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12 pages

#54

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Jeffrey L. Vercauteren
Laurie B. Mlatawou

Of Counsel:
Cheryl Rosen Weston
Curt F. Pawlisch

June 1, 2011

VIA HAND DELIVERY

A. John Voelker
Acting Clerk of Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

11 JUN - 1 PM 1:34
DANE COUNTY
DISTRICT ATTORNEY

Re: State of Wisconsin v. Circuit Court for Dane County, et al.
Appeal No.: 2011AP765-W

Dear Mr. Voelker:


Enclosed please find an original and ten copies of a Joint Motion to Dismiss on Grounds of Mootness by Respondents Mark Miller and Peter Barca and supporting Memorandum of Law in the above-referenced matter. Please file the documents in accordance with your usual procedure, date-stamp the extra copy and return it to the messenger.

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

Thank you for your attention to this matter. Please contact me with any questions or concerns.

Very truly yours,

CULLEN WESTON PINES & BACH LLP



Lester A. Pines

A. John Voelker

June 1, 2011

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Cullen Weston Pines & Bach LLP

LAP:hkb

Enclosures

cc: Mark Miller (via U.S. mail)
Deputy Attorney General Kevin St. John (via hand delivery)
AAG Maria S. Lazar (via hand delivery)
AG Steven C. Kilpatrick (via hand delivery)
District Attorney Ismael R. Ozanne (via hand delivery)
Robert J. Jambois (via email)
Roger A. Sage (via email)
Marie A. Stanton (via email)
Dean A. Strang (via email)
Eric M. McLeod (via email)
Michael P. Screnock (via email)
Joseph Louis Olson (via email)
Jina Jonen (via email)
Kurt Kobelt (via email)

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Acting Clerk
Wisconsin Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

11 JUN - 1 PM 1:34
DANE COUNTY
DISTRICT ATTORNEY

Re: *State ex. rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.*
Dane County Case No. 11-CV-1244
Supreme Court Case No. 2011-AP-765-W

Dear Mr. Voelker:

I am writing to you in my capacity as one of the attorneys for Mark Miller, a respondent in the above-entitled matter.

On Friday, May 27, 2011, Deputy Attorney General Kevin St. John sent a letter to you, purporting to describe certain actions taken by the Honorable Maryann Sumi in the underlying Circuit Court case and outlining the Petitioners' objections to those actions.

The letter was inappropriate in many respects. First, the legislators whom the Attorney General represents exercised their legislative privilege to not be subject to civil process and, therefore, did not appear as defendants before the Circuit Court in Case No. 11-CV-1244. Thus, they have no right to complain about court proceedings from which they absented themselves. Second, the final order in the Circuit Court case has not been appealed, so neither the legal

nor the factual issues in that case have been presented to the Court of Appeals or the Supreme Court.

Those non-appearing defendants, through the Attorney General's office, have sent a communication to you about issues that the Attorney General has not raised directly with the Court in its request for a supervisory writ in Supreme Court Case No. 11-AP-765-W. Specifically, the letter makes criticisms of and argument regarding the decision, findings of fact and final judgment that were entered by Judge Sumi in Case No. 11-CV-1244. Those matters are not before the Court in the request for supervisory writ.

If the Attorney General and the Secretary of the Department of Administration, who are not defendants in the Circuit Court proceedings, have complaints about the Circuit Court's decision, findings of fact and final judgment they may seek to amend their petition, if that is allowed under Wisconsin Supreme Court rules and precedent. But, what they may not do, and what they have tried to do, is raise additional issues in a matter pending before the Wisconsin Supreme Court, Case No. 2011-AP-765-W, by merely sending you a letter in the hope that those issues will find their way to the justices of the court.

Moreover, their letter stated: *"In its rush to judgment, the Circuit Court has exceeded its constitutional authority, not only in terms of intermeddling with the legislative process and voiding an enactment of the Legislature on grounds of an alleged statutory violation by also by its deprivation of the defendants' due process rights."* The temerity of the Deputy Attorney General in making such a statement is shocking. He surely must be aware that the word "intermeddling" means "to meddle impertinently and officiously . . ." (Merriam Webster Dictionary.) Accusing Judge Sumi of "impertinence and officious meddling" insults her and impugns her integrity. While the use of insulting language may have become acceptable to the executive branch of state government, such language is unacceptable in communications with the judicial branch.

