

1 STATE OF WISCONSIN: CIRCUIT COURT: KENOSHA COUNTY:  
2 BRANCH 1

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4 KRISTI LACROIX, et al., )  
5 Plaintiffs, ) CASE NO. 2013-CV-1899  
6 -vs- ) TEMPORARY INJUNCTION  
7 KENOSHA UNIFIED SCHOOL ) HEARING (Excerpt)  
8 DISTRICT, et al., )  
9 Defendants. )  
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10 THE HONORABLE DAVID M. BASTIANELLI  
11 JUDGE PRESIDING

12 APPEARANCES

13 ATTORNEYS RICHARD M. ESENBERG and CJ SZAFIR,  
14 Wisconsin Institute for Law & Liberty, Inc., appeared on  
15 behalf of the plaintiffs.

16 ATTORNEY NATHAN J. McGRATH, National Right to  
17 Work Legal Defense Foundation, appeared pro hac vice for  
18 the plaintiffs.

19 ATTORNEY JoAnn M. HART, Boardman & Clark, LLP,  
20 appeared on behalf of Kenosha Unified School District  
21 and Kenosha Unified School District Board of Education.

22 SHERONDA GLASS, Assistant Superintendent of  
23 Business Services for the district, appeared.

24 ATTORNEY LESTER A. PINES, Cullen, Weston, Pines &  
25 Bach, LLP, appeared on behalf of Kenosha Education  
26 Association.

DATE OF PROCEEDINGS:  
December 12, 2013

Tracy A. Czarnecki-Kozmer, RPR  
Official Court Reporter, Branch 1

COPY

1 (Excerpt of proceedings)

2 THE COURT: Okay. In the interim once we  
3 were off the record, the Court had made a request from  
4 the parties since they had provided me with the  
5 November 21st, 2013, Supreme Court decision as it  
6 related to a stay concerning the contempt order and also  
7 a request for stay of the declaratory judgment from  
8 September of 2012.

9 Following that since the matter had gone to  
10 the Court of Appeals on a couple issues involving stays,  
11 the Court had asked the parties to provide the Court  
12 with some of the materials and decisions reached by the  
13 Court of Appeals as it related to those motions.  
14 Specifically it was sent to me by e-mail, and I now  
15 printed out and reviewed them.

16 Basically you had an initial request for  
17 stay before the Court of Appeals, presented six  
18 questions it asked the parties to address primarily  
19 concerning with the effect on nonparties to the  
20 litigation in Dane County. That was presented then to  
21 the Court of Appeals, and the Court of Appeals  
22 essentially, I want to make sure I got the right ones in  
23 the right order, okay, dealt with whether or not there  
24 should be a stay as related to the original order  
25 concerning finding that Act 10 was unconstitutional.

1           Then there was a presentment of a request  
2 for a stay as it related to findings of contempt and a  
3 subsequent recent determination apparently by the Court  
4 of Appeals on or about November 4th addressing that  
5 issue, et cetera. Okay.

6           The request as the parties are aware for  
7 temporary injunctive relief under 813.02 provides in  
8 part: When it appears from a party's pleadings that a  
9 party is entitled to judgment and any part thereof  
10 consists in restraining some act, the commission or  
11 continuance of which during the litigation would injure  
12 the party; or when the litigation shall appear that the  
13 party is doing or threatens or is about to do or is  
14 procuring or suffering some act to be done in violation  
15 of the rights of another party and tending to render the  
16 judgment ineffectual, a temporary injunction may be  
17 granted restraining such act.

18           As the parties are aware, a temporary  
19 injunction is obviously within a trial court's  
20 discretion provided the trial court considers various  
21 facts and makes a proper record and does not give too  
22 much weight to any one of the factors.

23           Essentially, factors which are considered  
24 for a temporary injunction conclude the reasonable  
25 probability of success on the merits, inadequate remedy

1 at law, irreparable harm, and some discussion, some of  
2 the cases of preserving the status quo.

3 Firstly, in looking at the briefs, one of  
4 the issues which had been argued to some extent and the  
5 presentation was what is the applicability of the  
6 decision of the Honorable Judge Juan Colas in the Dane  
7 County proceedings where after the matter was presented  
8 by the parties, Judge Colas determined in terms of the  
9 Act, the constitution, what I'll refer to as Act 10, was  
10 unconstitutional in certain respects, how does that  
11 decision impact other courts or parties who were not  
12 parties to the decision itself?

