

FILED
06-24-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV000454

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' REPLY IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL**

On June 12, Plaintiffs filed an appeal of this Court's June 3 order denying their request to proceed anonymously and simultaneously filed a motion for a stay pending appeal of this Court's disclosure order. Dkts. 110, 111. Defendants filed their response to Plaintiffs' motion for a stay a few hours ago. Plaintiffs' motion for a stay presents two issues to be decided at the hearing tomorrow: (1) Are Plaintiffs entitled to a stay of the disclosure order pending their appeal of the anonymity issue? (2) What happens to the other proceedings in the case?

As to the first question, Defendants' 6-page response does not oppose Plaintiffs' request for a stay or respond in any way to Plaintiffs' arguments for a stay, effectively waiving the issue.

This Court should treat Defendants' silence as a concession that Plaintiffs are entitled to a stay pending appeal and should enter a stay of the disclosure order for that reason alone.¹

The only other issue to be decided is what to do with the remaining proceedings currently pending before this Court (both summary judgment and Plaintiffs' motion for a temporary injunction). Defendants' entire response focuses on this second issue. Plaintiffs proposed a means by which this case could move forward efficiently notwithstanding Plaintiffs' appeal of the anonymity issue. Defendants oppose Plaintiffs' proposal and further argue that Wis. Stat. § 808.075(3) prevents this Court from taking any further action given Plaintiffs' appeal.

Defendants are incorrect about the effect of Plaintiffs' appeal, at least as to Plaintiffs' outstanding motion for a temporary injunction. Wisconsin Statute § 808.07(2) explicitly provides that “[d]uring the pendency of an appeal, a trial court ... may ... grant an injunction.” And Section 808.075 cross-references Section 808.07(2), providing that “[i]n any case, whether or not an appeal is pending, the circuit court may act under ... 808.07(1) and (2).” Wis. Stat. § 808.075(1). *See League of Women Voters v. Evers*, No. 2019AP559, 2019 WL 1397017, at *2 (Wis. Ct. App. Mar. 27, 2019) (noting that Section 808.07(2) allows courts to “grant an injunction” while an appeal is pending); *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶ 14, 237 Wis. 2d 498, 614 N.W.2d 565 (same); *see also MillerCoors, LLC v. Anheuser-Busch Companies, LLC*, No. 19-CV-218-WMC, 2019 WL 4187489, at *2 (W.D. Wis., Judge Conley, Wis. Sept. 4, 2019)

¹ Defendants briefly state their belief that Plaintiffs should not be permitted to appeal this Court's order denying their request to proceed anonymously, but the proper place to raise that argument is with the Court of Appeals, not here.

(expanding a preliminary injunction while an appeal was pending, citing Fed. R. Civ. P. 62, the “federal counterpart” to Wis. Stat. § 808.07 (*see Scullion*, 2000 WI App 120, ¶ 14)).²

The entire purpose of a temporary injunction—and the reason Plaintiffs moved for one—is to prevent harm while a case is pending. A temporary injunction is especially critical when resolution of the merits may take some time. Given that Defendants have repeatedly opposed Plaintiffs’ efforts to resolve the merits efficiently, proceeding with Plaintiffs’ temporary injunction motion is now that much more important to prevent harm.

Defendants argue that they cannot adequately respond to Plaintiffs’ temporary injunction motion without knowing Plaintiffs’ identities, but that is simply not true. The only fact about the Plaintiffs that the Plaintiffs raised in their temporary injunction motion is that their children might begin to deal with gender-identity issues while this case is pending. That is undisputable, in the same way that it is undisputable that Plaintiffs’ children might get injured on the playground, or stung by a bee, etc. (and parents could seek to enjoin experimental treatments of those issues as well). All of the other relevant facts—related to the potential harms from transitioning as a child, the treatment approach the District will facilitate without parental involvement—come from Dr. Levine’s expert affidavit, which Defendants can fully respond to in the normal way (after all, Defendants have had Dr. Levine’s affidavit since February). Defendants may believe that Plaintiffs are not entitled to a preliminary injunction on the grounds that their children might begin to deal with this issue while this case pends (although they are wrong about that), but they can make that

² If this Court believes that Section 808.07(2) does not cover Plaintiffs’ motion for a temporary injunction (despite any textual limitation on a court’s authority to “grant an injunction” while an appeal is pending), Plaintiffs can, and will, file a separate motion for an injunction pending appeal, repeating all of the same arguments in their outstanding temporary injunction motion. The Seventh Circuit has held that a “motion for an injunction pending appeal [is analyzed] using the same factors and ‘sliding scale’ approach that govern an application for a preliminary injunction.” *Grote v. Sebelius*, 708 F.3d 850, 853 n.2 (7th Cir. 2013).

argument without knowing Plaintiffs' identities. In any event, that dispute goes to whether an injunction is warranted. The only question now is whether Plaintiffs are entitled to be *heard* on their temporary injunction motion, notwithstanding their appeal of the anonymity issue. For the reasons above, Plaintiffs are at least entitled to a hearing on the motion they filed back in February.

Dated: June 24, 2020.

Respectfully Submitted,

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