

STATE OF INDIANA) IN THE ST. JOSEPH SUPERIOR COURT
) SS:
COUNTY OF MARSHALL) CAUSE NO.: 71D05-2210-PL-000231

THOMAS DIXON, in his capacity as the)
Republican Member of the St. Joseph)
County Election Board,)
)

INDIANA REPUBLICAN STATE)
COMMITTEE, INC.,)
)

ST. JOSEPH COUNTY REPUBLICAN)
PARTY,)
)

Plaintiffs,)

v.)

RITA GLENN, in her official capacity as)
Clerk of the St. Joseph County Circuit)
Court and Secretary of the St. Joseph)
County Election Board, and)
)

CHARLES LEONE, in his official)
capacity as the Chair of the St. Joseph)
County Election Board (Democrat),)
)

Defendants.)

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS WITH PREJUDICE

COME NOW Plaintiffs Thomas Dixon, in his capacity as Member of the St. Joseph County Election Board ("Dixon"), Indiana Republican State Committee, Inc. ("IRSC"), and St. Joseph County Republican Party ("SJCRP"), and for their Response to Defendants' Motion to Dismiss with Prejudice, state as follows:

I. INTRODUCTION

The originating claims in this matter stem from an important question affecting the public interest: can an election board, by a contested vote from one

political party, effectively shut out that political party from the statutorily delegated duties of verifying absentee ballot signatures and maintaining key access to absentee ballots, both of which require politically unanimous participation?

Plaintiffs contended the answer should be obvious: no. However, the Court never reached a decision before the election cycle. As such, Plaintiffs agree their claim for injunctive relief is moot. Their claim for declaratory relief, in the form of the above question, is not. Notwithstanding, Plaintiffs are not asking the Court to answer this question. Instead, they are requesting dismissal. That dismissal should reflect that the questions in this case were never addressed on the merits. Because dismissals with prejudice are dismissals on the merits, a dismissal with prejudice here would have the legal effect of affirming Defendants' actions and interpretation of the law. Thus, the only and best means of disposing of this matter would be to dismiss it without prejudice.

II. STATEMENT OF FACTS

Plaintiffs filed their claims for declaratory and injunctive relief on October 11, 2022. No hearing or ruling on the merits ever occurred. The case, originally filed in Marshall County, was moved to St. Joseph County on or about October 25, 2022. After motions for a change of judge were filed by each party, Plaintiffs filed to dismiss their claims without prejudice on November 15, 2022. Therein, Plaintiffs argued dismissal without prejudice was appropriate because the merits of the case were never addressed but a dismissal with prejudice would have the effect of adjudicating the case on the merits. (*See Plaintiff's Motion to Dismiss.*) Defendants filed an objection

and motion to dismiss, asking that the case be dismissed with prejudice, claiming Plaintiffs may want to refile their claim at a later time. (*See* Defendants' Objection.)

III. DISCUSSION

“Except as provided in subsection (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . Unless otherwise specified in the order, a dismissal under this subsection is without prejudice.” Ind. Trial Rule 41(A)(2).

“[I]t is well settled that a dismissal with prejudice is generally a dismissal on the merits, and as such it is conclusive of the rights of the parties and *res judicata* as to the questions which might have been litigated.” *Destination Yachts, Inc. v. Pierce*, 113 N.E.3d 645, 654 (Ind. Ct. App. 2018), *reh'g denied, trans. denied* (citing *Lakeshore Bank & Tr. Co. v. United Farm Bureau Mut. Ins. Co.*, 474 N.E.2d 1024, 1027 (Ind. Ct. App. 1985) (opinion on rehearing)). *See also Fox v. Nichter Constr. Co.*, 978 N.E.2d 1171, 1180 (Ind. Ct. App. 2012), *trans. denied*.

A plaintiff's diligence in prosecuting the action or in bringing a motion for dismissal without prejudice is a relevant consideration in determining whether voluntary dismissal is appropriate. *Finke v. N. Ind. Pub. Serv. Co.*, 862 N.E.2d 266, 271 n.3 (Ind. Ct. App. 2006) (citing *Principal Life Ins. Co. v. Needler*, 816 N.E.2d 499 (Ind. Ct. App. 2004)). The factors most commonly considered on a motion for a voluntary dismissal are: (1) the extent to which the suit has progressed, including the defendant's effort and expense in preparing for trial, (2) the plaintiff's diligence in

prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff's explanation for the need to dismiss. Other factors that have been cited include whether the motion is made after the defendant has made a dispositive motion or at some other critical juncture in the case and any vexatious conduct or bad faith on plaintiff's part. *Principal Life Ins. Co.*, 816 N.E.2d at 503 (quoting 8 Moore's Federal Practice § 41.40[6], pp. 41-140 - 41-142 (3d ed. 2003)). The granting of a plaintiff's motion for voluntary dismissal is reviewed under an abuse of discretion standard. *Id.* at 502 (citing *Rose v. Rose*, 526 N.E.2d 231, 234 (Ind. Ct. App. 1988), *trans. denied*).

Here, the record shows the Court should exercise its discretion in granting Plaintiffs' motion for voluntary dismissal without prejudice.

First, the suit has barely progressed. No responsive pleading has been filed. While the issue of a preliminary injunction was briefed, there was never a determination on the merits. Instead, the Court that heard argument on the issuance of a preliminary injunction never ruled on it but instead transferred the venue to St. Joseph County. After the transfer, no substantive litigation occurred due to the parties' changing of judges, at which time Plaintiffs requested involuntary dismissal.

Second, the Plaintiffs showed absolute diligence in pursuing this matter. The record shows Plaintiffs briefed or responded to every motion or filing by Defendants and timely sought a preliminary injunction, which was delayed only by the above-referenced litigation.

Third, if litigation were ever duplicated, the cost of any such duplication would be minimal. Again, the merits of this case were never addressed by a court. All issues, perhaps with the exception of where to venue the case, remain unresolved. Thus, there would be little, if anything, for a court or the parties to rehash if the matter were refiled.

Fourth, Plaintiffs have offered an adequate explanation for dismissal. Plaintiffs wish to dismiss their claims without prejudice because the merits were never reached. If anything, Plaintiffs had every confidence that the Court would have found in their favor that an election board cannot by a contested vote shut out one political party from absentee ballot access and signature review. Thus, a dismissal with prejudice, which could be construed against Plaintiffs on the merits, would be highly prejudicial.

Fifth, and finally, while not an enumerated factor, a dismissal with prejudice would be an equivalent to handing Defendants a windfall. In addition to the interpretation of election laws, there remains the issue of whether Defendant Glenn acted appropriately in accessing absentee ballots. Upon information and belief, that matter remains under investigation by the Indiana State Police. Dismissing a case on the merits which could be dispositive of Glenn's actions might have the effect of giving her a victory on the merits without a court ever deciding as much in actuality.

For these reasons, the Court should exercise its discretion and grant the motion to voluntarily dismiss this matter without prejudice.

WHEREFORE Plaintiffs pray this Honorable Court dismiss this matter without prejudice and with each party to bear its own costs.

Respectfully Submitted,

JONES LAW OFFICE LLC

/s/ Andrew B. Jones

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the above and foregoing pleading was served upon all counsel of record via the IEFS on December 30, 2022.

/s/ Andrew B. Jones

Andrew B. Jones (#29686-71)

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