13 Now, two things need to be considered in  
14 that regard. First, some of the parties in the Dane  
15 County proceeding because of the challenge of the  
16 constitutionality of the statute such as the governor or  
17 others were state officers. Secondly, Judge Colas's  
18 decision as a circuit court judge, what value does that  
19 have in terms of precedent or binding precedent on those  
20 who are not parties to the lawsuit? Although some  
21 argument seems to be made it applied or has been made  
22 applied somewhat statewide, there appears in one of the  
23 briefs a concession they're really not arguing to an  
24 extent it's binding precedent as opposed to what I'll  
25 discuss in a few minutes, the effect of a statute being

1 declared unconstitutional and its effect on its  
2 enforceability by those state officers who were named in  
3 that suit.

4 To set it aside, does the decision of Judge  
5 Colas have statewide implication in terms of precedent  
6 and a binding effect on those who are not parties to  
7 that litigation? The decision of a circuit court judge  
8 is confined to the parties before it, and in essence you  
9 have the law of the case as it relates to those parties.  
10 None of the defendants before this Court in this lawsuit  
11 were parties. Although they may have participated in  
12 some manner in that lawsuit, they were not named  
13 defendants.

14 The viewpoint on that, that his decision not  
15 being precedent; in other words, a circuit court judge  
16 decision not having an effect on, say, nonparties from  
17 Kenosha County, Racine County or what have you, would in  
18 that particular vain have a status in this lawsuit that  
19 Act 10 is still out there and still until an appellate  
20 court decides otherwise applicable and constitutional?

21 In part, this is somewhat even seen by some  
22 of the appellate decisions recently provided to me and  
23 some references because those arguments were being made  
24 within the Court of Appeals and to an extent, I guess,  
25 perhaps to the Supreme Court. Unfortunately, I'm not

1 finding from one of those cases exactly the language or  
2 verbiage used, but the basic premise is the circuit  
3 court decision may not have precedent or binding  
4 precedent on other circuit courts or parties who are not  
5 action does not necessarily mean it does not affect that  
6 the decision of some who are not parties to the action.

7 That was seen somewhat in the case cited by  
8 the defendants of *Helgeland*, 307 Wis.2d 1. And as  
9 counsel pointed out, it did involve whether or not  
10 municipalities could intervene as a matter of right.  
11 And the case was all about procedure, but it did talk  
12 about in terms of how a decision in declaratory judgment  
13 by a circuit court might affect parties who are not  
14 action because you may have perhaps issues raised at  
15 another time such as stare decisis. The Court of  
16 Appeals talked a little bit about issue preclusion that  
17 might arise, but that's not the same thing as saying  
18 that the determination of the constitutionality of Act  
19 10 by a circuit court judge applies throughout the State  
20 of Wisconsin. Precedent would be from the Court of  
21 Appeals in a published decision; Supreme Court, of  
22 course, which would be binding and followed.

23 The issue which was presented was to an  
24 extent noted by the dissent in the Supreme Court  
25 determination to vacate the contempt order of

1 November 21st, 2013, and how the cause of action affects  
2 the enforceability and the applicability to the  
3 government officers.

4 The Court noting paragraph 33: The  
5 rationale underlying the rule that a declaratory  
6 judgment against a government officer is the functional  
7 equivalent of an injunction rests on the premise that  
8 the government official will adhere to a judicial  
9 decision declaring the statute facially  
10 unconstitutional. And we have long presumed that  
11 officials of the Executive Branch will adhere to the law  
12 as declared by the Court. As a result, the declaratory  
13 judgment, as I noted, is the functional equivalent of an  
14 injunction.

15 And the reason why the dissent pointed that  
16 out was their belief that the circuit court's subsequent  
17 order where the nonparty union members sought the same  
18 from the -- Judge Colas was that the judge was not  
19 basically entering an order which was different than  
20 what he had originally entered in his initial order in  
21 2012.

22 The majority apparently say in the case for  
23 the reasons discussed in the opinion concluded that the  
24 contempt order issue to the appeal from the circuit  
25 court, declaratory judgment was impermissible because it

1 was issued after the initial decision which was entered.  
2 The Supreme Court stated though as to the merits so to  
3 speak for -- in relation to analysis of the stay was  
4 essentially we do not rule on the stay of the  
5 September 2012 declaratory judgment.

6 The reason I had asked for some of the  
7 material dealing with the Court of Appeals and their  
8 request for stays was to address to an extent the  
9 balancing and the review of the issues this Court has to  
10 make in terms of probability of success in terms of  
11 irreparable harm and other matters.

12 The Court of Appeals, first of all, it  
13 should be noted that in their initial request for the  
14 stay as it related to the unconstitutionality noted as  
15 review -- reviewing the circuit court's decision under  
16 the erroneous-exercise-discretion-standard rather than  
17 considering the matter de novo because that motion had  
18 been brought before the circuit court. In that case  
19 before apparently Judge Colas, the circuit court  
20 concluded the first factor, likelihood of success on  
21 appeal weighed in favor of a stay but that factor is  
22 outweighed by the failure to show irreparable harm.

