No. 2020AP1032LV

STATE OF WISCONSIN
COURT OF APPEALS

JOHN DOE 1, JANE DOE 1, JANE DOE 3, JANE DOE 4, JOHN DOE 5, JANE DOE 5, JOHN DOE 6, JANE DOE 6, JOHN DOE 8, and JANE DOE 8,
Plaintiffs-Petitioners,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
Defendant-Respondent, and

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL, and GENDER SEXUALITY ALLIANCE OF ROBERT M. LAFOLLETTE HIGH SCHOOL,
Intervenors-Defendants-Respondents.

DEFENDANT-RESPONDENT MADISON METROPOLITAN SCHOOL DISTRICT'S RESPONSE AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSIVE APPEAL

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INTRODUCTION

Sixteen plaintiffs sued the Madison Metropolitan School District ("MMSD" or "the District") alleging that the District is violating their constitutional right to control the upbringing of their children.[1] Plaintiffs have identified themselves only as "John Doe" or "Jane Doe." Plaintiffs filed a Motion to Proceed Using Pseudonyms at the same time the action was initiated. The District moved to dismiss the complaint on several grounds, including that the complaint failed to identify the litigants by name. The circuit court denied Plaintiffs' motion to proceed using pseudonyms, and ordered that the individuals proceeding with the case disclose their identities to the court and attorneys for the litigants. The circuit court found "that there is sufficient need to keep the Plaintiffs' names sealed and confidential from the public" and directed that "on or before June 9, 2020, Plaintiffs must file, under seal, an amended complaint that lists the names and addresses of the plaintiffs that are proceeding in this action." (Pet. App. 101–02). The circuit court also directed that the parties negotiate a protective order. Plaintiffs did not file an amended complaint as directed, but instead sought this permissive appeal and filed a notice of appeal as a matter of right.

Both of Plaintiffs' attempts to invoke this Court's appellate review authority should be rejected. The circuit court's order on anonymity is not a final, appealable order as a matter of right, and therefore it should be dismissed. This Court should also decline to accept Plaintiffs' request for non-final review, because none of the traditional factors favoring interlocutory review are present here.

STATEMENT OF ISSUES

The question presented in this petition is whether the circuit court erred in determining that Plaintiffs could not commence this action anonymously. The circuit court simply held that plaintiffs may not commence this action without stating their names and addresses, but that the summons and complaint with that information may be filed under seal and a protective order would be entered to maintain plaintiffs' anonymity to anyone not covered by the protective order. The issue is not whether Plaintiffs may avoid public disclosure of their identities. The circuit court has ruled that the summons and complaint shall be filed

[1] That number of plaintiffs is now down to 10, because several individuals voluntarily withdrew from the action.

under seal and a protective order entered to prevent such disclosure. On appeal, Plaintiffs claim the absolute right to proceed without the court and the other parties (or their counsel) knowing their identities.

As the Wisconsin Supreme Court has recognized, it is "a basic tenet of the democratic system that the people have the right to know about operations of their government, including the judicial branch, and that where public records are involved the denial of public examination is contrary to the public policy and the public interest." *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983). No Wisconsin statute or appellate decision allows a plaintiff to remain anonymous from the court and opposing parties.

STATEMENT OF FACTS

On February 18, 2020, Plaintiffs filed a declaratory judgment action against MMSD, challenging as unconstitutional the District's affirming approach to support transgender, non-binary, and gender-expansive students at school. (Doc. 2). According to the complaint, Plaintiffs are adults from families with children enrolled at various public schools in the District. Plaintiffs' challenge focuses on a document that MMSD made available on its website in April 2018 entitled, "Guidance & Policies to Support Transgender, Non-Binary & Gender Expansive Students" (referred to here as the "Guidance"). (*See* Doc. 3 at 1–35.)

The Guidance states that MMSD is committed "to providing all students access to an inclusive education that affirms all identities." (Doc. 3 at 3.) It also states that "families are essential in supporting our LGBTQ+ students," and that, "with the permission of our students, we will strive to include families along the journey to support their LGBTQ+ youth." (*Id.* at 18.) The Guidance encourages staff to give families the resources, consultation, and support they need; and it states that families can at any time request a meeting with staff to discuss their child's gender support plan. The Guidance provides that "[a]ll MMSD staff will refer to students by their affirmed names and pronouns." (*Id.* at 20.) A student's name and gender may be changed in District systems with a parent's or guardian's permission, but "[s]tudents will be called by their affirmed name and pronouns regardless of parent/guardian permission to change their name and gender in MMSD systems." (*Id.*)

According to the Complaint, "Plaintiffs do not share the District's views about how to properly respond if their children experience gender dysphoria." (Doc. 2 at ¶ 63.) Specifically, Plaintiffs allege that if their children "ever begin to experience gender dysphoria," then most of them "would not immediately 'affirm' their children's beliefs about their gender identity and allow them to transition to a different gender role . . . ." (*Id.* at ¶ 64.)

