

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs,

Case No. 20- CV-249

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
REPUBLICAN PARTY OF WISCONSIN AND
WISCONSIN STATE LEGISLATURE,

Intervening Defendants

SYLVIA GEAR, et al.,

Plaintiffs,

Case No. 20- CV-278

v.

DEAN KNUDSON, et al

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
REPUBLICAN PARTY OF WISCONSIN AND
WISCONSIN STATE LEGISLATURE,

Intervening Defendants.

REVEREND GREG LEWIS, et al.,

Plaintiffs,

Case No. 20- CV-284

v.

DEAN KNUDSON, et al.,

Defendants.

and

REPUBLICAN NATIONAL COMMITTEE,
REPUBLICAN PARTY OF WISCONSIN AND
WISCONSIN STATE LEGISLATURE,

Intervening Defendants

**DEFENDANTS’ RESPONSE TO *LEWIS* PLAINTIFFS’ MOTION TO
DISMISS**

Defendants Dean Knudson, Julie M. Glancey, Robert F. Spindell, Jr., Mark L. Thomsen, Ann S. Jacobs and Marge Bostelmann (collectively, the “WEC”), by their undersigned counsel, respond as follows to the Plaintiffs’ Motion to Dismiss in *Lewis et al. v. Knudson*, Case No. 20-cv-284 [‘284 Case, Dkt. No. 147].

The WEC agrees that the April 7 Spring Election rendered the *Lewis* Plaintiffs’ claims moot and, therefore, that the *Lewis* case should be dismissed. The WEC objects, however, to the *Lewis* Plaintiffs’ request that this Court award costs because this Court denied the remedy which those plaintiffs sought – postponement of the April 7 Spring Election.

BACKGROUND

The *Lewis* Plaintiffs filed their complaint on March 26, seeking the following relief:

- A. A declaration that, in the context of the COVID-19 crisis, proceeding with the in-person election on April 7 was an undue burden on the Plaintiffs' constitutional rights (and those of their members, as applicable) and directing the WEC to reschedule the election;
- B. A declaration that, in the context of the COVID-19 crisis, Wisconsin's electronic and by-mail registration deadlines; the proof of residence and voter ID for voter registration and absentee applications; and the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted are unconstitutional.
- C. A declaration that, in the context of the COVID-19 crisis, the WEC had the authority and duty to suspend Wisconsin's election laws.
- D-F. Enjoining the WEC from enforcing of various aspect of Wisconsin election law in the context of the COVID-19 crisis and while Wisconsin's Emergency Order #12 was in place.
- G. An order requiring the WEC to supply envelopes and printed ballots to municipalities in sufficient number such that every registered voter could receive an absentee ballot in advance of a rescheduled election.
- H. Enjoining the WEC from, "rejecting ballots that are postmarked on or before Election Day and arrive at the municipal clerk's office by June 2, 2020."

- I. Enjoining the WEC from, “enforcing the requirement that municipalities allow in-person voter registration and/or in-person absentee voting until after Emergency Order #12, as it may be extended, has expired.”
- J. Order the WEC to permit clerks to mail election ballots to all registered voters and postpone in-person election voting in polling places until the election could be rescheduled.
- K. Order the WEC to extend the registration deadline to May 1, 2020.
- L. Ordering the WEC to establish Tuesday, June 2, 2020 as the deadline by which clerks must have counted all returned, mailed absentee ballots.
- M. An award of costs and fees.

[‘284 Case, Dkt. No. 147, pp. 65-67]. By the time the *Lewis* Plaintiffs filed suit, the Plaintiffs in *DNC et al. v. Bostelmann et al.*, Case No. 20-CV-249 had filed their first Amended Complaint, which sought some of the same relief, but did not request that this Court postpone the April 7, 2020 Spring Election. [‘249 Case, Dkt. No. 55]. In part, the *DNC* Amended Complaint requested relief enjoining the WEC, “from rejecting ballots that are postmarked on or before Election Day and arrive at the municipal clerk’s office within a minimum of ten days after Election Day; Ballots that do not have a postmark or other marking from the USPS shall be presumed to have been mailed by Election Day.” [‘249 Case, Dkt. No. 55, p. 19].

On March 27, 2020, the *DNC* Plaintiffs filed their Motion for Preliminary Injunction and Reconsideration of the Court’s Ruling on the By-Mail Absentee Deadline and Documentation Requirements. The *DNC* Plaintiffs requested a

preliminary injunction enjoining the enforcement of various election laws, including “(5) the requirement that polling places receive absentee ballots by 8:00 p.m. on Election Day to be counted...” The next day, the *Lewis* Plaintiffs filed their Motion for Temporary Restraining Order and Preliminary Injunction. The motion sought, *inter alia*, an order directing the WEC to reschedule in-person voting and an injunction restraining the WEC from, “enforcing the requirement that polling places receive absentee ballots by 8:00 p.m. on Election Day to be counted...” [284 Case, Dkt. No. 17, p. 2].

