IN THE SUPREME COURT
OF THE STATE OF FLORIDA

UNITED STATES OF AMERICA, et al., Defendants-Appellants,	)	
v.	)	No. SC07-1074
MAUREEN STEVENS, et al., Plaintiffs-Appellees.	)	

DEFENDANT-APPELLANT'S UNOPPOSED MOTION TO WAIVE CERTAIN RULES AND REQUIREMENTS

For the reasons set forth below, defendant-appellant the United States of America hereby respectfully moves this Court to waive Fla. R. App. P. 9.150(e), and any other provision of state law concerning payment by the United States of a filing fee or other fees in conjunction with this proceeding. The United States also respectfully moves this Court to waive Fla. R. App. P. 9.440(a), and Fla. R. Jud. Admin. 2.505, 2.510, and to authorize attorneys employed by the United States Department of Justice (Douglas N. Letter and H. Thomas Byron III) to continue to represent the United States in this proceeding.

1. This case comes before the Court on a certified question of Florida law from the United States Court of Appeals for the Eleventh Circuit. See

Stevens v. Battelle Memorial Inst., ___ F.3d ___, 20 Fla. L. Weekly Fed. C 705, 2007 WL 1631370 (11th Cir. June 7, 2007).

2. In cases certified by a federal court, this Court normally requires that "the costs of these proceedings shall be divided equally between the parties unless otherwise ordered by the court." Fla. R. App. P. 9.150(e). Although it does not specifically mention filing fees, the rule is apparently the source of the clerk's direction that each party must remit half of the $300 filing fee.

3. It is a seminal principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them." M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819). The Constitution of the United States makes clear in the Supremacy Clause that "the Judges in every State shall be bound [by federal law], any Thing in the constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. The principle of federal supremacy requires "modif[ication of] every power vested in subordinate governments, as to exempt [the federal government's] own operations from their influence." M'Culloch, 17 U.S. at 427. A corollary to the supremacy principle is the rule

that "a waiver of federal sovereign immunity cannot be implied but must be unequivocally expressed." Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990) (citations omitted).

4. The United States Supreme Court has expressly held that principles of federal supremacy prohibit state courts from assessing litigation fees against the federal government, absent an express and specific waiver of sovereign immunity. See United States v. Idaho, 508 U.S. 1 (1993). Even a general waiver of sovereign immunity, such as the statute at issue in Idaho (which subjected the United States to state court law and procedure generally in certain litigation), is insufficient to require "monetary exactions from the United States in litigation" in state court. Id. at 8.

5. Here, no federal statute waives sovereign immunity, either generally or specifically, subjecting the United States to state law in this case. This case arises from a complaint in federal district court, pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, et seq. The FTCA waives the government's sovereign immunity only in federal court in specific circumstances, for particular types of damages. See 28 U.S.C. §§ 2674, 2679, 2680. And, although the FTCA looks to the substantive tort law of the state where a tortious act or omission occurred, federal, not state,

law governs the incidents of litigation. Thus, there is no arguable basis for concluding that the United States has waived its immunity from litigation fees in state court in this case.

6. The Supreme Court's decision in Idaho controls here, and precludes the assessment of filing fees against the United States. Accordingly, the government respectfully requests that this Court waive any provision of law or other authority directing the payment of a filing fee (or any portion thereof) by the United States.[1]

7. Similar principles of federal supremacy likewise counsel against application of rules governing attorney admission and regulation to federal attorneys representing the United States in this case. This Court's Acknowledgment Of New Case, dated June 11, 2007, directs that "all pleadings signed by an attorney must include the attorney's Florida Bar number." Acknowledgment at 2 (capitalization omitted). Applicable rules permit out-of-state attorneys to appear before this Court only upon compliance with stringent requirements of registration and payment of a $250 fee. See Fla. R. App. P. 9.440(a), and Fla. R. Jud. Admin. 2.505(a), 2.510.

[1] This Court granted a similar motion in United States v. Dempsey, No. 81,705, opinion reported at 635 So.2d 961 (Fla. 1994).

8. As explained above, Idaho makes clear that payment of a fee in these circumstances is not permitted by the Constitution. Moreover, the procedural requirements of the Florida rules concerning out-of-state attorneys are themselves preempted by federal law. Under applicable federal statutory and regulatory authority, the Attorney General of the United States may send any Department of Justice attorney into any court in the United States (including state courts) to attend to the interests of the United States. See 28 U.S.C. 517 and 28 CFR 77.1(b).

