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01-20-2023
CIRCUIT COURT
DANE COUNTY, WI
2020CV000454

BY THE COURT:

DATE SIGNED: January 20, 2023

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

JANE DOE 4,

Plaintiff,

vs. Case No. 20-CV-454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

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

Intervenors.

DECISION AND ORDER

INTRODUCTION

On November 23, 2022, I dismissed Jane Doe's claims for declaratory and injunctive relief. Jane Doe now moves under Wis. Stat. § 808.07 for an injunction to limit the Madison Metropolitan School District's ("the District") conduct and also for a stay of sanctions imposed for her discovery violations. Both of these motions required Jane Doe to show (1) that she is likely to succeed, (2)

that she will suffer irreparable injury if the motion is denied, (3) that no substantial harm will come to other interested parties, and (4) that a stay will do no harm to the public interest. *Waity v. LeMahieu*, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).).

On her motion for an injunction, Jane Doe fails to demonstrate any of these four factors. On her motion for a stay of discovery sanctions, Jane Doe fails to make a strong showing of likelihood of success and fails to show she will suffer irreparable harm. Although she does show that the public and other interested parties will not be harmed, this is only because nobody, including Jane Doe herself, will be harmed by denying her motion. Accordingly, I conclude that in both cases Jane Doe fails to show she is entitled to relief pending appeal and I deny both motions.

I. BACKGROUND

The background of this case is more fully set forth in several previous decisions. *See* Decision and Order (Nov. 23, 2022), dkt. 312 (finding Jane Doe has no standing); *Doe 1 v. Madison Metro. Sch. Dist.*, 2021 WI App 60, 399 Wis. 2d 102, 963 N.W.2d 823, *aff'd,* 2022 WI 65, ¶28, 403 Wis. 2d 369, 976 N.W.2d 584 (discussing the earliest parts of this case and ordering Jane Doe to identify herself under narrow conditions designed to protect her privacy). To summarize, in 2018, the District created "policies and practices to support transgender, non-binary, and gender-expansive students." Berg Aff. Ex. 1, dkt. 10:8 (a copy of "the Trans Policy"). Jane Doe, a parent of a child enrolled in the District, then brought this action for declaratory and injunctive relief on the theory that the Trans Policy violated her constitutional rights to parent.

On November 23, 2022, this Court issued a series of five orders in this case. Jane Doe's present motions deal with only two of those orders: an order striking expert testimony and an order

dismissing her claims.[1]

The first order, which struck two affidavits Jane Doe had filed, requires some additional background. On November 7, 2022, I granted in part and denied in part the District's motion to compel discovery on what Jane Doe had told her disclosed expert, Dr. Stephen Levine. Tr. of Nov. 7, 2022 Hr'g, dkt. 310:37-38; *See* District's Motion to Compel, dkt. 276; Jane Doe Resp. Br., dkt. 289. I ordered Jane Doe to produce communications related to this case, but did not order disclosure of any communications from other cases. Then, on November 23, the Court reduced this order to writing, specifically requiring Jane Doe produce "all communications and documents exchanged between [her] attorneys and [her expert witness] Dr. Stephen Levine related to this lawsuit …" Order (Nov. 23, 2022), dkt. 311. Jane Doe refused to comply with this discovery order, so I sanctioned her by striking Dr. Levine's original affidavit, dkt. 31, and his rebuttal affidavit, dkt. 142.[2] *See* Tr. of Dec. 12, 2022 Hr'g, dkt. 359:48 ("both of those [affidavits] will be struck pursuant to the oral decision by this court issued here today.")

In response to the order striking her expert's testimony, Jane Doe orally moved for a stay. Tr. of Dec. 12, 2022 Hr'g, dkt. 359:53 (Jane Doe's oral motion). In a later-filed brief, Jane Doe said that "[t]he context of this stay motion is confusing …", then clarified that "the only order at issue in this stay motion is this Court's order striking Dr. Levine's affidavits." Jane Doe Reply Br., dkt. 379:2 (citing this Court's Decision and Order (Dec. 12, 2022), dkt. 357). Thus, I understand

[1] The Court also issued orders (1) on mootness because the case had been dismissed, Order (Nov. 23, 2022), dkt. 313, and (2) to seal depictions of non-party minor students of the district, Order (Nov. 23, 2022), dkt. 314, and (3) to redact part of the briefing to protect Jane Doe's privacy. Order (Nov. 23, 2022), dkt. 315.