Shortly after filing the Complaint, Plaintiffs moved to proceed using pseudonyms and for a temporary injunction. Plaintiffs submitted affidavits in support of their motions, with Plaintiffs' names and signatures redacted. (Docs. 8, 28.) The affidavits do not provide much information about Plaintiffs or their children, apart from identifying the schools their children attend. Many state that "[i]f my children ever express a desire to transition to a different gender identity, I would not immediately allow them to do so, but would instead pursue a treatment approach to help my children identify and address the underlying causes of the dysphoria and learn to embrace their biological sex." (Docs. 14–26.) Plaintiffs state they are "concerned that the District's policy prohibiting staff from communicating with me about how my children process gender identity issues at school will prevent me from learning that my children are dealing with gender dysphoria . . . ." (*Id.*) According to Plaintiffs, they are "concerned that if teachers and staff at the District learn that [they are] opposing the Policy they will retaliate against [them] and/or [their] children," and they worry about harassment if other students, parents, or members of the public learn of their role in this lawsuit. (*Id.*)

Plaintiffs seek a declaration that the Guidance violates their constitutional right to control the upbringing of their children, and temporary and permanent injunctive relief. However, as noted above, the circuit court rejected Plaintiffs' request to proceed anonymously as to the court itself and counsel for the parties, and it ordered that Plaintiffs file an amended complaint under seal listing their names. On June 26, 2020, the circuit court stayed that order pending appeal. (Doc. 122.)

REASONS FOR DENYING THE PETITION FOR LEAVE TO APPEAL A NON-FINAL ORDER

I. THE ORDER IS NOT APPEALABLE AS OF RIGHT.

Plaintiffs commenced this action using fictitious names and filed a motion seeking to proceed anonymously. However, no Wisconsin statute permits an individual to file an anonymous complaint, and at least three provisions require disclosure of the parties to the action. First, Wis. Stat. § 802.04 states that the caption of the Complaint "shall include the names and addresses of all the parties." Second, the listed plaintiffs are fictitious and, as such, plainly have no capacity whatsoever, including the capacity to sue. See Wis. Stat. § 802.06(2)(a)1. Third, by failing to name the actual individuals asserting claims against MMSD, Plaintiffs have failed to join the real parties in interest as necessary parties under Wis. Stat. §§ 802.06(2)(a)7, 803.01, and 803.03.

Plaintiffs contend that the Order is appealable as of right.[2] Plaintiffs are incorrect. An appeal as of right can be taken only from a final order or judgment. Wis. Stat. § 808.03(1). An order or judgment is final if it disposes of the entire matter in litigation as to one or more of the parties. *Id.* The Court of Appeals lacks jurisdiction over an appeal of a non-final judgment or order. *Leske v. Leske,* 185 Wis. 2d 628, 630, 517 N.W.2d 538 (Ct. App. 1994). On its face, the Order plainly does not dispose of the entire matter in litigation as to one or more of the parties.

Plaintiffs assert in their docketing statement that the Order is appealable as of right because this is a "special proceeding." Plaintiffs are wrong in two ways. First, this is not a special proceeding. Second, the Order is not a final order in a special proceeding.

Civil proceedings in Wisconsin courts are divided into actions and special proceedings. Wis. Stat. § 801.01(1). Special proceedings include processes such as probate, which consists of a series of special proceedings. *See In re Goldstein's Estate,* 91 Wis. 2d 803, 810, 284 N.W.2d 88, 91 (1979). In this action, Plaintiffs seek declaratory and injunctive relief based on an alleged threatened violation of their

[2] Plaintiffs argue leave should be granted because the Order is appealable as of right, but that argument makes no sense. If the Order were final, as Plaintiffs contend, then the appeal would have to proceed under Wis. Stat. § 808.03, not § 809.50. Regardless, Plaintiffs are incorrect that the Order is appealable as of right, and Plaintiffs' notice of appeal under Wis. Stat. § 808.03 should be dismissed for lack of jurisdiction.

constitutional rights. It is an ordinary civil action, not a special proceeding, and Plaintiffs have no support for its assertion otherwise. Although it is true that a motion may initiate a special proceeding, *see Wengerd v. Rinehart*, 114 Wis. 2d 575, 582, 338 N.W.2d 861 (Ct. App. 1983), a motion in a civil action does not typically qualify as a "special proceeding." If Plaintiffs' argument to the contrary were accepted, then the jurisdictional limitations of Wis. Stat. § 808.03 and the finality rule would become meaningless.

