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STATE OF WISCONSIN	CIRCUIT COURT Branch 2	DANE COUNTY 11 MAY 18 PM 3:32

STATE OF WISCONSIN, ex rel.
ISMAEL R. OZANNE, District Attorney
for Dane County, WI

Plaintiff

vs.

JEFF FITZGERALD, SCOTT FITZGERALD, MICHAEL ELLIS, SCOTT SUDER, DOUGLAS La FOLLETTE, MARK MILLER and PETER BARCA, JOINT COMMITTEE OF CONFERENCE, WISCONSIN STATE SENATE, WISCONSIN STATE ASSEMBLY

Defendants.

DANE COUNTY DISTRICT ATTORNEY

Case No. 11CV1244

FILED
MAY 18 2011
STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

BRIEF OF DEFENDANT PETER BARCA

State Representative Peter Barca, by his attorney ROBERT J. JAMBOIS, hereby submits this brief in response to the Court's request that the parties address the following three issues:

1. Whether under *Lister vs. Board of Regents* and subsequent cases an officer's immunity from liability for damages does not affect his amenability to suit for declaratory and injunctive relief.

2. Whether or not the four legislators asserting legislative immunity are "indispensable parties pursuant to§ 803.03(1) and, if so, whether sec. 803.13 (3) Wis. Stats. permits the court to proceed to judgment in the absence of indispensable parties.

3. Whether or not the time limits for service of summons and complaint are tolled during the period that [*legislative*?] immunity remains in effect.

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Peter Barca responds as follows:

I. THE OPEN MEETINGS LAW SPECIFICALLY SUPERCEDES AND OVERRIDES A GOVERNMENT BODY'S AND PUBLIC OFFICER'S CLAIM TO SOVEREIGN IMMUNITY.

Secretary of State La Follette, while previously being represented by the Attorney General's office in this case, had asserted sovereign immunity as an affirmative defense. It's not clear that the Secretary of State is continuing to claim that defense with current counsel. The Attorney General did not assert sovereign immunity on behalf of the Joint Committee of Conference, the Senate or the Assembly. To the contrary, the Attorney General conceded the court's and the district attorney's authority with respect to the Joint Committee of Conference:

> They can, correctly, have the court determine that the action taken by conference committee was – is now void because it is a voidable action. (3/18/2011 Trans. P. 31 LL 11-13)

In any event, neither the Secretary of State nor any of the other Public Officers, nor any governmental body in the State of Wisconsin, may invoke sovereign immunity as a defense to a suit under the Open Meetings Law. As was noted in Lister. V. Board of Regents, 72 Wis. 2d 282, 240 N.W. 2d 610, 617 (1972):

> The concept of sovereign immunity in this state derives from Article IV, Sec. 27 of the Wisconsin Constitution which provides: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

The legislature has specifically provided the manner, and in which courts, a public officer and /or a government body, may be sued for violation of the Open Meetings Law. Wisconsin Statutes § 19.81 through § 19.97 spell out the penalties which may be imposed upon individual officers (forfeitures up to $300) and what relief may be obtained against governmental bodies (mandamus, injunction, declaratory judgment and "voiding of any act taken at a meeting of a governmental body held in violation of this subchapter"). The legislature has explicitly empowered the "district attorney of any county wherein a violation may occur" to file an enforcement action in the name of and on behalf of the state upon the verified complaint of any person. (§ 19.97(1) Wis. Stats.)

Since the legislature has directed by law the manner and the courts in which suits may be brought to enforce the open meetings law, sovereign immunity, in any of its forms, does not exist in open meetings law cases. The Court in Lister had distinguished the concept of sovereign immunity from "the principle which extends an

immunity to public officers from civil liability for damages." (Lister, 72 Wis. 2d at 298). However, the Court then held:

> An officer's immunity from liability for damages does not affect his amenability to suit for declaratory or injunctive relief. The public policy considerations which have prompted the courts to grant the substantive immunity do not apply with equal force to actions for such relief." (Lister, 72 Wis. 2d at 304).

Thus, sovereign immunity, either in the Constitution or at common law, does not afford any shield to the Secretary of State, the Joint Committee of Conference, the Senate or the Assembly or any of the named legislators.

II. THE FOUR LEGISLATORS ASSERTING THEIR PRIVILEGE FROM CIVIL PROCESS MAY NOT BE PROSECUTED FOR CIVIL FORFEITURE OFFENSES UNTIL THEIR PRIVILEGE IS NO LONGER IN EFFECT.

In court, the Attorney General asserted "legislative immunity" on behalf of Senators Fitzgerald and Ellis and Representatives Fitzgerald and Suder. This court found:

> It is clear that at least the legislative defendants in this case do have legislative immunity from suit, from service of process. [*This was before the suit was amended to add Rep. Barca and Sen. Miller, who have both waived legislative immunity.*] I'm not and can't require anyone to relinquish that immunity. (3/18/2011 Trans. p. 24, L 24 to p.25 L. 3).

Rep. Barca agrees that the application of Article IV, section 15 of the Wisconsin Constitution may be construed to shield those four legislators from being served with process for any civil forfeiture action for violation of the Open Meetings Law during, and fifteen days before and after, any legislative session. Thus, it may be appropriate for this court to hold the civil forfeiture proceedings in abeyance until such time as those four legislators become amenable to service. However, if the legislature has acted, or acts in the future, to extend legislative sessions such that there is no point at which legislators become susceptible to service thereby impermissibly rendering themselves entirely immune to service of process at any time throughout the year, the judicial branch must act to limit the legislative privilege from service of process to that which was intended by the Constitution.

III. THE FOUR LEGISLATORS WHO HAVE ASSERTED PRIVILEGE FROM SERVICE OF PROCESS ARE NOT INDISPENSABLE PARTIES.

The "indispensable party" inquiry is in two parts. First, the court determines whether the four legislators are 'necessary' parties

under Wisconsin Statute § 803.03(1). If they are deemed to not be "necessary" parties, the analysis is concluded and they are not deemed to be "indispensable parties." If the court determines the four legislators are "necessary," it must then determine whether "in equity and good conscience" the action should not proceed in the absence of the four legislators. Dairyland Greyhound Park, Inc. v. McCallum, 2002 WI App 259, 258 Wis. 2d 210, 655 N.W. 2d 474.

With respect to the action to declare 2011 Wisconsin Act 10 "void" due to violation of the notice requirement in the Open Records Law, the four legislators do not meet any of the criteria for "necessary parties" and thus they are not "indispensable".

First, in their absence, complete relief can be granted to the remaining parties. The relief being sought is a determination that the action of the Joint Committee on Conference is voidable and second that the court, after weighing the public interest in the enforcement of the Open Meeting Law against the public interest in sustaining the action taken, void the action taken. There is no impediment to the court making either of these decisions in the absence of the four legislators since none of the legislators have "an interest of such direct

and immediate character that [they] will either gain or lose by the direct action of the judgment." Dairyland, (supra) 258 Wis. 2d at 224.

Second, the four legislators are not so situated that their absence will "impair or impede" their ability to protect their "interest" or "leave any of the named parties" at risk of multiple or inconsistent obligations. Dairyland, (supra) 258 Wis. 2d at 218. It should be noted that the record in this case plainly shows that the Attorney General has undertaken an aggressive defense of the four legislators' presumed position on this action and further, has been in regular consultation with at least one of the four legislators. Even in the absence of such efforts by the Attorney General, there is no showing that any of these four legislators have any more at stake than the Secretary of State, Representative Barca, Senator Miller or, for that matter, any other citizen in the State of Wisconsin. All Wisconsinites have an interest in the finality of legislative actions and in the enforcement of the Open Meeting Law. For these reasons, the four legislators are not "necessary parties".

Even if this court were to determine that these four legislators were "necessary," their absence is "not prejudicial to ... those already parties." Judgment rendered in their absence will be adequate and the

plaintiff would not have an adequate remedy if the action were to be dismissed for nonjoinder.

Therefore, Representative Barca respectfully requests that this court find that either the four legislators are not "necessary parties" or, if they are necessary parties, that this action "in equity and good conscience should proceed among the parties before it."

Dated this 18th day of May, 2011.

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