RECORD NO. 20-1704

In The

United States Court of Appeals

For The Fourth Circuit

JASON KESSLER,

Plaintiff – Appellant,

v.

CITY OF CHARLOTTESVILLE et al.,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT CHARLOTTESVILLE

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This case arises under the First Amendment to the United States Constitution, U.S. CONST. amend. I, and 42 U.S.C. § 1983. The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. On February 21, 2020, that Court granted each defendant's motion to dismiss all the plaintiff's claims. (JA 391; DE 53). On June 18, 2020, the District Court overruled plaintiff's motion for reconsideration. (JA 422; DE 63). On June 29, 2020, plaintiff timely appealed. (JA 428; DE 64). This Court's jurisdiction rests on 28 U.S.C. § 1291.

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN APPLYING *DeShaney v. Winnebago Cty.* TO THE APPELLANT'S FIRST AMENDMENT HECKLER'S VETO CLAIMS ?

II. DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLEES' CANCELLING OF APPELLANT'S SPEECH DUE TO PUBLIC DISORDER DID NOT CONSTITUTE JOINING OR ACQUIESCING IN A HECKLER'S VETO?

III. DID THE TRIAL COURT ERR IN FINDING THAT EVEN IF A CONSTITUTIONAL VIOLATION OCCURRED THE APPELLEES WERE PROTECTED BY QUALIFIED IMMUNITY?

STATEMENT OF THE CASE

Appellant Jason Kessler held a permit to hold a political rally in Charlottesville, Virginia on August 12, 2017. (JA 21 ¶75-76.) Kessler had to sue in the Western District of Virginia to secure his preferred event location. (JA 216.) Kessler was to be be a featured speaker at the rally. (JA 11, 202, 204.) Kessler's speech was announced as an "Alt-Right" political event. (JA 11, 202, 204.) Alt Right speech is considered deeply offensive by many due to it's racist and anti-Semitic content and phraseology. Appellees were aware of significant public hostility to Mr. Kessler's planned speech and event. (JA 11-17). Appellees were aware that certain members of the hostile public were highly likely to physically attack Mr. Kessler and his supporters at the rally location. (JA 11-17; 203, 320) Several elected officials in Charlottesville were outspoken in their hostility to the content of Kessler's speech as well (JA 134 identifying Charlottesville as "capital of the resistance" to, inter alia, racism) including one, Wes Bellamy, whom Kessler

had individually singled out for political opposition. (JA 156). Mr. Bellamy resigned from his private employment after Mr. Kessler publicized some of Mr. Bellamy's social media activity. (JA 157).

Appellees' engaged in a plan to use the expected public hostility as an excuse to cancel Kessler's speech. (JA 12, 14, 16, 17.) Appellees did so due to both public and political opposition to the content of Kessler's speech. (JA 11-17; 134, 140, 157 wherein a police officer stated that one elected official's anti-Kessler speech was "tantamount to war rhetoric", and 162.) Appellees caused a large number of police officers (JA 232, 239, and 262) to be present at the speech location but ordered those police to ignore public disorder and violence until such time as it was bad enough to declare an "unlawful assembly" under State law. (JA 17, 266.)

The expected melee did in fact occur despite members of the public begging police to intervene. (JA 18, 20.) The unlawful assembly having been declared, Mr. Kessler, who was at the designated speaker's location and had identified himself to police as both the event permit holder and a scheduled speaker, was ejected, pursuant to the *a priori* plan of the Appellees, from the rally location together with everyone else. No effort whatsoever was made to find a less restrictive means of restoring the public order than the complete suppression of Mr. Kessler's First Amendment protected speech. (JA 21.)

Mr. Kessler filed suit against Appellees in the Western District of Virginia bringing "heckler's veto" based claims. (JA 10.) The District Court held, with no objection from Appellant, that a report commissioned by the City of Charlottesville known as the "Heaphy Report" was integral to the Complaint. (JA 394.[1]) The Court then dismissed all claims for failure to state a claim on February 21, 2020 and overruled Appellant's R. 59 motion on June 18, 2020. Mr. Kessler timely filed his Notice of Appeal on June 29, 2020.

I. THE COURT DISMISSES APPELLANT'S COMPLAINT

All Appellees filed motions to dismiss for failure to state a claim. In examining the case, the trial Court assumed that Kessler's speech was protected by the First Amendment. (JA 411). With one minor exception, the Court did not find any of Appellant's factual allegations to be implausible. (JA 410.)

Rather, the Court made the novel finding that the "no duty" holding from *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), applied to Mr. Kessler's heckler's veto claims. (JA 404) The Court also examined whether the Appellees' unlawful assembly declaration constituted an impermissible participation or acquiescence in a heckler's veto. (JA 411.)

