STATE OF WISCONSIN, SUPREME COURT

ALBERT D. MOUSTAKIS,

Plaintiff-Appellant-Petitioner,

-vs-

Case No.: 2014AP001853

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE,

Defendant-Respondent,

and

STEVEN M. LUCARELI,

Intervenor.

ON APPEAL FROM THE CIRCUIT COURT FOR LINCOLN COUNTY,

THE HONORABLE JAY R. TLUSTY, PRESIDING

LINCOLN COUNTY CASE NO.: 14 CV 41

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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QUESTION PRESENTED

What rights does Moustakis have, as a person holding State Public Office, to pre-release judicial review of the State of Wisconsin Department of Justice ("DoJ") records under the Wisconsin open records laws?

BRIEF ANSWER

Applying the legislative history, in-context and as a whole, Moustakis should have full rights to pre-release judicial review under Wis. Stat. § 19.356. Even if the Court were to disagree, the DoJ's interpretation of Wis. Stat. § 19.356(9) excluding Moustakis is absurd and unreasonable based on the notes to 2003 Wis. Act. 47.

ARGUMENT

I. THE EXTRINSIC EVIDENCE IS ITSELF AMBIGUOUS.

It is significant to note DoJ's solution to the question of interpretation of the definition of "employee" in the open records statutes is to cast aside the portions of the statute which cannot be easily explained. Wis. Stat. § 19.356(9) is deemed by DoJ to be a "subsection not at issue in this case" as to the inter-relationship between "employee" and holding "state public office" or "local public office," despite it being the only subsection of the records-release review statute which actually mentions all three (3) terms directly. Respondent's Brief at 10. The accepted standard for statutory interpretation is not to strip away related statutes

and subsections to isolate the language, but to view the statutes in question as part of a whole. State ex. rel Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

The plain language of Wis. Stat. § 19.32(1bg) defining "employee" is not ambiguous; the statute creates two separate pathways to qualify as an employee. An "employee" is either a person "employed by an authority" or "employed by an employer other than an authority." By placing an exclusionary clause between these two (2) definitions, the legislature has explicitly stated[1] only local or state public office holders do not qualify as being employed by an authority for purposes of being considered an "employee." The drafting leaves open the question of whether a local or state public official may constitute employment by an employer other than an authority.

Since the word "employed" is used within the definition of "employee," the specified definition is not helpful to assist in our understanding of what constitutes being "employed." Typically, in an effort to give a word its common, ordinary, and accepted meaning, the Court and the parties consult a dictionary for guidance. *See*, Kalal, 2004 WI 58, ¶ 45; *See also*, Masri v. LIRC, 2014 WI 81, ¶ 42, 356 Wis. 2d 405, 850 N.W.2d 298. Moustakis has already provided argument as to

[1] For purposes of contrast, compare the definition in Wis. Stat. § 19.32(1bg) with the definition of "State public office" in Wis. Stat. § 19.32(4), also created by 2003 Act 47. In that section, the legislature places a restrictionary clause at the end of a definition as to clearly apply to both the cross-cited statute and the appointive offices referenced separately in the subsection. Had the Legislature intended the exclusionary clause in Wis. Stat. § 19.32(1bg) to have the definition-wide effect DoJ suggests, we must assume it would have been drafted differently.

this issue, complete with the Black's Law Dictionary definition.[2] *See,* Petitioner's Brief at 20-21. DoJ has not appeared to offer any competing definition of what it means to be "employed" under the statute, beyond its unsupported assertion the exclusionary clause ties Moustakis to the first clause of Wis. Stat. § 19.32(1bg) and the first clause alone.

When Moustakis argues he is a State employee, and his employer is not an "authority," it is because there has been no compelling argument for an alternative interpretation of the full definition of "employee" within Wis. Stat. § 19.32(1bg). With seemingly one reading of the complete definition, "employee" does not appear ambiguous. *See*, Kalal, 2004 WI 58, ¶ 47.

