

Case No. 22-1534

United States Court of Appeals for the Sixth Circuit

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, et al,
Plaintiffs-Appellees,

v.

TOWNSHIP OF PENINSULA, MI,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Michigan

**APPELLEE’S MOTION TO STRIKE NON-PARTY PROTECT THE
PENINSULA’S RESPONSE TO APPELLANT’S MOTION TO STAY
INJUNCTION PENDING APPEAL [41]**

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I. INTRODUCTION

Appellees (the “Wineries”) move to strike Protect the Peninsula’s Response in Support of Appellant Peninsula Township’s Motion to Stay Injunction Pending Appeal (Dkt. 41-1) because this Court lacks jurisdiction to receive such a filing in this case. Alternatively, the Wineries move to strike the response under 6 Cir. R. 25(e)(1)(A)(ii) because it was filed after the deadline set by this Court.

II. BACKGROUND

There are two separate appeals pending in this Court from *Wineries of the Old Mission Peninsula Association, et, al., v. Peninsula Township*, Case No. 1:20-cv-1008 (W.D. Mich.). In Case No. 21-1744, a panel of this Court reversed the District Court’s decision to deny Protect the Peninsula’s motion to intervene. *See Wineries of the Old Mission Peninsula Ass’n v. Twp. of Peninsula, Michigan*, 41 F.4th 767, 2022 WL 2965614 (6th Cir. 2022). Although the panel issued an opinion on July 27, 2022, the mandate has not yet issued under Federal Rule of Appellate Procedure 41. Under the normal Rule 41 timeline, the mandate will issue on August 17, 2022.

In the meantime, Peninsula Township began a separate appeal in this case, Case No. 22-1534, from the District Court’s entry of a preliminary injunction. Peninsula Township filed the notice of appeal on June 17, 2022. (Notice of Appeal on Behalf of Defendant Township of Peninsula, R. 164.) The Wineries have moved to dismiss this appeal because it was filed before an injunction was entered. (Appellee’s Motion to Dismiss for Lack of Jurisdiction, Dkt. 18.) To date, this Court

has not ruled on that motion.

Despite that pending motion to dismiss, on August 3, 2022, Peninsula Township filed a motion to stay the District Court's preliminary injunction. (Peninsula Township's Motion for Stay of Injunction Pending Appeal Pursuant to F.R.A.P. 8, Dkt. 35-1.) On August 5, 2022, this Court issued an expedited briefing schedule and ordered "a response to the motion must be filed with the Clerk's Office by **12 pm on August 9, 2022.**" (Letter from Case Manager, Exhibit 1.) Consistent with this Case Manager's order, the Wineries filed their response to the motion to stay on August 9, 2022 at 11:20 am. (Response to Appellant's Motion to Stay Injunction Pending Appeal, Dkt. 40-1; Notice of Docket Activity Email, Exhibit 2.)

Even though the mandate has not yet issued from Case No. 21-1744, Protect the Peninsula filed a response in support of Peninsula Township's motion to stay the injunction in this case, Case No. 22-1534. (Response in Support of Appellant Peninsula Township's Motion to Stay Injunction Pending Appeal, Dkt. 41-1.) Protect the Peninsula filed this response brief at 12:33 pm, *after* this Court's deadline for all responsive briefing to be submitted. (Notice of Docket Activity Email, Exhibit 3.)

III. ANALYSIS

The Court should strike Protect the Peninsula's response brief (Dkt. 41-1) for either of two independent reasons: lack of jurisdiction or untimely submission.

A. This Court only has jurisdiction over Protect the Peninsula with respect to a limited question in an entirely separate case.

“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). “The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Taylor v. KeyCorp*, 680 F.3d 609, 616 (6th Cir. 2012) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). An appeal from an order denying intervention in any respective is immediately appealable, and that appeal encompasses all the proposed intervenor’s rights at the time. *Purnell v. City of Akron*, 925 F.2d 941, 945 (6th Cir. 1991).

“The notice of appeal must . . . designate the judgment—or the appealable order—from which the appeal is taken.” Fed. R. App. P. 3(c)(1)(B)). “Rule 3(c) is jurisdictional and may not be waived by the court of appeals.” *Guy v. Lexington-Fayette Urb. Cnty. Gov’t*, 57 F. App’x 217, 223 (6th Cir. 2003). Therefore, this Court may not expand the issues on appeal, even for “good cause shown.” *Id.* (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988)).

