UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BIBLE BELIEVERS, et al.,

Plaintiffs,

Case No. 12-cv-14236

v.

HONORABLE STEPHEN J. MURPHY, III

WAYNE COUNTY, et al.,

Defendants.
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT (document no. 45), **AND GRANTING DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT** (document no. 46)

On October 28, 2015, the Sixth Circuit issued an *en banc* opinion remanding the case for entry of summary judgment in favor of the Plaintiffs.[1] One of the defendants, Wayne County, filed a motion for relief from judgment under Civil Rule 60(b). The motion argues that the Sixth Circuit's opinion relied on a fact for which there was no evidence in the record. Under Civil Rule 60, the Court may relieve a party from an order due to "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). In many cases interpreting the rule, the district court reviews its own order for a mistake or error. The present situation is less common because Wayne County is asking the district court to review the work of an appellate court (sitting *en banc*, no less). The Court has reviewed the filings and agrees that the Sixth Circuit's opinion contains a clear factual error. And the Court finds that the incorrect fact was necessary to the Sixth Circuit's reasoning. The Court will therefore grant Wayne County's motion, allow the parties to conduct discovery limited

[1] Judge Duggan was originally assigned to the case. The case was reassigned when Judge Duggan retired.

to the issue of whether Wayne County had an unconstitutional policy, and allow the parties to file renewed summary judgment motions on the issue of municipal liability.

BACKGROUND

I. Factual Background, As Detailed In The Sixth Circuit's Opinion[2]

The Bible Believers are a group of Christians dedicated to converting non-believers to the Christian faith. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 236 (6th Cir. 2015) (en banc). In 2011, they attended the Arab heritage festival in Dearborn, Michigan. *Id.* While at the festival they preached the message "that Mohammed was a false prophet who lied to them and that Muslims would be damned to hell if they failed to repent by rejecting Islam." *Id.* Members of the crowd responded by assaulting members of the group. *Id.* The police "initially watched and did nothing, then eventually silenced the Bible Believers by kicking them out and requiring them to leave the Festival grounds." *Id.*

Before the next Arab heritage festival, in 2012, the Bible Believers' lawyer sent a letter to Wayne County and Wayne County Sheriff Benny Napoleon recounting their experience at the prior year's festival. *Id.* The attorney stated that the Bible Believers had a First Amendment right to share their ideas during the festival, and that the police had a duty to protect them from the reactions of hostile listeners. *Id.* at 236–37.

The Wayne County Corporation Counsel ("Corporation Counsel"), Ms. Zenna Elhasan, responded by letter that the police did not owe any special duty to the Bible Believers. *Id.* at 237. The letter further stated that "individuals can be held criminally

[2] The Court here will provide an outline of the relevant details described by the Sixth Circuit's en banc opinion. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228 (6th Cir. 2015) (en banc).

accountable for conduct which has the tendency to incite riotous behavior or otherwise disturb the peace." *Id.* And the letter noted that the County did not owe any duty to defend a speaker addressing a hostile audience and that police could preserve the peace by removing the speaker for the speaker's protection. *Id.*

During the 2012 festival, the Bible Believers again carried signs and banners stating that "Islam Is A Religion of Blood and Murder," announcing that all Muslims would go to hell, and that the prophet was a pedophile. *Id.* at 238–39. They also carried a pig's head on a spike because they believed Muslims were afraid of swine. *Id.* at 238. While at the festival, bystanders started throwing bottles and trash at the Bible Believers. *Id.* When the police rode by, most of the assaultive behavior stopped. *Id.* at 239. But the police refused to stay close, explaining that they had to patrol the entire festival. *Id.* at 240. Instead, the police told the Bible Believers that they were causing a problem and expressed concern that the situation was escalating. *Id.*

According to the Sixth Circuit opinion, "Deputy Chiefs Richardson and Jaafar conferred with Corporation Counsel." *Id.* After the purported discussion, the police escorted the Bible Believers from the Festival. *Id.* The Bible Believers piled into a van; the police pulled the vehicle over down the road because it did not have a license plate. *Id.* at 241.

