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No. 17-6385

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL MILLER, PH.D.; KAREN ANN ROBERTS; SHANTEL BURKE; STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY; L. AARON SKAGGS; BARRY W. SPARTMAN
Plaintiffs – Appellees

v.

KIM DAVIS, in her official capacity as Rowan County Clerk
Defendant/ Third-Party Plaintiff – Appellee

ROWAN COUNTY, KENTUCKY
Defendant – Appellee

v.

MATTHEW G. BEVIN, in his official capacity as Governor of Kentucky; TERRY MANUEL, in his official capacity as State Librarian and Commissioner of the Kentucky Department for Libraries and Archives
Third-Party Defendants – Appellants

On Appeal from the United States District Court for the Eastern District of Kentucky
In Case No. 0:15-cv-00044 before the Honorable David L. Bunning

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REPLY BRIEF OF APPELLANTS, GOVERNOR MATTHEW G. BEVIN AND COMMISSIONER TERRY MANUEL, IN THEIR OFFICIAL CAPACITIES

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Introduction

When Rowan County Clerk Kim Davis ("Davis") created her own local policy to deny the issuance of any marriage licenses in Rowan County, Kentucky, she acted pursuant to her discretionary authority as an elected officer of Rowan County. Her local policy defied the unequivocal mandate issued by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), and her local policy stood in direct conflict with her statutory obligation to issue marriage licenses to qualified Kentucky couples. The local policy also undermined the Commonwealth of Kentucky's interest in upholding the rule of law. As a result, the Commonwealth cannot bear liability for any attorneys' fees related to challenges to the legality of this local policy.

While county clerks such as Davis may, at times, represent the county and the state, in this instance, Davis clearly acted only on behalf of her county office when she set this local policy for the Rowan County Clerk's Office. Importantly, neither the Governor of Kentucky nor the State Librarian and Commissioner of Kentucky Department for Libraries and Archives ("State Defendants") had authority to order Davis to change or stop her local policy. Indeed, following the Supreme Court's ruling, then-Governor of Kentucky, Steven L. Beshear, sent a letter to county clerks informing them of the decision and recommending county clerks seek advice from their county attorneys before implementing the Supreme

Court's mandate. (Letter to County Clerks, R. 1-3, Page ID # 26). This letter only reminded county clerks of their constitutional obligations to follow the law. (*Id.*) This letter did not, and could not, *mandate* how county clerks fulfilled their statutory duties. Instead, Davis, like other county clerks, had discretion in this area. Davis acted as a county official when making local policy for the non-issuance of marriage licenses.

Several Rowan County couples ("Plaintiffs") challenged Davis's local policy and sought judgments against Rowan County and against Davis, individually and in her official capacity as Rowan County Clerk. Significantly, at no time did Plaintiffs ever pursue claims for relief of any kind against the Commonwealth of Kentucky. Before this challenge to Davis's local policy was decided, the Commonwealth of Kentucky did voluntarily resolve the dispute among Plaintiffs, Davis, and Rowan County through a change in the law and without a directive from any court. The Commonwealth's creation of a new form for marriage licenses mooted the claims made against Davis and Rowan County, and the Plaintiffs' lawsuit was dismissed. Before this dismissal, the District Court vacated the preliminary injunction issued against Davis, which had temporarily prevented her from carrying out her local policy. While some Plaintiffs had obtained marriage licenses during the pendency of their lawsuit, the District Court's dismissal left them without an enforceable judgment. This dismissal also

left Plaintiffs without a *judicially sanctioned* change in the legal relationship between them and the Rowan County Clerk's Office. Plaintiffs, therefore, cannot qualify as "prevailing parties" for purposes of an award of attorneys' fees.

