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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT FOUR

State of Wisconsin,

Plaintiffs-Respondent,

v.

Case No. 2014AP2433

Judith Ann Detert-Moriarty,

Defendant-Appellant.

On Appeal from the Circuit Court of
Dane County, the Hon. David T. Flanagan, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT JUDITH A. DETERT-MORIARTY

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The Wisconsin Equal Access to Justice Act ("WEAJA"), Wis. Stat. § 814.245, was enacted to reimburse the costs of litigation to individuals, small businesses, and small non-profit organizations for having to defend against unreasonable state agency action. *Bracegirdle v. Dep't of Regulation and Licensing*, 159 Wis. 2d 402, 428 (Ct. App. 1990). In light of that broad purpose, WEAJA fees are available in "any action *by a* state agency." Wis. Stat. § 814.245(3) (emphasis added). In its brief, the State would have the Court read § 814.245(3) as "any action *captioned in the name of* a state agency" and as including an exemption for actions "*litigated by* the Department of Justice." Such a reading is improper because it alters the plain language, limits the broad reach of WEAJA intended by the legislature, and dilutes its purpose of deterring the agencies from commencing and continuing unreasonable agency action.

This Court should reject the State's arguments and correct the circuit court's erroneous holding that WEAJA does not apply to this type of forfeiture action. The case should then be remanded for a finding of whether the DOA has met its burden to show that its actions in bringing and maintaining this action were substantially justified and for a determination of the amount of fees and costs to which Detert-Moriarty is entitled for defending against the unconstitutional action of the DOA.[1]

[1] While the State did not appeal the merits of the dismissal of this case on constitutional grounds, that finding of the circuit court has recently been upheld in the related matter of *State v. Crute*, Appeal No. 2014AP659 (Decided Jan. 29, 2015).

ARGUMENT

I. THIS IS AN ACTION BY THE DEPARTMENT OF ADMINISTRATION.

The plain language of the WEAJA statute provides that fees are available to prevailing parties in "any action *by* a state agency." Wis. Stat. § 814.245(3) (emphasis added). The preposition "by" has a far-reaching definition, including "in consequence of", "in conformity with", "with the witness or sanction of", and "[t]hrough the means, act, agency or instrumentality of." *See* Black's Law Dictionary (6th ed.), p. 201 (defining "By"). The plain language does not say "captioned as" or "litigated by" or any other limiting language.

Under the plain language of the WEAJA statute, and as supported by the facts in this case, Detert-Moriarty is entitled to seek fees as the prevailing party. The State's focus on the caption and attempt to shade the facts cannot overcome that this was an action by the DOA.

A. Captioning the Case "State v." Does Not Alter The Fact That This Was An Action Brought By The Department Of Administration.

The State (for the first time on appeal) introduces a red herring by arguing, in effect, that this can only be a State of Wisconsin action—and not a DOA action—because the case is required by Wis. Stat. § 778.02 to be captioned "State of

Wisconsin." (Resp. Br. at 5-10).[2] Detert-Moriarty has not disputed that the caption in this forfeiture action. However, it is Detert-Moriarty's position that the caption is not determinative of whether this case falls within "any action by a state agency" under WEAJA.[3]

There is no dispute that this case was brought under the authority of Wis. Stat. § 16.846 to enforce the DOA's "emergency" rules[4] under Wis. Adm. Code ch. Adm 2. R.45:30.; (Resp. Br. at 12). The DOA is a part of the "State of Wisconsin." *See* Wis. Stat. § 15.10 (creating the Department of Administration), § 15.02 ("administrative departments . . . comprise the executive branch of the

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[2] In response to a related WEAJA petition, DOJ conceded to the circuit court that the forfeiture action could have been prosecuted in the DOA's name. R.39:18.

[3] The State pounces on Detert-Moriarty's reference to the caption below as "State of Wisconsin" in her filings. (Resp. Br. at 8-9). This "gotcha" moment is illusory and irrelevant, since there has never been a dispute about the caption in this case. Rather, as explained below (R.42:2) and in her initial brief to this Court (App. Br. at 34), regardless of the caption, this is an action *by* the DOA, an arm of the State. It does not matter that the plaintiff's name on the caption was overly-inclusive since the "State of Wisconsin" encompasses the DOA.

