

RECEIVED

05-06-2019

**CLERK OF SUPREME COURT
OF WISCONSIN**

Appeal No. 19-AP-559

SUPREME COURT OF WISCONSIN

League of Women Voters of Wisconsin, Disability Rights Wisconsin, Inc.,
Black Leaders Organizing for Communities, Guillermo Aceves, Michael J.
Cain, John S. Greene and Michael Doyle,

Plaintiffs-Respondents,

v.

Tony Evers,

Defendant-Respondent,

Wisconsin Legislature,

Intervening Defendant-Appellant.

**ON APPEAL FROM THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE RICHARD G. NIESS PRESIDING,
DANE COUNTY CASE NO. 2019-CV-000084**

**NON-PARTY BRIEF OF WISCONSIN DEMOCRACY CAMPAIGN
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES**

Jeanne M. Armstrong
State Bar No. 1103693
Christopher J. Dodge
State Bar No. 1011530
Attorneys for Wisconsin
Democracy Campaign

Fuhrman & Dodge, S.C.
2501 Parmenter Street, Suite 200B
Middleton, WI 53562

TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES..... | iii |
| INTEREST OF <i>AMICUS CURIAE</i> | 1 |
| INTRODUCTION..... | 1 |
| ARGUMENT..... | 3 |
| I. THE LEGISLATURE’S INSISTENCE THAT IT MEETS IN “CONTINUOUS SESSION” LEADS TO ABSURD RESULTS THAT RENDER NUMEROUS STATUTES MEANINGLESS..... | 3 |
| A. If the Legislature’s Claim That It Meets in “Continuous Session” Were Correct, a Lobbyist Count <u>Never</u> Make Campaign Contributions and a Legislator Could <u>Never</u> Accept Campaign Contributions from a Lobbyist..... | 4 |
| B. If the Legislature were in “Continuous Session,” Legislators Could Evade the Jurisdiction of the Court Until Their Retirement..... | 7 |
| C. If a Continuous Session Existed, Legislators Would Be Entitled to <i>Per Diem</i> Reimbursement 365 Days of the Year..... | 10 |
| CONCLUSION..... | 12 |
| CERTIFICATION OF COUNSEL..... | 14 |
| CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)..... | 15 |

TABLE OF AUTHORITIES

Cases

| | |
|--|----|
| <i>Belding v. Demoulin</i> , 2014 WI 8, 352 Wis. 2d 359, 843 N.W.2d 373..... | 7 |
| <i>Bostco LLC v. Milwaukee Metro. Sewerage Dist.</i> , 2013 WI 78, 350 Wis. 2d 554, 835 N.W.2d 160..... | 7 |
| <i>Kieninger v. Crown Equip. Corp.</i> , 2019 WI 27, 386 Wis. 2d 1, 924 N.W.2d 172..... | 4 |
| <i>Mireles v. LIRC</i> , 2000 WI 96, 237 Wis. 2d 69, 613 N.W.2d 875..... | 11 |
| <i>Pure Milk Prods. Coop. v. Nat’l Farmers Org.</i> , 64 Wis. 2d 241, 219 N.W.2d 564 (1974)..... | 11 |

Statutes

| | |
|--|---------------|
| Wis. Const. art. IV, § 11..... | 1, 2, 4, 5, 9 |
| Wis. Const. art. IV, § 15..... | 7, 8, 9 |
| 2017 Wis. Act 369, §§ 7, 8, 98, 99, 101..... | 9, 10 |
| Wis. Stat. § 13.02..... | 2, 4 |
| Wis. Stat. § 13.123..... | 10, 11, 12 |
| Wis. Stat. § 13.625(1m)(b)..... | 4, 5, 6 |
| Wis. Stat. § 757.13..... | 7, 8 |

INTEREST OF *AMICUS CURIAE*

Issues relating to whether the Legislature acts in compliance with the Wisconsin Constitution are at the heart of the Wisconsin Democracy Campaign's mission to promote a clean and open government and a full democracy. One of the principal activities of the Wisconsin Democracy Campaign is to track campaign donations, including donations made to legislators by lobbyists. *See* Section I.A, *infra*.

