IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED, CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, Plaintiffs-Appellants, v. SCOTT SCHWAB, in his official capacity as Secretary of State, and DEREK SCHMIDT, in his official capacity as Kansas Attorney General, Defendants-Appellees.	Appellate Case No. 2022-125084-A Original Action No. 2021-CV-000299

DEFENDANTS-APPELLEES' REPLY TO PLAINTIFFS-APPELLANTS' RESPONSE TO MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Defendants-Appellees Scott Schwab and Derek Schmidt respectfully submit this Reply brief in support of their Motion to Dismiss Plaintiffs-Appellants' Appeal for Lack of Jurisdiction.

Plaintiffs readily acknowledge that there has been no final judgment in this case. But they insist that the Court of Appeals may exercise jurisdiction pursuant to K.S.A. 60-2102(a)(3) over the district court's dismissal of their myriad causes of action challenging the constitutionality of (i) the signature verification requirements for advance mail voting ballots in K.S.A. 25-1124(h), and (ii) restrictions on the collection of advance mail voting ballots in K.S.A. 25-2437. They further maintain that this Court may entertain an appeal pursuant to K.S.A. 60-2102(a)(2) of the district court's decision not to consider (and thus

deny as moot) Plaintiffs' last-minute filing of a motion for a temporary partial injunction on the signature verification statute. A close examination of the underlying facts and the governing case law, however, demonstrates that Plaintiffs' arguments cannot carry the day and this appeal must be dismissed.

I. K.S.A. 60-2102(a)(2) Is Inapplicable Because There is Nothing to Appeal In Connection with Plaintiffs' Last-Minute Temporary Injunction Motion

Plaintiffs first contend that the fact the district court denied as moot (and expressly declined to consider) their motion for a partial temporary injunction against the signature verification statute – after having dismissed the claims attacking that statute on the merits under K.S.A. 60-212(b)(6) – is irrelevant. (Resp. at 4). As Plaintiffs see it, the district court's ruling on that motion (filed ten months after their original Petition and just four days before the dismissal Order) fully opened the floodgates to immediate appellate review (presumably under the standard applicable to scrutinizing the grant or denial of injunctive relief). This makes no sense on multiple levels.

First, there is effectively nothing to review here. Defendants had no opportunity to respond to the motion (since it was mooted before any response was due), no evidence was admitted, no hearing was conducted, and the district court never even evaluated the motion (other than to note that it was moot). Any appeal of the motion would thus be pointless.[1]

[1] This procedural posture also underscores the absurdity of Plaintiffs' suggestion in footnote 3 of their Response, citing *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, (10th Cir. 2013), that this Court might resolve their motion for a temporary injunction in the first instance. The key to the *Hobby Lobby Stores* holding was that "the record [was] sufficiently developed" in the district court. *Id.* at 1145 (10th Cir. 2013). That obviously is not the case here, and "appellate courts do not make factual findings." *State v. Rankin*, 60 Kan.App.2d 60, 64, 489 P.3d 471 (2021) (internal quotation omitted).

Second, to allow a litigant to appeal the denial of a temporary injunction as moot on a cause of action on which the district court simultaneously granted final judgment on the merits as to that claim defies logic. True, the district court's dismissal Order is technically subject to revision under K.S.A. 60-254(b) given that there is no final judgment in the case. But in critical contrast to *Wellington v. Daza*, 795 F. App'x 605 (10th Cir. 2020) and *Pinson v. Pachecho*, 424 F. App'x 749 (10th Cir. 2011), the district court here never substantively adjudicated the Plaintiffs' request for injunctive relief. What Plaintiffs seem to propose, therefore, is that this Court review the district court's K.S.A. 60-212(b)(6) dismissal of their claims by invoking a more liberal standard applicable to the evaluation of temporary injunction motions. *See generally Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 492-93 173 P.3d 642 (2007) (describing distinct standards governing motions for temporary injunction and ultimate merits determination). That "mix and match" approach would make a mockery of appellate review principles and promote gamesmanship. This Court should decline such an invitation.

To escape this morass, Plaintiffs attempt to pivot to pendant appellate jurisdiction. (Resp. at 6-7). They claim this Court is empowered to review the district court's dismissal of their various claims attacking the signature verification requirement and ballot collection restrictions because the rulings on those claims are "inextricably intertwined" with the denial of their motion for a partial temporary injunction. But that would stretch the concept of pendant appellate jurisdiction far beyond its breaking point.

The Kansas Supreme Court has embraced pendant appellate jurisdiction only in narrow contexts, primarily in cases where a specific question or issue has been certified.

See Williams v. Lawton, 288 Kan. 768, 783-87, 207 P.3d 1027 (2009) (where district court certified questions related to admissibility of evidence and proper handling of the jury, the court of appeals could also evaluate whether a new trial was necessary because the certified questions go to the heart of whether there should be a new trial); *City of Neodesha v. BP Corp. of N. Am., Inc.*, 295 Kan. 298, 310-12, 287 P.3d 214 (2012) (after district court certified the question whether it had erred in granting the plaintiffs judgment as a matter of law, the court of appeals properly expanded its review to consider whether the district court had likewise erred in conditionally granting a new trial since, "if the conditional order is left intact, it could potentially negate any ruling by this court that the district court's entry of judgment as a matter of law was improper."). Even then, the Supreme Court went to great lengths to emphasize that its holding hinged in significant part on the deferential standard under which it scrutinizes challenges to the scope of certified questions. *Williams*, 288 Kan. at 782.

If, as Plaintiffs propose here, an appellate court could reach the merits of a district court's dismissal of any and all causes of action – in a lawsuit in which there has been no final judgment (and no certification under K.S.A. 60-254(b) or 60-2102(c)) – anytime there is an appeal from the denial of a motion for a temporary injunction pursuant to K.S.A. 60-2102(a)(2), the restrictions on appellate jurisdiction in K.S.A. 60-2102(a)(4) could be circumvented with ease and the thin reeds of pendent appellate jurisdiction would take over the swamp. That was clearly not the intent of the Supreme Court. Interlocutory appeals are highly disfavored in Kansas, *McCain v. McCain*, 219 Kan. 780, 783, 549 P.2d 896 (1976), and Plaintiffs' theory is fundamentally at odds with that principle.

Plaintiffs' overreach is further demonstrated by the fact that they seek immediate interlocutory review under their pendent appellate jurisdiction argument of not merely their claims challenging the signature verification requirement, but also their causes of action directed at the ballot collection restrictions. Yet as Plaintiffs concede, they did not even request injunctive relief on the latter claims. (Resp. at 7). To backdoor all of those claims into this interlocutory appeal, therefore, would leave nothing left of the final judgment rule and serve as an open invitation for fractionalized appeals.

