#12

9 pages

COURT OF APPEALS

OF WISCONSIN
10 E. Doty Street, 7th Floor
Madison, Wisconsin 53703
TELEPHONE: (608) 266-9320
FAX: (608) 261-6644

FAX TRANSMISSION

TO:	Hon. Maryann Sumi	266-4079
	Carlo Esqueda	267-8859
	Steven C. Kilpatrick	267-2223
	Maria S. Lazar	267-2223
	Ismael R. Ozanne	267-2545

FROM: COURT OF APPEALS, District IV

DATE: March 24, 2011

PAGES: 9 (including cover sheet)

RE: 2011AP613-LV
Ismael R. Ozanne v. Jeff Fitzgerald (L.C. # 2011CV1244)

Appeal No. 2011AP613-LV Cir. Ct. No. 2011CV1244

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. ISMAEL R. OZANNE,

PLAINTIFF-RESPONDENT,

V.

JEFF FITZGERALD, SCOTT FITZGERALD, MICHAEL ELLIS AND SCOTT SUDER,

DEFENDANTS,

DOUGLAS LA FOLLETTE,

DEFENDANT-PETITIONER-MOVANT.

FILED

MAR 24, 2011

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, Higginbotham and Blanchard, JJ.

Wisconsin Secretary of State Douglas La Follette petitions for leave to appeal a temporary restraining order (TRO) issued on March 18, 2011, which enjoins La Follette from publishing 2011 Wisconsin Act 10, commonly known as the Budget Repair Bill, until the circuit court can rule on the underlying action. The circuit court issued the TRO after determining it was likely that the Dane County District Attorney would be able to establish that members of the Wisconsin Senate and of a joint legislative committee had violated Wisconsin's Open Meetings Law during the legislative process. La Follette further requests

temporary relief under WIS. STAT. RULE 809.52 (2009-10)[1] in the form of an order staying the TRO pending disposition of his petition, so that he may publish the Act on March 25, 2011.[2]

This case presents several significant issues involving justiciability and the remedies that are available under Wisconsin's Open Meetings Law, WIS. STAT. § 19.81 *et seq.* As we will explain below, we believe that resolution of these questions will require clarification of the interaction between the Open Meetings Law and a line of cases dealing with the separation of powers doctrine. Many more cases bear on the issues, but we will limit our discussion to the four that our review so far suggests are most significant: ***Goodland v. Zimmerman***, 243 Wis. 459, 10 N.W.2d 180 (1943); ***State ex rel. Lynch v. Conta***, 71 Wis. 2d 662, 293 N.W.2d 313 (1976); ***State ex rel. La Follette v. Stitt***, 114 Wis. 2d 358, 338 N.W.2d 684 (1983); and ***Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.***, 2009 WI 79, 319 Wis. 2d 439, 768 N.W.2d 700. Plainly, this case has broad statewide implications for the general public and those most directly affected by the challenged Act, in addition to those interested in the manner of its passage, as indicated by a non-party brief jointly filed by WEAC, AFSCME District Counsel 40, AFSCME District Counsel 24, ATF-Wisconsin, AFSCME District Counsel 48, SEUI Healthcare Wisconsin, and the Wisconsin State AFL-CIO. Accordingly, pursuant to WIS. STAT. RULE 809.61 and ***J.R.S. v. Fond du Lac Circuit Court***, 111 Wis. 2d 261, 263, 330 N.W.2d 217 (1983), we certify the

---

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise specified.

[2] Because the temporary relief sought would moot the appeal, we certify the motion as well.

petition for leave to appeal and accompanying motion for temporary relief to the Wisconsin Supreme Court.

We certify the following questions: (1) whether striking down a legislative act—also known as voiding—is an available remedy for a violation of the Open Meetings Law by the legislature or a subunit thereof; and, if so, (2) whether a court has the authority to enjoin the secretary of state's publication of an act before it becomes law.[3]

The first case that we have identified as particularly relevant was decided in 1943. In ***Goodland v. Zimmerman***, the court held that a circuit court lacked authority to enjoin the secretary of state from publishing an act on grounds that the act had not been constitutionally enacted and that it provided for an unconstitutional delegation of power. ***Goodland***, 243 Wis. at 477. The court reasoned that the legislative process is not complete until an enactment is published and that the judiciary had "no jurisdiction or right to interfere with the legislative process." ***Id.*** at 466-67. The ***Goodland*** court wrote: "If a court can intervene and prohibit the publication of an act ... it invades the constitutional power of the legislature to declare what shall become law." ***Id.*** at 468.