Because the Wisconsin Democracy Campaign has a strong interest in ensuring that the Constitution and the laws of Wisconsin are properly construed and followed, and because acceptance of the Legislature's argument would ensure that neither the Constitution nor the laws of Wisconsin could be properly construed and followed, the Wisconsin Democracy Campaign respectfully submits this *amicus curiae* brief to this Court.

INTRODUCTION

The Wisconsin Constitution controls when the Wisconsin Legislature may meet. With the exception of special sessions convened by the Governor, the Legislature has authority to "meet" only at "such time as shall be provided by law." Wis. Const. art. IV, § 11. The circuit court correctly held

that “provided by law” means “provided by duly-enacted statute.” (R. 90 at 2.)

The only statute implementing Article IV, Section 11 is Wis. Stat. § 13.02, titled “Regular session.” The opening words of the statute are: “The legislature shall meet annually.” Subsection (1) instructs as to when the Legislature “shall convene” to “organize itself for the conduct of its business.” Subsection (2) sets forth the time when the “regular session” shall commence “in each year unless otherwise provided under sub. (3).” Subsection (3) directs the joint committee on legislative organization to “meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year.” Finally, subsection (4) provides that “[a]ny measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year.” Nowhere does Wis. Stat. § 13.02 provide “by law” for the Legislature to meet in extraordinary session.

Before this Court is the question of whether the Legislature violated Article IV, Section 11 when it convened the December 2018 Extraordinary

Session. (Br. at 1.¹) The circuit court agreed with the Plaintiffs-Appellees that it did. (R. 90 at 7.) The Legislature insists that there is but one continuous biennial session of the Legislature. (*See, e.g.*, Leg. Br. at 4.²) The Legislature’s argument cannot be true because it would negate constitutional provisions and contravene existing statutes, stripping them of any meaning.

ARGUMENT

I. THE LEGISLATURE’S INSISTENCE THAT IT MEETS IN “CONTINUOUS SESSION” LEADS TO ABSURD RESULTS THAT RENDER NUMEROUS STATUTES MEANINGLESS.

The Legislature claims that it “meet[s] continuously throughout the biennial session period, with final adjournment occurring only immediately before the next biennial session begins.” (Leg. Br. at 4.) The Legislature further argues that “the 2017-18 Legislature unquestionably met in January 2017 and did not stop meeting until January 2019.” (*Id.* at 18.) The Legislature’s argument does not hold water. The Legislature’s claim that it meets continuously is baseless and yields absurd results that render existing law meaningless. The circuit court correctly held:

¹ “Br. at ____.” refers to pages in Plaintiffs-Appellees’ brief filed on April 30, 2019.

² “Leg. Br. at ____” refers to pages in the Legislature’s opening merits brief filed on April 10, 2019.

The bottom line in this case is that the Legislature did not lawfully meet during its December 2018 “Extraordinary Session,” which therefore proceeded in violation of both Article IV, Section 11 of the Wisconsin Constitution and its sole implementing statute § 13.02, Stats. The former constrains the Legislature from meeting except in two circumstances: (1) “at such time as shall be provided by law,” i.e., by statute, (2) “unless convened by the governor in special session.”

Neither circumstance occurred with the December 2018 “Extraordinary Session.” For whatever reason, Governor Walker did not exercise his constitutional authority to call a special session. And Section 13.02 does not set any “time” for an extraordinary session, as required by Article IV, Section 11. Indeed, nothing in § 13.02, Stats., authorizes the Legislature to self-convene and meet, as it did last December, upon mere committee vote months after final adjournment of its 2018 regular session.

(R. 90 at 7.)

This Court has a responsibility “to ascertain and apply the plain meaning of the statutes as adopted by the legislature.” *Kieninger v. Crown Equip. Corp.*, 2019 WI 27, ¶14, 386 Wis. 2d 1, 924 N.W.2d 172. Here, however, as demonstrated below, the plain meaning of the statutes cannot be applied under the Legislature’s “continuous session” erroneous interpretation of the Constitution or Wis. Stat. § 13.02.