[4] The State suggests that Detert-Moriarty is challenging the rules at issue in this case on the basis that there was no "emergency." (Resp. Br. at 36). The State misses the point that Detert-Moriarty prevailed and there is a final decision on the merits, so there would be no case in controversy to pursue in that regard. But the State is also wrong (Resp. Br. at 9 n.12) that Detert-Moriarty questions the "emergency" for the first time on appeal. *See* R.17:2-3.

Wisconsin state government) § 15.02(2) ("Each [department] shall bear a title beginning with the words 'State of Wisconsin' and continuing with 'department of . . . .'" (ellipsis in original)). Thus, this is an action by the "State of Wisconsin Department of Administration." The captioning requirements of Wis. Stat. § 778.02 do not compel a different finding.

The State relies heavily on a Dane County Circuit Court's decision (Judge Julie Genovese presiding) finding the "State of Wisconsin" was the correctly named party in *State v. Huberty* (Resp. Br. at 7).[5] Yet in a different forfeiture action under the DOA's rules, the court quickly eschewed any import placed on the caption in determining whether WEAJA fees were available. *See* R.45:13-14 (5/23/14 Tr. of Motion Hearing in *State v. Breckenridge*, Dane County Case No. 2013FO2396, Judge Maryann Sumi presiding ("I agree with you that it's not the caption that controls. . . .")). To the extent this Court any gives weight to circuit court judges who did not decide this particular case, the hearing transcript before Judge Sumi's was actually part of the record for this case (whereas the Judge Genovese transcript was not) and should be considered by the Court as further support that Wis. Stat. § 778.02 does not control whether Wis. Stat. § 814.245 applies.

[5] *State v. Huberty* was affirmed on other grounds, without considering the captioning requirements of Wis. Stat. § 778.02, by this Court on Feb. 11, 2014, Appeal No. 2013AP761, *et seq.*).

B. This Case Is Brought By the State of Wisconsin's Department of Administration.

A forfeiture action under Wis. Admin. Code ch. Adm 2 is commenced by Capitol Police filing a citation with the court. R.45:52 (Resp. to Interrog. No. 9).[6] The DOA, through its Capitol Police officers, commenced this action under those rules rules against Detert-Moriarty on July 25, 2013. R.1.

This action (and other forfeiture actions) were prosecuted by the Department of Justice at the request of the DOA. R:45.30. (*See also* Resp. Br. at 12 ("The Department of Justice, operating at the request of the Department of Administration . . . .")).

The only basis for the DOJ to have prosecuted the forfeiture actions is because the DOA requested the DOJ's representation under Wis. Stat. § 16.846(2) and prosecution of the citations issued under Adm 2.14(2) by the Capitol Police. The DOJ has no inherent authority to sue. *State v. Wisconsin Telephone Co.*, 91 Wis. 2d 702, 710 (1979) ("the attorney general is devoid of inherent power to initiate *and prosecute* litigation" (emphasis added)). It must have a statutory basis for its enforcement actions. *Id.* The actions of the DOJ in "prosecuting" the case are the actions of the

[6] In its unsupported (by any citation) recount of how prosecutorial decision-making is exercised, the State skips the step of commencing the action. (*See* Resp. Br. at 12-13). However, the State explained during discovery, a forfeiture case is commenced by the Capitol Police filing the citation with the court.

DOA. *See Journal/Sentinel v. School Bd.*, 186 Wis. 2d 443, 453-54 (Ct. App. 1994) (explaining the actions of the attorney *are* the actions of the client). The DOJ's litigation of this case is the action of the DOA.

C. *The Provision Of Taxable Costs To Be Borne By The County Does Not Abrogate The Statutory Payment Of Reasonable Fees And Other Costs Under WEAJA.*

The State reads too much into Wis. Stat. § 778.20, claiming it conflicts with WEAJA's fee provisions and therefore proves that WEAJA is not available under ch. 778 forfeiture actions. (Resp. Br. at 17-18). Section 778.20 does not impede the right to seek WEAJA fees in a forfeiture action brought by a state agency.

