

No. 21-2180

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAUL GOLDMAN,
Plaintiff-Appellee,

v.

ROBERT H. BRINK, in his official capacity, *et. al.*,
Defendants-Appellants.

On Appeal from the United States District Court for
the Eastern District of Virginia

**MOTION TO DISMISS FOR WANT OF 4TH CIRCUIT JURISDICTION
AND REMAND TO THE THREE-JUDGE COURT FOR FURTHER
PROCEEDINGS**

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March 2, 2022

MOTION

Now comes Appellee *pro se* seeking dismissal for want of 4th Circuit jurisdiction and remand to the three-judge Court for further proceedings.

1. Appellee did raise certain jurisdictional concerns in his Response Brief.
2. Appellants addressed some of these concerns in their Reply Brief.
3. Appellee reviewed the various cases cited to date.
4. The one and only hearing in this matter occurred on October 12, 2021.
5. “Now...the Commonwealth, in their papers, alluded to a three-judge panel,” declared District Court Judge David Novak. JA 081.
6. “I think I have an obligation to seek a three-judge panel, but only when a decision is rendered on the merits” Judge Novak added. *Id.*
7. In correcting my interpretation of the relevant jurisdictional statute, Judge Novak said, “(a) district court of three judges shall be convened when an action is filed challenging the constitutionality of the apportionment of any statewide or legislative body.” JA 082.
8. Judge Novak said a single judge has the authority to decide “jurisdictional” issues prior to requesting a three-judge panel. JA 083.

9. Accordingly, Judge Novak ruled against Appellants, claiming they were not the proper parties for this instant matter as they were not the type of state officials declared immune from suit under the 11th Amendment as it has been interpreted since the seminal Supreme Court ruling in *Ex parte Young*, 209 U.S. 103 (1908).

10. This ruling came in his Order of October 12, 2021 (hereinafter the “Novak Order”).

11. No three-judge district panel existed at the moment he made his ruling.

12. On the same date, Judge Novak alerted Chief Judge Roger Gregory to the matter of a three-judge court.

13. “...I’ve already alerted Chief Judge Gregory. He’s the one that appoints the three-judge panel. He knows about this.” JA082.

14. On the same October 12, 2021, the “Gregory Order” was issued convening a three-judge district court panel for this case. JA 123. (The Order was not entered into the PACER system until October 13, 2021. Dkt. No. 44.)

15. As the Gregory Order says, “[t]he Honorable Judge David J. Novak has requested appointment of a three-judge district court...” Id.

16. In the Gregory Order, he names three judges, including Judge Novak, “to constitute a district court of three judges to hear and determine this matter.”

JA 124.

17. The Novak Order further says that by “October 18, 2021...Defendants shall notify the Court in a filed pleading whether they are appealing the Court’s *ruling on sovereign immunity*. Should...Defendants file a notice of appeal, the Court will immediately stay all proceedings in this case.” JA 071 and JA 072 (Emphasis added).

18. On October 18th, Appellants filed a Notice of Appeal saying there were appealing to this 4th Circuit Court the October 12th Novak Order “denying the Eleventh Amendment immunity defense raised in Defendants’ Motion to Dismiss the Second Amended Complaint.” JA 125.

19. It took until December 2021 before Appellants actually filed their appeal and the memorandum of justification thereof.

THE REASONS FOR DISMISSING THE APPEAL WITHOUT ORAL ARGUMENT

20. *Shapiro v. McManus*, 136 S. Ct. 450 (2015) considered under what circumstances, if any, a district judge is free to “determin[e] that three judges

are not required” for an action “challenging the constitutionality of the apportionment of congressional district.” Id at 453.

21. *Shapiro* says more “likely that Congress intended a three-judge court, and not a single district judge, to enter all final judgments...” Id at 455.

22. Judge Novak had the authority to decide the sovereign immunity question until the moment the Gregory Order was signed, transferring jurisdiction over the instant matter to the three-judge district court of which Judge Novak would now be a member. 28 U.S.C. Section 2284(b)(1). See *Hicks v. Pleasure House*, 404 U.S. 1 (1971).

23. Upon creation of the three-judge district court, the Appellants had the right to ask for the three judges to convene to review the ruling, not the 4th Circuit Court. *Association Theatres v. Wade*, 487 F. 2d 1221 (1972).

24. The statute creating a three-judge panel says a “single judge may conduct all proceedings except the trial...but the action of a single judge may be reviewed by the full court any time before final judgment.” 28 U.S.C. Section 2284(b)(3).

25. The plain meaning of the Gregory Order makes clear that the three-judge panel, going forward, is the sole district court overseeing all matters in this instant appeal.

26. As soon as the Chief Judge signed his Order, Appellants lost any right to appeal to the 4th Circuit Court and should have appealed as pointed out in *Hicks and Associated Theatres, supra*.

REMEDY

Pro se Appellee asks that the appeal to the 4th Circuit Court of Appeals be dismissed and the matter remanded to the three-judge district court having jurisdiction over this case since October 13th, with an admonition for resolving the remaining issues as soon as possible.

Respectfully submitted,

By: /s/ Paul Goldman

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CERTIFICATE OF SERVICE

I certify that on March 2, 2022, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. A true copy was also sent electronically to:

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/s/ Paul Goldman

Paul Goldman
March 2, 2022