STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

AMERICAN OVERSIGHT,

Petitioner-Respondent,

v. Case No. 22-AP-1532

ROBIN VOS, EDWARD BLAZEL and WISCONSIN STATE ASSEMBLY,

Respondents-Appellants.

WISCONSIN STATE ASSEMBLY, ROBIN VOS, AND EDWARD BLAZEL'S, BRIEF IN OPPOSITION TO AMERICAN OVERSIGHT'S MOTION FOR CHANGE OF VENUE

NOW COME Respondents-Appellants, Wisconsin State Assembly, Robin Vos, and Edward Blazel, by and through their attorneys, Kopka Pinkus Dolin PC, and hereby submit their brief in opposition to American Oversight's motion for change of venue.

INTRODUCTION

This appeal arises out of public records mandamus actions venued in Dane County. American Oversight made separate, distinct public requests to each of the Respondents-Appellants, the Wisconsin State Assembly, Robin Vos, and Edward Blazel. Although the claims against each Respondent were distinct, for some reason American Oversight chose to file the three actions in the one case.

On September 8, 2022, the Respondents-Appellants filed this appeal and selected District II of the Wisconsin Court of Appeals as the venue pursuant to Wis. Stat. § 752.21 (2). Respondents seek review of the Dane County Circuit Court's Order granting American Oversight's Motion to Determine Costs, Fees, and Damages. On October 13, 2022, the Petitioner filed a motion for change of venue. In its motion, American Oversight argues that this appeal was improperly venued

in District II. American Oversight demands that this case be transferred to District IV– the district in which the Dane County Circuit Court is located.

Petitioner's motion for change of venue should be denied. Petitioner's motion misconstrues the relevant Wisconsin statutes. When the defendant in an action is a state actor, an appeal of the circuit court's final order may be filed in the appellate District selected by the appellant if the order appealed from was in an action venued in a county designated by the plaintiff. *See* Wis. Stat. §§ 752.21 (2). The key issue, therefore, is whether American Oversight designated venue in Dane County. As explained below, American Oversight designated venue in Dane County when it filed its writ in Dane County. Whether venue would also be proper under Wis. Stat. § 801.50(2) does not affect that determination.

ARGUMENT

I. THE CORRECT APPLICATION OF WIS. STAT. § 752.21 DIRECTS THAT DISTRICT II IS AN APPROPRIATE VENUE FOR THIS APPEAL.

Wisconsin's statutory method for determining the proper venue for appeals is simple and unambiguous. Appellate venue is governed by Wis. Stat. § 752.21, which provides:

> (1) Except as provided in sub. (2), a judgment or order appealed to the court of appeals shall be heard in the court of appeals district which contains the court from which the judgment or order is appealed.
>
> (2) A judgment or order appealed from an action venue in a county designated by the plaintiff to the action as provided under s. 801.50(3)(a) shall be heard in a court of appeals district selected by the appellant but the court of appeals district may not be the court of appeals district that contains the court from which the judgment or order is appealed.

Subsection (1) contains the "general rule controlling appellate venue" that appeals are to be filed in the appellate District of the underlying Circuit Court action. *State ex rel. Dep't of Natural Res. v. Wis. Court of Appeals*, 2018 WI 25, ¶ 13, 380 Wis. 2d 354, 367, 909 N.W.2d 114,

121. Subsection (2), however, contains an exception to the general rule. Pursuant to Wis. Stat. § 752.21 (2), if a plaintiff designates venue as provided for in Wis. Stat. § 801.50(3)(a), then the appellant may venue its appeal in any district other than the district in which the circuit court sits. It is this interrelated application of Wis. Stat. §§ 801.50(3)(a) and 752.21 (2) that makes venue in District II is appropriate in this case.

1. <u>American Oversight Designated Dane County As The Venue In Its Actions Against All Three Respondents.</u>

Venue is typically controlled by the application of Wis. Stat. § 801.50(2). Here, however, in the Public Records actions against the State and State officers, American Oversight was able to choose any county for venue because of the application of Wis. Stat. § 801.50(3)(a). Pursuant to that section, venue is controlled by the plaintiff's designation of venue, and venue may be in any county:

> (a) Except as provided in pars. (b) and (c),[1] all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity shall be venue in the county designated by the plaintiff unless another venue is specifically authorized by law.

Wis. Stat. § 801.50(3)(a). Although both statutes may have application, "where two conflicting statutes apply to the same subject, the more specific statute controls." *Lornson v. Siddiqui*, 2007 WI 92, ¶65, 302 Wis. 2d 519, 735 N.W.2d 55. The more specific provisions of Wis. Stat. § 801.50(3)(a) control here.

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[1] Subparagraphs (b) and (c) are relevant to this action:

> (b) All actions relating to the validity or invalidly of a rule shall be venued as provided in s. 227.40(1).
>
> (c) An action commenced by a prisoner, as defined under s. 801.02(7)(a)2., in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity shall be venued in Dane County unless another venue is specifically authorized by law.