The district court only regains jurisdiction over the intervenor upon the conclusion of the appeal through the issuance of a mandate. *See Fort Gratiot*

Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res., 71 F.3d 1197, 1203 (6th Cir. 1995). “A mandate is the document by which this court relinquishes jurisdiction and authorizes the originating court or agency to enforce this court’s judgment,” and formally represents the end of the appeal. 6 Cir. I.O.P. 41(a)(1). The mandates takes effect on the date it is issued, but not before. Fed. App. R. 41(c). Until this formality occurs, the district court “cannot proceed in the interim.” *See Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951–52 (6th Cir. 1999).

When Protect the Peninsula appealed the denial of its motion to intervene, only two questions were before this Court: whether Protect the Peninsula may intervene as of right in the District Court under Federal Rule of Civil Procedure 24(a)(2) and whether Protect the Peninsula could file a motion to dismiss before intervention was granted. (Case No. 21-1744, Civil Appeal Statement filed November 23, 2021, Exhibit 4.) Those issues represent the entirety of Protect the Peninsula’s role in the case until a mandate issues. *See Fed. R. App. P. 3(c)*.

The District Court lost jurisdiction over those two questions but retained jurisdiction over the remaining aspects of the case. *KeyCorp*, 680 F.3d at 616. Even though a panel of this Court reversed the District Court’s decision, the mandate in Case No. 21-1744 has not issued yet. Therefore, this Court still has jurisdiction over *everything* regarding Protect the Peninsula’s ability to intervene, but Protect the Peninsula only has the ability to make arguments relating to its intervention motion.

Until the mandate issues in Case No. 21-1744, Protect the Peninsula cannot do anything else.

In Case No. 22-1534, Peninsula Township is appealing the District Court's decision to enter a preliminary injunction against the Peninsula Township Winery Ordinances. That appeal has nothing to do with whether Protect the Peninsula may intervene as of right in the District Court under Federal Rule of Civil Procedure 24(a)(2) or whether Protect the Peninsula could file a motion to dismiss before intervention was granted. (*See* Civil Appeal Statement, Exhibit 4.) Therefore, even if this Court were to look beyond the formalities of separate cases,¹ Protect the Peninsula cannot raise arguments in support of Peninsula Township's motion to stay the injunction in this Court because those arguments do not relate to Protect the Peninsula's intervention motion.

In other words, Protect the Peninsula is stuck in Case No. 21-1744 until the mandate issues. 6 Cir. I.O.P. 41(a)(1). Before then, Protect the Peninsula is not a party with rights to do anything. It cannot go back down to the District Court because the District Court "cannot proceed in the interim" before a mandate issues. *Youghiogeny*, 200 F.3d 951–52. It cannot come back up to this Court to participate in Case No. 22-1534 until the mandate is issued. And it does not have standing to

¹ Parties may move to consolidate appeals, Fed. R. App. P. 3(b), but appeals are not consolidated unless and until ordered by the Court.

raise arguments in a separate appeal that has not been consolidated with its own until it has been made a full party. “[A]n intervenor seeking to appeal must have standing under Article III of the Constitution entitling it to have the court decide the merits of the dispute.” *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). Thus, “[t]he standing requirement therefore may bar an appeal even though a litigant had standing before the district court.” *Id.* (citation omitted).

Protect the Peninsula’s decision to file a brief in this case shows a complete disregard for this Court’s jurisdiction. The Wineries request that the Court strike the brief from the record and not consider it when ruling on Peninsula Township’s motion to stay the injunction pending appeal.

B. Protect the Peninsula filed its response brief too late.

The Wineries move to strike Protect the Peninsula’s response for another reason—it was late. “Electronic transmission of a document and transmission of the Notice of Docket Activity (NDA) from the court constitute filing the document under the Federal Rules of Appellate Procedure and entry of that document in the docket under Fed. R. App. P. 45(b)(1).” 6 Cir. R. 25(e)(1)(A)(i). “An electronically-filed document is filed at the time shown on the NDA. Electronic filing does not alter a filing deadline. **Where the deadline is a specific time of day, the electronic filing must be completed by that time.**” 6 Cir. R. 25(e)(1)(A)(ii) (emphasis added).

This Court set a 12 pm deadline for response briefs to be filed. (Exhibit 1: Letter from Case Manager.) Protect the Peninsula filed its response brief at 12:33 pm. (Exhibit 3: 12:33 pm NDA email.) Under 6 Cir. R. 25(e)(1)(A)(ii), Protect the Peninsula's filing was late and must be stricken.

IV. CONCLUSION

The Wineries request that the Court strike the brief from the record and not consider it when ruling on Peninsula Township's motion to stay the injunction pending appeal.

