No. 19-5276

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM H. THOMAS, JR.,
Plaintiff-Appellee,

v.

JOHN SCHROER, Commissioner of Tennessee Department of Transportation,
Defendant-Appellant,

and

JOHN H. REINBOLD; PATTI C. BOWLAN; ROBERT SHELBY; SHAWN BIBLE; and CONNIE GILLIAM,
Defendants,

and

GEORGE R. FUSNER, JR. and JONATHAN L. MILEY,
Proposed Intervenors.

On Appeal from the United States District Court for the
Western District of Tennessee
No. 2:13-cv-02987-JPM-cgc

MR. THOMAS'S REPLY IN SUPPORT OF MOTION TO DISMISS

Any way one construes the State of Tennessee's arguments against dismissal, this Court lacks jurisdiction over this appeal. There is already a case, examining the merits of the district court's decision, appealed to this Court as Case No. 17-6238.

The first appeal has been fully briefed and argued and is awaiting this Court's determination.

To try to save this inappropriate second appeal, No. 19-5276**,** the State is either arguing that Mr. Thomas should lose on the merits or that—even if he prevails on the merits—he should not have prevailing party status. In the second instance, the State would be raising an issue it forfeited at Case No. 17-6238. In the first instance, the State would be raising the *exact issue* it appealed at Case No. 17-6238. In either event, a second panel of this Court lacks jurisdiction and this second appeal should be dismissed.

But, there would be problems with this appeal even if the State were not attempting a second bite at the apple. The State appeals from the district court's Order Adopting the Report and Recommendations for Attorneys' Fees (RE 425, "the Order"), *see* RE 426 at 1 (PageID # 7970). But the only issue decided in that Order is the amount to be granted post-judgment in attorney's fees and costs. And the State disclaims any challenge to those specific amounts. Response of Defendant-Appellant in Opposition to Plaintiff-Appellee's Motion to Dismiss Appeal ("Opp.") at 4-5 (conceding that the State cannot and does "not wish to challenge" the amounts). There is, therefore, no subject matter to this appeal.

But, even if the State were appealing the subject matter of the Order, the Order is non-final and thus not a basis for appellate jurisdiction. Therefore, regardless of what the State is in fact now appealing, this appeal should be dismissed.

A. Lack of jurisdiction over merits and prevailing party issues

Mr. Thomas's motion noted that the State forfeited any appeal of his prevailing party status. The State seems to respond that it was not required to raise in the prior appeal whether Mr. Thomas was the prevailing party, because it had challenged the merits decision in Mr. Thomas's favor. *See*, *e.g.*, Opp. Br. at 3 (stating that "it was not necessary for Defendant to present, separately, the prevailing-party issue"). But whether a party wins on the merits and whether it is the prevailing party are separate questions. As the Federal Circuit has noted, "just because a party can be said to have 'prevailed' on a claim does not necessarily make him a 'prevailing party.'" *Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010).

Thus, to award prevailing party status, a court must determine not only that the party "receive[d] at least some relief on the merits of his claim," but also that the relief arises from "a court-ordered change in the *legal relationship* between the plaintiff and the defendant." *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 697 (6th Cir. 2015) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603, 604 (2001)) (alteration in original) (emphasis in original) (internal quotation marks omitted). Thus, contrary to the State's assertion,

if a party wishes to preserve the issue of prevailing party status, it must raise that issue in its appeal, not just appeal the merits.

The State's failure to raise the prevailing party issue when it appealed the district court's merits decision is fatal to any attempt to challenge it here. "When the district court resolves the merits of the case and the issue of fees *together*," the merits and the fees must be appealed at the same time. *JPMorgan Chase Bank, N.A. v. Winget*, No. 18-1143, __ F.3d ___, 2019 U.S. App. LEXIS 10549, at *5 (6th Cir. Apr. 10, 2019) (emphasis in original); *see* Motion to Dismiss Appeal ("Mot.") at 7. The district court determined that Mr. Thomas was the prevailing party in one of the orders determining the merits of the case. *See* RE 374 at 21-22 (PageID ## 7211-12); *see also* RE 381 (PageID # 7603) (appealing from RE 374 as part of merits appeal, Case No. 17-6238). Thus, to appeal prevailing party status, the State had to appeal that issue at the same time as it appealed the merits. It did not do so. *See* Mot. at 3 ¶ 4 (noting not raised in issues on appeal or briefing).

Thus, apart from the merits issue already being determined in Case No. 17-6238, the State has forfeited any appeal of prevailing party status. Accordingly, this Court lacks jurisdiction here. *See, e.g.*, *United States v. Miller*, 594 F.3d 172, 178-79 (3d Cir. 2010) ("dismiss[ing] . . . second appeal for lack of jurisdiction" because "allegations of error could and should have been raised in" the first appeal (internal quotation marks omitted)); *United States v. Mendes*, 912 F.2d 434, 437-38 (10th Cir.

1990) (holding no jurisdiction because allowing challenge to issue that should have been raised in first appeal "would undermine the doctrine of finality").

