



**DANE COUNTY
DISTRICT ATTORNEY
ISMAEL R. OZANNE**

#58
6 pgs

VIA HAND DELIVERY

June 3, 2011

Mr. A. John Voelker
Acting Clerk
Wisconsin Supreme Court
PO Box 1688
Madison WI 53701-1688

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JUN 03 2011

CLERK OF SUPREME COURT
OF WISCONSIN

RE: *State of Wisconsin, et al. v. Circuit court of Dane County, et al.*
Case No. 2011AP765-W
L.C. Case Number 2011CV1244 (Dane County)

State ex rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.
Case No. 2011AP613-LV
L.C. Case Number 2011CV1244 (Dane County)

Dear Mr. Voelker:

Please accept this letter memorandum as my response to the Supreme Court of Wisconsin's June 2, 2011, Order in the above-referenced cases. In Case No. 2011AP765-W, I am designated as "Respondent, Ismael Ozanne, District Attorney for Dane County, Wisconsin." In Case No. 2011AP613-LV, I am the "Plaintiff-Respondent, State of Wisconsin ex rel. Ismael R. Ozanne" and I represent the State of Wisconsin.

The effect of the circuit court's Findings, Conclusions, Decision and Judgment on Case No. 2011AP613-LV and on Case No. 2011AP765-W issued on May 26, 2011, is to render both petitions moot. My answers to the questions posed by the Court fully support this conclusion and are set forth below.

1. Whether an appeal is an available remedy and to whom in L.C. 2011CV1124?

An appeal is an available remedy to any aggrieved party in L.C. 2011CV1124. Secretary of State Douglas La Follette, the Joint Committee on Conference as constituted on March 9, 2011, the Wisconsin State Senate and the Wisconsin State Assembly may pursue an appeal as of right pursuant to Wis. Stat. § 808.03(1). Similarly, Senator Miller and Representative Barca, as members of the Joint Committee, could appeal the declaratory judgment if they choose to do so. They accepted service of process and waived any applicable legislative privilege. Senator Miller and Representative Barca are parties with rights to direct appeal. They have an institutional interest in whether the courts are

authorized to judicially review the activities of legislative committees for compliance with the Open Meetings Law (OML). Should this Court conclude that the May 26, 2011, Findings, Conclusions, Decision and Judgment does not constitute a final judgment, each of these parties would have a right to appeal pursuant to Wis. Stat. § 808.03(2). Lastly, a non-party may seek to intervene in L.C. 2011CV1124 pursuant to Wis. Stat. § 803.09 and pursue the same appellate remedies. Wisconsin law allows an aggrieved non-party to intervene post-judgment provided the statutory requirements are met. See *C.L. v. Edson*, 140 Wis. 2d 168, 178, 409 N.W.2d 417 (Ct. App. 1987).

2. Whether the circuit court's judgment is final for purposes of appeal?

“A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties.” *Edson*, 140 Wis. 2d at 178. The circuit court's Judgment at p. 18 plainly stated:

This is a Final Judgment for purposes of appeal as to the validity of actions taken on March 9, 2011 [by the Joint Committee on Conference]. This Judgment supersedes previous orders entered in this case.

On several recent occasions, this Court has clarified the requirements for a document to be a final judgment or order for purposes of appeal:

A document must meet three conditions in order to be considered a final judgment for purposes of appeal: (1) the document must be entered by the circuit court, (2) dispose of the entire matter in litigation as to one or more parties, and (3) state on its face that it is the final document for purposes of appeal.

Werner v. Hendree, 2011 WI 10, ¶ 62, 331 Wis. 2d 511, 795 N.W.2d 423, citing *Tyler v. The Riverbank*, 2007 WI 33, ¶ 26, 299 Wis. 2d 751, 728 N.W.2d 686. See also *Wambolt v. West Bend Mutual Insurance Co.*, 2007 WI 35, ¶ 31, 299 Wis. 2d 723, 728 N.W.2d 670.

Furthermore:

When an order or judgment is entered that disposes of all of the substantive issues in the litigation, as to one or more of the parties, as a matter of law, the circuit court intended it to be the final document for purposes of appeal, notwithstanding the label it bears or subsequent actions taken by the circuit court.

Harder v. Pfitzinger, 2004 WI 102, ¶ 19, 274 Wis. 2d 324, 682 N.W.2d 398.