In an odd coda to their Response's discussion of the scope of K.S.A 60-2102(a)(2), Plaintiffs argue that this Court's refusal to promptly address the merits of their claims in this appeal would irreparably deprive them of their fundamental constitutional rights by postponing a final appellate decision on the merits for months, or even years. (Resp. at 9). Putting this over-the-top hyperbole to the side, the fact is that this Court is confined to the jurisdiction that is granted to it by statute. *See Bd. of Cnty. Com'rs of Sedgwick Cnty. v. City of Park City*, 293 Kan. 107, 111, 260 P.3d 387 (2011) ("Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner prescribed by the applicable statutes" and "it is the duty of the appellate court to dismiss the appeal" if it lacks jurisdiction). The emotional "equity" argument that Plaintiffs advance simply has no place here. And in any event, if Plaintiffs thought the matter was so urgent, they easily could have sought temporary injunctive relief long before they did, rather than waiting ten months after filing their Petition and nearly a week after Kansas law provides for the acceptance of advance mail ballot applications (on April 1, 2022). *See* K.S.A. 25-1122(f)(1). As Defendants recently explained in their Response to

Plaintiffs' motion to expedite this appeal, enjoining an election statute this close to an election would be highly disruptive and wholly improper. *See Merrill v. Milligan*, 142 S. Ct. 879, 880-82 (2022) (Kavanaugh, J., concurring) (staying district court injunction of election procedures approximately four months prior to the election); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (denying application to vacate a stay of district court's attempt to change the state's election procedures too close to the election); *League of Women Voters of Fla. v. Fla. Sec'y of State*, __ F.4th __, 2022 WL 1435597, at *2-4 (11th Cir. May 6, 2022).

In sum, there is simply no basis for this Court to exercise appellate jurisdiction over the merits of Plaintiffs' motion for a partial temporary injunction. The district court did not take up the motion because it was mooted by the Order of Dismissal, and there is thus nothing for this Court to review.

II. K.S.A. 60-2102(a)(3) Is Not A Viable Path for Appellate Jurisdiction Due to the Absence of a Final Judgment in the Case

Plaintiffs alternatively argue that this Court has appellate jurisdiction pursuant to K.S.A. 60-2102(a)(3), which provides that a litigant may appeal as a matter of right from "[a]n order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or an order involving the tax or revenue laws, the title to real estate, the constitution of this state or the constitution, laws or treaties of the United States."

As this Court has noted, the "parameters of jurisdiction" under this statute are "less than clear." *Cummings v. Gish*, No. 96,124, 2007 WL 1530113, at *2 (Kan. Ct. App. May

25, 2007). But the Supreme Court has refused to read the statute as conferring jurisdiction over appeals of *any order* that involves the Kansas or federal constitution. Instead, there must be a "semblance of finality." *Cusintz v. Cusintz*, 195 Kan. 301, 302, 404 P.2d 164 (1965). The Court explained as follows:

> An appeal is permitted from '[a]n order . . . involving . . . the constitution of this state . . . .' However, the order must have some semblance of finality. The fact that one of the parties raises a constitutional question does not permit an appeal to this court until the trial court has had an opportunity to make a full investigation and determination of the controversy. An order involving a constitutional question or one where the laws of the United States are involved has always been subject to review regardless of the amount in controversy. Such an order is, however, subject to the rule that an order involving the constitutional question must constitute a final determination of the constitutional controversy. Any other conclusion would constitute a usurpation by this court of the original jurisdiction of the district court to determine actions involving constitutional questions. *Id.* (alterations in original) (internal citations omitted).

It is difficult to know what the Court meant by a "semblance of finality." But our research has not revealed *a single case* since the code of civil procedure was adopted in 1963 in which a Kansas appellate court agreed to exercise jurisdiction over an interlocutory appeal of a non-final judgment involving a constitutional question. In fact, two years after deciding *Cusintz*, the Supreme Court again addressed the scope of K.S.A. 60-2102(a)(3) and underscored that "[t]he policy of the new code (of civil procedure) leaves no place for intermediate and piecemeal appeals which tend to extend and prolong litigation." *In re Austin*, 200 Kan. 92, 94, 435 P.2d 1 (1967) (citing *Connell v. State Highway Comm'n*, 192 Kan. 371, Syl. ¶ 1, 388 P.2d 637 (1964)). Nearly two decades later, in *In re Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 683 P.2d 1247 (1984), the Court was even more emphatic, noting:

> If appeals in original proceedings were allowed under K.S.A. 60-2102(a)(3), the original proceedings would be subject to interminable interruption and delay. As we said in *McCain v. McCain*, 219 Kan. 780, 783, 549 P.2d 896 (1976): 'Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory appeals and fractionalized appeals are discouraged, and are the exceptions and not the rule.' *Id.* at 682.

The handful of cases in which appeals of non-final judgments have been allowed under K.S.A. 20-6102(a)(3) seem to involve either the appointment of receivers to sell or dissolve property free and clear of encumbrances – which would effectively abrogate a party's interests in the property – or definitive rulings on quiet title actions – which similarly would divest a party of its right to occupy or use the real property. *See Cummings*, 2007 WL 1530113, at *2 (citing *J.E. Akers Co. v. Advert. Unlimited, Inc.*, 274 Kan. 359, 360 49 P.3d 506 (2002) and *Smith v. Williams*, 3 Kan. App. 2d 205, 206, 592 P.3d 129 (1979)); *see also Pistotnik v. Pistotnik*, No. 115,715, 2017 WL 2210776, at *6 (Kan. Ct. App. May 19, 2017).

What is being advocated here, however, is of much greater breadth. In this lawsuit, Plaintiffs deliberately elected to throw the proverbial kitchen sink at the State's election integrity statutes, asserting fourteen constitutional claims involving four different statutes in their Amended Petition. Plaintiffs then opted to proceed piecemeal on certain claims, filing a motion for partial temporary injunction directed at one of the statutes, an appeal of the denial of that motion (in Case No. 21-124378-A), and later a separate motion for partial temporary injunction targeted at another statute. If this Court permits Plaintiffs to pursue this appeal now under K.S.A. 20-6102(a)(3), there will be *at least* three appeals in this case (including a second appeal of any post-remand final judgment on the merits of the issues

in Case No. 21-124378-A, regardless of the outcome of that appeal). This multiplicity of appeals runs directly contrary to the principles of finality that the Supreme Court has consistently declared to be of paramount importance in passing on the scope of K.S.A. 60-2102(a)(3).

Plaintiffs maintain that the district court's April 11 Order dismissing their signature verification requirement and ballot collection restriction claims provides sufficient finality to trigger appellate jurisdiction under K.S.A. 60-2102(a)(3). But as noted above, K.S.A. 60-254(b) makes clear that those rulings are not "final" inasmuch as they are subject to revision at any time before a final judgment has been issued in the case. The irony is not lost on Defendants that Plaintiffs trot out K.S.A. 60-254(b) when they think it is helpful to them (in seeking to avoid the mootness of their appeal of the district court's non-ruling on their motion for a partial temporary injunction) but then avoid it entirely when its presence would be inconvenient (in assessing finality in order to pursue an immediate appeal of the dismissal of their signature verification requirement and ballot collection restriction claims under K.S.A. 60-2102(a)(3)).

The bottom line here is that Plaintiffs are the master of their Petition and they must live with the consequences of their strategic decisions in prosecuting this case. They cannot simply create jurisdiction with bellicose rhetoric about allegedly "unjust" results. Their contentions about irreparable harm are meritless, but they are also irrelevant. Appellate jurisdiction is a matter of statute and, based on the case law divining the intent of K.S.A. 60-2102(a)(3), jurisdiction does not lie in this appeal. Defendants thus respectfully request that this Court dismiss Plaintiffs' appeal.