II. Sixth Circuit's Reasoning

The Sixth Circuit, sitting *en banc*, held that the police officers who threatened the Bible Believers with arrest and forced them to leave the festival violated the Bible Believers' First Amendment rights. *Id.* at 255. In addition, the Sixth Circuit held that the County was responsible for the police officers' removal of the Bible Believers from the festival. *Id.* at 260. The Court explained that a municipality could be liable for the acts of its police if the

officers were acting in accordance with a municipality's policy or custom. "A plaintiff may demonstrate the existence of a policy, custom, or usage in a variety of ways, two of which are relevant to this appeal." *Id.* at 260. "First, she may provide evidence of a formal policy officially adopted by the county." *Id.* Second, "a single unconstitutional act or decision, when taken by an authorized decisionmaker, may be considered a policy and thus subject a county to liability." *Id.*

The Sixth Circuit found that Wayne County had an unconstitutional policy, and were therefore liable for the officers' actions:

> We conclude that Wayne County Corporation Counsel's involvement in drafting a letter to the Bible Believers, and in sanctioning the Deputy Chiefs' decision to remove the Bible Believers from the Festival, easily resolves the matter of municipal liability. "*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). Therefore, with respect to a single decision, municipal liability is appropriate "where the decisionmaker possesses final authority to establish policy with respect to the action ordered." *Id.* at 481 (footnote omitted). Corporation Counsel informed the Bible Believers by way of letter that "under state law and local ordinances, individuals can be held criminally accountable for conduct which has the tendency to incite riotous behavior or otherwise disturb the peace." Then the Deputy Chiefs consulted Corporation Counsel at the Festival to confirm that they could threaten the Bible Believers with arrest for disorderly conduct because the Bible Believers speech had attracted an unruly crowd of teenagers. As discussed at length, speech cannot be proscribed simply because it has a "tendency" to cause unrest or because people reacted violently in response to the speech. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("[T]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."). Corporation Counsel's misstatement of the law in a letter may not constitute an official policy, but her direction and authorization for the Deputy Chiefs to threaten the Bible Believers with arrest based on the prevailing circumstances is certainly an action for which she "possesse[d] final authority to establish municipal policy." *See* Wayne Cty. Muni. Code § 4.312 (Corporation counsel is the chief legal advisor to the County CEO and "all County agencies," including the Sheriff's Office). The relevant facts in this case bearing on municipal liability are substantially similar to the facts of *Pembaur*. *See* 475 U.S. at 484 ("The Deputy Sheriffs who attempted to serve the capiases at petitioner's clinic found themselves in a difficult situation. Unsure of the proper course of action to follow, they sought instructions from their supervisors. The instructions

> they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner's clinic. That decision directly caused the violation of Petitioner's Fourth Amendment rights."). Therefore, Wayne County is liable.

Bible Believers, 805 F.3d at 260–61.

Judge Gibbons wrote a dissenting opinion. In her dissent, she read the majority's opinion as "admit[ting] that Corporations Counsel['s] misstatement of the law in the letter responding to Bible Believers does not amount to an official policy." *Id.* at 272 (Gibbons, J., dissenting). Furthermore, Judge Gibbons stated that the Corporation Counsel did not have final decisionmaking authority: She might have recommended to the Deputy Chiefs to remove the Bible Believers from the festival, but the recommendation did not have the force of County policy. Judge Gibbons did not dispute that the Deputy Chiefs met with Corporation Counsel prior to removing the Bible Believers. No other judge spoke to the issue of municipal liability.