Likewise, the Deputy Attorney General by using such ill-advised diction, accusing Judge Sumi of "impertinentence" and "officious meddling," has come perilously close to violating Supreme Court Rule 20:8.2 which states, *inter alia*, that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge." He would be well-advised to withdraw that statement. Such an expression of contempt for the considered judgment of a Circuit Court judge is beneath the dignity of the office of the Attorney General.

I trust that the Deputy Attorney General's letter will not be submitted to the court. If it is, I request the parties be notified and given an opportunity to formally response with briefs on the issues raised in that letter before the Court further considers them.

A. John Voelker

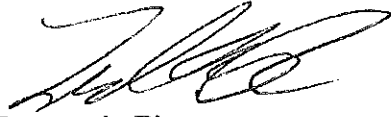
June 1, 2011

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Cullen Weston Pines & Bach LLP

Very truly yours,

CULLEN WESTON PINES & BACH LLP



Lester A. Pines

LAP:hkb

cc: Mark Miller (via U.S. mail)
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Michael P. Screnock (via email)
Joseph Louis Olson (via email)
Jina Jonen (via email)
Kurt Kobelt (via email)

STATE OF WISCONSIN
SUPREME COURT

Case No. 2011AP765-W

STATE OF WISCONSIN and
STATE EX REL. MICHAEL D. HUEBSCH,
Secretary of the Wisconsin Department of Administration,

Petitioners,
v.

CIRCUIT COURT OF DANE COUNTY,
THE HONORABLE MARYANN SUMI, Presiding,

ISMAEL R. OZANNE,
District Attorney for Dane County,

and

JEFF FITZGERALD, SCOTT FITZGERALD, MICHAEL ELLIS,
SCOTT SUDER, MARK MILLER, PETER BARCA, DOUGLAS LA
FOLLETTE, JOINT COMMITTEE ON CONFERENCE, WISCONSIN
STATE SENATE AND WISCONSIN STATE ASSEMBLY,

Respondents.

**JOINT MOTION TO DISMISS ON GROUNDS OF MOOTNESS
BY RESPONDENTS MARK MILLER AND PETER BARCA**

Respondents Mark Miller, by Cullen Weston Pines & Bach LLP,
and Peter Barca, by Robert J. Jambois, hereby move the Court to dismiss
the above-entitled matter on the grounds that the issues presented by the


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DISTRICT ATTORNEY

Petitioners are now moot as a result of the final order of the circuit court in the underlying case of *State ex rel. Ismael R. Ozanne v Jeff Fitzgerald, et al.*, Dane County Case No. 11-CV-1244. The grounds for the motion are more fully set forth in the Memorandum of Law In Support of Joint Motion to Dismiss on Grounds of Mootness by Respondents Mark Miller and Peter Barca.

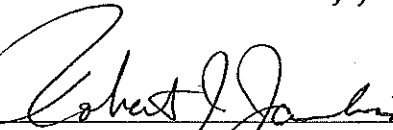
Dated this 31st of May, 2011.

Respectfully submitted,

CULLEN WESTON PINES & BACH LLP

By: 
Lester A. Pines, SBN 1016543
Susan Crawford, SBN 1030716
Attorneys for Mark Miller

LAW OFFICE OF ROBERT J. JAMBOIS

By: 
Robert J. Jambois, SBN 1002922
Attorney for Peter Barca

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STATE OF WISCONSIN
SUPREME COURT

Case No. 2011AP765-W

STATE OF WISCONSIN and
STATE EX REL. MICHAEL D. HUEBSCH,
Secretary of the Wisconsin Department of Administration,

Petitioners,
v.