To the extent Plaintiffs prevailed, if at all, they did so against Davis and Rowan County. The only rulings won by Plaintiffs prohibited actions by Davis in her capacity as Rowan County Clerk. These rulings demanded no action from State Defendants; State Defendants did not lose to Plaintiffs in any form and all third-party claims against them were dismissed. Until the District Court awarded fees against the "Commonwealth of Kentucky," generically, State Defendants had no reason to believe that any fees could be awarded against anyone other than Davis or the Rowan County's Clerk Office as they were the only defendants. The District Court, erred in holding the Commonwealth liable for Plaintiffs' fees, because Rowan County should be responsible for the actions of its county officer, Davis. To hold otherwise would be unjust and would ignore a primary goal of fee-shifting statutes: deterrence. Davis's local policy was intended only to have local effect, and so any consequences of that local policy must also be felt locally rather than by the taxpayers of the Commonwealth of Kentucky.

Arguments

I. Responsibility for Plaintiffs' fees was specifically considered by the District Court below.

The Court must reject Davis's contention that any issues have been waived. Despite Davis's suggestion, the issues presently before this Court were clearly before the District Court. The District Court directly considered the extent to which the Commonwealth may be held liable for any fee award. This issue was the subject of 15 pages of the District Court's initial order awarding fees, and it was the subject of the District Court's later order denying State Defendants' motion to amend the fee award. It cannot be said that the critical issue of fee liability—framed as "Who Pays?" by the District Court—was not raised below. (Fee Order, R. 206, Page ID # 2965). Certainly, there are no "surprise issues" appearing in this appeal. The only surprise in this case was suffered by State Defendants when they were assessed fees after being dismissed from the case and in circumstances where Plaintiffs did not seek fees from State Defendants and agree that no award should have been made against State Defendants. Thereafter, State Defendants—and other parties to this action—clearly developed the issue of which party must bear the responsibility for any fees awarded to Plaintiffs.

Here, Plaintiffs never asserted any claims against State Defendants. State Defendants were only parties to the case because Davis filed a third-party complaint against them. Davis's claims against State Defendants had been

dismissed at the time Plaintiffs sought their award of attorneys' fees from Davis. Until the District Court took it upon itself to raise the issue of "Who Pays?", it had not been raised by the parties as to State Defendants and there was no notice to State Defendants that of any potential for an award of fees generically against the "Commonwealth of Kentucky."

Even if the Court believes there may be a waiver on the part of State Defendants, which there is not, "this Court has discretion to entertain novel questions." *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 545 (6th Cir. 1996). Exercising that discretion is proper here, where the Court is faced with a legal question about the proper assessment of fees as between government entities that is a matter of initial impression. Specifically, guidance is needed from this Court regarding the proper test to apply to this fee issue. Below, the District Court erred by applying a test developed for immunity determinations, not fee awards. This Court now can explain the proper framework for assessing fees as between government entities.

II. Plaintiffs do not qualify as "prevailing parties," and did not prevail on any claims against the State Defendants.

Despite Plaintiffs' contentions, "[a] district court's determination of prevailing-party status for awards under attorney-fee-shifting statutes—such as 42 U.S.C. § 1988—is a legal question that [this court] reviews de novo." *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 617-18 (6th Cir. 2013) (alteration in original)

(quoting *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007)). This Circuit's position on the appropriate standard has changed since ruling its ruling in *DiLaura v. Township of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006). From 2007 forward, "the weight of Sixth Circuit precedent favors de novo review for prevailing-party determinations." *Woods v. Willis*, 631 F. App'x 359, 363 n.4 (6th Cir. 2015). *See, e.g., Balsley v. LFP, Inc.*, 691 F.3d 747, 771 (6th Cir. 2012) ("However, we review de novo the legal question of which party is the prevailing party."). The application of the de novo standard puts the Circuit in line with others who have reviewed prevailing party determinations in recent years. *Bridgeport Music, Inc. v. London Music, U.K.*, 226 F. App'x 491, 493 (6th Cir. 2007) (citing *Bailey v. Mississippi*, 407 F.3d 684, 687 (5th Cir. 2005), which observed "Post-*Buckhannon*, every Circuit to address the issue has determined that the characterization of prevailing-party status for awards under fee-shifting statutes . . . is a legal question subject to de novo review.").

