IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

COREY OFFINEER,	:	
	:	
Plaintiff,	:	
	:	**Case No. C2-09-CV-493**
v.	:	
	:	**JUDGE ALGENON L. MARBLEY**
ROGER KELLY, *et al.*,	:	
	:	**Magistrate Judge Terrence P. Kemp**
Defendants.	:	

OPINION AND ORDER

This matter is before the Court on the Plaintiff's Motion to Preserve Status Conference and Jurisdiction of the Court (Doc. 116). For the reasons that follow, the Motion is **DENIED**.

I. BACKGROUND

Plaintiff Corey Offineer initiated this action on June 16, 2009 against Defendants Detective Roger Kelly and Sheriff Matt Lutz, alleging federal and state claims arising out of his arrest and prosecution for the rape of a child (Doc. 2). Plaintiff filed his First Amended Complaint on July 13, 2009, naming the following additional parties as defendants: Six County, Inc.; Darcy Stephens; Amy Brand, R.N.; Danine Lajiness-Polosky; Bonnie J. Taylor; and William Clark Harlan, D.O. In his First Amended Complaint, Plaintiff added claims arising out of the failure of the medical staff at the Muskingum County Jail, where he was held pending trial, to diagnose and treat his mental illness.

Defendants Kelly and Lutz ("Defendants") filed a motion for summary judgment on December 31, 2009 arguing that they were entitled to qualified immunity on all of the claims against them (Doc. 32). Plaintiff filed a cross-motion for summary judgment on January 26, 2010 against Defendant Kelly (Doc. 45). This Court granted in part and denied in part the Defendants'

motion and denied the Plaintiff's cross-motion on September 24, 2010. *Offineer v. Kelly*, Case No. 09-cv-493, 2010 U.S. Dist. LEXIS 100619 (S.D. Ohio Sept. 24, 2010). In particular, the Court granted the Defendants summary judgment with respect to the Plaintiff's Fifth Amendment and state law malicious prosecution claims and denied it with respect to all other claims.

Defendants filed a notice of appeal of that order on October 20, 2010 (Doc. 117). Plaintiff filed the instant motion also on October 20, 2010, moving to preserve the November 9, 2010 status conference and for a ruling that this Court will retain jurisdiction notwithstanding the Defendants' appeal (Doc. 116). The Defendants did not oppose the motion to preserve the status conference, which was held before Magistrate Judge Kemp on November 9, 2010. The Court accordingly **DENIES** Plaintiff's Motion as moot with respect to its request to preserve the status conference.

Defendants have filed a response to the Plaintiff's Motion, which is now ripe for decision.

II. LAW AND ANALYSIS

The Plaintiff argues that district courts can, and this Court should, certify an interlocutory appeal of an order on qualified immunity as frivolous, retaining jurisdiction to continue the case to trial. The Defendants argue in response that this Court lacks jurisdiction and that their appeal is not frivolous. Without reaching the merits of retaining jurisdiction in this case, the Court concludes that it does not have the authority to certify interlocutory appeals of qualified immunity orders as frivolous.

A district court's denial of a claim of qualified immunity is immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Such *Forsyth* appeals often delay a trial on the merits by several months or years and can be used to raise the cost of litigation and encourage plaintiffs

to settle or drop their claims. In *Yates v. Cleveland*, 941 F.2d 444 (6th Cir. 1991), the Sixth Circuit recognized the potential negative effects of *Forsyth* appeals, discussing with favor Judge Eaterbrook's suggestion that district court's be allowed to certify a *Forsyth* appeal as frivolous and retain jurisdiction in a case. *Apostol v. Gallion*, 870 F.2d 1335, 1338-39 (7th Cir. 1989). Indeed, the Supreme Court has noted this practice with approval, listing the Sixth Circuit as one of several that employ it. *Behrens v. Pelletier*, 516 U.S. 299 (U.S. 1996) ("In the present case, for example, the District Court appropriately certified petitioner's immunity appeal as 'frivolous' . . . . This practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings.").

Nevertheless, any ambiguity about whether a district court within the Sixth Circuit has the authority to certify an interlocutory appeal as frivolous and retain jurisdiction for trial was resolved in *Dickerson v. McClellan*, 37 F.3d 251 (6th Cir. 1994). There, the Sixth Circuit acknowledged the language in *Yates* but concluded that there is "no authority that would permit a district court to dismiss a notice of appeal from [an order denying qualified immunity]." *Id*. at 252. The court went on to note that the Sixth Circuit "must determine its own jurisdiction and is bound to do so in every instance. It follows that the decision to dismiss a notice of appeal rests with this court, not the district court." *Id*.

When the Defendants filed their notice of appeal on October 20, 2010, this Court was divested of its jurisdiction. *Dickerson*, 37 F.3d at 252 ("A proper notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the court of appeals."). Any decision on the frivolity of the Defendants' appeal is for the Sixth Circuit alone to decide. The Plaintiff's Motion to Preserve Jurisdiction is, accordingly, **DENIED**.

III. CONCLUSION

For the above reasons, the Plaintiff's Motion is **DENIED** (Doc. 116).

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
United States District Court Judge

DATED: February 23, 2011