Respectfully Submitted,

By: /s/ Bradley J. Schlozman

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May 2022, I electronically filed the foregoing "Defendants-Appellees' Reply to Plaintiffs-Appellants' Response to Motion to Dismiss Appeal for Lack of Jurisdiction" with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which caused electronic notifications of such filing to be sent to all counsel of record. I also hereby certify that a true and correct copy of the foregoing was e-mailed to:

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APPENDIX OF UNPUBLISHED CASES

Exhibit A

158 P.3d 375 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Ron CUMMINGS, Appellee,
v.
Ina M. GISH, et al., Defendant/Appellees,
Isaac MILLER, Defendant/Appellee,
Dan NEAR and Toinette Near, Defendant/Appellant.

No. 96,124.
|
May 25, 2007.

Appeal from Rooks District Court; Thomas L. Toepfer, judge. Opinion filed May 25, 2007. Appeal dismissed.

Attorneys and Law Firms

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Rachel K. Pirner and Tyler E. Heffron, of Triplett, Woolf & Garretson, LLC, of Wichita, for appellee Isaac Miller.

Edward C. Hageman, of Edward C. Hageman, P.A., of Stockton, for the appellee Ron Cummings.

Before MCANANY, P.J., ELLIOTT and PIERRON, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Toinette Near and Dan Near appeal from the trial court's order granting partition of mineral interests they held with others in property located in Rooks County, Kansas. The Nears contend their interest is not subject to partition. We dismiss the appeal for lack of jurisdiction under K.S.A. 60–2102(a)(3) and (a)(4).

Ron Cummings initially filed this action against numerous parties who allegedly owned fractional shares of the mineral interests in 400 acres in Rooks County. Cummings requested partition of the parties' commonly held mineral interests under K.S.A. 60–1003. The Nears allegedly owned a 1/8th share of the mineral interests and were the only parties contesting partition. Judgment on the pleadings was entered in Cummings' favor as to all the remaining parties who failed to respond to the petition. After contentious and convoluted pretrial proceedings, the claims involving the Nears proceeded to trial in December 2005. It was agreed at the pretrial conference that the only issues at trial would be the nature of the Nears' interests in the property, whether partition was appropriate, and whether sanctions under K.S.A. 60–211 were appropriate against the Nears.

In its journal entry, the trial court found that all the parties owned mineral interests in the property as tenants in common and rejected the Nears' claims they only held a nonpossessory overriding royalty interest in the minerals produced. Finding no credible evidence that partition would create an extraordinary hardship or oppression as to any party, the trial court found partition was warranted. However, the court found that partition in kind would be inequitable. Accordingly, the court ordered that appraisers be appointed to appraise the mineral interests and that an election period be established to determine if one or more of the parties elected to purchase the complete interest at the appraised price. If no such election was made, the court ordered that a public sale be held. In either event, the trial court ordered any proceeds from a sale be divided according to the ownership proportions previously held by the parties.

The trial court also found the Nears had violated K.S.A. 60–211(b)(1) and (3) in their various pleadings. The court found that attorney fees and nonmonetary sanctions were appropriate but deferred imposition of sanctions until the conclusion of the partition sale.

The Nears appealed from this order challenging various evidentiary rulings made by the trial court as well as the court's conclusion their property interest was subject to partition and that their conduct violated K.S.A. 60–211(b).

This court issued an order to show cause directing the parties to show case why the appeal should not be dismissed for lack of jurisdiction; the court pointed out that the order from which the appeal was taken was interlocutory. Only the Nears filed a response to the court's show cause order.

Kansas courts have only such appellate jurisdiction as is conferred by statute, pursuant to Article 3, § 3, of the Kansas

Constitution. *In re Condemnation of Land v. Stranger Valley Land Co.*, 280 Kan. 576, 578, 123 P.3d 731 (2005). The right to appeal is purely statutory, and an appellate court has a duty to question jurisdiction on its own initiative. If the record indicates that jurisdiction does not exist, the appeal must be dismissed. *State v. Phinney*, 280 Kan. 394, 398, 122 P.3d 356 (2005). Whether jurisdiction exists is a question of law over which we have unlimited review. *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 414, 997 P.2d 681 (2000).

***2** The parties do not dispute that there is no final order in this case within the meaning of K.S.A. 60–2102(a)(4). Under that statute, appellate jurisdiction exists when all claims between all parties are resolved and there are no further questions or the possibility of future directions or actions by the court. *Investcorp, L.P. v. Simpson Investment Co., L.C.*, 277 Kan. 445, Syl. ¶ 3, 85 P.3d 1140 (2003). The record fails to reflect whether appraisers have appointed, an appraisal has been made, any sale has been completed, or any final determination made as to the appropriate amount of sanctions to be assessed.

In response to the court's order to show cause, however, the Nears encourage the court to retain jurisdiction under K.S.A. 60–2102(a)(3). That statute permits a party to invoke the jurisdiction of the court of appeal from "an order involving ... the title to real estate...." This particular provision has been interpreted to allow review of nonfinal order involving real estate only if the order has " 'some semblance of finality." ' *In re Estate of Ziebell*, 2 Kan.App.2d 99, 101, 575 P.2d 574 (1978).

The parameters of jurisdiction under K.S.A. 60–2102(a)(3) is less than clear. However, the cases where jurisdiction have been found clearly meet the "semblance of finality" standard. For example, in *J.E. Akers Co. v. Advertising Unlimited, Inc.*, 274 Kan. 359, 49 P.3d 506 (2002), the district court authorized the receiver of a dissolved corporation to sell corporate realty free and clear of any encumbrances, including judgment liens held by the appellants. The appellants immediately appealed, and the Supreme Court found jurisdiction under K.S.A. 60–2102(a)(3) to consider the merits of the nonfinal order. 274 Kan. at 360. Under those facts, however, the district court's order effectively abrogated the appellants' liens and their interest in the property; any further proceedings regarding the real estate would have no effect on the appellants' interests. Such an order possesses "some semblance of finality."

Likewise, in *Smith v. Williams*, 3 Kan.App.2d 205, 592 P.3d 129, *rev. denied* 226 Kan. 792 (1979), adjoining landowners filed counter-petitions for quiet title in a boundary line dispute. The original defendant filed a counterclaim for monetary damages and the plaintiffs filed a third party claim against their predecessor in interest for indemnification if monetary damages were awarded. The trial court granted summary judgment to the defendant on the quiet title claims and reserved ruling on the claim for monetary damages and the third party petition. The Plaintiffs immediately appealed. The Court of Appeals concluded jurisdiction existed under K.S.A. 60–2102(a)(3). 3 Kan.App.2d at 206.

Although the *Smith* court did not discuss why jurisdiction existed under that provision, the facts support a finding that the order in question had "some semblance of finality." The order finally determined the boundary line dispute as between all the parties; the only remaining issues related to the defendant's claims for monetary damages which were collateral to the title issue.

***3** However, the mere fact an order affects title to real estate does not render the order subject to immediate appeal under K.S.A. 60–2102(a)(3). In *Valley State Bank v. Geiger*, 12 Kan.App.2d 485, 748 P.2d 905 (1988), this court dismissed an appeal from a district court's order directing the sale of real property in a mortgage foreclosure action; the debtor immediately appealed because of the order directed the sale in parcels different from those he requested. 12 Kan.App.2d at 485. This court declined to exercise jurisdiction under K.S.A. 60–2102(a)(3) because the statutory requirements for future review and confirmation of the sale of the property established there was no semblance of finality to the order being appealed. 12 Kan.App.2d at 486.

