#38

13 pages

Cullen
Weston
Pines
& Bach
A Limited Liability Partnership

Attorneys at Law
122 West Washington Avenue
Suite 900
Madison, Wisconsin 53703
(608) 251-0101
(608) 251-2883 Fax
www.cwpb.com

11 MAY 18 PM 4:19

DANE COUNTY
DISTRICT ATTORNEY

Lee Cullen
Lester A. Pines
Steven A. Bach
Alison TenBruggencate
Carol Grob
Linda L. Harfst
Jordan Loeb
Tamara B. Packard

Elise Clancy Ruoho
Susan M. Crawford
Theresa R. Gabriel
Elisabeth S. Bach-Van Horn
Jeffrey L. Vercauteren
Laurie B. Mlatawou

Of Counsel:
Cheryl Rosen Weston
Curt P. Pawlisch

May 18, 2011

VIA HAND DELIVERY

Honorable Maryann Sumi
Dane County Courthouse, Br. #2
215 South Hamilton Street, #7105
Madison, WI 53703-3285

Re: State of Wisconsin, *ex. rel.* v. Jeff Fitzgerald, *et al.*
Case No. 2011-CV-1244

Dear Judge Sumi:

Enclosed please find Defendant Mark Miller's Brief Regarding *Lister v. Board of Regents*, Indispensible Parties, and Tolling of Time Limits in the above-referenced matter.

I certify by copy of this letter and enclosure, copies of the same have been served on all counsel of record this date.

Sincerely,

CULLEN WESTON PINES & BACH LLP

Susan M. Crawford

SMC:kc

1

Enclosures

cc: Mark Miller (via U.S. mail)
AAG Maria S. Lazar (via hand delivery)
AAG Steven C. Kilpatrick (via hand delivery)
Ismael R. Ozanne (via hand delivery)
Robert J. Jambois (via U.S. mail)
Roger A. Sage (via U.S. mail)

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 DANE COUNTY

STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE,

Plaintiff,

Case No.: 11CV1244

v.

Jeff Fitzgerald,
Scott Fitzgerald,
Michael Ellis,
Scott Suder,
Douglas La Follette,
Mark Miller,
Peter Barca,
Joint Committee of Conference,
Wisconsin State Senate, and
Wisconsin State Assembly,
Defendants.

Defendant Mark Miller's Brief Regarding *Lister v. Board of Regents*, Indispensible Parties, and Tolling of Time Limits

---

INTRODUCTION

On April 1, 2011, this court directed the parties to submit briefs on the following three issues:

I. Whether this court may proceed to final judgment on the state's claims for declaratory and injunctive relief, in light of *Lister v. Board of Regents* and its progeny.

II. Whether this court is barred from proceeding to final judgment under Wis. Stat. §803.03(3) based on an alleged absence of indispensible parties.

3

III. Whether the time limits for service of a complaint and summons pursuant to Wis. Stat. §801.02 are tolled during the pendancy of the legislative privilege from arrest or civil process claimed by four legislative defendants.

Defendant Mark Miller's arguments as to these three issues and his response to the brief submitted by District Attorney Ismael Ozanne are set out below.

ARGUMENT

I. THE COURT MAY ISSUE A FINAL ORDER ON DECLARATORY AND INJUNCTIVE RELIEF BUT SHOULD ORDER A CONTINUANCE ON THE FORFEITURE ACTIONS DUE TO THE LEGISLATORS' INVOCATION OF THEIR PRIVILEGE.

This court directed the parties to submit a brief discussing the impact of *Lister v. Board of Regents* and its progeny on issues presented by this case. *Lister* discusses the scope of official and sovereign immunity in actions seeking declaratory and injunctive relief.

The legislators in this case have not claimed official or sovereign immunity, as did the defendants in *Lister*. Rather, they have invoked a constitutional privilege from arrest and civil process as members of the Wisconsin Legislature. The rationale of *Lister* is more relevant to the discussion of indispensible parties in Question 2 and is discussed below. This section will discuss the scope of the legislative privilege from arrest and civil process.

The legislative privilege found in Wis. Const. Art. 15, §15, 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 fifteen days next before the commencement and after the termination of each session.

Unlike official immunity, the privilege extended to members of the legislature by this provision does not make them immune from civil liability in any matter.

Six members of the legislature are named as defendants in this lawsuit. Senator Miller and Representative Barca were served with the summons and complaint and have voluntarily appeared, by counsel, at all stages of the proceedings. Counsel for the four remaining legislator defendants has asserted their legislative privilege from civil process and has objected to the court's exercise of personal jurisdiction over them.

Defendant Miller's position is that the four legislators' invocation of the privilege from civil process found in Wis. Const. Art. IV, §15 does not defeat this court's personal jurisdiction over them. Article 15, §15 simply allows members of the legislature to assert a privilege against the execution of civil process while the legislature is in session.

