STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP967-AC

KAREN SCHILL, TRACI PRONGA, KIMBERLY MARTIN, ROBERT DRESSER, and MARK LARSON,

Plaintiffs-Appellants,

v.

WISCONSIN RAPIDS SCHOOL DISTRICT and ROBERT CRIST,

Defendants-Respondents,

DON BUBOLZ,

Intervenor-Respondent.

ON CERTIFICATION BY THE COURT OF APPEALS, DISTRICT IV, OF AN APPEAL FROM THE CIRCUIT COURT FOR WOOD COUNTY, THE HONORABLE CHARLES A. POLLEX, ADAMS COUNTY CIRCUIT COURT JUDGE PRESIDING

BRIEF AND APPENDIX OF THE *AMICUS CURIAE* WISCONSIN DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
Attorney General

JENNIFER SLOAN LATTIS
Assistant Attorney General
State Bar #1000387

Attorneys for Amicus Curiae
Wisconsin Department of Justice

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lattisjs@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Page

OTHER AUTHORITIES CITED

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP967-AC

KAREN SCHILL, TRACI PRONGA, KIMBERLY MARTIN, ROBERT DRESSER, and MARK LARSON,

Plaintiffs-Appellants,

v.

WISCONSIN RAPIDS SCHOOL DISTRICT and ROBERT CRIST,

Defendants-Respondents,

DON BUBOLZ,

Intervenor-Respondent.

ON CERTIFICATION BY THE COURT OF APPEALS, DISTRICT IV, OF AN APPEAL FROM THE CIRCUIT COURT FOR WOOD COUNTY, THE HONORABLE CHARLES A. POLLEX, ADAMS COUNTY CIRCUIT COURT JUDGE PRESIDING

BRIEF OF THE *AMICUS CURIAE* WISCONSIN DEPARTMENT OF JUSTICE

The Wisconsin Department of Justice, as *amicus curiae*, submits its brief on this case.

SUMMARY OF THE ARGUMENT

It is axiomatic that a court lacks competence to hear a judicial review when the petitioner lacks standing in the first instance. Wisconsin Stat. § 19.356(1) states that "[e]xcept as authorized . . . no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Thus a petitioner must establish that he or she is *authorized* to seek judicial review in order to demonstrate standing. The legislative history establishes that Wis. Stat. § 19.356 was adopted specifically to limit the record subject's right to judicial review of an authority's decision which this court had created in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). Despite clear guidance in the statute, the teachers filed this suit as a judicial review, but failed to allege any facts demonstrating that their cause of action was authorized either by Wis. Stat. § 19.356 itself or any other law. The school district failed to defend on standing, and neither the circuit court nor the court of appeals raised the issue *sua sponte*. The result is that a train has arrived at the Wisconsin Supreme Court that should never have left the station.

The court should not ignore plain language in the statutes at the heart of its or any courts' competence to hear the case. In accepting certification of this appeal, this court informed the parties that it would consider *all* issues, not merely the issues certified (Order dated 4/30/09). This *amicus* submits that the court should consider the standing limitations dictated by Wis. Stat. § 19.356 in its review of this case.

I. THE PLAINTIFFS-APPELLANTS, LACK STANDING TO PURSUE THIS CASE.

A. State statute confers a right of judicial review only in limited situations not applicable here.

Under the Wisconsin Public Records Law, if an authority withholds a record, the requester may pursue a mandamus action to seek court ordered release of the record. Wis. Stat. § 19.37. The public records law provides for only a narrowly prescribed and limited judicial review remedy for any dissatisfied person other than a requester. The plaintiffs here, teachers in the Wisconsin Rapids School District, were not dissatisfied requesters, but were unhappy about the district's decision to release records. Under the circumstances presented, the law provides the teachers with no right of judicial review.

1. The plaintiffs seek judicial review in this case premised only on rights established by this court in *Woznicki*.

The plaintiff teachers filed this case as a judicial review action of the defendant school district's decision to release personal email created on the district's computers to a public records requester. Though not required to do so by any statute, the school district went beyond its obligations under the public records law and notified the teachers of the request and of its decision to release the email in question. In their amended complaint and request for injunctive relief, the teachers asserted a cause of action as follows:

> 21. The Wisconsin Supreme Court's decision in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996) contemplates that a public records custodian will not make a decision to release records, without first considering the interests of those individuals whose privacy or reputational

> interests may be affected by the release of the records.
>
> 22. Ms. Schill, Ms. Pronga, Mr. Larsen, Mr. Dresser, and Ms. Martin's privacy and reputational interests outweigh any interest the public may have to inspect or release the contents of the personal emails because they contain private, personal information.
>
> 23. Ms. Schill, Ms. Pronga, Mr. Larsen, Mr. Dresser, and Ms. Martin now seeks [sic] to exercise their rights under *Woznicki* and request *de novo* judicial review of the Defendants' decision to release their personal emails.
>
> 24. In the alternative, Ms. Schill, Ms. Pronga, Mr. Larsen, Mr. Dresser, and Ms. Martin request a writ of mandamus ordering that the personal emails are not public records subject to release.

