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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III/IV

Appeals No. 2021 AP 1321-LV, 2021 AP 1322-W, 2021 AP 1325

COUNTY OF DANE *ET AL.*,

Petitioners-Respondents,

v.

PUBLIC SERVICE COMMISSION *ET AL.*,

Respondents-Respondents.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Petitioners-Respondents Driftless Area Land Conservancy (DALC) and Wisconsin Wildlife Federation (WWF) submit this reply brief in support of their motion for an order dismissing Appeals No. 2021 AP 1321-LV, 2021 AP 1322-W, and 2021 AP 1325 as moot. Michael Huebsch is seeking to appeal a routine, nonfinal discovery order concerning a subpoena *duces tecum* for document production and deposition, which DALC and WWF have since withdrawn.

BACKGROUND

In late 2019, DALC, WWF, several Wisconsin counties and municipalities, and individual Wisconsin citizens petitioned for judicial review of a September 26, 2019 adjudicatory decision by the Public Service Commission of Wisconsin (PSC) approving a Certificate of Public Convenience and Necessity (CPCN) for the Cardinal-Hickory Creek transmission line proposed by co-owners American Transmission Company, Dairyland Power, and ITC Midwest (Transmission Companies).

The circuit court issued a Decision and Order on May 25, 2021, following briefing and oral argument, after it was revealed that former Commissioner Huebsch had, among other actions:

- engaged in more than 200 telephone calls with agents for the parties to the CPCN case while it was pending before him and he was leading the Commissioners' deliberations for their adjudicatory decision-making;
- engaged in many more phone calls, texts, meetings, dinners and other *ex parte* communications with executives and agents of each of the three Transmission Companies and other parties seeking approval of the CPCN;
- accepted an official position as an advisor to one of those parties in the case seeking approval of the CPCN; and
- applied to become CEO of another party shortly after resigning from the PSC.

The circuit court allowed discovery pursuant to WIS. STAT.

§ 227.57(1) on the issue of whether Mr. Huebsch's actions amounted to improper bias or the appearance thereof, which undermines public confidence in the fairness, independence, and integrity of the utility regulatory decision-making process. *County of Dane, et al. v. Public Service Commission*, Case No. 2019CV3418, Dkt. 322, Decision and Order at 1–3, 9.¹ That order set a discovery schedule for document production and depositions in June, July, and August 2021, and a subsequent order set a trial date of September 29 and 30, 2021. Dkt. 322, at 10; Dkt. 333. The timing of the discovery in advance of the September trial date is important: it enables the parties to fully and effectively present their evidence at trial to obtain a final judgment and order concerning the PSC's CPCN approval before the Transmission Companies begin construction of their proposed transmission line in Wisconsin in October 2021.

Neither former Commissioner Huebsch nor any other party or nonparty sought leave to appeal the Circuit Court's May 25, 2021 Decision and Order during the 14-day period for doing so. WIS. STAT. § 809.50.

Discovery revealed that parties to and others interested in the CPCN

¹ Documents filed in the circuit court are cited to here by their circuit court docket number and are appended as exhibits to this brief.

docket engaged in frequent texting and social events, e.g., golf and dining, with Commissioner Huebsch while the docket was pending. *See, e.g.*, Dkt. 244. In addition, on June 28, 2021, ATC and ITC revealed in a filing with the circuit court that their agents, and others, additionally regularly engaged in secret encrypted and disappearing text messaging with Commissioner Huebsch using the “Signal” app, including while the CPCN case was pending before him. *See* Dkt. 356.

In accordance with the discovery schedule established by the circuit court, DALC and WWF issued a subpoena *duces tecum* to Mr. Huebsch on May 28, 2021. The subpoena was updated several times. The subpoena, in its final form, commanded Mr. Huebsch to appear for a deposition on August 4, 2021, and to provide his cell phone for forensic imaging and analysis, among other things. Mr. Huebsch moved to quash the subpoena. The circuit court denied the motion. Mr. Huebsch filed three separate appeals in this Court, along with a motion for an emergency stay. This Court granted the motion to an emergency stay on August 2, 2021, and subsequently denied DALC and WWF’s motion for reconsideration. As a result, the scheduled deposition of Mr. Huebsch did not occur.

At that point, the writing was on the wall: Mr. Huebsch had

succeeded in delaying the deposition and forensic analysis of his phone long enough that DALC and WWF would have great difficulty in completing the discovery directed at Mr. Huebsch sufficiently in advance of the September 29 and 30 trial dates. The trial cannot be delayed because the Transmission Companies plan to begin construction of the transmission line, which is the subject of the trial, in October 2021.

