IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFERY GULICK,

Plaintiffs,

vs.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

Case No. 1:20-cv-00414

Hon. Paul L. Maloney

PLAINTIFFS' RESPONSE BRIEF OPPOSING DEFENDANTS' JOINT MOTION FOR RECONSIDERATION

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Introduction

The Defendants are not entitled to reconsideration of this Court's decision to certify certain state law questions. The Defendants' belated attempt to invoke sovereign immunity—after they filed voluminous motions to dismiss, submitted two sets of opposition briefs, and participated in a hearing on the state law questions without objection—is the type of litigation conduct demonstrating a clear intent to waive sovereign immunity. That the Defendants asserted sovereign immunity *only after* they suffered an adverse ruling crystallizes the unfair tactical advantage they seek to gain. Moreover, it remains appropriate for this Court to certify the questions of state law to the Michigan Supreme Court, whose resolution may obviate the need for this Court to weigh in on any of the claims in this case.

Argument

I. The Eleventh Amendment defense does not divest this Court of jurisdiction.

At the outset, the Defendants are incorrect that the Eleventh Amendment divests this Court of subject matter jurisdiction over Counts I and II of the Plaintiffs' Complaint. The Supreme Court has held that the Eleventh Amendment "does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so." *Wisconsin Dep' of Corr. v. Schacht*, 524 U.S. 381, 389 (1998).

It is well established that parties may not, by their conduct, confer subject matter jurisdiction on a federal court. *Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 629 (6th Cir. 1992) (collecting cases). Yet it is also well established that the State may waive its sovereign immunity. *See, e.g., Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 623 (2002). Moreover, a federal court has no obligation to raise an Eleventh Amendment issue on its own. "Unless the State raises the matter, a court can ignore it." *Schacht*, 524 U.S. at 389.

That the sovereign immunity defense can be waived by the State and ignored by a court demonstrates that it is a defense of immunity and not of subject matter jurisdiction. *See Kovacevich v. Kent State Univ.*, 224 F.3d 806, 816 (6th Cir. 2000) (reasoning that the Supreme Court has stated that "the Eleventh Amendment is not jurisdictional, and is not akin to the complete diversity requirement"). The key question is not whether the Court has subject matter jurisdiction over Counts I and II, but whether Defendants timely invoked the sovereign immunity defense, and, even so, whether that defense prevents this Court from certifying questions of state law to the Michigan Supreme Court. The answer to both questions is no.

II. The Defendants waived Eleventh Amendment immunity by filing two separate opposition briefs and moving to dismiss without ever invoking immunity—and only raising the defense after they lost.

As the Defendants concede, the State may waive its sovereign immunity through its litigation conduct. The doctrine of waiver by litigation conduct rests upon the "judicial need to avoid inconsistency, anomaly, and unfairness." *Lapides*, 535 U.S. at 620. It prevents the State from selectively invoking immunity "to achieve unfair tactical advantages." *Id.* at 621. The Defendants are correct that there is no per se rule regarding when a state defendant waives the sovereign immunity defense. Instead, the focus of the inquiry is on "the litigation act the State takes that creates the waiver." *Lapides*, 535 U.S. at 620.

Cases addressing waiver by litigation conduct illustrate that the State may not actively litigate the case, only to belatedly assert the sovereign immunity defense to gain a tactical advantage. For example, the Sixth Circuit held in *Ku v. State of Tennessee,* 322 F.3d 431 (6th Cir. 2003), that where a state defendant "appear[s] without objection and defend[s] on the merits in a case over which the district court otherwise has original jurisdiction," that litigation conduct "is sufficient to waive a State's defense of Eleventh Amendment immunity." *Id.* at 435. In that case, the state defendant waited until after it received an adverse judgment to invoke sovereign

immunity, "reveal[ing] that it had its fingers crossed behind its metaphorical back the whole time." 322 F.3d at 435. The court rejected that strategic behavior, holding that the state defendant waived sovereign immunity by its conduct. Likewise, in *In re Bliemeister*, 296 F.3d 858 (9th Cir. 2002), the Ninth Circuit held that a state defendant waived sovereign immunity when it filed a response, answer, and motion for summary judgment, then attended an oral argument and heard the court announce its preliminary leanings, all without raising the issue of sovereign immunity. *Id.* at 862. Only after the court indicated its preliminary ruling did the state defendant assert that the claims were barred by sovereign immunity. *Id*. The court rejected the defendant's attempt, reasoning that "[t]o allow a state to assert sovereign immunity after listening to a court's substantive comments on the merits of a case would give the state an unfair advantage when litigating suits." *Id.*

In this case, the Defendants committed several substantial litigation acts without once invoking their sovereign immunity. These acts demonstrate their intent to waive their immunity defense, and they underscore the unfair advantage that Defendants now seek to gain:

First, on May 22, 2020, the Defendants filed hundreds of pages in opposition to the Plaintiffs' motion for preliminary injunction. PageID.442-532 (Defendant Nessel's response and exhibits); PageID.794-1044 (Defendants Whitmer and Gordon's response and exhibits). In support of the Plaintiffs' motion, the Plaintiffs principally argued that they were likely to succeed on the merits of the state law claims in Counts I and II and spent the majority of their brief addressing those claims. PageID.255-266. Yet in the Defendants' voluminous responsive briefs, the Defendants did not once claim that they enjoyed sovereign immunity from Counts I and II. Instead, the Defendants made several arguments, including ones that addressed the merits of the Plaintiffs' state law claims, and argued that the Governor's Executive Orders at issue in this case

were valid and reasonable given the severity of the pandemic. PageID.467-471; PageID.829-839. None of the Defendants raised the Eleventh Amendment at this stage.

