UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WILLIAM FEEHAN,

Plaintiff-Appellee,

Appellate Case No. 22-2704

v.

TONY EVERS, in his official Capacity as Wisconsin's Governor

Defendant-Appellant.

District Court No. 2:20-cv-01771
District Judge Pamela Pepper

REPLY BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS APPEAL

Federal Courts of Appeals conduct jurisdictional screening for the very purpose of protecting their jurisdiction, preserving valuable judicial resources, and avoiding confusion and waste when it is clear there is no live case and controversy. This appeal should be dismissed upon jurisdictional screening or by "summary disposition" as a matter of law. As briefed in Feehan's Motion to Dismiss this appeal (Dkt. 4 at 6), and as explained in the District Court's Order denying defendant's motion, *Overnite* is good and controlling law in this Circuit. *See Feehan v. Evers*,

No. 20-cv-1771, E.D. WI (2022) at ECF No. 113, pg. 23. A party *may not* bring a motion for sanctions long after an appeal has been dismissed. *Overnite Transp. Co. v. Chi. Indus. Tire Co*., 697 F.2d 789, 793-794 (7th Cir. 1983).

Defendant/Appellant Evers' motion for sanctions may not be considered in the district court because it lacks jurisdiction over the motion. *Overnite*, 697, F.2d at 793-794 (no case or controversy when sanctions motion filed in district court after mandate issued). Appellant did not seek sanctions against the Plaintiff and his counsel until almost four months after the case had been closed. *Feehan* at ECF No. 97. As Appellant concedes, *Overnite* is the controlling law in this Circuit. It unequivocally required the District Court to dismiss the case because there was no case or controversy before it.

Appellant does not claim the governing law was misapplied to the facts, nor that *Overnite* is not dispositive. (*See* Brief of Appellant, Doc. 6 at 2). Here, Appellant did not seek sanctions until one hundred and twelve (112) days after the case had been dismissed by the district court and two months after the mandate from this Court had issued.

The District Court was correct in determining that it does not have "jurisdiction to decide a sanctions motion after the appellate court has affirmed the district court's dismissing the case and issued its mandate." *Feehan* at ECF No. 113, pgs. 19-20. Alternately, the district court also held it would not have imposed sanctions anyway.[1]

Appellant Evers' much-belated Section 1927 motion lacked a live case or controversy. He cannot create one now. His appeal is nothing more than a further effort at his taxpayers' expense to harass, inflict costs upon, and punish good lawyers who filed a case raising federal issues of national importance with which he disagrees politically.[2] *See, Moss v.*

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[1] *See Feehan* at ECF No. 113, pg. 24 "In an abundance of caution, the court notes that if it did have jurisdiction to rule on the motion, it would not have awarded fees under 28 U.S.C. §1927. The court would be hard-pressed to find that the plaintiff unreasonably and vexatiously "multiplied" the litigation; other than the original complaint, the plaintiff filed only eight affirmative pleadings…the court has no basis on which to conclude that the plaintiff was "dilatory" or that he needlessly delayed proceedings; if anything (as the defendant also has argued), the plaintiff was pushing an extremely expedited schedule, which the court and the defendants struggled to accommodate."

[2] The political, punitive nature of Gov. Evers' appeal is obvious. The Wisconsin Attorney General ably represented the Wisconsin Elections Commission defendants in district court, obtaining an expeditious dismissal of Plaintiff Feehan's complaint. The Attorney General was authorized to represent Gov. Evers as well. Sec. 165.25(1m), Wis. Stats. Yet, the Governor chose to retain outside counsel, duplicating effort and cost at public expense. The Attorney General did not seek § 1927

Bush, 828 N.E.2d 994, 997 (Ohio 2005) (refusing to sanction Democrats for litigation challenging the 2004 Presidential Election in Ohio for alleged vote flipping and computer rigging of voting machines).

Of course, this Court could require full briefing, but given Appellant's appropriate admission that *Overnite* controls, and *Overnite* is dispositive on the absence of a case or controversy here[3], to proceed

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sanctions on behalf of the Commission; yet Gov. Evers did, claiming, ironically, that he did so because of "significant costs on the taxpayers of Wisconsin" that were "needless." ECF No. 97, pg. 2. Even after the district court's well-reasoned decision that she "would not have awarded fees" even if she had reached Gov. Evers' motion, ECF No. 113, pg. 24, Gov. Evers continues compounding needless costs to Wisconsin taxpayers, prosecuting an appeal he concedes is controlled by *Overnite.*

He now argues for plenary briefing without explaining how it would differ from his briefing of Appellee Feehan's motion, emphasizing an alleged circuit split, which signals that he intends petition the Supreme Court for a writ of certiorari, incurring even more needless costs to inflict further retribution and expense against Feehan's counsel. As the district court noted, Ever's *real* objection is to the merits of Feehan's claims: "The heart of the defendant's motion is his argument that the plaintiff should not have filed suit to begin with . . . ." ECF No. 113, pg. 24.

Having avoided facing the merits of Feehan's claims on procedural grounds, Gov. Evers now seeks to litigate those merits via a truncated § 1927 proceeding. (If the district court *did* have jurisdiction over the Governor's § 1927 motion, Feehan and his counsel would be entitled, at a minimum, to the plenary evidentiary hearing he requested to begin with that the Governor avoided.) *Overnite* controls. The gamesmanship should end.

[3] Contrary to Evers contention, there is no true "circuit split." The cases from other circuits that Evers cites are distinguishable. Two expressly distinguish *Overnite. See, e.g., Hicks v. S. Md. Health Sys. Agency*, 805

with full briefing would be a waste of this Court's time and scarce resources.[4]

Nor would dismissal now wreak a sea-change in this Court's review of questions of Article III jurisdiction or set new precedent for dismissing an appeal. Rather, this dismissal would be limited to the unusual facts of this case. Courts of Appeals have full authority to dismiss cases based on controlling law, to decide them on the summary calendar, or to proceed otherwise. *See, Joshua v. USA*, 17 F.3d 378, 380 (Fed. Cir. 1994)

F.2d 1165, 1167 (4th Cir. 1986) (distinguishing *Overnite*); *See, e.g., In re Ruben*, 825 F.2d 977, 982 (6th Cir. 1987) (distinguishing *Overnite* and writing that "unlike the appeal in *Overnite*, the appeal here was pending for only a brief time before it was dismissed due to inaction by Rabun and her attorneys...") *See also, Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90, 100 (3d Cir. 1988) (In the Rule 11 context, the Third Circuit has adopted a "supervisory rule…that motions [] requesting sanctions be filed in district court before the entry of a final judgment.") The remaining cases cited are also distinguishable on their facts. *See Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 333 (2d Cir. 1999) (finding jurisdiction in long simmering dispute but reversing award of sanctions); *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006) (District Court granted motion, dismissed case, and entered judgment on August 3, 2000; eight days later on August 11, 2000, a motion for attorneys fees was filed).

[4] Fed. R. Civ. P. 12 (b)(2) applies to motions to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12 (h)(3) makes clear that when the issue before the court is lack of subject matter jurisdiction, the court must dismiss the case. "(3) *Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.*" (Emphasis added).

("summary disposition is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.") *See also Groendyke Transport Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) ("summary disposition is necessary and proper… [when] the appeal is frivolous.").

The facts are undisputed. The District Court lacked jurisdiction, and this appeal should be dismissed upon application of controlling Circuit precedent.

Respectfully submitted, this 31st day of October, 2022.

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Certificate of Service

I hereby certify that on this 31st day of October 2022, the foregoing motion was served electronically on all counsel of record in this matter via electronic mail.

/s/ Sidney Powell
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