The reasoning of *Valley State Bank* is more compelling in this case. Here, the partition statute requires, once partition is ordered, the appointment of commissioners to appraise the value of the property. K.S.A. 60–1003(c)(2). Any party may then take exception to the commissioners' report and the court may modify the same. K.S.A. 60–1003(c)(3). The statute then provides for election to purchase by any of the parties or for sale of the property. K.S.A. 60–1003(c)(4). The Nears or other parties may well challenge any of the orders from these subsequent proceedings and all these proceedings have some effect on the parties' interest in the property. Likewise, the Nears are challenging the finding that they violated K.S.A. 60–211(b), even though no final determination has been made as to the amount of sanctions that will be imposed.

In noting the limits of jurisdiction under K.S.A. 60–2102(a)(3) in eminent domain cases, the Supreme Court noted:

> "All original eminent domain proceedings, to some extent, involve title to real estate. If appeals in original proceedings were allowed under K.S.A. 60–2102(a)(3), the original proceedings would be subject to interminable interruption and delay. As we said in *McCain v. McCain,* 219 Kan. 780, 783, 549 P.2d 896 (1976):
>
> 'Our code and our rules envision and are designed to provide but one appeal in most cases, that to come after all issues have been determined on the merits by the trial court. Interlocutory and fractionalized appeals are discouraged, and are the exceptions and not the rule.'
>
> We do not think the legislature contemplated appeals in original eminent domain proceedings when it enacted K.S.A. 60–2102(a)(3). We conclude that this appeal does not lie under that statute." *In re Condemnation of Land for State Highway Purposes,* 235 Kan. 676, 682, 683 P.2d 1247 (1984).

Similarly, all partition actions under K.S.A. 60–1003 inherently involve title to real estate. If parties were permitted to appeal every interim order in a partition action, the "proceedings would be subject to interminable interruption and delay." 235 Kan. at 682.

For these reasons, the court concludes the order granting partition lacks any semblance of finality and therefore is not appealable under K.S.A. 60–2102(a)(3). In the absence of evidence establishing any other basis for this court's jurisdiction, the appeal must be dismissed.

***4** Appeal dismissed.

All Citations

158 P.3d 375 (Table), 2007 WL 1530113

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Exhibit B

2022 WL 1435597
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al., Plaintiffs-Appellees,
v.
FLORIDA SECRETARY OF STATE, et al., Defendants-Appellants

Nos. 22-11133; 22-11143; 22-11144; 22-11145
|
Filed: 05/06/2022

Appeal from the United States District Court for the Northern District of Florida, D.C. Docket Nos. 4:21-cv-00242-MW-MAF; 4:21-cv-00186-MW-MAF; 4:21-cv-00187-MW-MAF; 4:21-cv-00201-MW-MJF

Before Newsom, Lagoa, and Brasher, Circuit Judges

Opinion

Per Curiam:

*1 The district court here permanently enjoined three provisions of Florida law governing elections in that state. It also subjected Florida to a "preclearance" regime whereby the state—for the next decade—must seek and receive the district court's permission before it can enact or amend certain election laws. The state now asks us to stay that decision pending appeal. After careful consideration, we grant the state's motion. [1]

I

Florida's governor signed Senate Bill 90 into law on May 6, 2021. Plaintiffs sued, challenging four of SB90's provisions, three of which are relevant here: (1) a provision regulating the use of drop boxes for collecting ballots (the "Drop-Box Provision"), Fla. Stat. § 101.69(2)–(3); (2) a provision requiring third-party voter-registration organizations to deliver voter-registration applications to the county where an applicant resides within a proscribed period of time (the "Registration-Delivery Provision") and specifying information that third-party voter-registration organizations must provide to would-be registrants (the "Registration-Disclaimer Provision"), Fla. Stat. § 97.0575(3)(a); and (3) a provision prohibiting the solicitation of voters within 150 feet of a drop box or polling place (the "Solicitation Provision"), Fla. Stat. § 102.031(4)(a)–(b). [2]

Plaintiffs [3] challenged those provisions, as relevant here, on several grounds. First, they asserted that the provisions discriminated on the basis of race in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act. Second, they contended that the Solicitation Provision was unconstitutionally vague or overbroad in violation of the First and Fourteenth Amendments. And finally, they argued that the Registration-Disclaimer Provision compelled speech in violation of the First Amendment.

*2 The district court largely agreed with plaintiffs that "SB 90 runs roughshod over the right to vote, unnecessarily making voting harder for all eligible Floridians, unduly burdening disabled voters, and intentionally targeting minority voters." Specifically, the court held that all of the above-mentioned provisions were intentionally discriminatory, violating the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act. Moreover, the court held that the Solicitation Provision violated the First and Fourteenth Amendments because it was unconstitutionally vague and overbroad. And it held that the Registration-Disclaimer Provision violated the First Amendment because it impermissibly compelled speech.

Accordingly, the district court permanently enjoined those provisions of SB90. It then sua sponte considered whether it would stay the injunction pending appeal and refused to do so. Finally, based on its determination that the Florida legislature had intentionally discriminated against black voters, the court subjected Florida to "preclearance" under Section 3 of the VRA: For the next decade, it held, "Florida may enact no law or regulation governing [third-party voter-registration organizations], drop boxes, or line-warming activities without submitting such law or regulation" to the district court for its advance approval. The state now moves this Court to stay the district court's decision pending appeal.

II

A

Under the " 'traditional' standard for a stay," we "consider[ ] four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' " *Nken v. Holder*, 556 U.S. 418, 425–26, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). But of course, that "traditional" four-factor standard does not always apply. For example, in some circumstances —namely, "when the balance of equities ... weighs heavily in favor of granting the stay"—we relax the likely-to-succeed-on-the-merits requirement. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (quotation marks omitted). In that scenario, the stay may be "granted upon a lesser showing of a 'substantial case on the merits.' " *Id.* (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 26, 1981)).

Under what has come to be called the "*Purcell* principle," *see Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam), the "traditional test for a stay" likewise "does not apply" in the particular circumstance that this case presents—namely, "when a lower court has issued an injunction of a state's election law in the period close to an election," *Merrill v. Milligan*, —— U.S. ——, 142 S. Ct. 879, 880, —— L.Ed.2d —— (2022) (Kavanaugh, J., concurral).[4] In such a case, an appellate court considering a stay pending appeal is "required to weigh ... considerations specific to election cases." *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5. For instance, the reviewing court must be cognizant that "orders affecting elections ... can themselves result in voter confusion." *Id.* at 4–5, 127 S.Ct. 5. And that risk only increases as an election draws closer. *Id.* at 5, 127 S.Ct. 5. For that reason, the *Purcell* principle teaches that "federal district courts ordinarily should not enjoin state election laws in the period close to an election." *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurral). And if a district court violates that principle, the appellate court "should stay [the] injunction[ ]," *id.*, often (as it could not do under the "traditional" test) while "express[ing] no opinion" on the merits. *Purcell*, 549 U.S. at 5, 127 S.Ct. 5.

