IN THE SUPREME COURT OF WISCONSIN

No. 2020AP1911-OA

SCHOOL CHOICE WISCONSIN ACTION, WISCONSIN COUNCIL OF RELIGIOUS & INDEPENDENT SCHOOLS, EVERGREEN ACADEMY, RACINE CHRISTIAN SCHOOL, RACINE LUTHERAN HIGH SCHOOL, ST. JOHN'S LUTHERAN CHURCH & SCHOOL, TRINITY LUTHERAN SCHOOL, ETHAN BICKLE, ANDREA THUNHORST, RYAN THUNHORST, AND ELAINE WILSON,

Petitioners,

v.

DOTTIE-KAY BOWERSOX, IN HER OFFICIAL CAPACITY AS PUBLIC HEALTH OFFICER AND PUBLIC HEALTH ADMINISTRATOR OF THE CITY OF RACINE PUBLIC HEALTH DEPARTMENT

AND

CITY OF RACINE PUBLIC HEALTH DEPARTMENT,

Respondents.

RESPONSE OF RESPONDENTS DOTTIE-KAY BOWERSOX AND CITY OF RACINE PUBLIC HEALTH DEPARTMENT IN OPPOSITION TO THE EMERGENCY MOTION FOR A TEMPORARY INJUNCTION

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COME NOW Respondents, Dottie-Kay Bowersox (hereinafter "Bowersox") and the City of Racine Public Health Department[1] and as and for a Response to Petitioners' Emergency Motion for a Temporary Injunction show unto this Honorable Court as follows:

INTRODUCTION

Except as otherwise stated, Respondents adopt the facts, law, and argument stated at length in their Response to Petitioners' Emergency Petition for an Original Action as if set forth herein. Respondents pray this Honorable Court deny Petitioners' Emergency Motion for a Temporary Injunction.

ARGUMENT

Under Wisconsin Statutes section 813.02, courts have the discretion to grant a temporary injunction when the moving party can demonstrate that it meets the following four criteria: (1) the movant is likely to suffer irreparable harm if the temporary injunction is not issued; (2) the movant has no other adequate

[1] The City of Racine Public Health Department is not actually a separate legal entity with the capacity to sue or be sued. It is a department of the City of Racine.

remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. *Milwaukee Deputy Sheriffs' Assoc. v. Milwaukee County*, 2016 WI App 56, ¶ 20. If a movant can establish the four elements under this statutory framework, then the court has the discretion to issue a temporary injunction. Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial.

> A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo *pendente lite*, the permanent injunction sought would be rendered futile.

Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) (internal citations omitted).

The first prong of the statutory analysis requires the moving party to demonstrate a harmful consequence that will occur if a temporary injunction is not issued. Harm is central to the analysis, and failure to prove "irreparable harm" means that a temporary injunction is not appropriate as a temporary remedy. The second prong of the analysis requires no other adequate remedy at law to resolve the dispute. *Werner*, 80 Wis. 2d at 520.

The first prong—irreparable harm—and the third prong—necessity to

preserve the status quo—are intertwined. Again, "[t]emporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo *pendente lite*, the permanent injunction sought would be rendered futile." *School Dist. of Slinger v. Wisconsin Interscholastic Ath. Ass'n*, 210 Wis. 2d 365, 371, 563 N.W.2d 585 (1997).

When considering the grant of injunctive relief, in the exercise of their discretion, courts must balance and reconcile competing interests. The movant must satisfy the court "that on balance equity favors issuing the injunction." *Pure Milk Products Cooperative v. National Farmers Organization*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

Most importantly, however, is the requirement to demonstrate a reasonable likelihood of success on the merits. In order for the Court to grant a temporary injunction, Petitioners must demonstrate not only harm, but a likelihood of success on the merits for a controversy that exists with no other avenue for redress.

I. Petitioners are not Likely to Succeed on the Merits.

Petitioners argue principally that Respondent Bowersox did not have the lawful authority to issue her November 12, 2020, order. They argue that such

authority is not found within Wisconsin Statute section 252.03. Petitioners do not reference any of the other law—statutes and administrative code sections—that weigh in favor local health officers having the authority to close school buildings in an effort to prevent, suppress, and otherwise respond to communicable disease. In reply thereto, Respondents rest upon the argument set forth in their Response to Petitioners' Emergency Petition for an Original Action.