CIRCUIT COURT OF DANE COUNTY,
THE HONORABLE MARYANN SUMI, Presiding,

ISMAEL R. OZANNE,
District Attorney for Dane County,

and

JEFF FITZGERALD, SCOTT FITZGERALD, MICHAEL ELLIS,
SCOTT SUDER, MARK MILLER, PETER BARCA, DOUGLAS LA
FOLLETTE, JOINT COMMITTEE ON CONFERENCE, WISCONSIN
STATE SENATE AND WISCONSIN STATE ASSEMBLY,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION
TO DISMISS ON GROUNDS OF MOOTNESS
BY RESPONDENTS MARK MILLER AND PETER BARCA**

The Petitioners filed a Petition for Supervisory Writ and for
Immediate Temporary Relief in the above captioned case, seeking a writ
of mandamus directing the Circuit Court for Dane County to vacate the

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DANE COUNTY
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temporary restraining order issued in *State ex rel. Ozanne v. Fitzgerald*, Case No. 2011CV1244, on March 31, 2011, as well as two prior TROs issued in the case. *Pet. at 28*. The temporary restraining order issued by the circuit court on March 31, 2011, ordered that "Secretary of State Douglas La Follette, in his official capacity, is hereby enjoined from designating the date of publication for 2011 Wisconsin Act 10, or any further implementation of 2011 Wisconsin Act 10," and further declared that "2011 Wisconsin Act 10 has not been published within the meaning of Wis. Stats. §§ 991.11, 35.095(1)(b) and 35.096(3)(b), and is therefore not in effect." *Pet. App. at 518-19*.

The Petitioners also requested an immediate stay of the March 31, 2011 TRO and all further proceedings in the circuit court, pending review of the petition. *Pet. at 31*.

This Court did not order a stay of the circuit court proceedings pending the resolution of the petition for supervisory writ and for immediate relief, but on May 4, 2011, ordered the parties to file responses to the petition for supervisory writ and for immediate temporary relief and to address additional issues, as directed in the order.

The circuit court issued a final judgment and order in *State ex rel. Ozanne v. Fitzgerald*, Case No. 2011CV1244, on May 26, 2011. *See Respondent's Motion to Supplement the Record (attached documents)*

(pending). The circuit court found that the meeting of the Wisconsin Legislature's Joint Committee of Conference on March 9, 2011, violated the Wisconsin Open Meeting Law. *Id.* The circuit court further declared that the actions taken at the committee meeting and subsequent legislative actions with respect to 2011 Wisconsin Act 10 were void and have no force and effect. *Id.* The judgment issued by the circuit court expressly "supersedes previous orders entered in this case." *See Respondent's Motion to Supplement the Record (Findings of Fact, Conclusions of Law and Judgment at 18).*

The previous temporary restraining orders issued by the circuit court in this matter, which the Petitioners seek to have vacated through a writ of mandamus, are therefore superseded and no longer in effect.

The issuance of a final judgment and order superseding the previous orders in the case renders the petition for supervisory writ moot. A writ of mandamus from this Court directing the circuit court to vacate the temporary restraining order, when that order has already been superseded by the court, will have no legal effect and no practical effect on the underlying controversy. "A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in

advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy." *Ziemann v. Village of North Hudson*, 102 Wis.2d 705, 712, 307 N.W.2d 236, 240 (1981), quoting *Wisconsin E. R. Bd. v. Allis Chalmers W. Union*, 252 Wis. 436, 440, 32 N.W.2d 190 (1948).

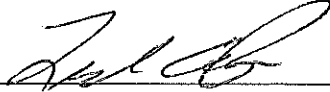
Because the temporary restraining orders have been superseded, a decision by this Court on the petition for supervisory writ regarding the circuit court's authority to issue the temporary restraining orders would be, at best, an advisory opinion, based on arguments by the parties that do not address the circuit court's ultimate findings of fact, conclusions of law, and judgment.

To the extent that the underlying open meeting case in *State ex rel. Ozanne v. Fitzgerald* may involve an issue that should be addressed by this Court, the proper way to bring it before the court is an appeal as of right from the final judgment and order brought by a party to the action.

Dated this 31st of May, 2011.

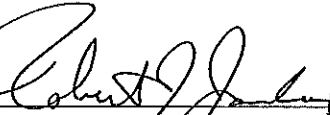
Respectfully submitted,

CULLEN WESTON PINES & BACH LLP

By: 

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Susan Crawford, SBN 1030716
Attorneys for Mark Miller

LAW OFFICE OF ROBERT J. JAMBOIS

By: 

Robert J. Jambois, SBN 1002922
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