Filed: 11/15/2017 4:01 PM
Monroe Circuit Court 6
Monroe County, Indiana

STATE OF INDIANA	IN THE MONROE CIRCUIT COURT 6
COUNTY OF MONROE	CAUSE NO. 53C06-1705-PL-1138
CITY OF BLOOMINGTON, Plaintiff, vs. ERIC HOLCOMB, in his official capacity as Governor of the State of Indiana Defendant.	

RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY ORDER FOR IMMEDIATE APPEAL

The Governor thinks that his Motion to Dismiss should have been granted, essentially because he disagrees with the Indiana Court of Appeals' decision in *Stoffel v. Daniels*. Mem. in Supp. of Mot. for Cert. of Interlocutory Order for Immediate Appeal ("Governor's Mem.") at 7. Therefore, he has asked this Court to certify for immediate interlocutory appeal its denial of the Governor's Motion to Dismiss.

Discretionary interlocutory appeal is the exception, not the rule. The First Circuit Court of Appeals has described interlocutory appeal as being as rare as hens' teeth. *Camacho v. Puerto Rico Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004); *see also McGillicuddy v. Clements*, 746 F.2d 76, 76 n. 1 (noting that discretionary interlocutory appeal "should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more

difficult and pivotal questions of law not settled by controlling authority"). Likewise, Judge Najam of the Indiana Court of Appeals described discretionary interlocutory appeals as being reserved for "extraordinary cases raising important and novel legal issues." 24 Ind. Prac., Appellate Procedure § 5.7 (3d ed.) (quoting Hon. Edward W. Najam, Jr., Interlocutory Appeals Under the Revised Rules, Appellate Practice, p. 10 (Indiana Continuing Legal Education Forum, May 4, 2000)). In fact, discretionary interlocutory appeals tend to not be permitted from denials of motions to dismiss. *See, e.g.*, *Estates of Ungar v. Palestinian Auth.*, 228 F. Supp. 2d 40, 50-51 (D.R.I. 2002) (noting that certification should be reserved for unsettled questions of law, not denials of motions to dismiss).

There is an important and novel legal issue in this case: Whether the General Assembly can single out the City of Bloomington and impose an annexation moratorium that applies only to Bloomington. That question, which constitutes the merits of this case, will be addressed by this Court. The Governor, however, has attempted to cast the question of whether he is an appropriate defendant in this case as an important and novel legal question. It is certainly not novel. The Indiana Court of Appeals has already answered that question. While the Governor clearly disagrees with the Indiana Court of Appeals' previous decision in *Stoffel v. Daniels,* and this Court's correct application of that decision, that disagreement could, and properly should, be addressed on appeal after the merits of this case have been decided.

The Governor's Motion to Dismiss does not rise to the level of an important and novel legal issue. Accordingly, the Motion to Certify for Interlocutory Appeal should be denied.

I. Because there is no substantial question of law raised by this Court's proper application of *Stoffel v. Daniels* to the facts of this case, the Motion to Certify for Interlocutory Appeal should be denied.

In Indiana, a trial court may certify an order for interlocutory appeal if "[t]he order involves a substantial question of law[.]" Ind. App. R. 14(B)(1)(c)(ii). Even if an order involves a substantial question of law, this Court is under no obligation to certify its order for interlocutory appeal. *See, e.g.*, *Dukes v. State*, 661 N.E.2d 1263, 1267 (Ind. Ct. App. 1996) ("It is within the sound discretion of the trial court whether issues in an order will be certified for an appeal as an interlocutory order.")

The City agrees with the Governor that there is very little guidance regarding what qualifies as a substantial question of law for purposes of Appellate Rule 14(B). The Governor points to 28 U.S.C. § 1292(b) ("Section 1292(b)") as the federal analogue to Indiana Appellate Rule 14(B). For purposes of this Response, the City takes no issue with the Governor looking to Section 1292(b), which permits an interlocutory appeal under certain circumstances; however, the City disagrees with the Governor's explanation of Section 1292(b) and the conclusion that the necessary circumstances have been met in this instance.

Section 1292(b) permits an interlocutory appeal after the trial court has made three findings:

1. There is a "controlling question of law";
2. There is "substantial ground for difference of opinion" with respect to that controlling question of law; and
3. An immediate appeal will "materially advance the ultimate termination of the litigation."

Although Indiana's Appellate Rule 14(B)(1)(c)(ii) refers only to a "substantial question of law", which the Governor suggests is analogous to the "controlling question of law" requirement in Section 1292(b), the second and third findings required in Section 1292(b) are consistent with the idea expressed by Judge Najam regarding discretionary interlocutory appeals and the general rule against piecemeal litigation. 24 Ind. Prac., Appellate Procedure § 5.7 (3d ed.) (quoting Hon. Edward W. Najam, Jr., Interlocutory Appeals Under the Revised Rules, Appellate Practice, p. 10 (Indiana Continuing Legal Education Forum, May 4, 2000)). The justiciability question raised by the Governor does not meet the Section 1292(b) standard.