A. If the Legislature’s Claim That It Meets in “Continuous Session” Were Correct, a Lobbyist Could Never Make Campaign Contributions and a Legislator Could Never Accept Campaign Contributions from a Lobbyist.

Section 13.625(1m)(b) of the Wisconsin Statutes restricts lobbyists from making financial contributions to legislators until the Legislature is no longer in session. Section 13.625(1m)(b) states, in relevant part:

A lobbyist may make a personal contribution to a partisan elective state official or candidate for partisan elective state office or to the candidate committee of the official or candidate between the first day authorized by law for the circulation of nomination papers as a candidate at a general election or special election and the day of the day of the general election or special elections, except that:

1. A contribution to a candidate for legislative office may be made during that period only if the legislature has concluded its final floorperiod, and is not in special or extraordinary session.

The text is clear. Lobbyists may not contribute to campaigns for current legislators or to campaigns for candidates for Assembly or Senate while the Legislature is in session. Instead, a lobbyist may make a personal contribution to a legislator or a legislative candidate only after the Legislature has concluded its final floorperiod and is not in special or extraordinary session.³ The Legislature's claim that the Legislature is in continuous session would render Wis. Stat. § 13.625(1m)(b)1 meaningless.

If it were true that the Legislature meets in continuous session, a lobbyist could never make a campaign contribution because there would never be a period during which the Legislature "has concluded its final

³ The Legislature argues that the December 2018 Extraordinary Session was simply a non-prescheduled floorperiod occurring during the regular session. (Leg. Br. at 35-37.)

The Legislature further argues that statutory references to "extraordinary sessions" somehow render extraordinary sessions legitimate. (Leg. Br. pp. 36-37.) However, the mere mention of extraordinary sessions cannot, and do not, authorize the legislature to convene "by law" in extraordinary session as required by Article IV, Section 11.

floorperiod” since adjournment occurs “immediately before the next biennial session begins.” (Leg. Br. at 4.) It would follow that any contribution to a legislator or a candidate for legislative office ever made by a lobbyist is made in violation of Wis. Stat. § 13.625(1m)(b). The Legislature cannot have it both ways. It cannot meet in continuous session and lawfully accept lobbyists’ campaign contributions. To find otherwise would render the language of Wis. Stat. § 13.625(1m)(b) meaningless.

The Legislature’s theory thus requires a finding that legislators and candidates for legislative office violate the law each time they accept campaign contributions from lobbyists. On this basis, current members of the Legislature have violated the law.⁴ If true, the Legislature’s own argument could lead to the mass indictment of legislators for violations of Wis. Stat. § 13.625(1m)(b).⁵ Not only does the Legislature’s assertion lead to absurd results, it renders Wis. Stat. § 13.625(1m)(b) meaningless. Statutes

⁴ See https://www.wisdc.org/index.php?option=com_wdcfinancedatabase&view=searchadvanced&active_search=1&ic_date_start=06%2F01%2F2018&ic_date_end=12%2F31%2F2019&ic_name=&cand_last_name=&ic_employer=&ic_interest=&ic_city=&ic_state=&ic_zip=&ic_amount_start=0&ic_amount_end=0&limit=100&filter_order=ic.contribution_date&filter_order_Dir=DESC&custom_page=1 (last visited on May 3, 2019).

⁵ These same legislators, however, would be immunized from court proceedings *in perpetuum*, see Section B., *infra*, yielding yet another absurd result.

should be interpreted in such a way that no provision is rendered meaningless. *See, e.g., Belding v. Demoulin*, 2014 WI 8, ¶¶ 33-34, 352 Wis. 2d 359, 374, 843 N.W.2d 373. *See also Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 217, 350 Wis. 2d 554, 664, 835 N.W.2d 160 (“We are required to read statutes so that no part is rendered meaningless or superfluous and so that the statute is not rendered unreasonable or absurd”).

B. If the Legislature were in “Continuous Session,” Legislators Could Evade the Jurisdiction of the Court Until Their Retirement.

