UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEAGUE OF WOMEN VOTERS OF MICHIGAN, *et al.*,

Plaintiffs,

v.

JOCELYN BENSON, in her official Capacity as Michigan Secretary of State, *et al.*,

Defendants.

Case No. 2:17-cv-14148

Hon. Eric L. Clay
Hon. Denise Page Hood
Hon. Gordon J. Quist

THE MICHIGAN SENATE AND THE MICHIGAN SENATORS' REPLY IN SUPPORT OF THEIR RULE 52(c) MOTION

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Plaintiffs complain that Senate Defendants' Rule 52(c) Motion was untimely and procedurally improper because it was filed after trial. The Senate Defendants' Motion was timely and procedurally proper because: (1) Plaintiffs were not fully heard on the issue of standing until all *de bene esse* depositions were complete; and (2) courts may grant judgment on partial findings after all evidence has been presented, not only before the movant has presented evidence.

I. THE SENATE DEFENDANTS' MOTION WAS TIMELY FILED AFTER PLAINTIFFS' *DE BENE ESSE* DEPOSITIONS.

In their Response (ECF No. 252), Plaintiffs imply that when the trial in this case ended on February 7, 2019, all evidence in their case had been presented. (ECF No. 263, PageID.11520). This is demonstrably untrue. As Plaintiffs well know, 35 individual Plaintiffs and League members testified through *de bene esse* depositions from February 4 to February 12, 2019, before, during, and *after* trial. (*See* 2/1/19 Order, ECF No. 234, PageID.8367; *see also* Pls.' Resp. to Intervenors' Rule 52(c) Mots. ("Pls.' Resp."), ECF No. 263, PageID.11520 (acknowledging the "almost three dozen *de bene esse* depositions")).[1]

[1] Notably, depositions of individual Plaintiffs and League members were not taken during discovery in this case because Plaintiffs failed to identify them as trial witnesses until December 4, 2018, the deadline for pretrial disclosures, despite that Defendant Secretary Johnson requested names of potential voter witnesses multiple times during discovery, as early as June 12, 2018. (*See* Def. Sec'y's Mot. in Limine to Exclude Testimony of Undisclosed League Member Witnesses, ECF

Federal Rule of Civil Procedure 52(c) states that during a nonjury trial, a "court may enter judgment against [a] party on a claim or defense that . . . can be maintained or defeated only with a favorable finding on that issue" *only* "*[i]f* [the] party has been *fully heard* on [the] issue . . . ." Fed. R. Civ. P. 52(c) (emphasis added). Rule 52(c) thus "requires that a party be 'fully heard' on an issue essential to its case *before* the court can enter a judgment on partial findings against that party." 9 James Wm. Moore *et al.*, *Moore's Federal Practice - Civil* § 52.50 (2019) (emphasis added); *see also Eberhardt v. Comerica Bank*, 171 B.R. 239, 243; 30 Fed. R. Serv. 3d 320 (E.D. Mich. 1994) (holding judgment on partial findings appropriate only when party against which judgment is entered is afforded opportunity to be fully heard on relevant evidence).

Plaintiffs asserted that "Intervenors have obviated the utility of a Rule 52(c) judgment" by failing to tender the motion at trial (Pls.' Resp., ECF No. 263, PageID.11521)—yet on the last day of trial, Plaintiffs had not been "fully heard"

No. 169, PageID.7219-20; Pls.'s Resp. to Def. Sec'y's Mot. in Limine, ECF No. 177, PageID.7488-89). Although in its Order Denying Defendant Secretary Johnson's Motion to Exclude Testimony of Undisclosed League Member Witnesses, this Court concluded that "Plaintiffs substantially complied with their discovery obligations" concerning disclosure of witnesses (ECF No. 197, PageID.7597-98), Senate Defendants note that some individual League members were deposed *after* trial because Plaintiffs failed to label them as witnesses until after discovery. Because of Plaintiffs' delay, the normal course of procedure was altered in this case and depositions were taken through February 12, 2019, five days after trial ended. Plaintiffs cannot now complain that the Senate Defendants' Rule 52(c) Motion was untimely when filed after trial because the unusual timing of post-trial depositions was self-inflicted by Plaintiffs.

