STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

In re the commitment of Michael L. McGee:

State of Wisconsin,

Petitioner-Respondent,

Town of Wheatland,

District: 2
Appeal No. 2016AP01068
Circuit Court Case No.
2003CI000001

Proposed Intervenor-Appellant,

v.

Michael McGee,

Respondent-Respondent-Cross-Appellant,

Appeal from Circuit Court for Racine County
The Honorable Allan B. Torhorst, Presiding
Case No. 03-CI-0001

PROPOSED INTERVENOR-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

1. Did the Town of Wheatland have a right to intervene under Wis. Stats. §803.09(1)?

   ***Trial Court Answer*: No.**

2. Should the Town of Wheatland have been permitted to intervene under Wis. Stats. §803.09(2)?

   ***Trial Court Answer*: No.**

STATEMENT ON ORAL ARGUMENT

The Proposed Intervenor-Appellant does not request oral argument because the legal issues presented are straightforward and the facts are undisputed.

STATEMENT ON PUBLICATION

Pursuant to the criteria of Wis. Stats. § 809.23(1)(a), publication of this case is warranted. This is a case of substantial public interest as it involves the abrogration of local ordinance under the authority of the newly revised Chapter 980 of the Wisconsin Statutes. Given the recency of the changes to Chapter 980, there are few reported cases in Wisconsin addressing the statutory requirements of Chapter 980 and what, if any role, a municipality may play in ensuring such placement complies with the Statute. Accordingly, this case presents an opportunity for the Court to clarify the law.

STATEMENT OF THE CASE

This case involves Chapter 980 of the Wisconsin Statutes and DHS' proposed placement and Supervised Release Plan of a sexually violent person. In May of 2015, the Town of Wheatland, Kenosha County, Wisconsin ("Wheatland") learned that Michael McGee ("McGee"), a Racine County resident and sexually violent person, committed under Chapter 980 of the Wisconsin Statutes, was to be released and placed at 32200 Geneva Road, Wheatland ("Subject Property"). (R.53 at 1.) Wheatland reviewed the proposed Supervised Release Plan and had significant concerns that DHS did not follow statutory requirements for the placement. (R.35 at 2-3; A-App. at 101-104.)

Wheatland asserted that if placement was not compliant with Wis. Stats. §980.08, that Wheatland's Ordinance, restricting where Sex Offenders could reside ("Ordinance"), could not be abrogated. (R.35 at 3-4: A-App. at 101-108.) Wheatland had duly adopted its Ordinance on March 8, 2010. (R.35 at 5-8: A-App[1]. at 105-108.)

Wheatland, in seeking to insure that the procedures, mandates and spirit of Chapter 980 were followed, filed its Petition to Intervene on May 11, 2016. (R.35: A-App. at 101.) The affidavits of Town of

[1] Appendix of Intervenor-Appellant ("A-App"), filed herewith

Wheatland Constable, Robert Santelli, and Mark Smith-Rogers, who resides adjacent to the Subject Property with his one-year-old son, supported that Petition. (R.34; R.37: A-App. at 109-112.) On May 12, 2016, Kenosha County filed its Motion to Intervene and the circuit court set both Motions for hearing on May 18, 2016. (R.33; R.38.) On May 18, 2016, the circuit court denied Wheatland's request for intervention but allowed Kenosha County to intervene and set the matter for an evidentiary hearing on May 24, 2016. (R.81, p. 33 line 5-p. 37 line 25, A-App. at 148 line 5-A-App. at 152 line 25.)

On May 24, 2016, the circuit court entered a written order denying Wheatland's intervention, finding that Chapter 980 did not state a specific interest attributable to Wheatland and therefore Wheatland would not be allowed to intervene. (R.58 at 1; A-App. at 156.)

The circuit court held the evidentiary hearing and, by written decision of May 24, 2016, approved McGee's placement in Wheatland. (R.57.) Wheatland filed its Notice of Appeal on May 25, 2016 and moved the circuit court to Stay the Placement pending appeal on May 26, 2016. (R.60; 61.) The circuit court denied that Motion by written Order signed on May 26, 2016. (R.65.)

