SUPREME COURT OF WISCONSIN

Appeal No. 2019AP614-LV

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH and JANET BEWLEY,

Plaintiffs-Respondents,

v.

ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY MAJORITY LEADER and SCOTT FITZGERALD, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,

Defendants-Petitioners,

JOSH KAUL IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN and TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,

Defendants-Respondents.

Appeal No. 2019AP622

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH, and JANET BEWLEY,

Plaintiffs-Respondents,

v.

ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY MAJORITY LEADER, and SCOTT FITZGERALD, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,

Defendants-Appellants,

JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, and TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,

Defendants.

ON APPEAL/PETITION FROM THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE FRANK D. REMINGTON, PRESIDING,
DANE COUNTY CASE NO. 2019-CV-000302

DEFENDANT-RESPONDENT/DEFENDANT TONY EVERS' BRIEF IN SUR-REPLY TO THE REPLY BRIEF OF LEGISLATIVE DEFENDANTS-PETITIONERS/DEFENDANTS-APPELLANTS

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The Petitioners/Defendants-Appellants, Robin Vos, et al. ("the Legislative Defendants") submitted to this Court a reply brief that was rife with misstatements and distortions of law and other parties' positions. This brief will succinctly detail the most egregious misstatements in Legislative Defendants' reply brief ("LD Reply").[1]

I. The reply brief uses a fragment of a quotation to distort the holding in *Daniel v. Armslist*, LLC, 2019 WI 47, ¶ 13, 386 Wis. 2d 449, 926 N.W.2d 710 in order to claim that *Daniel* shows that Governor Evers' description of how Wisconsin courts review a motion to dismiss is inconsistent with Wisconsin law.

First, Legislative Defendants suggest that *Daniel v. Armslist, LLC*, 2019 WI 47, ¶ 48, 386 Wis. 2d 449, 926 N.W.2d 710, rejects the straightforward pleading requirement, recited in Governor Evers' brief, that a plaintiff's complaint must allege facts that satisfy each element of the claim asserted. (LD Reply at 4) They rely on *Daniel* for the proposition that the pleading requirement described by the Governor is "'inconsistent with Wisconsin's pleading standard' as articulated in *Data Key.' see* Gov. Evers Brief at 22."

However, *Daniel* said nothing of the sort about Wisconsin's pleading standard. Rather, it stated that ***Washington State***'s pleading standard,

[1] Governor Evers does not here address the more minor mischaracterizations in Legislative Defendants' reply brief, or those that he did or had the opportunity to address in his response brief.

where a complaint cannot be dismissed if any set of facts—whether pled in the complaint or not—would justify recovery, is inconsistent with Wisconsin's. *Daniel*, 386 Wis. 2d 449, ¶ 48 (citing *Data Key Partners*, 356 Wis. 2d 665, ¶ 21, 849 N.W.2d 693 ("a complaint must plead facts, which if true, would entitle the plaintiff to relief")).

Relatedly, Legislative Defendants depict *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693, as effecting a pleadings sea change, such that appellate cases considering the merits of legal claim at the motion to dismiss stage are now "legion." (LD Reply at 4 (citing cases).) Yet "*Data Key* did not change Wisconsin's pleading standard as previously articulated in *Strid v. Converse*, 111 Wis. 2d 418, 422-43, 331 N.W.2d 350 (1983)." *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46, 386 Wis. 2d 515, 926 N.W.2d 756 (per curiam). It is true, as it has always been, that legal conclusions in a complaint are no substitute for the needed factual allegations, *Data Key Partners*, 356 Wis. 2d 665, ¶ 21, but this is not the same as saying, as Legislative Defendants suggest (LD Reply at 4), that the court can decide the merits of a case at the motion to dismiss phase.

This Court should reject the Legislative Defendants' misleading characterizations of Wisconsin pleadings case law and Governor Evers' description of that law.

II. The reply brief wrongly claims that *Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W.2d 208 "merely narrowly interpreted the Legislature's statutory authority to intervene to defend state law under the pre-Act 369 version of Wis. Stat. § 803.09, and the Legislature changed that law in Act 369."

Second, Legislative Defendants claim that *Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W.2d 208, interpreted only the Legislature's statutory authority to appear in court, not its constitutional authority. (LD Br. at 18-19.) That is incorrect. *Helgeland* relied on and extensively discussed separation of powers principles to reject the Legislature's argument that its public policy prerogative in enacting and defending legislation, and its constitutional duty to balance the budget, required its intervention in that case. *Helgeland*, 296 Wis. 2d 880, ¶¶ 10-16; *id*. ¶ 14 ("by claiming an interest in defending its statutes against constitutional challenges, the Legislature conflates the roles of our government's separate branches"). The court also pointed to the executive's role in defending the state. *Id*. ¶ 14. *Helgeland* discussed the general intervention statute in Wis. Stat. § 803.09(1), *id*. ¶ 11,

but it explicitly rejected the Legislature's constitution-based argument for its participation in litigation.

III. The reply brief repeatedly and deliberately claims that the Governor has asserted that in reviewing whether there is a violation of the separation of powers in a "shared powers" context the court must determine if the legislation imposes a "practical burden" when, in fact the Governor never used the term "practical burden" and has explained that the correct test is whether the legislation imposes an "undue burden" or "substantially interferes" with executive authority.

Third, Legislative Defendants repeatedly characterize Governor Evers' description of the legal test in a violation of the separation of powers claim in the shared powers context as whether one branch has created "practical burdens" for another. (*E.g.*, LD Reply at 7, 8, 9, 44, 45, 46.) This is false. Governor Evers' brief never once uses the phrase "practical burdens." The test for a violation of the separation of powers in the shared powers context, which Governor Evers' brief repeated numerous times, is whether one branch has unduly burdened or substantially interfered with another. (*E.g.*, Evers Br. at 16, 17, 39, 41.)

Notably, Legislative Defendants focus wholly on "undue burden," claiming without any basis that whether an undue burden has occurred is a pure question of law, and that facts alleged in a complaint to support an undue burden could ***never*** defeat a motion to dismiss. (LD Reply at 5, 44.) While this is by itself untrue and absurd, the Legislative Defendants

pointedly ignore that "substantial interference" with another branch can independently support a separation of powers violation. Plaintiffs here alleged facts that Act 369 causes both an undue burden and a substantial interference with the Executive Branch.

IV. The reply brief mischaracterizes Governor Evers' argument as to Act 369, § 64.

Finally, the Legislative Defendants claim the Governor has conceded that the challenge to Section 64 "must be dismissed." (LD Reply at 35.) In fact, the Governor has said the Court should uphold the circuit court's determination that the complaint stated a claim as to Act 369, § 64 (Gov. Br. at 28-29); that the Court should not decide the merits of this issue (id. at 55); that the section violates the separation of powers (*id*. at 56); and finally, that the Court **could**, not **should**, dismiss this claim without prejudice and decide it when the Legislature has actually utilized the suspension procedure in Section 64 (*id*. at 56).

Respectfully submitted this 25th day of September 2019

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CERTIFICATION

I hereby certify that 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 1,072 words.

Dated this 25th day of September, 2019.

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