

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRACIE HUNTER, et al., : Case No. 11-3738
:
Plaintiff-Appellees, : PLAINTIFFS’ MOTION TO
: DISMISS DEFENDANTS’ APPEAL
vs. : OR EXPEDITE REVIEW IN THE
: ALTERNATIVE
HAMILTON COUNTY BOARD :
OF ELECTIONS, et al., :
:
Defendant-Appellants. :

**PLAINTIFFS’ MOTION TO DISMISS DEFENDANTS’ APPEAL OR
EXPEDITE REVIEW IN THE ALTERNATIVE**

Defendants Board of Elections, Alex Triantifilou, Timothy Burke, Charles Gerhardt, III, and Caleb Faux (the “Defendants”) have filed the fourth appeal in this case, a case that is finally going to a trial on the merits for at least a week, starting July 18, 2011. This case involves two constitutional challenges to the Board of Elections’ handling of 849 rejected provisional ballots in the Hunter/Williams Juvenile Court Judge race, where only 23 votes separate the candidates. The voters have not yet had their elected official take the bench. Now Defendants want to delay the outcome of the election one more time.

On the eve of the final pretrial conference – a mere twelve days before trial was scheduled to begin and seven months into this litigation that has

involved extensive pretrial proceedings and expansive discovery – Defendants raised the issue of Eleventh Amendment immunity for the first time in their Motion for Summary Judgment. R. No. 94: Defendant Board’s MSJ. Sovereign immunity was not asserted in the Defendants’ Answer that was filed five months after Plaintiff Hunter’s Complaint. R. No. 56: Defendants’ Answer. Nor was the issue of sovereign immunity raised in the Defendants’ Joint Final Pretrial Order submitted to the District Court on June 29, 2011. Instead, the Board waited until the last possible minute to raise this claim.

When this issue was discussed at the Final Pretrial Conference, the District Court indicated there would be no ruling on the Defendants’ Motion until Plaintiffs were given the appropriate time to respond and brief the issues pursuant to the Southern District of Ohio Local Rules. Defendant Board now seeks to treat that decision by the District Court to be a denial of its Motion so that it may file an interlocutory appeal before Plaintiffs *or* the District Court have had the opportunity to address the issues. Plaintiffs thus respectfully move this Court pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure and Rule 27(d) of the Sixth Circuit Rules to dismiss the Defendants’ appeal, which is manipulative and solely intended to cause undue delay, on the grounds that: (1) this court lacks jurisdiction to hear this

appeal without a final decision by the District Court; and (2) Defendants waived any claim to sovereign immunity. In the alternative, Plaintiffs respectfully move this Court to expedite the review of this matter so that the important matters of public concern underlying this dispute may reach an expedient resolution.

MEMORANDUM

I. INTRODUCTION

Plaintiff Hunter filed this civil rights action on November 21, 2010, on grounds that the Defendants violated her equal protection and due process rights in their treatment of provisional ballots in the November 2010 general election. R. No. 1: Plaintiff Hunter's Complaint. The Defendants filed their Answer on May 3, 2011. R. No. 56: Defendants' Answer. In that intervening time period, the parties engaged in expansive discovery and extensive pretrial proceedings, including three separate appeals to this Court. *See* Case Nos. 10-4481, 11-3059, and 11-3060. Yet the Defendants never raised the issue of sovereign immunity in their pleadings or any of these appeals. The issue had still not been raised when the Joint Final Pretrial Order was submitted to the District Court on June 29, 2011. It was not until the Defendants filed their Motion for Summary Judgment on July 6, 2011, the day before the Final Pretrial Conference, that any claim to sovereign immunity was raised for the first time in this case. R. No. 94: Defendant Board's MSJ.

At the Final Pretrial Conference with the District Court the following day, the Defendants pressed the District Court to compel a response from Plaintiffs and issue its own decision before the scheduled trial date on June 18, 2011. R. No. 103-2: Transcript of the Final Pretrial Conference on July 7, 2011, p. 64:14-21. The District Court refused this suggestion and instead stated there would be no ruling on the Defendants' Motion until Plaintiffs had the appropriate amount of time as set out in the local rules to respond to and brief the issues. *Id.* at p. 65:5-19. Defendants have now filed an appeal of this decision by the District Court, characterizing this decision to follow the local rules as a "denial" of their Motion for Summary Judgment and seeking interlocutory appeal of the immunity question. R. No. 103: Defendant Board's Notice of Appeal.