Although Wis. Stat. § 778.20 allows a victorious defendant "all the costs of the action" to be paid by the County, the statute covers only taxable costs.[7] *See State v. Amato*, 126 Wis. 2d 212, 217 (Ct. App. 1985) ("The right to cover costs is not synonymous with the right to recover the expense of litigation."). WEAJA, on the other hand, specifically provides for the recovery of "reasonable expenses of expert witnesses, . . .and reasonable attorney or agent fees." Wis. Stat. § 814.245(5)(a). The general costs provision of Wis. Stat. § 778.20 does not preclude reasonable attorneys fees and costs under Wis. Stat. §

[7] If, on the other hand, the State is arguing, that "all of the costs of litigation" under Wis. Stat. § 778.20 include reasonable attorneys fees and costs, Detert-Moriarty would be entitled to her fees and costs on those grounds as well.

814.245. *See Amato*, 126 Wis. 2d at 217 ("Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail. . . ." (internal quotation marks, emphasis and citation omitted)).

In fact, the forfeiture costs provision, allowing prevailing defendants costs covered by the County, has been on the books in substantially similar form since 1858. *See State v. Smith*, 52 Wis. 134, 138 (1881) (discussing R.S. 1858, ch. 155, sec. 3313 (renumbered as § 288.20 (1925) and renumbered again as § 778.20 (1979)). In 1985, the legislature set up a special fund to pay for awards of WEAJA fees, which include costs of litigation beyond taxable costs. Wis. Stat.§ 814.245(9). Thus, since 1985, prevailing defendants in agency actions were able to seek reasonable fees and other costs to be made whole. The State's implicit attempt to hoist those costs onto the County should be rejected. (*See* Resp. Br. at 17).

The requirement of Wis. Stat. § 778.20 that the County pay the taxable costs of a prevailing defendant does not affect the requirement of Wis. Stat. § 814.245 that the State pay the reasonable fees and costs of the prevailing defendant in an action brought by a state agency such as this case.

II. THERE IS NO PROSECUTORIAL DISCRETION EXEMPTION FROM WEAJA.

Under the plain language of the Wis. Stat. § 814.245(3), WEAJA fees are available for "any action" including those which require the exercise of prosecutorial discretion. There is no need to look to extrinsic aids because the plain language is not ambiguous. *State v. Schuman*, 173 Wis. 2d 743, 746 (Ct. App. 1992).

Nonetheless, following the circuit court, the State urges this Court to look beyond the broad plain language and adopt a court-made "prosecutorial discretion" exemption based on the policy reasons stated in *City of Janesville v. Wiskia*, 97 Wis. 2d 473 (1980) (applying the frivolous litigation costs provision under the now-repealed Wis. Stat. § 814.025). The State has presented nothing that overcomes the legislative history, purpose and relevant WEAJA case law to support importing the *Wiskia* exemption into Wis. Stat. § 814.245.[8]

The State suggests that if the legislature wanted to undo the exemption adopted for frivolous actions in *Wiskia*, it would have "changed the law." (Resp. Br. at 13). The legislature *did* change the law: it adopted Wis. Stat. § 814.245 in 1985 after the Court decided *Wiskia* in 1980. In enacting WEAJA, the legislature specified that fee-shifting was allowed in "any action by a state agency," but only

[8] Detert-Moriarty responds to a few of the arguments, but does not concede those not discussed herein. Rather, in the interest of brevity, Detert-Moriarty relies on the strength of her initial brief.

from the state (not from the other party). This language contrasts with the any "party" language that was used under Wis. Stat. § 814.025. As the State contends, "Wis. Stat. § 814.025 did not mention the state. . . . Wis. Stat. § 814.245 applies different standards for awarding fees." (Resp. Br. at 22). Under the rule stated in *Martineau v. State Conservation Comm'n*, 54 Wis. 2d 76, 79 (1972), there was no express authorization by statute to assess costs against the State under § 814.025, but there is under § 814.245. The legislature thus intended WEAJA to apply in forfeiture actions brought by the state agencies.

A contrary interpretation would nullify Wis. Stat. § 814.245(3)'s coverage of "any action by a state agency" that was initiated by an agency in circuit court, since such actions would involve "prosecutorial discretion." "[S]tatutory interpretations which effectively repeal other statutes by implication are not favored by the law." *Amato*, 126 Wis. 2d at 216. Instead, "[i]t is the duty of the courts, if possible, to construe two statutes such that both will be operative." *Id*. at 217. The Court should decline to ratify the exemption to WEAJA created by the circuit court.