First, the question of whether the Governor is the proper defendant is not a controlling question of law. The Governor cites *Dep't of Economic Development v. Arthur Anderson* in its Memorandum. Governor's Mem. at 4 (citing *Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.)*, 683 F. Supp. 1463, 1486 (S.D.N.Y. 1988) (internal quotation omitted)). In that case, the District Court wrote: "A 'controlling question of law' under Section 1292(b) is one that could terminate the action, and additionally 'may contribute to the determination, at an early stage, of a wide spectrum of cases.'" *Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.)*, 683 F. Supp. 1463, 1486 (S.D.N.Y. 1988) (citing *Herold v. Braun*, 671 F. Supp. 936, 938

(E.D.N.Y. 1987). The District Court in *Herold v. Braun* elaborated on what was needed to establish a controlling question of law:

> In addition, in this Circuit "a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." "Although the question here is intellectually intriguing," it is virtually certain that a ruling will not have "precedential value for a large number of other suits." The situation in which Great American has gotten itself is highly unusual and most unlikely to be replicated by other members of the usually cautious insurance industry.
>
> Moreover, appellate resolution of the issue sought to be certified will probably not enable the Court and the parties to "avoid a lengthy trial," because Braun's liability for the accident must be determined in any event. In addition, the trial of this case can probably be completed in a relatively short time.
>
> For these reasons, and in light of the federal policy against piecemeal appeals, it would be inappropriate at this stage to add the instant matter to the already heavy docket of the Court of Appeals.

Herold v. Braun, 671 F. Supp. 2d 936, 938 (E.D.N.Y. 1987) (internal citations omitted).

Key to the *Herold v. Braun* analysis is whether the question is going to help resolve a "wide spectrum of cases" or have "precedential value for a large number of other suits." *Id.* The Governor speculates that the issue of whether the governor is a proper defendant is likely to arise in other cases as well. Governor's Mem. at 7. The City is not aware of any other instance in which the General Assembly has passed a law prohibiting certain action but omitting an explicit enforcement mechanism, leaving the Governor as the default defendant. Likewise, the Governor has not identified any such instance. Unless the General Assembly changes its

general practice in creating laws, it seems unlikely that another entity will find itself similarly situated to Bloomington. The question of whether the Governor can be named as the only defendant will be the means of resolving very few cases in the future.[1]

Likewise, there seems to be—at most—minimal upside to handling this litigation in a piecemeal manner. This is not a fact intensive case. The City's first Set of Interrogatories contained only three interrogatories. The merits of the case are likely to hinge upon what inherent characteristics justify singling out the City of Bloomington for disparate treatment. In fact, it may be that there are no disputes of fact, making it possible to resolve the case through Motions for Summary Judgment rather than a trial.

Second, even if the question of whether the Governor can be named as the only defendant is a "controlling question of law" under Section 1292(b), there is not a substantial ground for a difference of opinion with respect to that question. "Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal." *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996). In other words: "If a controlling

[1] While not legally relevant, the City does not want to leave unaddressed the Governor's suggestion that he was named as the defendant in this case because it was easy or politically expedient. As stated in the City's Response to the Governor's Motion to Dismiss and as elaborated upon during oral argument on the Motion to Dismiss, the Governor is the *only* permissible defendant in this case. To dismiss this case would provide a blueprint for the General Assembly to enact unconstitutional and unchallengeable laws.

court of appeals has decided the issue, no substantial ground for difference of opinion exists and there is no reason for an immediate appeal." *Brown v. Mesirow Stein Real Estate, Inc.*, 7. F. Supp. 2d 1004, 1008 (N.D. Ill. 1998) (citing *Kirkland & Ellis v. CMI Corp.*, No. 95 C 7457, 1996 WL 674072 at *4 (N.D. Ill. Nov. 19, 1996)).

The City recognizes: (1) that the Governor disagrees with the Court of Appeals' decision in *Stoffel v. Daniels* and this Court's application of *Stoffel v. Daniels* to the facts before the Court, and (2) that the Governor has cited to a few instances of non-binding precedent suggesting that a different rule should apply. Governor's Mem. at 6-7. Nonetheless, the fact remains that *Stoffel v. Daniels* is a controlling decision and squarely addresses the question raised by the Governor. As such, there is no "substantial ground for difference of opinion" sufficient to satisfy the statutory requirements for an interlocutory appeal.

II. Because the Governor has an adequate remedy on appeal, the Motion to Certify for Interlocutory Appeal should be denied.

In Indiana, a trial court may certify an order for interlocutory appeal if "[t]he remedy by appeal is otherwise inadequate." Ind. App. R. 14(B)(1)(c)(iii). Even if the remedy by appeal is otherwise inadequate, this Court is under no obligation to certify its order for interlocutory appeal. *See, e.g.*, *Dukes*, 661 N.E.2d at 1267 (Ind. Ct. App. 1996) ("It is within the sound discretion of the trial court whether issues in an order will be certified for an appeal as an interlocutory order.")