[1] The entire Heaphy report was attached to Appellant's Complaint (JA 121-340; DE 7-1)

Though Mr. Kessler argued for strict scrutiny in this section, the Court opted for intermediate scrutiny. (JA 411.) The Court also touched very briefly on qualified immunity, finding that Fourth Circuit persuasive precedent specifically allowed Appellees to cancel a free speech protected event due to the mere threat of counter protestor violence. (JA 413.)

SUMMARY OF THE ARGUMENTS

Mr. Kessler respectfully contends that 1) *Deshaney* does not apply to a heckler's veto claim; 2) the District Court erred in failing to apply strict scrutiny to plaintiff's "acquiesced in" claim and under strict or intermediate scrutiny the appellees were prohibited from making content based decisions regarding Appellants protected speech and were also required to do something, rather than absolutely nothing, to protect Mr. Kessler's speech rights from being negatively impacted by appellees' unlawful assembly declaration; and 3) Mr. Kessler's alleged rights were clearly established on August 12, 2017.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FINDING THAT APPELLEES WERE PROTECTED BY QUALIFIED IMMUNITY.

A. Standard of Review

The standard of review for a qualified immunity based motion to dismiss is *de novo. Ray v. Roane* 948 F.3d 222, 226 (4th Cir. 2020).

B. Discussion: Heckler's Veto right was Clearly Established

To determine whether a right was clearly established, Courts in the Fourth Circuit "ask whether, when the defendant violated the right, there existed either controlling authority—such as a published opinion of this Court—or a "robust consensus of persuasive authority," *Booker v. S.C. Dept of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017) "that would have given the defendants "fair warning that their conduct was wrongful." *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018)." *Turner v. Thomas*, 930 F. 3d 640 (4th Cir. 2019).

In *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 236 (6th Cir. 2015) the Sixth Circuit engaged in an extended discussion of the heckler's veto doctrine. The Sixth Circuit held: "The [protestors] attended the Festival to exercise their First Amendment rights and spread their religious message. The way they conveyed their message may have been vile and offensive to most every person…….; nonetheless, they had every right to espouse their views. See *Cantwell*, 310 U.S. at 309, 60 S.Ct. 900. When the message was ill-received, the police did next to nothing to protect the [protestors] or to contain the lawlessness …….in the crowd…..... On this record, there can be no reasonable dispute that the [police] effectuated a heckler's veto, thereby violating the [protestors] First Amendment rights."

In making this holding the Sixth Circuit relied on numerous U.S. Supreme Court decisions. "[E]xpressive activity cannot be proscribed merely because it 'stirred people to anger, invited public dispute, or brought about a condition of unrest.' " *Edwards v.*

South Carolina, 372 U.S. 229, 238 (quoting *Terminiello v. City of Chicago,* 337 U.S. 1, 5)" ; "[P]olice cannot punish a peaceful speaker as an easy alternative to dealing with a lawless crowd that is offended by what the speaker has to say. *Bible Believers* 805 F.3d 228, 250. "[T]he espousal of views that are disagreeable to the majority of listeners may at times "necessitate police protection," Edwards, 372 U.S. at 237.

The Sixth Circuit is not alone in it's interpretation of the heckler's veto. The Third Circuit has explained ""If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *see also Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) ("[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.") *Startzell v. Fisher* 533 F.3d 183, 200 (3d Cir. 2008). "[W]e agree with appellants that the heckler's veto analysis is not so limited (to an anticipated hostile reaction) but may apply to situations where police restrict speech that is taking place" *Id.* quoting *Frye v. Kansas City Police Dep't*, 375 F.3d 785 (8th Cir. 2004).

The Seventh Circuit has explained that " the Supreme Court held in *Terminiello v. City of Chicago,* 337 U.S. 1, 4-5, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), and the holding has been repeated countless times, see, e.g., *Cox v. Louisiana,* 379 U.S. 536, 551-52, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Collin v. Smith,* 578 F.2d 1197, 1206 (7th Cir.

1978); *PeTA, People for the Ethical Treatment of Animals v. Rasmussen,* 298 F.3d 1198, 1206-07 (10th Cir. 2002); see also *Reno v. American Civil Liberties Union,* 521 U.S. 844, 880, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), that a permit for a parade or other assembly having political overtones cannot be denied because the applicant's audience will riot. To allow denial on such a ground would be to authorize a "heckler's veto." *Church of the American Knights v. City of Gary* 334 F.3d 676, 680 (7th Cir. 2003.)

The Fourth Circuit, far from calling any of the above into question, substantially agrees with all of it. In the Fourth Circuit, *Berger v. Battaglia* 779 F.2d 992, 1001 (4th Cir. 1985) commands "Nevertheless, however real the dilemma [of public violence], we think and hold that the [police] Department" must enforce the First Amendment." Berger at 1001. In the Fourth Circuit the only choice "wholly consistent with the First Amendment" is to protect the speaker's rights as against a heckler's veto. Berger at 1001-1002.

"Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the `heckler's veto,' imposed by the successful importuning of government to curtail `offensive' speech at peril of suffering disruptions of public order. *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). Courts have recognized a heckler's veto as an impermissible form of content-based speech regulation for over sixty years. *See Terminiello v. City of Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Repeatedly, courts have emphasized the state's responsibility to permit

unpopular or controversial speech in the midst of a hostile crowd reaction. *See, e.g., Ovadal*, 416 F.3d at 537; *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973); *Grider v. Abramson*, 994 F.Supp. 840, 845-16 (W.D.Ky. 1998). In the abstract, at least, the impermissibility of a heckler's veto is clearly established by First Amendment jurisprudence." *Rock for Life-Umbc v. Hrabowski* 411 F. App'x 541, 554 (4th Cir. 2010).

Appellant respectfully asserts that the above establishes the necessary "robust consensus of persuasive authority," required to demonstrate that the specific First Amendment right he is asserting in this litigation was "clearly established" in this Circuit on August 12, 2017. Accordingly, the trial Court erred in finding appellees were protected by qualified immunity.

II. THE TRIAL COURT ERRED IN FINDING THAT DeSHANEY APPLIES TO THIS HECKLER'S VETO CASE

A. Standard of Review.

"[W]e review a grant of a motion to dismiss for failure to state a claim de novo." *Weidman v. Exxon Mobil Corp.* 776 F.3d 214, 219 (4th Cir. 2015.) In reviewing a motion to dismiss for failure to state a claim, we must "accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." A complaint need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Tobey v. Jones* , 706 F.3d 379, 387 (4th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly* , 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A Rule 12(b)(6) motion

to dismiss 'does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses.' " *Id.* (quoting *Republican Party of N. Carolina v. Martin* , 980 F.2d 943, 952 (4th Cir. 1992)).

B. Discussion: *DeShaney* does not apply to First Amendment cases

"Section 1983, of course, is not an independent source of substantive rights, but simply a vehicle for vindicating preexisting constitutional and statutory rights. The first step in any such claim is to pinpoint the specific right that has been infringed." *Safar v. Tingle* 859 F.3d 241, 245 (4th Cir. 2017.)

"Compared to the "more generalized notion" of due process, the Fourth Amendment "provides an explicit textual source of constitutional protection against [unreasonable seizures and arrests]," *Id.* Here, the First Amendment provides "an explicit textual source" of protection for Mr. Kessler's First Amendment rights. The Trial Court did not fail to note that fact in it's Opinion. (JA 411 at footnotes.)

Importantly, none of the four cases relied on by the District Court in making it's *DeShaney* holding come anywhere near applying *DeShaney* to a heckler's veto or any other First Amendment claim. The District Court cited to *Musso v. Hourigan,* 836 F.2d. 736 (2d Cir.1988); ;*Doyle v. Town of Scarborough*, 2016 WL 4764902, (D. Maine Sept. 13, 2016); *Morlock v. West Cent. Educ. Dist.,* 46 F. Supp. 2d 892,922 (D. Minn.1999); and Charlottesville connected *Turner v. Thomas*, 930 F. 3d 640 (4th Cir. 2019).

Not a single one of these cases applies *DeShaney* to a First Amendment case. In *Musso* the Court held that one city councilman had no duty to prevent another city councilman from violating the First Amendment right of a speaker at public council meetings. The *Musso* Court allowed claims to proceed against government officials who actually violated the Plaintiff's rights as well as other councilmen to the extent they participated in the violation. *Musso* did not hold there was no duty regarding its plaintiff's alleged rights, nor did it deal in any way with heckler's veto or *DeShaney*.

In *Doyle* the Court held that city councilors had no duty regarding a plaintiff's First Amendment rights where they had no supervisory authority over other councilors but were liable for their own misconduct. The *Doyle* Court did not deal with heckler's veto law or *DeShaney*.

Morlock was a student speech case. The *Morlock* Court was unimpressed with its plaintiff's argument that her speech had been chilled since the school "tolerated sexual harassment" and she was consequently less willing or unwilling to report said harassment. Once again, there is zero discussion of heckler's veto law or *DeShaney* though the phrase "no duty" does appear.

Lastly, the District Court and Appellees each cited to the Fourth Circuit case of *Turner v. Thomas* 930 F. 3d 640 (4th Cir. 2019.) The Turner plaintiff seems to

have argued that the authorities' failure to intervene in the violence in Charlottesville VA on August 12, 2017 until it reached a crescendo actually caused the violence, or made it worse, and this caused the personal injury to the Turner plaintiff. Said plaintiff explicitly brought a state created danger/*DeShaney* claim and therefore the Court properly applied *DeShaney* analysis. As above, there was no discussion of a heckler's veto claim.