Moustakis raises the lack of ambiguity in Wis. Stat. § 19.32(1bg) not to avoid a review of the extrinsic evidence, having already acknowledged the Joint Legislative Council's notes on 2003 Wis. Act 47 as problematic. Petitioner's Brief at 18-19. Part of the problem in using the Joint Legislative Council's notes is the manner in which they contribute to what the Court of Appeals calls a "befuddling mess." Moustakis v. State of Wisconsin Dept. of Justice, 2015 WI App 63, ¶ 23, 364 Wis. 2d 740, 869 N.W.2d 788. The legislative history on subsection nine (9) makes it clear the legislature intended the subsection to apply to local or state public officials:

[2] The relevant Merriam-Webster Dictionary definition for "employ" ("(1) : to use or engage the services of; (2) : to provide with a job that pays wages or a salary") is less helpful than the definition already provided in Moustakis' previous brief. *See*, http://www.merriam-webster.com/dictionary/employ.

> Creates s. 19.365(9), [sic.] stats., to provide that an authority must notify a record subject who holds a local public office or a state public office of the impending release of a record containing information relating to the employment of the record subject. The record subject, within 5 days of the receipt of the notice, may augment the record to be released with written comments and documentation selected by the record subject. The authority shall release the augmented record, except as authorized or required by statute.

2003 Wis. Act. 47 at § 4, note 6.

While the notes suggest the subsection is intended to apply to all record subjects holding local public office or a state public office, the use of "employee" in the actual wording of Wis. Stat. § 19.356(9) runs directly into conflict with another note from the Joint Legislative Council regarding the intent behind the definition of "employee" in Wis. Stat. § 19.32(1bg):

> Creates a definition of the term "employee" to mean any public sector or private sector employee, other than an individual holding a local public office or a state public office.

2003 Wis. Act 47 at § 1, note 1. Because a person holding local or state public office cannot be an "employee" according to this note, it should not also be possible for an "employee" to hold local or state public office; however, a reading of subsection nine (9) informed by the legislative history for this subsection tells us the legislature did not intend "employee" and holding state (or local) public office to be mutually exclusive. The notes lack explanation why the Joint Legislative Council felt it necessary to insert the exclusionary clause into Wis. Stat. § 19.32(1bg), or why the language of Wis. Stat. § 19.356(9) includes the word "employee" when referring to persons holding local or state public office.

The Court clearly has authority to review legislative history when it believes a statute is ambiguous, or when the apparent plain meaning of the statute

would otherwise be unreasonable or absurd, and may do so even when the Court cannot agree whether a statute's meaning is ambiguous or plain. *See*, Teschendorf v. State Farm Ins. Companies, 2006 WI 89, ¶ 18, 293 Wis. 2d 123, 717 N.W.2d 258. Moustakis requests the Court not foreclose argument as to the meaning of second clause of Wis. Stat. § 19.32(1bg) as unreasonable based on only the portion of the legislative history, noting the definition, as both the trial court and the Court of Appeals did. R. 54 at 15-16; Moustakis, 2015 WI App 63, ¶ 22. The same directive which suggests parties should view statutes as part of a whole, in conjunction with the nearby and related statutes, should also apply to the evidence of legislative intent behind the interoperation of those statutes. As there is support in the extrinsic evidence for Moustakis' belief that it is possible for a person to be both a "state public official" and simultaneously an "employee" as those terms are defined in Wis. Stat. § 19.32, it is the extrinsic evidence – not the statutory definition of "employee" – which must itself be deemed ambiguous.

II. DOJ'S ABDICATION OF THE PROCESS REQUIRED BY WIS. STAT. § 19.356(9) MAKES THE SUBSECTION RELEVANT TO THE ISSUES BEFORE THE COURT.

The analysis of the legislative intent for Wis. Stat. § 19.356(9) is also relevant to the fact pattern and issues before the Court for another reason. DoJ has asserted it was not required to provide Moustakis with the notice required under the subsection because he was not an officer or employee of the DoJ. R. 5 at 5. While the primary issue before the Court in resolving the definition of "employee"

under Wis. Stat. § 19.32(1bg) for purposes of resolving whether Moustakis has standing under Wis. Stat. § 19.356(2)(a)1, the review of the extrinsic evidence makes it abundantly clear the DoJ's interpretation of the Wis. Stat. § 19.356(9) requirements for pre-release notice are the product of improper and absurd statutory interpretation. This court is empowered to review legislative history to verify the legislature did not intend the unreasonable or unthinkable results of a proffered plain meaning. Teschendorf, 2006 WI 89, ¶ 15 (internal citations omitted).