The *Lewis* Plaintiff’s Brief in Support of their motion focused exclusively on their request that this Court reschedule the April 7 Spring Election:

“Simply put, if the election remains on April 7, it will disenfranchise hundreds of thousands or more Wisconsin voters.” [284 Case, Dkt. No. 18, p. 2].

“The only effective remedy is severe, but it is both necessary and proportionate to a crisis unique in our State’s history: suspend the April 7 election until after the expiration of Governor Evers’ Emergency Order #12, currently set for April 24.” [284 Case, Dkt. No. 18, p. 2].

“... the Defendants’ and State’s interest in holding the election on April 7 must bend to Plaintiffs’ constitutional rights.” [284 Case, Dkt. No. 18, p. 2].

“In the event that the election is allowed to proceed under the state’s statutory schedule and regulations, unprecedented numbers of voters will not be able to participate and exercise the franchise.” [284 Case, Dkt. No. 18, p. 11].

“This Court can and should delay the April 7 election.” [284 Case, Dkt. No. 18, p. 11].

The *Lewis* Plaintiffs concluded with a request that this Court postpone the April 7 Spring Election until the end of Governor Evers' emergency order, suspend the witness requirement and photo ID requirements, and extend the process to request and submit absentee ballots. [‘284 Case, Dkt. No. 18, p. 13]. The same day, this Court consolidated the *Lewis* case with *DNC et al. v. Bostelmann et al.* and *Gear et al. v. Bostelmann et al.* [‘249 Case, Dkt. No. 86]. The parties and various *amici* briefed both motions, along with a motion in *Gear*.

While the motions were pending, the WEC notified the Court and parties that it would not object to an order requiring any absentee ballot postmarked by April 7, 2020 and received by April 10 to be counted. [‘249 Case, Dkt. No. 123]. The WEC later advised that it would not object to counting ballots received by April 13 at 4:00 p.m. [‘249 Case, Dkt. Nos. 152].

This Court heard both motions, as well as the motions in *DNC* and *Gear* on April 1. On April 2 this Court issued its decision and a preliminary injunction, enjoining the WEC from the following: (1) enforcing the requirement that absentee ballots be received on Election Day - the Court extended the deadline to 4:00 PM on April 13; (2) enforcing the requirement that requests for absentee ballots be received by April 2 – the Court extended that deadline to 5:00 p.m. on April 3; and (3) enforcing the witness certification as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts. [‘249 Case, Dkt. Nos. 170, 171]. This Court specifically denied the *Lewis* Plaintiffs' request that it postpone the April 7

Spring Election. [‘249 Case, Dkt. No. 170, p. 36]. Intervening Defendants, the Republican National Committee and Republican Party of Wisconsin, along with Proposed Intervenors [now Intervening Defendants], the Wisconsin State Legislature, immediately filed Notices of Appeal. [‘249 Case, Dkt. Nos. 172, 173].

The WEC sought clarification regarding (1) whether unofficial results should be announced prior to April 13 and (2) when an absentee voter needs to submit a written statement. [‘249 Case, Dkt. No. 174]. The Court issued an amended preliminary injunction prohibiting the release of preliminary results and clarifying that a voter could provide written affirmation prior to tabulation. [‘249 Case, Dkt. Nos. 179, 180]. The RNC and Legislature appealed from the amended injunction. [‘249 Case, Dkt. Nos. 182, 185].

On April 6, the Seventh Circuit Court of Appeals stayed only this Court’s injunction pertaining to the witness certification. [‘249 Case, Dkt. No. 189]. The RNC and Legislature sought and received an emergency stay from the U.S. Supreme Court which required that, to be counted, ballots had to be postmarked on or before Election Day. *DNC v. RNC*, 589 U.S. ____ (2020).

ARGUMENT

I. This Court Should Deny the *Lewis* Plaintiffs’ Request for Statutory Costs and Fees Because They Did Not Prevail.

A district court may impose terms and conditions on a voluntary dismissal. Fed. R. Civ. P. 41(a)(2). Federal Rule of Civil Procedure 54(d) provides: “Unless a federal statute, these rules, or a court order provides otherwise, costs—other than

attorney's fees—should be allowed to the prevailing party.” Fed. R. Civ. P. 54(d). “Rule 54(d) creates a presumption that the prevailing party will recover costs, and that the ultimate decision to award costs is within the district court's discretion.” *Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co.*, 854 F.2d 219, 221 (7th Cir. 1988). Similarly, 42 U.S.C. section 1988 permits an award of attorneys’ fees and non-taxable expenses to prevailing parties¹. 42. U.S.C. § 1988 (b). The definition of “prevailing party” under the Rule and statute are analogous. *See Mother and Father v. Cassidy*, 338 F.3d 704, 708 (7th Cir. 2003).