STATEMENT OF FACTS

Michael McGee is a Racine County Resident. (R.1.) Michael McGee ("McGee") was convicted of Second Degree Sexual Assault, in Racine County circuit court, under case number 87-CF-436. (R1; R.31; R.82 at 48.) He broke into an adult female stranger's residence, threatened and raped her. (R.82 at 58; R.53.) McGee then violated his parole by sexually fondling a ten-year-old male. *Id.*

Specifically, McGee's parole was revoked because, "while intoxicated and under the influence of drugs, [McGee] fondled a 10-year-old male related to him." (R.53, R.82 at 58.) His targeted victims were described as "[a]dult females; prepubescent males." (R.53, R. 82 at 58.) McGee was further subject to a Civil Commitment proceeding, under Racine County Case Number 03CL001, whereby he was found to be a Sexually Violent Person as defined under Wisconsin Statutes § 980. (R1.)

In November 2013, McGee petitioned for discharge. (R3.) In March of 2015, the State and McGee eventually reached a stipulation. (R.74.) McGee withdrew his petition for discharge and agreed to have six months of counseling at Sand Ridge Treatment Facility. *Id.* He then agreed to be discharged on Supervised Release. *Id.*

The State and McGee had a status conference on June 22, 2015. (R.76.) During this time, McGee's counsel informed the court that

there was no housing available in Racine County. *Id.* McGee's counsel stated there was housing available in Kenosha and asked the court to allow DHS to look at Kenosha County for placement. (*Id.*: R.19.) When Judge Torhorst questioned the appropriateness of placing in other counties, District Attorney Chiapete explained it was necessary "because of the ordinances that a number of the counties have." (R.76 at 4.) Judge Torhorst signed the order giving DHS authority to look for housing in both Kenosha County and Racine County. (R.19.)

At a status conference held on October 5, 2015 District Attorney Chiapete stated the State needed more time to find a placement. McGee's attorney stated there were "issues right now with finding placements as a result of these local zoning ordinances." (R.77 at 2.)

On January 14, 2016, Judge Torhorst ordered the Racine County Department under Wis. Stat. §51.42 to prepare a report identifying potential residential options for community placement of McGee and to forward this report to DHS. (R.27.) Racine County and DHS proposed a residence in Kenosha County. Specifically, DHS proposed to place McGee at 32200 Geneva Road, Wheatland, Wisconsin, located in Kenosha County (hereinafter referred to as the "Subject Property.") (R.31.)

The Subject Property is within 1,500 feet of a County Bike Trail. (R.34, A-App. at 109-110; R.82 at 22-23.) The Bike Trail and the area

surrounding it are also frequented by children. (R.34, A-App. at 109-110; R.37, A-App. at 111-112; R.82 at 23.) There is also a fishing area near the Subject Property, which is frequented by families. (R.34, A-App. at 109-110; R.82 at 22-23.)

The Subject Property is also directly adjacent to the residence of Mark Smith-Rodgers. (R.37, A-App. at 111-112; R.82 at 81.) Mark Smith-Rodgers has a one-year-old male child that resides with him at the residence. (R.37, A-App. at 111-112; R.82 at 82.) There are no physical barriers between his home and the Subject Property. (R.37 at 1, A-App. at 111.) There are also children ranging from age eight (8) to fifteen (15) staying at his home on a regular basis. (R.37; A. App. at 111-112; R.82 at 82.)

On April 22, 2016, after the law changed, Ms. Angie Serwa from DHS, sent correspondence to Judge Torhorst, along with a copy of the Supervised Release Plan. (R31; R.52.) In this correspondence, DHS specifically asked the court to revisit the issue of good cause and stated the following:

> Given the new requirements under Act 156, which include a narrower definition of 'good cause' for out of county placements, the DHS respectfully requests the Court to determine whether the Court's previous order for a statewide search is still valid. If the Court maintains the order for a statewide search, the DHS has attached an SR plan and rules to this letter proposing the residence in Kenosha County for Mr. McGee.