(R. 5, Amended Complaint).

The teachers asserted two alternative causes of action—a judicial review or a writ of mandamus. This case evidently proceeded as a judicial review. No writ of mandamus was ever issued or quashed, pursuant to Wis. Stat. § 783.01, and the teachers never established the required prerequisite for a mandamus action, that is, the school district's failure to perform a prescribed duty that is plain, clear and unequivocal. *See Burns v. City of Madison*, 92 Wis. 2d 232, 284 N.W.2d 631 (1979); *Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714 (1988).

Instead, the teachers premised their right to judicial review solely on the 1996 *Woznicki* decision. In *Woznicki*, a school teacher filed suit in circuit court to prevent the District Attorney from releasing personnel records obtained by subpoena. Among the questions addressed by the supreme court was "whether the District Attorney's decision to release [the records] is subject to

judicial review." *Woznicki*, 202 Wis. 2d at 183. The court concluded that:

> [A]n individual whose privacy or reputational interests are implicated by the district attorney's potential release of his or her records has a right to have the circuit court review the District Attorney's decision to release the records.

Id., at 193. Subsequently, in *Milwaukee Teachers' Ed. Ass'n v. Bd. of Sch. Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), the supreme court extended the *Woznicki* right to judicial review to any public employee. Both decisions also included an employee right to notice prior to the release of such records.

2. The plain language of Wis. Stat. § 19.365 unquestionably repealed *Woznicki* in applicable part, and provides no right of judicial review to the plaintiffs in this case.

In 2003 Wisconsin Act 47 adopted Wis. Stat. § 19.356, subsequent to the decisions in *Woznicki* and *Milwaukee Teachers'*. The statute provides, in relevant part:

> (1) Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.
>
> (2)(a) . . . if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall . . . serve written notice of that decision on any record subject to

> whom the record pertains. . . . This paragraph applies only to the following records:
>
> 1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.
>
> 2. A record obtained by the authority through a subpoena or search warrant.
>
> 3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.
>
> . . . .
>
> (4) Within 10 days after receipt of a notice under sub.(2)(a), a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record.

Any statutory interpretation question necessarily begins with the assumption that the legislature's intent is expressed within the statutory language. "Thus . . . statutory interpretation 'begins with the language of the statute.' If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Here the Legislature plainly expressed its intent that no person is entitled to judicial review of a custodian's decision to provide a requester with access to a record unless authority to do so is found within Wis. Stat. § 19.356 or in another statute.[1] The language so states in subsection (1). The judicial review language of

[1]Of course, if a custodian in applying the balancing test decides not to release records subject to the Wis. Stat. § 19.356 exceptions, then the process is not triggered.

subsection (4) provides that a records subject may commence an action "after receipt of a notice under sub.(2)(a)." Subsection (2)(a) provides for notice to a records subject only where the request falls in one of the three categories described, and does not apply to other records. No other means of judicial review for a records subject is provided in chapter 19. The Legislature intended that records subjects should have judicial review of an authority's decision to release records only where those records relate to a disciplinary investigation, were obtained by subpoena, or were originally prepared by a private employer.

3. The legislative history establishes that Wis. Stat. § 19.356 was enacted to limit *Woznicki* rights to situations not present in this case.

In the aftermath of the *Woznicki* and *Milwaukee Teachers'* decisions, custodians of public records were left to wrestle with, among other things, the question of whether a particular records request implicated privacy or reputational interests triggering the notice requirements and right to judicial review created by *Woznicki*. In 2002, the Wisconsin Legislature established a Special Committee on Review of the Open Records Law, and charged the committee with the following study assignment:

> The [ ] Committee [is] directed to review the Supreme Court decisions in *Wosnicki v. Erickson* and *Milwaukee Teachers' Educational Association v. Milwaukee Board of School Directors* and recommend legislation implementing the procedures anticipated in the opinions, amending the holdings of the opinions, or overturning the opinions.

See Department of Justice Appendix ("DOJ-App.") at 125, "*Special Committee on Review of the Open Records Law*," Wisconsin Legislative Council Report to the Legislature,

March 25, 2003, at 17.[2] The Wisconsin Education Association Council ("WEAC") which represents the teachers in this matter had a representative on the study committee, Melissa Cherney. *See id.*

The study committee met numerous times in 2002 and made recommendations to the Joint Legislative Council Special Committee. The result was 2003 Assembly Bill 196 and 2003 Senate Bill 78 which partially codified *Woznicki* and *Milwaukee Teachers'*. According to the description in the legislative council memorandum, "[i]n general, the legislation applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records in the possession of government entities." *See Legislative Council Report*, at 9; DOJ-App. 117.