***3** So, an important question: When is an election sufficiently "close at hand" that the *Purcell* principle applies? *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral). As the district court noted, the Supreme Court has never specified precisely what it means to be "on the eve of an election" for *Purcell* purposes. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam). In *Purcell* itself, the Court stayed an injunction that a lower court had issued "just weeks before the election." *Purcell*, 549 U.S. at 4, 127 S.Ct. 5. In *Milligan*, by contrast, the Court granted a stay even though the primary election was still "about four months" away. *Milligan*, 142 S. Ct. at 888 (Kagan, J., dissenting).[5]

Whatever *Purcell*'s outer bounds, we think that this case fits within them.[6] When the district court here issued its injunction, voting in the next statewide election was set to begin in *less* than four months (and local elections were ongoing). Moreover, the district court's injunction implicates voter registration—which is currently underway —and purports to require the state to take action now, such as re-training poll workers. And although the district court satisfied itself that its injunction—including the requirement that the state preclear new voting rules—was not too draconian, we are reminded that "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wis. State Legislature*, —— U.S. ——, 141 S. Ct. 28, 31, 208 L.Ed.2d 247 (2020) (Kavanaugh, J., concurral).

Because the election to which the district court's injunction applies is close at hand and the state "has a compelling interest in preserving the integrity of its election process," *Purcell* controls our analysis. *Purcell*, 549 U.S. at 4, 127 S.Ct. 5 (quotation marks omitted).

B

Of course, even under *Purcell*, a state's interest in proceeding under challenged election procedures is not "absolute." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). Instead, we agree with Justice Kavanaugh that *Purcell* only (but significantly) "heightens" the standard that a plaintiff must meet to obtain injunctive relief that will upset a state's interest in running its elections without judicial interference. *Id.*[7] In Justice Kavanaugh's view, the plaintiff must demonstrate, among other things, that its position on the merits is "entirely clearcut." *Id.* Whatever the precise standard, we think it clear that, for cases controlled by *Purcell*'s analysis, the party seeking injunctive relief has a "heightened" burden.

*4 Here, of course, we have the converse of that situation. The plaintiffs in this case have already obtained injunctive relief upsetting the previously applicable state election procedures, and the question before us is whether the state is entitled to a stay pending appellate review of the district court's injunction. In that posture, it seems to us, *Purcell* effectively serves to *lower* the state's bar to obtain the stay it seeks. The state need not show, for instance—as a plaintiff would to obtain a "late-breaking injunction" in the first place—that its position is "entirely clearcut," *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). Rather, it need only show that plaintiffs' position is *not*. [8]

Accounting for *Purcell*, we hold that the state is entitled to a stay of the district court's order enjoining the operation of SB90's Drop-Box, Registration-Delivery, and Solicitation Provisions and subjecting Florida to preclearance. The district court's determination regarding the legislature's intentional discrimination suffers from at least two flaws, either of which justifies a stay. And, although we think it presents a closer question, we hold that the district court's determination that the Solicitation Provision is unconstitutionally vague and overbroad is sufficiently vulnerable to warrant a stay. [9]

i

The first two flaws come from the district court's determination that SB90 is the product of intentional race discrimination. That inquiry is guided by an eight-factor test—the first five of which come from the Supreme Court's opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and the remaining three from our ensuing caselaw. We have summarized the *Arlington Heights* factors as follows: "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators." *Greater Birmingham Ministries v. Sec'y of State for Al.*, 992 F.3d 1299, 1322 (11th Cir. 2021) ("*GBM*"); *see also Arlington Heights*, 429 U.S. at 266–68, 97 S.Ct. 555. And we have added the following considerations: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact[;] and (8) the availability of less discriminatory alternatives." *GBM*, 992 F.3d at 1322.

First, we find the district court's historical-background analysis to be problematic. We have been clear that "old, outdated intentions of previous generations" should not "taint [a state's] legislative action forevermore on certain topics." *Id.* at 1325. To that end, *Arlington Heights*'s "historical background" factor should be "focus[ed] ... on the 'specific sequence of events leading up to the challenged decision' " rather than "providing an unlimited lookback to past discrimination." *Id.* (quoting *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555); *see also Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2325, 201 L.Ed.2d 714 (2018) ("The 'historical background' of *a legislative enactment* is 'one evidentiary source' relevant to the question of intent." (emphasis added) (quoting *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555)).

*5 In its assessment of SB90's historical background, the district court led with the observation that "Florida has a grotesque history of racial discrimination." It began its survey of that history beginning immediately after the Civil War and marched through past acts of "terrorism" and "racial violence" that occurred during the early and mid-1900s. And it concluded by seeming to chide the Supreme Court for suggesting that "[o]ur country has changed" since the Voting Rights Act was enacted in 1965. *Shelby County v. Holder*, 570 U.S. 529, 557, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). At least on our preliminary review, the district court's inquiry does not seem appropriately "focus[ed]" or "[ ]limited," as *GBM* requires. 992 F.3d at 1325.

Second, the district court failed to properly account for what might be called the presumption of legislative good faith. The Supreme Court has instructed that when a court assesses whether a duly enacted statute is tainted by discriminatory intent, "the good faith of the state legislature must be presumed." *Perez*, 138 S. Ct. at 2324 (cleaned up).

For starters, in its 288-page opinion, the district court never once mentioned the presumption. And while we do not require courts to incant magic words, it does not appear to us that the district court here meaningfully accounted for the presumption at all. For instance, the court imputed discriminatory intent to SB90 based in part on one legislator's observation, when asked about the law's potentially disparate impact, that based on "the patterns of use" some voters "may have to go about it a little different way" once SB90 becomes law. Applying the presumption of good faith—as a court must—that statement by a single legislator is not fairly read to demonstrate discriminatory intent by the state legislature. Moreover—even if we do not presume good faith—that statement at worst demonstrates

an "awareness of consequences," which is insufficient to establish discriminatory purpose. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (" 'Discriminatory purpose' ... implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group.").

ii

Separate and apart from its intentional-discrimination finding, the district court determined that the Solicitation Provision was unconstitutionally overbroad and vague. Although we think that issue presents a closer call than the intentional-discrimination finding, the state has met its burden to obtain a stay.

The Solicitation Provision precludes any "person, political committee, or other group or organization" from "solicit[ing] voters inside the polling place" or within 150 feet thereof. Fla. Stat. § 102.031(4)(a). And it defines "solicit" as follows:

> [S]eeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; selling or attempting to sell any item; and engaging in any activity with the intent to influence or effect of influencing a voter.

Id. § 102.031(4)(b).

The district court held that the language "engaging in any activity with the intent to influence or effect of influencing a voter" was impermissibly vague because it "fails to put Floridians of ordinary intelligence on notice of what acts it criminalizes" and because it "encourages arbitrary and discriminatory enforcement." And it determined it was also unconstitutionally overbroad because it "prohibits a substantial amount of activity protected by the First Amendment relative to the amount of unprotected activity it prohibits."

***6** The state has a substantial argument that the statute passes constitutional muster. First, as to vagueness, the state correctly points out that the panel that ultimately decides the merits of its appeal might determine that the language the district court found problematic is limited by the surrounding examples of prohibited conduct. *See United States v. Williams*, 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated.").