On the other hand, if this appeal is merely a second challenge whether Mr. Thomas should win on the merits, then it should still be dismissed. That is the issue this Court is already determining at Case No. 17-6238. By definition, this appeal would be a duplicative appeal that wastes judicial resources, and it should be dismissed. *See* 6 Cir. R. 45(a)(8) (empowering the Clerk of the Court to dismiss duplicative appeals); *United States v. Cannion*, 597 F. App'x 1060, 1062 n.2 (11th Cir. 2015) (dismissing duplicative appeal); Mot. at 4 ¶¶ 5-6 (compiling cases).

B. Lack of jurisdiction over determination of fees amounts

The only non-forfeited, non-duplicative ground for a second appeal might have been a challenge to the amounts in attorney's fees and costs awarded in the post-judgment action. And that is the only issue decided in the order that the State has appealed from. But, the State has forfeited that appeal as well, and this Court would lack any jurisdiction over it.

As the State conceded, it has forfeited and disclaimed any appeal of the amounts awarded. *See* Opp. at 4 ("recognizes that he may not challenge on appeal the *amount* of the fees awarded by the district court" (emphasis in original)); *see*

also Mot. at 5-6 ¶¶ 7-11). Indeed, the State has disclaimed any "wish to challenge the magistrate judge's determinations regarding those amounts." Opp. at 5.[1]

Thus, the State has disclaimed any challenge to the only issue decided in the order it appealed. Quite simply, a second panel of this Court has no subject matter jurisdiction over this appeal because there is no subject matter in the appeal. Therefore, the appeal should be dismissed.

But, even if, for the sake of argument, the State were appealing the amounts granted in attorney's fees and costs, there would still be no jurisdiction. The State

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[1] The State notes that a court may excuse such forfeiture in exceptional circumstances. Opp. at 5. That argument and the precedent cited are irrelevant, however, because the State has disclaimed any desire to challenge the recommendations forfeited. *See id*.

Furthermore, the argument and precedent cited are irrelevant because the State has not pointed to any cognizable exception here. The exception does not apply merely because the forfeiting party is adversely affected by his or her failure to act—that is the case whenever a party forfeits a right. Rather, the exception applies in *pro se* cases, where this Court is especially solicitous of the non-movant's rights. *See*, *e.g.*, *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 457-58 (6th Cir. 2012). It also applies when a *pro se* party filed objections, but did so late because he did not receive the magistrate's report until the deadline. *See*, *e.g.*, *Alspaugh v. McConnell*, 643 F.3d 162, 166 (6th Cir. 2011); *Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987) (declining to create "any specific exception"). This case, however, involves the well-represented sovereign, and the State has not pointed to any circumstance that made it impossible to respond in time. And the State has not pointed to "any intervening change in the controlling law" or to any "explanation for why [it] sat on [its] hands before the district court." *Hohman v. Internal Revenue Serv.*, No. 18-1756, 2019 U.S. App. LEXIS 9478, at *5 (6th Cir. Apr. 1, 2019) (unpublished) (compiling cases).

has appealed from a non-final order. *See* 28 U.S.C. § 1291 (granting appellate jurisdiction only over final district court decisions); Mot. at 7-9 ¶¶ 12-17.

The State nowhere explains how the Order could be considered final. The fees are not "payable until the" district court receives notice of the "conclusion of the" merits appeal and orders payment. RE 425 at 7 (PageID # 7969). And the state concedes that, at that time, post-judgment interest and additional fees and costs must still be added to the final post-judgment award. Opp. at 7.

Therefore, the Order can in no way be considered "the last order to be entered in the [post-judgment] action." *JPMorgan Chase Bank*, 2019 U.S. App. LEXIS 10549, at *8 (internal quotation marks omitted). The Order is therefore not "final and appealable." *Id*. at *9 (internal quotation marks omitted); *see also Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs*, 571 U.S. 177, 183 (2014) (noting not final order because there remained something "for the court to do [other than] execute the judgment"). Accordingly, this Court lacks jurisdiction over any appeal from the Order.[2]

[2] The State misconstrues Mr. Thomas's position. Mr. Thomas does not argue that "no separate order awarding attorneys' fees based on an earlier-appealed merits judgment could itself be appealed until after the conclusion of the earlier appeal." Opp. at 7. Rather, as this Court requires in *JPMorgan*, there may be no appeal of a post-judgment award until there is a final district court order—which the district court *in this case* made contingent on the conclusion of the earlier appeal. Because a final order is lacking here, the State's second appeal fails.

For all these reasons, the Court lacks jurisdiction and should dismiss this appeal.

Respectfully submitted,

Allen Dickerson

/s/ *Owen Yeates*

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Dated: May 14, 2019

CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Rule 27(d)(2) of the Federal Rules of Appellate Procedure because it contains 1691 words (does not exceed 2,600 words), excluding the items and documents exempted by Rules 27(a)(2)(B) and 32(f). It also complies with the typeface and style requirements of Rules 27(d)(1)(E), 32(a)(5), and 32(a)(6) of the Federal Rules of Appellate Procedure, because this document has been prepared using a proportionally spaced typeface in Microsoft Word 2016 in Times New Roman, 14-point font.

Dated: May 14, 2019

/s/ *Owen Yeates*
Owen Yeates

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing MR. THOMAS'S REPLY IN SUPPORT OF MOTION TO DISMISS using the Court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

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