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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2012AP000032

FRIENDS OF SCOTT WALKER
and
STEPHAN THOMPSON
Plaintiffs-Respondents,
v.

Waukesha County Circuit
Court Case No. 2011-CV-4195

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CAYNE, THOMAS BARLAND, and TIMOTHY VOCKE each in his official capacity as a member of the Wisconsin Government Accountability Board and KEVIN KENNEDY Director and General Counsel for the Wisconsin Government Accountability Board,
Defendants-Respondents,

THE COMMITTEE TO RECALL WALKER, THE COMMITTEE TO RECALL KLEEFISCH, JULIE WELLS, THE COMMITTEE TO RECALL WANGGAARD, RANDOLPH BRANDT, THE COMMITTEE TO RECALL MOULTON, JOHN KIDD, THE COMMITTEE TO RECALL SENATOR PAM GALLOWAY, NANCY STENCIL and RITA PACHAL,
Proposed-Intervening Defendants-Appellants.

REPLY BRIEF OF PROPOSED-INTERVENING DEFENDANTS-APPELLANTS

APPEAL FROM THE CIRCUIT COURT OF WAUKESHA COUNTY, THE HONORABLE J. MAC DAVIS PRESIDING

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ARGUMENT

I. INTERVENTION AS OF RIGHT IS WARRANTED.

Plaintiffs-respondents ("respondents") argue that proposed-intervening defendants-appellants' ("appellants") brief fails to assert that the circuit court made a "clear mistake" in denying appellants' motion for intervention as of right. This was the crux of appellants' opening brief. Appellants stated in their opening brief that "[d]enial of the motion to intervene was error." Appellants' Br. at 11. The contention regarding the words "clear mistake" is word-play and nothing more. This appeal rests on the circuit court's error and is subject, in large part, to *de novo* review. *See Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 41, 307 Wis. 2d 1, 23, 745 N.W.2d 1.

The parties agree that a party moving to intervene as of right in an action must satisfy four requirements to satisfy the statutory standard:

> (1) The motion to intervene is timely;
> (2) The movant claims an interest sufficiently related to the subject of the action;
> (3) The disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and

(4) The existing parties do not adequately represent the movant's interests.

Id. at 20-21, ¶ 38. However, the parties disagree on the application of the above standards. In analyzing the above-referenced standards, it is clear that intervention is warranted.

A. The Motion Seeking Intervention was Timely.

Neither the circuit court nor the respondents dispute that appellants' motion to intervene was timely. Accordingly, appellants have satisfied this requirement.

B. Appellants' Interests are Directly and Inextricably Tied to the Subject of the Action.

Respondents argue that appellants' asserted interests are neither legally cognizable nor related to the subject matter of this action. Respondents' argument is without merit.

In support of their argument that the appellants' interests are not legally cognizable, respondents quote from portions of the transcript of the circuit court's decision. In particular, they quote the passage where the circuit court described the appellants' interests as "largely general; and, therefore unripe." It is precisely this conclusion that appellants are appealing.

The analysis is straightforward. The complaint seeks to alter the procedures to be used during the recall petition review process, proceedings to which appellants are now parties since petitions were offered for filing on January 17, 2012. It is the appellants' recall efforts that will now be reviewed by the GAB pursuant to the new procedures set forth by the circuit court. Efficiency, fairness, concepts of due process, and the benefit of the circuit court having the fullest array of perspectives represented support intervention. This is especially true because Art. XIII, § 12 of the Wisconsin Constitution establishes that appellants' recall efforts are constitutionally protected conduct.

Respondents argue that the claims asserted in their complaint do not address any procedures applicable to any part of the recall process to which appellants will be parties. According to the respondents, the complaint solely concerns the review of the petitions, which involves only the GAB. This argument is pure fantasy.

The process by which the GAB reviews the petitions implicates the appellants' interests in a direct and immediate way. On a concrete level, appellants have relied upon the process by which the GAB has always reviewed petitions and upon the process by which the GAB specifically

indicated it would implement in these anticipated recall efforts. In particular, appellants relied upon the fact that the GAB would employ the same process that it has used in previous recall proceedings and with every reasonable effort to complete its review in a manner that reflects the statutory 31-day deadline as much as possible. *See* § 9.10, Wis. Stats. By requesting that the circuit court shift the burden of reviewing the petitions from the elected official sought to be recalled to the GAB, the respondents seek to obstruct, impede, and delay the appellants' (and many others') profound efforts.