Plaintiffs now respectfully move this Court to dismiss the Defendants' appeal, which is manipulative and solely intended to cause undue delay, on the grounds that: (1) this court lacks jurisdiction to hear this appeal without a final decision by the District Court; and (2) Defendants waived any claim to sovereign immunity. In the alternative, Plaintiffs respectfully move this Court to expedite the review of this matter so that the important matters of public concern underlying this dispute may reach an expedient resolution.

II. ARGUMENT

A. This Appeal Should Be Dismissed Because There Was No Final Decision By The District Court That Would Give Rise To This Court's Appellate Jurisdiction

It is a well established rule that federal appellate courts generally have no jurisdiction to review interlocutory decisions under 28 U.S.C. § 1291. *Kimble v. Hoso*, 439 F.3d 331, 333 (6th Cir. 2006). The collateral order doctrine provides an exception to this general rule in certain limited circumstances where a district court's order "is effectively unreviewable on appeal from a final judgment," when it "conclusively determin[e]s the disputed question," and when it involves a claim "of right separable from, and collateral to, rights asserted in the action." *Everson v. Leis*, 556 F.3d 484, 490 (6th Cir. 2009) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985)). Decisions on issues of immunity unquestionably satisfy this last requirement that the decision must involve a claim of right separable from, and collateral to, rights asserted in the action. *See id.*; *Kimble*, 439 F.3d at 334. This leaves only the questions of whether a district court's order is effectively reviewable only on interlocutory appeal and whether that order conclusively determines the question of immunity.

Several recent decisions by this Court are highly instructive in analyzing any claim to interlocutory appeal in this case. In *Skousen v. Brighton High School*, this Court held that the district court had erred when it held a motion for summary

judgment in abeyance while then later denying it without prejudice to allow plaintiffs more time to complete discovery. 305 F.3d 520, 527 (6th Cir. 2002).

The court reasoned that by refusing to address the qualified immunity claim set out in the defendant's motion and thereby exposing the defendant to potentially unwarranted discovery, the district court curtailed the basic purpose of immunities.

Id. Thus interlocutory appeal was permitted to correct the district court's erroneous decision to further delay ruling on the immunity question to permit more the parties to engage in further discovery. *Id.*

A few years after the decision in *Skousen*, this Court heard similar arguments in *Kimble*. The district court in that case stayed discovery until the question of immunity could be resolved and continued to grant plaintiff's motions for extensions to file their brief responsive to defendant's motion for summary judgment. 439 F.3d at 333. This Court noted that the two main differences setting it apart from *Skousen* were the fact that: (1) the district court filed no order denying or dismissing the motion for summary judgment and that, without such an order to appeal, the issue of immunity had not therefore been conclusively determined; and (2) "the district court did not delay ruling on the defendants' [] motion for the legally erroneous reason of permitting further discovery." *Id.* at 335. This led to the ultimate decision that there was no appealable order from the district court. *Id.* at 336.

More recently this Court heard arguments in *Everson*, where the district court declined to rule on the defendant's motion for summary judgment invoking qualified immunity, while instead holding the motion in abeyance to reopen discovery at plaintiff's request and permitting plaintiff to file a response to defendant's motion at the close of this new discovery period. 556 F.3d at 490. The Court analyzed two similar cases – *Kimble* and *Skousen* – and found that the case presented a question somewhere between the two. Like *Skousen* and unlike *Kimble*, the district court in *Everson* permitted more discovery without resolving the immunity question raised in the motion for summary judgment. *Everson*, 556 F.3d at 491. Although like *Kimble* and unlike *Skousen*, there was no order by the district court denying or dismissing the defendant's motion for summary judgment. *Everson*, 556 F.3d at 491. This Court ultimately determined that the plaintiff's case was more like *Skousen*, holding that “a district court's decision to hold in abeyance a motion seeking qualified immunity is immediately appealable *unless* that decision is related to the proper disposition of the motion.” *Id.* at 492 (emphasis in original).