on standing, the issue on which the Rule 52(c) Motion is based. *See* Fed. R. Civ. P. 52(c); 9 James Wm. Moore *et al.*, *Moore's Federal Practice - Civil* § 52.50 (2019). If the Senate Defendants had moved for judgment on standing on the last day of trial, this Court would have had no choice but to deny the motion as premature. Fed. R. Civ. P. 52(c); 9 James Wm. Moore *et al.*, *Moore's Federal Practice - Civil* § 52.50 (2019); *Eberhardt*, 171 B.R. at 243. Thirteen deponents testified after trial, and each gave evidence relevant to standing.[2] (*See*, *e.g.*, Purcell Dep., ECF No. 252-17, PageID.9846-47; Noorbakhsh Dep., ECF No. 252-3, PageID.9430; Borenstein Dep., ECF No.252-19, PageID.9891). Because Plaintiffs had not been fully heard until February 12, the Senate Defendants appropriately and timely filed their Rule 52(c) Motion following the close of Plaintiffs' evidence.

II. RULE 52(C) MOTIONS MAY BE MADE AND GRANTED AFTER THE CLOSE OF ALL EVIDENCE IN A CASE.

Plaintiffs incorrectly assert that "[c]ourts recognize that Rule 52(c) motions serve no purpose if the movant has already presented its evidence to defend a plaintiff's claims." (Pls.' Resp., ECF No. 263, PageID.11521). This does not capture the full extent of Rule 52(c)'s purpose and flexibility. Rather, the more immediate goal of a judgment on partial findings under Rule 52(c) is to narrow the

[2] The Senate Defendants' Rule 52(c) Motion relies in large part on the testimony from the *de bene esse* depositions because they focused on whether the deponents suffered any individualized, district-specific harms from partisan gerrymandering, as alleged. (*See generally* ECF No. 252).

number of claims that the court must decide because, as the text of the rule indicates, the particular claim or defense may "be maintained or defeated only with a favorable finding on that issue." Fed. R. Civ. P. 52(c). The rule thus provides an efficient procedure for disposing of unsupported claims.

Rule 52(c) is a flexible tool to be used by a court to enter judgment against a party whenever that party has been fully heard on an issue that is essential to its claim or defense and has failed to produce evidence to support it. The court is not limited to entering judgment on partial findings only *before* a Rule 52(c) movant presents evidence: "[T]he court may opt to *reserve judgment until all the evidence is in . . . .*" *EBC, Inc. v. Clark Building Sys. Inc*, 618 F.3d 253, 272 (3d Cir. 2010) (citing *Int'l Union of Operating Eng'rs, Local Union 103 v. Ind. Constr. Corp.*, 13 F.3d 253, 257 (7th Cir. 1994) ("[I]t is within the trial court's sound discretion to decline rendering judgment until hearing all of the evidence.")); *Feliciano v. Rullan*, 378 F.3d 42, 59 (1st Cir. 2004).

Therefore, a Rule 52(c) motion may be made and granted after the close of all evidence in a case. *See* Fed. R. Civ. P. 52(c), Notes of Advisory Committee on 1991 Amendments; 9 James Wm. Moore *et al.*, *Moore's Federal Practice - Civil* § 52.50 (2019) ("The court in its discretion may enter a judgment on a claim after all the evidence on the crucial issue is heard, or the court may wait and render a judgment at the close of all the evidence.").