[2] The District sought to strike this evidence under Wis. Stat. § 802.06(6) as immaterial or impertinent. *See* District Br., dkt. 335. However, I also considered their motion under Wis. Stat. §§ 804.12(2) and 805.03, which allow a court to sanction any party for disobeying a court order. *See* Tr. of Dec. 12, 2022 Hr'g, dkt. 359:40-41. This authority "is absolutely essential to the court's ability to efficiently and effectively administer its calendar." *Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553 (citations and quotations omitted).

Jane Doe to seek only to stay the limited order striking Dr. Levine's affidavits.

The remaining order related to Jane Doe's present motions dismissed Jane Doe's claims. I found Jane Doe had no standing, or, put another way, that she failed to show this was a justiciable controversy. Decision and Order (Nov. 23, 2022), dkt. 312:33. Consistent with this finding, I necessarily found that Jane Doe failed to show a "reasonable probability of ultimate success on the merits," and, because that is one of the elements for the injunction, I denied her motion for an injunction and dismissed her claim for declaratory relief. *Id.* Jane Doe now seeks the same injunction denied by this order.

II. LEGAL STANDARD

The legal standard for a "stay" or an "injunction" pending appeal is the same. Wis. Stat. § 808.07; *See e.g. Waity v. LeMahieu*, 2022 WI 6, ¶19, 400 Wis. 2d 356, 969 N.W.2d 263 (using stay and injunction interchangeably). "Courts must consider four factors when reviewing a request to stay an order pending appeal." *Waity*, 2022 WI 6, ¶49. These four factors are:

> (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) whether the movant shows that no substantial harm will come to other interested parties; and
>
> (4) whether the movant shows that a stay will do no harm to the public interest.

Id.; State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). These four factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.*

III. DISCUSSION

I address Jane Doe's two motions, in turn, by discussing each of the *Waity/Gudenschwager*

factors for an injunction. I begin with Jane Doe's motion for an injunction on the merits: Jane Doe seeks an order prohibiting the District from three kinds of conduct loosely related to her dismissed claim for declaratory relief. Next, I discuss Jane Doe's motion for a stay of an order striking her expert's testimony.

A. Jane Doe fails to show she is entitled to an injunction pending appeal.

Typically, the analysis for an injunction pending appeal would proceed as a step-by-step examination of the four factors for a stay under *Waity/Gudenschwager*. In this case, however, this would not be helpful for three reasons: (1) because Jane Doe herself ignores these factors, (2) because, specifically focusing on the first factor, Jane Doe does not explain what a reasonable appellate court would do, (3) because the relief she seeks exceeds the scope of her pending appeal.

1. Jane Doe does not meaningfully discuss any factor.

The first reason it would not be helpful to analyze the four factors for an injunction pending appeal is because Jane Doe does not meaningfully discuss any of these factors. The sum total of Jane Doe's briefing is that she is entitled to an injunction for "the reasons previously explained …" Jane Doe Br., dkt. 317:2. It is true that a court "cannot simply input its own judgment … and conclude that a stay is not warranted." *Waity,* 2022 WI 6, ¶52. But this does not mean that a court automatically reverses or ignores its own judgment—after all, "the movant is always required to demonstrate more than the mere possibility of success on the merits." *Waity,* 2022 WI 6, ¶54 (quoting *Gudenschwager*, 191 Wis. 2d at 441."

Jane Doe cannot ignore this required demonstration then expect a court to vaguely reflect on its own decisions and somehow reach a different conclusion about how another judge could decide this case. *See Vos,* 2020 WI 67, ¶24 ("We do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case."). Furthermore, even if the

Court had some obligation to sua sponte review its own decisions—a proposition not supported by any law—and even if the Court concluded upon doing so that Jane Doe had demonstrated she had standing, then Jane Doe *still* would not be entitled to an injunction because the Court has stricken the evidence on which she relies to prove harm. I address the reasons why this was a proper sanction for Jane Doe's refusal to comply with discovery orders, below.