Meanwhile, DALC and WWF's limited legal resources were being strained as they struggled to complete other depositions and resolve other discovery disputes, while also litigating the three separate appeals that Mr. Huebsch filed. As a result, DALC and WWF decided to abandon the effort to depose Mr. Huebsch in order to conserve their limited resources for trial. They notified Mr. Huebsch's counsel of this decision in an August 12, 2021 letter in which they withdrew "all subpoenas for testimony and documents which have been issued to Mr. Huebsch." Ex. B to Michael Huebsch's Response to Motion to Dismiss. On August 16, they confirmed that they did not intend to issue any other discovery subpoena *duces tecum* to Mr. Huebsch. However, they "reserve[d] their right to call Mr. Huebsch to testify at [the September 29-30] trial." ² Ex. D to Michael Huebsch's

² Mr. Huebsch incorrectly characterizes DALC and WWF's correspondence as

Response to Motion to Dismiss.

Immediately upon withdrawing their subpoenas, DALC and WWF asked this Court to dismiss Mr. Huebsch's three appeals as moot. Mr. Huebsch opposes the motion. The Court should grant the motion for the following reasons.

ARGUMENT

Mr. Huebsch has already won his appeals. Not because he's right on the merits—he isn't—but because of the collective burden that he, the Transmission Companies, third-party executives and representatives of the Transmission Companies, and the PSC, represented by ten law firms and groups of attorneys, have imposed on non-profit DALC and WWF. DALC and WWF decided not to engage in a battle over discovery that has proven too much of a distraction from trial preparations that cannot be delayed. Yet Mr. Huebsch urges this Court to force DALC and WWF to continue draining their resources to fight that battle, despite the fact that the outcome would have no practical effect on the underlying litigation. This Court

"confirming" that they "will 'imminent[ly]' be issuing *yet another* subpoena of Mr. Huebsch under WIS. STAT. § 805.07." Response Br. at 1. Not so. The letter, which is attached to Mr. Huebsch's response brief as Exhibit D, states that DALC and WWF "reserve their right to call Mr. Huebsch to testify at trial."

should reject Mr. Huebsch's attempt to undermine DALC and WWF's ability to litigate the merits of the underlying case—that is, whether Mr. Huebsch's communications and other activities with agents of the parties that appeared before him at the PSC amounted to improper bias or the appearance thereof that would undermine the public's confidence in the fairness, independence, and integrity of the utility regulatory decision-making process. This Court should grant DALC and WWF's motion to dismiss these appeals as moot.

A. The issues on appeal are moot.

"[A] case is moot when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy." *In re G.S.*, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984). That is the case here. Each of the three appeals initiated by Mr. Huebsch asks this Court to bar enforcement of the subpoena issued by DALC and WWF to Mr. Huebsch requiring him to provide his cell phone for data extraction and analysis, produce certain other documents, and sit for a discovery deposition. DALC and WWF have withdrawn that subpoena. There is nothing left to enforce. Whether the subpoena at issue could be enforced is literally a moot point, and this Court's determination

on that point would not have any practical legal effect.

Mr. Huebsch argues that the issue is not moot because the circuit court's order denying his motion to quash is still "in effect." Resp. Br. at 4. That order is effectively moot because the subpoena challenged in the motion to quash has been withdrawn. DALC and WWF likewise assume that the circuit court's order regarding forensic analysis of Mr. Huebsch's phone is moot with regard to Mr. Huebsch because the subpoena giving rise to that order has been withdrawn. Because DALC and WWF have withdrawn the subpoena *duces tecum* for Mr. Huebsch's phone, the circuit court's order cannot be applied to him. If this Court believes it necessary for the circuit court's orders regarding the subpoena to be withdrawn as a condition of this Court dismissing Mr. Huebsch's appeals as moot, DALC and WWF respectfully request that this Court so order, or allow sufficient time for DALC and WWF to request that the circuit court do so.

Mr. Huebsch argues that DALC and WWF intend to reissue an identical subpoena as soon as this Court dismisses the appeals. To reiterate the assurances made to Mr. Huebsch in prior correspondence: DALC and WWF will not issue any further discovery subpoenas *duces tecum* to Mr. Huebsch in the circuit court proceedings before the September 29-30

trial. DALC and WWF will not seek to depose Mr. Huebsch or obtain documents or things—including his cell phone—from him in this pre-trial discovery before the circuit court. DALC and WWF do reserve the right to call Mr. Huebsch at trial. Nothing more. Therefore, the issue on appeal—whether the circuit court erroneously exercised its discretion when denying Mr. Huebsch’s motion to quash the discovery subpoena *duces tecum*—is moot.

B. The exceptions to mootness do not apply.

Mr. Huebsch points out that there are several exceptions to the general rule that moot appeals should be dismissed. That’s true. Wisconsin appellate courts have made exceptions where:

the issues are of great public importance; the constitutionality of a statute is involved; the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts; the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or, a question is capable and likely of repetition and yet evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties.

In re G.S., 118 Wis. 2d at 805. None of those exceptions are present here.