If the Legislature were in “continuous session,” the result would be that Wis. Stat. § 757.13 and Article IV, § 15 of the Constitution, which limit the courts’ jurisdiction over members of the Legislature while they are in session, would be rendered virtually meaningless. Legislators could evade trial and avoid participation in court proceedings for decades, or perhaps even permanently.⁶ The wrongheadedness of the Legislature’s contention that it “meets continuously” is demonstrated by its inability to coexist with Wis. Stat. § 757.13 and Article IV, § 15 of the Constitution.

⁶ To illustrate, a current member of the Legislature has served continuously for more than six decades and, under the Legislature’s theory, could avoid prosecution or court proceedings for the duration of that service.

Under section 757.13, Stats., “[w]hen a witness, party or an attorney for any party to any action or proceeding in any court or any commission, is a member of the Wisconsin legislature, in session, that fact is sufficient cause for the adjournment or continuance of the action or proceeding, and the adjournment or continuance shall be granted without the imposition of terms.” (Emphasis added.) If the Legislature is in continuous session, there would be “sufficient cause for the adjournment or continuance of [any] action or proceeding” to which the Legislator is a witness, party, or any attorney for a party and would render Wis. Stat. § 757.13 mere surplusage. Certainly, it cannot be true that legislators are immune from participation in court proceedings for years, or even decades. No person—not even a member of the Legislature—is above the law.

The language of Article IV, § 15 of the Wisconsin Constitution is similarly meaningless if the Legislature’s assertion that it is in “continuous session” is applied. Article IV, Section 15 provides: “Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.” (Emphasis

added.) But the Legislature contends that “final adjournment occur[s] only immediately before the next biennial session begins.” (Leg. Br. at 4.) (Emphasis added.) If the Legislature meets in continuous session, Article IV, Section 11 is rendered not only superfluous but nonsensical: there would be no fifteen-day period before the commencement of a session or after the termination of a session and, more importantly, there would be no period during which a legislator would be subject to process.

Accordingly, every single legislator would be immune to civil process for the length of their term of office. Wis. Const. art. IV, § 15. This is absurd.

Additionally, if the Legislature sincerely believed that it meets in continuous session, it would not have adopted 2017 Act 369 in the December 2018 Extraordinary Session, which requires service on various members and committees of the Legislature in certain judicial proceedings which, in turn, authorizes the Legislature’s intervention in those proceedings. *See* 2017 Wis. Act 369, §§ 7, 8, 98, 99, 101. The Legislature received notice of the instant lawsuit by service of process (R.43, 44, 45), which led to its intervention. The Legislature’s position in this lawsuit, if credited, renders compliance with this new law impossible. It would truly be perverse to believe that the

Legislature adopted this law with the very intention of imposing a service requirement that cannot be met. Accordingly, the only logical conclusion is that the words the Legislature adopted as a part of 2017 Wis. Act 369, Section 7, 8, 98, 99, and 101 have meaning, and their meaning requires that the Legislature's theory of a continuous session be rejected.

The Legislature's assertion of a "continuous session" in light of a contradictory law it adopted mere months ago defies common sense and, as a result, must fail.

C. If a Continuous Session Existed, Legislators Would Be Entitled to *Per Diem* Reimbursement 365 Days of the Year.

Section 13.123 of the Wisconsin Statutes sets forth, *inter alia*, the extent to which legislators are entitled to a *per diem* allowance for food and lodging. The statute would not make sense if, as the Legislature contends in this Court, it meets perpetually. If the Legislature met in continuous session, legislators would be entitled to *per diem* reimbursement every day of every year; that would undermine the entire purpose of a *per diem* reimbursement because it would effectively become just a part of a legislator's salary. In relevant part, Wis. Stat. § 13.123 provides:

IN-SESSION EXPENSES.⁷ (a) 1. Any member of the legislature who has signified ... the necessity of establishing a temporary residence at the state capital for the period of any regular or special legislative session shall be entitled to an allowance for expenses incurred for food and lodging ... but not including any Saturday or Sunday ...

