ORAL ARGUMENT NOT YET SCHEDULED

No. 12-7012

United States Court of Appeals for the District of Columbia Circuit

3M COMPANY,

Plaintiff-Appellee,

v.

LANNY DAVIS, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
CASE NO. 11-CV-01527-RLW, JUDGE ROBERT L. WILKINS

PLAINTIFF-APPELLEE SHIRLEY SHERROD'S OPPOSITION TO MOTION OF LANNY DAVIS, LANNY J. DAVIS & ASSOCS., PLLC AND DAVIS-BLOCK LLC TO CONSOLIDATE *3M COMPANY V. LANNY DAVIS, ET AL.* WITH *SHIRLEY SHERROD V. ANDREW BREITBART, ET AL.*

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April 4, 2012

OPPOSITION TO MOTION FOR CONSOLIDATION

Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC (the "*Davis* Appellants") improperly seek to consolidate the appeal they noticed just weeks ago in *3M Company v. Lanny Davis et al.*, C.A. No. 12-7012, with the separate and unrelated appeal Andrew Breitbart and Larry O'Connor (the "*Breitbart* Appellants") noticed more than seven months ago in *Shirley Sherrod v. Andrew Breitbart et al.*, C.A. No. 11-7088. The *Davis* Appellants' highly unusual motion should be rejected. Consolidation makes no sense with these two entirely separate cases that arise from different judges and different orders, and that involve different parties, different facts, different claims, and different procedural histories. Importantly, several dispositive threshold rulings in *Breitbart* have no relation whatsoever to *Davis*, as the Court in *Breitbart* ruled, among other things, that Defendants' failure to file their motion within the prescribed time period was an independent and sufficient basis for its denial. No such issue arises in *Davis.* Moreover, consolidation would certainly cause unnecessary and unjustifiable delay to the *Breitbart* appeal, where the motion to dismiss has been fully briefed for months and is awaiting adjudication. Consolidation therefore is not appropriate.

In preparing this motion, the *Davis* Appellants conveniently conferred only with those parties likely to agree with them: their brief asserts that Larry O'Connor (one of the *Breitbart* Appellants) and the District of Columbia (an intervenor in

Davis) do not oppose consolidation. *See* March 23, 2012 Motion to Consolidate [Dkt. #1365399] at 5. However, they never consulted with Mrs. Sherrod before filing their motion. Mrs. Sherrod therefore respectfully submits this opposition brief to make clear that she opposes consolidation and that the *Davis* Appellants' motion should be denied.

1. The Court's Handbook of Practice and Internal Procedures states that appeals generally are consolidated only if they involve "the same district court judgment or order" or "the same administrative proceeding." *See* Handbook of Practice and Internal Procedures at 23. In those circumstances, consolidation makes sense: because the parties, facts, legal issues, timing, and circumstances of the appeals are virtually identical, the Court can treat substantially related appeals "as one appeal for most purposes" through "a single briefing schedule" (preferably with joint briefs) and a "hearing on the same day before the same panel," with "argument time … allotted to the cases as a group." *Id.* at 24. This "achieve[s] the most efficient use of the Court's resources" without prejudice to any of the parties. *See id.* at 23.[1]

[1] Although the *Davis* Appellants note that the Handbook acknowledges that cases "may be consolidated" if they involve "essentially the same parties or the same, similar, or related issues," *id.*, this presumably means that all of the issues in the two cases should overlap. At a minimum, the common issues should predominate such that the appeals are "essentially" like appeals from "the same district court judgment or order" or "the same administrative proceeding." *Id.* Here, the differences predominate.

2. Here, however, the *Breitbart* Appellants and the *Davis* Appellants did not appeal from "the same district court judgment or order"—and the parties, facts, legal issues, timing, and circumstances of their separate appeals are ***not*** the same. The appeal in *Shirley Sherrod v. Andrew Breitbart, et al.*, relates to the *Breitbart* Appellants' publication of the blog post *Video Proof: The NAACP Awards Racism–2010,* in which the *Breitbart* Appellants used deceptively edited video clips and false written statements to assert that Plaintiff-Appellee Shirley Sherrod racially discriminated against a white farmer in her position as a USDA official. *See* Oct. 21, 2011 Pl.-Appellee's Mot. to Dismiss or in the Alternative, for Summ. Affirmance [Dkt. 1337116] at 3, No. 11-7088 (D.C. Cir.). Mrs. Sherrod sued the *Breitbart* Appellants on February 11, 2011, in D.C. Superior Court, alleging claims for defamation, false light invasion of privacy, and intentional infliction of emotional distress to remedy the reputational, emotional, and financial damages the *Breitbart* Appellants caused, including the widely publicized loss of her job. *Id.* at 4-5. On March 4, 2011, the *Breitbart* Appellants removed the case and on July 28, 2011, after full briefing and oral argument, the District Court denied the *Breitbart* Appellant's motions to dismiss under the D.C. Anti-SLAPP Act and Rule 12(b)(6).

