

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SHARONELL FULTON, *et al.*,

Plaintiffs,

v.

CITY OF PHILADELPHIA, *et al.*,

Defendants.

No. 2:18-cv-02075

**PROPOSED INTERVENORS’ MOTION FOR RECONSIDERATION OF THE
COURT’S ORDER STAYING THE MOTION FOR LEAVE TO INTERVENE
OR, IN THE ALTERNATIVE, THAT THE COURT AMEND ITS ORDER TO
INCLUDE AN INDICATIVE RULING PURSUANT TO F.R.C.P. 62.1**

Proposed Intervenor Philadelphia Family Pride (“PFP”) and Support Center for Child Advocates (“Child Advocates”) respectfully request that this Court reconsider its Order staying Proposed Intervenor’s motion to intervene, or, in the alternative, to make an indicative ruling pursuant to F.R.C.P. 62.1 so that the Third Circuit may grant permission for this Court to decide the Motion to Intervene.

In the Court’s Order, the Court declined to rule on Proposed Intervenor’s motion to intervene after concluding that there is an absence of Third Circuit precedent on the question of whether the Court retains jurisdiction to decide the motion after an interlocutory appeal was filed. Proposed Intervenor respectfully disagree because the Third Circuit law is clear that a notice of appeal divests the district court of jurisdiction over only “those aspects of the case involved in the appeal,” *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985), and the Proposed Intervenor’s motion to intervene is not an aspect of the case involved in the interlocutory appeal of the Court’s denial of Plaintiffs’ request for a preliminary injunction.

In the alternative, Proposed Intervenors ask the Court to make an indicative ruling that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. *See* F.R.C.P. 62.1(a)(3). In the absence of such an indicative ruling, Proposed Intervenors lack the predicate to seek permission from the Third Circuit for this Court to decide the motion.

ARGUMENT

A motion for reconsideration is addressed to the district court's discretion. Such a motion may be granted "if the party seeking reconsideration establishes at least one of the following grounds: '(1) an intervening change in controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.'" *O'Malley v. Lukowicz*, No. CIV.A. 308-CV-0680, 2008 WL 2561984, at *1 (M.D. Pa. June 25, 2008) (citation omitted). "[D]istrict courts have more discretion in reconsidering interlocutory orders than in revising final judgments." *Foster v. Westchester Fire Ins. Co.*, No. CIV. 09-1459, 2012 WL 2402895, at *4 n.1 (W.D. Pa. June 26, 2012).

A. This Court Retains Jurisdiction Over the Motion to Intervene.

The filing of a notice of appeal divests a district court of its control only "over those aspects of the case involved in the appeal," Order at n. 1 (citing *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985)). *See also Sheet Metal Workers' Intern. Ass'n Local 19 v. Herre Bros., Inc.*, 198 F.3d 391, 394 (3d Cir. 1999). The Proposed Intervenors' motion to intervene is not an "aspect of the case involved in the appeal." The appeal is an interlocutory appeal of the Court's denial of the Plaintiffs' request for a preliminary injunction. That is the only matter before the Third Circuit. *See Smith v. Twp. of Aleppo*, No. 05CV0071, 2005 WL 4984381, at *2 (W.D. Pa.

Aug. 24, 2005) (explaining in a case involving an interlocutory appeal that “[t]here is no complete divestiture of jurisdiction where ‘the judgment appealed from does not determine the entire action, in which case the district court may proceed with those matters not involved in the appeal.’”) (citations omitted).

In discussing the rule that a district court may not address matters that are currently on appeal, the Third Circuit has noted that “[t]he rule is a judge-made, rather than a statutory, creation that is founded on prudential considerations,” and is “designed to prevent the confusion and inefficiency that would result if both the district court and the court of appeals were adjudicating the same issues simultaneously.” *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988). None of the issues presented by Proposed Intervenors’ motion to intervene is presently before the Third Circuit. As a result, there is no danger that this Court and the Third Circuit will adjudicate any issue simultaneously.