Certainly Respondents understand that this Honorable Court has issued a temporary injunction in a series of seemingly similar cases involving the health department for the City of Madison and Dane County.[2] However, the order of the local health officer in the instant case differs from that in the Madison and Dane County case. The instant order is limited in duration—it is specific to the six-week period encompassing the November 2020 to January 2021 holiday season. The reasons for the duration and scope of the instant order are set forth at length in Response to Petitioners' Emergency Petition for an Original Action. However, in brief, the order is in response to the ever-growing 2019 novel coronavirus (COVID-19) public health crisis, the demonstrable history of COVID-19 cases and outbreaks in the schools within the public-health jurisdiction of Respondent Bowersox during this school year, and the very predictable increases in COVID-

[2] Those cases are 2020AP1419-OA, *James v. Heinrich*; 2020AP1420-OA, *Wis. Council of Religious and Indep. Schools, et al. v. Heinrich, et al*.; and 2020AP1446-OA, *St. Ambrose Academy, Inc., et al. v. Parisi, et al.*

19 cases in the schools that can be accurately anticipated during a time of celebratory gatherings of friends and family. The circumstances of the instant case do not parallel those in the Madison and Dane County case.

Further, as to statutory authority of a local health officer to issue an order respecting the closure of schools, as a legal basis, the Court's order granting the temporary injunction in the Madison and Dane County case only compares Wisconsin Statutes section 252.02, regarding the authority of the Wisconsin Department of Health Services, and Wisconsin Statutes section 252.03, regarding the authority of a local health official. The Court's order there does not address arguments made by Respondents in the instant case that a broader reading of the Wisconsin Statues and Administrative Code demonstrates that the Wisconsin legislature has understood in specific terms that local health officers have authority as to the closure of school buildings.

Respondents' arguments in this regard are set forth at length in their Response to Petitioners' Emergency Petition for an Original Action. In brief, for some time statutory provisions, including Wisconsin Statutes section 115.01(10), have recognized local health officers' authority with respect to school closure. The Wisconsin legislature has reaffirmed its understanding that local health officers have the authority and responsibility to close schools just in the several months since the COVID-19 pandemic began.

Effective April 15, 2020, the state legislature enacted 2019 Wisconsin Act

185.[3] In that Act, the legislature created provisions to be in effect "[d]uring the public health emergency declared on March 12, 2020, by executive order 72."[4] *See, e.g.*, 2019 Wis. Act 185, sec. 57. In 2019 Wisconsin Act 185, the legislature added several statutory references to the authority of local health officers to close schools, when and if school closures should occur due to the COVID-19 pandemic. Specifically, the newly-added statutory sections added relief that schools—and specifically private schools—would be afforded during periods of COVID-19 school closures. *See, e.g.*, Wis. Stat. § 115.7915(8m) (regarding a special needs scholarship program), Wis. Stat. § 118.60(12) (regarding a parental choice program), and Wis. Stat. §119.23(12) (regarding the Milwaukee parental choice program). Each newly-enacted statutory provision recognized school closure authority by local health officers.

The Wisconsin Legislative Council Amendment Memorandum to 2019 Assembly Bill 1038, Assembly Amendment 4, which bill was enacted as 2019 Wisconsin Law 185, reemphasizes the point.[5] In eleven separate instances, the Memorandum references the closure of schools during the COVID-19 pandemic by "the local health officer." In stark contrast to any argument that only the

[3] 2019 Wisconsin Act 185, enacted April 15, 2020, https://docs.legis.wisconsin.gov/2019/related/acts/185.pdf.
[4] Executive Order 72, Relating to a Proclamation Declaring a Health Emergency in Response to the COVID-19 Coronavirus, https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf.
[5] https://docs.legis.wisconsin.gov/2019/related/lcamendmemo/ab1038.pdf

Wisconsin Department of Health Services has statutory authority to close schools, in each of those eleven references, the Memorandum proclaims an equal ability of the Department of Health Services or of a local health officer to effect school closure.

This Court previously has declared that statutory language cannot be considered in a vacuum. Instead, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46. The context in which section 252.03 exists underscore its applicability to permit local health officers to close schools.