Id.

Despite this request and the statements regarding the change in the law, Judge Torhorst failed to revisit the issue of "good cause." There is no evidence in the record that any type of hearing was conducted after DHS sent this request or that any additional evidence was collected. To the contrary, Judge Torhorst stated "that there does not have to be another good cause hearing simply based on the enactment of the Act." (R.75 at 15.)

The Supervised Release Plan filed with the court was originally prepared for a different sex offender that was scheduled to move into the Subject Property. It did not state that a one-year-old male child lived in the residence right next door to the Subject Property. (R.31; R.52; R.82 at 59.) Moreover, the Supervised Release Plan did not state that the April 1, 2016 report was for a different sex offender. (R.31; R.52.) In the Supervised Release Plan, DHS did not mention or refer to the County Bike Path, which was located near the residence or the fishing area. (R.31; R.52.) Relying on the Supervised Release Plan, Judge Torhorst signed the Order for Supervised Release on May 4, 2016. (R.32.)

Wheatland was subsequently notified that McGee, a Racine County resident and registered sex offender under Chapter 980 of the Wisconsin Statutes, was scheduled to be released and placed in its Township. (R.35 at 1-2, A-App. at 101-102.) Along with the Town of

Wheatland, Kenosha County filed a motion to intervene in the Racine County action, requested the circuit court rescind approval of the Supervised Release Plan and halt placement of McGee at the Subject Property. (R.35, A-App. at 101-104.) On May 18, 2016 the circuit court denied Wheatland's Petition to Intervene but granted Kenosha County's intervention and scheduled an evidentiary hearing on May 24, 2016. (R.81 at 37-38, A-App. at 153-154.)

Following the evidentiary hearing, Judge Torhorst issued a written decision denying Kenosha County's motion to stay placement and ordered McGee placed within ten (10) days of the date of the decision, which was June 3, 2016. (R.57.) Kenosha County subsequently obtained an Order (under 2016AP1082) from this Court to Stay Placement pending Appeal.

STANDARD OF REVIEW

This Court is presented with two questions pertaining to Wheatland's intervention under Wis. Stats. §803.09(1) and (2). First, Wis. Stats. §803.09(1) is intervention as a matter of right and its review requires statutory interpretation and the application of a statute to specific facts and are questions of law that are reviewed *de novo*. *See State v. Stenklyfit*, 2005 WI 71, ¶ 7, 281 Wis. 2d 484, 697 N.W.2d 769, *see also Marotz v. Hallman*, 2007 WI 89, 302 Wis. 2d 428, 734 N.W.2d 411.

Second, Wis.Stats. §803.09(2) is Wisconsin's permissive intervention statute and its application is a mixed question of fact and law. This Court reviews, *de novo*, whether the legal requirements of the statute are met and reviews the discretionary decision denying intervention for *abuse of discretion.* *Helgeland v. Wisconsin Municipalities*, 296 Wis.2d 880, 918-19, 724 N.W.2d 208 (Ct. App. 2006)(citing to *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992)(cert. denied, 506 U.S. 868, 113 S.Ct. 197, 121 L.Ed.2d 140 (1992)).

ARGUMENT

I. WHEATLAND MET ITS BURDEN UNDER WIS. STATS. §803.09(1) AND HAD A RIGHT TO INTERVENE IN THIS ACTION.

A party may intervene in an action when the moving party's interest relating to the transaction subject to that action is situated so that the disposition of the action is impeded unless the movant's interest is adequately represented. Wis. Stats. §803.09(1). Specifically, a movant has a right to intervene:

> Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that he disposition of the action may as a practical matter impair or impeded the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

Id.

Courts have long held "that motions to intervene must be evaluated 'with an eye toward disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *M & I Marshall & Ilsley Bank v. Urquhart Companies*, 287 Wis. 2d 623, 2005 WI App 225, ¶7, 706 N.W.2d 335, 339 (Ct. App. 2005)(citations omitted).