The Supreme Court also has favored reviewing prevailing party-status under a de novo standard. *Sole v. Wyner*, 551 U.S. 74, 86 (2007). *See also Radvansky*, 496 F.3d at 619 (explaining that in *Sole* the Supreme Court was "reviewing *de novo* prevailing-party status without explicitly stating the standard of review"). Given *DiLaura*'s inconsistency with *Sole*, and the consistent application of a de novo standard to prevailing-party status by this Court, a de novo standard of

review applies to the District Court's prevailing-party determination. Regardless, the application of either the abuse of discretion or de novo standard produces the same result: the District Court erred in finding Plaintiffs qualified as "prevailing parties."

The District Court erred by failing to apply the proper standard for "prevailing parties" under 28 U.S.C. §1988. State Defendants briefed this issue at length in their principal briefs in this and the related appeal, and so they refer the Court to those arguments. However, the limitation on "prevailing party" status must be reiterated. A prevailing party is limited to "a party who obtains either a judgment on the merits or a court-ordered consent decree." *Hermansen v. Thompson*, 678 F. App'x 321, 328 (6th Cir. 2017) (citing *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 605 (2001)). Indeed, this Court has recognized that the applicable test "will generally counsel against fees in the context of preliminary injunctions." *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010). Under the proper test, Plaintiffs fall short of being considered "prevailing parties." At most, they catalyzed a change—albeit a voluntary one from the Commonwealth and not from Davis or Rowan County, the parties they actually sued—and that is not enough to prevail. *See Buckhannon*, 532 U.S. at 605 (expressly rejecting the "catalyst theory" in the context of fee awards). In holding otherwise, the District Court

failed to correctly apply the "touchstone" of the inquiry under § 1988—"the material alteration of the legal relationship of *the parties*." *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792-93 (1989) (emphasis added).

III. The Rowan County Clerk's Office is responsible for the payment of any award of fees or costs, because Davis is a county official.

The District Court erred by finding Davis acted as a state official when she enacted a local policy pursuant to her authority as a county official. This finding is not supported by how Kentucky characterizes county clerks. Kentucky law is clear that county clerks—like Davis—are considered "county officials." Ky. Const. § 99. County clerks are elected by the residents of their own county. *Id.* County clerks are paid from the fees they generate, not from funds allocated by the Commonwealth of Kentucky. (Transcript of Preliminary Injunction Hearing on July 20, 2015, R. 26, Page ID # 241). It is the Rowan County Fiscal Court that provides oversight of the Rowan County Clerk's Office. (*Id.* at Page ID # 234). In Kentucky, county clerks are simply not directly supervised by state government. Furthermore, the State Defendants had no authority to order Davis to do anything, because they do not possess any supervisory authority over other elected constitutional officers. *See Brown v. Barkley*, 628 S.W.2d 616, 618 (Ky. 1982). Instead, as this Court has recognized, Kentucky's county clerks have been granted authority to enforce the issuance of marriage licenses. *See Summe v. Kenton Cty.*

Clerk's Office, 604 F.3d 257, 267 (6th Cir. 2010) ("County Clerks are charged with enforcing the law regarding the issuance of licenses, the registration of voters and the running of elections, and the storage and maintenance of legal and governmental records. County Clerks presumably have discretionary authority regarding how to facilitate these numerous and varied duties.").

Despite these facts and Kentucky's characterization of clerks, the District Court mischaracterized Davis as a state official. To reach this conclusion, the District Court misapplied a test normally used to determine the scope of sovereign immunity. Acknowledging that the test did not fit the present circumstances, the District Court incorrectly applied a multi-factor test from *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015). Even under these factors, Davis remains a county official.

The District Court made much of the first *Crabbs* factor—a state's potential liability for a judgment—but this factor does not offer much, if any, guidance, outside the sovereign immunity context. Recognizing that no Kentucky statutes directly addressed whether the Commonwealth would be responsible for any judgment against a county clerk or her office, the District Court focused "exclusively on sovereign immunity." (Fee Order, R. 206, Page ID # 2968 n. 24). That analysis is unhelpful in a context in which immunity was not an issue. The majority of the remaining *Crabbs* factors, however, do show that Davis acted as a county official in this context: she is considered a county official by Kentucky law,

she is selected by Rowan County votes, she is paid by fees generated by the Rowan County Clerk's Office, and the Commonwealth has little or no control over her actions in this context.