Proposed Intervenors do not believe that the cases from other jurisdictions cited in the Court’s Order suggest that the Court is divested of jurisdiction, as each of those cases involved a motion to intervene filed *after the entry of a final judgment*. *Doe v. Public Citizen*, 749 F.3d 246, 258-59 (4th Cir. 2014) (motion to intervene filed seven days after the district court entered judgment); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298 (5th Cir. 1984) (motion to intervene filed five days after judgment entered). *See Nicol*, 743 F.2d at 299 (“If an appeal is taken **from a judgment which determines the entire action**, the district court loses power to take any further action in the proceeding upon the filing of a timely and effective notice of appeal.”) (emphasis added). Here, Proposed Intervenors filed their motion to intervene prior to judgment and, indeed, prior to the order appealed from.

B. In the Alternative, in Order to Create the Predicate for a Ruling Under F.R. App. P. 12.1, the Court Should Amend its Order to Include an Indicative Ruling.

In its Order staying the Motion to Intervene, the Court stated that it would rule on the motion if given permission to do so by the Third Circuit. In order for the Proposed Intervenors to seek such permission from the Third Circuit, however, the Court would need to amend its Order to include an indicative ruling.

This procedure is governed by F.R.C.P. 62.1¹ and F.R. App. P. 12.1.² F.R.C.P. 62.1 allows a district court that has been divested of jurisdiction by a pending appeal to make an indicative ruling. If the court issues an indicative ruling stating that it would grant the motion or

¹ F.R.C.P. 62.1 provides:

- (a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
 - (1) defer considering the motion;
 - (2) deny the motion; or
 - (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.
- (b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.
- (c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

² F.R. App. P. 12.1 provides:

- (a) Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.
- (b) Remand After an Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

that the motion raises a substantial issue, the movant may notify the circuit clerk under F.R.App.P. 12.1. Then the district court may decide the motion if the court of appeals remands for that purpose.

This procedure is predicated on the existence of an indicative ruling from the district court stating that it would grant the motion or that the motion raises a substantial issue. Without that, Proposed Intervenors cannot ask the Circuit Court to authorize this Court to rule on the motion. Proposed Intervenors therefore respectfully request that in the event the Court does not conclude that it has jurisdiction to rule on the motion to intervene, the Court amend its Order to include an indicative ruling stating that it would grant the Motion to Intervene or that the motion raises a substantial issue. Proposed Intervenors would then request that the Court of Appeals remand that issue to this Court.

Respectfully submitted,

Dated: July 20, 2018

/s/ Mary Catherine Roper
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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing motion was filed electronically and served on all counsel of record via the ECF system of the United States District Court for the Eastern District of Pennsylvania.

Dated: July 20, 2018

/s/ Mary Catherine Roper

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SHARONELL FULTON, <i>et al.</i> ,	:	
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Plaintiffs,	:	No. 2:18-cv-02075
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, <i>et al.</i> ,	:	
	:	
Defendants.	:	
	:	

[Proposed] Order

AND NOW, this __ day of _____, 2018, upon consideration of Proposed Intervenors’ Motion for Reconsideration of the Order Staying the Motion to Intervene, or, in the alternative, for an indicative ruling pursuant to F.R.C.P. 62.1, and any response thereto, it is hereby ORDERED that Proposed Intervenors’ Motion is GRANTED.

IT IS FURTHER ORDERED THAT the Order staying the motion to intervene (ECF N. 59) is hereby amended to add the following paragraph:

Pursuant to F.R.C.P. 62.1, the Court further states that, were the Court of Appeals permit the Court to rule on the Motion to Intervene, the Court would grant the motion, finding that Philadelphia Family Pride and the Support Center for Child Advocates are entitled to intervene as of right under F.R.C.P. 24(a).

Hon. Petrese Tucker, U.S.D.J.