Second, on June 2, and June 5, 2020, the Defendants filed lengthy motions to dismiss, but again they did not invoke the sovereign immunity defense. PageID.1370-1456 (Defendant Nessel's motion to dismiss, supporting brief, and exhibits); PageID.1774-2042 (Defendant Whitmer and Gordon's motion to dismiss, supporting brief, and exhibits). Though the Defendants moved to dismiss Counts I and II, they never once uttered "sovereign immunity" in addressing those claims. Instead, they spent many pages arguing that the state law claims were moot, that this Court should decline to exercise supplemental jurisdiction over them because they raise novel issues of Michigan law, and that the claims failed on the merits. The Defendants' failure to invoke sovereign immunity as to Counts I and II was tactical: Defendants Whitmer and Gordon did not ignore sovereign immunity altogether but instead argued that the Eleventh Amendment barred only the Plaintiffs' claims for money damages. PageID. 1794-1795.

Third, on June 5, 2020, the Defendants filed even more voluminous briefing requesting that this Court decline to certify questions of state law to the Michigan Supreme Court. PageID.1603-1698 (Defendants Whitmer and Gordon's brief and exhibits); PageID.1699-1773 (Defendant Nessel's brief and exhibits). All Defendants raised arguments for why this Court should either dismiss Counts I and II or decline to exercise supplemental jurisdiction over them. They acknowledged that these were state law claims concerning "the scope and state constitutionality of two Michigan statutes." PageID.1607; *see also* PageID.1712 ("the predominant issues in this case concern the validity and scope of the Governor's statutory authority to act during an emergency or disaster"). But they did not invoke sovereign immunity.

Fourth, on June 10, 2020, the Defendants participated in a hearing conducted by this Court to determine whether to certify state law questions to the Michigan Supreme Court. Defendants appeared at that hearing without objection. Though they raised many arguments for not certifying the state law questions—and even requested that the Court dismiss the Plaintiffs' claims with prejudice—they never raised sovereign immunity. The Court decided to certify the state law questions over the Defendants' objections. The very next day, June 11, 2020, the Defendants asserted sovereign immunity for the first time. PageID.2045 ("By this filing, Defendants also raise Eleventh Amendment Immunity regarding Plaintiffs' state law claims in Counts I and II . . . .")

As in *Ku* and *Bleimester*, the Defendants' belated assertion of the sovereign immunity defense would give the Defendants an unfair tactical advantage. The Defendants have now made several attempts to air their arguments and resolve Counts I and II both on jurisdictional grounds and on the merits. Though the case may be relatively young in age, the urgency of the case has caused proceedings to mature rapidly, and Defendants have already amassed a huge volume of briefs and filed more pages than many cases see in the entirety of their proceedings. In some of the briefing, Defendants Whitmer and Gordon even acknowledge that the Eleventh Amendment would apply to the Plaintiffs' claims for damages (but not to Counts I and II). Until June 11, Defendants did not assert sovereign immunity as to Counts I and II in any brief or filing, including any of the motion to dismiss briefing. That fact distinguishes this case from *Barachkov v. Davis*, 580 F. App'x 288 (6th Cir. 2014), where the defendant did not file a motion to dismiss but raised the issue of sovereign immunity in its answer to the complaint and again in its amended affirmative defenses.

Moreover, the Defendants appeared, without objection, at a hearing before this Court that centered on the potentially dispositive state law questions. At the hearing, the Defendants had the opportunity to test their arguments and to listen to this Court's comments on the state law claims. Only after the Defendants lost on the issue of certification—a result they fought hard to avoid, and which effectively denied their request that this Court dismiss the Plaintiffs' claims with prejudice—did they invoke the sovereign immunity defense for the first time. Under *Lapides*, the Defendants' tactical decision to invoke sovereign immunity after they actively litigated the case and received an adverse ruling should be rejected.

III. Certification of the state law questions gives the highest state court the opportunity to resolve state law issues that may obviate the need for this Court to rule on the Plaintiffs' federal constitutional claims.

Even if this Court determines that the Defendants did not waive sovereign immunity, certification of the state law questions is nonetheless proper. Thus, a different disposition would not result from the Plaintiffs' motion for reconsideration.

Under MCR 7.308(A)(2)(a), when this Court "considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent," it may certify the question to the Michigan Supreme Court. Likewise, under Local Rule 83.1, this Court "may certify an issue for decision to the highest court of the state whose law governs any issue, claim or defense in the case."

The Michigan Supreme Court's answer to the state law questions may make it unnecessary for this Court to rule on the Plaintiff's federal constitutional claims in Counts III through VI of the complaint. For example, the Michigan Supreme Court may determine that the Governor's Executive Orders are invalid under the Emergency Powers of the Governor Act or Emergency Management Act. Or the Michigan Supreme Court may hold that those acts violate the Separation of Powers or Non-Delegation Clauses of the Michigan Constitution. Either answer

may obviate the need for this Court to weigh in on the remaining counts and allow the Court to avoid answering the constitutional questions. Accordingly, certification remains the proper course in this case, regardless of the Defendants' belated assertion of immunity.

Conclusion

The Plaintiffs respectfully request that this Court deny Defendants' Joint Motion for Reconsideration and proceed with certifying the following questions to the Michigan Supreme Court:

1. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, et seq., or the Emergency Management Act, MCL § 30.401, et seq., Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.

2. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

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