The Wisconsin Supreme Court and the Court of Appeals have acknowledged that the term "civil process," as used in the Wisconsin Constitution, is ambiguous. *Beno*, 116 Wis. 2d at 137, *quoting State v. Beno*, 110 Wis.2d 40, 327 N.W.2d 712 (Ct. App. 1982). The court concluded that the legislator may assert the privilege against a subpoena, which would compel the legislator to appear and testify. *Beno*, 116 Wis. 2d at 137. However, the Court also concluded that a legislator may not invoke the privilege against a subpoena issued to a legislative aide, because such a subpoena would "not prevent the

legislator from voting or participating in legislative activities or representing the constituents." *Id* at 139.

The purpose of the provision is not to provide legislators with immunity from civil liability not available to ordinary citizens, or available to other officials in the discharge of their official duties. Rather, the Supreme Court has stated that the framers' objective in adopting the provision was "to preserve the public's right to representation in the state legislature during the session of the legislature. When a legislator cannot appear the people whom the legislator represents lose their voice in debate and vote." *State v. Beno*, 116 Wis.2d 122, 138-39, 341 N.W.2d 668 (1984).

Senator Miller submits that Art. IV, §15 allows a legislator to avoid the compulsory effects of civil process, such as compelling a personal appearance in court or filing an answer, upon threat of default judgment. Merely serving the complaint and summons on the defendants puts them on notice, but does not "subject them to," civil process. Upon service of a summons and complaint, a Legislator may invoke the privilege to avoid being "subject to" the civil process of being compelled to answer the complaint, on penalty of default judgment, for the duration of the legislative session and fifteen days thereafter.

This court should not read the 1848 constitution using modern definitions and syntax, but must examine "(1) the nineteenth century plain meaning of the words in the context used, (2) the historical analysis of the constitutional debates and what practices were in existence in 1848,...and (3) [t]he earliest interpretations of th[e] section by the

legislature as manifested in the first law passed following the adoption of the constitution." *State v. Burke*, 258 Wis.2d 832, 653 N.W.2d 922 (Ct. App. 2002).

As discussed in *Burke*, in 1849, civil lawsuits arising *ex delictu* (founded upon a tort or wrong) were commenced by "capias ad respondendum," a judicial writ which commanded the sheriff to "take the defendant, and him safely keep, so that he may have his body before the court on a certain day, to answer the plaintiff in the action." *Id.* at 840, *citing* Black's Law Dictionary 168 (1st ed. 1891). Contract actions were commenced by summons, which under common law required the defendant to appear in court on a certain day to answer the plaintiff, and was enforceable by attachment of the person.

The court may exercise personal jurisdiction over a member of the legislature but must recognize and protect the constitutional privilege. The privilege would be adequately protected in most, if not all, cases by granting a continuance in the case until such time as the privilege expires. This is acknowledged by Wis. Stat. §757.13, which provides:

> When a witness, party or an attorney for any party to any action or proceeding in any court or any commission, is a member of the Wisconsin legislature, in session, that fact is sufficient cause for the adjournment or continuance of the action or proceeding, and the adjournment or continuance shall be granted without the imposition of terms.

Wis. Stat. §757.13.

To interpret the legislative privilege from arrest and civil process as precluding the court's exercise of personal jurisdiction far exceeds the purpose and rationale of the privilege. Nothing in the language and history of the state constitution evinces an

intent to shield members of the legislature from civil liability for their personal actions or failures to act.

Moreover, to read the legislative privilege found in Art. IV, §15 as conferring immunity from civil liability, rather than a privilege from arrest or civil process, would create a conflict with Art. IV, §16. Section 16 provides that "no member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate." If the privilege in section 15 actually provided legislators with broad immunity to legislators in "all cases," it would swallow up the narrower immunity for "words spoken in debate" found in section 16, rendering section 16 superfluous and meaningless.

Thus, as to the enforcement actions brought in this case against the individual members of the legislature, the members may invoke the privilege under Art. IV, §15 and not be made to appear or answer the complaint until the privilege expires.

However, the complaint also states causes of action for declaratory and injunctive relief. See Amended Complaint at pp. 8-9. The complaint requests declaratory and injunctive relief against the defendant Secretary of State, who is not a member of the legislature and has not claimed a privilege. The complaint also seeks declaratory judgment declaring the meeting held by the Joint Committee on Conference to be in violation of the open meeting law; and declaring the legislative action taken at the meeting and 2011 Wisconsin Act 10 to be void. Amended Complaint at p. 9.

"[T]he district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96 [action for forfeitures against a member of a governmental body], to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances." Wis. Stat. §19.97(2). "Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by...the district attorney of the county wherein the violation occurred." Wis. Stat. §19.97(3).