23 The Court pointed out that the first factor,  
24 likelihood of success on appeal, the appellants must  
25 make a strong showing of likely success on the merits.



1 And it went on to discuss various degrees of success in  
2 that regard. But essentially what it did on the  
3 appellate level as did the trial court apparently when  
4 the motion was brought before the trial court, it took  
5 into account the general proposition that the required  
6 showing of irreparable harm is inversely proportional to  
7 the strength of the movant's showing regarding  
8 likelihood success on appeal. And the Court pointed out  
9 that the Court should apply the presumption of  
10 constitutionality and conclude that the appellants have  
11 made a showing that they are likely to succeed on the  
12 merits of appeal, without attempting to more precisely  
13 identify the appellants' likelihood of success, which  
14 that Court found to be a middle-ground category; in  
15 other words, can go either way so to speak.

16 This was raised and discussed a little bit  
17 by us earlier. If Judge Colas's decision did not have  
18 statewide applicability in terms of it being binding on  
19 nonparties, which this Court believes to be the law,  
20 then the analysis in terms of likelihood of success for  
21 purpose of this case is the presumption of the  
22 constitutionality of a state statute. So I believe that  
23 is shown, but that hardly ends the inquiry.

24 The parties have talked and presented  
25 arguments concerning whether there is an adequate remedy

1 of law and possibility of irreparable harm; and that  
2 also requiring a little bit of a balancing here because  
3 you have to look not only at the potential irreparable  
4 harm of the plaintiffs in this action; but if a stay is  
5 granted, is there a potential irreparable harm? I think  
6 to an extent you have to consider the effect on the  
7 purported contract and the parties involved in that.

8 The Court of Appeals noted, and this was an  
9 argument made in -- made by the defendants in terms of  
10 irreparable harm in terms of payments perhaps being made  
11 to the taxpayer, and the appellate court noted what was  
12 argued in front of me the possibility of collecting such  
13 monies through other means such as: If employers choose  
14 this route, as appellants acknowledge in supplemental  
15 briefing, there would be no legal impediment to  
16 negotiating conditional contracts or retroactive wages  
17 that take into account the uncertain legal status of the  
18 challenged statutory provisions, or to attempting to  
19 recoup any overpayments if Act 10 is ultimately upheld.  
20 Such action would reduce the risk of irreparable harm.

21 And as I acknowledged earlier, I'm trying to  
22 find the quote: We acknowledge that the respondent's  
23 argue that the circuit court's decision here is binding  
24 statewide but reject out of hand the proposition the  
25 circuit court's decision has the same effect as a

1 published opinion of this Court or the Supreme Court.  
2 And again it went into what I discussed a little bit  
3 ago. More interesting issue is if there's a suit  
4 somewhere else, will issue preclusion or other doctrines  
5 such as stare decisis perhaps be applied?

6 The question of inadequate remedy of law or  
7 irreparable injury as it relates to the plaintiff  
8 Kristin LaCroix I don't believe has been demonstrated.  
9 Although she has standing, and if monetary amounts were  
10 expended perhaps in violation of Act 10 and Act 10 was  
11 determined to be constitutional, I believe as the Court  
12 of Appeals indicated and as argued before me there is  
13 the ability to recoup the same.

14 The more interesting issue is whether or not  
15 the other plaintiff, who is an actual teacher for the  
16 Kenosha Unified School District, will suffer irreparable  
17 injury and whether or not there's an adequate remedy at  
18 law.

19 One of the arguments presented is the  
20 requirement under a contractual -- under the contract  
21 that may have been entered into between Kenosha Unified  
22 School District and the KEA is the certain requirements  
23 that may be involved in terms of either being a member  
24 or payment of dues, and I do believe an argument can be  
25 made that -- that does involve some constitutional

1 issues on association, certain freedoms which cannot be  
2 given back.

3 It is somewhat, I guess, of some import that  
4 although the Supreme Court's decision to essentially  
5 vacate the contempt order, that the agency responsible  
6 for certification has not notified the Kenosha Unified  
7 School District of any change because of the  
8 certification process. As the Kenosha Unified School  
9 District argues, at the time they entered into the  
10 contract, essentially the state agency subject to  
11 enforcement essentially said go ahead and they haven't  
12 apparently changed their position at this time.

13 If certification was done, let's say, under  
14 Act 10, there still is some effect of union  
15 representation, although certain items are limited to  
16 the employer. Act 10, and looking at Section 111.70(2),  
17 basically indicated teachers have the right to refrain  
18 from paying union dues. And in part provided municipal  
19 employees have the right of self-organization, and the  
20 right to form, join, or assist labor organizations, to  
21 bargain collectively through representations of their  
22 own choosing, and to engage in lawful, concerted  
23 activities for the purpose of collective bargaining or  
24 other mutual aid or protection. And municipal employees  
25 have the right to refrain from any and all such

1 activities. A general municipal employee has a right to  
2 refrain from paying dues while remaining a member of a  
3 collective bargaining unit.