3. The *Davis* appeal, on the other hand, relates to a complex international business dispute regarding the commercial viability of a medical

screening test and efforts to settle litigation about the screening test in the United Kingdom. Feb. 2, 2012 Mem. Op. [Dkt. 61] at 2-4, *3M v. Boulter*, 11-CV-1527 (D.D.C.). Plaintiff-Appellee 3M Company filed its amended complaint on December 9, 2011 in the District Court, alleging claims for intimidation and blackmail under U.K. law, tortious interference with existing and prospective business advantage, tortious interference with contract, commercial defamation, injurious falsehood and business disparagement, breach of fiduciary duty, aiding and abetting, and civil conspiracy. *Id.* at 2, 8. None of the parties in *Davis* is a party in *Breitbart*.

4. The differences between the two cases do not end there. Although the *Breitbart* Appellants and the *Davis* Appellants both filed motions to dismiss under the D.C. Anti-SLAPP Act (just as they both filed motions to dismiss under Rule 12(b)(6)), the District Court in each case denied the motion for different reasons.

5. In *Breitbart*, the District Court correctly denied the *Breitbart* Appellants' Anti-SLAPP motion on three grounds. The court concluded that: (i) because the D.C. Anti-SLAPP Act was not yet effective when the case was filed and it is not retroactive, it is inapplicable to this case; (ii) even if the Act were purely procedural such that it applied retroactively, it would not apply in federal court under *Erie*; and (iii) the *Breitbart* Appellants missed the statutory deadline

for filing their motion. Feb. 15, 2012 Statement of Reasons [Dkt. 1359070] at 4-5, No. 11-7088 (D.C. Cir.). At the same time, the District Court rejected the *Breitbart* Appellants' "opinion" defense, which they asserted in their Rule 12(b)(6) motion and incorporated into their Anti-SLAPP motion as the sole basis for dismissing part of Mrs. Sherrod's claims. Apr. 18, 2011 Mem. of Law in Supp. of Mot. to Dismiss [Dkt. 22] at 3, No. 1:11-cv-00477 (D.D.C.).[2] The *Breitbart* Appellants noticed their appeal on August 26, 2011, and contend that all four of these issues are before this Court. *See, e.g.*, Feb. 21, 2012 Defs.-Appellants' Resp. to District Court's Statement of Reason, [Dkt. 1359763], No. 11-7088 (D.C. Cir.).

6. In *Davis*, however, the District Court did not address the timing issues that are dispositive in *Breitbart* because Plaintiff-Appellee 3M Company filed its original complaint months after the D.C. Anti-SLAPP Act became effective, and the *Davis* Appellants apparently filed their Anti-SLAPP motion on time. Instead, the court in *Davis* held only that the Act does not apply in federal court because it conflicts with Federal Rules of Civil Procedure 12 and 56. Moreover, the District Court in *Davis* did not address the "opinion" defense asserted by the *Breitbart*

[2] The *Breitbart* Appellants' Rule 12(b)(6) motion argued only that the textual statements in the blog post were "nonactionable opinion" and thus failed to state a claim. The motion did not challenge the defamatory nature of the deceptively edited video clips themselves, which independently defamed Mrs. Sherrod, cast her in a damaging false light, and intentionally inflicted emotional distress. *See* Pl.-Appellee's Mot. to Dismiss at 5.

Appellants, which they based on the particular facts and circumstances of their defamatory conduct and Mrs. Sherrod's claims. *See* Pl.-Appellee's Mot. to Dismiss at 5-6, 15. The *Davis* Appellants noticed their appeal on February 23, 2012, and contend that they are only challenging the court's holding "that the Act conflicts with the Federal Rules of Civil Procedure." *See* Mot. at 2. As a result, three of the issues the *Breitbart* Appellants intend to pursue in their appeal—retroactivity, timeliness, and their "opinion" defense—will not be presented in *Davis.*

7. The *Davis* Appellants ignore the fundamental differences between the two cases so that they can incorrectly assert that the "[*Breitbart*] appeal and Davis's appeal present the same or closely related issues." *Id.* at 1; *see id.* at 5 ("Given the identity of issues in this appeal and the *Breitbart* appeal…."). They do not. Indeed, because of the threshold issues presented in the *Breitbart* appeal, it is quite possible there would be ***no*** overlap at all in the appellate determination of the two cases. This Court could affirm the District Court in *Breitbart* on any of the three straightforward arguments without even reaching the *Erie* question.