III. Wayne County's Motion For Relief From Judgment

On remand, Wayne County has filed a motion for relief from judgment under Civil Rule 60(b)(1). The motion argues that there was no evidence that the Deputy Chiefs spoke with Corporation Counsel about the Bible Believers during the festival. In support, Wayne County attached an affidavit from the Corporation Counsel stating that "[a]t no time on June 15, 2012, or at any other point during the Arab Festival, did I communicate with Deputy Chief Dennis Richardson, Ms. Ursula Henry, or any other Wayne County employee regarding what action, if any, should be taken by the Wayne County Sheriff's Office towards the Bible Believers." Mot. Relief, Elhasan Aff. ¶ 4, ECF No. 46-1.

The Bible Believers' Response agrees that there is no evidence Corporation Counsel

spoke with the Deputy Chiefs during the Festival. Instead, the Deputy Chiefs apparently spoke with Ursula Henry, the legal advisor to the Wayne County Sheriffs' Office. The briefing and the Sixth Circuit's prior panel decision are consistent that the Deputy Chiefs met with the Sheriffs' legal advisor, not the Corporation Counsel. *See Bible Believers v. Wayne Cnty.*, 765 F.3d 578, 585 (6th Cir. 2013) (panel decision) ("Deputy Chief Richardson stepped away briefly to confer with the Director of Legal Affairs for the WCSO and then told Chavez, 'You need to leave. If you don't leave, we're going to cite you for disorderly. You're creating a disturbance. I mean, look at your people here. This is crazy!' Officers then escorted the Bible Believers out.").

The Sixth Circuit's opinion conflates the Sheriffs' legal advisor with the Corporation Counsel. Neither party has identified evidence that the Sheriff's legal advisor had final policymaking authority necessary to establish municipal liability. And neither party has explained what connection, if any, the Sheriff's legal advisor has to the Corporation Counsel.

DISCUSSION

In general, district courts make factual findings and draw legal conclusions, which are then reviewed by the appellate courts. The appellate court's conclusions are then binding on the lower court under the doctrine of the law of the case, and the mandate rule. "Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir.1994). A complementary doctrine is the mandate rule, under which the district court must adhere to the commands of the superior court. *Allard Enters. Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 569 (6th Cir. 2001). "The trial court is

required to implement both the letter and the spirit of the appellate court's mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006). "This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (citation omitted).

There are very limited exceptions to the doctrine of the law of the case and the mandate rule. Civil Rule 60(b) allows for a district court to relieve a party "from a final judgment, order, or proceeding" due to "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b). A district court can grant relief from an appellate court's earlier ruling in one of three exceptional circumstances: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Westside Mothers*, 454 F.3d at 538.

The issue here is whether the Sixth Circuit's "decision is clearly erroneous and would work a manifest injustice." The parties agree that the Sixth Circuit found a fact — that "Deputy Chiefs Richardson and Jaafar conferred with Corporation Counsel" immediately prior to escorting the Bible Believers out of the festival — that is unsupported by the record. The opinion's factual statement was therefore clearly erroneous.

The more difficult question is whether the error "would work a manifest injustice." The Bible Believers argue that the narrow exception is not satisfied here because the Sixth Circuit gave alternative justifications for its finding of municipal liability. They also contend

that, even if the Sixth Circuit's opinion did not give alternative justifications, the Corporation Counsel's letter, standing alone, established an official policy or custom.

I. The Factual Error Was Necessary To The Sixth Circuit's Reasoning

The Sixth Circuit's opinion does not determine whether the letter, standing alone, constituted an official policy. The opinion's analysis begins by stating that there were two relevant ways that a plaintiff could establish an official policy. First, "she may provide evidence of a formal policy officially adopted by the county." And second, "a single unconstitutional act or decision, when taken by an authorized decisionmaker, may be considered a policy and thus subject a county to liability." *Bible Believers*, 805 F.3d at 260.