A party may be a prevailing party if it has prevailed on some, but not all, of its claims, but only if the party has prevailed on an important matter in the litigation. *Harnrahan v. Hampton*, 446 U.S. 754, 757-758 (1980). “[P]arties are said to have prevailed in litigation for ‘attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.’” *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 414 (7th Cir. 2005), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). “[A]t a minimum, to be considered a prevailing party ... [a party] must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.” *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–793 (1989). That resolution must be in place at the time of judgment. *Farrar v. Hobby*,

¹ The WEC is mindful that the *Lewis* Plaintiffs have not, yet, moved for an award of attorneys’ fees and non-taxable costs. They have, however, requested that this Court permit such a motion. [‘284 Case, Dkt. No. 147]. Because the *Lewis* Plaintiffs did not prevail, however, this Court should deny this request. The WEC reserves any argument regarding the reasonableness of attorneys fees, as well as any objection that fees are not related to the actual outcome achieved. *See Hensley*, 461 U.S. at 435-36.

506 U.S. 103, 111 (1992). In cases involving discrete sets of plaintiffs seeking various forms of relief, a court may award costs and fees to some plaintiffs and not others. *Hastert v. Illinois State Bd. of Elections*, 28 F.3d 1430, 1443 (7th Cir. 1993).

Generally, “a voluntary dismissal with prejudice renders the opposing party a “prevailing party” within the meaning of Rule 54.” *Mother and Father*, 338 F.3d at 708. While the *Lewis* Plaintiffs did not specify, dismissal for mootness is generally with prejudice. *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) (“Because this case was rendered moot ... a dismissal with prejudice is indicated).

In this case, the *Lewis* Plaintiffs did not prevail because they did not achieve the relief they requested – that this Court postpone the April 7 Spring Election. This was the “principal issue” in the *Lewis* case throughout its existence. *Hastert*, 28 F.3d at 1439-40. Indeed, it is how the *Lewis* Plaintiffs characterized their suit from the outset:

Plaintiffs seek an order from this Court directing Defendants to postpone the current April 7, 2020 election to a date no earlier than the expiration of Emergency Order #12 issued by Wisconsin Governor Tony Evers on March 24, 2020, and to extend from April 7, 2020 to June 2, 2020 the deadline by which municipal clerks must have counted all returned mailed ballots for the Wisconsin spring election.

[‘284 Case, Dkt. No. 1, ¶ 1]. The Court specifically denied this request in its April 2 Decision. [‘249 Case, Dkt. No. 170].

The *Lewis* Plaintiffs are not a prevailing party as a result of the more limited relief awarded. Following the orders of the Court of Appeals and Supreme Court, the relief in effect at the time of the election was the extension of the receipt deadline to April 13 and the injunction against reporting preliminary election

results, as well as a brief extension of the deadline for electors to request an absentee ballot. [‘249 Case, Dkt. No. 180]. The *Lewis* Plaintiffs did not seek this relief. Instead, the *Lewis* complaint requested an injunction prohibiting the WEC from “rejecting ballots that are postmarked on or before Election Day and arrive at the municipal clerk’s office **by June 2, 2020.**” [‘284 Case, Dkt. No. 1, p. 66, ¶ H]. (emphasis added). Similarly, they requested that this Court order the WEC, “to establish **Tuesday, June 2, 2020** as the deadline by which municipal clerks must have counted all returned mailed absentee ballots.” [‘284 Case, Dkt. No. 1, p. 67, ¶ L]. These requests, of course, were conditioned on this Court delaying the election, which did not occur. The *Lewis* Plaintiffs’ request for a postponement was the gravamen of their complaint and the entire focus of their Motion for a Temporary Restraining Order and Preliminary Injunction. [‘284 Case, Dkt. Nos. 17, 18]. They did not request an extension of the deadline to request an absentee ballot, nor an injunction against the release of preliminary results.

Other plaintiffs, particularly the *DNC* Plaintiffs, sought relief closer to what the Court ordered. Permitting the *Lewis* Plaintiffs to recover their costs (and eventually, fees) would impose a duplicative burden on the WEC which, notably, did not object to the major form of relief afforded by this Court’s Amended Preliminary Injunction – the extension of the receipt deadline. [‘249 Case, Dkt. Nos. 123, 152].

CONCLUSION

For the reasons stated herein, Defendants Dean Knudson, Julie M. Glancey, Robert F. Spindell, Jr., Mark L. Thomsen, Ann S. Jacobs and Marge Bostelmann respectfully request that this Court grant the *Lewis* Plaintiffs' Motion to Dismiss but deny their requests regarding costs and fees.

Dated: 5/28/2020

LAWTON & CATES, S.C.

Electronically signed by Daniel S. Lenz

Dixon R. Gahnz, SBN: 1024367

Daniel S. Lenz, SBN: 1082058

Daniel P. Bach, SBN: 1005751

Terrence M. Polich, SBN: 1031375

345 W. Washington Avenue, Suite 201

P.O. Box 2965

Madison, WI 53701-2965

Phone: (608) 282-6200

Fax: (608) 282-6252

dgahnz@lawtoncates.com

dlenz@lawtoncates.com

dbach@lawtoncates.com

tpolich@lawtoncates.com