III. THE QUESTION OF WHETHER THE STATE MET ITS BURDEN TO SHOW THAT ITS ACTIONS WERE SUBSTANTIALLY JUSTIFIED IS FOR THE CIRCUIT COURT ON REMAND.

The State spends much of its brief arguing that its actions in bringing and continuing this case were "substantially justified" under WEAJA. (Resp. Br. at 24-

35).[9] For the reasons stated by Detert-Moriarty below (R.36:6-9; R.42:7-9; R.44:7-16), the State cannot meet its burden. However, the question was never reached by the circuit court and should not be decided on this appeal.

WEAJA states "the court shall award costs . . . unless the court finds that the state agency was substantially justified in taking its position." Wis. Stat. § 814.245(3). The legislation thus "emphasizes the fact that the determination is for the [trial] court to make." *Pierce v. Underwood*, 487 U.S. 552, 559 (1988) (interpreting the federal EAJA); *see id*. at 563 (holding that the abuse of discretion is the correct standard of review for "substantial justification" under EAJA). The Wisconsin Supreme Court adopted this standard for WEAJA. *Sheely v. Dep't Health & Soc. Servs*., 150 Wis. 2d 320, 337 (1989) ("[A]n appellate court must review a trial court's determination on whether a government's agency position was 'substantially justified' as a question of an abuse of discretion.").

[9] The State argues an incorrect standard (that of "qualified immunity") (Resp. Br. at 26-27) applying incorrect rules (ch. Adm 2 in effect prior to the "emergency" rules at issue in this case) (*id*. at 30-32), and misinterprets the holding in *Kissick v. Huebsch* (which enjoined the enforcement of the "emergency" rules requiring a permit unless more than 20 people were "anticipated" to participate) (*id*. at 32-34), and mistakenly asserts that this Court has asked for briefing on *Smith v. Exec. Dir. of the Indiana War Mem'l Comm'n*, 742 F.3d 282 (7th Cir. 2014) (*id*. at 34). The State's convoluted argument on the issue of substantial justification demonstrates why the Supreme Court held that a decision should be hashed out first in the trial court. *See Underwood*, 487 U.S. at 562.

This Court cannot review whether there has been an abuse of discretion unless the circuit court has considered the issue. Here, the circuit court did not reach the question of "substantial justification." R.46:6. Thus, there is nothing for this Court to review.

Instead, this Court should clarify on remand that the legal standard for "substantial justification" is not that of "frivolousness," and that it is the State's burden to show that the actions of the Department of Administration, its agents, and its counsel, were substantially justified.

IV. THE STATE HAS FORFEITED ANY OBJECTION TO THE HOURS EXPENDED AND THE RATE SOUGHT UNDER WEAJA.

Although Detert-Moriarty provided a detailed statement of attorney hours expended and the basis for the hourly rate (*see* R.43), the State did express any specific objections to the fee petition. R.40:13. Any objections from the State to the itemized application for fees and other expenses were due 15 working days after Detert-Moriarty filed her motion for costs. Wis. Stat. §§ 814.245(6), 814.10(3). The State forfeited its opportunity to file any objections and any attempt to do so post-remand would be untimely. *See* Wis. Stat. § 814.10(4) ("No objection shall be entertained on review which was not made before the clerk, except to prevent great hardship or manifest injustice.") Yet, the State asks this Court to allow it to do so, without any showing of cause. (*See* Resp. Br. at 35). It has waived its opportunity and the State's request should be denied. Nonetheless, for the reasons provided in the filings to the

circuit court, the hours and rate are reasonable in defending Detert-Moriarty from unconstitutional state action.

CONCLUSION

For the reasons stated above, Detert-Moriarty respectfully requests that this Court reverse the decision of the circuit court and remand for a decision on Detert-Moriarty's motion for fees and other costs under WEAJA, with clarifications as to the proper legal standards as set forth above.

Respectfully submitted this 16th day of February, 2015.

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CERTIFICATION

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: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,920 words.

I hereby certify that this electronic brief is identical in form and content to the printed version of this brief, filed February 16, 2015, pursuant to Wis. Stat. § 809.19(12).

Dated this 16th day of February, 2015.

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