"The test to be applied in determining the nature of any judicial remedy, as regards whether it is a special proceeding, is whether it is a mere proceeding in an action, or one independently thereof or merely connected therewith. The latter two belong to the special class and the other does not." *Voss v. Stoll*, 141 Wis. 267, 271, 124 N.W. 89 (1910). The *Voss* test was reaffirmed by the Wisconsin Supreme Court just last year. *See L. G. v. Aurora Residential Alternatives, Inc.*, 2019 WI 79. In *L.G.*, the Supreme Court ruled that an order denying a motion to stay a civil action and compel arbitration was appealable as of right. *Id.*, ¶ 20. *See also State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141 (ruling that competency proceeding "resolves an issue separate and distinct from the issues presented in the defendant's underlying criminal proceeding [and] is not part of the defendant's underlying criminal proceeding [but] 'related' or 'connected' to one another").

A motion to proceed anonymously in a civil action is not a "special proceeding." It is rather a "mere proceeding in an action." Indeed, the prerequisite step to initiate any civil action is the filing of a summons and complaint, which must identify who the parties are and contain a short and plain statement of the plaintiffs' claims. An order denying a request to proceed anonymously during a civil action is an interim proceeding in that action. It is in no way independent of the underlying action and does not fully resolve an issue separate and distinct from the issues raised in the action. Plaintiffs' motion to litigate anonymously did not commence a special proceeding, and the circuit court's order denying Plaintiffs' motion is not appealable as a matter of right.

Plaintiffs' identities are fundamental to this action. The District contends that Plaintiffs lack standing and cannot demonstrate the irreparable harm needed for injunctive relief. "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not

done." *Krier v. Vilione,* 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (citation omitted). As the Wisconsin Supreme Court stated in *Foley-Ciccantelli v. Bishop's Grove Condominium Association, Inc.*, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789:

> [T]he essence of the determination of standing, regardless of the nature of the case and the particular terminology used in the test for standing, is that standing depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.

Id., ¶ 40 (footnotes omitted).

Mere disagreement with the District's decisions is insufficient to confer standing. *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶23, 259 Wis. 2d 107, 655 N.W.2d 189. Rather, "[i]n order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." *Id.* at ¶ 15 (citing *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81). "Standing must ultimately rest on a showing, or at least an allegation, of direct injury or a real and immediate threat of direct injury." *Fox v. Wis. Dep't of Health & Social Servs.*, 112 Wis. 2d 514, 5239 334 N.W.2d 532 (1983). In order to know whether Plaintiffs will suffer an immediate threat of direct injury, rather than a conjectural or hypothetical risk of future harm dependent on a sequence of unlikely events, the court and the Defendants must know who the plaintiffs are.

Similarly, a circuit court may issue a preliminary injunction only when the party seeking that relief demonstrates: (1) a "reasonable probability of ultimate success on the merits," (2) the lack of an alternative "adequate remedy at law," and (3) "irreparable harm." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313-314 (1977). In all circumstances, the court must find that the plaintiffs have actually suffered or are likely to suffer injuries that would be irreparable absent equitable relief. *See Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 803, 280 N.W.2d 691 (1979). Plaintiffs cannot make that showing here without disclosing their identities, and the Defendants are entitled to learn that information.

There is no legal basis for Plaintiffs to demand that this case be litigated anonymously, and the circuit court did not erroneously exercise its discretion by denying Plaintiffs' request. Indeed, it would be functionally impossible to do what Plaintiffs ask. Suppose one of the anonymous Plaintiffs violated the protective order by publishing in the press some detail covered by the protective order, or engage in other conduct that violated court rules. Would that person by immune from contempt sanctions because the court and the Defendants would not know who the person is? The very notion that a person can seek redress from the court without disclosing who he or she is seems absurd.[3]

Finally, even if the Order was one issued in a special proceeding, it is clearly not a final order. A final order is one "that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding . . . ." The Order does not dispose of the entire matter; it simply required that Plaintiffs amend their complaint. And the Order does not state that the decision is final for purposes of appeal, as the Wisconsin Supreme Court requires. *See Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 44, 728 N.W.2d 670 ("Going forward, we therefore will require that final orders and final judgments state that they are final for purposes of appeal.").