The legislative history cited above does not include a coverage limitation for "employee" or a requirement for employment by the authority having custody of the records prior to release. 2003 Wis. Act. 47 at § 4, note 6. Subsection nine (9) is intended to apply whenever an authority plans to release employment-related records, the subject of which is a local public official or state public official. As the holder of the Office of District Attorney for Vilas County, Moustakis is unambiguously a state public official. DoJ's "courtesy notice" fails to include any description of Moustakis' rights under Wis. Stat. § 19.356(9), making it improper notice under the subsection. R. 5 at 3. The decision to send a "courtesy" notice without notification of rights under Wis. Stat. § 19.356(9) was an intentional decision, made by the records custodian for DoJ. R. 5 at 4.

While the parties may maintain a disagreement over whether the terms of Wis. Stat. § 19.356(9) are meant as a complement to – versus a substitute for – pre-release judicial review under Wis. Stat. § 19.356(2) - (4), there can be no bona

fide dispute[3] over whether the records at issue qualify for pre-release notice under subsection nine (9). Apparently it is easier for DoJ to label subsection nine (9) "not at issue" than it would be to defend its own practices, which are very much at issue before the Court. Respondent's brief at 10.

III. DOJ'S CITATION OF THE LINZMEYER CASE CALLS INTO QUESTION DOJ'S UNDERSTANDING OF THE CUSTODIAN'S DUTY UNDER THE BALANCING TEST.

DoJ's brief to the Court contains a curious reference to this case as presenting a stronger public interest than the one at issue in Linzmeyer v. Forcey, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811; Respondent's brief at 23-24. This sort of categorical, one-sided approach to the balancing test is directly at odds with Linzmeyer, the "fundamental question" of which was whether – on a case-by-case basis – permitting the inspection of records would result in harm to the public interest, to outweigh the public interest in permitting inspection. Id., ¶ 24-25. Linzmeyer specifically notes law enforcement records are "more likely to have an adverse effect on other public interests if they are released." Id., ¶ 30. The

[3] DoJ has taken exception to whether there is a bona fide dispute over the records' qualification under Wis. Stats. 19.356(2)(a)1. *See*, Respondent's brief at 19. The question is not ripe for review by this Court, since there has been no judicial fact-finding as to the contents of the records due to DoJ's insistence on preventing an *in camera* review of the records until after the trial court decided the standing question. R. 4 at 47-50. The parties have noted the investigation which produced the records related to allegations of a criminal nature, itself forms the essential nexus to Moustakis' employment. Respondent's brief at 21 ("investigation into potential criminal activity"). As District Attorney, Moustakis is charged – by his employer, the State of Wisconsin – with the duty to prosecute "all criminal actions before any court within [Vilas County]." Wis. Stat. § 978.05. The allegation of criminal activity by Moustakis, even if it occurred outside the operating hours for the Office of the District Attorney (the intended meaning of the Complaint paragraphs miscategorized by DoJ in its briefs on the subject), would still interfere in direct relation with Moustakis' statutory duties.

decision also speaks to the public interest in protecting the reputation and privacy, a factor separate and distinct from the individual's interest in protecting character and reputation. Id., ¶ 31. The decision in Linzmeyer was compelled less by the public interest in disclosure, but due to the lack of compelling public interest in protecting statements made by the record subject in the public, corroborated by the audience for those statements. Id., ¶ 37. Investigative reports routinely prepared by DoJ are "gathered from witnesses of varying degrees of reliability" and would more generally support nondisclosure of their contents. Id., ¶ 38. The statements in this case are not public, as demonstrated by the DoJ's own categorization of the allegations as being "unsubstantiated", following the investigation which yielded the records. R. 23 at 2.

