant Pope") interference with brothers Jeff and Kevin Hulberts'

(“Plaintiffs” or “the Hulberts”) First Amendment rights during a demonstration near Lawyer’s Mall in Annapolis, Maryland. On February 5, 2018, the Hulberts were peacefully picketing in Maryland’s capital when Defendant Pope unconstitutionally ordered Kevin Hulbert to move the demonstration to Lawyer’s Mall, violating the group’s first amendment rights to assembly and speech. When the Hulberts refused to move the demonstration, knowing that they (1) had a right to exercise their freedom of speech in a public forum and (2) did not have a permit to demonstrate on Lawyer’s Mall, Defendant Pope falsely arrested the brothers and issued a citation to each of them.

On February 14, 2018, the Hulberts and Maryland Shall Issue, Inc. filed suit against Defendant Pope and Colonel Michael Wilson, the Chief of Police of the Maryland Capitol Police. The complaint alleged claims for the violations of the Hulbert’s First Amendment and Fourth Amendment rights, as well as violations of the Hulbert’s rights under the Maryland Declaration of Rights and common law false arrest and false imprisonment tort claims. Defendants claimed qualified immunity as a defense.

After the Defendants filed a motion for summary judgment seeking judgment in their favor on all counts, the United States District Court for the District of Maryland, the Honorable Stephanie A. Gallagher presiding, granted in part and denied in part the defendants’ motion. *See* Exhibit A (April 22, 2021

District Court Order). The District Court granted judgment in favor of Defendant Colonel Michael Wilson on all counts but denied judgment as to Defendant Pope on four counts of Plaintiff's complaint due to outstanding factual disputes.

On May 7, 2021, Defendant Pope filed a motion for reconsideration, seeking review of the District Court's decision to deny summary judgment in his favor. *See* Exhibit B (Defendant's Motion for Reconsideration). Without waiting for a response from the District Court on the motion for reconsideration, Defendant Pope then filed an interlocutory appeal in this Court, seeking appellate review of the District Court's order. *See* Exhibit C (Defendant's Notice of Appeal).

Since a notice of appeal would ordinarily divest the District Court of jurisdiction over the portions of the case challenged on appeal, the court entered a stay of this case pending the outcome of this appeal. *See* Exhibit D (District Court Order Staying Case). Inexplicably, despite apparently having drafted the brief of appellant, Defendant then filed a motion in this Court to suspend the briefing schedule, or for a 30-day extension. ECF No. 18. Plaintiffs-Appellees submitted an opposition to the motion to suspend the briefing schedule on August 6, 2021. ECF No. 21. This Court then issued an order suspending briefing and directing the parties to file memoranda regarding this Court's jurisdiction. ECF No. 22. Plaintiffs-Appellees respectfully submit this brief in accordance with this Court's order and find that (1) this Court does not have jurisdiction to proceed with this

appeal and (2) the District Court has jurisdiction to rule on Defendant's motion for reconsideration. Further, because the Fourth Circuit has consistently held that it will not review interlocutory appeals of denials of qualified immunity based on evidentiary disputes, this appeal should be dismissed.

II. LEGAL ANALYSIS

A. **This Court does not have jurisdiction to proceed on appeal while Defendant's motion for reconsideration is pending in the district court.**

The Federal Rules of Civil Procedure do not expressly allow for motions for reconsideration. However, the Fourth Circuit has recognized that "Federal Rule of Civil Procedure 54(b) governs a motion to reconsider an interlocutory order."

Blanch v. Chubb & Sons, Inc., 124 F.Supp.3d 622, 628 n.2 (D. Md. 2015) (citing *Netscape Commc'ns Corp. v. ValueClick, Inc.*, 704 F.Supp.2d 544, 546 (E.D. Va. 2010)). Since "the Fourth Circuit has not identified the precise standard for resolving [a rule 54(b) motion], courts often apply the standards applicable to motions under Rules 59(e) or 60(b). *Id.* at 629 (citing *Nana-Akua Takyiwaa Shalom v. Payless Shoesource Worldwide, Inc.*, 921 F.Supp.2d 470, 480 (D. Md. 2013)).

Federal Rule of Appellate Procedure 4(a)(4)(A) provides that, "[i]f a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to

file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

...

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

Therefore, “when a notice [of appeal] is prematurely filed, **it shall be in abeyance** and become effective upon the date of entry of an order disposing of the Rule 59(e) motion.” *See* Fed. R. App. P. 4(a)(4); *see also Schroeder v. McDonald*, 55 F.3d 454, 458 (9th Cir. 1995) (analyzing the effect of the December 1993 amendments to the Federal Rules of Appellate Procedure on an appeal filed before the district court’s entry of judgment on a Rule 59 motion) (emphasis added).