8. The *Davis* Appellants ultimately concede as much, explaining that the *Erie* issue in *Davis* would arise in *Breitbart* only if this Court were to first "disagree[ ] with the District Court's holding [in *Breitbart*] that the Act does not apply to cases filed before the Act's effective date." *Id.* at 4. In point of fact, the

Court also would have to reverse the District Court's holding that the *Breitbart* Appellants filed their motion out of time, reverse its holding that the Act does not apply retroactively, ***and*** reverse the District Court's rejection of the *Breitbart* Appellants' "opinion" defense. Only then would this Court need to decide an *Erie* issue in both cases.[3]

9. There is therefore no basis to consolidate these appeals under the Court's Handbook of Practice and Internal Procedures because consolidation would not "achieve the most efficient use of the Court's resources." Joint briefing would not be practical because two different sets of parties would need to address two different sets of facts and two different procedural histories. Moreover, the *Breitbart* Appellants would want to address three legal issues that turn on the particular facts and procedural history in *Breitbart* but do not matter in *Davis*. For the same reasons, consolidated oral argument also would not be practical or further the Court's interest in efficiency.

10. Finally, the *Davis* Appellants suggest that consolidation may be appropriate because Mrs. Sherrod has moved to dismiss the *Breitbart* appeal for lack of jurisdiction, and the *Davis* Appellants "anticipate[ ]" that 3M Company

[3] To the extent the *Davis* Appellants wish to have a say on the outcome of the *Sherrod v. Breitbart et al*. appeal—or to be heard on these several issues that are not presented in their case—the proper vehicle for doing is to file an *amicus* brief, not to join two entirely different cases.

may do the same. *See id.* at 4. This is not a basis for consolidation. Mrs. Sherrod's motion to dismiss the *Breitbart* Appellants' appeal has been fully briefed for several months, has already been considered by a panel of this Court, and has prompted the District Court to issue a Statement of Reasons that is unique to the facts and procedural history of the *Breitbart* case. There is no reason that panel should not promptly rule on Mrs. Sherrod's motion given that the briefs already cite nearly every court of appeals decision that meaningfully considered the jurisdictional issue. There is little the *Davis* parties could add to the Court's analysis—and nothing they could add that should change the Court's conclusion that it lacks jurisdiction.

11. Consolidation is especially inappropriate in these circumstances because it will further delay Mrs. Sherrod's case. It was been well over a year since Mrs. Sherrod first filed her complaint in the D.C. Superior Court and over eight months since the Defendant-Appellants' motions to dismiss were rejected. Since that time, the *Breitbart* Appellants have employed delay tactics to avoid an on-the-merits defense of Mrs. Sherrod's claims, seeking (and achieving) a virtual stand-still in the District Court while their improper interlocutory appeal is considered. Further delay is especially unfair because the only issue raised by the *Breitbart* Appellants in their Anti-SLAPP motion—their "opinion" defense—has already been rejected by the District Court in denying their 12(b)(6) motion. The

Breitbart Appellants moved to certify that issue for interlocutory appeal under 28 § 1292(b), thereby acknowledging that it is not appealable as a matter of right. As such, the Breitbart Appellants ask this Court to make immediately appealable orders that otherwise require certification under § 1292(b). It is long past time for Mrs. Sherrod's case to proceed on the merits, and there is no reason why this unrelated case should further delay it.

CONCLUSION

For the foregoing reasons, the Court should deny the motion of Lanny Davis, Lanny J. Davis & Associates, PLLC and Davis-Block LLC to consolidate *3M Company v. Lanny Davis et al.*, No. 12-7012, with *Sherrod v. Breitbart et al.*, No. 11-7088.

Dated: April 4, 2012

Respectfully submitted,

/s/ Thomas D. Yannucci, P.C.

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CERTIFICATE OF SERVICE

Pursuant to this Court's Circuit Rule 25(c), I hereby certify that on this 4th day of April, 2012, I electronically filed the foregoing Plaintiff-Appellee's Reply in Support of Her Motion to Dismiss or, in the Alternative, for Summary Affirmance with the Court by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Thomas A. Clare, P.C.
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