Clearly, under the standards set forth by this Court's previous decisions, the circuit court's May 26, 2011, Findings, Conclusions, Decision and Judgment are a final judgment for purposes of Wis. Stat. § 808.03(1). The documents were entered by the circuit court, contain an explicit statement that the judgment is intended to be final, and the judgment disposed of the entire matter in litigation against the Wisconsin State Senate, the Wisconsin State Assembly, the Joint Committee on Conference, Secretary La Follette and legislators Barca and Miller.

3. Whether this Court's exercise of original jurisdiction may include the appellate power to review a circuit court judgment absent the filing of an appeal?

Article VII, § 3 of the Wisconsin Constitution defines this Court's jurisdiction:

Supreme court: jurisdiction. SECTION 3 [As amended April 1977] (1) The supreme court shall have superintending and administrative authority over all courts. (2) The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction. (3) The supreme court may review judgments and orders of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals.

Several statutes also codify this Court's authority. Wisconsin Statutes § 751.05 states this Court "has appellate jurisdiction only, except as provided by law or the constitution." Before the Supreme Court may take jurisdiction over an appeal, an appeal must have been made to the Wisconsin Court of Appeals. *See* Wis. Stat. § 809.61.

Wisconsin law requires a party to file a notice of appeal containing certain required pieces of information that alerts the Courts of Appeal, the circuit court, and the opposing party of the parties' intention to seek appellate review. *See In re Commitment of Sorenson*, 2000 WI 43, ¶ 16, 234 Wis. 2d 648, 611 N.W.2d 240 (citations omitted). *See also* Wis. Stat. § 809.10(1)(a).

The timely filing of a notice of appeal is necessary to give the court of appeals subject matter jurisdiction over an appeal. . . . If a party fails to comply with the statutory requirements for filing a timely notice of appeal, the court of appeals lacks jurisdiction, and the court must dismiss the appeal as defective.

Sorenson at ¶ 16. *See also* Wis. Stat. § 809.10(1)(e).

I am aware this Court has exercised its original jurisdiction in order to review a decision from a circuit court in the absence of the filing of a notice of appeal based on a petition for a writ of mandamus filed by a party to the circuit action. *See State of Wisconsin ex rel. Nader v. Circuit court for Dane County*, 04-2559-W (2004); *Green For Wisconsin v State Election Board*, 2006 WI 120, ¶21, 297 Wis. 2d 300, 723 N.W.2d 418 (Roggensack, J. dissenting). However, *Nader* is distinguishable for several reasons. First, the facts were undisputed in *Nader* and as we set forth below there are likely disputed facts in this case. Second, the exigencies confronting *Nader* were real; whereas the claimed exigency in this case is wholly contrived. The legislature has the ability to provide its own remedy; *Nader* did not. Lastly, there is a final judgment in this case. In *Nader*, there was decision but not a final judgment upon which an appeal could rest.

4. Are any of the circuit court's findings of fact clearly erroneous?

We do not take issue with any of the Findings of Fact, and believe them to be well supported by the evidence presented.

5. Whether any facts beyond those found by the circuit court, material to the determination of the issues in Case No. 2011AP613-LV and in Case No. 2011AP765-W, are in dispute?

After receiving this Court's order yesterday, I unsuccessfully attempted to determine whether there was a consensus as to facts not found by the circuit court that are material to a determination of an issue in either petition.

Regardless, I believe there are material facts that *might* be in dispute that are not part of the circuit court's Findings of Fact that relate to a determination of the merits, should this Court address the merits. For example, the circuit court makes no findings of fact regarding the testimony of Chief Senate Clerk Robert Marchant. Pet. App., Vol. 3, pp. 35-108. Mr. Marchant testified on April 1, 2011. *See id.* His testimony concerned the rules under which the Senate and Assembly operate. *Id.* He testified about the 24-hour notice requirement for meetings and under what circumstances the notice period can be shortened to two hours for "good cause." *Id.* There is no discussion or findings related to the "good cause issue;" nor have the parties argued and briefed the potential impact of this issue. To the point, there are facts regarding an afternoon meeting on March 7, 2011, a full two days before the Joint Committee of Conference met, to discuss the removal of fiscal items from what was to become 2011 Wis. Act 10.

