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DISTRICT IV

November 4, 2013

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You are hereby notified that the Court has entered the following order:

2013AP2405 Madison Teachers Inc. v. Scott Walker (L.C. # 2011CV3774)

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

Commissioners James Scott and Rodney Pasch of the Wisconsin Employment Relations Commission move for relief pending appeal. The commissioners ask us to stay the circuit court's order finding them in contempt and ordering them to cease enforcement of certain statutes relating to certification elections for collective bargaining agents. We deny the motion.

Background

The history of this case is lengthy, and we provide a summary of only the most relevant parts. In September 2012, the circuit court issued a declaratory judgment. That judgment included a holding that statutory changes made by 2011 Wis. Acts 10 and 32 relating to certification elections for municipal and school district unions were unconstitutional.[1] The judgment was appealed by the state defendants, and that appeal is currently pending in the supreme court as appeal no. 2012AP2067, with oral argument set for November 11, 2013.

In April 2013, the original plaintiff unions in this case asked the circuit court for an injunction that would forbid the commissioners from enforcing the election statutes "statewide," that is, against non-party unions. The court denied that request in September 2013 on the ground that the plaintiff unions were not suffering injury because the commissioners were not enforcing the statutes as to them.

Non-party unions, that is, unions that were not among the original plaintiffs, then filed a motion in the circuit court, under the existing circuit court case number, for an order finding the commissioners in contempt. The basis for the non-party unions' request was the unions'

[1] Although the statutory term is "collective bargaining agent," we use "union" here for brevity.

assertion that the commissioners improperly continued to enforce laws that the circuit court found to be unconstitutional. The circuit court granted that motion orally on October 21, 2013, and in a written order four days later on October 25, 2013.

In the October 25 written order, the circuit court found the commissioners in contempt of its September 2012 judgment and, as a purge condition, ordered that the commissioners must obey a detailed series of provisions. For purposes of this order, our attention is mainly on a provision requiring the commissioners to cease and desist from implementing the rules for administration of annual certification elections, the first of which are slated to be held this month, November 2013. The commissioners have appealed the October 25 contempt order. In the context of that appeal, they ask us to stay enforcement of the contempt order until we decide the merits of the appeal of the contempt order.

The commissioners ask us to grant relief by November 5, 2013. According to the commissioners, the applicable statute requires that certain elections be completed by December 1, 2013. For that to occur, the commissioners assert, they must be able to resume administration of the elections no later than November 5, 2013. Their motion for relief was filed in this court on October 25, 2013. We ordered the respondent unions to file a response by October 30, 2013. We stated that we would decide the motion by November 4, 2013. During this period, five Wisconsin teachers moved for permission to file a non-party brief on the commissioners' motion for relief, which we now grant.

A party seeking relief pending appeal is required to move first in circuit court unless it is impractical to do so. WIS. STAT. RULE 809.12. In this case, the commissioners argued that the short time period made a circuit court motion impractical. While we questioned in our previous

order why the commissioners did not act sooner to seek a stay after the circuit court ruled orally, we accepted their representation that the time is now so short that they should be allowed to file the motion in this court first.

In considering a motion for relief pending appeal, we normally review whether the circuit court erroneously exercised its discretion in deciding the motion. *See* ***State v. Gudenschwager***, 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). However, in this case there has been no circuit court decision for us to review. Thus, we are the court making the first application of the relevant standard. Movants seeking relief pending appeal must: (1) make a strong showing that they are likely to succeed on the merits of the appeal; (2) show that they will suffer irreparable injury unless a stay is granted; (3) show that no substantial harm will come to other interested parties; and (4) show that a stay will do no harm to the public interest. ***Id.*** at 440. These are interrelated factors that must be balanced together, and more of one factor excuses less of another. ***Id.*** at 440-41.

Injuries And Harms

We begin by addressing the last three factors, those related to injury and harm. The parties assert that various potential harms will occur, depending on whether we grant or deny the stay, and depending on whether the election statutes are eventually upheld by the supreme court. For the reasons that follow, we regard the potential harms on each side as being in roughly equal balance and, therefore, conclude that the commissioners have not demonstrated that the injury and harm factors weigh in favor of a stay.

The commissioners argue that, if we do not allow them to resume administration of the elections, the elections will not be held in the manner provided by statute, that is, completed by December 1. *See* WIS. STAT. § 111.70(4)(d)3. They argue that this will prevent the elections

from being held this year. As to this timing issue, we stress that the question is not whether elections will ever be held, but whether a further delay will cause harm.

