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No. 08-1754

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GINNAH MUHAMMAD
Plaintiff-Appellant

v.

PAUL J. PARUK
Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of Michigan
(Originating Case No. 07-11342)

APPELLANT'S REPLY BRIEF

NABIH H. AYAD & ASSOCIATES, P.C.
NABIH H. AYAD
2200 Canton Center Rd. (Suite 220)
Canton Michigan, 48187
(734) 983-0500

Attorney for Plaintiffs

MARGARET A NELSON
Michigan Department of Attorney General
Public Employment & Elections Division
PO Box 30736
Lansing, MI 48909
(517) 373-6434

Attorney for Defendant

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ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION; THE FIVE FACTOR TEST DOES NOT SUPPORT THE DISTRICT COURT'S HOLDING.

The District Court applied a five factor test and decided not to exercise jurisdiction. Based on the reasons articulated by the Court, and controlling case law, this decision was an abuse of discretion. In *Grand T. W. R.,*[1] this Court has held that the District Court is guided by dual policy considerations when deciding whether or not to exercise discretion under the DRA. This Court has held that the Court should exercise discretion when:

1) It will serve a useful purpose in clarifying and settling the legal relations in issue, and;
2) When it will afford relief from uncertainty, insecurity, and controversy.

As argued at length in Appellant's principal brief, the facts of this controversy weigh heavily in favor of exercising discretion. That declaratory judgment would

[1] *Grand T. W. R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 325 (6th Cir. Mich. 1984),

"serve a useful purpose" is an understatement. ***Defendant Paruk's action effectively forbids Muslim women from testifying in court. The consequence is the forfeiture of a fundamental right to access the courts. Predicating access to the courts on a Muslim woman's removal or her niqab is unconscionable***. The American Civil Liberties Union (ACLU) offers the following hypothetical:

> ... what if Ms. Ginnah was the victim of a criminal act? What if she were a survivor of rape? In order to bring a criminal claim against her assailant, she would have to subject herself to cross examination and be physically present at trial. Yet so long as she satisfied these requirements, her actions would comport with the Sixth Amendment. To hold any differently would necessarily mean that assailants could rape women who wear a niqab with impunity. (*Exhibit A: Letter from ACLU to the Michigan Supreme Court*).

The offered hypothetical shows that the legal issue presently before this court is in dire need of clarity. Furthermore, the above hypothetical shows that there is presently a great deal of uncertainty and insecurity created by this controversy. In fact, a number of organizations have shown interest in having this dispute resolved in favor of Plaintiff and other similarly situated Muslim woman. These organizations are:

1) American-Arab Anti-Discrimination Committee of Michigan
2) American Jewish Congress
3) Arab Community Center for Economic and Social Services
4) Baptist Joint Committee for Religious Liberty
5) Council on American-Islamic Relations (Michigan)
6) First Step
7) Jewish Council for Public Affairs
8) KARAMAH
9) Prof. Douglas Laycock, Yale Kamisar Colligate Professor of Law
10) Legal Services of South Central Michigan
11) Prof. Ashley Lowe, Clinic Director of the Family Law Assistance Project
12) Michigan Coalition Against Domestic & Sexual Violence
13) Michigan Conference of the United Church of Christ
14) The Michigan Immigrant Rights Project
15) The Michigan Poverty Law Project
16) SafeHouse Center
17) Turning Point

Instead of focusing on the guiding principles mandated by this Court in Grand T. W. R., the District Court conducted an unwarranted freehand analysis. Appellee readily admits that "the factor the District Court determined to be most compelling" was that federal review would necessitate a detailed examination of how Judge Paruk manages his courtroom. In comparing this factor in context of the fundamental rights at issue in this case, it is clear that the District Court abused its discretion in failing to exercise jurisdiction. To say that the District Court made a "thorough and thoughtful analysis" ignores the gravity of the issues that Appellant seeks to address.

II. APPELLANT HAS A CLEARLY MERITORIOUS CLAIM UNDER THE FIRST AMENDMENT FREE EXERCISE CLAUSE BECAUSE JUDGE PARUK'S ACTIONS CANNOT PASS EVEN THE LOWER RATIONAL BASIS STANDARD.

Appellant will be successful under even the lower rational basis standard because Judge Paruk's policy is not a neutral law of general applicability and it is not rationally related to a legitimate government interest. First, as argued at length in Appellant's principle brief, Judge Paruk's rule is not generally applicable. As noted by the Michigan Civil Rights Commission, allowing a Judge to order the removal of a woman's niqab:

> ... has the potential to result in harm which will work to alienate individuals not only on the basis of religion... but also on the basis of disability, cultural norms, and/or the visual impairment of the fact finder. (*Exhibit B: Letter from the Michigan Civil Rights Commission to the Michigan Supreme Court*).

In fact, the Courts, presumably including Judge Paruk, routinely accept testimony despite the trier of facts' inability to visually assess the speakers creditability. As argued at length in Appellant's principle brief, there is a board range of such situations which include: (1) blind jurors, (2) the admission of former testimony, and (3) disabled/diseased witnesses. The admission of this evidence and the continued participation by these jurors and witnesses demonstrate that Judge Paruk's policy is neither generally applicable or neutral.