Assembly Bill 196 and Senate Bill 78 were adopted as 2003 Wisconsin Act 47. The Act, among other things, created Wis. Stat. § 19.356 and significantly altered Wis. Stat. § 19.36 (limitations upon access and withholding). Application of Wis. Stat. § 19.356 would have provided rights to notice and judicial review to the records subjects in *Woznicki* (documents held by a district attorney obtained by subpoena), *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994) (sheriff's discipline records), and *Milwaukee Teachers'* (disciplinary investigations into criminal backgrounds). But the statute stopped short of codifying the less precise language from the court's decisions relating to reputational and privacy interests.

If there is any ambiguity to be found in Wis. Stat. § 19.356, the legislative history clarifies the matter:

> This bill partially codifies *Woznicki* and *Milwaukee Teachers'*. In general, the bill applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records pertaining to employees

[2]Available at: *http://www.legis.state.wi.us/lc/committees/study/prior/files/rl2003_01.pdf* (last visited Aug 27, 2009).

> residing in Wisconsin. As an overall construct, records relating to employees under the bill can be placed in the following 3 categories:
>
> 1. Employee-related records that may be released under the general balancing test without providing a right of notice or judicial review to the employee record subject.
>
> 2. Employee-related records that may be released under the balancing test *only* after a notice of impending release and the right of judicial review have been provided to the employee record subject.
>
> 3. Employee-related records that are absolutely closed to public access under the open records law.

2003 Wisconsin Act 47, "Joint Legislative Council Prefatory Note." (Emphasis in original; *see* DOJ-App. 101).

The legislative history supports the plain language interpretation of Wis. Stat. § 19.356 above. No records subject or other individual may have judicial review of a custodian's decision to release records unless the records in question meet one of the three exceptions set forth in subsection (2)(a), or unless a right is asserted pursuant to another statute. To the extent that *Woznicki* authorized a broader right to judicial review, that decision has been limited by the subsequently enacted statute.

B. The plaintiffs have no path to judicial review of the district's decision to release personal emails.

Applying Wis. Stat. § 19.356 to the teachers' situation, it is clear that they never had any right to judicial review of the district's decision to release their personal emails. This answer is rendered clear by applying the facts alleged by the teachers in the amended complaint to the three categories set forth in the prefatory note to 2003 Wisconsin Act 47 cited above.

Regarding the content of the records the school district sought to release, the teachers make the following allegations relevant to their interests:

> 9. Pursuant to the District's computer use policy, Ms. Schill, Ms. Pronga, Mr. Larsen, Mr. Dresser, and Ms. Martin were authorized to use the District's email for personal use.
>
> 15. The personal emails are not related to the official acts of Ms. Schill, Ms. Pronga, Mr. Larsen, Mr. Dresser, and/or Ms. Martin as employees of the District.
>
> 16. The personal emails are not related to the official acts of the District.

(R. 5, Amended Complaint).[3]

There is no allegation that the email in question contains information from category three, above, that is, "employee-related records that are absolutely closed to public access under the open records law." (2003 Wisconsin Act 47 prefatory note, DOJ-App. 101). Of course, the school district would be required by Wis. Stat. § 19.36(10) to redact information that is prohibited from disclosure, such as home addresses, social security numbers, pending disciplinary investigations, and employment examinations, but none of these subjects are implicated by the teachers' allegations. The teachers argue that their personal email is not a "record" under Wis. Stat. § 19.32(2), but no law absolutely prohibits a custodian from releasing information that is not technically a record. Similarly, no law compels a custodian to apply the balancing test in the manner an individual or records subject might prefer.

[3]The amended complaint also alleged "upon information and belief" that their email includes messages received from other private citizens and student information that the District intended to release. Even if this were so, release of that information would not adversely affect the rights of the teachers, but rather of others who are not parties to this suit.

Nor do the teachers allege that their email meets the criteria for category two—employee information that may be released only after notice of impending release and the right to judicial review have been provided to the employee record subject pursuant to Wis. Stat. § 19.356. The teachers do not suggest that their personal email contains information that was obtained as the result of a disciplinary investigation, a subpoena or search warrant, or from a private employer.

The teachers do allege that information in their email is personal and private, but there is no provision in chapter 19 providing a cause of action for judicial review of an employer's decision to release employee information that is personal and private unless it falls into one of the exceptions specified in Wis. Stat. § 19.356(2)(a) or Wis. Stat. § 19.36(10). Such "personal and private" information that does not meet one of the other statutory exceptions would fall into the first category noted in the 2003 Wisconsin Act 47 prefatory note of "Employee-related records that *may* be released under the general balancing test without providing a right of notice or judicial review to the employee record subject" (emphasis supplied).

