

RECEIVED
06-17-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT II
Appeal No. 22AP636

AMERICAN OVERSIGHT

Petitioner-Appellee,

v.

ASSEMBLY OFFICE OF
SPECIAL COUNSEL et al

Respondent-Appellant.

On Appeal from the Circuit Court for Dane County
The Honorable Frank D. Remington, Presiding
Circuit Court Case No. 2021CV003007

NOTICE AND MOTION FOR THREE-JUDGE PANEL

Pursuant to §§ 752.31(2)(h) and (3), Stats., Respondent-Appellant Assembly Office of Special Counsel ("OSC"), by its attorneys James Bopp, Jr., The Bopp Law Firm, PC, and Michael D. Dean, Michael D. Dean, LLC, move the Court for an order providing that Respondent-Appellant OSC's appeal and anticipated motion for relief pending appeal in this case be heard by a three-judge panel.

In support, Respondent-Appellant shows:

PROCEDURAL STATUS

1) In this case, Petitioner-Appellee American Oversight ("AO") brought a petition for writ of mandamus to compel OSC to produce records in response to AO's requests for records pursuant to the Wisconsin Open Records Law, Wis. Stat.

§§ 19.31 *et seq.*

2) By final order entered March 8, 2022, Dkt. # 177, circuit court judge Hon. Frank D. Remington denied the OSC's motion to dismiss and made final his earlier bench and written orders entered January 21 and 25, 2022, directing OSC to produce various documents responsive to AO's requests. Dkt. ## 110, 148.

3) By notice of appeal dated April 18, 2022, OSC appealed the March 8 final order to this court. Dkt. # 187.

4) Thereafter, on April 20, AO filed motions for an injunction and sanctions, alleging that OSC was destroying records and had not produced all responsive records in compliance with the March 8 order. Dkt. ## 194, 195. In response, OSC denied that it was destroying records, admitted that a limited number of records were inadvertently omitted and alleged that it had cured the deficiency by producing all records at issue. Dkt. # 262.

5) Following briefing and a contempt hearing on June 10, 2022, J. Remington issued a supplemental order entered June 15, 2022, finding OSC in intentional contempt of his earlier orders under Ch. 785. Although he did not specify responsive records OSC had not by then produced, he imposed remedial sanctions of \$2,000 per day against OSC and ordered OSC Special Counsel, former Justice Michael Gableman, to personally submit proof in sworn affidavit form regarding continued searches for responsive records. Dkt. # 327 at 25. Copy attached as Exhibit 1.

6) OSC has now appealed J. Remington's June 15 contempt order by amended

notice of appeal dated June 17, 2022 and filed herewith.

7) Pursuant to §§ 752.31(2) and (3), OSC now files this contemporaneous motion for a three-judge panel to hear its appeal and anticipated motion for stay of J. Remington's June 15 order.

BACKGROUND

8) On March 17, 2021, finding that the integrity of Wisconsin's elections had been jeopardized, the Wisconsin Assembly passed 2021 Assembly Resolution 15, "direct[ing] the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019" Dkt. # 101.

9) Pursuant to the Resolution, the Committee authorized Assembly Speaker Robin Vos to hire legal counsel to assist the Committee in the investigation. *Id.*

10) On June 25, 2021, Speaker Vos contracted with J. Gableman to serve as Special Counsel to coordinate and supervise the investigation. Dkt. # 36. On August 30, 2021, the Assembly created The Office of The Special Counsel ("OSC") to be led by Special Counsel Gableman. Dkt. # 5, ¶ 2.

11) On July 20 and August 12, 2021 (prior to constitution of the OSC), AO submitted open records requests to Speaker Vos and Chief Assembly Clerk Edward Blazel seeking records related to OSC and its contractors. Dkt. # 5, ¶ 30.

12) (Not surprisingly, AO is a non-profit left-of-center action organization. According to its website, AO's board of directors includes a former Democratic

U.S. Senator's chief of staff, a former general counsel of progressive think tank Roosevelt Institute, and a senior fellow at the progressive Brennan Center for Justice. <http://www.americanoversight.org/board>, last accessed January 19, 2022.)

13) Soon after OSC was created August 30, AO submitted fourteen new open records requests between September 15 and October 26, 2021, seven to Vos and Blazel and seven to OSC. The requests covered different time periods, but essentially sought records from OSC beginning August 12, 2021 through the date OSC conducted its search for the records. Dkt. ## 8, 9, 14-25 (Petition Exhs. A–N).

14) Those records requested from OSC by AO are the subject of this litigation. (They are summarized at Dkt. # 5, ¶ 58, Table 1, and described in the court's order entered March 2, 2022, which denied OSC's motions to quash AO's writ and to stay the January 25 order. Dkt. 165, at 3-4.)

15) OSC completed its searches for records responsive to AO's requests in early December, 2021. By email to AO sent December 4, 2021, by OSC office manager and chief of staff, Zakory Niemierowicz, OSC produced a number of responsive records and also advised AO that OSC was withholding other records containing strategic information related to the investigation, which would be released to AO and the public once the investigation was completed.

Attached are the open records for the Office of Special Counsel up until December 1st, 2021. Some documents that contain strategic information to our investigation will continue to be hel[d] until the conclusion of our investigation. . . .

¹ One request does ask for certain records from June 1, 2021 through the date of search.

Dkt. # 27. (The email contained a typographical error, “help” rather than “held.”)

16) On December 20, 2021, AO filed its petition for writ of mandamus ordering OSC to produce the records sought, Dkt. # 5, or in the alternative to show cause for failure to produce them. Dkt. # 11.

17) On December 21, 2021, J. Remington issued the writ with a return or show cause date of January 21, 2022. Dkt. # 42. OSC then filed motions to quash the writ. Dkt. ## 98, 99, and 105.

18) At the January 21 show cause hearing, J. Remington ordered OSC to file records responsive to AO’s requests with the court under seal by January 31, and directed AO and OSC to complete plenary briefing by February 10 in anticipation of hearing and argument on March 8. Dkt. # 148.

19) On January 25, J. Remington entered a written scheduling order pursuant his January 21 bench order. Dkt. # 110. AO and OSC then filed opposing and reply briefs. Dkt. ## 125-137, 150, 151.

20) On January 31, OSC counsel Michael Dean filed a total of 761 pages of responsive records with the court along with OSC’s motion to seal for in camera review, which the court entered in the e-File system. Dkt. # 123, 142, 143, 144, 145, 146, 147, 149, 161, 162, 163, 164, and 165. J. Remington then issued an order to seal, directing that the records would not be “disclosed until further order of the Court following the hearings schedule[d] for March 8, 2022.” Dkt. # 139.

21) On March 2, after reviewing the records *in camera*, J. Remington issued a

final written order that they be released pending his ruling at the March 8 hearing on a motion filed by OSC to stay release pending appeal. Dkt. # 165. At the hearing, he denied OSC's motion to stay and ordered the records to be unsealed and produced to AO through the e-File system. Dkt. ## 177, 182.

22) On March 25, 2022, AO counsel Christa Westerberg sent a letter to OSC counsel alleging that OSC's January 31 production failed to include a set of documents generally referred to as "contracts and calendars," and also omitted attachments to emails that were included in the production. She also questioned OSC's willingness to comply with J. Remington's March 2 order. Dkt. # 199.

23) In a responsive letter from OSC counsel Courtney Milbank dated April 8, OSC asserted its willingness to comply with J. Remington's order. OSC acknowledged that the "contracts and calendars" had been "inadvertently" omitted from the January 31 production, and provided them to AO as attachments to the letter. Dkt. # 262.

24) Per Attorney Milbank's letter, the OSC also committed to recover the email attachments by contacting the senders and recipients of the emails. OSC completed that task and produced the attachments to AO by letter from Attorney Milbank dated May 13. Dkt. # 265.

25) On April 20, notwithstanding OSC's production of the contracts and calendars and commitment to obtain the email attachments, AO moved to re-open the court's March 2 final order, requesting J. Remington to enjoin alleged

destruction of records by OSC and to hold OSC in contempt for failure to comply with his January 21 and 25 orders to file documents by January 31. Dkt. # 110.

26) At a scheduling conference held April 26, J. Remington set dates for filing witness lists, expedited discovery, additional briefing, and a June 10 evidentiary hearing on AO's motion for sanctions. Dkt. # 324. He also ruled that AO had established a *prima facie* case for contempt, and that the burden shifted to OSC to prove violations of his January 21 and 25 orders was not intentional. *Id.* at 9:9-10:9.

27) On May 10, OSC filed its witness list, naming Mr. Niemierowicz as its only witness. Dkt. # 224

28) AO did not file a witness list. However, on Sunday, June 5, AO served J. Gableman with a subpoena to appear at the June 10 hearing. OSC then brought a motion to quash the subpoena, which was heard June 8. Dkt. ## 255, 314.

29) On June 8, OSC also filed affidavits of Attorneys Dean and Milbank. Dean's affidavit affirmed OSC's production of documents filed with the court on January 31. Dkt. # 259. Milbank's affidavit affirmed that the contracts and calendars and email attachments were provided to AO by her letters dated April 8 and May 13, and included all those records for filing with the court. Dkt. ## 261-298.

30) At the June 8 motion to quash hearing, with J. Gableman and Mr. Niemierowicz present, Attorney Dean explained repeatedly that in light of OSC's burden to prove the "contracts and calendar" omissions were not intentional, Niemierowicz would testify at the June 10 hearing that the records referenced and

filed at Dkt. ## 259 and 261-298 were *all* responsive records possessed by OSC, that he had produced them to counsel for disclosure to AO and filing with the court, and that the only responsive records *not* produced were drafts of the Special Counsel's interim report, which OSC has been unable to recover because the Google Docs app that OSC used to create the report automatically deletes prior versions of collaborative documents. Dkt. # 314 at 7:7 – 8:11; 9:14 – 11:2; 13:2 – 5; 17:11 – 23; 19:20 – 20:6; 24:19 – 25:4; 35:10 – 36:6.