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.

By: /s Joseph M. Infante
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Attorneys for Plaintiffs/Appellees

Dated: August 10, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this 1,577-word brief complies with the Court's type-volume limitations.

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.

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Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification the filing to all ECF filing participants.

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.

By: /s Joseph M. Infante
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Exhibit 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 05, 2022

Ms. Tracy J. Andrews

Mr. Timothy Allen Diemer

Mr. Joseph M. Infante

Re: Case No. 22-1534, *Wineries of the Old Mission Peninsula Association, et al v. Township of Peninsula, MI*
Originating Case No. 1:20-cv-01008

Dear Counsel,

The Appellant in the above styled case has filed a motion stay injunction pending appeal.

A response to the motion must be filed with the Clerk's Office by **12 pm on August 9, 2022.**

Your immediate attention to this matter is appreciated.

Sincerely yours,

s/Michelle R. Lambert
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. John S. Brennan
Mr. Eric Paul Conn
Mr. William Kelly Fahey
Mr. Christopher J. Gartman
Mr. Gregory M. Meihn

Mr. Christopher Scott Patterson
Mr. Stephen M Ragatzki
Mr. Matthew T. Wise

Exhibit 2

Ragatzki, Stephen M.

From: ca06-ecf-noticedesk@ca6.uscourts.gov
Sent: Tuesday, August 9, 2022 11:20 AM
To: Ragatzki, Stephen M.
Subject: 22-1534 Wineries of the Old Mission Peninsula Association, et al v. Township of Peninsula, MI "response"

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United States Court of Appeals for the Sixth Circuit

Notice of Docket Activity

The following transaction was filed on 08/09/2022

Case Name: Wineries of the Old Mission Peninsula Association, et al v. Township of Peninsula, MI
Case Number: [22-1534](#)
Document(s): [Document\(s\)](#)

Docket Text:

RESPONSE in opposition filed regarding a motion, [35]; previously filed by Mr. Timothy Allen Diemer for Township of Peninsula, MI. Response from Attorney Mr. Joseph M. Infante for Appellees Bowers Harbor Vineyard & Winery, Inc, Brys Winery, LC, Chateau Grand Traverse, Ltd., Chateau Operations, Ltd, Grape Harbor Inc., Montague Development, LLC, OV The Farm LLC, Tabone Vineyards, LLC, Two Lads, LLC, Villa Mari, LLC, Wineries of the Old Mission Peninsula Association and Winery at Black Star Farms LLC. Certificate of Service: 08/09/2022. [22-1534] (JMI)

Notice will be electronically mailed to:

Mr. Gregory M. Meihn: gmeihn@grsm.com, nmartuzi@grsm.com, kxjohnson@grsm.com, rdedene@grsm.com
Ms. Tracy J. Andrews: tjandrews@envlaw.com, karla@envlaw.com, jill@envlaw.com, holly@envlaw.com
Mr. Joseph M. Infante: infante@millercanfield.com, vanderwaal@millercanfield.com
Mr. Timothy Allen Diemer: tad@jacobsdiemer.com, mary@jacobsdiemer.com
Mr. William Kelly Fahey: wfahey@fsbrlaw.com, sparrish@fsbrlaw.com, kmarshall@fsbrlaw.com, rmask@fsbrlaw.com
Mr. Christopher Scott Patterson: cpatterson@fsbrlaw.com, kmarshall@fsbrlaw.com, sparrish@fsbrlaw.com
Mr. Stephen M Ragatzki: ragatzki@millercanfield.com, guikema@millercanfield.com
Mr. Matthew T. Wise: mwise@grsm.com, nmartuzi@grsm.com, kxjohnson@grsm.com, rdedene@grsm.com
Mr. John S. Brennan: jbrennan@fsbrlaw.com, sparrish@fsbrlaw.com, kmarshall@fsbrlaw.com, jstaffeld@fsbrlaw.com
Mr. Christopher J. Gartman: gartman@millercanfield.com, guikema@millercanfield.com
Mr. Eric Paul Conn: econn@jacobsdiemer.com, mary@jacobsdiemer.com
Mediator Office: CA06-Mediation@ca6.uscourts.gov

Notice will be stored in the notice cart for:

Ms. Michelle R. Lambert, Admin and/or Clerical Support

The following document(s) are associated with this transaction:

Document Description: WOMP Response Brief in Opposition to Motion to Stay Injunction

Original Filename: WOMP Response Brief in Opposition to Motion to Stay Injunction.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1105031299 [Date=08/09/2022] [FileNumber=6847784-0]

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Document Description: Ex 1 - Unpublished Cases

Original Filename: Ex. 1 Unpublished Cases.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1105031299 [Date=08/09/2022] [FileNumber=6847784-1]

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Exhibit 3

Ragatzki, Stephen M.