The interest claimed by appellants is, as is required by *Helgeland*, more than "remotely related to the subject of the action," and there can be no doubt that the interest of the appellants is "of such direct and immediate character that [they] will either gain or lose by the direct operation of the judgment." 307 Wis. 2d at 25, ¶ 45 (citation omitted). If the circuit court's decision denying intervention is not reversed, the appellants will have lost by virtue of the fact that GAB's process for reviewing the petitions offered for filing by the appellants has been up-ended at the last minute.

Respondents further assert that the circuit court correctly found that allowing appellants to intervene would jeopardize the goal of speedy and

economical resolution. They assert that appellants' request to engage in limited discovery prior to the hearing on the merits would have unnecessarily delayed the case, given that the parties (the respondents and GAB) did not intend to conduct any discovery. Again, respondents' argument and the circuit court's conclusion are without merit.

The limited discovery that appellants sought would not have delayed the case in any meaningful way. Discovery would have been sought on a narrow and limited topic: the veracity of the allegation in paragraph 27 of the respondents' complaint that "it will be a practical impossibility for FOSW and/or Thompson to review, identify, and challenge multiple signatures." (*See* Supp. Appx. 11.) Indeed, in appellants' motion seeking expedited discovery, appellants requested an order requiring the respondents to respond to written discovery within one week of service upon them. (Supp. Appx. 47-49.) Additionally, any depositions sought would have been completed prior to the hearing previously scheduled for December 29, 2011. (*Id*.) In other words, no delay would have resulted. And this discovery (or the ability to marshal evidence for a hearing) would have supported defenses the GAB chose not to pursue.

C. GAB Did Not Adequately Represent Appellants' Interest.

Respondents argue that the GAB adequately represented the appellants' interest. In making this argument, they minimize the fact that the GAB has indicated that it will not appeal the circuit court's declaratory judgment and the circuit court's order denying GAB's motion to dismiss. Respondents play down the GAB's decision not to appeal, arguing that "second-guessing of GAB's litigation strategy is irrelevant and cannot overcome the presumption of adequate representation." Respondents' Br. at 16. While GAB's decision not to pursue limited discovery prior to the hearing on the merits could be viewed as "trial strategy," the decision not to appeal the circuit court's declaratory judgment and order denying GAB's motion to dismiss cannot.

The respondents' reliance upon *Helgeland* for this argument is misguided. In *Helgeland*, the municipalities argued that DETF failed to adequately represent their interests because the DETF failed to raise a long list of defenses favored by the municipalities. 307 Wis. 2d at 54, ¶ 111. The court rejected the municipalities argument, stating that "[r]easonable lawyers and litigants often disagree about trial strategy" and that "mere disagreements over trial strategy such as the one apparent here are not

sufficient to demonstrate inadequacy of representation." *Id*. at 54-55, ¶¶ 111-112.

While reasonable lawyers may disagree about asserting one affirmative defense over another, reasonable lawyers will not disagree about appealing a decision that was made in error. That is precisely the situation here. In its motion to dismiss, the GAB argued in favor of the status quo and in opposition to the respondents' arguments that the GAB's review process needed to be modified. However, now that the circuit court has entered a declaratory judgment, the GAB has essentially withdrawn its previous arguments and adopted the respondents' position. Rather than appeal the circuit court's declaratory judgment, the GAB has, at the last minute, changed its long-established review process so that it can deploy an as-yet undefined and untested new process.

GAB's decision not to seek appeal illustrates that its interests are fundamentally different from those of appellants. The GAB's interest is in overseeing, regulating, and administering elections and election-related matters such as the recall process. While the GAB presumably has an interest in doing so correctly, it has no interest in how the law it administers is shaped or changed or the substantive content thereof.

The appellants' interests are entirely different. The appellants have an interest in ensuring that their efforts to recall the Governor, Lieutenant Governor, and various Senators are protected, that the process that they relied upon (and that GAB announced it would follow) is followed, that the process is not unduly delayed, and that recall elections are ultimately scheduled.

As stated in appellants' opening brief, the "showing required for proving inadequate representation should be treated as minimal," but not "so minimal as to write the requirement completely out of the rule." *Helgeland*, 307 Wis. 2d at 44, ¶ 85 (citations omitted). Appellants have made a sufficient showing that the GAB did not represent their interests.