31) Dean also repeatedly advised the court that Niemierowicz “was the only one responsible for collecting and ultimately compiling and producing the document requests, he’s the only one who can testify whether or not he, in fact, did so.” Dkt. # 314, 22:8-16. *See also* Dkt. # 314 at 24:1–4 (“Mr. Niemierowicz is the only one with firsthand knowledge of what he actually collected and what he actually produced”) and Dkt. # 314 at 24:12–18 (“Again, there’s no testimony at all that Justice Gableman -- there’s nothing in Mr. Niemierowicz’s testimony that he did anything other than hear from Justice Gableman the direction to compile and maintain and produce all responsive records, and that he did so”).

32) After Dean had repeatedly explained why Niemierowicz was the only witness with personal knowledge of the records and was indispensable to OSC’s defense of the contempt motion, J. Remington made the extraordinary remarks directly to Niemierowicz that sanctions against him could include “confinement in the Dane County Jail,” asked whether OSC counsel had properly advised him

(Niemierowicz) of risks and potential conflicts of interest, and suggested that Niemierowicz obtain separate personal representation:²

In that respect, you know, the standard, I think, requirement of substantive, if not procedure of due process is when the Court entertains a motion for contempt. Understanding that one remedial sanction can be incarceration, I wonder whether Mr. Niemierowicz has been apprised of the possibility that he may need to seek independent legal counsel. If, in fact, the strategy of the Office of Special Counsel is to place the failure to comply with the Court's orders squarely upon his shoulders. Because I'm not sure that Mr. Niemierowicz's interests now are -- have not diverged from the interest of Mike Gableman or the Office of the Special Counsel.

I'm not suggesting there's a conflict of interest. I am saying that I also proceed very carefully and extremely cautiously when the question before the Court the contempt, and where one of the sanctions that could be imposed is confinement in the Dane County Jail. I just raise the issue because I don't believe anyone is deserving -- certainly not Mr. Niemierowicz's interest by having this occur to him spontaneously on Friday's hearing.

I don't know that it's been discussed. It might not have occurred, but I do think a discussion may be warranted because Mr. Niemierowicz's personal interests might be to escape the scrutiny of the Court for deficiencies that appear now to be undisputed that he was acting at the direction of Mike Gableman; and Mike Gableman told him what to do, how to do it, and when to do it. That very well may be grounds for the Court to find that the individual who is responsible for following the Court's order should be relieved of his failure. I don't know.

But in reviewing the documents and understanding the arguments and consideration of why the Office of Special Counsel does not believe Mike Gableman should be there -- knowing that Mike Gableman is going to be there and also Mr. Niemierowicz is, I just think it would be appropriate to have a discussion over whether a potential conflict exists. If so, whether there's a knowing and written waiver or other discussion.

I am not suggesting that anyone has done anything wrong or that anyone has failed to do anything. It just appears to me that at this junction of the litigation, the interest may be divergent, which would cause this individual to look perhaps probably to his own personal interest or at least have a discussion with an attorney either provided to him by the Office, by you, Mr. Dean, or by his own choosing.

² OSC counsel represent J. Gableman and Mr. Niemierowicz in their official capacity as representatives of OSC, not in their personal capacities.

ATTORNEY DEAN: Well, thank you, Judge. I just submit that the incarceration for contempt based on the record before the Court there that might even be conceivably be represented would be incomprehensibly disproportionate. That's how it strikes me.

THE COURT: Well, you may entirely be correct; but my experience, Mr. Dean, in this serious matter is to afford all the individuals who play a role in a disobedience to the Court advance notice of the possibilities that could occur so they can prepare accordingly. This just occurred to me for the first time having read Ms. Westerberg's response brief and currently understanding possibly the strategy of Mike Gableman and the Office of Specific Counsel to put the total responsibility of the deficiency on Mr. Niemierowicz's shoulders.

Now, like I said, I'm not accusing anyone of anything wrong. I do believe [sic] it's a discussion that should be had so we don't have a problem on Friday if it were to come at that late date.

Dkt. 314 47:1-49:14.

33) To what should have been no one's surprise in light of J. Remington's remarks to Niemierowicz, Attorney Dean advised the court at the beginning of the June 10 hearing that he had been advised after 6:00 p.m. the night before by Attorney Kevin Scott that (Scott) represented Niemierowicz and that Niemierowicz would not appear at the June 10 hearing in light of J. Remington's statements. Dkt. 322 5:3-23.

34) Dean also advised the court that J. Gableman was seeking separate counsel as well, and moved for a continuance because Niemierowicz was the only witness with personal knowledge of OSC's search for records, making it impossible to present a defense for OSC. *Id.*

35) Attorney Westerberg then argued that the hearing should proceed based on Niemierowicz's June 6 deposition that she had filed with the court, and J. Remington stated that the court would proceed on the question whether OSC

intentionally violated the January 21 order.

36) Attorney Dean again stated that Niemierowicz was the sole OSC witness with personal knowledge, that AO had presented its prima facie case and rested, and that

it would be more than inappropriate, it would be a reversible error to allow the petitioner to supplement their case in chief now that they have rested with additional evidence only for rebuttal when I have not even -- when I am declining to present any case in chief whatever.

Dkt. 322 7:13-18.

37) J. Remington then denied Dean's motion as untimely and ordered J. Gableman to take the stand, even though Gableman had not yet obtained separate counsel. J. Gableman refused to testify without counsel, and after a heated exchange with the court, J. Remington mis-characterized Gableman's objection as invoking "Fifth Amendment" rights against self-incrimination and found OSC in contempt.

Dkt. # 322 48:6-17.

38) On June 15, J. Remington entered his written decision finding OSC in intentional contempt, ordering remedial sanctions against OSC of \$2,000 per day, "the maximum daily forfeiture under Wisconsin statute," and directing J. Gableman personally to carry out various actions to purge the contempt, including submitting proof in affidavit form. Dkt. # 327.

ISSUES

39) As stated in OSC's docketing statement accompanying its Notice of Appeal and this Motion, J. Remington's conduct and June 15 order raise numerous issues

related to contempt under §§ 752.31(2) and (3). Stats. Issues include whether J.

Remington erred by

Denying OSC's motion to adjourn the contempt hearing because OSC's only witness (Niemierowicz) had consulted separate counsel at the court's direction, and then on advice of that counsel refused to appear and testify;

Forcing J. Gableman to testify without benefit of counsel;

Finding OSC in contempt;

Ordering remedial sanctions including sworn affidavits by J. Gableman despite lack of personal knowledge; and

Ordering sanctions grossly disproportionate to the violation.

ARGUMENT

40) Few questions will ever reach this court more significant than the separation of powers and legislative authority questions raised in OSC's pending appeal under notice filed April 18, 2022, which will be heard by the customary three-judge panel.

41) The validity of J. Remington's contempt order, purge conditions, sanctions, and other contempt-related issues raised by OSC's amended notice of appeal are all dependent on the validity of his original January 21 and 25 and March 8 orders challenged by OSC under the April 18 notice. *State ex rel. Zignego v. Wisconsin Elections Comm'n*, 2021 WI 32, ¶ 5, 396 Wis. 2d 391, 396, 957 N.W.2d 208, 210 ("But remedial sanctions cannot remain for failure to obey what we have determined was an unlawful writ of mandamus").

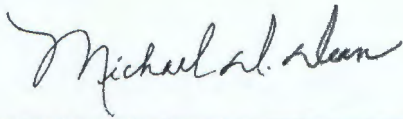
42) Rather than converting this motion to a brief in chief by citing an exhaustive list of such issues, OSC notes by way of illustration that, in comparison to the extraordinary \$2,000 per day sanctions ordered by J. Remington, the circuit court in

Zignego imposed remedial sanctions of only \$50 per day against WEC and forfeitures of only \$250 per day against three commissioners who refused to comply with the court's writ refused to deactivate 230,000 "moved" voters in the state election database. *Id.*, ¶ 10. If J. Remington's underlying writ of mandamus and prior orders are "unlawful," then as *Zignego* requires, his contempt finding, sanctions, and purge conditions are necessarily also unlawful.

43) Judicial economy and consistency therefore require that the contempt issues under the amended notice be heard by the same three-judge panel deciding the underlying appeal on which the contempt issues depend.

WHEREFORE, for the foregoing reasons, Respondent-Appellant Assembly Office of Special Counsel respectfully requests that its appeal of J. Remington's June 15, 2022, order, together with OSC's anticipated motion for relief from that order, be heard by a three-judge panel pursuant to §§ 752.31(2)(h) and (3), Stats.

Respectfully submitted: June 17, 2022



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FILED

06-17-2022

CIRCUIT COURT
DANE COUNTY, WI
2021CV003007STATE OF WISCONSIN, CIRCUIT COURT, DANE, COUNTY

Case Caption (Case Name)

American Oversight

v.

Assembly Office of Special Counsel, et al.

Amended Notice of Appeal
DOCKETING STATEMENTCircuit Court Case No. 221CV3007Case Number Issued by Court of Appeals
2022AP000636

Appellant(s) (Cross-Applicant)

Assembly Office of Special Counsel

Attorney's Name and Address

Michael D. Dean
P.O. Box 2545
Brookfield, WI 53008

Attorney's Telephone Number

(262) 798-8044

Respondent(s) (Cross-Respondent)

American Oversight

Attorney's Name and Address

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Attorney's Telephone Number

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CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
 1. no more than 3 issues are raised;
 2. the parties' briefs will not exceed 15 pages in length; and
 3. the briefs can be filed in a shorter time than normally allowed.
 These requirements can be modified somewhat in appropriate cases.
- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?

☒ Yes ☐ No If yes, date of entry June 15, 2022

Is appeal timely? (See §808.04, Wisconsin Statutes)

☒ Yes ☐ No

Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?

☒ Yes ☐ No (If "no", explain jurisdiction basis for appeal on separate sheet.)**NATURE OF ACTION** – Briefly describe the nature of action and the result in circuit court:

Petition for Writ of Mandamus ordering response to Open Records Requests under §§ 19.35(1)(a) et al. Appellant appealed a prior final order of the circuit court in this case by notice of appeal filed April 18, 2022. Appellant files its amended notice of appeal in relation to the circuit court's orders denying appellant's motion to adjourn the contempt hearing and finding appellant in contempt and imposing sanctions in relation to a prior order of the circuit court.

