

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SCHUYLER FILE,

Plaintiff,

v.

Case No. 19-CV-1063

JILL M. KASTNER, et al.,

Defendants.

**WISCONSIN SUPREME COURT DEFENDANTS'
REPLY IN SUPPORT OF THEIR
MOTION TO STAY PROCEEDINGS
PENDING A DECISION ON THE MOTION TO DISMISS**

INTRODUCTION

In his response, Plaintiff Schuyler File does not directly engage with the main factors this Court considers in exercising its discretion to grant a stay. Instead, he argues that this is a summary-judgment case with purely legal issues that should not require discovery, depositions, motion practice, or much factual development; therefore, a stay is inappropriate. (Dkt. 22:1–2.) However, all the relevant factors support granting a stay to prevent the unnecessary burden of summary-judgment proceedings.

Plaintiff is also wrong because summary judgment is not available to him, and this case will likely be resolved on the pending dismissal motions. As explained in the defendants' memoranda of law in support of their motions to dismiss, Plaintiff's First Amendment claim is foreclosed by binding U.S.

Supreme Court and Seventh Circuit precedent. (Dkt. 15; 20.) The Court should grant a stay of all proceedings and dispose of the pending dismissal motions.

ARGUMENT

The Court should order a stay. A stay is appropriate considering the four main factors district courts weigh in addressing a stay request. As already argued, (1) the litigation is at a very early stage, (2) a stay will not unduly prejudice or tactically disadvantage Plaintiff, (3) it will streamline the issues, as Plaintiff's claim is barred by controlling precedent and should be dismissed, and (4) it will reduce the litigation burden on the parties and the Court. *See Feed.Ing BV v. Principle Sols., LLC*, No. 14-C-1241, 2015 WL 13158324, at *1 (E.D. Wis. Apr. 21, 2015); (Dkt. 17:3–9).

The only of these four factors Plaintiff seems to implicitly address in his response is the third, and that is because he believes he should prevail on summary judgment. (*See* Dkt. 22:1–2.) Plaintiff asserts this is a summary-judgment case involving purely legal issues that will not require written discovery, depositions, other motion practice, or much factual development outside his own declaration, the SCRs, and Wisconsin Supreme Court decisions. (Dkt. 22:1.)

While this case is certainly straightforward, Plaintiff is wrong because summary judgment is not available to him. As explained in the defendants' memoranda of law in support of their motions to dismiss—and as will be

explained in the dismissal-motion reply that the Wisconsin Supreme Court Defendants are filing contemporaneously—Plaintiff’s First Amendment claims are foreclosed by binding U.S. Supreme Court and Seventh Circuit precedent. (Dkt. 15; 20.) Since Plaintiff has not stated a viable claim, the Court should order a stay and then dispose of the pending dismissal motions.

Finally, in their memoranda of law in support of their stay motion, the Wisconsin Supreme Court Defendants noted that this case is not the only one raising the same claim. (Dkt. 17:5–8.) For the Court’s benefit, two updates are worth noting.

First, in *Jarchow v. State Bar of Wisconsin*, No. 19-CV-266 (W.D. Wis. Dec. 13, 2019), the court granted the defendants’ motion to dismiss on December 11, 2019. (Dkt. 35.) The court concluded that it is “bound by Keller, and because the parties agree that plaintiffs’ challenges fail under Keller, plaintiffs’ claims fail in this court.” (Dkt. 35:3.) The plaintiffs filed a notice of appeal on December 13, 2019. (Dkt. 37.)

Second, in *Fleck* (out of the Eighth Circuit), the plaintiff has filed a petition for a writ of certiorari in the U.S. Supreme Court. *Fleck v. Wetch*, No. 19-670 (U.S.). The petition presents two questions:

1. Are laws mandating membership in a state bar association subject to the same “exacting” First Amendment scrutiny that the Court prescribed for mandatory public-sector union fees in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018)?

2. Does it violate the First Amendment to presume that an attorney is willing to pay for a bar association's "non-chargeable" political and ideological speech, unless and until that attorney takes steps to opt out?

Petition for a Writ of Certiorari at i, *Fleck*, No. 19-670 (U.S.), available at https://www.supremecourt.gov/DocketPDF/19/19-670/123251/20191121144037011_Petition.pdf.

Either of these cases could eventually result in additional binding precedent (either from the Seventh Circuit or U.S. Supreme Court) that this Court would be obliged to apply here, further supporting a stay.

CONCLUSION

The Court should grant the stay motion and order that all proceedings are stayed pending disposition of the motions to dismiss.

Dated this 20th day of December, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

s/ Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

Attorneys for Defendants Chief Justice
Patience Roggensack, and Justices Ann
Walsh Bradley, Annette Ziegler, Rebecca

Bradley, Daniel Kelly, Rebecca Dallet,
and Brian Hagedorn, in their official
capacities

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549 (Kawski)
(608) 266-5457 (Murphy)
(608) 267-2223 (Fax)
kawskicp@doj.state.wi.us
murphysm@doj.state.wi.us

CERTIFICATE OF SERVICE

I certify that on December 20, 2019, I electronically filed the foregoing Wisconsin Supreme Court Defendants' Reply in Support of Their Motion to Stay Proceedings Pending a Decision on the Motion to Dismiss with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 20th day of December, 2019.

s/ Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General