The court began its application section by "conclud[ing] that Wayne County Corporation Counsel's involvement in drafting a letter to the Bible Believers, and in sanctioning the Deputy Chiefs' decision to remove the Bible Believers from the Festival, easily resolves the matter of municipal liability." *Id.* If that were all the opinion said, the Court might agree that there were two independent bases for imposing municipal liability. The two legal premises align with the two factual predicates. The structure of the opinion would therefore support finding that the letter was a "formal policy officially adopted by the county," and the Corporation Counsel's sanctioning of the Deputy Chiefs' decision to remove the Bible Believers was "a single unconstitutional act or decision . . . taken by an unauthorized decisionmaker." *Id.*

But that is not all that the opinion stated. A few sentences later: "*Corporation Counsel's misstatement of the law in a letter may not constitute an official policy*, but her direction and authorization for the Deputy Chiefs to threaten the Bible Believers with arrest based on the prevailing circumstances is certainly an action for which she possessed final

authority to establish municipal policy." *Id.* (emphasis added). Judge Gibbons interpreted the sentence to mean that the majority "admits that Corporations Counsel['s] misstatement of the law in the letter responding to Bible Believers does not amount to an official policy." *Id.* at 272 (Gibbons, J., dissenting). She read the majority opinion to hold that Corporation Counsel's instruction advising the Deputy Chiefs to threaten to issue the Bible Believers a citation was the sole basis for imposing municipal liability. *Id.*

The best reading of the opinion is that the Sixth Circuit did not resolve whether the letter, standing alone, constituted an official policy that caused the constitutional harm. Rather, because the Sixth Circuit found that the Corporation Counsel's purported direction to the Deputy Chiefs to threaten the Bible Believers with arrest established the County's liability, it did not need to resolve the question. This reading supports a natural interpretation of the Sixth Circuit's reasoning that "Corporation Counsel's misstatement of the law in a letter may not constitute an official policy." It explains why the Sixth Circuit did not analyze whether the letter caused the constitutional harm. And it explains why the Sixth Circuit relied almost exclusively on *Pembaur*, a case that involved a single unconstitutional act by a final decisionmaker, but not a formal policy.

Accordingly, the Sixth Circuit's opinion contains a clearly erroneous fact that would work a manifest injustice, and the Court will grant Wayne County's motion for relief from judgment.

II. Proceedings Moving Forward

The parties have not yet engaged in any discovery in the case because the Defendants filed their motion for summary judgment shortly after the case was filed. Judge Duggan's resolution of the motion for summary judgment so early in the case was

consistent with the need to resolve questions of qualified immunity as early as possible. And the Sixth Circuit's opinion resolved the qualified immunity issue. The Court will therefore treat the case as it would any other dispute with unresolved legal and factual issues, and allow the parties to engage in discovery and file summary judgment motions on the question of municipal liability. The parties may make any argument regarding municipal liability that is supported by the record.[3]

The parties should file a joint discovery plan no later than January 29, 2016. The Court will set a scheduling conference for February 22, 2016 at 2:00 p.m. The Court will not allow more than ninety days of discovery. The discovery plan should list three potential discovery masters. If the parties cannot resolve discovery disputes amicably, and instead resort to motion practice, the Court will appoint a discovery master to expedite the discovery process.

ORDER

WHEREFORE, it is hereby **ORDERED** that the case be **REOPENED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion For Judgment (document no. 45) is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion For Relief From Judgment (document no. 46) is **GRANTED**.

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[3] The Defendants state in their brief that the Bible Believers had the opportunity to request discovery but failed to do so. The Court notes that Wayne County refused to participate in formulating a Rule 26 discovery plan and filed their motion to dismiss before the date of the scheduling conference. Their earlier refusal to participate in discovery was "due to the fact that qualified immunity bars Plaintiffs' claims and is an adequate basis to object to discovery." Pl.'s Rule 26(f) Rep., ECF No. 11. Now that qualified immunity is no longer an issue, discovery is appropriate.

IT IS FURTHER ORDERED that the parties should submit a joint discovery plan no later than January 29, 2016, and that the Court will set a scheduling conference for February 22, 2016 at 2:00 p.m.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: January 6, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on January 6, 2016, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager