UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02802-REB- MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, in his individual capacity,

Defendant.

RESPONSE TO PLAINTIFF'S MOTION TO CERTIFY DEFENDANT'S APPEAL AS FRIVOLOUS AND FORFEITED

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, the Loveland City Attorney's Office and Wick & Trautwein, LLC, hereby responds as follows in opposition to Plaintiff's Motion to Certify Defendant's Appeal as Frivolous and Forfeited:

I. GOVERNING LEGAL AUTHORITIES

An outline of the following governing legal authorities is beneficial here.

"[A] federal district court and a court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Stewart v. Donges,* 915 F.2d 572, 574 (10th Cir. 1990). "[T]he filing of a notice of appeal . . . from a decision within the collateral order exception . . . 'is an event of jurisdictional significance—it 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.* at 575. "The district court only retains jurisdiction over tangential matters such as . . . issuing stays . . . pending the appeal." *Id.* at n.3.

"The divestiture of jurisdiction occasioned by the filing of a notice of appeal is especially significant when the appeal is an interlocutory one." *Id.* at 575. "When the interlocutory appeal is from . . . the denial of a motion . . . based on qualified immunity, the *central issue* in the appeal is the defendant's asserted right not to have to proceed to trial. The interruption of the trial proceedings is the central reason and justification for authorizing such an interlocutory appeal in the first place." *Id.* at 575-76 (emphasis added). Naturally, the same considerations apply when the interlocutory appeal springs from a denial of absolute immunity.

"Therefore, in such cases the divestiture of jurisdiction brought about by the defendant's filing of a notice of appeal is virtually complete, leaving the district court with jurisdiction only over peripheral matters unrelated to the disputed right not to have [to] defend the prosecution or action at trial." *Id.* at 576. "'Until this threshold immunity question is resolved, *discovery should not be allowed.*'" *Id.* (citing *Harlow v. Fitzgerald*, 457 US 800, 818 (1982)) (emphasis added).

"Once a notice of appeal on an appealable issue such as [absolute] immunity is filed, the status quo is that the district court has lost jurisdiction to proceed. To regain jurisdiction, it must take the affirmative step of certifying the appeal as frivolous or forfeited, and until that step is taken it simply lacks jurisdiction to proceed with the trial." *Id.* at 577-78. *"[I]t is the plaintiff's burden to obtain a determination that the defendant's appeal is frivolous or dilatory." Id.* at 577 (emphasis added).

In order to certify an appeal as frivolous or forfeited, the district court must (1) conduct a hearing; (2) make written findings based upon substantial reasons; and (3) find the claim asserted in the appeal to be frivolous. *Id.* at 576 (citing *United States v.*

Hines, 689 F.2d 934, 936-37 (10th Cir. 1982)); *see McCauley v. Halliburton Energy Services, Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005).

In summary, the District Court in its certification must find that Defendant's claim of immunity is a "sham." *See Stewart*, 915 F.2d at 577 ("If the claim of immunity is a *sham* . . . the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks.") (emphasis in original).

II. KOOPMAN'S INTERLOCUTORY APPEAL IS NOT A SHAM, FRIVOLOUS OR DILATORY

Koopman has raised three issues on appeal in his Docketing Statement to the Tenth Circuit Court of Appeals:

A. Whether Koopman is entitled to share in absolute prosecutorial immunity as to the sole § 1983 claim for "malicious prosecution" alleged to be in violation of Plaintiff's Fourth and Fourteenth Amendment Due Process rights, pursuant to *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (*Ginsburg, J.*, concurring) and *Taylor v. Meacham*, 82 F.3d 1556, 1563 n.8 (10th Cir. 1986).
B. Whether Koopman is alternatively entitled to share in absolute prosecutorial immunity for all actions taken by him after the charging criminal information was filed initiating the prosecution of Plaintiff.

C. Whether Koopman is alternatively entitled to absolute immunity in connection with his testimony at the preliminary hearing in the underlying criminal case.

The first two issues raised on appeal involve an "open issue," *see Albright*, 510 U.S. at 279 n.5 (*Ginsburg, J.*, concurring) (*citing Stevens, J.*, dissenting, 510 U.S. at 831, n.26). The third issue raised on appeal represents a requested extension of *Briscoe v. Lahue*, 460 U.S. 325, 326 (1983) (in litigation brought under § 1983, all witnesses—police officers as well as lay witnesses—are absolutely immune from civil liability based on their testimony in judicial proceedings") and *Anthony v. Baker*, 955 F.2d 1395, 1400 (10th Cir. 1992) ("In this Circuit, we extended *Briscoe* beyond the trial

itself to judicial proceedings generally," and recognizing that other circuits have granted absolute immunity to a witness testifying in a pre-trial setting, including testimony at adversarial preliminary hearings), and seeks to have the Tenth Circuit reconsider its conclusion in *Anthony* that a *complaining* witness—as distinguished from a *lay* witness—is not entitled to absolute immunity in a malicious prosecution action for testimony given at a preliminary hearing "if that testimony is relevant to the manner in which the complaining witness initiated or perpetuated the prosecution," 955 F.2d at 1401-02, in light of Justice Ginsburg's concurring opinion in *Albright, supra.*

The essence of Koopmans' interlocutory appeal is grounded upon Justice Ginsburg's observation that a malicious prosecution action against police officers is "anomalous." 510 U.S. at 279 n.5. The entire *Albright* opinion has been characterized by the Seventh Circuit as a "minefield." *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) (concluding that an arrestee's complaint did not state a claim for malicious prosecution because what he labeled malicious prosecution was nothing more than a time-barred wrongful arrest claim).

Striking similarities exist between the facts in *Reed* and this case. Here, the District Court found Plaintiff's Fourth Amendment claims for unlawful search and seizure and for use of excessive force to be time barred. (*See* Order Concerning Defendants' Motions To Dismiss [Docket #99], filed 09/27/10, at 8, and ordering those claims dismissed at 13.) Plaintiff, in large part, relies upon the same set of alleged facts which supported his time-barred unlawful search and seizure and excessive force claims in support of his solitary malicious prosecution claim. Therefore, Plaintiff's unlawful search and seizure and excessive force claims are essentially identical to his malicious

prosecution claim, whereby Plaintiff has attempted to shoehorn such claims into a malicious prosecution claim in order to avoid a successful statute of limitations defense. *See Reed, supra*, at 1051 (disallowing plaintiff there from "shoehorn[ing] a wrongful arrest claim into a malicious prosecution claim in order to avoid a successful statute of limitations defense").

For these many reasons, Koopmans' interlocutory appeal cannot accurately be termed a sham, frivolous or dilatory. Furthermore, the District Court, in its Order Concerning Defendants' Motion to Dismiss [#140], filed June 17, 2011, denying Koopman's claim of absolute prosecutorial immunity, did not even address most of the arguments and legal authorities raised and relied upon by Koopman (regarding his entitlement to absolute immunity) in Defendants' Motion to Dismiss Plaintiff's Amended Complaint [#128], filed March 11, 2011, and in Koopman's Reply in Support of Defendants' Motion to Dismiss Plaintiff's Amended Complaint [#136], filed April 14, 2011, including Koopman's "*Albright*" argument and his request that at a bare minimum, he be granted absolute immunity for his testimony given at Plaintiff's preliminary hearing, in reliance upon *Briscoe, supra*.

Koopman's interlocutory appeal derives from a somewhat unsettled and emerging area of constitutional law. Rather than being frivolous, Koopman's appeal is a legitimate effort to avail himself of all constitutional protections and defenses available to him.

Plaintiff complains about the number of motions filed in this case and stays of discovery, yet overlooks that Koopman has been successful, at least in part, with almost all of his motions. Just as his motion practice has been well grounded in facts and law,

so, too, is his interlocutory appeal potentially meritorious. For instance, neither of the cases cited by the District Court in denying Koopman absolute immunity—*Mink v. Knox*, 613 F.3d 995, 999 (10th Cir. 2010), and *Mink v. Suthers,* 482 F.3d 1244, 1262 (10th Cir. 2007)—dealt with the question of a police officer's absolute immunity from a claim of malicious prosecution for testimony given during a criminal preliminary hearing even if alleged to have been false or deceptive. Under these circumstances, this Court would do well to deny Plaintiff's Motion to Certify Defendant's Appeal as Frivolous and Forfeited.

III. CONCLUSION

WHEREFORE, Koopman respectfully requests the Court deny Plaintiff's Motion to Certify Defendant's Appeal as Frivolous and Forfeited.

DATED this 5th day of August, 2011.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 5, 2011, I electronically filed the foregoing RESPONSE TO PLAINTIFF'S MOTION TO CERTIFY DEFENDANT'S APPEAL AS FRIVOLOUS AND FORFEITED with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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