Overall, Davis's actions are best considered local. She created her own local policy pursuant to her authority to discharge her statutory duties. This Court has found localities liable for similar actions from local officials. Davis's actions are most similar to those of a county coroner, who, like Davis, enacted a voluntary policy not required by state law. *Brotherton v. Cleveland*, 173 F.3d 552, 565-66 (6th Cir. 1999) (finding that Hamilton County Coroner "acted as a county, not state, official" when he voluntarily enacted a policy). *See also Granzeier v. Middleton*, 173 F.3d 568, 572 (6th Cir. 1999) (affirming award of fees against a Kentucky county for unconstitutional actions taken by county officials). Even in *Crabbs*, this Court refused to consider a local official was a state actor simply because state law controlled, generally, the area of law at issue. *Crabbs*, 786 F.3d at 430. There, as here, state law did not *require* the sheriff to act as he did, so "the State's sovereign immunity offers him no refuge." *Id.*

To avoid being characterized as a local official, Davis argues that she acted for the Commonwealth—by *defying the law*. The position of the State Defendants on this point has never wavered. Before and during this litigation, the State Defendants' position was simple: Davis must fulfill her statutory duties by

following the law. In his letter following the Supreme Court's decision in *Obergefell*, then-Governor Beshear acknowledged the ruling from the Supreme Court, explained the Commonwealth's action to assist county clerks in fulfilling their statutory duties, and reminded the county clerks of their obligations as constitutional officers. (Letter to County Clerks, R. 1-3, Page ID # 26). This letter did not instruct Davis or any other county clerk to do anything. (*Id.*). In fact, it noted that county clerks "should consult with your county attorney on any particular aspects related to the implementation of the Supreme Court's decision." (*Id.*). Davis's legal responsibilities—under Kentucky law and the *Obergefell* decision—were wholly unaffected by the issuance of the letter by Governor Beshear. With or without that letter, Davis had an independent and sworn duty to uphold the law as an elected county officer. *See* Ky. Const. § 99 (providing for the election of clerks as "county officers"); Ky. Const. § 228 (oath in which Kentucky officers swear that they "will support the Constitution of the United States and the Constitution of this Commonwealth").

As discussed above, the Governor of Kentucky could *not* instruct county clerks to make any particular policy decision, because the Governor has no supervisory authority over constitutional officers. *Brown*, 628 S.W.2d at 618. In her own letter to then-Governor Beshear, Davis also acknowledged the mandate

that the Supreme Court—not the Commonwealth—had placed upon her and other county clerks. (Letter to Governor Beshear, R. 34-5, Page ID # 788).

Upon taking office, Governor Matthew G. Bevin ordered the modification of Kentucky's marriage licenses to remove the name of the county clerk under whose authority the license was issued. (Executive Order, R. 157-2, Page ID ## 2616-18). While this modification resolved Davis's criticism of the prior marriage license form, this action did not change the State Defendants' position on the issuance of marriage licenses. As before, the State Defendants' position remained the same: county clerks must follow the law and issue marriage licenses to qualified couples. Because State Defendants have never asked Davis to do anything other than follow the law, she cannot claim to represent the Commonwealth when she defies that law.

Further, whether Davis was acting as a state or local official in this context is a false choice. Davis was sued in her individual capacity and she acted in her individual capacity.[1] She decided upon a policy that she alone enforced. She did so as an elected official of Rowan County and not pursuant to any directive from either State Defendants or Rowan County. Rather, she took her action as the

[1] Davis recognized that the blurring of her capacities in this case, noting that "it would make little sense to say Davis went to jail only in her official capacity." (Davis's Principal Brief, Doc. No. 46, p. 21).