Wis. Stat. § 801.50(3)(b)-(c).

American Oversight contends that Wis. Stat. § 801.50(3)(a) cannot apply here because it did not designate venue pursuant to that statute. (Pl.'s Mot. at ¶¶ 7-8.) American Oversight believes that it "selected" venue as being appropriate pursuant to Wis. Stat. § 801.50(2), and therefore § 801.50(3)(a) does not apply. (*Id.* at ¶ 8 (citing Dkt. 4., Petition for Writ of Mandamus at ¶ 6).) American Oversight's argument, however, is misguided and ignores that to select and to designate are two different acts. *See State ex rel. Dep't of Nat. Res*., 2018 WI 25, ¶29.

Because of the statutory language in Wis. Stat. § 801.50(3)(a), American Oversight was able to select any county for venue, but selecting venue is not designating venue. *Id*. at ¶30. American Oversight appears to unintentionally confirm this when it points out that, "Venue is determined at the outset of the action. The complaint …determines venue." (*See* Resp. Motion, ¶ 6 (citing 3 Jay E. Grenig, Wis. Prac., Civ. P., § 150.1 (4th ed. 2021) (citing *State v. Risjord*, 183 Wis. 553, 198 N.W. 273 (1924); *State v. Park*, 174 Wis. 452, 183 N.W. 165 (1921)).

When American Oversight drafted its writ, it chose Dane County as the place for venue. When American Oversight filed the writ in Dane County, it designated the venue in this matter as being in Dane County. See *State ex rel. Dep't of Nat. Res*., 2018 WI 25, ¶31 (holding when § 801.50(3)(a) applies, a plaintiff "designates" venue in the circuit court when it files its complaint.) There is no other conclusion.

There is nothing within the language of Wis. Stat. § 801.50(3)(a) that requires a plaintiff to plead that it is invoking its right to designate venue: the plaintiff's act of filing its complaint or writ in a particular county is the act of designating venue. "Designating venue" under Section 801.50(3)(a) does not mean "choosing venue"; it means "specifying venue" in the circuit court through the act of filing the complaint in that venue. *State ex rel. Dep't of Nat. Res.*, 2018 WI 25,

¶ 31. That "specifying" occurs even where other venue statutes may control or influence the proper venue. See *id*.

Whether venue was proper under Wis. Stat. § 801.50(2) is not determinative of whether venue was designated for purposes of applying Wis. Stat. § 801.50(3)(a). Section 801.50(2) lists the factors a circuit court may consider in determining if venue is proper. Nevertheless, Wis. Stat. § 801.50(3)(a) is clear that "all actions" in which the defendant is the state or a state actor are venued pursuant to § 801.50(3)(a). American Oversight's act of filing its pleading in Dane County designated the venue to be in Dane County regardless of whether venue was appropriate under Wis. Stat. § 801.50(2). As pointed out above, the more specific statute, Wis. Stat. § 801.50(3)(a), controls over the less specific statute.

American Oversight claims that Respondents forfeited any argument that the case was venued under Wis. Stat. § 801.50(3)(a). Forfeiture is a rule of judicial administration and can be overlooked where the issue raised is a legal question and there are no disputed issues of fact. *Estate of Stanley G. Miller v. Storey*, 2017 WI 99, ¶ 67, 378 Wis. 2d 358, 903 N.W.2d 759. There was no reason for Respondents to object to venue in Dane County because it was a county properly designated by American Oversight. Thus, there was no reason for Respondents to challenge venue or for the circuit court to rule on the issue of venue. The application of § 801.50(3)(a) was not ripe for decision until this appeal was taken. Additionally, the party's statements on venue in the complaint or answer do not control, because venue is a legal question controlled by the venue statutes. For example, in *State ex rel. Dep't of Nat. Res*, the Court applied Sections 752.21(2) and 801.50(3)(a) even though the petition claimed that Section 227.53(1)(a)3 controlled venue in the circuit court. 2018 WI 25.

Once American Oversight filed its writ in Dane County, it designated the venue in this matter as being in Dane County. On these facts, Wis. Stat. § 801.50(3)(a) applies in this case. American Oversight designated venue in Dane County, and therefore pursuant to Wis. Stat. § 752.21 (2), Respondents had the right to select venue in any district of the court of appeals other than District IV.

2. <u>The sole Defendant in this case is the State of Wisconsin</u>.

Recognizing that it may be misconstruing Wis. Stat. § 801.50(3)(a), American Oversight also claims that Wis. Stat. § 801.50(3)(a) cannot apply to this case as there are "multiple defendants." (Pl. Mot at ¶¶ 12-13.) American Oversight argues that Wis. Stat. § 801.50(3)(a) specifies that it applies to "all actions in which the ***sole*** defendant is the state…". (*Id.*) Pursuant to this language, American Oversight interprets the text of Wis. Stat. § 801.50(3)(a) to direct that the statute can only apply when there is a single ("sole") defendant who is the state or a state official. American Oversight's interpretation is vastly overly restrictive.