This Court has summarized its jurisdiction to review denials of qualified immunity as consisting of a single, narrow question: “‘*if we take the facts as the district court gives them to us, and we view those facts in the light most favorable to the plaintiff, are the defendant officers ‘still entitled to qualified immunity?’*” *Id.* (quoting *Strickland*, 917 F.3d at 768) (emphasis in original). Thus, “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 fact for trial.” *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011) (quoting *Johnson v. Jones*, 515 U.S. 304, 319, 115 S. Ct. 2151, 2159, 132 L. Ed. 2d 238 (1995)) (emphasis in original)

In the instant case, the District Court released a memorandum opinion on April 22, 2021, granting in part and denying in part Defendants’ motion for summary judgment. Defendant Pope filed his motion for reconsideration on May 7, 2021. Defendant Pope then filed a premature interlocutory appeal of the District Court’s memorandum opinion on May 20, 2021. *See* Exhibit C (Defendant’s Notice of Appeal). The appeal is considered premature because the District Court has not yet ruled on Defendant Pope’s motion for reconsideration. Rule 4(a)(4) essentially extends the time to file an appeal until the District Court’s ruling is released. Thus, Defendant Pope’s interlocutory appeal would have been appropriate only after a ruling on the motion for reconsideration.¹

If this Court, based on relevant Fourth Circuit guidance, determines that the rules applicable to a Rule 59 or 60 motion apply to Defendant’s Rule 54(b) motion

¹ Once this appeal is properly in this Court following resolution of Defendant’s motion for reconsideration in the District Court, Appellees will move to dismiss. It is well settled in the Fourth Circuit 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 fact for trial.” *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011). The District Court found several factual disputes after examining the evidence presented in this case which can only be resolved by a jury. This interlocutory appeal will therefore be dismissed under Fourth Circuit precedence.

for reconsideration, then under Fed. R. App. P 4(a)(4) this Court does not have jurisdiction to proceed on appeal until the District Court rules on Defendant's motion for reconsideration. Additionally, under Fourth Circuit precedence, this Court may not review denials of qualified immunity based on factual disputes and therefore must dismiss this appeal regardless of District Court jurisdiction in this case.

If this Court chooses not to dismiss Appellant's appeal, then once the District Court has ruled on Defendant's motion for reconsideration, Defendant's appeal will ripen, and this Court will then obtain jurisdiction to proceed. Until such time, this Court has no jurisdiction to proceed.

B. The District Court retains jurisdiction to rule on Defendant's motion for reconsideration.

"[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). "Ordinarily, 'a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" *Id*; accord *United States v. Ransom*, 866 F.2d 574, 575 (2d Cir. 1989).

"At the same time, in order to prevent unnecessary appellate review, the district court [has] express authority to entertain a timely motion to alter or amend the judgment under Rule 59, even after a notice of appeal had been filed." Fed. R.

App. P. 4(a)(4); *Griggs*, 459 U.S. at 59. “The District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case.” *United States v. Cronin*, 466 U.S. 648, 667 n.42, (1984); *see also United States v. Jackson*, 468 F.Supp.3d 59 (D.D.C. 2020).

Despite Defendant Pope’s premature appeal of this case, the District Court retains jurisdiction to review his motion for reconsideration. Allowing Defendant Pope’s appeal to proceed absent a District Court ruling on the motion for reconsideration would impede on the District Court’s jurisdiction and is prohibited by Federal Rule of Appellate Procedure 4(a)(4).

Because the District Court and this Court cannot assert jurisdiction simultaneously, this Court must allow the District Court an opportunity to rule on the motion for reconsideration to avoid unnecessary appellate review. Following a District Court decision on the motion, this Court may entertain Defendant Pope’s appeal—but not before.

III. CONCLUSION

For the foregoing reasons, this Court currently lacks jurisdiction to proceed on appeal in this case. Regardless of the District Court’s jurisdiction over the pending motion for reconsideration, this Court should dismiss this appeal because it does not have jurisdiction to proceed with an interlocutory appeal of a district

court's denial of qualified immunity due to factual disputes. However, if this appeal is not dismissed, the District Court has jurisdiction at this juncture to rule on Defendant's pending motion for reconsideration.

Respectfully submitted,

HANSEL LAW, P.C.

/s/ Cary J. Hansel

Cary J. Hansel (AIS No. 9912150020)

cary@hansellaw.com

2514 North Charles Street

Baltimore, MD 21218

Tel: (301) 461-1040

Fax: (443) 451-8606

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2021, I caused the forgoing to be filed via the Court's MDEC electronic filing system, which will make service on all parties entitled to service.

/s/ Cary J. Hansel

Cary J. Hansel