STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,

Plaintiff,

vs. Case No. 18CV3122

JAMES FETZER,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO STAY

Plaintiff Leonard Pozner, through his attorneys, respectfully requests that this Court deny Defendant Fetzer's Motion to Stay Pozner's "Taking Order" Until Ruling on Petition for Writ of Certiorari (the "Motion to Stay"). The basis for this denial is set forth below.

ARGUMENT

Dr. Fetzer has not established any basis to stay this Court's order pending the outcome of his appeal to the United States Supreme Court. A stay is only appropriate when a litigant makes a strong showing that the litigant is likely to succeed on the merits of his appeal. Dr. Fetzer's writ of certiorari has zero chance of being granted. His idea that the equal protection clause requires each state to use the same civil procedure in its own civil courts has no legal support. But even if that was right, Dr. Fetzer's argument that this Court's summary judgment determination violates the Seventh Amendment of the United States Constitution is wrong—the Seventh Amendment does not apply to a state court civil case applying state court law. Dr. Fetzer's U.S. Supreme Court petition does not have even the slightest possibility of success.

LEGAL STANDARD

Courts must consider four factors when reviewing a request to stay an order pending

appeal:

> (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.

Waity v. LeMahieu, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263. "The relevant factors 'are not prerequisites but rather are interrelated considerations that must be balanced together.'" *Id*. (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). That said, the moving party must *always* demonstrate more than "the mere possibility" of success on the merits. *Gudenschwager*, 191 Wis. 2d. at 441.

I. DEFENDANT FETZER HAS FAILED TO SHOW THAT HE IS LIKELY TO SUCCEED ON THE MERITS.

There is no possibility that Dr. Fetzer's writ of certiorari will be granted. The gist of his appeal is that Wisconsin's summary judgment procedures violates the equal protection clause of the U.S. Constitution by instituting a different summary judgment procedure than that utilized by other states.[1] Dr. Fetzer argues that lack of uniformity between summary judgment procedures in different states denies him equal protection of the law under the Fourteenth Amendment, because the Seventh Amendment would have a different application in one state than another. *Id*. He is wrong at every step.

Dr. Fetzer argues that in order for Wisconsin's summary judgment procedure to pass constitutional muster, mere allegations, unsupported by admissible evidence, must be sufficient to

[1] Dr. Fetzer's Writ of Certiorari is available via the U.S. Supreme Court's online docket at: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-7916.html

create a disputed issue of material fact. *Id*. at 23. He suggests that Texas summary judgment procedures accept all evidence, even if it is inadmissible. *Id*. at 17. But he offers no support that those differences alone create an equal protection violation.

To support his supposed equal protection violation, Dr. Fetzer argues that state summary judgment procedures must be the same or else his rights under the Seventh Amendment to the U.S. Constitution will be violated. He argues that a Wisconsin litigant facing summary judgment, and the concomitant loss of a trial by jury, would face a different standard than would a litigant in Texas. He cites no case, statute, treatise, or even law review article that supports that proposition. It is not a strong argument.

First, the Seventh Amendment to the United States Constitution has *never* been held to apply to civil cases in state courts applying state court law. *See*, *e.g.*, *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (refusing to apply the Seventh Amendment to state court civil proceedings); cited in *Osborn v. Haley*, 549 U.S. 225, 252 (2007) (reiterating that Seventh Amendment does not apply to cases in state court). For Dr. Fetzer's argument to be successful, he would first need to convince the U.S. Supreme Court to incorporate the Seventh Amendment—a not-insubstantial challenge.

Second, even if the Seventh Amendment to the U.S. Constitution was held to apply to a state court proceeding, the U.S. Supreme Court has long held that the right to a trial by jury in civil cases is not unlimited. More than a century ago, the U.S. Supreme Court held that directed verdict is constitutionally permissible even though that procedural mechanism necessarily deprived a litigant of a trial by jury. *Fidelity & Deposit Co. of Maryland v. U.S.*, 187 U.S. 315, 320-321 (1902). Likewise, in a well-known series of decisions, the Supreme Court validated the procedures for using summary judgment to decide a case without a trial by jury. *Celotex Corp. v. Catrett*, 477

U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Wisconsin uses the same standard as the Federal Rules of Civil Procedure for evaluating a motion for summary judgment. *Compare* Fed. R. Civ. P. 56 and Wis. Stat. § 803.08; *see also Yahnke v. Carlson*, 2000 WI 74, ¶19, 236 Wis. 2d 257, 613 N.W.2d 102 ("The federal and state rules of civil procedure governing motions for summary judgment are virtually identical."). Given that Wisconsin's procedure is the same as the federal procedure, which has long passed muster, Dr. Fetzer is unlikely to prevail in his argument that Wisconsin's summary judgment standard is unconstitutional.

The reality is simple: there is no chance that the U.S. Supreme Court is going to accept Dr. Fetzer's writ of certiorari. There is no chance the Supreme Court is going to apply the Seventh Amendment to a Wisconsin state court action applying Wisconsin law. The Supreme Court is not going to find that the summary judgment procedure used by Wisconsin and by all federal courts is unconstitutional. They are not going to find an equal protection violation. With all due respect to Dr. Fetzer, there is a zero percent chance of even one of those things happening.

It is an understatement of the greatest magnitude to say that Dr. Fetzer has failed to make a strong showing of success on his writ of certiorari. Not only has he failed to show that the Supreme Court is likely to grant his writ, but he has failed to show any hope of success on the merits of the appeal. Given the absence of any possibility of success on appeal, much less a "strong showing," the court need not reach the other factors. *See Gudenschwager*, 191 Wis 2d. at 441.

CONCLUSION

In sum, Defendant Fetzer's Motion to Stay fails because he has no chance of success on appeal. As a result, this Court should deny Defendant Fetzer's Motion to Stay.

Respectfully submitted this 29th day of July 2022.

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