ISSUES – Specify the issues to be raised on appeal: (Attach separate sheet if necessary.)

(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal. The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

Did the circuit court err

Denying appellant's motion to adjourn the contempt hearing while appellant's only witness sought separate counsel?

Denying appellant's motion to dismiss?

Forcing the special counsel to testify without benefit of counsel?

Finding appellant in contempt?

Ordering remedial sanctions?

Ordering sanctions disproportionate to the violation?

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:

Standards of review related to

CONTEMPT ISSUES. (1) Findings of fact: "not clearly erroneous." *Shepard v. Circuit Ct. for Outagamie Cnty.*, 189 Wis. 2d 279, 286, 525 N.W.2d 764 (Ct. App. 1994). (2) Construction/application of Ch. 785, Stats.: de novo/independent. *Gower v. Circuit Ct. for Marinette Cnty.*, 154 Wis. 2d 1, 6, 452 N.W.2d 354 (1990).

MOTION TO DISMISS AND COMPETENCY OF COURT. De novo/independent. *Vill. of Shorewood v. Steinberg*, 174 Wis. 2d 191, 200, 496 N.W.2d 57, 60 (1993)

DENIAL OF RIGHT COUNSEL. De novo/independent re determination of "constitutional facts." *State v. Phillips*, 218 Wis. 2d 180, 190, 577 N.W.2d 794, 799 (1998).

PROCEDURAL ISSUES DENYING ADJOURNMENT AND ALLOWING PETITIONER TO CURE DEFICIENCIES IN PRIMA FACIE CASE. (1) Substantial rights affected: abuse of discretion. *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir. 2008). (2) Procedural due process: de novo/independent. *Teague v. Schimel*, 2017 WI 56, ¶ 19, 375 Wis. 2d 458, 471, 896 N.W.2d 286, 292.

Do you wish to have this appeal placed on the expedited appeals calendar? (See *Criteria For Expedited Appeals*.)

☐ Yes ☒ No

If "no", explain: The appeal does not meet the expedited appeal criteria. However, given the issues and circumstances, appellant will move for an expedited briefing and disposition schedule in the court's discretion. *State ex rel. Zignego v. Wisconsin Elections Comm'n*, 2020 WI App 17, ¶ 2, 391 Wis. 2d 441, 448, 941 N.W.2d 284, 288, aff'd as modified, 2021 WI 32, ¶ 2, 396 Wis. 2d 391, 957 N.W.2d 208

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?

☒ Yes ☐ No

Will you request oral argument?

☒ Yes ☐ No

List all parties in trial court action who will not participate in this appeal:

Party

Robin Vos, Wisconsin State Assembly

Attorney's Name and Telephone Number

Ronald Stadler 847.549.9611

Reason for not Participating

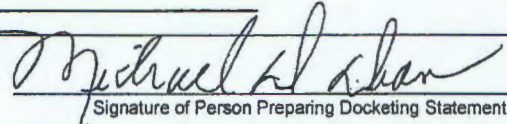
Dismissed from the action by order of the circuit court.

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?

☒ Yes ☐ No

Name of Case Initial notice of appeal in this case filed April 18, 2022

Appeal Number 2022AP000636


Signature of Person Preparing Docketing Statement

Michael D. Dean

Name Printed or Typed

miked@michaelddeanllc.com

Email Address (if any)

June 17, 2022

Date

Appellant Note:

You **MUST** file this form and attachments with the Clerk of the Circuit Court.

You **MUST** attach a copy of the following trial court documents to this form:

1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You **MUST** also serve all parties with a copy of this completed Docketing Statement and attached trial court documents.

The clerk of circuit court shall forward this form to the Court of Appeals.

FILED
06-17-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

STATE OF WISCONSIN, CIRCUIT COURT, DANE COUNTY

American Oversight

(party designation) Petitioner-Respondent

-vs-

Assembly Office of Special Counsel

(party designation) Respondent-Appellant

Amended
Notice of Appeal

Case No. 21CV3007, 2022AP000636

Notice is hereby given that (Name of party filing appeal) Assembly Office of Special Counsel appeals to the Court of Appeals, District II, from [Choose one] ☒ the whole ☐ a part of the final judgment or order, entered on (Date) June 15, 2022 in the circuit court for Dane County, the Honorable (Name of Judge) Frank D. Remington, presiding, in favor of (Name of party opposing appeal) American Oversight, and against (Name of party filing appeal) Assembly Office of Special Counsel, wherein the court (Describe judgment or order) the court found Appellant in contempt and ordered remedial sanctions. e-File Dkt. # 327.

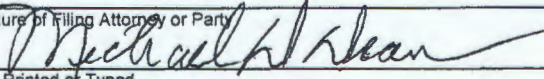
NOTE: If this is an appeal under §809.30 or §809.32, also include the following [see §809.10(1)]:

- If a postconviction motion was not filed, state the date of service of the last transcript or service of a copy of the circuit court case record.
- If a postconviction motion was filed, state the date of the order deciding the postconviction motion(s).
- If the Court of Appeals established any other filing deadline, state it.

If counsel is appointed under ch. 977, a copy of the order appointing counsel should be attached to the notice of appeal.