Accordingly, there is no case law support whatsoever for the District Court's application of *DeShaney* to Appellant's heckler's veto claim. Indeed, as explained above, mandatory precedent in this Circuit requires that the District Court not apply "the more generalized" law of *DeShaney* to this First Amendment case.

III. THE TRIAL COURT ERRED IN FINDING THAT APPELLEES DID NOT PARTICIPATE OR ACQUIESCE IN A HECKLER'S VETO WHEN THEY DECLARED AN UNLAWFUL ASSEMBLY AND CANCELLED THE APPELLANT'S SPEECH

A. Standard of Review.

"[W]e review a grant of a motion to dismiss for failure to state a claim de novo." *Weidman v. Exxon Mobil Corp.* 776 F.3d 214, 219 (4th Cir. 2015.)

B. Discussion

The District Court acknowledged that Appellees had a duty not to participate or acquiesce in a heckler's veto of Mr. Kessler's protected speech. (JA 409, 411). The District Court ignored much Appellant's operative Complaint when it

analyzed Appellant's claim that the unlawful assembly declaration and subsequent complete suppression of Appellant's speech constituted impermissible participation or acquiescence in a heckler's veto. (JA 409.)

It is the contents of the Heaphy Report that adds necessary detail to the allegedly conclusory allegation cited by the Court. (JA 410.) The Heaphy Report was attached as an exhibit to Appellant's Complaint and the the Court itself held the report to be integral to the Complaint. (JA 394.) Thus, that reports contents must be considered in this appeal.

As listed above there was ample allegation that City of Charlottesville officials were opposed to the content of Appellant's speech. (JA 134, 140, 156, 157). Moreover ""Listeners' reaction to speech is not a content-neutral basis for regulation." *Draego v. City of Charlottesville* Case No. 3:16-CV-00057, at *31 (W.D. Va. Nov. 18, 2016; Moon, J.) citing *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Indeed, if Appellant's Complaint says anything, it says that "Antifa" was going to show up and punch Nazis on August 12, 2017 in Charlottesville. (JA 10-118.) Accordingly, the District Court must be reversed so it can apply strict scrutiny to this portion of the Complaint.

The proper scrutiny level notwithstanding, the Court did apply intermediate scrutiny. (JA 411.) "Under intermediate scrutiny, the State bears the burden of proving that the law is "narrowly tailored to serve a significant government interest

and leave[s] open ample alternative channels of communication." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013.) The means chosen must not be substantially broader than necessary to achieve the government's interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989.) To demonstrate narrow tailoring, Appellees are required to present "actual evidence supporting [their] assertion that [the] speech restriction[s] [do] not burden substantially more speech than necessary." *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015).

Appellees must "*prove* that [the government] actually *tried* other methods to address the problem." *Reynolds* at 231 (emphasis in original). "[T]he government must *show* [] that it seriously undertook to address the problem with less intrusive tools readily available to it, and must *demonstrate* that [such] alternative measures . . . would fail to achieve the government's interests, not simply that the chosen route is easier." *Reynolds*, 779 F.3d at 231-32 (emphasis in original).

Neither the District Court Opinion nor the Appellees have shown how Appellee's alleged actions comply with the above legal standard. Not unless Appellees's police officers telling Mr. Kessler he is not allowed to speak and must leave with everyone else (JA 21) constitutes an ample alternative channel of communication or unless the "capitol of the resistance's" police chief commanding

"let them fight, it will make it easier to declare an unlawful assembly" (JA 17) constitutes narrowly tailored in this Circuit.

C. Remaining Claims

The District Court dismissed Mr. Kessler's *Monell* and supervisory liability claims in quick fashion (JA 22-23) as it found they must be dismissed due to the finding that no constitutional violation had been successfully pled or that qualified immunity applied. Appellant concurs that if this Court sustains the trial Court then the *Monell* and supervisory liability claims also fail. However, as shown above the District Court must be reversed and, if so, then it must be reversed as to the *Monell* and supervisory claims as well.

CONCLUSION

For the reasons stated above, Mr. Kessler respectfully requests that this Court reverse the District Court as to all claims and remand this matter so that Appellant can begin litigating his case. In the alternative, Mr. Kessler requests that this Court reverse the District Court and remand this matter so that that Court can reexamine the motion to dismiss issues in the light of the correct legal standard, to wit: that DeShaney does not apply to heckler's veto claims, that Mr. Kessler's alleged rights were clearly established in this Circuit on August 12, 2017, that strict scrutiny should be applied to the participation or acquiescence in a heckler's veto claim cause of action or at least that the correct intermediate scrutiny standard should be used to examine the viability of the claim.

Respectfully submitted, this 2nd day of March 2021.

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/s/ James E. Kolenich

Dated: March 2, 2021

Counsel for Appellant

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I hereby certify that on this 2nd day of March, 2021, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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