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DANE COUNTY
DISTRICT ATTORNEY
ISMAEL R. OZANNE

5 pages

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STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

April 28, 2011

Honorable Maryann Sumi
Dane County Courthouse, Br. #2
215 S. Hamilton St. #7105
Madison, WI 53703

RE: State ex rel. Ismael R. Ozanne v. Jeff Fitzgerald et al.
11CV1244

Dear Judge Sumi,

Please find enclosed for filing two corrected pages regarding the State's Brief Regarding *Lister v. Board of Regents,* Indispensible Parties, And Tolling Of Time Limits that was filed yesterday. We corrected a cite on page 12 and fixed the ellipses and a comma placement on page 15. All other pages remain the same. I apologize for the inconvenience and missed cite. I am enclosing one set with the highlighted changes, and one clean set to swap pages into the brief filed yesterday.

Copies are being served on defense counsel as well.

Sincerely,

Ismael R. Ozanne

Ismael R. Ozanne

cc: AAG Maria Lazar, WI DOJ
AAG Steven Kilpatrick, WI DOJ
Atty Roger Sage, counsel for Douglas LaFollette
Atty Susan Crawford, counsel for Mark Miller
Atty Robert Jambois, counsel for Peter Barca

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The interpretation of the provisions of the Wisconsin Constitution involve examining (1) the plain meaning of the words in the context used; (2) the historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 Constitution; and (3) the earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the Constitution. *State v. Beno*, 116 Wis. 2d 122, 136-37, 341 N.W. 2d 668 (1984).

Art. IV, § 15 of the Wisconsin Constitution provides as follows:

> Members of the Legislature shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for 15 days next before the commencement and after the termination of each session.[4]

This section creates two privileges: freedom from arrest and freedom from being subject to civil process. We start by examining the meaning of "civil arrest" and "civil process" as they were used at or around the time the Wisconsin Constitution was created in 1848.

"Civil arrest" refers to the fact that arrests were common in civil suits in America when the Constitution was adopted. *Long v. Ansell*, 293 U.S. 76, 82-83 (1934).

"Civil process" was found to include attachments, subpoenas *ad respondendum* and *ad testificandum*, and summons to serve on a jury or to commence a suit based on contact. *Anderson v. Roundtree,* 1 Pin. 115, 120 (1841). Art. IV, § 15 was clearly designed to limit private litigation, because the typical civil suits filed against representatives during the time the privilege was created by the Territorial Statutes of Wisconsin were based in contract or

[4] The original version of this provision, while containing slightly different language, is in all material respects the same. *See Anderson v. Roundree*, 1 Pin. 115, 123 (1841).

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> on a jury, and with reason, because a member has superior duties to perform in another place....The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house; and every man must, at his peril, take notice who are the members of house returned of record. *Id.* 120.

Once again, the Territorial Supreme Court of Wisconsin made clear that it was referring to private civil lawsuits, and not actions brought in the name of the state to enforce a statute. Additionally, it emphasized that the privilege exists both for the legislator and the people served by the legislator, based on the public policy that the legislator is there to do the work of the people and perform "superior duties" associated with the representation of the people who elected him.

Equally important is the acknowledgment that the privilege is not a license to do wrong. The court recognized that for "suits in courts against members of the legislature, it may become proper and necessary to set aside the privilege." A civil action to enforce Wisconsin's OML is a "suit in court" within the meaning of *Anderson.*

Further proof that the privileges found in art. IV, § 15 are not available for assertion in this OML enforcement action is found *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W. 2d 610 (1976). In *Lister*, the Supreme Court emphasized, just as it had in *Doty* and *Anderson*, that the essence of the suit was one for the recovery of monetary damages; *i.e.* the plaintiffs' claim involved a request for a refund of college tuition, thus the action was one in the nature of money "had and received." *Lister,* at 297.

Doty, Anderson, and *Lister* all involve private suits for monetary damages. They dealt with private redress of grievances. However, the present case does not seek to redress a private grievance or monetary damages, but instead vindicates the rights of

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