This [Choose one] ☒ is ☐ is not an appeal within Wisconsin Statutes §752.31(2).
This [Choose one] ☐ is ☒ is not an appeal to be given preference in the circuit court or court of appeals pursuant to statute.

Date: June 17, 2022

Signature of Filing Attorney or Party 	Telephone Number (262) 798-8044	State Bar Number (if applicable) 01019171
Name Printed or Typed Michael D. Dean	Email Address (if any) mike@michaelddeanllc.com	
Address P.O. Box 2545, Brookfield, WI 53008		

This completed form must be *filed* with the clerk of the circuit court in which the judgment or order appealed from was entered. In addition, copies of this completed form must be served upon the following:

1. Opposing counsel; and
2. any other party.

The clerk of circuit court shall forward this form to the Court of Appeals.

STATE OF WISCONSIN
DANE COUNTY
CIRCUIT COURT

AMERICAN OVERSIGHT,

Petitioner,

Case No. 2021CV003007

v.

ASSEMBLY OFFICE OF SPECIAL COUNSEL, et
al.

Respondents.

**Brief of The Office of The Special
Counsel in Support of Motion to
Stay Imposition of Sanctions
Pending Appeal**

**Brief of The Office of The Special Counsel in Support of Motion to Stay
Imposition of Sanctions Pending Appeal**

On June 10, 2022, this Court held a hearing on Petitioner's Motion to Modify and for Contempt. Despite The Office of The Special Counsel ("OSC") being unable to present its case-in-chief and timely seeking a continuance, this Court found the OSC in contempt. The Court also indicated that a written order imposing sanctions would be forthcoming. The Court's decision and order was issued on June 15, 2022, and includes the imposition of sanctions of \$2,000 per day. Decision and Order, Doc. 327. The OSC now moves for a stay of the imposition of these sanctions pending disposition of its appeal.

Relevant Facts

This Court previously found that American Oversight ("AO") had made a prima facie showing of noncompliance. In response, counsel for the OSC stated that whether AO made a prima facie case was "an issue that we will explore and we will raise it if we think it's pertinent . . . [or] warranted." Transcript of Scheduling Conference Proceedings, April 26, 2022, Doc. 223, 27:32–28:5. The OSC did not raise such an issue, but instead declined to contest the

Court's finding it is Opposition. Response in Opp'n to Mtn. to Modify and for Contempt, Doc, 225, 7 n. 9. Accordingly, the burden shifted to the OSC to prove that the violation was not intentional.

In its case-in-chief, the OSC intended to call to the stand Mr. Zakory Niemierowicz, one of the legal custodians for the OSC and the person most knowledgeable about the OSC's production and compliance, to testify to the fact that the OSC's violation of the court's order was neither intentional nor continuing.¹ However, on June 8, 2022, during a hearing on OSC's Motion to Quash Subpoena of Special Counsel Gableman, this Court, speaking directly to both Mr. Niemierowicz² and counsel for the OSC, advised him that he should be apprised of his right to seek private counsel, given his risk of incarceration. This Court stated that:

I'm not suggesting there's a conflict of interest. I am saying that I also proceed very carefully and extremely cautiously when the question before the Court the contempt, and where one of the sanctions that could be imposed is confinement in the Dane County Jail. I just raise the issue because *I don't believe anyone is deserving -- certainly not Mr. Niemierowicz's interest by having this occur to him spontaneously on Friday's hearing.*

Transcript of Motion Hearing, June 8, 2022, Doc. 314, 47:13–47:20 (suggesting that Mr.

¹Mr. Niemierowicz was designated as the OSC's sole witness on May 10, 2022. *See* OSC Witness List, Doc. 224. Mr. Niemierowicz was responsible for the searches and production of the documents in response to the requests at issue. *See* Motion to Quash, Doc. 255, 3. He is the person most knowledgeable of the requests, searches, production, and office procedures regarding records requests. *Id.* Accordingly, the OSC previously made clear that Special Counsel Gableman's testimony is both unnecessary and irrelevant for resolving the underlying issues. *Id.* Additionally, Attorney Dean advised the Court that Mr. Niemierowicz was the only person who collected the documents and had first-hand knowledge of what was produced. Transcript of Motion Hearing, June 8, 2022, Doc. 314, 22:8–16; 24:1–4, 12–18.

²"There is another matter that I want to bring up. And I'm glad Mr. Niemierowicz is appearing here." Transcript of Motion Hearing, June 8, 2022, Doc. 314, 46:14–15 (indicating that the Court was also addressing Mr. Niemierowicz directly).

Niemierowicz could be “spontaneously” ordered to jail at Friday’s hearing).

These statements gave the appearance that this Court was seeking to threaten and to intimidate Mr. Niemierowicz into not testifying. Whether or not that was the Court’s intention, it was the effect. This Court’s suggestion that if Mr. Niemierowicz attended and testified at the hearing on June 10, 2022, this Court could remand him to the county jail, caused Mr. Niemierowicz to seek private counsel and to refuse to testify (on the advice of said counsel).

In light of this Court’s statements, counsel for the OSC recommended to both Mr. Niemierowicz and Mr. Gableman, since he had been subpoenaed to testify by Petitioner and the Court had refused to quash the subpoena, that each should consider obtaining counsel to represent them in their personal capacity. Mr. Niemierowicz secured personal counsel, and after multiple conversations with such counsel, OSC’s counsel was informed on the evening of June 9, 2022, that Mr. Niemierowicz would not be appearing on June 10, 2022, and would not testify because of the comments of this Court at the Motion to Quash hearing, until Mr. Niemierowicz’s personal counsel could become fully apprised of the situation and provide informed advice to Mr. Niemierowicz.

At the June 10, 2022 hearing, Counsel for the OSC immediately moved to adjourn the hearing until counsel for Mr. Niemierowicz could get fully informed and advise his client, and so that Mr. Gableman could secure personal counsel, which he was seeking. Counsel for the OSC made abundantly clear that it was *unable* to present a defense or a case-in-chief, given these significant developments as a result of this Court’s comments on June 8, 2022, and that it had no witnesses to testify. *See, e.g.*, Transcript of June 10, 2022, Hearing, Doc. 322, 47:10–47:14 (“just to be clear, . . . [i]t is not that we would not wish to present evidence. It’s, again, on the basis that

we are not able to present evidence.”); *see also id.* 4:19–5:23.

Despite these significant issues and the inability of the OSC to present *any* defense, the Court denied OSC’s Motion to Adjourn and continue the case and proceeded to order the OSC in contempt. It then imposed sanctions of “\$2,000 each day, the maximum daily forfeiture under Wisconsin statute.” Decision and Order, Doc. 327, 2. Therefore, the OSC now moves for a stay of any imposition of these sanctions pending appeal.

Legal Standard

“During the pendency of an appeal, a trial court or an appellate court may . . . [s]tay execution or enforcement of a judgment or order” Wis. Stat. § 808.07(2).

A stay pending appeal is appropriate where the moving party:

- (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
- (2) shows that, unless a stay is granted, it will suffer irreparable injury;
- (3) shows that no substantial harm will come to other interested parties; and
- (4) shows that a stay will do no harm to the public interest.

State v. Gudenschwager, 191 Wis. 2d 431, 440 (1995) (citation omitted)³. Because these four “factors are . . . interrelated considerations that must be considered together . . . more of one factor excuses less of the other.” *Id.* at 440–41 (citation omitted).

I. The OSC Has a High Likelihood of Success and an Irreparable Injury Absent a Stay.

As to the first two factors, although a movant must “demonstrate more than the mere ‘possibility’ of success on the merits,” the “movant need not always establish a high probability of success” *Id.* at 441. Rather, “the probability of success that must be demonstrated is

³The *Gudenschwager* factors have been amplified in relation to specific facts situations not relevant here. *See, e.g., State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141 (involuntary commitments) and *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, 237 Wis. 2d 498, 614 N.W.2d 565 (stay of money judgment).

inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay.”

Id.

As to likelihood of success, the Wisconsin Supreme Court has recently explained:

When reviewing a motion for a stay, a circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted. The relevant inquiry is whether the movant made a strong showing of success *on appeal*. *Gudenschwager*, 191 Wis. 2d at 440, 529 N.W.2d 225. Of course, whenever a party is seeking a stay, there has already been a determination at the trial level adverse to the moving party. If the circuit court were asked to merely repeat and reapply legal conclusions already made, the first factor would rarely if ever side in favor of the movant.

Waity v. LeMahieu, 400 Wis. 2d 356, 389 (2022) (emphasis original).

In the present case, the OSC is likely to prevail on the merits on appeal. In refusing to grant the OSC’s motion to adjourn and grant a continuance in light of the unavailability of Mr. Niemierowicz or any other witness to present in its case-in-chief, this Court did not give proper weight to any of the relevant factors, all of which favor the OSC, and in so doing deprived the OSC of due process in supplying its case-in-chief and defense. “In passing upon a motion for a continuance due to the absence of a witness, the trial court should consider . . . whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located.” *Bowie v. State*, 85 Wis. 2d 549, 556–57 (1978). First, in this case, not only was Mr. Niemierowicz’ testimony material, he was the *sole* and *chief* witness, the records custodian most familiar with the treatment of the records in this case. In his absence, the OSC was *unable* to put forth its case-in-chief or its defense. There can be no question that his testimony was not only material, but superlatively material. Second, there can

likewise be no question that the OSC was *not* guilty of any neglect in attempting to procure Mr. Niemierowicz' attendance. Indeed, the OSC had fully prepared for his attendance. As detailed above, it was not until after the hearing on June 8, 2022—less than 48 hours before the June 10 hearing—that Mr. Niemierowicz would obtain personal counsel who advised him not to appear, and that he would not appear was communicated to the OSC on the evening of June 9, less than 24 hours before the hearing. Mr. Niemierowicz' independent decision (subsequent to this Court's intimation that he may be sent to jail if he served as the witness of OSC) to follow the advice of his counsel not to appear—which decision was communicated to counsel for the OSC less than 24 hours before he was scheduled to do so, is far from a demonstration of neglect on the OSC's part. Third and finally, as noted above, the OSC's motion to adjourn was in part for the purpose of allowing personal counsel for Mr. Niemierowicz to become fully apprised of the case and to advise his client, which additional time might have led to Mr. Niemierowicz deciding to appear at all.