The normal appellate process provides an adequate remedy in this case. The Governor has failed to identify any sort of irreparable harm that will befall him in

the event he has to wait a short period of time for the merits to be fully addressed before determining whether there is any reason to appeal.[2]

In attempting to characterize the normal appellate process as inadequate in this case, the Governor has argued that: (1) the appellate courts will have multiple issues to address and not be able to focus on this one, (2) it is more efficient to engage in piecemeal litigation, and (3) other trial courts have allowed denials of motions to dismiss to be certified for interlocutory appeal. None of these arguments actually addresses why the normal appellate process is inadequate in this case. As such, this case should proceed through the ordinary course of litigation, with any necessary appeal coming at the conclusion of this Court's work.

While the Governor seems skeptical of the ability of both the Indiana Court of Appeals and the Indiana Supreme Court to address multiple issues in a case, the City is confident in the ability of both Courts to address multiple issues and to give each issue appropriate attention in a written decision. Governor's Mem. at 8. Moreover, depending on how this Court resolves this case, the justiciability question raised by the Governor could become moot. The Plaintiff recognizes that depending on which issue or issues are found to be dispositive by the appellate court, one issue may receive more or less treatment than another, and the Plaintiff does not see that as a problem.

---

[2] The City has already served the Governor with a set of three Interrogatories. After receipt of the Governor's responses to those Interrogatories, the City anticipates being able to file a Motion for Summary Judgment in short order.

Additionally, despite the Governor's suggestion that the most efficient course of action is to engage in piecemeal litigation, handling this case in the ordinary manner is in accordance with Indiana's policy against piecemeal litigation. *See, e.g.*, *Lake County Trust Co. v. Indiana Port Comm'n*, 229 N.E.2d 457 (Ind. 1967).

Finally, the fact that other interlocutory decisions have been certified for interlocutory appeal does not mean that interlocutory appeal is appropriate in this case. None of the eight cases cited by the Governor explains why interlocutory appeal was granted by the Court of Appeals. In other words, there is no indication in any of these cases that the Court of Appeals (or the Trial Court) felt the normal appellate remedy was inadequate.

In fact, the statistics support the idea that discretionary interlocutory appeals are as rare as hens' teeth. The Governor has pointed to eight cases in which a motion to dismiss has been certified and accepted for interlocutory appeal over a thirty-five year period. Governor's Mem. at 9. The City is not aware of any statistics regarding how often a request to certify for interlocutory appeal is made to the Indiana trial courts. However, the City is aware that in 2016 the Indiana Court of Appeals issued 160 orders granting or denying a request for acceptance of a discretionary interlocutory appeal. Court of Appeals of Indiana, 2016 Annual Report page 16, available at http://www.in.gov/judiciary/appeals/files/2016-coa-annual-report.pdf. Put another way, no more than 160 interlocutory orders were certified by the trial courts across the State of Indiana, an average of 1.74

interlocutory orders per county in 2016. 2016 Activities, Indiana Trial Court Statistics by County, available at https://publicaccess.courts.in.gov/ICOR/.

Discretionary interlocutory appeals are rare beasts. They should only be used when necessary. There is nothing about the settled question raised in the Governor's motion to dismiss that requires immediate review of this Court's decision. As such, the Governor's motion should be denied.

III. Conclusion

Discretionary interlocutory appeals are uncommon. The Governor's Motion to Dismiss does not raise the sort of question for which a discretionary interlocutory appeal is appropriate. It is not a "substantial question of law", because the Indiana Court of Appeals has already rejected the Governor's argument. Moreover, there is nothing inadequate about the Governor's remedy on appeal. If the Governor is correct that *Stoffel v. Daniels* was wrongly decided, his argument has already been adequately preserved for appeal. In all likelihood, he will simply have to wait a short while to raise it as this case quickly proceeds to the merits. Accordingly, this Court should deny the Governor's Motion to Certify for Interlocutory Appeal.

Respectfully Submitted,

/s/ Thomas D. Cameron
Michael Rouker, Attorney No. 28422-53
Thomas Cameron, Attorney No. 29852-53

City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
legal@bloomington.in.gov
(812) 349-3426

CERTIFICATE OF SERVICE

I certify that on November 15, 2017, I electronically filed the foregoing documents using the Indiana Electronic Filing System (IEFS).

I further certify that on November 15, 2017, the foregoing document was served upon the following persons via IEFS.

Thomas M. Fisher
Elizabeth M. Littlejohn
Julia C. Payne
302 W. Washington Street
Indiana Government Center South, 5th Floor
Indianapolis, Indiana 46204

/s/ Michael Rouker
Michael Rouker
Thomas Cameron

City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
legal@bloomington.in.gov
(812) 349-3426