The school district records custodian provided the teachers with notice of an intent to release their personal emails (Amended complaint, ¶ 14), but the notice was given as a courtesy or by voluntary choice of the district beyond what was required by law. As we have seen, notice could not have been provided under Wis. Stat. § 19.356(2)(a) because there is no suggestion anywhere that any of the information in the personal emails fell within the exceptions delineated in Wis. Stat. § 19.356(2)(a). Moreover, it is not the mere provision of notice that creates a right to judicial review. Pursuant to Wis. Stat. § 19.356(1), no person is entitled to judicial review unless such right is authorized by Wis. Stat. § 19.356 or another statute.

C. Public records policy supports a narrow right to judicial review by non-requesters.

The declaration of policy in Wis. Stat. § 19.31 states unequivocally that the "denial of public access [to government records] is contrary to the public interest, and only in an exceptional case may access be denied." A construction of the public records law that limits the grounds for objecting to a release and limits the number of persons who can raise objections is consistent with that purpose. To overlook the standing requirements for an action objecting to a custodians decision to release records, not only embroils custodians in litigation, and not only delays the receipt of records by requesters, but also looks past this important policy.

II. THE COURT SHOULD EXERCISE ITS DISCRETIONARY APPELLATE REVIEW AND ADDRESS THE MERITS OF THE STANDING ARGUMENT.

A. The courts lack competence to hear the teacher's case.

> A circuit court's ability to exercise its subject matter jurisdiction . . . may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction. The failure to comply with these statutory conditions . . . may under certain circumstances affect the circuit court's competency to proceed to judgment in the particular case before the court.

Village of Trempealeau v. Mikrut, 2004 WI 79, ¶ 2, 273 Wis. 2d 76, 82, 681 N.W.2d 190.

There can be no doubt that the circuit court would have lacked competence to proceed on the teacher's case had the matter been raised by the defendant school district, because there is no judicial review available

where the law specifically provides that judicial review is unavailable. "Administrative decisions . . . are subject to review as provided in this chapter, *except as otherwise provided by law.*" Wis. Stat. § 227.52. Here, as we have seen, the law excludes the teachers from judicial review.

But the school district did not raise the standing issue, and a challenge to the circuit court's competency is waived if not raised in the circuit court. *Mikrut*, 273 Wis. 2d at ¶ 3. However, "a reviewing court has the inherent authority to disregard a waiver and address the merits of an unpreserved argument." *Id.* The *amicus* here suggests that, because the Legislature has so clearly provided that no recourse to judicial review arises in a case such as the teachers raise, the court should address the merits of the Wis. Stat. § 19.356 argument despite the school district's apparent waiver. The issue should be addressed in order to avoid a decision that appears in conflict with the statute, and creates confusion over standing requirements for records subjects in the future.

Unlike *Mikrut*, this case does not simply address a failure to follow statutorily mandated time limits. Rather, the teachers had no standing in the first instance to seek judicial review. Prior to *Mikrut*, it was clearly established law in Wisconsin that subject matter jurisdiction did not attach where the putative plaintiff lacked standing to seek judicial review. *See Fox v. DHSS*, 112 Wis. 2d 514, 537-38, 334 N.W.2d 532 (1983) (challengers to a prison location decision lacked standing to seek judicial review where they failed to show compliance with ch. 227 review requirements). It was also "fundamental that parties cannot confer subject matter jurisdiction on a court by their waiver or consent." *Wis. Environmental Decade v. Public Service Comm.*, 84 Wis. 2d 504, 515, 267 N.W.2d 609 (1978). However, *Mikrut* holds that, "except for statutory time limits, every statutory mandate for invoking a circuit court's jurisdiction is waived if not first raised in the circuit court proceeding." *Mikrut*, 273 Wis. 2d at ¶ 41 (Justice Abrahamson concurring). Nevertheless, a complete failure by the petitioners to

comply with statutory mandates conferring standing is sufficiently important to warrant application of this court's inherent authority to address unpreserved arguments and provide guidance.

CONCLUSION

The plaintiffs lacked a cause of action to pursue this case. The court should exercise its inherent authority to dismiss this case for lack of standing under the applicable statutory mandates.

Dated this _____ day of October, 2009.

J.B. VAN HOLLEN
Attorney General

JENNIFER SLOAN LATTIS
Assistant Attorney General
State Bar #1000387

Attorneys for Amicus Curiae
Wisconsin Department of Justice

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lattisjs@doj.state.wi.us

spar cases\schill\doj amicus brief.doc

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,559 words.

Dated this _____ day of October, 2009.

_____
JENNIFER SLOAN LATTIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic brief is identical in content to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of October, 2009.

_____
JENNIFER SLOAN LATTIS
Assistant Attorney General