Turning to overbreadth, we note that "succeeding on a claim of substantial overbreadth is not easy to do." *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1371 (11th Cir. 2021) (quotation omitted). And the district court below failed to contend with any of the "plainly legitimate" applications of the Solicitation Provision, and thereby arguably failed to balance its legitimate applications against its potentially unconstitutional applications. *See Williams*, 553 U.S. at 292, 128 S.Ct. 1830 ("[W]e have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." (emphasis omitted)).

Therefore, the underlying merits of the vagueness and overbreadth challenges to the Solicitation Provision, at the very least, aren't "entirely clearcut." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral).

* * *

In the circumstances of this case, and accounting for the fact that our review is governed by *Purcell*, we conclude that the state is entitled to a stay pending appeal. The motion for a stay pending appeal is **GRANTED**.

All Citations

--- F.4th ----, 2022 WL 1435597

Footnotes

1 We note that we write only for the parties' benefit. Because an "order[ ] concerning [a] stay[is] not a final adjudication of the merits of the appeal, the tentative and preliminary nature of a stay-panel opinion precludes the opinion from having an effect outside that case." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1280 n.1 (11th Cir. 2020) (quotation marks omitted).

2 Plaintiffs also challenged a provision governing mail-in voting, Fla. Stat. § 101.62(1), but the district court rejected plaintiffs' contentions regarding that provision and refused to enjoin it. Accordingly, that provision is not relevant to the state's motion for a stay pending appeal.

3 On appeal, we consolidated four separate cases. Each set of plaintiffs has brought slightly different claims: The Harriet Tubman Freedom Fighters challenge only the Registration-Disclaimer Provision; The League of Women Voters challenge only the Registration-Disclaimer and Solicitation Provisions; and Florida NAACP and Florida Rising Together challenge all four provisions. For simplicity's sake—and because plaintiffs' claims are all interwoven—we will address each claim generally rather than specifying which plaintiff goes with which claim.

4 We note plaintiffs' contention that the state has "waived" any argument that the *Purcell* principle applies because it "never raised *Purcell* below as a basis for denying injunctive relief." We disagree. We are doubtful that the *Purcell* principle is subject to the ordinary rules of waiver (or perhaps more accurately here, forfeiture, *see United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (en banc)). As when considering jurisdictional limitations, we have an independent obligation to "weigh ... considerations specific to election cases." *Purcell*, 549 U.S. at 4, 127 S.Ct. 5. When we are "[f]aced with an application to enjoin" voting laws close to an election—or, as here, a request to stay such an injunction—we are "*required* to weigh" the injunction's impact for an upcoming election. *Id.* (emphasis added).

5 *See also Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir.) (per curiam) (noting that a stay was warranted in light of *Purcell* notwithstanding its observation that the election was "months away"), *motion to vacate stay denied*, —— U.S. ——, —— S.Ct. ——, 207 L.Ed.2d 1094, 2020 WL 3456705 (2020).

6 It may be, in marginal cases, that "[h]ow close to an election is too close" will depend on a number of factors. *Milligan*, 142 S. Ct. at 881 n.1 (Kavanaugh, J., concurral). But because we determine that this case easily falls within the time period that triggered *Purcell* in *Milligan*, we need not endeavor to articulate *Purcell*'s precise boundaries.

7 To put it slightly differently, *Purcell* stands for the proposition that when an election is close at hand, it is "ordinarily" improper to issue an injunction. *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurral). That leaves room for the "extraordinary" case where an injunction—despite its issuance on the eve of the election—might be proper.

8 We are of course aware that Justice Kavanaugh provided three additional factors—*all* of which must be satisfied to justify an injunction under *Purcell*. *See Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). But because we determine that the underlying merits of the district court's order in this case are vulnerable on several grounds, we need not go any further.

9 We decline to weigh in on the merits of the Registration-Disclaimer Provision. That provision has been repealed by a newly enacted statute, which Florida's Governor has already signed. That law will go into effect —thereby mooting any challenge to the Registration-Disclaimer Provision—as soon as the district-court-

ordered preclearance regime ceases to operate. And that regime will cease to operate upon the issuance of this opinion.

End of Document

Exhibit C

394 P.3d 902 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Bradley A. PISTOTNIK and Brad Pistotnik Law, P.A., Appellees,
v.
Brian D. PISTOTNIK, Affiliated Attorneys of Pistotnik Law Offices, P.A., and Pistotnik Law Offices, LLC, Appellants.

No. 115,715
|
Opinion filed May 19, 2017

Appeal from Sedgwick District Court; TIMOTHY H. HENDERSON, Judge.

Attorneys and Law Firms

Brian D. Pistotnik, of Wichita, appellant pro se.

Charles E. Millsap, Lyndon W. Vix, and Ron Campbell, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, for appellees.

Before Green, P.J., Standridge and Gardner, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Brian D. Pistotnik appeals the district court's decision to deny his motion to terminate the receivership it ordered after dissolving Affiliated Attorneys of Pistotnik Law Offices, P.A. (AAPLO), an association which Brian owned with his brother, Bradley A. Pistotnik. Brian argues the court should have terminated the receivership because the parties contemplated termination in their settlement agreement and because the facts and circumstances of the case no longer necessitate the receivership. Finding no abuse of discretion, we affirm the district court's decision.

FACTS

Brian and Brad were each 50% shareholders of the law firm AAPLO. On June 19, 2014, Brad filed a petition seeking dissolution of AAPLO. Brian answered the lawsuit and asserted several counterclaims against Brad. Brad answered Brian's counterclaims and included additional claims against Brian. The numerous claims between the brothers were the subject of lengthy litigation, most of which is not relevant to this appeal.

Brad filed a motion for dissolution of AAPLO and appointment of receiver on November 3, 2014. The district court issued an order on January 15, 2015, dissolving AAPLO and placing it in receivership. The court appointed attorney David Rapp to serve as the receiver to wind up the affairs of AAPLO. See K.S.A. 17–6808 (appointment by court and power of receiver for dissolved corporations). Rapp filed his oath as receiver on January 28, 2015, and filed his bond on February 11, 2015.

During the course of the receivership, Rapp worked under the authority of the district court to marshal AAPLO's assets, collect its debts, and evaluate claims made by or against AAPLO or its shareholders. The receiver also oversaw the litigation of certain claims in which AAPLO asserted attorneys' liens for predissolution cases, which are referred to as the *Consolver* and *Hernandez* cases. Former AAPLO clients additionally filed counterclaims against Brad (in *Consolver II*) and Brian (in *Hernandez*).

On July 16, 2015, Brian and Brad met with a mediator, who assisted them in settling their claims against each other and agreeing to a mutual release. The mediator read the terms of the settlement agreement into the court's record the same day. Brian and Brad confirmed that the terms of their agreement were correctly recited by the mediator into the record. Relevant to the issue on appeal, the settlement agreement included the following provision:

> "[THE MEDIATOR]: Judge, this is what I believe the settlement agreement to be between the parties. The receivership will be closed as soon as possible. There's been a lawsuit filed recently naming the old—I'm not going to call it AAPLO—I'm just going to say the old law firm as a defendant, which may require some action by the receiver. These parties

> agree that it should be closed as soon as possible."

