

CV-22-135

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, in his official capacity
as the Secretary of State of Arkansas; and
SHARON BROOKS, BILENDA
HARRIS-RITTER, WILLIAM LUTHER,
CHARLES ROBERTS, JAMES SHARP,
and J. HARMON SMITH, in their official
capacities as members of the Arkansas State
Board of Election Commissioners,

APPELLANTS

THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS, ARKANSAS UNITED,
DORTHA DUNLAP, LEON KAPLAN,
NELL MATTHEWS MOCK, JEFFREY
RUST, and PATSY WATKINS,

APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS, HONORABLE WENDELL GRIFFEN
PULASKI COUNTY CIRCUIT COURT CASE NO. 60CV-21-3138

**APPELLEES' OPPOSITION
TO APPELLANTS' EMERGENCY MOTION TO STAY**

Appellees, for their opposition to Appellants' Emergency Motion for
Immediate Stay ("Motion"), state:

1. Appellants seek to delay an agreed trial date based on a second appeal
of the same issue (sovereign immunity) that this Court considered and rejected three
weeks ago. The Court should deny the Motion.

2. On November 1, 2021, the circuit court fully considered and denied Appellants' motion to dismiss on sovereign immunity grounds. Appellants promptly appealed to this Court. On February 17, 2022, the Court affirmed the circuit court's decision. *Thurston, et al. v. League of Women Voters of Arkansas, et al.*, 2022 Ark. 32, at 6 (“*LOWV*”).

3. The circuit court subsequently denied Appellants' summary judgment motion raising the same sovereign immunity defense, by order dated February 18, 2022. (**RP 1422** (“[T]he Court again holds—as it did in November—that sovereign immunity does not bar plaintiffs' alleged claims.”)). Appellants then filed a second appeal to this Court raising the issue, this time from the circuit court's denial of summary judgment.

4. Appellants fail to mention, much less address, the fact that their singular argument on this second interlocutory appeal was expressly *considered and rejected* by this Court just three weeks ago. *See LOWV*, 2022 Ark. 32, at 6-7 (sovereign immunity does not bar Appellees' claims). But Appellants' failure to mention that decision cannot avoid the only logical conclusion: their second interlocutory appeal is foreclosed by *stare decisis* and law of the case and must be denied as a matter of law. *Clemmons v. Office of Child Support Enf't*, 345 Ark. 330, 346 (2001) (law of the case doctrine “prevents an issue raised in a prior appeal from being raised in a subsequent appeal” (internal citations omitted)).

5. Accordingly, Appellants cannot satisfy the legal standard for obtaining a stay pending appeal, under which this Court must consider Appellants' likelihood of success on the merits, among other things. *Smith v. Pavan*, 2015 Ark. 474, at 3. Appellants' Motion fails at the very threshold: having presented and lost on the same issue, in the same case, to this same Court only weeks ago, they cannot establish *any* "likelihood of success." This alone dooms their Motion.

BACKGROUND

6. The claims and procedural history of this litigation are summarized in this Court's opinion in *LOWV*, 2022 Ark. 32. Appellees filed suit alleging that four acts passed by the 93rd Session of the Arkansas General Assembly are unconstitutional—Act 736, Act 973, Act 249, and Act 728.

7. On July 20, 2021, Appellants moved to dismiss the amended complaint on various grounds, including sovereign immunity.

8. On November 1, the circuit court entered an order denying Appellants' motion to dismiss on all grounds, including sovereign immunity, finding that "sovereign immunity does not bar [Appellees'] claims," based on this Court's "long recognized . . . exception to the defense of sovereign immunity when the State is acting illegally, unconstitutionally, or if a state agency officer refuses to do a purely ministerial action required by statute." *LOWV*, 2022 Ark. 32, at 4.

9. Appellants filed an interlocutory appeal and this Court ordered expedited briefing on December 15, 2021. *Id.*

10. While Appellants' first interlocutory appeal on sovereign immunity was pending in this Court, Appellants filed a motion for summary judgment in the circuit court raising, among other things, sovereign immunity. (**RP 62-350**).

11. Appellants never suggested that the circuit court lacked jurisdiction to decide their motion for summary judgment, even though their first interlocutory appeal on sovereign immunity grounds remained pending in this Court. (*See* **RP 297-350; RP 1155-1174**).

12. On February 11, 2022, the circuit court ruled from the bench, denying Appellants' motion for summary judgment on all grounds, including sovereign immunity. At no point during that proceeding did Appellants suggest that the circuit court lacked jurisdiction to rule on the motion for summary judgment.

13. At that same proceeding, Appellants said they intended to file a second appeal on the issue of sovereign immunity, but nevertheless agreed with Appellees to re-schedule trial for March 15-18, 2022.

14. On February 17, this Court affirmed the circuit court's decision to deny Appellants' motion to dismiss based on sovereign immunity, rejecting Appellants' appeal. *LOWV*, 2022 Ark. 32, at 6-7.

15. The next day, on February 18, the circuit court entered a written order denying Appellants' motion for summary judgment on all grounds, including sovereign immunity. (**RP 1418-1425**).

