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August 27, 2021

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Via ECF

Re: *Whole Woman's Health v. Jackson*, No. 21-50792

Dear Mr. Cayce,

Defendant-Appellants write to notify the Court that the district court entered an order at 10:11am this morning vacating the preliminary-injunction hearing and staying the case as to Defendants Jackson, Clarkston, Carlton, Thomas, Young, Benz, and Paxton (“Government Defendants”) only. The district court did not stay the case nor vacate the preliminary injunction hearing as to Mark Lee Dickson, the private defendant.¹

As explained in Defendant-Appellants’ emergency motion to stay, Mr. Dickson—as a private individual—did not assert a sovereign immunity defense. But he did raise several jurisdictional objections like the Government Defendants did, and the Government Defendants intend to raise those in this appeal. See *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002) (“[W]here, as in the instant case, we have interlocutory appellate jurisdiction to review a district court’s denial of Eleventh Amendment immunity, we may first determine whether there is federal subject matter jurisdiction over the underlying case.”); *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011). Moreover, “appeals transfer jurisdiction from the district court to the appellate court concerning ‘those aspects of the case involved in the appeal.’” *Id.* (emphasis added) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). That would include Mr. Dickson’s jurisdictional arguments.

As also explained in Defendants-Appellants’ motion, permitting the district court to proceed on merits issues against Mr. Dickson will prejudice the Government Defendants and result in

¹ Mr. Dickson’s counsel was in a hearing this morning and unavailable. He may file a response later, but in the interest of letting the Court know of this development with alacrity, Government Defendants wanted to file as soon as possible.

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piecemeal litigation. In adjudicating the preliminary-injunction motion, the district court may make factual findings that negatively impact the Government Defendants' defense of the same law in their absence, which they will have no opportunity to respond to.

CONCLUSION

In light of the district court's order, Defendants-Appellants no longer require immediate relief as to the Government Defendants themselves, but Government Defendants still respectfully urge the Court to stay proceedings as to Mr. Dickson as well to avoid prejudice and piecemeal litigation.

Sincerely,

/s/Heather Gebelin Hacker

Heather Gebelin Hacker
Counsel for Defendant-Appellant Penny
Clarkston

/s/Natalie D. Thompson

Natalie D. Thompson
Counsel for Defendant-Appellants Jackson,
Carlton, Thomas, Young, Benz, and Paxton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMEN’S HEALTH, et al.,

Plaintiffs,

v.

JUDGE AUSTIN REEVE JACKSON, et. al.,

Defendants.

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1:21-CV-616-RP

ORDER

Before the Court is Defendants’ opposed motion to stay case and vacate the preliminary injunction hearing. (Dkt. 84). Plaintiffs filed a response, (Dkt. 86), and Defendants’ filed a reply, (Dkt. 87). Having reviewed the parties’ briefs and the relevant law, the court will grant in part and deny in part Defendants’ motion.

Defendants ask the Court to stay this case and vacate the upcoming preliminary injunction hearing because they have appealed this Court’s order denying their motions to dismiss, (Order, Dkt. 82; Not. Appeal, Dkt. 83). Defendants argue that this Court lacks jurisdiction over this case because they have appealed the Court’s denial of their claims of sovereign immunity under the collateral order doctrine. (Dkt. 84, at 1). Under the collateral order doctrine, Defendants may appeal a denial of a motion to dismiss asserting sovereign immunity. (*Id.*) (citing *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 411–12 (5th Cir. 2004)). In their response, Plaintiffs ask the Court to retain jurisdiction by certifying Defendants’ appeal as “frivolous or dilatory.” (Dkt. 86, at 2) (citing *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 399 (5th Cir. 2017)). The Court is unwilling to make an “express finding of frivolousness” as to Defendants’ appeal and rejects Plaintiffs’ invitation to do so at this time. *BancPass, Inc.*, 863 F.3d at 400.

Nonetheless, the Court finds that only Defendants Allison Vordenbaumen Benz, Stephen Brint Carlton, Ken Paxton, Katherine A. Thomas, Cecile Erwin Young, Austin Reeve

Jackson, Penny Clarkston (“the State Defendants”) have asserted that they are immune from suit under the doctrine of sovereign immunity. (*See* Mots. Dismiss, Dkts. 48, 49, 50, 51). The Court will thus grant Defendants’ motion as to the State Defendants.

Defendant Mark Lee Dickson (“Dickson”), however, has not asserted that he is entitled to sovereign immunity, and as a private actor, he could not make such a claim. As Defendants acknowledge in their reply, their appeal has only divested this Court of jurisdiction as to the State Defendants. (Reply, Dkt. 87, at 1). Defendants attempt to couch Dickson’s standing to appeal this Court’s order by citing to cases dealing with appeals of final orders or interlocutory appeals by state actors claiming sovereign immunity. (Dkt. 87, at 2) (citing *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013); *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002) (court reviewed subject matter jurisdiction in state health official’s collateral order doctrine appeal of denial of motion to dismiss)). None of these cases are relevant here. Given that Dickson has made no claim to sovereign immunity, the denial of his motion to dismiss is not appealable. *Newball v. Offshore Logistics Int’l*, 803 F.2d 821, 824 (5th Cir. 1986). Moreover, Dickson does not provide the Court with a legitimate independent basis for staying the proceedings as to him. Finding that Dickson has not shown good cause as to why the proceedings against him should not go forward, the Court denies Defendants’ motion as to Dickson.

Accordingly, **IT IS ORDERED** that Defendants’ opposed motion to stay case and vacate the preliminary injunction hearing, (Dkt. 84), is **GRANTED IN PART** and **DENIED IN PART**. Defendants’ motion is granted as to the State Defendants and denied as to Dickson.

SIGNED on August 27, 2021.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE