STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

JOHN and JANE DOE 1, et al.,

Plaintiffs,

v. Case No. 20-CV-454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

and

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, et al.,

Defendant-Intervenors.

PLAINTIFFS' MOTION TO STAY PENDING APPEAL THE COURT'S JUNE 3 ORDER, AS MODIFIED ORALLY, DENYING PLAINTIFFS' REQUEST TO PROCEED ANONYMOUSLY AND REQUIRING PLAINTIFFS TO DISCLOSE THEIR IDENTITIES BY JUNE 12

Earlier today, all of the remaining Plaintiffs[1] filed a notice of appeal of this Court's June 3, 2020 Order denying Plaintiffs' motion to proceed anonymously and ordering Plaintiffs to disclose their identities by June 12.[2] Plaintiffs hereby move this Court for a stay of the Court's order to disclose, pending this appeal. The grounds for this motion are as follows:

[1] Two of the Plaintiffs voluntarily dismissed their claims because their children will no longer attend a District school in the fall.

[2] The Court's June 3 Order directs Plaintiffs' to disclose their identities by June 9, but, during a hearing on June 8, the Court orally extended Plaintiffs' deadline to disclose their identities until June 12 at noon.

1. A denial of a request to proceed anonymously is appealable as of right because it is a final order in a "special proceeding." *See* Wis. Stat. § 808.03(1).

2. Although the appealability of the denial of a request to proceed anonymously is a novel issue in Wisconsin courts, multiple federal courts of appeals, including the Seventh Circuit Court of Appeals, have considered the issue, and every one (that undersigned counsel is aware of) has held that a denial of such a request is immediately appealable under the "collateral order" doctrine. *See Doe v. Vill. of Deerfield*, 819 F.3d 372, 376 (7th Cir. 2016) (listing cases). The collateral order doctrine is the federal equivalent to Wisconsin's statutory provision for final orders from a "special proceeding."

3. As the Seventh Circuit explained in *Village of Deerfield*, an order denying a request to proceed anonymously is immediately appealable because such an order is "conclusive on the issue presented" (whether the party may proceed anonymously), because "the question of anonymity is separate from the merits of the underlying action," and because, if such orders were not immediately appealable, they would be "effectively unreviewable"—"If parties were required to litigate the case through to a final judgment on the merits utilizing their true names, the question of whether anonymity is proper would be rendered moot." *Id*.

4. Although no Wisconsin appellate court has yet considered whether the denial of a motion to proceed anonymously is appealable as of right, the Wisconsin Supreme Court recently held that involuntary medication orders (which pose a similar dilemma) are immediately appealable as of right for essentially the same reasons the federal cases invoke for orders pertaining to anonymity requests. *State v. Scott*, 2018 WI 74, ¶ 27, 382 Wis. 2d 476, 914 N.W.2d 141. The Supreme Court explained that an involuntary medication order "resolves an issue separate and distinct from the issues presented in the defendant's underlying criminal proceeding," and, if such

orders were not immediately appealable, they would be "effectively unreviewable." *Id*. ¶¶ 27–34 and n. 17. Thus, the Supreme Court held that such an order is "best classified as a final order from a special proceeding." *Id.* ¶ 31.

5. For essentially the same reasons, the *Scott* decision also held that involuntary medication orders should ordinarily be stayed pending appeal because, "if [such] orders are not stayed pending appeal," the right sought to be protected by an appeal "is rendered a nullity." 2018 WI 74, ¶ 44. Given that the right asserted on appeal would be lost without a stay, the Court invoked its "superintending authority" over the lower courts and "order[ed] that involuntary medication orders are subject to an automatic stay pending appeal." The State could "move to lift the [automatic] stay," but the Court flipped the burden, requiring the State to show that the four factors for a stay (as set forth in *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995)) are *not* present. *Id*. ¶¶ 46–47.

6. As with involuntary medication orders, a claimed right to proceed anonymously is effectively lost if not stayed pending appeal. If a party seeking to proceed anonymously must disclose their identity prior to appealing a denial of such a request, the appeal would be "rendered moot" and the denial order would be "effectively unreviewable." *Vill. of Deerfield*, 819 F.3d at 376; *Scott*, 2018 WI 74, ¶ 29 n. 17. So, as in *Scott*, a stay should be near automatic when a party seeks to appeal the denial of a request to proceed anonymously. Accordingly, if the Defendants (meaning the District and the Defendant-Intervenors) oppose a stay pending appeal, they should bear the burden to show that the *Gudenschwager* factors are not met here.

7. Even if the Court disagrees that *Scott* is analogous and concludes that Plaintiffs bear the burden of establishing that they are entitled to a stay pending appeal, the *Gudenschwager* factors for a stay are all present in this case.

8. As set forth in *Gudenschwager*, a stay pending appeal is appropriate where the moving party "(1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest." *Scott*, 2018 WI 74, ¶ 46 (quoting *Gudenschwager*, 191 Wis. 2d at 440).

9. As to the likelihood of success, Plaintiffs will not re-brief the merits of their request to proceed anonymously, but instead refer the Court to their briefs filed with their motion to proceed anonymously. However, Plaintiffs wish to emphasize a few things. First, as this Court recognized, the question of when and how a party may proceed anonymously is a novel issue in Wisconsin. Plaintiffs cited closely analogous federal cases allowing parents to anonymously challenge controversial school policies and to remain anonymous even to the defendants' lawyers, *see*, *e.g.*, *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710 (7th Cir. 2011); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n. 1 (9th Cir. 1998); Dkt. 50:25 (discussing the anonymity order in *Elmbrook*). Plaintiffs also cited a recent Dane County case against the Madison Metropolitan School District in which the court granted an anonymity request, even as to the District's lawyers. *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Feb. 20, 2020, Judge Anderson presiding). And the Defendants have not identified any analogous case *denying* a request to proceed anonymously. So, Plaintiffs have a more than sufficient likelihood of success on appeal for purposes of a stay, especially given that their right to seek appellate resolution of this novel question of law is effectively lost if not stayed.

10. As to irreparable injury, Plaintiffs again will not re-brief this issue, but instead simply emphasize a few things. The Court has not yet issued a protective order in this matter but the Court laid out what it intends for the protective order during the oral argument on June 8, 2020.

Generally, the Court indicated that the protective order would be consistent with the standard protective order used by the United States District Court for the Eastern District of Wisconsin. The Plaintiffs have already set forth their concerns about the number of people who would be entitled to learn their identities under that approach (including any attorneys and employees of the three separate law firms (Boardman & Clark, Quarles & Brady, and the ACLU), court reporters and their employees, copy personnel, etc. If any one of those people leaks the Plaintiffs' identities (even inadvertently), the Plaintiffs have no practical remedy; once their identities become publicly known, the harm cannot be undone. And if Plaintiffs' identities are leaked, they and their children are at serious risk of retaliation or harassment. *See* Dkts. 9:8–13; 50:18–22. This Court concluded that the protective order described above is sufficient to protect against those risks, but Plaintiffs respectfully disagree that the contemplated order is sufficiently protective. They should have the opportunity to appeal that issue without first having to subject themselves to the risks and potential harm they seek to avoid.

11. There is no harm whatsoever to the Defendants from a stay pending appeal. Defendants simply have no imminent need to learn Plaintiffs' identities. The only even arguable harm Defendants might assert is the delay in reaching the merits caused by an appeal of the anonymity issue. But there are ways to allow this case to proceed to the merits, while fully preserving Defendants' right to discovery and to a complete defense, notwithstanding Plaintiffs' appeal and a stay of the disclosure order. Plaintiffs are open to working with the Court and the Defendants on this, but to give just one possible example,[3] this Court could retain the existing summary judgment schedule with the condition that, for purposes of summary judgment, Defendants may assert any fact about the Plaintiffs that they believe is relevant and that they *might*

[3] Plaintiffs have proposed this to the Defendants as well.

be able show through discovery, without citing any admissible evidence. Plaintiffs will either concede those proposed facts or dispute them. Then, if this Court finds that there are no relevant, disputed facts about the Plaintiffs (which is the most likely outcome, given that this case is about the District's Policy), this Court can resolve the constitutionality of the Policy on summary judgment, and the appeals can be consolidated.[4] In the unlikely event that there are any relevant disputed facts about the Plaintiffs that cannot be resolved while preserving Plaintiffs' anonymity, this Court can then withhold decision on summary judgment until after the appeal of the anonymity issue is resolved and Defendants have had a full opportunity to conduct discovery with whatever Plaintiffs remain and under whatever terms the appellate courts decide are appropriate.[5] Even if this Court decides that summary judgment must be put on hold now, until Plaintiffs' appeal on the anonymity issue is resolved, any delay in reaching the merits is primarily attributable to Defendants' continued opposition to Plaintiffs' attempts to preserve their confidentiality. As noted at the hearing on June 8, some of the Plaintiffs were willing to disclose their identities to the limited group of lawyers who have appeared for the Defendants so that the case could proceed on the merits now, but Defendants opposed that.

12. Finally, the public interest strongly cuts in favor of a stay here. The question of whether and how a party may sue anonymously is a novel and important legal issue, and a stay would allow orderly resolution of that question by the appellate courts. As noted in Plaintiffs' motion to proceed anonymously, Wisconsin courts on multiple occasions have allowed plaintiffs

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[4] If Defendants so desired, Plaintiffs could immediately move to stay their appeal of the anonymity issue so that Defendants would not need to respond at all until it becomes clear whether the case can nevertheless be resolved on summary judgment.

[5] To the extent that this Court is concerned that Plaintiffs' appeal of the anonymity issue divests it of jurisdiction to proceed in this way, the Plaintiffs (or the parties by stipulation) can file a motion in the appellate court to remand to allow this court to proceed as described. Wis. Stat. § 808.075(5), (6).

to sue anonymously, yet there is no published decision discussing this issue in detail. Dkt. 9:2, 5. And, within a few months, two different judges in Dane County came to opposite conclusions about whether a plaintiff may sue using a pseudonym and remain anonymous even to opposing counsel. *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Feb. 20, 2020, Judge Anderson presiding). Granting a stay is the only way to fully preserve Plaintiffs' claimed legal right to proceed anonymously in this matter and to allow an orderly resolution of that issue.

Dated: June 12, 2020.

Respectfully Submitted,

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