D. The Disposition of the Action Will, as a Practical Matter, Impair or Impede Appellants' Ability to Protect Their Interests.

Respondents argue that the disposition of this case will not impair or impede appellants' interests. According to respondents, that is because "nothing the Circuit Court has decided will alter the procedures that govern the separate, limited part of the petition challenge process that might involve Appellants." Respondents' Br. at 18. As already addressed above, the respondents' argument is pure fantasy.

Now that the circuit court has issued a declaratory judgment, which essentially imposed on the GAB an undefined affirmative duty to make an affirmative effort to locate and strike duplicate and obviously fictitious names, it is clear that appellants' interests have been impaired. (R.33.) While the circuit court did not indicate what specifically it found the statute required of the GAB, it did indicate that the GAB should choose measures that are reasonable in light of all relevant factors. As a result of the circuit court's declaratory judgment, the GAB has now sought an open-ended "extension" from the Honorable Richard G. Niess so that it can deploy an as-yet undefined and untested new review process.[1] *In re: Petitions to Recall Governor Scott Walker, et al.*, Dane County Circuit Court Case No. 2012-CV-295. And, Judge Niess said he will not revisit the issue which was the subject of the declaratory judgment entered by Judge Davis.[2]

As respondents correctly note, the analysis of this factor is tied to the analysis of the nature of the claimed interest and whether one of the parties can and will adequately represent their interest. Respondents' Br. at 17

[1] http://www.jsonline.com/news/statepolitics/republicans-facing-recalls-want-more-time-to-challenge-petitions-dc3u774-137990308.html

[2] Appellants will file a copy of the transcript from the January 25, 2012 hearing before Judge Niess in Dane County Circuit Court Case No. 2012-CV-295 upon receipt of the same.

(citing *Helgeland*, 307 Wis. 2d at 41, ¶ 79 ("Although we examine the inability of a movant to protect its interests separately, it is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest.")). That the GAB did not adequately represent the appellants' interest further shows that the disposition of this matter has and will impair appellants' ability to protect its interests.

For the foregoing reasons, the circuit court's decision denying appellants' motion for intervention as a matter of right should be reversed.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION IS WARRANTED.

While an appellate court will not disturb a circuit court's discretionary decision if the record reflects the circuit court's reasoned application of the appropriate legal standards to the relevant facts of the case, it will if the record does not reflect such a reasoned application. *Helgeland*, 307 Wis. 2d at 58, ¶ 120.

Respondents argue that the circuit court did not abuse its discretion when it denied appellants' motion for permissive intervention. According to respondents, the circuit court's decision should not be disturbed because the court concluded that allowing intervention would unduly delay the

resolution of the merits and create a standard by which the court could not justify keeping other third parties out of the case.

Respondents' characterization of the circuit court's decision suggests that the circuit court methodically and separately addressed appellants' request for permissive intervention. Such is not the case. Rather, after the circuit court concluded that it was going to deny appellants' request for intervention as of right, the circuit court simply stated the following:

> And I deny the request on a discretionary ground for the same reasons they overlap.

(Appx. 13: 15-16.)

As the transcript from the circuit court's decision makes clear, the circuit court denied appellants' motion to intervene as a matter of right because (1) it concluded that appellants' interest was speculative, general, and unripe[3]; (2) it concluded that permitting intervention would substantially slow down the case[4]; (3) it concluded that permitting intervention would establish a precedent for requiring intervention of third-parties[5]; (4) it concluded that granting intervention would make the

[3] (Appx. 12.)
[4] (Appx. 9-10.)
[5] (Appx. 10-11).

proceedings fruitlessly complex and unending[6]; and (5) it concluded that appellants' interests were adequately represented by the GAB.[7] As thoroughly discussed above, the circuit court's reasoning and conclusions were flawed and its decision to deny intervention as of right should be reversed. Given that these were the same reasons that the circuit court denied appellants' motion for permissive intervention, that portion of the circuit court's decision should also be reversed.

Finally, respondents argue that the permissive intervention standard is higher than the intervention as of right standard in one respect – the movant must have an actual claim or defense that shares a common question of law or fact with the current action. Indeed, appellants filed with their motion for intervention a proposed answer and affirmative defenses in response to the complaint, setting forth their defenses to the current action. (R.13.) Nonetheless, the circuit court never addressed this requirement. Rather, it simply stated that it was denying appellants' motion for permissive intervention for the same reasons that it denied appellants' motion for intervention as of right.