2. Even relying only on the first factor, Jane Doe does not attempt to make a strong showing that she is likely to succeed on appeal.

In a similar vein, the second reason why it would not be helpful to address each factor for an injunction pending appeal is because, as Jane Doe points out, "[i]n constitutional cases, the first factor is typically dispositive." *Vitolo v. Guzman,* 999 F.3d 353, 360 (6th Cir. 2021).). But an examination of the first factor is not helpful either because, to be perfectly clear, Jane Doe's argument on the first factor is one sentence long. That argument does not cite a standard of review. *See Waity,* 2022 WI 6, ¶53 ("courts must consider the standard of review…"); *See also Krier v. Vilione,* 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517 ("[w]hether a party has standing presents a question of law that we also review de novo."). Nor does the argument provide any specific reason why a reasonable appellate court would disagree with this Court. Nor does Jane Doe explain how a reasonable appellate court would find a school policy on transgender students threatens an imminent injury to a parent who has no "reason to believe that [her child] has an interest in exploring their gender identity." *See* Decision and Order (Nov. 23, 2022), dkt. 312:5 (citing Jane Doe Sealed Depo., dkt. 231:84).

3. The relief Jane Doe seeks is not necessary to preserve the status quo.

Third, "temporary injunctions are to be issued only when necessary to preserve the status quo." *Waity,* 2022 WI 6, ¶49 (quoting *Werner,* 80 Wis. 2d at 520). Put another way:

> The purpose of a temporary injunction is to *maintain* the status quo, not to change the position of the parties or *compel the doing of acts which constitute all or part of the ultimate relief sought*.

Sch. Dist. of Slinger v. WIAA, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) (emphasis in original, citations and quotations omitted). This is a problem for Jane Doe because the relief she seeks (orders limiting what the District can do) vastly exceeds the scope of her appeal (whether she has standing to seek orders limiting what the District can do). If Jane Doe reads some unbound powers into Wis. Stat. § 808.07(2)(a)2, which authorizes courts to "[s]uspend, modify, restore, or grant an injunction," then she does not explain or support this interpretation. *See* Jane Doe Reply Br., dkt. 369:1-2. So, if I could not compel the ultimate relief sought by Jane Doe's appeal—an order concluding Jane Doe has standing and remanding to the circuit court to consider the discretionary factors for an injunction—then it would not make sense that I could compel anything beyond the ultimate relief sought, either.

In sum, Jane Doe does not address any of the factors for an injunction pending appeal. Alternatively, the relief she seeks in a temporary injunction exceeds what is necessary to preserve the status quo. Either reason is sufficient to deny her motion for an injunction limiting the District's conduct pending appeal.

B. Jane Doe fails to show she is entitled to a stay on the Court's discovery order.

I turn, next, to Jane Doe's motion to stay the order striking her expert's affidavits. In this motion, Jane Doe does discuss the four factors for a stay pending appeal.

1. Jane Doe fails to make a strong showing that this Court abused its discretion when it sanctioned her for disobeying court orders.

The first factor for a stay pending appeal asks whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal. *Waity*, 2022 WI 6, ¶49. Although Jane Doe

discusses this factor, she once again does not cite any standard of review or tailor her argument to that standard. *Id.* ¶53 ("courts must consider the standard of review…"). The standard of review applicable here: "is a deferential standard. The decision to impose sanctions and the decision of which sanctions to impose, including dismissing an action with prejudice, are within a circuit court's discretion." *Indus. Roofing Servs, Inc. v. Marquardt,* 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. Thus, Jane Doe's burden on a motion for a stay pending appeal was to make a strong showing that an appellate court will likely conclude this Court abused its discretion. But because Jane Doe does not even acknowledge the deferential standard of review, it is difficult to track her arguments.

a. Parties are not immune for sanctions when they disobey orders which, for unrelated reasons, are later moot.