If the election statutes are ultimately held to be unconstitutional, thus negating the basis for elections, a delay will cause no harm. However, if the election statutes are upheld, the harms claimed by the commissioners will be limited to the period of delay that occurs between now and whenever the elections occur.

The commissioners may be assuming that delay means a full year delay. We observe, however, that, if the supreme court rules that the election statutes are constitutional, that court might then order the elections to be held promptly, regardless of any other schedule set by statute or rule. If the supreme court acts promptly after oral argument, the delay might be substantially less than a full year. The commissioners do not address this scenario and, therefore, do not argue that such an order for prompt elections would be an improper remedy. Our purpose here is not to give an opinion on the propriety of this remedy, but rather to explain that the arguments before us leave uncertainty about the length of the delay, should the commissioners eventually prevail before the supreme court on the underlying issue.

We also observe that the delay at issue here would not be the first delay. The non-party unions point out that a stay ordered by a federal court was in place between March 2012 and January 2013, during the pendency of ***Wisconsin Education Ass'n Council v. Walker***, 705 F.3d 630 (7th Cir. 2013). Thus, the issue here is additional delay.

We now turn our attention to what might occur during the delay if no stay is in place. The commissioners argue that they will suffer harm by being prevented from doing their statutory duty. They further argue that the public will be harmed by not having the law timely

enforced, that school boards may be confused about the bargaining status of unions, and that those members of unions who want to decertify their own unions will have been deprived of the opportunity to vote for, and perhaps achieve, that outcome.

In response, the non-party unions assert that other harms will occur if we *do* allow the elections to occur, and the election statutes are later held to be *un*constitutional. If that combination occurs, it would mean that elections were held, but should not have been. In that situation, from this time forward, all of the unions in those elections will have needlessly spent money and other resources campaigning in the elections.[2] And, for those unions that are decertified, there will have been a period during which their members were unlawfully deprived of union representation. It seems beyond dispute that these harms are nearly certain to occur if we allow the elections to proceed and the election statutes are later held to be unconstitutional by the supreme court. Nothing in the arguments of the commissioners persuasively explains why these harms would not also be substantial and statewide.

None of the claimed harms in either direction are quantifiable in a way that permits easy or precise balancing. Many of the claimed harms are substantial and widespread, although they differ somewhat in character in ways that make them hard to compare. For example, a delay in enforcing a valid law theoretically harms every resident of the state, but, for most Wisconsin residents, delayed elections would have no significant concrete effect on their finances or daily lives. In contrast, the potential injury of enforcing an invalid law falls on a narrower group (the

[2] The commissioners argue that the costs for *preparing* for the elections have already been incurred. The commissioners, however, do not address the proposition that there are significant union costs associated with the conduct of the elections over the 20-day voting period.

non-party unions and the members of those unions that prefer to remain unionized), but it does so in a more direct way. However, the harm also similarly falls on union members who want to decertify their unions. While the various injuries are difficult to compare directly, when taken together we consider the relative severity of the claimed injuries and harms to be in roughly equal balance on each side.

A question arises, however, whether the harms on each side are equally *likely* to occur. That likelihood does not hinge on the outcome of the appeal before us now, but rather on the outcome of the appeal before the supreme court addressing the merits of the circuit court's ruling on the constitutionality of the challenged statutory provisions. If it were possible to reliably predict whether the election statutes will be upheld, it would also be possible to say that one set of the above harms is more likely to occur than the other. Thus, we explore this topic.

Last year, we were asked to stay the circuit court's decision holding the election statutes unconstitutional. We declined, in part, because we concluded that the appellants had shown a possibility of success, but not a strong likelihood of it. Thus, our own previously expressed view of the merits is that the likely outcome is unclear. What has changed in the interim is that now it is the supreme court, not this court, that will be deciding the issue. Although the underlying merits appeal has been pending before the supreme court since our certification was accepted in June 2013, the state defendants did not, until October 25, ask the supreme court to stay the circuit court's September 2012 judgment. Accordingly, the supreme court has not expressed any views about the likelihood of success on the merits. Rather, in response to the commissioners' motion, the supreme court wrote that it would allow us to address the motion we are now considering before the court would review the motion pending there. In the absence of some indication from

the supreme court, we treat the possible outcomes in that court as being equally likely, and thus, for purposes of this motion, the claimed harms are equally likely to occur.