Therefore, all three *Bowie* factors favor the OSC when it moved for an adjournment and continuance. In declining to grant that motion, this Court deprived the OSC of due process in being able to present its case-in-case and defense in the contempt proceedings. While the OSC is likely to succeed on the merits for this reason alone, it is also likely to succeed on the merits because its case-in-chief would have proven that any violation of the Court's order was unintentional and therefore, not contemptuous. *See Response in Opposition to Motion to Modify and for Contempt*, Doc. 255, which the OSC incorporates by reference. It would have also proven that any such violation had been voluntarily cured, so there is no continuing contempt, which makes imposition of any sanctions inappropriate. *Id.*

Accordingly, the OSC has a high probability of success on the merits of its appeal. While that means the OSC has a lesser burden to show irreparable injury absent a stay being granted since “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay,” *Gudenschwager*, 191 Wis. 2d at 441 (citation omitted), it is nonetheless the case that OSC will clearly suffer irreparable injury absent a stay. Absent a stay, in addition to aggravation of the underlying injury of this deprivation of due process, the OSC would, of course, suffer the injury-on-top-of-injury caused by the imposed \$2,000 per day sanction—“the maximum daily forfeiture under Wisconsin statute.” Decision and Order, Doc. 327, 2. To impose this sanction upon the OSC while they pursue an appeal would be unduly burdensome and would irreparably harm an entity that already has limited funds available. Beyond this, both the OSC and the public would be irreparably harmed by the imposition of this sanction on the basis of an *inadvertent* failure, due to a mere oversight, to fully comply with the Court’s order despite its good faith efforts to do so. Such a precedent would do grave harm to the OSC and the public that the Assembly serves through the OSC by tempering the willingness of such public entities to engage in any processes at all that may result in its custody of public records that could potentially be legally controversial.

The OSC, then, has both a high probability of success on the merits of its appeal and a clear irreparable harm absent a stay.

II. A Stay Would Present No Substantial Harm to Parties or the Public.

As to the third and fourth factors, the OSC has already voluntarily complied with the Court’s order, having corrected any oversight immediately after being made aware of it, and having promptly rectified the issue of missing attachments. The records at issue in this cases

therefore having been supplied, no harm would befall either party by the minimal delay caused by granting a stay. And, the Assembly being, in fact, the “People’s House,”⁴ “composed of persons chosen and elected by the people, who are answerable directly to the people.” *State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 296 (1969), the Assembly’s resolution and conduct of its business through the OSC’s investigation are therefore a legislative act taken on behalf of the people. The OSC’s actions are equally entitled to the presumption that they are in the public interest, and a stay of sanctions on the OSC therefore would not harm the very public that the OSC serves, especially in light of the OSC’s voluntary compliance with the Court’s order and immediate correction of any oversight of which it has been made aware. Indeed, as noted above, granting a stay would benefit the public by granting the OSC the due process to which it is entitled and pausing the passage of a chilling precedent.

Conclusion

For all the foregoing reasons, this Court should grant the OSC’s Motion to Stay Imposition of Sanctions Pending Appeal.

⁴<https://legis.wisconsin.gov/assembly/asgt/submenu/visit-assembly-visit/> (“The Wisconsin State Assembly is often called the People’s House. Each of the 99 Wisconsin State Representatives represent roughly 58,000 Wisconsin residents.”)

Dated: June 16, 2022

/s/ Michael D. Dean

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Certificate of Service

I hereby certify that a copy of the foregoing document was served on all counsel of record in this matter on June 16, 2022, via the Court's electronic filing system.

/s/ Michael D. Dean

Michael D. Dean

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06-17-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

STATE OF WISCONSIN
DANE COUNTY
CIRCUIT COURT

AMERICAN OVERSIGHT,

Petitioner,

v.

ASSEMBLY OFFICE OF SPECIAL COUNSEL, et
al.

Respondents.

Case No. 2021CV003007

**The Office of The Special
Counsel's Notice of Motion and
Motion to Stay Imposition of
Sanctions Pending Appeal**

**The Office of The Special Counsel's Notice of Motion and
Motion to Stay Imposition of Sanctions Pending Appeal**

PLEASE TAKE NOTICE that Respondent The Office of The Special Counsel ("OSC"), by its attorneys, The Bopp Law Firm, P.C., and Michael D. Dean, LLC, hereby moves this Court, the Honorable Frank D. Remington, to enter an Order staying imposition of sanctions pending disposition of its appeal.

The grounds for this Motion are set forth in the accompanying brief, filed herewith.

WHEREFORE, the OSC respectfully requests that this Court stay imposition of sanctions pending disposition of its appeal, as set forth in the accompanying brief.

Dated: June 16, 2022

/s/ Michael D. Dean

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Certificate of Service

I hereby certify that a copy of the foregoing document was served on all counsel of record in this matter on June 16, 2022, via the Court's electronic filing system.

/s/ Michael D. Dean

Michael D. Dean