In accordance with their agreement, Brad's attorneys drafted a written settlement agreement and mutual release that incorporated the terms of the mediated agreement and then presented the draft to Brian for signature. On October 13, 2015, Brad filed a motion to enforce the settlement agreement, asking the court to order that Brian sign the written agreement. On October 16, 2015, Brian filed a separate motion to enforce the terms of the settlement agreement and terminate the receivership, or in the alternative to stay the receivership. Brian complained that after the July 16, 2015, settlement agreement was reached, Brad filed a claim against AAPLO for indemnity in *Consolver II*. Brian alleged that because Brad was aware of that case prior to agreeing to release all claims against the receivership on July 16, 2015, Brad breached the terms of the settlement agreement and his claim for indemnity should be rejected.

***2** The district court held a hearing on October 29, 2015, regarding the competing motions and heard argument from the parties on issues pertaining to the interpretation of the settlement agreement. The court ultimately allowed Brad to make an indemnity claim against AAPLO in *Consolver II* and ordered the receiver to oversee that litigation. The court then granted Brad's motion to enforce the settlement agreement. Noting several objections, Brian signed the written settlement agreement on November 12, 2015. Relevant to the sole issue on appeal, the written agreement stated:

> "8. CLOSING OF THE RECEIVERSHIP. The Receivership shall be closed as soon as practicable. It is understood that a suit has recently been filed in which the RECEIVER has been named as a defendant, which may require some action by the RECEIVER."

On December 8, 2015, the district court entered a journal entry dismissing the parties' claims against each other with prejudice. The order stated: "[T]his action shall remain open until the Receiver, David Rapp, winds up the affairs of Affiliated Attorneys of Pistotnik Law Offices, P.A., and provides his final report to the Court pursuant to K.S.A. 17–6808."

On February 11, 2016, Brian filed a motion to terminate the receivership. The district court heard argument on the motion on February 24–25, 2016, along with other issues pertaining to the ongoing wind up of AAPLO. On March 31, 2016, the court issued an order in which it denied the motion to terminate the receivership, but strictly limited the receiver's work. The order stated, in relevant part:

> "2. At the time of the hearing, there were four cases outstanding for AAPLO: *Consolver I*, *Consolver II*, and two *Hernandez* cases, all involving attorneys' liens. There is a potential for future litigation concerning these cases. The Receiver does not believe the receivership needs to stay open for these cases. The Court shares that observation and notes that Brian Pistotnik made a very fair point when he indicated that four or five years from now there may be liability for the corporation and we do not need to keep a receiver open for those purposes.
>
> "3. The Receiver does believe, however, as does the Court, that the receivership needs to remain open to complete the 2015 taxes and may need to stay open for the 2016 taxes.
>
> "4. The Court's primary concern about closing the receivership is that throughout the life of this case, the Court had concluded that the matter was resolved. However, such closure never came to fruition. The Court is mindful of the expenses to the parties that a receivership creates. The Court is equally mindful that much of these expenses are the result of issues raised by the parties to the Receiver.
>
> "5. The Receiver has performed admirably, and the Court has no concerns about the work done by the Receiver.
>
> "6. The Receiver is to complete the work necessary for the 2015 taxes. Once those tax returns are filed, the Court orders that the Receiver shall not work this case in any further manner without further Court order (with the exception of 2016 taxes, as discussed below). The Court will consider any motion allowing the Receiver to work the case filed by the parties or the Receiver for future actions. Absence of issuance of such an order, there is not to be any further work on the receivership. The Court cautions the parties that it reserves the right to assess the cost of future work done by the Receiver to the party seeking the Receiver's involvement from this point forward. The Receiver may work the receivership concerning 2016

AAPLO taxes without further order of the Court. Once the 2016 taxes are paid, it is the Court's intention to close the receivership. The Court is not terminating and winding up the Receivership at this time, but is limiting its future work as outlined above.

***3** "IT IS SO ORDERED."

Brian timely appealed the district court's order on April 15, 2016.

After the district court's March 31, 2016, order in this case, Rapp, in his capacity as receiver of AAPLO, was served with a counterclaim in the *Hernandez* lawsuit. On August 11, 2016, Rapp filed a motion in the district court seeking authorization to participate in the defense of the *Hernandez* litigation asserted against AAPLO. The district court granted the motion and authorized Rapp "to participate in the defense of the above identified Counterclaim, but direct[ed] that the Receiver minimize his participation to the extent reasonably possible." The order also provided that the parties could terminate the receivership as matters progressed "only if both parties consent."

ANALYSIS

Motion to terminate receivership

Brian argues the district court erred when it denied his motion to terminate the AAPLO receivership, citing two reasons the receivership should have been be closed. First, he argues the parties agreed to terminate the receivership and the court erred in failing to enforce that agreement. Second, he contends that under the facts and circumstances of this case, there was no reason for the court to keep the receivership open. In response to Brian's argument, Brad contends the agreement did not require the district court to immediately close the receivership, the court had discretion to keep the receivership open, and there are pending matters for the receiver to address before the receivership may be completed.

When a corporate entity is dissolved, the district court may, upon application, appoint a receiver of the corporation. K.S.A. 17–6808. The receiver's duties are defined by statute:

> "[T]o take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation." K.S.A. 17–6808.

The powers of the receiver continue "as long as the court shall think necessary for the purposes aforesaid." K.S.A. 17–6808.

This court reviews the district court's decisions regarding the appointment and retention of a receiver for abuse of discretion. See *Inscho v. Mid–Continent Development Co.*, 94 Kan. 370, 382, 146 P. 1014 (1915) (retention of receiver reviewed for abuse of discretion); see also *City of Mulvane v. Henderson*, 46 Kan. App. 2d 113, 118, 257 P.3d 1272 (2011) (appointment of receiver reviewed for abuse of discretion). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable or when the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances. *Uhruh v. Purina Mills, LLC*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009); *Rose v. Via Christi Health System, Inc.*, 276 Kan. 539, Syl. ¶ 1, 78 P.3d 798 (2003).

> ***4** "Under an abuse of discretion standard, a district court's decision is protected if reasonable persons could differ upon the propriety of the decision, as long as the discretionary decision is made within and takes into account the applicable legal standards." *Harrison v. Tauheed*, 292 Kan. 663, Syl. ¶ 2, 256 P.3d 851 (2011).

The burden of showing an abuse of discretion is on the party claiming error. *Miller v. Glacier Development Co., LLC*, 284 Kan. 476, 498, 161 P.3d 730 (2007).

Brian first argues that the district court abused its discretion by failing to enforce the parties' settlement agreement, which he contends primarily required closing the receivership. Brad contends that Brian overstates the nature of the parties' agreement with respect to the termination of the receivership and that the district court is in any case not bound by the parties' agreement to terminate the receivership.

Brian makes two conflicting contract interpretation arguments. First, he urges us to look to the plain language of the verbal agreement and written agreement and contends "both agreements clearly state that the parties agreed to close the receivership." Alternatively, Brian argues that the termination provision in the written agreement is ambiguous because it fails to clearly define when and how the receivership will be closed, and such an ambiguity should

be resolved against Brad since his attorneys drafted that agreement. The interpretation of a written instrument is a question of law, over which this court exercises unlimited review. *Prairie Land Elec. Co–Op. v. Kansas Elec. Power Co–Op.*, 299 Kan. 360, 366, 323 P.3d 1270 (2014). "Whether a written instrument is ambiguous is a matter of law subject to de novo review." *Liggatt v. Employers Mut. Casualty Co.*, 273 Kan. 915, 921, 46 P.3d 1120 (2002).