American Oversight elected at the outset of this case to sue Robin Vos and Edward Blazel in their "official capacities." (*See* Complaint [Doc. 4].) Official-capacity suits "…generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). Thus, because American Oversight sued the State Assembly and also sued Vos and Blazel in their "official capacity" as officers of the Assembly, this is a suit against the entity, the Assembly. As such, regardless of the number of causes of action or the number of officials named, the "sole defendant" here is the Assembly.

Any other interpretation of Wis. Stat. § 801.50(3)(a) would allow plaintiffs to completely eviscerate and evade the statue simply by naming the state and a state officer in their official capacity in every case. It is not difficult to add a plausible state-officer defendant to any official capacity suit. For example, a plaintiff could always sue the secretary of the Department of Administration in addition to any other agency head. Similarly, the State can only act through its officials and agents. See, *Crane v. Texas*, 759 F.2d 412, 430 (5th Cir. 1985) (holding that "there must be an official whose acts reflect governmental policy, for the government necessarily acts through its agents.") As such, it is hard to imagine a claim against the State that does not also involve the act of state officer or agent in his or her official capacity. Under American Oversight's construction of Wis. Stat. § 801.50(3)(a), a plaintiff could always name the state and a state official as defendants and destroy the ability to ever apply Wis. Stat. § 752.21. Such a construction is unreasonable.

3. Alternatively, If One Concludes That There Are Multiple Defendants In This Case, Each Was The Sole Defendant in The Action Against Them, Making Wis. Stat. § 801.50(3)(a) Applicable.

The text of Wis. Stat. § 801.50(3)(a) reveals that its operative effect and purpose is to provide a plaintiff with greater freedom in selecting a venue when the plaintiff is suing the state or a state agency or officer. *State ex rel. Dep't of Natural Res.*, at ¶ 26, 380 Wis. 2d at 375 ("The entire purpose of the act was to change the treatment of venue in both the circuit and appellate courts when the state is the sole defendant, so it is brief and to the point.") The statute's legislative history confirms this operative effect and purpose. In 2011, the legislature amended the relevant venue statutes, Wis. Stat. §§ 801.50(3) and 752.21. See 2011 Senate Bill 117. Before that, the prior version of § 801.50(3) provided that all actions in which the sole defendant is the state "shall be venued in Dane County unless another venue is specifically authorized by law." *E.g.*, Wis. State.

§ 801.50(3) (1983-84); *id*. (2003-04); *id*. (2009-10). The legislature removed the requirement for the action to be venue in Dane County and allowed plaintiffs to bring actions against the state in any state jurisdiction of their choosing.

American Oversight's argument that Wis. Stat. § 801.50(3)(a) cannot apply because there is not a "sole defendant" is simply an incomplete analysis. This Court interprets statutes by looking, first and foremost, to the text. See *State ex rel. Kalal v. Circuit Court for Dane Cty. (In re Criminal Complaint)*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. The Court reads the text according to its "common, ordinary, and accepted meaning," unless it is clear that a technical or special meaning applies. *Id*. A statute must be read in the "context" of "the language of surrounding or closely-related statutes." *Id*. at ¶ 46.

The text of Wis. Stat. § 801.50(3)(a) does not include a numerical restriction on the number of state defendants. Instead, one must recognize that venue is analyzed individually as to each defendant. See, *State ex rel. Boyd v. Aarons*, 239 Wis. 643, 646, 2 N.W.2d 221, 222 (1942). Thus, venue in this matter would be analyzed as to each of the three Respondents individually. Here, in each action against each Respondent, the "sole defendant" in that action is the state or a state official.[2]

American Oversight's attempt to analyze venue jointly is contrary to Section 801.50(3)(a)'s text, purpose, and legislative history. The statute is designed to provide greater freedom to plaintiffs in the selection of the venue when suing the State and state agencies and officials. American Oversight's attempt to apply Wis. Stat. § 801.50(3)(a)'s text jointly to separate

[2] In addition to the fact that each Respondent is an individual party, each was sued under a distinct, individual cause of action relating to separate, distinction records requests directed to them individually. The fact that Petitioner chose to bring three distinct actions within one lawsuit does not mean that it can lump venue into one singular analysis. In each action the Respondent is the sole respondent in that action.

and distinct parties facing separate and distinct actions is inconsistent with the statute's design. Indeed, American Oversight's construction is absurd in light of the statute's design.

The text, purpose, and legislative history of Wis. Stat. § 801.50(3)(a) confirms that its use of the word "sole" is meant to address the individual application of venue as to each defendant in each action and is not meant as a numerical restriction on the number of defendants in the case. The term "sole" is meant as a restriction on the character of the defendant in the action. Hence, the plaintiff may designate whatever venue it desires as to each of the state actors. Here, American Oversight designated the same venue (Dane County) as to each Respondent. This does not preclude the application of Wis. Stat. § 801.50(3)(a).

CONCLUSION

For the aforementioned reasons, the Respondents-Appellants respectfully request the Court DENY American Oversight's motion for change of venue.

Dated this 21st day of October, 2022.

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