II. THE PETITION TO APPEAL A NON-FINAL ORDER SHOULD BE DENIED.

A. The Plaintiffs Should Await Final Judgment to Appeal.

The Court of Appeals need not exercise its discretion to allow a permissive appeal of the Order, because Plaintiffs have an obvious and direct route to seek review of the circuit' court's decision: they can await a final judgment. The circuit court agreed with the District that the plaintiffs could not proceed anonymously, but did not grant the District's motion to dismiss on that ground, instead giving the plaintiffs an opportunity to file an amended complaint under seal. The plaintiffs have chosen not to file that amended complaint. If the circuit court enters

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[3] Indeed, there is no conceivable way for any plaintiff to proceed anonymously against a body corporate and politic because they must first comply with Wis. Stat. § 893.80. Written notice of a claim and an itemization of requested relief must be presented to a body politic (such as the District) before commencing an action. Wis. Stat. § 893.80(1d); *Dep't of Nat. Res. v. City of Waukesha*, 184 Wis. 2d 178, 202, 515 N.W.2d 888 (1994). The statute expressly requires that a claimant's address must be stated in the claim. Wis. Stat. § 893.80(1d)(a).

judgment on the action based on Plaintiffs' failure to comply with its Order, then that judgment will be a final order appealable as of right. And if on appeal this Court rules that Plaintiffs must be allowed to proceed anonymously, then it may reverse judgment and remand the matter for further proceedings. Permissive appeal is unnecessary.

B. Immediate Appeal Will Not Materially Advance the Litigation or Clarify Further Proceedings.

Allowing Plaintiffs an immediate appeal of a nonfinal order will do nothing to advance the ultimate resolution of the litigation. In fact, Plaintiffs' immediate efforts to appeal the Order has delayed proceedings in the circuit court. Plaintiffs are effectively seeking to litigate both the issue of anonymity and their arguments on the merits simultaneously, even though they have refused to take the first step of identifying themselves. That tactic is contrary to appellate procedure and should be rejected. If Plaintiffs wish to proceed on the merits, then they must identify themselves under seal to the court and counsel for the parties.

C. Immediate Appeal Will Not Protect The Petitioner from Substantial or Irreparable Injury.

The circuit court agreed that plaintiffs had a legitimate interest in maintaining their anonymity. There are established procedures for filing matters under seal, and the circuit court has directed the parties to prepare a protective order. The identities of the plaintiffs will be known only to counsel of record and certain representatives of the District. These provisions are more than adequate to protect the anonymity of the plaintiffs. Therefore, immediate appeal is not necessary to protect the petitioner from substantial or irreparable injury.

D. Immediate Appeal Will Not Clarify an Issue of General Importance in the Administration of Justice.

Wisconsin law expressly states that a plaintiff must identify themselves in order to commence an action. Courts have the ability to protect legitimate concerns of parties in proper cases through a protective order and permitting information to be submitted under seal. Allowing anonymous litigation as Plaintiffs envision it must come by legislation or rulemaking, not by a court ruling. Indeed, given the Court of Appeals' limited role as an error-correcting court, the outcome that Plaintiffs seek may be outside this Court's authority. *See Deegan v.*

Jefferson Cnty., 188 Wis. 2d 544, 559, 525 N.W.2d 149 (Ct. App. 1994) (acknowledging that the Court of Appeals is primarily an error-correcting court and if there are policy reasons for recognizing a claim, those arguments are best directed to the Supreme Court).

Even more fundamentally, Plaintiffs' request to proceed anonymously should be rejected because it impugns the integrity of the entire court system. The basic premise animating Plaintiffs' request is that the court and counsel cannot be trusted with identifying information, but they have not identified any fact-specific evidence to justify this extraordinary claim. Counsel for the parties are officers of the Court, and it is baseless for Plaintiffs to assume that they or court staff will disregard protective orders or other rulings and publicly disclose Plaintiffs' identities. Anonymous litigation raises obvious concerns about due process and transparency and any exception to full disclosure should be sparingly applied.

CONCLUSION

For all of the reasons set forth above, Defendant-Respondent Madison Metropolitan School District respectfully urges the Court to deny the petition for permissive appeal.

DATE: July 6, 2020

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CERTIFICATION AS TO FORM AND LENGTH

In accordance with Wis. Stat. § 809.50(4), I certify that this combined Response and Memorandum in Opposition to Plaintiffs' Petition for Permissive Appeal conforms to the rules specified in Wis. Stat. § 809.50(2), in that this combined response and memorandum uses a proportional serif font and the length of this submission is 3,390 words.

DATE: July 6, 2020

Barry J. Blonien

STATEMENT OF MAILING AND SERVICE

I certify that I caused this Response and Memorandum in Opposition to Plaintiffs' Petition for Permissive Appeal to be placed in a U.S. mailbox on July 6, 2020. Kimberly Bernards, an employee with Boardman & Clark, placed the document with proper postage in a mailbox at the United States Post Office located at 2 E. Mifflin Street, Suite 103, Madison, WI 53703. An original and four copies, along with an additional copy to be authenticated and returned, were mailed with a self-addressed stamped envelope to the Clerk of the Wisconsin Court of Appeals, 110 East Main Street, Suite 215, PO Box 1688, Madison, WI 53701-1688. Copies were also sent to counsel at the following addresses:

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