16. On February 28, Appellants moved to stay or reschedule trial in the circuit court pursuant to Arkansas Rule of Civil Procedure 62, based on their second interlocutory appeal of sovereign immunity under Arkansas Rule of Appellate Procedure—Civil 2(a)(10). (**RP 1429-1434**). Appellees opposed a stay and argued, among other things, that Appellants' second appeal was foreclosed by *stare decisis* and law of the case based on this Court's decision on Appellants' first appeal on identical grounds just days before.

17. Appellants lodged the record on this second interlocutory appeal on March 3, 2022.

18. On March 4, the circuit court denied Appellants' Rule 62 motion, noting that "The Arkansas Supreme Court rejected the sovereign immunity contention asserted by Defendants weeks ago." *See* Appellees' Mot. to Supplement Record at 16 (March 8, 2022)

19. On Monday, March 7, Appellants filed the instant Motion.

ARGUMENT

20. This Court should deny the Motion because Appellants cannot satisfy the standards for a stay under Rule 8 of the Arkansas Rules of Civil Procedure—

Civil: “(1) petitioner’s likelihood of success on the merits; (2) the likelihood of irreparable harm to the petitioner absent a stay; (3) whether the grant of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Smith v. Pavan*, 2015 Ark. 474, at 3 (citing *Smith v. Denton*, 313 Ark. 463, 855 S.W.2d 322 (1993); *Hilton v. Braunskill*, 481 U.S. 770 (1987)).

A. This Appeal has no merit.

21. Appellants’ second interlocutory appeal of sovereign immunity is barred by law of the case. This Court decided that question three weeks ago, holding sovereign immunity *does not* bar Appellees’ claims. *LOWV*, 2022 Ark. 32, at 6-7. Law of the case provides that “on second appeal the decision of the first appeal becomes law of the case, and is conclusive of every question of law or fact decided in the former appeal[.] . . . The doctrine . . . prevents an issue raised in a prior appeal from being raised in a subsequent appeal.” *Clemmons*, 345 Ark. at 346 (internal citations omitted).

22. And sovereign immunity is a legal question determined on the claims asserted in the case. *Bd. of Trustees of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 5. None of the claims in this case have changed in the last three weeks.

23. Moreover, the only issue this Court would consider on Appellants’ second interlocutory appeal under Rule App. P.–Civ. 2(a)(10) would be whether sovereign immunity bars Appellees’ claims. *LOWV*, 2022 Ark. 32, at 5 (“We note

that although Thurston has presented three points in this interlocutory appeal, the only issue we have jurisdiction to review is whether Thurston is entitled to sovereign immunity.”).

24. Appellants’ second appeal involves the same rule, applied to the same dispute, by the same Court, as the first one. Under law of the case, the decision of the first appeal controls the second.

25. In addition, Rule of Appellate Procedure—Civil 2(a)(10) does not contemplate serial interlocutory appeals of sovereign immunity in the same case: the Rule provides for appeal of an “order denying a motion to dismiss *or* for summary judgment based on the defense of sovereign immunity.” (emphasis added). The Rule does not provide for two appeals; it provides for an appeal from a motion to dismiss or from summary judgment. This is consistent with the doctrine of law of the case, which makes a second appeal nonsensical after a decision on sovereign immunity in the first.

26. Appellants also erroneously contend their second interlocutory appeal divests the circuit court of jurisdiction to hold the trial on the merits. Motion at ¶ 7. Appellants’ position is at odds with itself. If a circuit court were deprived of jurisdiction upon the filing of an appeal under R. App. P.—Civ. 2(a)(10), then Appellants’ motion for summary judgment and the order that followed would be a nullity, as their first appeal was pending at the time they moved for summary

judgment *and* when their motion was denied. By Appellants' own logic, this subsequent appeal of that order would also therefore be a nullity. Appellants cannot have it both ways.

B. A stay would cause prejudice and would be contrary to the public interest.

27. Moreover, a stay would severely prejudice Appellees and all Arkansas voters by delaying trial on claims aimed at vindicating the fundamental rights to vote, speak, and assemble as enshrined in the Arkansas Constitution.

28. A stay would also prejudice Appellants, who have previously agreed that expeditious resolution of this case is *necessary* to provide clarity to election officials and to allow for the orderly conduct of the approaching election. *See Thurston v. League of Women Voters of Ark.*, No. CV 2021-581, Defs.' Mot. to Expedite Appeal ¶¶ 5–6 (Dec. 10, 2021). Early voting for the primary election begins on May 9, 2022, Ark. Code Ann. § 7-5-418(a)(1)(A), and ballots must be delivered to overseas and military voters by April 8, 2022. *See* Ark. Code Ann. § 7-5-407(a).

WHEREFORE, Appellees respectfully request the Court deny Appellants' emergency motion for immediate stay and grant Appellees all just and proper relief.

Respectfully submitted,

/s/ Jess Askew III

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CERTIFICATE OF SERVICE

I, Jess Askew III, hereby certify that I served the Clerk of Court with the foregoing on this 9th day of March 2022, via the e-flex electronic filing system, which shall send notice to all counsel of record.

/s/ Jess Askew III

Jess Askew III