First, Jane Doe appears to argue that I abused my discretion because I sanctioned her for disobeying an order, even though that order was later rendered moot by the dismissal of this action. Jane Doe Reply Br., dkt. 379:6. In other words, Jane Doe says that a party may freely disobey certain court orders, so long as later circumstances make their disobedience immaterial to the outcome of the action. Jane Doe cites no authority in support of this argument. *Id.*

I reject the argument. A court's authority to sanction parties for disobedience is well-settled in this state—a party who chooses to violate a court order subjects themselves to "just" sanctions. Wis. Stat. §§ 804.12 and 805.03; *Indus. Roofing Servs;,* 2007 WI 19, ¶41. This authority is necessary to "ensure prompt disposition of lawsuits" and "essential to the trial court's ability to enforce its orders." *260 N. 12th St., LLC v. DOT,* 2010 WI App 138, ¶27, 329 Wis. 2d 748, *aff'd,* 2011 WI 103, 338 Wis. 2d 34 (citing *Burnett v. Alt*, 224 Wis. 2d 72, 114, 589 N.W.2d 21 (1999).). The authority to sanction parties is inherent, *id.,* but courts additionally have the statutory authority

to "make such orders in regard to the failure [to obey] as are just, including but not limited to orders authorized under s. 804.12(2)(a)." Wis. Stat. § 805.03. The cited statute, in turn, provides that a court may issue orders "prohibiting the disobedient party from introducing designated matters in evidence" or even "dismissing the action or proceeding…" Wis. Stat. § 804.12(2)(a)2-3. For example, in *Schneller v. St. Mary's Hosp.*, our supreme court upheld sanctions which had been issued to prevent "dilatory behavior by counsel," even though the behavior had caused no prejudice, explaining that sanctions are designed to "convey to the litigant and future litigants that scheduling deadlines must be obeyed." 162 Wis. 2d 296, 314, 470 N.W.2d 873 (1991) (emphasis added); *See also Sentry Ins.*, 2001 WI App 203, ¶19 ("discretion to impose sanctions is 'not dependent on a showing that the opposing party has been actually prejudiced by the delay.'")

Applying those principles here, it is clear that sanctions would do little to ensure the prompt disposition of lawsuits if Jane Doe could escape just sanctions for her undeniably sanctionable conduct. Jane Doe refused to comply with orders that required her to produce discovery. As a result, she was properly sanctioned.

b. Jane Doe's remaining arguments are not persuasive.

Jane Doe's second and third arguments for why she is likely to succeed on appeal are not persuasive. These arguments are that "the strike order was also an unwarranted sanction given that … the underlying order to compel was 'moot.'" Jane Doe Reply Br., dkt. 379:6. This is the same argument, discussed above, which I reject for the same reasons. Simply put, whether a sanction is "just" does not depend on the harm the sanctionable conduct has caused. *Schneller,* 162 Wis. 2d at 314; *Sentry Ins.* 2001 WI App 203, ¶19.

Jane Doe next says that she is likely to succeed because she expects to prevail on an appeal of the order to compel, the disobedience of which was the basis for her sanctions. Jane Doe Reply

Br., dkt. 379:7. Her primary argument here appears to be that because "there is no case supporting Defendants' position, [Jane Doe] necessarily has a significant likelihood of success." *Id.* There is no such talismanic test for when a party "necessarily" has a likelihood of success. *See Waity*, 2022 WI 6, ¶68 (Hagedorn, J., concurring) ("[a stay] should not be uncommon, particularly when faced with a difficult legal question of first impression …"). But in any event, the defendants do cite cases supporting their position, for example, *Blakely v. Waukesha Foundry Co., Inc.*, which required disclosure of expert reports *and also* "any other written communication on the subject matter." 65 Wis. 2d 468, 478-80, 222 N.W.2d 920 (1974). The defendants cite the work of prominent commentators supporting their position, too. *See* Jay E. Grenig and Jeffrey S. Kinsler, *8 Wisconsin Practice Series, Civil Discovery,* (2022) § 1:29 (identifying "one court" that has agreed with Jane Doe's position, then rejecting that position.).

2. Jane Doe fails to show she will be irreparably harmed by the specific order she seeks to stay.

The second factor on a motion to stay pending appeal is whether the movant shows that, unless a stay is granted, it will suffer irreparable injury. *Waity*, 2022 WI 6, ¶49. "The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant." *Gudenschwager*, 191 Wis. 2d at 441-42 (citation omitted).