[3] La Follette also contends that the circuit court erred in issuing the TRO because: (1) the secretary of state is immune from suit; (2) there was no violation of the Open Meetings Law here because the government bodies at issue followed conflicting legislative rules for notice, that took precedence over Open Meetings Law provisions; (3) even if there was a violation, the remedy would be limited to voiding the actions of the legislative committee and senate who committed the alleged violations, and could not reach subsequent actions by the assembly, governor or secretary of state; and (4) the circuit court failed to properly consider the irreparable harm to the State which La Follette claims will be caused by the TRO. We do not believe that any of those questions, standing alone, would warrant granting leave to appeal, although, of course, the Wisconsin Supreme Court would have full authority to address any or all of them.

4

Goodland, viewed alone, might be read as precluding the immediate injunctive relief sought in this case. The District Attorney argues, however, that the legislature has since then *itself* authorized just such relief by enacting revisions to the Open Meetings Law in its 1975-76 legislative session. The Open Meetings Law begins with a declaration of policy that includes the following:

> In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, *it is declared to be the intent of the legislature to comply to the fullest extent* with [the open meetings provisions set forth in] this subchapter.

WIS. STAT. § 19.81(3) (emphasis added). The legislature went on to make the Open Meetings Law provisions expressly applicable to itself. The law applies to legislative meetings, except for specific exemptions set forth in the statute. WIS. STAT. § 19.87. The Open Meetings Law also provides that it can be enforced by a broad range of remedies, explicitly including injunctions. WIS. STAT. § 19.97(2).

The District Attorney's position—that revisions to the Open Meetings Law provide a wider range of available relief to remedy violations of the Open Meetings Law than were available at the time of ***Goodland***—gains some support from the next case we highlight.

In the 1976 case, ***Lynch v. Conta***, a district attorney sought a declaratory judgment regarding what types of meetings were included within the scope of the pre-1975 version of the Open Meetings Law in order to determine whether his office could bring a forfeiture action against legislators upon a verified complaint. ***Lynch***, 71 Wis. 2d 662. In the course of its discussion, the ***Lynch*** court again addressed separation of powers concerns. It noted the general rule that "mere violations of parliamentary procedure are no grounds for voiding

legislation." ***Id.*** at 695. The court contrasted that rule with the judiciary's long established power to review the constitutionality of acts of the legislature, and concluded that there was "an area of uncertainty" regarding a court's ability "to review the activity of a legislature for a violation of *a statute duly enacted by it*." ***Id.*** (emphasis added). The court then reasoned that the legislature must have intended the Open Meetings Law to apply to legislators and legislative committees, because otherwise the specific statutory exceptions created for them would be superfluous. ***Id.*** at 698-99. Therefore, the court concluded, there was no separation of powers problem in actions seeking declaratory judgment and/or forfeitures against legislators for alleged violations of the Open Meetings Law. ***Id.*** Following ***Lynch***, it might seem that questions about the enforceability of Open Meetings Law remedies against the legislature had been answered in favor of the District Attorney.

That brings us to ***State ex rel. La Follette v. Stitt***, a case decided in 1983. In ***Stitt***, the court considered its authority to review whether the legislature had failed to refer an act to the proper committee before passage. The ***Stitt*** court rejected any prior suggestion that it had the power to invalidate legislation based upon a violation of a "procedural" statutory provision in passing an act, unless the challenged procedure "constitutes a deprivation of constitutionally guaranteed rights." ***Stitt***, 114 Wis. 2d at 369. As in prior cases, the court cited the concepts of separation of powers and comity and reasoned that the legislature's failure to follow procedural rules that were not constitutionally mandated amounted to an *ad hoc* repeal of its own rules. ***Id.*** at 365. The court further stated that its holding did not conflict with ***Lynch*** because that case did not address the voidability of legislative actions taken in violation of the Open Meetings Law. ***Id.*** at 368-69; *see also* ***Lynch***, 71 Wis. 2d at 671.