9. Federal law requires that a government attorney "shall be subject to State laws and rules * * * governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. Consistent with that statutory obligation, government attorneys representing the United States in this case will fully comply with the ethical requirements of this Court and the Florida Bar, as set forth in 28 C.F.R. § 77.3. Regulations implementing § 530B, however, make clear that federal law does not subject a government attorney to "[a]ny statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure," and specifically does not require compliance with any "statute, rule, or regulation requiring licensure or

membership in a particular state bar." 28 C.F.R. § 77.2(h)(1),(3). Accordingly, federal law does not require a government attorney to be a member of the Florida Bar, nor does federal law require government attorneys to comply with procedural rules governing admission or appearances by out-of-state attorneys.

10. The United States Supreme Court has recognized that state law regulating the practice of law "must yield when incompatible with federal legislation." Sperry v. Florida, 373 U.S. 379, 384 (1963) (internal quotation marks omitted). And the federal supremacy concerns underlying the decision in that case are even stronger here, in light of the federal government's immunity from state regulation. "[T]he activities of the Federal Government are free from regulation by any state." Mayo v. United States, 319 U.S. 441, 445 (1943), quoted in Hancock v. Train, 426 U.S. 167, 179 (1976). In Hancock, the United States Supreme Court held that a state licensing agency could not require a federal installation to obtain a state permit concerning air pollution. And in Johnson v. Maryland, the Supreme Court rejected a state's effort to require a federal government truck driver to obtain a state license, referring to the "immunity of the instruments of the United States from state control in the performance of their duties," and emphasizing that a state may

not "require[] qualifications in addition to those that the [federal] Government has pronounced sufficient." 254 U.S. 51, 55 (1920). These longstanding precedents demonstrate that the Attorney General's selection of attorneys to represent the United States cannot be subject to additional licensing or other requirements by a state government.

11. H. Thomas Byron III is the government attorney principally responsible for representing the United States in this litigation, and Douglas N. Letter is the supervisory attorney. Both attorneys are employed by the United States Department of Justice, Civil Division, Appellate Staff, and have represented the United States and its agencies, officers, and employees in state and federal appellate courts throughout the United States for decades (ten years and 28 years, respectively). Both are active members of the bar of the District of Columbia, and neither has ever been subject to any disciplinary action by a court or bar regulatory authority.[2] Both have been representing the United States in this litigation throughout the appeal to the Eleventh Circuit, and will continue to do so when the case returns to that federal court following this Court's decision on the certified question of state law. They will

[2] Thomas Byron is also an inactive member of the bars of Florida and Colorado. Under Fla. R. Jud. Admin. 2.510, inactive membership in the Florida Bar appears to render an attorney ineligible for appearance in this

appear in this Court solely to represent the interests of the United States in this ongoing litigation, and have no expectation of appearing in a Florida court in the foreseeable future.

12. This Court should waive those provisions of Florida rules that could create a conflict with federal law by allowing state courts or other officials to review or reject the selection by the United States Attorney General of government attorneys to represent the interests of the United States. Such a discretionary waiver by the Court would avoid any such conflict, and thus avoid potentially difficult questions of federal preemption of state law.[3]

13. I certify that Philip Burlington, counsel for appellee, and William O'Brien, counsel for appellant Battelle Memorial Institute, in telephone calls to

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Court.

[3] The Supreme Court of Montana recently waived its attorney admission (and pro hac vice) rules in a similar case on certified questions of state law from federal court, authorizing Thomas Byron to appear and argue before the state supreme court, without requiring compliance with Montana's admission requirements. See Oberson v. United States, MT No. OP06-0232, Order (Apr. 17, 2007) (copy attached).

government counsel Thomas Byron on June 22, have authorized us to state that they do not oppose the requested waivers.

CONCLUSION

For the foregoing reasons, the United States respectfully moves this Court to waive Fla. R. App. P. 9.150(e), and any other provision of state law concerning payment by the United States of a filing fee or other fees in conjunction with this proceeding. The United States also respectfully moves this Court to waive Fla. R. App. P. 9.440(a), and Fla. R. Jud. Admin. 2.505, 2.510, and to authorize attorneys employed by the United States Department of Justice (Douglas N. Letter and H.

Thomas Byron III) to continue to represent the United States in this proceeding.

Respectfully submitted,

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June 22, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have, this 22d day of June, 2007, served a copy of the foregoing Motion to Waive Certain Rules and Requirements, by sending a copy of the Motion by First Class mail, postage prepaid, to counsel listed below.

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