Jane Doe does not evaluate her harm on those terms. Instead, she principally relies on *County of Dane v. PSC*, 2022 WI 61, 403 Wis. 2d 306, 976 N.W.2d 780, as an example of a case in which compelled discovery could cause irreparable harm. I reject her argument because provides no basis on which I could evaluate her harm under the required terms—substantiality, likelihood, and proof—as set forth in *Gudenschwager*, and I further reject her argument for two additional reasons.

First, Jane Doe fails to recognize that every part of *County of Dane* on which she relies is not precedent. The majority portion of that decision is ¶4, alone. *See* 403 Wis. 2d at 316 (explaining the justices' participation). No majority of justices assented to the parts Jane Doe cites. *See e.g. id.* ¶90 (Hagedorn, J., op.) ("Only the circuit court's order denying … [the] motion to quash the discovery subpoena is properly before us."). Nothing Jane Doe cites from this opinion, or the other case she cites, *State v. Scott,*[3] discusses discovery or a stay pending appeal.

The second problem with Jane Doe's argument is that she confuses precisely what "harm" is relevant to this decision. The harm relevant to this decision is *not* whether disclosure of communications to her expert will irreparably harm Jane Doe. Perhaps that disclosure may cause irreparable harm, and perhaps if Jane Doe sought to stay the Court's order compelling disclosure, that question would be ripe for an answer. But in this case, Jane Doe has explicitly clarified that "the only order at issue in this stay motion is this Court's order striking Dr. Levine's affidavits." Jane Doe Reply Br., dkt. 379:2 (emphasis added). Thus, the question here is whether the *order striking Dr. Levine's affidavits* will, unless a stay is granted, cause irreparable injury to Jane Doe. The answer to this question is, of course, that no harm will come. I need look no further than Jane Doe's own briefing, in which she has just finished explaining why the order to strike was moot, or in other words, why this order could have "no practical effect on the controversy." *See PRN Associates, LLC v. DOA,* 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559.

3-4. Jane Doe shows that no other parties or the public will be harmed.

The third and fourth factors for a stay pending appeal are similar. They ask, respectively,

[3] In *State v. Scott,* the Wisconsin Supreme Court held that "involuntary medication orders are subject to an automatic stay pending appeal." 2018 WI 74, ¶43, 382 Wis. 2d 476, 914 N.W.2d 141. This was because, otherwise, a defendant's "liberty interest in avoiding the unwanted administration of antipsychotic drugs is rendered a nullity." *Id.* ¶44 (internal citations and quotations omitted). There is no involuntary medication order in this case.

whether the movant shows that no substantial harm will come to other interested parties or to the public interest. In making this determination, I must consider "the period of time that the case is on appeal … [and] the extent of harm the non-movant will experience if a stay is entered, but the non-movant is ultimately successful." *Waity*, 2022 WI 6, ¶58.

The District says that Jane Doe fails to make this showing because "[t]hird parties and the public have an interest in upholding the dignity of Circuit Courts." District Resp. Br., dkt. 378:6. I agree, although I consider this a weak rationale for denying a motion to stay because Wisconsin has "a unified court system," Wis. Const., art. VII, § 2, and the dignity of our system can still be vindicated after an appeal.

Jane Doe replies that the District cannot be harmed because, as she acknowledges elsewhere, the sanctions are moot. Jane Doe further argues that the public is not harmed by these sanctions because it is served "in having that question [on expert witness discovery] resolved without a party first having to lose—irreparably—the privilege." Jane Doe Reply Br., dkt. 379:11. I agree with Jane Doe that the extent of harm to the other parties or to the public will be minimal.

5. Considering the four factors together, Jane Doe fails to show she is entitled to a stay pending appeal.

In conclusion, Jane Doe fails to make a strong showing that she is likely to prevail on appeal and also fails to show that, if her motion is denied, she will be irreparably harmed. However, Jane Doe does show that no substantial harm will come to the public or to other interested parties. I must consider all four factors as interrelated considerations to determine whether a stay should issue. In doing so, I consider the second factor most heavily—Jane Doe fails to show she will be irreparably harmed because she fundamentally misunderstands how, if at all, she will be harmed. Accordingly, I conclude that Jane Doe's motion for a stay pending appeal should be denied.

ORDER

For the foregoing reasons, Jane Doe's motion for an injunction pending appeal is denied, and her motion for a stay pending appeal is also denied.

This is a final order for purpose of appeal.