> "The primary rule in interpreting written contracts is to ascertain the intent of the parties. If the terms of the contract are clear, there is no room for rules of construction, and the intent of the parties is determined from the contract itself. [Citation omitted.] ... Ambiguity exists if the contract contains provisions or language of doubtful or conflicting meaning. [Citation omitted.] Put another way: 'Ambiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning.' [Citation omitted.] Before a contract is determined to be ambiguous, the language must be given a fair, reasonable, and practical construction. [Citation omitted.]" *Liggatt*, 273 Kan. at 921.

The intent of the parties can be determined from the plain language of the agreements. The verbal agreement states that "[t]he receivership will be closed as soon as possible." Similarly, the written agreement provided that "[t]he Receivership shall be closed as soon as practicable." The agreements plainly did not require immediate termination of the receivership.

The language "as soon as possible" and "as soon as practicable" does not render the provision ambiguous, as the meaning of those provisions is not doubtful or contradictory. See *Liggatt*, 273 Kan. at 921. The context of the agreement is an ongoing wind up of a corporation. Looking at the provisions themselves, they contemplated that the receiver had pending responsibilities prior to winding up AAPLO: the verbal agreement stated "[t]here's been a lawsuit filed recently naming ... the old law firm as a defendant, which may require some action by the receiver," and the written agreement stated "[i]t is understood that a suit has recently been filed in which the RECEIVER has been named as a defendant, which may require some action by the RECEIVER." The provisions did not contemplate immediate termination but anticipated that the receiver would have to wind up the outstanding litigation.

***5** Because the provisions are not ambiguous, it is not proper to interpret the provision against the drafter of the agreement. See *Thoroughbred Associates, LLC v. Kansas City Royalty Company, LLC*, 297 Kan. 1193, 1206, 308 P.3d 1238 (2013) ("When ambiguity appears, the language is interpreted against the party who prepared the instrument."). In any case, the written agreement simply formalized the parties' earlier verbal agreement, and the two provisions are almost identical. There is no reason for this court to interpret the meaning of the agreement to terminate the receivership against Brad.

As Brad contends, the district court is not bound by the agreement of the parties to terminate a receivership, even if that is what the parties agreed. Indeed, the receiver serves at the discretion of the court. The receivership may continue "as long as the court shall think necessary" to do all acts that might be done by the corporation necessary for the final settlement of unfinished business of the corporation. K.S.A. 17–6808; see also *Shaw v. Robison*, 537 P.2d 487, 490 (Utah 1975) ("A receivership is an equitable matter and is entirely within the control of the court. The fact that the parties requested a termination of the matter in the midst of the proceedings does not compel the court to 'about face' and cease all matters instanter.").

> "The decision on whether to terminate a receivership turns on the facts and circumstances of each case. In determining whether to continue a receivership or discharge the receiver, the court will consider the rights and interests of all parties concerned and will not grant an application for discharge merely because it is made by the party at whose instance the appointment was made. Similarly, the fact that the parties request a termination of receivership in the midst of the proceedings does not compel the court to cease all matters instantly though a court may agree to discharge a court-appointed receiver upon the agreement of all parties." 65 Am. Jur. 2d Receivers § 146.

The district court did not abuse its discretion in denying Brian's motion to terminate the receivership based on the parties' agreement that the receivership would be terminated as soon as possible.

In his next argument, Brian points to several facts and circumstances that he argues required the receivership to be terminated. First, he alleges the settlement agreement resolved all outstanding issues with the wind up of AAPLO —how the receiver would handle AAPLO's assets and debts, how the parties would pay the expenses of filing tax returns, and how the parties would divide expenses and recovery regarding the *Consolver I* case. Second, he notes that the receiver admitted he was not actively involved in *Consolver*

I and *Consolver II* and that the parties could file the taxes on their own if the court relieved him of his duties. Finally, Brian argues the continuation of the receivership is depleting AAPLO's assets which would otherwise be distributed to the shareholders. In short, Brian alleges that the purpose of the receivership is complete, and the district court abused its discretion in keeping it open. He argues that a receiver is not necessary for the filing AAPLO's taxes, which is a function performed by AAPLO's accountant.

Brian acknowledges that the receiver was named on behalf of AAPLO as a counterclaim defendant in *Hernandez* after the district court's March 31, 2016, order, and the court has approved the receiver to oversee that litigation. Although Brian asserts his malpractice insurer is handling the defense of the case, he fails to acknowledge that the receivership is the only entity that can act on behalf of AAPLO as a dissolved corporation. As such, the receiver must not only communicate with the attorneys representing AAPLO in the *Hernandez* litigation but also is solely responsible for making decisions on the corporation's behalf to resolve that claim.

***6** The district court exercised its discretion to deny Brian's motion to terminate the receivership after taking into consideration the facts and circumstances Brian raises now on appeal. The court's March 31, 2016, order denying Brian's motion to terminate the receivership stayed the receiver's work except to complete the work necessary for the filing of AAPLO's 2015 and 2016 taxes. The court specified that the limitation on the receiver's work was in response to concerns about expenses incurred by continuing the receivership. The court specifically noted its agreement with Brian's position that the receivership did not need to remain open indefinitely to handle any future litigation filed against AAPLO. The court provided a method for the receiver to be involved in unforeseen issues that may arise during the wind up of the corporation but only upon application to the court and permission granted.

The district court has discretion to continue the receivership "as long as the court shall think necessary" for the receiver to complete its work. K.S.A. 17–6808. The powers of the receiver include "all ... acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation." K.S.A. 17–6808. Filing AAPLO's 2016 taxes to complete the wind up of the corporation is squarely within the receiver's powers. At the time of the district court's order, the final wind up of the corporation was not complete. The district court was not "beyond the limits of permissible choice under the circumstances" of this case. See *Rose*, 276 Kan. 539, Syl. ¶ 1.

The district court's decision was made within the applicable legal standards. See *Harrison*, 292 Kan. 663, Syl. ¶ 2. Reasonable persons could agree that the receivership should have been continued on a limited basis so that the receiver could oversee filing of the 2016 taxes and could be available to take care of any unresolved issue that arose as the wind up was completed. As such, the district court's decision to deny Brian's motion to terminate the receivership and to maintain the receivership in a limited fashion through the filing of the 2016 taxes was not an abuse of discretion.

Indemnity claim

Brian contends that Brad breached the terms of the settlement agreement by making a claim against the receivership for indemnity in the *Consolver II* lawsuit. On appeal, Brian asks us for an order prohibiting Brad from making additional claims against the receivership. Because Brian appeals only from the district court's decision to deny his motion to terminate the receivership, we lack jurisdiction to consider the indemnity issue he now raises. See *State v. Herman*, 50 Kan. App. 2d 316, 327, 324 P.3d 1134 (2014) ("An appellate court may not properly exercise jurisdiction over an appeal that has not been taken in conformity with that statutory grant."). As we stated in our order dated June 16, 2016: "This appeal is limited to the question of whether the district court erred by refusing to wind up the receivership. Under K.S.A. 2015 Supp. 60–2102(a)(3), this is the only statutory jurisdiction which exists."

Affirmed.

All Citations

394 P.3d 902 (Table), 2017 WL 2210776