The ***Stitt*** court's treatment of ***Lynch***, in the course of broadly asserting the general rule that courts will not invalidate legislation based upon violations of procedural statutes, suggests that voidability is not an available option for a violation of the Open Meetings Law. Thus, ***Stitt*** seemingly weighs in favor of the Secretary of State's position in this case. Nonetheless, ***Stitt*** did not involve an alleged violation of the Open Meetings Law and the court did not consider the implications of strong language in that law indicating a legislative intent to subject itself to the law. Perhaps more significantly, the ***Stitt*** court did not consider whether the Open Meetings Law implicates a constitutional right of public access to legislative proceedings, something that appears to be key to the next decision we discuss.

In 2009, the court in ***Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.***, considered whether the legislature's ratification of a collective bargaining agreement containing certain confidentiality provisions could be treated as having created an "as otherwise provided by law" exception to the Public Records Law. ***Milwaukee Journal Sentinel***, 319 Wis. 2d 439, ¶15. Two newspapers sought access to information deemed confidential under a bargaining agreement ratified by the legislature. Pertinent here, a judicial assessment of the merits of the newspapers' argument required inquiry into the legislature's compliance with a statutory enactment requirement. ***Id.***, ¶16. The Wisconsin State Employees Union participated in the action and argued that the court lacked jurisdiction to determine whether the legislative committee had followed the correct statutory procedure. Significantly, the ***Milwaukee Journal Sentinel*** majority rejected the contention that it lacked jurisdiction to review the legislature's compliance with the statutory provision because that statute, at least to some degree, furthered Wisconsin constitutional directives found in Art. IV,

Section 17(2). ***Milwaukee Journal Sentinel***, 319 Wis. 2d 439, ¶¶19-20. A concurrence, supporting the rationale of the majority, observed that the weighty public policies of notice and transparency in government tipped the scale in favor of the conclusion that the statute at issue was not merely procedural. ***Id.***, ¶75 (Bradley, J, *concurring*). Without going into detail, we think there is a rough parallel between the constitutional provision and statute in ***Milwaukee Journal Sentinel*** and the constitutional provision and statute at issue here.

The District Attorney in this case argues that courts should have the power to review the legislature's compliance with the Open Meetings Law in the same manner as the court reviewed the legislature's compliance with the statutory provision in ***Milwaukee Journal Sentinel***. To support his position, the District Attorney points to WIS. STAT. § 19.81(3), which pronounces the legislature's intent to comply with the Open Meetings Law to the fullest extent possible "[i]n conformance" with Article IV, section 10 of the Wisconsin Constitution. The constitutional provision to which the statute refers broadly states that the doors of each house shall remain open, except when the public welfare requires secrecy. WIS. CONST. art. IV, § 10.

In sum, ***Goodland*** and ***Stitt*** appear to favor the Secretary of State's position that courts lack authority to invalidate legislation enacted in violation of the Open Meetings Law or, at the least, to do so before publication. In contrast, ***Lynch*** and ***Milwaukee Journal Sentinel*** support the District Attorney's view.

It appears to us that the central question presented by the petition and request for temporary relief is whether the Open Meetings Law's express reliance on and reference to WIS. CONST. Art. IV, § 10 means that the statute should be interpreted as protecting a constitutional interest, thus subjecting alleged

8

violations by the legislature or subunits thereof to judicial review, as in ***Milwaukee Journal Sentinel***. *See* WIS. STAT. § 19.81(3). If the Open Meetings Law is not viewed as protecting a constitutional right, then it would appear, under ***Stitt***, that a court would have no authority to void an act based upon an alleged violation. If, however, the legislature's compliance with the Open Meetings Law is subject to judicial review in order to protect the underlying constitutional interests involved, the additional question arises whether such review may occur while the legislative process is still pending (under the ***Lynch*** rationale that the legislature consented to being subject to injunction), or must wait until the process has been completed with publication of an act under the ***Goodland*** rationale.

It is appropriate to certify to the Supreme Court appeals raising issues which that court might otherwise ultimately consider on a petition for review, in order to reduce the burden and expense of the appellate process on both the parties and the judicial system. *See* ***Wisconsin Public Serv. Corp. v. Public Service Comm'n of Wis.***, 176 Wis. 2d 955, 958 n.1, 501 N.W.2d 36, 37 n.1 (1993) (Abrahamson, J., *concurring*). Because this appeal presents significant issues, we believe that the Supreme Court is the proper forum for it.