Rowan County Clerk and it is that office that should bear the financial consequences of her action.[2]

Given that Davis exercised her discretion and created a new policy for Rowan County, any fee award flowing from that local policy must run against the office she holds. Rowan County's disagreement is without merit as there is clear authority for assessing fees against the funds controlled by the local entity directly challenged. In *Hutto v. Finney*, the Supreme Court explained that attorney fee awards can be "obtained 'either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).'" 437 U.S. 678, 700 (1978) (quoting S. Rep. No. 94-1011, p. 5 (1976)). State Defendants do not deny that, in certain circumstances, fees may be assessed against the Commonwealth when certain state officials have been sued in their official capacities. That is clear from *Hutto*. Notably, in *Hutto*, the state officials were sued for a *statewide* policy, and the state officials were defended by the state's attorney general. Nevertheless, in *Hutto*, the Supreme Court also acknowledged

[2] Rowan County's contention that it would ultimately bear financial responsibility if surplus funds from Davis's office are insufficient is irrelevant. The record below shows that there are sufficient funds for the Office of the Rowan County Clerk to satisfy the fees judgment. Further, if Davis's office is required by law to make any payment for any reason that serves to reduce the surplus funds remitted to Rowan County. Payment of attorneys' fees in this context does nothing other than reduce the surplus; it does not create an affirmative obligation on the part of Rowan County.

that fees can be assessed, if possible, against the entity responsible for a challenged policy. There, the Supreme Court concluded that "the Department of Correction is the entity intended by Congress to bear the burden of the counsel-fees award." *Id.* As a result, the awarded attorneys' fees were to be paid from that entity's funds, not the state's funds generally.

Here, Plaintiffs never sued the Commonwealth or any agency of the Commonwealth; Plaintiffs directly challenged a Rowan County policy and a Rowan County official. Davis cannot be said to have represented the official policy of the Commonwealth, and she certainly did not make policy for anywhere beyond Rowan County. Plaintiffs did not sue Davis for the actions she had taken on behalf of the Commonwealth; instead they sued her because of the direct role she had played in establishing and implementing the Rowan County policy of not issuing marriage licenses.

Therefore, the Rowan County Clerk's Office, the entity actually enforcing Davis' policy, is properly liable for any award of fees, because "[f]ee awards against enforcement officials are run-of-the-mill occurrences." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 738 (1980) (finding that fees were properly assessed against the Virginia Supreme Court for its unconstitutional rule prohibiting certain advertising by attorneys) *superseded on other grounds by* 42 U.S.C. § 1983 (as amended). Holding the Rowan County Clerk's Office

responsible is the proper result. It cannot be "unjust" for the entity which created and enforced a challenged policy to bear the consequences of that policy. Allowing that entity to avoid liability instead undermines a primary purpose of § 1988(b): deterring conduct that violates civil rights. *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006) ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."). If fees are awarded, they must be the responsibility of the Rowan County Clerk's Office, which should be deterred from engaging in conduct that violates civil rights—and leads to costly litigation.

Conclusion

The District Court erred, as a matter of law, in finding that Plaintiffs were entitled to any award, because Plaintiffs cannot qualify as "prevailing parties." Although Plaintiffs obtained preliminary injunctions against Davis, these were vacated. Plaintiffs never received any enforceable rulings on the merits of their claims, and they never received any ruling against State Defendants, at all. Under the proper standard, Plaintiffs have not prevailed. The District Court committed error by conferring prevailing party status on Plaintiffs when there was no judicially sanctioned change in the relationship between Plaintiffs and the Rowan County Clerk's Office.

The District Court further erred, as a matter of law, by finding the "Commonwealth of Kentucky" was responsible for the fees awarded to Plaintiffs. To the extent Plaintiffs prevailed against any party it was against Davis as the Rowan County Clerk in her Official Capacity. Nevertheless, the District Court found that the "Commonwealth of Kentucky" was responsible for the consequences of Davis's policy. This finding was in error because Davis, a county official under Kentucky law, acted on behalf of the county when she enacted a local policy (which violated state and federal law). As a result, Rowan County must be responsible for Davis's decision to undertake a discretionary marriage license policy. Because Davis was a local actor, liability for her actions must be

local. For these and all foregoing reasons stated above and in principal brief of State Defendants, this Court should reverse the District Court's award of attorneys' fees and costs.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief complies with the type-face and type-volume limitations because it was produced using the Times New Roman 14-point typeface and contains 3,811 words as calculated through Microsoft Word.

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Certificate of Service

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