To summarize, both sides in this case have made a showing of potential injuries and harms that may occur under various sets of future circumstances. It is difficult to predict which of those circumstances are most likely, or how long they will occur. The harms at issue are substantial, but are also roughly equal in severity. In this situation, it cannot be said that the harm and injury factors weigh in favor of a stay.

Likelihood Of Success On The Merits Of The Appeal

As stated above, the commissioners must make a strong showing that they are likely to succeed on the merits of the appeal. This means that they must show more than the mere possibility of success. *See* ***Gudenschwager***, 191 Wis. 2d at 441. In this case, we conclude that the commissioners have not made a *strong* showing on this factor.

To be clear, the "merits" for purposes of this discussion is not the underlying question of the constitutionality of various provisions of Act 10 and Act 32, including the ones relating to union elections. Rather, the "merits" we discuss here involve the law relating to a circuit court's contempt powers and whether the circuit court here properly found the commissioners in contempt.

Before discussing the individual arguments, we emphasize that our discussion is based on a preliminary review. As should be apparent from the very short time line we described above, the parties had a limited opportunity to provide us with arguments, and we have had a limited opportunity to read and understand the arguments and to conduct research of our own. Notably,

although the commissioners sometimes suggest otherwise, the contempt issue before us is not the same issue we addressed in the context of harm in our March 2013 order. That order contains no discussion of contempt, much less the contempt order scenario we now face.

After this motion for relief is decided, this appeal will continue towards complete briefing and decision at some later time. Therefore, we should generally be cautious in how much we say about the merits of the appeal, so as to avoid giving the appearance of having prejudged the merits. *See* ***Gudenschwager***, 191 Wis. 2d at 441 n.2. Although we have made our best effort to assess the underlying merits in deciding a motion for relief, it is possible our assessment now will turn out to be incomplete or incorrect, or that the parties will further develop the arguments in a way that renders our preliminary conclusions mistaken in hindsight. Thus, when briefing the appeal, the following discussion of the merits should not have the effect of discouraging the parties from pursuing particular arguments.

As relevant to this case, contempt of court is intentional disobedience, resistance, or obstruction of the authority or order of a court. WIS. STAT. § 785.01(1)(b). The motion in this case seeks a remedial sanction, meaning one imposed for the purpose of terminating a continuing contempt of court. § 785.01(3).

We review a circuit court's use of its contempt power for an erroneous exercise of discretion. ***Monicken v. Monicken***, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999). However, if there are factual findings underlying that discretionary determination, we review those findings using the "clearly erroneous" test. ***Id.*** If there are underlying questions of law, we review those de novo. ***Id.*** In the present case, it does not appear that there are disputed findings of fact. Rather, it appears that the key issues argued are questions of law, and therefore,

in our discussion below, we are mainly assuming our eventual standard of review will be de novo.

Although the commissioners organize their arguments differently, we have organized our discussion around what we perceive to be the commissioners' five main arguments for reversing the contempt order on appeal. We now address each of those grounds.

The commissioners' first argument is that they cannot be held in contempt of the circuit court's September 2012 declaratory judgment because that judgment did not order them to act or not act in any way. The commissioners argue that, by itself, a declaration that the statutes are unconstitutional cannot be a basis for a later contempt finding. We understand this argument to be an assertion that, as to *all* unions, including the plaintiff unions, contempt is unavailable because the circuit court did not direct the commissioners to do or to refrain from doing anything. Rather, the circuit court simply issued what amounted to its opinion that the challenged statutory provisions are unconstitutional.[3] The commissioners' responses to questions posed by the circuit court at the hearing on the contempt motion indicate that, following its September 2012 judgment, the commissioners refrained from enforcing the challenged statutory provisions against the plaintiff unions out of respect for the circuit court.

[3] The commissioners might dispute our summary of their position by explaining that the plaintiff unions were not powerless to obtain enforcement. The commissioners might point out that the plaintiff unions may have been able to obtain enforcement through a contempt action if these unions had first returned to the circuit court and obtained an additional order containing injunctive relief. But such a point does not undercut our summary of the commissioners' position that the September 2012 judgment, as it stands, does not compel them to stop enforcing the statutory provisions the circuit court deemed unconstitutional.

Although we may ultimately determine that the commissioners are correct, we pause to comment on the possible implications of their position that the September 2012 judgment did not actually contain injunctive relief directing them to refrain from enforcing the statutes deemed unconstitutional.