DoJ, via the Wisconsin Attorney General, is supposed to be the arbiter of the open records statutes. Wis. Stat. § 19.39. In this instance, DoJ has already demonstrated a failure to seek pre-release decision input from the records subject; this being one of the precise reasons why the Court established a right to pre-release judicial review. R. 23 at 2; R. 5 at 3; Woznicki v. Erickson, 202 Wis. 2d 178, 191, 549 N.W.2d 699 (1996). Given its individual confusion over the case-by-case application of the balancing test, we must wonder why DoJ is so adamant about placing DoJ's own application of the balancing test outside the purview of this Court.

IV. ADOPTION OF THE CUSTODIAN-AS-AUTHORITY PARADIGM FOR INTERPRETING THE OPEN RECORDS LAWS SOLVES MANY OF OUR INTERPRETATION ISSUES.

Moustakis began his prior brief to this Court by suggesting one of the flaws in our current understanding of the open records laws comes from the lack of attention applied to the "having custody of a record" language in Wis. Stat. § 19.32(1). Petitioner's Brief at 11-13. In contrast to the arguments presented by both parties, Moustakis briefly suggests the analysis is far simpler if the term "authority" as used in Wis. Stat. § 19.32(1bg) requires custody of the records being requested.

To start, Moustakis' employer would not be an "authority" under Wis. Stat. § 19.32(1bg), since Moustakis is not employed by the DoJ, the agency with custody of the records. Moustakis would fall under the second sub-definition of "employee," having the same rights to pre-release judicial review as any other member of the general public, even those in the private sector. *See*, Respondent's brief at 15-16.

What Moustakis has, which most members of the general public might not, is a nexus between his employment (as a State Public Official) and the custodian's investigation. *See*, Supra, at 9 n.3. Private contractors could also have this nexus, which is why the "logical extension" of the case law expanded judicial review to public sector and private sector employees. *See*, 2003 Wis. Act 47 at Joint Legislative Council prefatory note, § 1 note 1. Wis. Stat. § 19.356(2) remains the

gatekeeper for standing purposes, but with an eye toward whether the records fall under its categories.

Because the only state and local public officials excluded from the definition of "employee" are those employed directly by the authority with custody of the records, the DoJ's hang-up over the "officer or employee of the authority" language in Wis. Stat. § 19.356(9) makes sense in this alternative context. The rights in this subsection are a substitute for those given to "employees." The individual pieces of the legislation fit together, and work as a whole, harmonious with the legislative intent.

CONCLUSION

When the Court of Appeals writes that giving a term in a statute its definitional meaning renders the statute a "befuddling mess," this should provide pause for further analysis. Moustakis, 2015 WI App 63, ¶ 23. This is particularly true when the Court of Appeals decision follows a trial court ruling specifically requesting guidance from the higher courts.[4] R. 61 at 25.

Is the problem with the parties' attempts at understanding legislative intent the product of selective review (or dismissal) of legislative history? Does the legislative history itself demonstrate a clearly-focused intention? While Moustakis does believe the legislature intended to provide greater pre-release

[4] Despite DoJ's insistence to the trial court the statute was "crystal clear", the trial court referenced the statute as, "poorly constructed, and "a frustration to the Court" and also, "somewhat of a procedural nightmare" requiring some direction from the higher Court. R. 63 at 4-5: 24-3. R. 54 at 11: 18. R. 61 at 17: 16-17. R. 61 at 25: 13-19.

rights to record subjects in his position than DoJ would allow, perhaps the underlying problem is our collective framing of the open records laws. Indeed, the alternative framing suggested here by Moustakis harmonizes with the statutory language, context, and intent of the open records laws better than either party's prior attempts.

DoJ's interpretation of the open records laws as a tool to deny standing to a record subject would place the records custodian beyond the reproach of this Court. Unfortunately, its selective use of legislative intent, seeking to prevent Moustakis from having any right of review while DoJ attempts to release non-credible, unsubstantiated, false allegations about a public official is worthy of reproach.

Dated this 8th day of January, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify 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 2,562 words.

Signed this 8th day of January, 2016.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify on January 8, 2016, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify the brief was correctly addressed.

Signed this 8th day of January, 2016.

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ELECTRONIC BRIEF CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief which complies with the requirements of § 809.19 (12).

I further certify this electronic brief is identical in content and format to the printed (paper) form of the brief in transit for delivery and filing as of this date.

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