Although the state may have a legitimate interest in identifying and assessing the creditability of a witness, Judge Paruk's policy is not rationally related to accomplishing that purpose. As suggested by the ACLU, "A woman's identity can be verified by a female court officer in a separate room." (Exhibit A). Furthermore, the notion that a witnesses creditability can be determined by facial cues is an archaic pseudo-science that has no place in a modern court room. By analogy, an expert that read a witness' face to determine creditability would never

be admitted under the Daubert Standard. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). ***Thus, it is not rational simply because Judge Paruk believes it to be so. As previously argued, the empirical evidence demonstrates that visual cues are unreliable and perhaps even detrimental to assessing creditability. Likewise, Judge Paruk's rule is not rationally related to the state's interest in assessing creditability.***

III. THE CORRECT STANDARD IS STRICT SCRUTINY. WHILE THE 6TH CIRCUIT CASE LAW MAY BE CONFLICTING, THE SUPREME COURT HAS MADE IT CLEAR THAT STRICT SCRUTINY APPLIES WHERE A FREE EXERCISE CLAIM IS PAIRED WITH ANOTHER FUNDAMENTAL RIGHT.

Appellee relies on the 1993 decision of *Kissinger v Bd of Trustees*[2] for the proposition that the rational basis standard applies. This reliance is misplaced. *Smith*,[3] expressly recognizes special treatment for "hybrid" rules which affect Free Exercise and other constitutionally protected rights. *Smith* at 1601-02. In fact, the Kissinger Court does not deny the effective holding of *Smith*, it merely states that, "the Smith court did not explain how the standards under the Free Exercise Clause

[2] *Kissinger v Bd of Trustees of Ohio State Univ*, 5 F3d 177, 180 (CA 6, 1993)
[3] *Employment Division v. Smith*, 494 U.S. 872 (1990)

would change depending on whether other constitutional rights are implicated." *Kissinger* at 180.

In fact, a closer look at 6th Circuit case law suggests that this point is far from settled. For example see this Court's more recent holding in *Duncan v. Cone*.[4] Here the Court held, "Moreover, the Duncans' challenge to the statute does not present a "hybrid situation" as their claim of a violation of their right to travel is frivolous." (Citing with approval, *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999). This language suggests that a "hybrid situation" would be present if the right to travel were non-frivolous, and moreover that the Court would be willing to examine the claim under the rubric of hybrid claim under *Smith, supra*. ***While there may be conflicting cases, the fact of the matter is that the United States Supreme Court has recognized that an exception to Smith applies where the Free Exercise claim is combined with another claim of fundamental rights.***

IV. APPELLANT WAS DENIED ACCESS TO PURSUE HER SMALL CLAIMS CASE AND BECAUSE THE 31ST DISTRICT COURT IS A SINGLE JUDGE COURT, APPELLANT WAS PREVENTED FROM RE-FILING ON THE GENERAL CIVIL DOCKET OF THE SAME COURT.

[4] *Duncan v. Cone*, 2000 U.S. App. LEXIS 33221 (6th Cir. Tenn. Dec. 7, 2000)

The United States Supreme Court has held that, "While the circumstances thus vary, the ultimate justification for recognizing each kind of claim is the same. Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that ***the right is ancillary to the underlying claim***, without which a plaintiff cannot have suffered injury by being shut out of court. *Christopher v. Harbury*, 536 U.S. 403, 414-415 (U.S. 2002).

In the present case, the ancillary underlying claim is Ms. Muhammad's original small claims case. Appellee contends that Appellant could have refilled her claim with the general civil division of the 31st District Court and then sought appellate review. Such a contention seriously overlooks the facts of this case. 31st District Court is a single-judge court. Judge Paruk presides over both the small claims and general civil docket. Accordingly, Appellant would have received the same treatment in both dockets. In fact this is exactly what occurred. Enterprise was able to win a Motion for Summary Disposition based upon Appellant's inability to create a genuine issue of material fact through her own testimony. The facts of this case create a clear cut denial of access claim because if Appellant

attempted to re-file she would have been met with the same derogatory conduct that is the source of the present claim.

CONCLUSION

Appellant should not have to forgo her religion as a condition precedent to participating in this nation's courts. The District Court failed to follow the principle criteria set forth in *Grand T. W. R.* when applying the five factor test. This freehand analysis was an abuse of discretion that has left Appellant and all Muslim women with a very real insecurity about their ability to seek redress within the courts. Exhibits A and B demonstrate that the ACLU, the Michigan Department of Civil Rights, and a great number of other community organizations support Appellant in this matter.

Appellant urges this Court to apply strict scrutiny as intended by the United States Supreme Court holding in *Smith*. However, even under rational basis Appellant's claim must prevail because the notion that creditability can be accessed through verbal cues itself lacks creditability.

Finally, Appellant clearly has a claim based denial of access to the Courts. Judge Paruk prevent Appellant from participating in the proceedings because she removed to remove her religious headdress. Appelles's argument that she could have refilled and sought appellate review is disingenuous; and flies in the face of common sense and experience.

Respectfully submitted,

NABIH. H. AYAD & ASSOCIATES, P.C.

Dated: June 23, 2009

/s/ Nabih H. Ayad____________

Nabih H. Ayad (P59518)
2200 Canton Center Rd., Suite 220
Canton, Michigan 48187
734-983-0500
734-983-0520

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CERTIFICATE OF SERVICE

The undersigned does herby certify that on June 23, 2009 that I electronically filed the above Reply Brief with the Clerk of the Court using the ECF system which will send electronic notification of said filing to all appropriate parties.

/s/ Nabih H. Ayad

Nabih H. Ayad