* * *

(b) No allowance shall be paid under this subsection for any day during a recess of the legislature for 30 days or more unless so provided by joint resolution adopted by both houses of the legislature.

(Emphases added.)

The details of the statute are significant. *First*, if the Legislature were in continuous session, as it contends, it would follow that the legislators could claim *per diem* expenses for every day of the biennium. Because the Legislature's position is that "final adjournment occur[s] only immediately before the next biennial session begins" (Leg. Br. at 4), "IN-SESSION EXPENSES" would apply to every single day of the biennial session. No legislator claims *per diem* expenses for every day of the year, because, simply, the Legislature is not in session every day of the year. Indeed, in the last year for which public records are available, only two legislators—out of

⁷ Although a statutory title cannot overrule the language of the law, the title "is persuasive evidence of a statutory interpretation." *Mireles v. LIRC*, 2000 WI 96, ¶60 n.13, 237 Wis. 2d 69, 613 N.W.2d 875 (citing *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 253, 219 N.W.2d 564 (1974)); accord *Scalia & Garner*, *supra*, at 221 ("Titles and headings are permissible indicators of meaning.").

This statutory section's title of "IN-SESSION EXPENSES" affirms the intention that legislators be reimbursed for expenses while the Legislature is in session. If, however, the Legislature is continuously in session, it follows that the term "expenses" need not be qualified by "in-session."

132—claimed *per diem* expenses for even half the calendar days in the year.

See <https://www.postcrescent.com/story/news/investigations/2018/02/06/wisconsin-legislators-claim-over-1-3-million-allowances-but-work-fewerdays/307599002/> (last visited May 3, 2019).

Second, the Legislature’s contention renders meaningless other sections of Wis. Stat. § 13.123. For example, Wis. Stat. § 13.123(1)(b) provides: “No allowance shall be paid under this subsection for any day during a recess of the legislature for 30 days or more unless so provided by joint resolution adopted by both houses of the legislature.” (Emphasis added.) A recess is, by definition, a time when the Legislature is not in session. There can be no recess—a time during which the Legislature does not meet—if the Legislature is in “continuous session.”

By excluding Saturdays, Sundays, and periods of recess as times the Legislature is not in session, the statute clearly contradicts the Legislature’s claim that it is continuously in session.

CONCLUSION

The arguments set forth above illustrate that the position the Legislature has asserted in this litigation about “continuous sessions” is both

contrary to existing law and would, if true, significantly retrench Wisconsin's tradition of and commitment to government transparency. For these reasons, Wisconsin Democracy Campaign respectfully urges the Court to affirm the circuit court's Decision and Order.

May 3, 2019

Respectfully submitted,

/s/ Jeanne M. Armstrong

Jeanne M. Armstrong

State Bar No. 1021451

Christopher J. Dodge

State Bar No. 1011530

Attorneys for Wisconsin Democracy Campaign

Fuhrman & Dodge, S.C.
2501 Parmenter Street
Suite 200B
Middleton, WI 53562

CERTIFICATION OF COUNSEL

I hereby certify that this brief and the accompanying appendix conform to the rules contained in Wisconsin Statutes Sections 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,673 words.

Dated: May 3, 2019

FUHRMAN & DODGE, S.C.

/s/ Jeanne M. Armstrong
Jeanne M. Armstrong
State Bar No. 1021451
Christopher J. Dodge
State Bar No. 1011530
Attorneys for Wisconsin Democracy Campaign

Fuhrman & Dodge, S.C.
2501 Parmenter Street
Suite 200B
Middleton, WI 53562

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I will submit an electronic copy of this brief, which complies with the requirements of Wisconsin Statutes Section 809.19(12).

I further certify that:

The 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: May 3, 2019

FUHRMAN & DODGE, S.C.

/s/ Jeanne M. Armstrong

Jeanne M. Armstrong

State Bar No. 1021451

Christopher J. Dodge

State Bar No. 1011530

Attorneys for Wisconsin Democracy Campaign

Fuhrman & Dodge, S.C.
2501 Parmenter Street
Suite 200B
Middleton, WI 53562