

FILED
10-12-2020
Clerk of Circuit Court
Polk County, Wisconsin
2020CV000219

BY THE COURT:

DATE SIGNED: October 12, 2020

Electronically signed by Michael Waterman
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

POLK COUNTY

DEREK LINDOO,
JOHN KRAFT, and
BRANDON WIDIKER,

Plaintiffs,

v.

TONY EVERS,

Defendant.

DECISION AND ORDER

Case No. 20 CV 219

The plaintiffs commenced this suit to challenge the governor’s authority to issue Executive Order 90, which declared a public health emergency related to COVID-19. Section 323.10 allows the governor to declare a public health emergency for up to 60 days, unless extended by the legislature. The plaintiffs believe that the governor exceeded his statutory authority by declaring public health emergencies on three separate occasions, each related to the same health crisis – COVID-19. By doing so, the plaintiffs argue, the governor has exceeded his authority by essentially extending a state of emergency past 60 days. The plaintiffs ask for a temporary injunction while their case plays out in the courts.

Temporary injunctions are not issued lightly. “Temporary injunctions are to be issued only when necessary to preserve the status quo.” Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313–14 (1977). Temporary injunctions freeze the litigants’ condition until the merits of the case can be adjudicated at a final hearing.

Plaintiffs in this case don’t ask to preserve the status quo; they ask to change it. They ask the Court to give them the ultimate relief sought in their lawsuit – i.e. termination of Executive Order 90. The Supreme Court has stated on several occasions that where the issuance of a temporary injunction would have the effect of granting all the relief that could be obtained by a

final decree, and would practically dispose of the whole case, it ordinarily will not be granted unless the complainant's right to relief is clear. Codept, Inc. v. More-Way N. Corp., 23 Wis. 2d 165, 172, 127 N.W.2d 29, 34 (1964).

The plaintiffs' right to relief is not clear. Although the plaintiffs agree that COVID-19 constitutes a public health emergency, they believe that the governor may not issue successive executive orders for the same emergency without violating the 60-day limit of section 323.10. To reach that conclusion, the governor argues, one must deviate from the language of the statute and find meaning that is not expressed by the text. The Court agrees. Nothing in the statute prohibits the governor from declaring successive states of emergency. Instead, the statute allows a declaration "if the governor determines that a public health emergency exists."¹ That language gives the governor broad discretion to act whenever conditions in the state constitute a public health emergency. Although "the governor cannot rely on emergency powers indefinitely," Wisconsin Legislature v. Palm, 2020 WI 42, ¶ 41, 391 Wis. 2d 497, 942 N.W.2d 900, he can when a public health emergency exists and the legislature lets him do it.

The plaintiffs disagree with this reading of the plain text. They counter that the 60-day limit becomes meaningless if the governor can declare successive states of emergency for the same crisis. That's incorrect. The 60-day limit serves an important function even if the governor can make successive orders. A finite executive order prevents the governor from perpetuating emergency powers after the emergency has dissipated. When an executive order ends after 60 days, it forces the governor, before issuing another order, to reexamine the situation and publicly identify existing, present-day facts and circumstances that constitute a public health emergency. The 60-day limit provides an important check against run-away executive power, but it does not prevent the governor from issuing a new executive order when the emergency conditions continue to exist. And, if the legislature is unconvinced that a state of emergency does exist, the legislature has the ultimate power to terminate it. Wis. Stat. § 323.10. ("The executive order

¹ A "public health emergency" means the occurrence or imminent threat of an illness or health condition that meets the criteria of Wis. Stat. § 323.02(16), including a novel biological agent that poses a high probability of a large number of deaths, serious long-term disabilities, or widespread exposure that creates a significant risk of substantial future harm to a large number of people.

may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.”)

That brings the Court to the final point: balancing the equities. The plaintiffs are three private citizens, who are seeking redress for injuries they have suffered from Executive Order 90. Their requested injunction goes well beyond their private interests, though. If granted, the temporary injunction will affect every person in Wisconsin by a judicial act that usurps the governor’s power to declare a state of emergency and the legislature’s power to end one. The legislature can end the state of emergency at anytime, but so far, it has declined to do so. As the statewide representative body of the citizens of Wisconsin, the legislature’s inaction is relevant and it weighs against judicial intervention, especially when the requested intervention will have statewide impact.

For these reasons, the motion for a temporary injunction is denied.

BY THE COURT:



R. Michael Waterman
Circuit Court Judge