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August 27, 2021

VIA ECF

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

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

Dear Mr. Cayce:

Plaintiffs-Appellees write to update the Court about developments with respect to the two emergency motions filed in this Court earlier today.

1. Early this morning, Defendants-Appellants filed an emergency motion in this Court asking it to stay the district-court proceedings and vacate the preliminary-injunction hearing scheduled for Monday, August 30.

After Defendants-Appellants filed their emergency motion, the district court issued the attached order staying proceedings and vacating the preliminary-injunction hearing as to Defendants-Appellants Benz, Carlton, Paxton, Thomas, Young, Jackson, and Clarkston. Accordingly, Defendants-Appellants' emergency motion to stay is now moot as to those defendants.

In the same order, the district court rejected Defendant-Appellant Mark Lee Dickson's arguments that the stay should apply to him as well. The district court explained that Dickson has no claim to sovereign immunity, and thus he has no right to appeal from the denial of the state officials' assertion of sovereign immunity. Accordingly, Defendants-Appellants' emergency motion for a stay remains live as to Defendant-Appellant Dickson. Plaintiffs-Appellees will file an opposition to the emergency motion to stay as to Dickson this afternoon.

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2. Also this morning, Plaintiffs-Appellees filed an emergency motion to expedite Defendants-Appellants' appeal. Plaintiffs explained that if this Court were to grant the emergency stay motion as to any of the Defendants-Appellants, it is imperative that the Court review the merits of this appeal on an emergency expedited schedule.

Now, in light of the district court's intervening stay of proceedings as to all but one of the Defendants-Appellants, Plaintiffs-Appellees' motion to expedite is all the more critical *regardless* of whether this Court grants a stay as to Defendant Dickson. As Plaintiffs will explain further in their forthcoming opposition, this Court should deny the stay as to Defendant Dickson so that the district court has an opportunity to prevent the immediate and irreparable harm that Defendant Dickson and those acting in concert with him pose to Plaintiffs on September 1, when the challenged law takes effect. However, any preliminary relief issued by the district court against Defendant Dickson will not prevent other harm the challenged law will cause to thousands of Texans seeking abortion care across the State starting on September 1 in violation of nearly fifty years of precedent. Plaintiffs-Appellees therefore implore the Court to set the briefing schedule for the appeal on an emergency expedited basis.

Respectfully submitted,

/s/ Marc Hearron

Marc Hearron

Counsel for Plaintiffs-Appellees

cc: All Counsel of Record

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