- If the commissioners voluntarily choose to abide by the circuit court's declaration out of respect for the circuit court, such inaction may violate the commissioners' obligation to enforce the laws of this state, absent a binding order to do otherwise. If there is authority for the proposition that a state agency may decline to enforce the law out of respect for a non-binding opinion of a court, we would be interested to see such authority. If, on the other hand, the September 2012 judgment was a binding order on the commissioners not to enforce the challenged laws, then it is difficult to understand why such an order is not enforceable by contempt.

- If, as the commissioners seem to contend, they were not bound by the September 2012 judgment to refrain from enforcing any of the challenged statutory provisions because the order did not contain injunctive language, then why did the commissioners seek a stay of that judgment?

- The argument raises a question as to whether the commissioners appealed from a final order. The plaintiff unions requested both declaratory and injunctive relief. If the commissioners are correct that the September 2012 judgment addressed only the request for a declaratory judgment, it is at least arguable that the judgment was not a final appealable order because it did not resolve the entire matter in litigation. *See* ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶16, 299 Wis. 2d 723, 728 N.W.2d 670 ("'A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties ....'") (quoting WIS. STAT. § 808.03(1)).

We stress these are questions, not conclusions. But we think the answers to these questions may shed some light on the proper reading of the September 2012 judgment.

We now examine some of the legal support the commissioners provide for their argument that a mere declaration that a statute is unconstitutional cannot be a basis for a later contempt finding. It does not appear to us at this juncture that the authority provided by the commissioners

is dispositive. Generally, the authority supports the proposition that a party may not be held in contempt for a failure unless the party has first been informed what was required. That arguably occurred here when the circuit court ruled that the challenged statutory provisions were "null and void" because they were unconstitutional. At least in the circuit court's view, this ruling should have communicated to the commissioners that they were not to enforce the provisions.

The commissioners find support for their view that a direction must be express in ***State v. Dickson***, 53 Wis. 2d 532, 193 N.W.2d 17 (1972). We acknowledge that the ***Dickson*** court faulted the circuit court for granting a contempt sanction in the absence of an "unequivocal direction." ***Id.*** at 541. Still, the ***Dickson*** court did not hold that any particular language is required, or even that such direction must be express to be sufficiently "unequivocal." Moreover, the facts in ***Dickson*** do not appear to parallel the facts here.

In ***Dickson***, the circuit court held an attorney in contempt for not bringing his client to a hearing. ***Id.*** at 538. At issue was whether contempt could be based on the failure to comply with a letter from the clerk of the circuit court and with a letter written by the court. As to the clerk's letter, the ***Dickson*** court explained it was not a court order, and therefore not enforceable by contempt. ***Id.*** at 540-41. As to the court's letter, the ***Dickson*** court explained that the statements in the letter "were so qualified that it could have been interpreted, as it was by [the attorney], to authorize him to appear without his client." ***Id.*** Thus, there was nothing informing the attorney that he was obligated to appear with his client. As our comments above suggest, we are uncertain whether the result in ***Dickson*** would have been the same if the court had less directly communicated the requirement that the client appear. ***Dickson*** might shed more light on the situation here if the court there had generally informed the attorney of the court's view that an appearance by a client in such a situation was required, but failed to expressly direct that the

particular client appear. *Cf.* ***Armstrong v. Executive Office of the President***, 1 F.3d 1274, 1288-90 (D.C. Cir. 1993) (district court order finding the agency in contempt for failing to promulgate new guidelines was improper because, although the court declared current guidelines invalid, the court did not direct the agency to promulgate new guidelines).

The commissioners rely on federal cases, but it is not apparent that those cases have direct application here. For example, ***International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n***, 389 U.S. 64, 75-76 (1967), and ***Burgess v. Ryan***, 996 F.2d 180, 183-84 (7th Cir. 1993), address whether orders were injunctions within the meaning of particular federal laws. These cases may be persuasive more generally, but we cannot determine that with confidence in the limited time we have to rule on this order.

In sum, it is not apparent from the case law the commissioners present that the failure of the September 2012 judgment to include language expressly directing the commissioners to refrain from enforcing the challenged laws means, per se, that the judgment cannot be the basis of a contempt finding.

