

CV-22-149

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 AND
APPELLEES' EMERGENCY CROSS-MOTION FOR SUMMARY
AFFIRMANCE AND DISMISSAL OF APPEAL**

Appellees, for their opposition to Appellant's Emergency Motion for Immediate Stay ("Motion"), and in support of Appellees' Emergency Cross-Motion for Summary Affirmance and Dismissal of the Appeal, state:

1. Trial is scheduled to begin in this matter in just *five* days. Appellants return to this Court less than 24 hours after their last appeal was summarily

dismissed, seeking to delay trial based on review of an issue (sovereign immunity) that the Court already considered and rejected less than a month ago. This Court should deny the Motion, dispose of the appeal, and issue its mandate, so that the trial can go forward as scheduled.

2. As with Appellants' prior interlocutory appeal, this appeal, too, is necessarily narrow and raises only the sovereign immunity defense. But that issue is squarely 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)).

3. Appellants' suggestion that the question of whether they are entitled to the affirmative defense of sovereign immunity must be decided differently because this time they raised it in a summary judgment motion and not (as the first time this Court heard their appeal on this issue) in a motion to dismiss, is belied by the precedent of this Court. That precedent makes clear that, whether raised in a motion to dismiss or on summary judgment, the availability of the *sovereign immunity defense is determined on the claims in the pleadings*.

4. In deciding Appellants' motion to stay, the Court must consider (among other things), Appellants' likelihood of success in this narrow interlocutory appeal. *Smith v. Pavan*, 2015 Ark. 474, at 3. Having presented and lost on the very same

issue, in the same case, to this same Court only weeks ago, Appellants cannot establish *any* “likelihood of success.” This alone dooms their Motion.

5. Moreover, given that the Court already decided this very issue and that prejudice that would follow to Plaintiffs and Arkansas voters alike if the trial on this important case were to be further delayed, the Court should promptly issue an order denying the motion to stay, affirming the circuit court’s order, and remanding this back to the circuit court so that trial may proceed as scheduled next Tuesday.

BACKGROUND

6. The claims and procedural history of this litigation are summarized in this Court’s opinion in *Thurston v. League of Women Voters of Arkansas*, 2022 Ark. 32 (“*LOWV I*”). In May of 2021, 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 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 I*, 2022 Ark. 32 at 4.

8. Appellants filed an interlocutory appeal of that order pursuant to Rule 2(a)(10), and this Court ordered expedited briefing on December 15, 2021. *Id.*

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

10. 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 and set this matter for trial, beginning this coming Tuesday, March 15, 2022. **(RP 1418-1425)**.

11. Appellants lodged the record on their second interlocutory appeal on March 3, 2022, before the mandate issued on their first interlocutory appeal. *Thurston et al. v. League of Women Voters et al.*, CV-22-135 (Sup. Ct. Mar. 2, 2022) (“*LOWV II*”).

12. On Monday, March 7, Appellants filed an emergency motion to stay trial during the pendency of their second attempt at an interlocutory appeal. *Id.* The Court dismissed that appeal on Wednesday, March 9, and, on the same day, issued its mandate. *Id.*

13. In its Order issued Wednesday, this Court held that: “APPELLANTS’ APPEAL IS DISMISSED. THE CIRCUIT COURT’S FEBRUARY 18, 2022, ORDER DENYING APPELLANTS’ MOTION FOR SUMMARY JUDGMENT IS

VACATED BECAUSE THE MANDATE IN CV-21-581 HAD NOT YET ISSUED, AND THE CIRCUIT COURT WAS WITHOUT JURISDICTION TO ENTER THE ORDER. APPELLANTS' EMERGENCY MOTION FOR AN IMMEDIATE STAY OR, ALTERNATIVELY, FOR A TEMPORARY STAY IS MOOT." *Id.*

14. On March 10, at Appellants' request, the circuit court re-entered its order denying Appellants' motion for summary judgment on all grounds, including sovereign immunity. (RP 1438-1446).

15. Less than an hour later, Appellants noticed the instant interlocutory appeal. *Thurston et al. v. League of Women Voters et al.*, CV-22-149 (Sup. Ct. Mar. 10, 2022) ("*LOWV III*"); (RP 1447-1449). And just before 5:00 p.m. on March 10, Appellants filed the instant Motion to stay the circuit court proceedings.

ARGUMENT

16. This Court should deny the Motion because Appellants cannot satisfy the standards for a stay under Rule 8, which include: (1) likelihood of success on the merits; (2) likelihood of irreparable harm to the petitioner absent a stay; (3) whether granting a 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 is barred by the law of the case.

17. Appellants’ narrow interlocutory appeal is barred by law of the case. This Court already decided the singular question at issue—whether sovereign immunity bars Appellees’ claims—only three weeks ago, holding that it *does not* bar Appellees’ claims. *LOWVI*, 2022 Ark. 32 at 6-7.

18. 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).

19. Appellants’ argument that the question of sovereign immunity is decided differently based on whether it is raised in a motion to dismiss or for summary judgment is contrary to the precedent of this Court. In both procedural postures, sovereign immunity is determined on the face of the pleadings.