The actions for declaratory relief do not impose upon the individual legislative defendants a burden of defending themselves. They may decide they wish to participate in the actions for declaratory relief as interested parties, by waiving the privilege. However, their decision to rest on the privilege does not deprive this court of jurisdiction to proceed to judgment on the declaratory relief. Likewise the actions for injunctive relief directed at parties other than the four legislative defendants do not impose upon the individual legislative defendants a burden of defending themselves, and may proceed to final judgment.

II. The four legislators are not indispensible parties to the declaratory relief actions.

The district attorney seeks declarations that the Joint Conference Committee was held in violation of the Open Meeting law. Defendant Miller believes that the actions

for declaratory and injunctive relief may go forward to final judgment without the participation of the four legislative defendants.

Defendant Miller accedes to the district attorney's discussion of the legal principles and tests for determining necessary parties in an action, but proposes a slightly different application of the legal principles to the facts. In determining whether, in equity and good conscience, an action should proceed among the parties before it or be dismissed, this court must consider the following factors:

(a) To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
(b) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
(c) Whether a judgment rendered in the person's absence will be adequate; and
(d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In *Lister*, the court said that since sovereign immunity bars suits brought for declaratory judgment against the state. It noted, however, "that the declaratory judgment procedure is particularly well-suited (in cases where such relief is otherwise appropriate) for resolving controversies as to the constitutionality or proper construction and application of statutory provisions. As a result, it has been necessary to engage in a fiction that allows such actions to be brought against the officer or agency charged with administering the statute on the theory that a suit against a state officer or agency is not a suit against the state when it is based on the premise that the officer or agency is acting

outside the bounds of his or its constitutional or jurisdictional authority." *Lister*, 72 Wis.2d at 303.

The defendants that have not claimed legislative privilege are sufficient to invoke the "fiction" described in *Lister* to allow the declaratory action to proceed. Proceeding on the declaratory relief claims does not prejudice the defendants who have chosen not to participate. A declaration that the Conference Committee meeting was held in violation of the Open Meeting Law would not impose civil liability on the legislative defendants or subject them forfeitures. Their liability for forfeitures would be reserved by the adjournment of that portion of the case. Forfeitures may only be imposed if the court finds that any individual member knowingly attended the meeting held in violation of the Open Meeting Law. Wis. Stat. §19.96. The possibility of prejudice could be lessened by an explicit declaration by the court that a finding that the Joint Conference Committee meeting was held in violation of the Open Meeting Law is not a finding that any of the individual legislators knowingly attended the meeting in violation of the Open Meeting law or otherwise violated the Open Meeting Law by some act or omission. *See* Wis. Stat. 19.96.

Likewise, the four legislators' involvement in the action is not required in order for an adequate judgment to be entered. Conversely, the plaintiff, relator for the State of Wisconsin, will not have an adequate remedy if the action is dismissed for non-joiner.

//

If this court determines that the four defendants must be joined, the remedy is to continue the case until such time as their legislative privilege expires. The remedy is not dismissal of the lawsuit.

III. The time limits for filing an answer or dispositive motion are tolled during the pendency of the legislative privilege from arrest or civil process claimed by four legislative defendants.

As argued in response to Question I, Senator Miller's position is that the legislative privilege is not a form of civil immunity and does not preclude the circuit court's exercise of jurisdiction. Rather, Art. IV, §15 allows a legislator to assert a privilege to avoid being arrested or subjected to civil process during the legislative session. A legislator who asserts the legislative privilege under Art. IV, §15 is privileged not to answer a complaint while the legislature is in session, and cannot be held in default as a result. To interpret the provision to allow the imposition of a default judgment would render the legislative privilege ineffective.

Defendant Miller believes a legislator must assert the privilege, in response to the service of a complaint and summons, to invoke its protections. Once invoked, the privilege precludes the court from compelling the legislative defendant's appearance or compelling an answer under the penalty of default judgment. However, the invocation of the privilege does not immunize the legislator from civil liability or defeat the circuit court's personal jurisdiction. It simply delays the proceedings until such time as the privilege expires and the legislator may be compelled to appear and answer the

complaint. The court may, in its exercise personal jurisdiction over the legislative defendant, recognize the legislator's invocation of the privilege and adjourn or continue the case until a date when the legislator can be compelled to appear and answer. This not only protects the Legislator's constituents from the loss of representation, but preserves the plaintiff's legal rights and the timeliness of the claim.

Thus, equitable tolling of the service of the complaint and summons is unnecessary. The complaint and summons may be served on the legislative defendants. In response, they may assert their privilege from civil process, such that they are not required to appear or answer the complaint. This court may grant an adjournment of the case or a continuance of the time period for filing an answer to the complaint until the privilege expires.

Dated this 18th day of March, 2011.

CULLEN WESTON PINES & BACH LLP

Susan Crawford, SBN 1030716
Attorneys for Plaintiff

Mailing Address:
122 West Washington Avenue, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
crawford@cwpb.com