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84 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 84 MAP 2019

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA and LORRAINE HAW,

Appellee

v.

KATHY BOOCKVAR, The Acting Secretary of the Commonwealth,

Appellant

ANSWER TO APPELLEES' EMERGENCY APPLICATION TO LIFT SUPERSEDEAS

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON OCTOBER 30, 2019 AT NO. 578 MD 2019

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DATE: November 3, 2019

Appellant Kathy Boockvar, Acting Secretary of the Pennsylvania Department of State (Secretary), hereby files this Answer to Appellees' Emergency Application to Lift Supersedeas and in opposition thereof, sets forth the following:

I. The League's Applications and the Commonwealth Court's Post-Appeal Order Implicitly Concede that the Original Order Lifting the Supersedeas was Defective.

In its October 30, 2019 Order, the Commonwealth Court *sua sponte* and preemptively lifted the automatic supersedeas that the Secretary, on appeal, is entitled to by operation of law. The League does not dispute that it did not seek such relief below, nor does it cite to any authority that suggests, contrary to the language of Pennsylvania Rules of Appellate Procedure 1732 and 1737, no application was necessary.

In an implicit recognition of this fatal procedural flaw, the League filed, post-appeal, an emergency application in both this Court and the Commonwealth seeking that the supersedeas be lifted. And on Saturday, November 2, 2019, the Commonwealth Court issued an order granting that application. Like its prior opinion, that one-page order contained no supersedeas analysis.

II. The League's Application Grossly Mischaracterizes What Occurred in the Commonwealth Court.

In their application, the League assert that the Secretary proffered no evidence "that the existence of an injunction would change voter behavior." Application at 3. This is false.

During a conference preceding the hearing, the trial judge informed counsel for the Secretary that she did not want to hear from any witnesses on harms. And that counsel would be able to present such evidence through argument. The League acknowledges "the court's decision not to hear the witness from the Department of State . . . ." Application at 3. And this directive from the court was referenced by the court during the hearing. Transcript[1] at 5:23-6:3 ("We're not going to need any witnesses. There's no challenge to the – the costs and the expenditures and other issues that the – that the General Assembly went through in terms of harms. You're going to be able to just talk about that in your argument, Ms. Boland"); at 104:11-12 ("The petitioners agreed to stipulate to all the harms in terms of costs and whatnot. So I know what they are . . . in terms of the – the dollars and the money spent and the efforts made for the polling places and that sort of thing. So they did stipulate to that").

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[1] A copy of the October 23, 2019 hearing transcript was filed along with Appellees' brief. We will cite to the transcript by page and line numbers.

Given the trial court's directive, counsel for the Secretary did proffer—at least three times—what her witness would have presented if permitted. For example, counsel proffered that "[the Secretary's] witness was going to testify to the harms that would happen if . . . the certification was withheld." Transcript at 104:23-25. When told by the trial court that the harms she was referencing in argument were "speculative," counsel again proffered that "we could also put our witness up, Your Honor, and he could testify as to his experience in terms of confusion at the polls . . . ." Transcript at 113:13-17. The trial court told counsel such evidence was unnecessary. *Id.* at 16-19.

Finally, given the trial court's directive, counsel for the Secretary asked that court to take notice of what the witness would have testified about: "If an injunction is issued, even as to certifying the ballot -- and we do have a witness here. And you can take notice of what he was going to testify to as to all of the harm that would befall the Commonwealth should this -- the certification be withheld." *Id.* at 104-6-10.

With respect to the only testimony that the trial court did permit, the League asserts that Mr. Greenblatt's testimony was unrebutted by the Secretary. Application at 9. This assertion, however, ignores that witness's own testimony on cross-examination. Mr. Greenblatt conceded that the 1998 Crime Victims Act already

provides many of the victim rights contained by the proposed Amendment. Transcript at 54:20-56:7. The cross-examination also revealed that Mr. Greenblatt's testimony was not supported by any investigations or studies, and that Mr. Greenblatt had no data on any harms caused by the decades-old Crime Victim's Act. Transcript at 72:4-16.

III. The League's Application Fails, in Any Way, to Address the Analytical Errors of the Commonwealth Court in Lifting the Automatic Supersedeas. Indeed, the League Invites this Court to Make the Same Error.

As detailed in our emergency application to reinstate the supersedeas, an appellee, in its application, must make a "strong showing" on *each* of the following elements to lift a supersedeas: "a substantive case on the merits[;]" vacating the supersedeas will prevent "irreparable injury[;]" "other parties will not be harmed[;]" and vacating the supersedeas "is not against the public interest." *Dep't of Envtl. Res. v. Jubelirer*, 614 A.2d 199, 202-03 (Pa. 1989); *Public Utility Comm'n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983).

The Commonwealth Court failed to conduct this analysis before lifting the supersedeas *sua sponte* or in its post-appeal order. In fact, it performed no supersedeas analysis at all in support of either order. Instead, the Commonwealth Court merely referenced, in one sentence, its preliminary injunction analysis, citing solely to this Court's decision in *Jubelirer*, 614 A.2d at 203. This is perplexing, as

that decision required the Commonwealth Court to conduct a *separate* analysis never undertaken here.

In *Jubelirer*, this Court admonished the Commonwealth Court for improperly conflating the preliminary injunction test with the separate test for vacating the automatic supersedeas.

> We must *not* blur the distinction between the standard required for the entry of a preliminary injunction . . . and the requirements necessary for the entry of a stay [of the automatic supersedeas] . . . .

Jubelirer, 614 A.2d at 203 (internal citations omitted) (emphasis added). The test prohibiting the lifting of a supersedeas is not the balancing of harms, as in a preliminary injunction analysis, but the existence of any harm to any party. *Jubelirer*, 614 A.2d at 203.

Here, the Commonwealth Court ignored this distinct supersedeas analysis and replaced it with its flawed preliminary injunction analysis. Oct. 30, 2019 Order at 39. On this basis alone, the League's application should be denied and the order(s) lifting the automatic supersedeas should be reversed. *See Germantown Cab Co. v. Philadelphia Parking Authority*, 15 A.3d 44 (table), 609 Pa. 64, 65 (2011) (*per curiam*) (reinstating automatic supersedeas without discussion where Commonwealth Court's order vacating it was clearly deficient).

In their own application, the League makes no attempt to address these fundamental analytical errors. Indeed, the League invites this Court to make the same errors. For the reasons discussed above and more fully in our emergency application, the Court should reaffirm its holding in *Jubelirer* and reinstate the supersedeas.

CONCLUSION

The Court should deny Appellees' Emergency Application to Lift Supersedeas.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Howard G. Hopkirk ___

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CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing answer by electronic service to the following:

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