First, Mr. Huebsch’s appeals concern a discovery dispute of the sort usually left to the circuit court’s discretion. Discretionary discovery orders

are not appealable as of right and are not of great public importance. Certainly, the underlying issues to be decided in the circuit court are issues of great public importance: they concern the transparency, fairness, and integrity of the PSC's adjudicatory decisionmaking process, the possibility that a public official engaged in hundreds of *ex parte* communications with agents of the parties appearing in the case before him, and the possibility that that same public official sought special treatment from the parties in the docket before him upon his retirement. But the circuit court has not yet passed judgment on those issues, and they cannot be decided within the context of Mr. Huebsch's appeals of a nonfinal discovery order concerning a subpoena *duces tecum* that has since been withdrawn. The importance of those underlying issues tips in favor of dismissing these appeals and allowing the litigation to continue, without interruption or distraction, in the circuit court below.

Second, circuit courts are not in need of a definitive decision on the discovery issues presented by Mr. Huebsch's appeals. The standards governing motions to quash are well established, and circuit courts can and do decide such motions without incident on a near daily basis. Courts must exercise their discretion to decide each motion on a case-by-case basis. The

precise situation presented by Mr. Huebsch's motion to quash is unlikely to arise again, and so this Court's guidance would be of little use to trial courts in the future.

Third, the issue presented by Mr. Huebsch's appeals will not arise again. DALC and WWF have stipulated that they will not issue another discovery subpoena *duces tecum* for documents, things, or deposition testimony to Mr. Huebsch in this case before the September 29–30 trial. Mr. Huebsch attempts to make much of the fact that DALC and WWF have reserved the right to call him as a witness at trial, but such a subpoena *ad testificandum* would differ fundamentally from the deposition and document subpoena at issue in these appeals; in other words, it would not present the same issues as Mr. Huebsch's current appeals, and Mr. Huebsch could not move to quash a subpoena *ad testificandum* on the same grounds.

When it comes to discovery subpoenas *duces tecum* such as the one at issue in Mr. Huebsch's appeals, WIS. STAT. § 805.07(3) grants circuit courts the discretion to quash or modify the subpoenas if they are unreasonable or oppressive. But "§ 805.07(3) does not authorize the court to issue a protective order in the case of a subpoena *ad testificandum*." *State v. Gilbert*, 109 Wis. 2d 501, 509, 326 N.W.2d 744 (1982). When it comes to testimony to

the court, “the public has a right to every person’s evidence, except for those persons protected by a constitutional, common-law, or statutory privilege,” and therefore “[c]ourts rarely excuse persons from the duty to testify.” *Id.* at 505–07.

Fourth, Mr. Huebsch’s appeals do not present an issue that often evades appellate review “because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties.” *In re G.S.*, 118 Wis. 2d at 805. To the contrary, Mr. Huebsch’s appeals present a discovery issue that is not often the subject of appellate review because nonfinal, discretionary discovery orders are not appealable as of right and cannot be the subject of supervisory relief.

In other words, the issue presented in Mr. Huebsch’s appeal doesn’t *evade* review; rather, it is *not* properly the subject of appellate review in the first place. And for good reason: It cannot be “that every witness is entitled to halt a proper proceeding by an appeal or writ of *certiorari* to test the materiality and relevancy of information requested before he is required to supply it.” *State ex rel. St. Mary’s Hospital v. Industrial Commission*, 250 Wis. 516, 518, 27 N.W.2d 478 (1947) (dismissing an appeal concerning a

subpoena *duces tecum* issued to a witness to an administrative proceeding). “The duty of courts to review proceedings does not include interference at this stage of the proceeding with the conduct of hearings before administrative boards by advance rulings on evidence.” *Id.*

Finally, Mr. Huebsch argues that in the event this Court dismisses his appeal as of right and alternative petition for leave to appeal as moot, it “would only *strengthen* Mr. Huebsch’s case for a petition for supervisory writ.” Response Br. at 9. This convoluted logic fails for two independent reasons.

First, Mr. Huebsch’s three appeals all present the same issue: whether the circuit court erroneously exercised its discretion in denying Mr. Huebsch’s motion to quash the subpoena *duces tecum* issued by DALC and WWF that has since been withdrawn. If that issue is moot—which it is—it is moot as to all three appeals. The mootness of an issue does not depend on the procedural vehicle in which it arrives.

Second, the discovery order at issue on appeal *cannot* be subject to review by petition for supervisory writ. Only nondiscretionary judicial acts are subject to review by petition for writ of mandamus. *See State ex rel. Dressler v. Circuit Court for Racine County*, 163 Wis. 2d 622, 640, 472 N.W.2d

532 (Ct. App. 1991) (“We will not invoke our supervisory control over the trial court to compel a discretionary act.”). Rulings on motions to quash are discretionary. *Lane v. Sharp Packaging System, Inc.*, 2002 WI 28, ¶ 19, 251 Wis. 2d 68, 640 N.W.2d 788 (2002). The circuit court order that Mr. Huebsch attempts to obtain review of here is precisely the sort of act that this Court has held cannot be subject to a supervisory writ. *See Dressler*, 163 Wis. 2d at 640, 644.

For these reasons, Petitioners-Respondents respectfully request that this Court summarily dismiss Appeals No. 2021 AP 1321-LV, 2021 AP 1322-W, and 2021 AP 1325.

Dated this the 18th day of August, 2021.

DRIFTLESS AREA LAND CONSERVANCY
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