[6] (Appx. 11.)
[7] (Appx. 12-13.)

For the foregoing reasons, permissive intervention should be granted.

III. APPELLANTS SOUGHT TO INTERVENE RATHER THAN REQUESTING LEAVE TO FILE AN AMICUS CURIAE BRIEF BECAUSE INTERVENTION WAS WARRANTED.

Respondents argue that appellants could have sought leave to file an amicus curiae brief rather than seeking to intervene in the case. To be clear, appellants moved to intervene in this action because the requirements for intervention were met and appellants should not be limited to addressing the circuit court via an amicus curiae brief. Indeed, appellants moved to intervene in a recent case filed in the Wisconsin Supreme Court regarding what districts anticipated recall elections for state senators should be conducted in given recent redistricting. *See Dennis Clinard, et al. v. Michael Brennan, et al*., Appeal Number 2011-AP-2677-OA. In that case, intervention was granted as a matter of course. Likewise, intervention should have been granted in this case as a matter of course, and appellants should not be limited to addressing the circuit court as an amicus party.

IV. APPELLANTS ARE NECESSARY PARTIES AND THE CIRCUIT COURT'S ORDERS ARE VOID.

Respondents argue that appellants are not necessary parties under § 803.03, Wis. Stats., because they have not met the requirements of

intervention under § 803.09, Wis. Stats. As addressed above, the circuit court erred in denying appellants' motion for intervention. Thus, respondents' argument for why appellants are not necessary parties should fail for the same reason that their argument that intervention is not warranted fails. As the Supreme Court Stated:

> the inquiry of whether a movant is a necessary party . . .is in all significant respects the same inquiry . . . as to whether a movant is entitled to intervene in an action as a matter of right, including the factor of whether the interest of the movant is adequately represented by existing parties.

Helgeland, 307 Wis. 2d at 62, ¶ 131.

The respondents further argue that even if appellants were necessary parties, the circuit court's orders should not be void. According to respondents, appellants have misread *Wis. Finance Corp. v. Garlock*, 140 Wis. 2d 506, 410 N.W.2d 649 (Ct. Ap. 1987) and *Brotherhood of R.R. Trainmen v. Sawn*, 214 F.2d 56 (7th Cir. 1954). Respondents assert that *Garlock* is uniquely applicable to foreclosure actions and *Sawn* is much narrower than the appellants read it. The respondents' attempts to minimize the implications of these two cases are unpersuasive, at best.

The concept that an order should be voided when it is later concluded that a necessary party should have been joined in the action and

permitted to address the merits of issue previously brought before the court is not novel. Indeed, this is a concept that is well accepted:

> Where a person having or claiming an interest in the subject matter is brought in as a party defendant, he or she has a substantial right to be heard on all matters which materially affect his or her interest. He or she may defend on the merits as though he or she were an original party defendant, unrestricted by any of the prior proceedings, and may have the entire case reopened insofar as his or her rights are involved.

67A C.J.S. Parties § 166 (citing *Swan*, 214 F.2d 56 and other cases).

Finally, the respondents argue that even if the circuit court's prior orders could be declared void, the appellants "offer no argument as to why the present judgment should be void due to their absence from the case." Respondents' Br. at 24. Presumably, it goes without saying that the appellants should have had an opportunity to address the merits before the circuit court entered a judgment that affected their interests.

CONCLUSION

Based on the foregoing and the record in this matter, intervention should be granted and any orders entered by the circuit court should be declared void.

Dated this 26th day of January, 2012.

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CERTIFICATION PURSUANT TO § 809.19(8)(d), WIS. STATS.

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,942 words.

Dated this 26th day of January, 2012.

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CERTIFICATION PURSUANT TO § 809.19(12), WIS. STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Wis. Stats.

I further certify that this electronic brief is identical in content and format 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 26th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2012 the original and ten (10) copies of the Reply Brief of Proposed-Intervening Defendants-Appellants were served upon the Wisconsin Court of Appeals via hand-delivery. Three (3) copies of the same were served upon counsel of record via overnight mail.

Dated this 26th day of January, 2012.

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