4 So as counsel for Kenosha Education  
5 Association has pointed out, there was in some degree a  
6 structure, union, provided it's properly certified,  
7 which would have had some impact on that plaintiff in  
8 terms of the rights she may or may not present. If a  
9 constitutional right is involved, and there is still  
10 some right there in terms of the dues, association,  
11 things like that which have been or will be purportedly  
12 affected by this agreement, there's not an adequate  
13 remedy under the law for that plaintiff. If the Court  
14 were to grant a temporary restraining order, there's  
15 obviously an effect upon the employees; but ultimately  
16 the Supreme Court is going to determine one way or  
17 another which way this case is going.

18 As indicated earlier, this Court is not  
19 deciding the constitutionality of Act 10. This Court is  
20 not judging the wisdom or lack thereof of the passage of  
21 Act 10. A temporary injunction also should not be  
22 granted lightly. Although there's a likelihood of  
23 success on the merits, I have to concur with the Court  
24 of Appeals to some extent in their review of it that  
25 it's mixed and middle-ground. I'm familiar with the

1 Court of Appeals for the 7th Circuit and what they  
2 decided. I'm concerned that the Supreme Court didn't  
3 take the matter up.

4 There is something to be said about what we  
5 talk about what is or is not the status quo. As noted  
6 by the plaintiffs, in essence you can't put the genie  
7 back in the bottle once it's out. It's a very complex  
8 and difficult case.

9 However, counsel, I don't feel that you've  
10 demonstrated the degree of irreparable injury to warrant  
11 the granting of a temporary injunction. Therefore, the  
12 Court declines the same. Matter will be calendared on  
13 the Court's calendar accordingly, although I would say  
14 it would have been wiser, I think, to wait until the  
15 Supreme Court made its decision before going forward.

16 MR. PINES: Would you like me to prepare an  
17 order?

18 THE COURT: I think someone should.

19 MR. PINES: I will -- I will prepare the  
20 order and I'll --

21 THE COURT: Keep it short, keep it to -- for  
22 the reasons set forth on the record. That way you don't  
23 have any problems with the terminology.

24 MR. PINES: That's what I was going to do.  
25 I will have that actually prepared today, and I'll

1 e-mail it -- I'll email it.

2 MR. ESENBERG: You emailed it before. The--  
3 Your Honor, I -- and it may not be an issue that we need  
4 to --

5 THE COURT: Sure.

6 MR. ESENBERG: -- take up the Court's time  
7 with right now. The only issue that concerns me is  
8 should the plaintiffs decide to seek some type of  
9 permissive appeal, the thing that might be difficult to  
10 deal with is this \$1.65 million payment. Now, if it's  
11 not about to go out, and I don't know if the district is  
12 able to represent when that will be but, for example, if  
13 it's not going to go out until sometime late next week  
14 anyway, then the plaintiffs can take whatever action  
15 they want. Otherwise, if it's -- if it's going out as  
16 imminent, you know, we might -- we would request that  
17 the TRO be continued until we can file it should a  
18 permissive appeal should we decide to do so. But  
19 perhaps it's not an issue because perhaps that payment  
20 is not imminent.

21 THE COURT: Well, if you're talking a week.

22 MS. HART: Your Honor, I do not have that  
23 information, and I don't believe that Miss Glass does  
24 either.

25 THE COURT: Well, the issue I'd have to

1 decide is whether I'll stay my order pending their  
2 appeal. I'd rather-- If there's any stay, I think it  
3 should be the Court of Appeals to an extent. But what I  
4 will do, I'll continue at least until-- What day is it  
5 today? Thursday.

6 THE CLERK: Thursday.

7 THE COURT: I'll continue the temporary stay  
8 until 5 p.m. Wednesday, okay --

9 MR. ESENBERG: All right. Thank you, your  
10 Honor.

11 THE COURT: And if you appeal me, you appeal  
12 me. If you don't, you don't.

13 MR. PINES: Okay. So the order should say  
14 that the --

15 THE COURT: Payment of the 1.6-- Denied.  
16 However, the Court will stay any payment of the 1.6  
17 million if that's what it is, I have no idea, pursuant  
18 to the terms of the collective bargaining agreement, I  
19 assume, from November 15, 2013, will be stayed until  
20 5:00 p.m.

21 THE CLERK: On the 18th.

22 THE COURT: Eighteenth, my cousin's  
23 birthday. Okay? Okay. Good luck. Everyone have a  
24 good holiday.

25 MR. ESENBERG: Thank you, your Honor.



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(Proceedings concluded)