The commissioners' second argument is that, regardless whether the declaratory judgment could be a foundation for *the original plaintiffs* to seek a contempt order, the remedy of contempt is not available *to the non-party unions* because the declaratory judgment legally binds the commissioners only as to the existing plaintiffs who were parties to the suit. In other words, the commissioners argue that they have not disobeyed the court's declaratory judgment because that judgment does not prohibit them from continuing to enforce the election statutes as to other unions who were not original plaintiffs.

Although the commissioners do not say so directly, it appears that this argument is based on the proposition that, regardless whether the September 2012 judgment directed the commissioners to refrain from applying the challenged laws to the plaintiff unions, the judgment did not contain any directive with respect to non-party unions. In this regard, the commissioners rely in large part on language in two orders we issued in appeal no. 2012AP2067, regarding the motion to stay the circuit court's September 2012 judgment. The first order, issued on December 28, 2012, directed the parties to file further argument on several legal questions. Then, on March 12, 2013, we denied the stay motion. We discuss this issue in more detail because we believe it is important to clarify what we did, and did not, say in those orders.

From the December 28 order for further briefing, the commissioners rely on a passage in which we made statements noting: that case law cited by the unions did not directly address who is bound by a circuit court decision holding a statute unconstitutional; that the mandate portion of the September 2012 judgment did not appear to contain language enjoining the commission from taking any particular action; and that it was "not immediately apparent" why an agency is bound to apply a non-precedential circuit court decision to parties other than those involved in the case in which the decision arose. Order of December 28, 2012, in appeal no. 2012AP2067, at 2-4.

However, as should readily be apparent, our December 28 order for additional briefing did not decide any of those issues. For example, when a court says it "is not immediately apparent" that a proposition is true, the court is not holding, or even opining, that the proposition is untrue or even probably untrue. It is only a statement that the proposition appears open to debate.

The commissioners also rely on a statement in our March 12 order denying the stay motion. Again, that order did not decide any issue that appears to be germane in the current appeal. There, in a footnote, we commented that in response to our order for further briefing, the state appellants had more forcefully argued that the circuit court's decision is not binding "state-wide" on non-parties. Order of March 12, 2013, in appeal no. 2012AP2067, at 14 n.1. We observed that, in opposition, the unions argued that the circuit court's decision *is* binding "state-wide," and we then stated:

> [W]e reject out of hand the proposition that the circuit court's decision has the same effect as a published opinion of this court or the supreme court.

The commissioners read too much into our sentence. The full footnote makes clear that we were addressing whether there could be any argument that the circuit court's decision here was binding on other courts.

Similarly, when the commissioners state in their memorandum that "[t]reating a circuit court's declaration as final as to all parties would elevate the decision to a published appellate decision," they present a straw man. As the non-party unions acknowledge, "This is not a case involving the precedential authority of the trial court's decision over courts engaged in other litigation." Rather, this is a case involving whether the circuit court's decision imposes an obligation on the *commissioners* that can be enforced in a contempt proceeding by a non-party union.

In sum, we have not indicated our opinion on the specific disputes before us. The commissioners go too far when they argue that "[i]t was an abuse of discretion for the circuit court to sanction state officers for following through on what [this panel of appellate court judges

have] already observed was, by all appearances, permissible." It is *not* reasonable to read any of our prior statements as opining that "by all appearances" the commissioners may permissibly enforce the challenged laws against non-party unions.

Before moving on to the commissioners' next argument, we further observe that, in the context of contempt, the difference between a circuit court decision and a precedential decision of this court or the supreme court may not be a relevant consideration at all. It seems unlikely that the publication of a decision affirming a circuit court's order would, by itself, somehow expand the universe of persons who can seek the remedy of contempt as to that circuit court order. We are not currently familiar with a basis on which a person can be held in contempt for "disobedience of a published opinion." It may be more likely that, for contempt purposes, the focus should be entirely on the circuit court's order, which the commissioners are either in violation of, or not.

The commissioners' third argument is that the unions who were not original plaintiffs cannot seek a contempt order because they are not aggrieved by the commissioners' conduct. The contempt statute provides that a "person aggrieved" may seek a remedial contempt order. WIS. STAT. § 785.03(1)(a).

To the extent this argument relies on the proposition that the non-party unions are not "aggrieved" because the September 2012 judgment neither expressly nor otherwise with reasonable clarity prohibited the commissioners from enforcing the challenged statutory provisions, we have already addressed the topic. In our discussions above, we address the question whether the judgment failed to sufficiently convey to the commissioners that the

judgment required action or inaction and conclude, tentatively, that the authority cited by the commissioners does not resolve the question.