The District Court in this case has issued no decision or order on Defendants' Motion for Summary Judgment as was the case in *Kimble* and *Everson*. The facts in this instance create a situation more comparable to *Kimble* than to either *Skousen* or the facts presented in *Everson*, although the procedural

posture of this case presents an even stronger argument than *Kimble* that this Court lacks jurisdiction.

Here the only decision by the District Court to which the Defendants may cite is its decision to follow Southern District of Ohio Local Rule 7.2(a)(2), which ensures that parties are given at least twenty-one days to respond to any motion filed. Unlike all of the other cases cited above, including *Kimble*, the District Court has not even held the Defendants' Motion in abeyance or otherwise delayed disposition of their Motion in this instance. Why would it? Plaintiffs would have until July 27, 2011, to respond to Defendants' Motion pursuant to the local rules and have indicated every intention that they will do so. R. No. 103-1: Transcript of the Final Pretrial Conference on July 7, 2011, p. 64:6-9.

This Circuit's case law instructs that the presence of such delay is a necessary element to give rise to appellate jurisdiction when there is no decision addressing the dispositive motion by a district court. This Court held that one of the facts that made the difference between *Kimble* and *Skousen* was that the district court in *Kimble* "did not delay ruling on the defendants' [] motion for [a] legally erroneous reason." Similarly, this Court noted that a district court may only delay a ruling on a motion for summary judgment (or hold the motion in abeyance) only where "that decision is related to the proper disposition of the motion." In both situations, this Circuit was looking at instances where a *delay* in ruling on a motion

for summary judgment will not constitute a final order giving rise to appellate jurisdiction. It should then also follow that when a district court has indicated its intent to follow the appropriate procedures and has not delayed ruling on a motion for summary judgment that there is no final order giving rise to appellate jurisdiction until that court issues a decision.

Here the Defendants will undoubtedly suggest that they are prejudiced by being forced to undergo the stresses of trial when a decision on immunity could potentially save them from doing so. However, this is no fault of the district court or of the Plaintiffs. Defendants were well aware of the trial date when they raised their immunity argument for the first time less than two weeks before trial. They were also well aware of local rules that allow parties twenty-one days to respond to motions when they first claimed immunity immediately before trial. Nothing in the expansive discovery that has been conducted in this case shed light on any new facts that Defendants needed to determine before they assert the sovereign immunity defense. Defendants have had all the facts they need to assert this defense since this case was first filed on November 21, 2010. It was Defendants who chose to wait until July 6, 2011 – on the verge of trial – to raise their immunity claim for the first time. It would be a perversion of justice for Defendants' dilatory tactics to create further delay by characterizing the District Court's decision as a final decision denying the motion.

Thus the Defendants' appeal should be dismissed because there has been no final decision from the District Court that would give rise to appellate immunity. The Defendants knowingly and willingly put themselves in a situation where following the basic rules of court would require a decision on its motion after the trial date and a decision by the District Court to simply follow the rules in place does not constitute a denial or dismissal of that motion such that it converts the District Court's decision to a final order giving rise to appellate jurisdiction.

B. This Appeal Should Be Dismissed Because Defendants Waived Any Claim to Sovereign Immunity

The Board cannot on the eve of trial attempt to raise immunity where it already voluntarily invoked the jurisdiction of the federal court by defending the case on the merits. *See Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003) (state waived the defense of Eleventh Amendment immunity in § 1983 action where the state, instead of asserting Eleventh Amendment immunity, defended the suit on the merits—engaging in substantial discovery and filing a motion for summary judgment); *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469, 476 (6th Cir. 2006) (“If a State refuses to invoke its sovereign immunity as a threshold defense, usually by way of motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, it cannot credibly be heard to complain about the indignity of the federal courts resolving the merits of its case...”);

In re Corporacion de Servicios Medico Hospitalarios de Fajardo, 123 B.R. 4, 6-7 (Bankr.D.P.R.1991) (defendant waived any Eleventh Amendment immunity by waiting until the eve of trial to first raise defense, after having participated in extensive pretrial proceedings).

A State may waive Eleventh Amendment sovereign immunity through its own conduct: by legislation, by removing an action to federal court, or by appearing without objection and defending on the merits. *Nair*, 443 F.3d 469; *see also Lawson v. Shelby County, TN*, 211 F.3d 331 (6th Cir. 2000) (State may waive protection of Eleventh Amendment by consent in the form of a voluntary appearance and defense on the merits in federal court); *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000) (observing that courts have found waiver where the state evidenced an intent to defend the suit against it on the merits).

In determining whether there has been a waiver, courts evaluate the extent to which a state has participated in the lawsuit. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 365 (3d Cir. 1997) (collecting cases), *aff'd*, 527 U.S. 666 (1999). They recognize that waiver should be unequivocal but that “[i]t may evidence that waiver ... through action other than an express renunciation.” *Neinast*, 217 F.3d at 279. In *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir.

1999), the court, addressing the concept of waiver by participation, explained as follows:

Although the waiver must be unambiguous, we have never held that an express written waiver is invariably required. On the contrary, we have recognized that a state may waive its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.... [A] waiver of Eleventh Amendment immunity has been found when the state's conduct during the litigation clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity. *See, e.g., Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) (defendants' conduct during litigation "indicates consent to this suit and an acceptance of the federal court's jurisdiction"). ...

Hill, 179 F.3d at 759.

Defendants' Answer, filed more than five months after the Plaintiff Hunter's Complaint, does not raise sovereign immunity nor make any claim that Plaintiff seeks retroactive relief in violation of the Eleventh Amendment. Nor was sovereign immunity raised in the Joint Final Pretrial Order, which was submitted to the District Court just one week prior to the Final Pretrial Conference. Moreover, the Defendants have defended both the case on the merits before the District Court and in three appeals before this Circuit, one of which Defendants filed. In none of the appeals did Defendants raise sovereign immunity. Furthermore, Defendants have engaged in broad discovery and extensive pretrial proceedings – none of which raised any new facts that would have suddenly alerted Defendants they could have raised a sovereign immunity defense. They have had the only facts

they needed to assert this defense since the complaint was first filed in November of 2010. If permitted to assert this belated defense, the Defendants will have effectively “proceed[ed] to judgment without facing any real risk of adverse consequences.” *Ku*, 322 F.3d at 433 (quoting *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring)). Accordingly, in evaluating the extent to which the Defendants have participated in the lawsuit to date, it is clear that the Defendants waived their immunity and cannot now raise such a defense to either the particular due process claim or the entire case. Therefore, this Court should dismiss Defendants’ manipulative appeal, intended for the sole purpose of causing undue delay, on the grounds that they have waived any claim to sovereign immunity.

CONCLUSION

This Motion to Dismiss the Appeal should be granted. In the alternative, should this motion be denied, the briefing schedule on the merits should be expedited to serve the public interests represented in this elections case.¹

Respectfully submitted,

/s/ Jennifer L. Branch
Jennifer L. Branch #0038893
Trial Attorney for Plaintiff-Appellee
GERHARDSTEIN & BRANCH CO. LPA

¹ Plaintiffs note that previous appeals have already been granted expedited review by this Court.

Alphonse A. Gerhardstein #0032053
Attorney for Plaintiff-Appellee Hunter
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-9100
(513) 345-5543 fax
jbranch@gbfirm.com
agerhardstein@gbfirm.com

s/ Caroline H. Gentry
Caroline H. Gentry, Trial Attorney (0066138)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
One South Main Street, Suite 1600
Dayton, OH 45402
(937) 449-6748 / (937) 449-6820 Fax
Email: cgentry@porterwright.com

Subodh Chandra
THE CHANDRA LAW FIRM, LLC
1265 W. 6th Street, Suite 400
Cleveland, OH 44113-1326
Tel: (216) 578-1700
Fax: (216) 578-1800
Email: subodh.chandra@gmail.com

*Attorneys for Intervenor Northeast Ohio Coalition
for the Homeless*

s/ Donald J. McTigue
Donald J. McTigue, Trial Attorney (0022849)
Mark A. McGinnis (0076275)
McTIGUE LAW GROUP
550 East Walnut Street
Columbus, OH 43215
(614) 263-7000 / (614) 263-7078 Fax
mctiguelaw@rroho.com

Attorneys for Intervenor Ohio Democratic Party

CERTIFICATE OF SERVICE

I hereby certify all Counsel for all parties to this Appeal, were served with a copy of this pleading by email service on July 13, 2011.

/s/ Jennifer L. Branch