To prevail on a motion to intervene, as of right, a movant must meet four elements. *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983). Those elements are: (1) timely application for intervention; (2) that the movant claims an interest "relating to the property or transaction which is the subject of the action"; (3) that the disposition of the action may, as a practical matter, impair or impede the proposed intervener's ability to protect that interest; and, (4) the movant's interest will not be adequately represented by the existing parties to the action. *Id.*

Here, under the first prong, there is no dispute that Wheatland's application for intervention was timely. The application was made within seven days of learning of the circuit court's Order for Supervised Release to the Subject Property. (R.32; R.35.)

Wheatland also meets its burden under the second and third prongs respectively. Under these prongs, a proposed intervenor has an interest relating to the transaction where the intervenor will "**gain or**

lose by direct operation of the judgment." *Lodge 78 Intl. Ass'n of Machinists, AFL-CIO v. Nickel*, 20 Wis.2d 42, 46, 121 N.W.2d 297 (1963)(emphasis added). Here, Wheatland stood to lose the protection of its Ordinance if this placement were ordered and if it was compliant with Chapter 980. Wheatland certainly has an "interest in the transaction" as the transaction may result in its Ordinance being abrogated.

Additionally, an intervenor has an "interest relating to a transaction" where it has statutory authority to take action. *See Bilder* at 546-47. In *Bilder*, the Wisconsin Supreme Court upheld intervention by a newspaper in a police chief's lawsuit against his Town Board. *Id.* The newspaper sought to intervene so it could use its statutory authority, under Wis. Stats. §59.14, to access sealed court documents. *Id.* The Wisconsin Supreme Court found that the statutory right provided to the newspaper was sufficiently related to the transaction to allow its intervention. *Id.*

Wheatland, as a town under Wis. Stats. §60.10(2)(c), has adopted the powers laid forth in Wis. Stats. §61.34(1) which enables it the power to create and enforce ordinances. *Id.* The nexus here is even more closely related than in *Bilder*, as Wheatland has adopted a Sexual Offender Ordinance that this very action seeks to abrogate. Wis. Stats. §980.135 limits *Local Restrictions*, and can abrogate a local Ordinance

if the person "is released under §980.08." *Id.* It follows logically, that if Wis. Stats. §980.08 has not been complied with, such abrogation cannot be permitted and the local ordinance remains.

Lastly, the Wisconsin Legislature has required DHS to provide notice to any law enforcement agency where a sex offender, released under Chapter 980, will reside. Wis. Stats. §301.46(2m)(am). The Town of Wheatland's Constable, as the Town Law Enforcement Agency, received the required notice via a Release Bulletin. (R.53, A-App at 113-115.) To assert that notice is required, yet those receiving that statutorily required notice cannot intervene or partake in a contest relating to the placement is faulty. The statute requiring notice confirms an interest by the municipality.

As to the fourth and final prong, Wheatland's interest would not and could not be adequately represented by the existing parties. A municipality may not delegate its authority to enforce an ordinance to another person or entity. *See e.g. Hagerty v. Village of Bruce*, 82 Wis.2d 208, 218, 262 N.W.2d 102 (1978). While both the State of Wisconsin (via the Racine County District Attorney's Office) and Kenosha County have an interest in the public safety component of placement, neither faces having a statute or ordinance abrogated by placement under Chapter 980. The only reference in Chapter 980 to any local ordinances goes directly to a municipal or local ordinance.

See Wis. Stats. §980.135. **Only Wheatland stands in a position to enforce duly enacted legislation if the placement at issue does not comply with Chapter 980. Likewise, if a court determines the placement to be compliant, Wheatland loses the protection of its ordinance.** (emphasis added). Wheatland not only meets, but also exceeds the burden under the above four-prong test. Wheatland is entitled to intervene as a matter of right.