Beyond that proposition, the commissioners contend that the non-party unions are not "aggrieved" because aggrieved in this context carries with it the threshold requirement that a party to the action be aggrieved. And, according to the commissioners, the plaintiff unions are not aggrieved because the commissioners are refraining from applying the challenged laws to those unions. On this topic, the limited law cited by the commissioners is inconclusive. Nothing cited is plainly and directly on point. We see nothing that addresses the situation in which a party, allegedly in contempt, violates a court order to the detriment of a non-party, but at the same time acts in a manner that avoids harm to adversary parties. Beyond that, the commissioners argue that a non-party contempt movant is not aggrieved unless it is somehow in privity with the original plaintiffs. But, again, the commissioners have sparse case law support, and the partial quotation from a legislative note that they rely on is not law and, in any case, seems potentially ambiguous.

The commissioners' fourth argument is that they did not subjectively believe that the September 2012 judgment required enforcement of the challenged statutory provisions. It follows, according to the commissioners, that they cannot be held in contempt because their actions were not "intentional," as required by the definition of contempt. *See* WIS. STAT. § 785.01(1). The commissioners contend that showing intent for purposes of contempt requires showing a party's subjective belief that the party was violating a court order. They assert that their alleged disobedience as to the non-party unions was not intentional because the commissioners did not *believe* they were violating the September 2012 judgment.

The commissioners have not cited persuasive authority in support of their view that the test for intent, in this context, requires a subjective intent to disobey the court. In opposition, the non-party unions have responded with case law that supports the proposition that it is not relevant whether an alleged contemnor knows that its actions are in disobedience of an order, at least for the purpose of a remedial contempt. For example, the non-party unions cite ***Carney v. CNH Health & Welfare Plan***, 2007 WI App 205, ¶19, 305 Wis. 2d 443, 740 N.W.2d 625, which, in turn, quotes ***McComb v. Jacksonville Paper Co.***, 336 U.S. 187 (1949). In the quoted Supreme Court passage, the Court explains that because the purpose of civil contempt is remedial, that is, to enforce compliance with a court order, contempt as a sanction is available even if a party "innocently" violates the order. *See id.* at 191. Accordingly, based on the arguments before us now, we are not persuaded that it matters whether the commissioners subjectively believed they were complying with the circuit court's September 2012 judgment.

The commissioners' fifth argument is that the circuit court lacked competency to enter the October 25, 2013, contempt order because an appeal was already pending. Circuit courts have only a limited authority to act while an appeal is pending. *See* WIS. STAT. § 808.075. The commissioners argue that the October 25 order exceeded that authority because it "expanded" the scope of the court's September 2012 judgment to include injunctive language that, for the first time, covers the non-party unions.

This argument, once again, relies entirely on the answer to the question whether the declaratory judgment had the effect of barring the commissioners from enforcing the election statutes against the non-party unions. If the earlier judgment had that effect, then the circuit court's new contempt order did not "expand" the September 2012 judgment, because that judgment *always* governed the commissioners' conduct as to non-party unions, starting from its

entry. If the earlier judgment did *not* have that effect, then it appears the contempt order might be infirm for that reason alone. In addition, the commissioners do not appear to dispute the general proposition that, while an appeal is pending, a circuit court may issue contempt orders under WIS. STAT. ch. 785, and injunctions pending appeal under WIS. STAT. § 808.07(2).

Our discussions in this order have focused on the strength of the arguments made by the commissioners because they are the parties requesting relief and they have the burden of persuading us that they are entitled to that relief. We have said little about the strength of the non-party unions' responsive arguments. That is because, on many issues, the lack of strength in the commissioners' arguments is evident from reviewing the materials the commissioners themselves rely on. However, to the extent we are silent about the non-party unions' arguments, that silence should not be read as indicating that those arguments are better supported than the commissioners' arguments. On some issues, neither party has provided a well-developed argument, perhaps partly due to a lack of existing law on the relatively uncommon legal questions arising from the unusual facts before us. For the remaining briefing in the appeal, we encourage all parties to continue with research on the topics that seem most likely to be dispositive.

IT IS ORDERED that the motion to file a non-party brief is granted.

IT IS FURTHER ORDERED that the motion for relief pending appeal is denied.

Diane M. Fremgen
Clerk of Court of Appeals