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 REPLY BRIEF

Todd A. Terry
State Bar No. 1047175
Hotvedt & Terry LLC
4015 80th Street, Suite H
Kenosha, WI 53142
(262) 842-2338
todd@handtlaw.com
Attorneys for Proposed Intervenor-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Wisconsin Cases

Wisconsin Statutes

Page(s)

ARGUMENT

I. MCGEE'S BRIEF SHOWS A MATERIAL MISUNDERSTANDING OF THE HOLISTIC, FLEXIBLE AND HIGHLY FACT SPECIFIC STANDARDS THAT ALLOW WHEATLAND TO INTERVENE HERE.

Respondent McGee seeks to read Wisconsin's Intervention Statute too narrowly. Rather, when analyzing intervention, Wisconsin court's take a "holistic, flexible and highly fact specific analysis." *Helgeland v. Wisconsin Municipalities*, 307 Wis.2d 1, 22, 754 N.W.2d 1 (2008). Additionally, while McGee seeks to require specific and articulable elements under each of the four statutory criteria (Respondent's Brief at p. 3), the standard is less stringent. Rather, each criterion is to be analyzed together and "a movant's strong showing with respect to one requirement may contribute to the movant's ability to meet other requirements as well." *Id.* at 21-22. Here, Wheatland can and does meet the standard for statutory intervention and the circuit court's denial of the same was in error.

A. When considering all of the facts and circumstances, together, Wheatland meets all four of the standards for intervention under Wis. Stats. s. 803.09(1).

1. Wheatland has a direct, unique and specific interest in the proceeding.

McGee seeks to; incorrectly, turn Wheatland's argument pertaining to abrogation of its Ordinance into a semantics lesson on statutory construction. (Respondent's Brief at 4-6). The argument fails

on two accounts. First, while McGee goes to great lengths detailing the effects of Wis. Stats. s. 980.135 on a local ordinance, it fails to recognize Wheatland's interest in this action is not in arguing the supremacy of its Ordinance over State Statute, but in ensuring the requirements of s. 980.08 have been followed. As clearly stated, and cited by McGee, s. 980.135 "provides a limited exemption from local ordinances for person on supervised release." Wis. Stat. s. 980.135. As pertinent here, the Statute provides that:

> No county, city, town or village may enforce an ordinance or resolution that restricts or prohibits a sex offender from residing at a certain location...against an individual **who is released under s. 980.08...so long as the individual is subject to supervised release under this chapter..."**

(Respondent's Brief at 4-5)(emphasis added).

Wheatland does not seek to litigate the constitutionality or supremacy of the Supervised Released Statutes. Rather, by intervention, it seeks to ensure that the Supervised Release Statutes are complied with. McGee glosses over this very significant distinction. As cited by McGee, a statute's meaning is clear by its plain language. *State v. Peters*, 263 Wis.2d 475, 481-82, 665 N.W.2d 171 (2003). Here, it is clear that Wheatland's Ordinance cannot prevent McGee's placement **if** McGee is released under s. 980.08. (emphasis added). Based upon that plain language, if s. 980.08 has not been complied with, Wheatland's Ordinance stands. As fully briefed already,

Wheatland asserted that the placement was not substantively or procedurally compliant with s. 980.08 for a number of reasons (Intervenor-Appellant's Brief p. 1-2).

While Wheatland's Ordinance would stand if the placement were not compliant with Chapter 980, the enforceability of that Ordinance may not matter for this analysis. Determining an intervenor's interest is not just search for a "legal" hook, but rather it is a "practical, nontechnical approach." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 744, 601 N.W.2d 301 (Ct. App. 1999). That "practical" approach was utilized in a case where a school district employee sought to intervene in an open records litigation and prevent the release of school district records pertaining to his employment. *Armada Broadcasting Inc. v. Stirn*, 183 Wis. 2d 463, 473, 516 N.W. 2d 357 (1994). In *Armada,* the statutory right to litigate the release of the employee's record belonged to the School District as the record custodian, not to the employee. *Id.* The Wisconsin Supreme Court found the intervenor employee's interest was sufficient not because of a specific statute or rule providing for that interest, but rather, the intervenor-employee was "able to offer reasons to the court why the record should remain closed." *Id.* at 473.

The same interest found to be sufficient in *Armada* is present here for Wheatland. Wheatland as the lowest subdivision of

government encompassing the proposed placement location, via its representatives, including its law enforcement agency, has arguments, reasons and specific knowledge to advocate in opposition to McGee's placement. Wheatland's intimate and personal interest is akin to that of the employee in *Armada*. Wheatland has and does meet the interest requirement because it can "offer reasons to the court" that it has an interest in the State complying with Chapter 980 regarding McGee's placement in its Township.