III. THE INTERVENORS' MOTIONS DID NOT VIOLATE THE COURT'S POST-TRIAL BRIEFING INSTRUCTIONS.

Plaintiffs also claim that the Senate Defendants' Rule 52(c) Motion violated this Court's post-trial briefing instructions. However, the Court's instructions pertained only to the parameters for the proposed findings of fact and conclusions of law. The Court ordered that the parties' proposed findings and conclusions were due on February 22, 2019. (Order Re: Parties' Partial Stips. & Report, ECF No. 234, PageID.8370; Trial Tr. vol. 3, 2/7/19, ECF No. 250, PageID.9347). The Court did not prohibit the parties from filing motions authorized by the Federal Rules of Civil Procedure.[3] The Court simply stated that "submissions, whatever you have, and whatever the two sides are going to offer should be submitted on or before February 22nd." (Trial Tr. vol. 3, 2/7/19, ECF No. 250, PageID.9348). This statement by the Court provided a final deadline by which all submissions must be filed. The Senate Defendants filed their Motion before the deadline.

Plaintiffs allege that Senate Defendants filed the Rule 52(c) Motion separately to extend the Court's 50-page limit on legal briefing. This is not true. The Senate Defendants' legal conclusions (ECF No. 254) were 43 pages. The first

[3] The only restriction that the Court put on motions concerned objections to *de bene esse* deposition testimony, which the Court said "may not be stated in separate written motions and must be included within the maximum page limit that the Court establishes for the post-trial briefs." (Order Re: Parties' Partial Stips. & Report, ECF No. 234, PageID.8368). The Court did not put the same restriction on other subject matter, which indicates that other written motions were not prohibited.

8 pages reiterated the position on Plaintiffs' standing, the topic of the Rule 52(c) Motion. Therefore, Senate Defendants submitted 35 pages of legal conclusions on issues other than standing, with 15 pages remaining to address standing if needed. The Senate Defendants did not file their Motion separately to extend the 50-page limit. Rather, the purpose for filing the Motion was to provide a narrow basis on which to dismiss Plaintiffs' claims: lack of standing.

IV. PLAINTIFFS FAILURE TO ADDRESS THE MERITS OF THE RULE 52(C) MOTION WAIVES THEIR RIGHT TO RESPOND.

In their Response, Plaintiffs failed to address the merits of Senate Defendants' Rule 52(c) Motion on a district-by-district basis.[4] Plaintiffs addressed the merits of the challenge to the standing of only one Senate voter–witness: Jane Speer (36th Senate District). (Pls.' Resp., ECF No. 263, PageID. 11526-28). By declining to defend the standing of other challenged individuals, Plaintiffs waived their right to do so. "Waiver is the intentional relinquishment or abandonment of a known right." *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 905 (6th Cir. 2006) (citing *United States v. Osborne*, 402 F.3d 626, 630 (6th Cir. 2005)). By responding to the Motion, Plaintiffs demonstrated that they knew of their right to respond. (ECF No. 263). By failing to respond to *all* of the individual challenges,

[4] As this Court knows, to support standing to bring a partisan gerrymandering claim, a plaintiff must demonstrate on an individual, district-specific basis that he or she has suffered harm from residing in a packed or cracked district. *Gill v. Whitford*, 138 S. Ct. 1916; 201 L. Ed. 2d 313 (2018).

however, Plaintiffs abandoned their known right to respond to the challenges left unaddressed. *Id.* ("By choosing not to respond . . . when he was aware of his right to respond, appellant intentionally abandoned his right . . . ."); *Allstate Ins. Co. v. Global Med. Billing, Inc.*, 520 Fed. Appx. 409 (6th Cir. 2013) (holding that failure to respond to attack on standing amounted to a waiver of the argument); *Humphrey v. U.S. Attorney Gen. Office*, 279 Fed. Appx. 328, 331 (6th Cir. 2008). But, "the Sixth Circuit requires district courts to evaluate the merits of a dispositive motion, even when the opposing party fails to file a response." *Werth v. Ball*, No. 1:18-cv-523, 2019 U.S. Dist. LEXIS 11652, at *2-3 (W.D. Mich. Jan. 24, 2019) (citing *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991)). Therefore, this Court should evaluate the merits of the Rule 52(c) Motion without the benefit of a response regarding the districts not addressed. (ECF No. 263).

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Dated: March 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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