20. In *Bd. of Trustees of Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 4, for example, the question arose on a motion to dismiss but the Court also discussed the standard on summary judgment and concluded: “However, when the issues on appeal do not involve factual questions but rather the application of a legal doctrine, we simply determine whether the moving party is entitled to judgment as a matter of law.” (Citation omitted). This Court held: “Sovereign immunity is jurisdictional

immunity from suit, and jurisdiction must be determined *entirely from the pleadings.*” *Id.* at 5 (emphasis added). Similarly, in *Smith v. Daniel*, 2014 Ark. 519, at 5, which was decided on summary judgment, this Court stated that when the circuit court does not make substantive interpretations of law and determines sovereign immunity by “whether the pleadings state ‘sufficient facts for [the] exception to sovereign immunity,’ we apply the abuse of discretion standard of review [and] treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint.” (citing and quoting from *Ark. Lottery Comm’n v. Alpha Mktg.*, 2013 Ark. 232). See also *Martin v. Haas*, 2018 Ark. 283, 11, 556 S.W.3d 509, 516 (holding the same sovereign immunity analysis applies on an appeal of an order granting a preliminary injunction—that is, whether the plaintiff *pleads* that the state acted unconstitutionally and *seeks* only equitable relief and not monetary damages; if the answer to both questions is yes, the defense is inapplicable); *LOWV I*, 2022 Ark. 32, at 5 (holding that *Haas* controls on the question of sovereign immunity in this case).

21. The only issue this Court could consider on Appellants’ latest appeal under Rule App. P.–Civ. 2(a)(10) is whether sovereign immunity bars Appellees’ claims. *LOWV I*, 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.”).

22. Accordingly, Appellants’ second appeal involves precisely 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 necessarily controls the second.

23. Nor does Rule 2(a)(10) contemplate serial interlocutory appeals of sovereign immunity in the same case: it provides for appeal of an “order denying a motion to dismiss *or* for summary judgment based on the defense of sovereign immunity.” (Emphasis added). This is consistent with the law of the case doctrine, which makes a second appeal nonsensical after a decision on sovereign immunity in the first. Appellants’ conduct here threatens to create a pointless wash, rinse, and repeat cycle on an issue already decided by this Court.

B. Granting a stay would cause Plaintiffs and Arkansas voters significant prejudice and would run contrary to the public interest.

24. 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.

25. 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 (Ark. Dec. 10, 2021) (arguing that the original February 15, 2022 “trial date is necessary to permit a decision on the merits before

Arkansas's primary elections in May of 2022. Election officials, including the Appellants, must have sufficient time to know what election laws will be in effect before the afore-referenced primaries.”). Early voting for the primary election begins on May 9, 2022, Ark. Code § 7-5-418(a)(1)(A), and ballots must be delivered to overseas and military voters by April 8, 2022. *See* Ark. Code § 7-5-407(a).

C. The circuit court's order denying summary judgment should be affirmed, and Appellants' interlocutory appeal should be dismissed.

26. Given the unique and exigent circumstances here, the clarity of the law, and this Court's own ruling in the same case on the same issue just weeks ago, Appellees respectfully submit that the Court should expeditiously summarily affirm the circuit court's denial of summary judgment on sovereign immunity grounds or summarily dismiss Appellants' appeal. *See Coulter v. State*, 343 Ark. 22, 34, 31 S.W.3d 826, 833 (2000) (summarily affirming trial court on four of appellants' points of error, "as they were previously raised by Appellant in his direct appeal and

were rejected by this court.”). This Court has plenary power over its own docket and has previously expedited appeals when appropriate,¹ including in election matters.²

¹ See *Heathscott v. Raff*, 334 Ark. 224, 971 S.W.2d 266 (1998) (Mem.) (granting appellee’s motion for expedited consideration of an appeal); see also *Keep Our Dollars in Indep. Cnty. v. Mitchell*, 2017 Ark. 154, 10, 518 S.W.3d 64, 70 (2017) (explaining that exceptions to mootness did not apply in part because “[t]he parties failed to seek expedited consideration of th[e] appeal” (emphasis added)). Furthermore, Arkansas courts have “inherent authority to protect the integrity of the proceedings and to safeguard the rights of the litigants before” them. *Arkansas Dep’t of Hum. Servs. & Minor Child. v. Shelby*, 2012 Ark. 54, at 4.

² “In order to ensure the prompt consideration of election cases at the appellate level, this court has granted expedited appeals in such matters.” *Etherly v. Eddy*, 346 Ark. 87, 90, 57 S.W.3d 116, 117-18 (2001); see also *Womack v. Foster*, 338 Ark. 514, 514, 998 S.W.2d 737 (1999) (“We have had occasion to expedite consideration of election appeals in the past, which involved setting a schedule for filing the record and for briefing.”).

27. Nothing has changed since this Court's February 17, 2022 decision on sovereign immunity. For precisely the same reasons, this newest order should be summarily affirmed, and the appeal dismissed.

28. Prompt resolution of this meritless duplicative appeal will allow the circuit court to proceed to address the merits of this important case in a timely matter, which is plainly in the public interest for all concerned: the parties, the public, the voters, and election administrators.

WHEREFORE, Appellees respectfully request the Court deny Appellants' emergency motion for immediate stay, grant Appellees' cross-motion for summary affirmance and dismissal of the appeal, and grant Appellees all just and proper relief.

Respectfully submitted,

/s/ Jess Askew III

Jess Askew III

KUTAK ROCK III

124 West Capitol Avenue, Suite 2000

Little Rock, Arkansas 72201-3740

Telephone: (501) 975-3141

Facsimile: (501) 975-3001

jess.askew@kutakrock.com

Counsel for Appellees

CERTIFICATE OF SERVICE

I, Jess Askew III, hereby certify that I served the Clerk of Court with the foregoing, and all exhibits hereto, on this 11th 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

RETRIEVED FROM DEMOCRACYDOCKET.COM