2. The disposition of the proceeding directly impairs and affects Wheatland's ability to protect its citizens and its duly adopted ordinances.

Here, the very arguments made by McGee directly support the impact and impairment on Wheatland in the disposition of this proceeding. McGee acknowledges, and Wheatland agrees, that Wheatland's Ordinance is "unenforceable against McGee, and others **released under s. 980.08**, and then only for so long as he is on supervised release and complying with the supervised release order." (Respondent's Brief p. 14) (emphasis added). The element that McGee continues to gloss over is **compliance** with s. 980.08. The same cannot be understated.

Wheatland has a direct and tangible interest in insuring that McGee's placement comports with Chapter 980, as that is the means to "exempt" McGee from Wheatland's Ordinance. On the surface,

Wheatland and Kenosha County asserted facts that, if true, could allow a court to find that McGee's placement was not compliant with Chapter 980. McGee asserts that Wheatland's interest is not "impaired in light of the standards and conditions that must be met before supervised release can occur." (Respondent's Brief p. 14). That argument **assumes that the standards and conditions are followed.** (emphasis added). In determining whether Wheatland is entitled to intervene begs the question, who is best situated to explore and verify compliance of placement in the Town of Wheatland, Kenosha County? Is that the Racine County District Attorney (the "State" as cited by McGee at p. 14-15) or the municipality (Wheatland) directly affected by the placement that must answer to its constituents? Wheatland believes the clear answer is the latter.

3. The Racine County District Attorney's Office cannot fully represent the Town of Wheatland's (in Kenosha County) interest.

While the criterion requiring a showing of "inadequate representation" is "minimal", the showing here is substantial. McGee argues that the "State", represented by the Racine County District Attorney's Office, adequately represents Wheatland's interest as the interests are identical. (Respondent's Brief p. 16). It defies logic that the Racine County District Attorney's office can adequately represent the interest of a Town not even within its jurisdictional charge. A

District Attorney is charged with carrying out his or her duties within their "prosecutorial unit." *See* Wis. Stats. s. 978.05. The Racine County District Attorney is elected by the citizens of Racine County to service its prosecutorial unit in Racine County. Wis. Stats. s. 978.05(1). There is no direct effect upon the Racine County District Attorney's Office by McGee being placed in the Town of Wheatland, Kenosha County.

The real question here comes down to who, the Racine County District Attorney or the Town of Wheatland, has a greater personal interest in the outcome of this proceeding? In *Armada,* both the School District and the employee had an interest in opposing the release of certain personnel records. *Armada,* 183 Wis. 2d 463 at 468-69. The District, much like the State in this instance, was charged by State Statute with defending the disclosure. *Id.* Even with the District's legal responsibility and having a shared interest in opposing disclosure, the Wisconsin Supreme Court still held that the employee should have been permitted to intervene. *Id.* at 477. The Court focused on the intervenor's personal stake in the outcome in comparison to the District and held that we "cannot expect the District to defend with the vehemence of **someone directly affected.**" *Id.* at 468-69. (emphasis added). Additionally, the supreme court found that the possibility that the interests of the employee and the District could diverge at some

point, weighed in favor of the employee being permitted to intervene. *See Id.* at 476.

Here, even though both Wheatland and the State have an interest in the proceeding, the greater interest most certainly belongs to Wheatland. The placement is in Wheatland and its interest in ensuring the procedures for placement have been followed certainly outweighs that of the District Attorney from an adjacent county that does not answer to the electorate of Wheatland nor Kenosha County. Additionally, the possibility that Wheatland's interest and the State's interest can diverge is present given the ability and standards, requiring "good cause" for an out-of-county placement. *See* Wis. Stats. s. 980.08(4)(cm). Logically, if not permitted to intervene, who represents the interests of that placement municipality? The District Attorney of the County that just avoided such placement?

II. WHEATLAND DID NOT FORFEIT ITS ARGUMENT FOR PERMISSIVE INTERVENTION.

McGee alleges Wheatland forfeited its argument on appeal for permissive intervention under s. 803.09(2) simply because Wheatland did not write "(2)" in its Petition to Intervene or state specific language during the Motion hearing. (Respondent's Brief at 18-22). McGee's argument fails for lack of merit.