Moreover, the facts concerning the discussions occurring on March 7 and the afternoon of March 9 bear on the egregiousness of the violation, a factor arguably relevant to the circuit court's exercise of discretion in deciding to void the act. Consequently, there are

material facts that would bear upon not only the absence of any good cause for a notice of less than 24 hours, but also support the inference the violation of the OML was planned and willful, and not the result of mistake or accident. Pet. App., Vol. 3, pp. 575, 600-610. These facts take on greater significance when one considers the public's high level of interest in the legislation and its access to the debate are key components of the state's enforcement action. Similarly, these facts have additional meaning because they relate to the ability of the elected representatives to be informed in a timely fashion so that they may cast an informed vote on behalf of the public they represent. None of this was accomplished as a result of the violation of the OML that occurred on March 9, 2011.

Additional key facts that are likely in dispute and not part of the circuit court findings concern the testimony of Michael Barman, Cathleen Hanaman and Stephen Miller given on March 29, 2011. Pet. App., Vol. 2, pp. 22-124. These facts are critical to the determination of the issues set forth in 2011AP613-LV and 2011AP765-W for these reasons. In their pleadings requesting a dismissal of the petition for leave to appeal regarding the Temporary Restraining Order, the Attorney General argued 2011 Wis. Act 10 had been published in the constitutional and statutory sense; and was law. Petitioners appear to take a different approach in the Petition for Supervisory Writ. Nevertheless, whether the law was published when the circuit court declared it a nullity may affect the analysis regarding the separation of powers doctrine, as expressly argued by the Attorney General.¹

Furthermore, there is the issue of irreparable harm. Petitioner Huebsch has argued there is a \$30 to \$300 million dollar fiscal injury at stake. I have argued there is no fiscal injury at all. *Ozanne Response Brief* at 5-6. If this Court is to resolve this case on the merits, it should have the benefit of a finding from the circuit court, particularly since the state's fiscal health has improved significantly.

This takes me to the final point. If this case were addressed in the normal course of a direct appeal, this Court would not only have the benefit of the complete trial record below, but also the benefit of briefs from the affected parties regarding all issues and facts relevant to the procedural issues as well the merits. In its current posture, this Court does not have a sufficiently developed record to exercise its original or appellate jurisdiction.

Respectfully, I believe these arguments militate against this Court exercising original jurisdiction. The circuit court's May 26, 2011, Findings, Conclusions, Decision and Judgment represent a declaratory judgment issued pursuant to Wis. Stat. § 806.04. If a

¹ As previously argued, I do not believe the separation of powers doctrine is violated regardless of whether the Act had been "published" at the time the circuit court issued its Findings, Conclusions, Decision and Judgment.

party appealed this case to the Court of Appeals or to this Court, Wisconsin law provides that the standard of review would be to determine whether the circuit court had engaged in a clearly erroneous exercise of its discretion. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶ 35-37, 309 Wis. 2d 365, 749 N.W.2d 211 (citations omitted). If this Court were to perform such a review, it would generally look for reasons to uphold the circuit court's decision. *See Loomans v. Milwaukee Mutual. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). This Court would be allowed to "search the record to determine if it supports the court's discretionary determinations." *Randall v. Randall*, 2000 WI App 98, ¶ 7, 235 Wis. 2d 1, 612 N.W.2d 737.

To conclude, this Court's policy regarding the acceptance of a case on original jurisdiction and the current procedural posture of these petitions do not afford this Court with an opportunity to exercise original jurisdiction. Therefore, these petitions must be dismissed.

Sincerely,



Ismael R. Ozanne
Dane County District Attorney

- cc: Atty. Susan Crawford (*representing Mark Miller*)
Carlo Esqueda, Dane County Clerk of Courts
Atty. Robert Jambois (*representing Peter Barca*)
Atty. Jina Jonen (*representing WI Education Association Council*)
Atty. Steven Kilpatrick (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)
Atty. Kurt Kobelt (*representing WI Education Association Council*)
Atty. Maria Lazar (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)
Atty. Eric McLeod (*representing Michael Huebsch*)
Atty. Joseph Olson (*representing Michael Huebsch*)
Atty. Tamara Packard (*representing Mark Miller*)
Atty. Lester Pines (*representing Mark Miller*)
Atty. Roger Sage (*representing Douglas LaFollette*)
Atty. Michael Screnock (*representing Michael Huebsch*)
Atty. Kevin St. John (*representing Michael Huebsch*)
Atty. Marie Stanton (*representing Maryann Sumi*)
Atty. Dean Strang (*representing Maryann Sumi*)