From: ca06-ecf-noticedesk@ca6.uscourts.gov
Sent: Tuesday, August 9, 2022 12:33 PM
To: Ragatzki, Stephen M.
Subject: 22-1534 Wineries of the Old Mission Peninsula Association, et al v. Township of Peninsula, MI "response"

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United States Court of Appeals for the Sixth Circuit

Notice of Docket Activity

The following transaction was filed on 08/09/2022

Case Name: Wineries of the Old Mission Peninsula Association, et al v. Township of Peninsula, MI
Case Number: [22-1534](#)
Document(s): [Document\(s\)](#)

Docket Text:

RESPONSE in support filed regarding a motion to stay injunction pending appeal, [35]; previously filed by Mr. Timothy Allen Diemer for Township of Peninsula, MI. Response from Attorney Ms. Tracy J. Andrews for Movant Protect the Peninsula, Inc.. Certificate of Service: 08/09/2022. [22-1534] (TJA)

Notice will be electronically mailed to:

Mr. Gregory M. Meihn: gmeihn@grsm.com, nmartuzi@grsm.com, kxjohnson@grsm.com, rdedene@grsm.com
Ms. Tracy J. Andrews: tjandrews@envlaw.com, karla@envlaw.com, jill@envlaw.com, holly@envlaw.com
Mr. Joseph M. Infante: infante@millercanfield.com, vanderwaal@millercanfield.com
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Notice will be stored in the notice cart for:

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The following document(s) are associated with this transaction:

Document Description: response

Original Filename: 2022-08-09 PTP response to PT Motion to Stay Injunction FINAL.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1105031299 [Date=08/09/2022] [FileNumber=6847882-0]

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Document Description: Additional Document

Original Filename: Exhibit A 2022-06-05 Record Eagle Article.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1105031299 [Date=08/09/2022] [FileNumber=6847882-1]

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Document Description: Additional Document

Original Filename: Exhibit B Wedding Ceremonies, Wine Wagon Tours and Cider at Brys Estate!.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1105031299 [Date=08/09/2022] [FileNumber=6847882-2]

[abe30e291252476fb85e59439cb62cd34b81ace4a7aa710ee86e7942a2cd58e6a05514c68cb909fed220dc60e2ff7952214af8abc61c90dba567ce06618941c2]]

Exhibit 4

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES**

Case No: 21-1744 Case Manager: Michelle R. Lambert

Case Name: Wineries of Old Mission Peninsula Assoc. et al v. Twp. of Peninsula & Protect the Peninsula, Inc.

Is this case a cross appeal? ☐ Yes ☒ No

Has this case or a related one been before this court previously? ☐ Yes ☒ No

If yes, state:

Case Name: _____ Citation: _____

Was that case mediated through the court's program? ☐ Yes ☐ No

This is an appeal taken against Plaintiffs, Wineries of Old Mission Peninsula, Inc. (WOMP) together with 11 named individual wineries, who opposed the Motion to Intervene filed by Appellant Protect the Peninsula, Inc. (PTP). Defendant Peninsula Township did not oppose the Motion to Intervene filed by PTP.

PTP proposes to raise two specific issues. The first is whether PTP meets the standards to intervene by right in the pending lawsuit pursuant to Fed. R. Civ. P. 24(a). The elements for intervention are: (1) timeliness of the application; (2) the applicant has a substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) inadequate representation by parties before the court. Timeliness is not contested; Plaintiffs opposed intervention on the remaining 3 elements, and the District Court denied intervention based on these elements. PTP raises issues on appeal under each of the 3 contested elements of intervention.

The second specific issue that PTP proposes to raise is whether an entity that moved to intervene may, prior to a ruling on intervention, seek leave to supplement their pending intervention motion with a dispositive motion. In the period between when PTP filed its motion to intervene in February and the Court ruled on that motion in October, PTP filed a motion for leave to supplement the intervention motion with a proposed motion to dismiss Plaintiffs' state law claims. The District Court rejected PTP's motion for leave on the bases that PTP was not a party at the time it requested leave and the motion sought dismissal of some of Plaintiffs' claims. PTP raises issues on appeal related to this decision.

This is to certify that a copy of this statement was served on opposing counsel of record this 23 day of

November, 2021.

Tracy Jane Andrews

Name of Counsel for Appellant