Further, this Court has declared it to be "a basic precept of statutory construction that the legislature is presumed to act with full knowledge of existing laws." *State v. Gordon*, 111 Wis. 2d 133, 145, 330 N.W.2d 564 (1983). By enacting such provisions included in 2019 Wisconsin Law 185 during this moment, knowing that Wisconsin Statutes section 252.03 is in place, the legislature has declared that the school-closure authority of local health officers exists and is necessary and reasonable.

II. Petitioners are not Harmed by the Order; Granting an Injunction Would Cause Greater Public Harm.

Nothing in Respondent Bowersox's November 12, 2020, order causes harm to Petitioners. The order does not close schools. The order does not prevent instruction. The order simply closes school buildings for a limited time, based upon a reasoned and scientifically-supported analysis. (*See* generally, Affidavit of Dottie-Kay Bowersox in Opposition to the Emergency Petition for an Original Action and Emergency Motion for a Temporary Injunction, filed herewith.)

In fact, enjoining the order would reasonably be expected to result in a predictable increase in COVID-19 cases in the schools represented by Petitioners and within the Greater-Racine area. COVID-19 is a highly infectious communicable disease. Families and friends gather for holidays. In many cases, these gatherings are made up of persons outside of each other's daily group of contacts. The order is intended to prevent students, teachers, and staff from intermingling within school buildings during the incubation period following the several holidays occurring between Thanksgiving and New Year's Day and thus further spreading COVID-19.

Some may argue that Petitioners are assuming the risk of attending school in-person following these holidays. If that were the only consideration for Respondent Bowersox, perhaps Petitioners could succeed in their argument. However, as a communicable disease "of urgent public health importance,"

COVID-19 spreads exponentially.[6] The health care system is near a tipping point. Petitioner Bowersox's November 12, 2020, order does not just affect the students, teachers, and staff of Petitioners' schools. The order is intended to affect and benefit the Greater-Racine area, including the City of Racine and the Villages of Elmwood Park and Wind Point, as an integral part of a strategy to limit interactions among different groups of residents and visitors. The order is intended to prevent greater transmission broadly, not just at Petitioners' schools.

This Court must balance the equities and interests. This issue is bigger than just the effect on Petitioners.

III. Because Petitioners are not Harmed by the Order, there is no Remedy to Consider

If Petitioners are not harmed, as Respondents argue, there is no remedy in the abstract for the Court to consider. In fact, because Respondent Bowersox's order benefits the public at large by slowing the spread of COVID-19, Petitioners actually will be enriched by the Court's allowing the order to remain in effect.

IV. The Denial of a Temporary Injunction Will Maintain the Status Quo.

The prong of the test regarding irreparable harm and the prong regarding necessity to preserve the status quo are intertwined. If there is no actionable harm to Petitioners from Respondent Bowersox's order remaining in effect, there is no

[6] Wisconsin Administrative Code chapter DHS 145, Appendix A, *Communicable Diseases and Other Notifiable Conditions*.

reason for the Court to grant a temporary injunction. Further, the granting of a temporary injunction would upset the status quo—the order remaining in effect—and the granting of a temporary injunction may reasonably be expected to result in greater public harm.

Upon a reading of the Petitioners' affidavits, each understands that they must obey Respondent Bowersox's order. That order is limited in time and scope and does not interfere with the ability of Petitioners' schools to provide necessary instruction. The order will end on its own terms on January 15, 2021.

CONCLUSION

Respondent Bowersox's November 12, 2020, order was a reasonable and necessary measure, narrowly tailored, and put in place to respond to the COVID-19 conditions extant in schools. Further, the order was effected based upon the soundly anticipated increase in cases that could follow the upcoming holiday season.

Respondent Bowersox had the lawful authority to issue her order. Petitioners are unlikely to succeed on the merits of this case.

Further, upon a balancing of the equities, Petitioners are not harmed by the order remaining in effect. The order does not close schools; it closes the school buildings. Virtual or other remote instruction may continue. Moreover, Petitioners will actually be beneficiaries of the order because of its predictable effect resulting in the slowing of the spread of COVID-19 broadly.

NOW THEREFORE, Respondents respectfully request that this Honorable Court deny Petitioners' Emergency Motion for a Temporary Injunction.

Respectfully submitted this 23rd day of November, 2020.

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