

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO.: 612-8-10 Wncv

SH
2011 MAY -9 P 4:03

GERALD TRUDELL et al

v.

STATE OF VERMONT, SECRETARY
OF STATE

DECISION ON MOTION FOR INTERLOCUTORY APPEAL

The State seeks permission to take an interlocutory appeal of the Superior Court's order denying the motion to dismiss.

By decision dated February 22, 2011, the court denied the motion to dismiss on the ground that the constitutional test required by *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) requires fact-based judgments about the "character and magnitude of the asserted injury" to the plaintiff and "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson, id.* at 789. These are not decisions which can be made without evidence. Put another way, the state cannot win dismissal of the case against it by asserting in its moving papers that it has good reasons to support the early filing deadline.

V.R.A.P. 5 provides for interlocutory appeal upon a showing:

1. that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and
2. that an immediate appeal may materially advance the termination of the litigation.

I. Controlling question of law

At this stage of the case, the "controlling question of law" is whether a hearing is required. Motions to dismiss are rarely granted in cases requiring the court to balance competing interests. *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1187 (10th Cir. 2003) ("A court's function on a Rule 12(b)(6) motion 'is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.'") They are rarely granted in cases such as this which present a novel legal theory. *In Re A.G.*, 151 Vt. 167 (1989). They are never granted unless there exists no combination of facts and

circumstances which could entitle the plaintiff to relief. *Richards v. Town of Norwich*, 169 Vt. 44 (1999).

These principles are hardly controversial. Nor do they raise grounds for a legitimate difference of opinion. When this case is examined through a procedural lens, it is very clear that the motion to dismiss is the wrong way to resolve the parties' dispute.

The state argues that the court misunderstood the correct level of constitutional scrutiny to bring to bear on the issue. This is an entirely appropriate issue to raise in the course of an evidentiary hearing. It puts the cart before the horse, however, to suggest that it is necessary or practical for the appellate court to give its advice on the proper legal test before the matter is heard and ruled upon by the trial court. Since the parties and the court have agreed that the *Anderson* and *Burdick* decisions supply the appropriate test, the differences among the three of us must be relatively narrow.

For these reasons, the court concludes that on the threshold issue of whether the case may be dismissed without hearing evidence, there is little room for disagreement and no substantial ground for a difference of opinion.

II. Advancing the litigation

Few steps are more likely to slow the litigation than the proposed interlocutory appeal. As matters stand now, the trial will be over and a court ruling out within two months. An appeal from a final order could be complete before the 2012 election deadline.

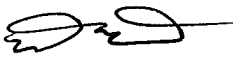
If the case is appealed now without a final order, it is highly likely to be sent back for hearing and rescheduled for trial in 2012. If the final order requires an appeal – as seems only reasonable in the case of a significant election law issue – it is extremely unlikely that the interlocutory appeal, the hearing on remand, and a second appeal on the merits could be completed before 2013 – long after the next general election.

For these reasons, the court concludes that granting the motion for interlocutory relief will greatly delay this matter.

CONCLUSION

The court denies the motion for interlocutory appeal.

Dated: May 9, 2011


Geoffrey Crawford,
Superior Court Judge