II. THE CIRCUIT COURT FAILED TO EXERCISE DISCRETION IN DENYING WHEATLAND'S PERMISSIVE INTERVENTION.

A movant may intervene in an action "when a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. §803.09(2). Permissive intervention merely requires an entity to be a proper party. *City of Madison v. WERC*, 234 Wis.2d 550, 610 N.W.2d 94, 2000 WI 39 at ¶ 11 n. 11. It is in the trial court's discretion to decide whether a party may permissively intervene. *Id.* That said, it is an abuse of discretion where a trial court relies upon an erroneous view of the law. *Timm v. Portage County Drainage Dist.*, 145 Wis.2d 743, 753, 429 N.W.2d 512 (Ct. App. 1998)(citing to *Barstad v. Frazier*, 118 Wis.2d 549, 554, 348 N.W.2d 479, 482 (1984)). Lastly, a failure to exercise any discretion constitutes an abuse of discretion. *Groh v. Groh*, 110 Wis.2d 117, 128, 327 N.W.2d 655 (1983).

Here, Wheatland should have been permitted to permissively intervene as its Ordinance (claim and defense) can only be abrogated or stand if the placement complies with or violates Chapter 980. The question of whether or not the placement complies with the statute is central to enforcement or abrogation of Wheatland's Ordinance. could only be abrogated if DHS followed the requirements of Chapter 980. This blending of facts and law are precisely the commonality required under the permissive Intervention statute. Allowing Wheatland to appear and challenge the facts in support of the placement will lead to a result under the law that either the placement complies with Chapter 980 and can abrogate Wheatland's Ordinance or it does not and the Ordinance stands.

A. The circuit court denied Wheatland's intervention based upon an erroneous view of the law.

Permissive intervention derives from Wis. Stats. §803.09(2). Here, the circuit court looked solely to Chapter 980 for Wheatland's stated interest to intervene. (R.58 at 1, A-App. at 156-157.) Specifically, in response to the May 18, 2016 hearing on Wheatland's Petition to Intervene, the court found and ordered as follows:

1. That the Town of Wheatland does not have and interest as stated within Wis. Stats. §980.

2. That based upon a lack of stated interest, within Wis. Stats. §980, the Town of Wheatland is not permitted to intervene pursuant to Wis. Stats. §803.09.

(R.58 at 1, A-App. at 156-157.)

The finding of the circuit court relies, erroneously, upon some "stated interest" under Chapter 980. Permissive intervention does not come from a "stated interest" under Chapter 980, but rather merely requires an entity to be a proper party to an action. *See City of Madison, supra.* The circuit court incorrectly relied upon the language of Chapter 980 to find no basis for Wheatland's intervention. This focus was not very narrow, but an erroneous view of the law.

B. <u>The circuit court failed to exercise any discretion in denying Wheatland's intervention</u>.

The circuit court failed to exercise any discretion in denying Wheatland's intervention. Failing to excerise any discretion is an abuse of discretion. *See Groh, supra.* Nothing within the court record evidences any consideration of the factors under Wisconsin's permissive intervenion statute, Wis. Stats. §803.09(2). Rather, the court focused erroneously on a "lack of stated interest" in Chapter 980 (see above) and simply ruled:

> THE COURT: "My conclusion is Wheatland is out. Kenosha County is in. I think that's really where the law drops..."

(R.81 p. 33 lines 5-7; A-App. at 149, lines 5-7.)

The court failed to make any findings in support of this decision. Additionally, the record is devoid of facts which would support such a discretionary finding. Rather, the court started and ended its review within the "four corners" of Chapter 980 in looking for some basis for Wheatland to intervene. This was not only an error of law, but a failure to exercise any discretion.

CONCLUSION

The Town of Wheatland was entitled, as a matter of right, to intervene in this action. The circuit court erred as a matter of law and in failing to exercise its discretion in permitting Wheatland's intervention. The circuit court's decision should be overturned and the matter remanded so Wheatland may be fully heard.

Dated this 7th day of September 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,244 words.

Dated this 7th day of September 2016.

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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 § 809.19(12). 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 7th day of September 2016.

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CERTIFICATION OF SERVICE

I hereby certify that on September 7, 2016 this Brief was delivered to a third-party commercial printer for hand delivery of ten copies of this Brief, including the original, to the Clerk of Court of Appeals at the following address:

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