Wisconsin caselaw is devoid of any requirement to specifically cite s. 803.09(2) in a written motion or use magic language at a hearing to allow a court to use its permissive intervention authority granted by the Legislature under s. 803.09. In fact, the Wisconsin Supreme Court has articulated that a party does not have to specifically state or refer to "s. 803.09(2)" for a court to consider permissive intervention. *See, e.g., City of Madison v. Wisconsin Employment Relations Comm'n*, 2000 WI 39, 234 Wis. 2d 550, 610 N.W. 2d 94. In *City of Madison,* the Board of Police and Fire Commissioners of the City of Madison ("PFC") moved the court of appeals to intervene under s. 809.13. *Id.* at ¶5. The supreme court reviewed the text of s. 809.13 and found that that section referred to s. 803.09(1) and (2). It held that a non-party may intervene in an action under s. 809.13, "as long as the non-party meets the requirements of the general intervention statute, Wis. Stat. § (Rule) 803.09" because s. 803.09 is referenced in s. 809.13.[1] *Id.* at ¶8. The supreme court remanded to the court of appeals to consider the PFC's motion under s. 803.09 generally (both (1) and (2)).

Here, unlike the PFC in *City of Madison,* it is undisputed that the Town of Wheatland directly and specifically referenced the "general

---

[1] Note that the supreme court did not differentiate subsections of s. 803.09, the "general intervention statute." The reference to the general intervention statute is a reference to the whole, not parts of the whole, for the court to consider.

intervention statute" of s. 803.09 in its Petition to Intervene. (A-App. 101, Petitioner's Brief 19). That direct reference requires the court to consider intervention under subs. (1) or (2). To find any other way would be nonsensical. A court must consider subs. (1) and (2) for an intervention motion under s. 809.13 simply because there is a reference to s. 803.09(1) and (2) in that section. *See, City of Madison, supra.* It follows, then, that a court must consider subs. (1) and (2) for an intervention motion under s. 803.09 because there is a plain reference to subsections when referencing the superior section. Thus, Wheatland preserved its appeal argument for permissive intervention by referencing s. 803.09 in its Petition to Intervene, whereby requesting the circuit court for intervention under both subs. (1) and (2). This Court must consider Wheatland's appeal argument for permissive intervention because Wheatland duly preserved its rights.

CONCLUSION

For the reasons stated above, Wheatland was entitled, as a matter of right under s. 803.09(1), to intervene in this action and was further entitled to a good-faith discretionary review by the circuit court under s. 803.09(2). 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 reversed and the matter remanded so Wheatland may be fully heard.

Dated this 7th day of November 2016.

HOTVEDT & TERRY LLC
Attorneys for Intervenor-Appellant Town of Wheatland.

By: _____
Todd A. Terry
State Bar No. 1047175

P.O. ADDRESS:
4015 80th St., Suite H
Kenosha, WI 53142
262-842-2338

Todd@handtlaw.com

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 2,002 words.

Dated this 7th day of November 2016.

HOTVEDT & TERRY LLC
Attorneys for Intervenor-Appellant Town of Wheatland.

By: _____
Todd A. Terry
State Bar No. 1047175

P.O. ADDRESS:
4015 80th St., Suite H
Kenosha, WI 53142
262-842-2338

Todd@handtlaw.com

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 November 2016.

HOTVEDT & TERRY LLC
Attorneys for Intervenor-Appellant Town of Wheatland.

By:_____
Todd A. Terry
State Bar No. 1047175

P.O. ADDRESS:
4015 80th St., Suite H
Kenosha, WI 53142
262-842-2338

Todd@handtlaw.com

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:

Ms. Diane M. Fremgen, Clerk
Wisconsin Court of Appeals
110 E. Main Street, Suite 215
Madison, WI 53701-1688

I further certify that on September 7, 2016 this Brief was delivered to a third-party commercial printer/courier for delivery of three copies of this Brief via United States Postal Service, first-class postage prepaid, to each of the following addresses:

Mr. Richard W. Chiapete
Racine County District Attorney
Racine County Courthouse
730 Wisconsin Avenue, 9th Floor
Racine, WI 53403

Mr. Peter Rank
Wisconsin Department of Justice
17 W. Main Street
P. O. Box 7857
Madison, WI 53707-7857

Attorney Jefren E. Olsen
State Public Defenders Office
Appellate Division
17 S. Fairchild Street, Floor 3
P. O. Box 7862
Madison, WI 53707-7862

Attorney Jennifer J. Kopp
Kenosha County Corporation Counsel
912 56th Street, Lower Level 13
Kenosha, WI 53140-3736

Dated this 7th day of November 2016.

HOTVEDT & TERRY LLC
Attorneys for Intervenor-Appellant Town of Wheatland.

By:_____
Todd A. Terry
State Bar No. 1047175

P.O. ADDRESS:
4015 80th St., Suite H
Kenosha, WI 53142
262-842-2338
Todd@handtlaw.com