

STATE OF WISCONSIN
SUPREME COURT
NO. 2017AP2278

Kristi Koschkee, Amy Rosno
Christopher Martinson, and
Mary Carney,

Petitioners,

v.

Tony Evers, in his official capacity
as Wisconsin Superintendent of Public Instruction
and the Wisconsin Department of Public Instruction,

Respondents.

**PETITIONERS' BRIEF
REGARDING GOVERNOR AS A NECESSARY PARTY**

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INTRODUCTION

The Petitioners were ordered to submit a brief as to whether the Governor is a necessary party herein. Petitioners believe that the Governor is not a necessary party.

ARGUMENT

I. THE GOVERNOR IS NOT A NECESSARY PARTY.

Under Wis. Stat. § 803.03 a person is a necessary party if: (1) in the person's absence complete relief cannot be accorded to the parties already in the case; (2) the person claims an interest in the subject matter of the action and the person cannot practically protect that interest without being a party; or (3) the absence of the person will subject an existing party to double, multiple or inconsistent obligations. The Governor is not a necessary party under any of these three tests.

A. Complete Relief Can Be Accorded to the Parties Without Participation by the Governor.

This petition has been filed to enforce 2017 Wis. Act 57 (commonly referred to as the REINS Act¹). The relief sought by the Petitioners, should the action proceed, is a declaratory judgment stating that the Superintendent

¹ REINS stands for Regulations from the Executive In Need of Scrutiny. The key sections of the REINS Act for purposes of this action are codified in Wis. Stat. §§ 227.135 and 227.136.

of Public Instruction and the Department of Public Instruction (collectively “DPI”) are required to comply with all portions of the REINS Act and an injunction preventing DPI from enforcing any rules promulgated without such full compliance. This case can be litigated and complete relief can be afforded to the Petitioners without any need to make the Governor a party.

The Governor certainly has a role to play in the administration of the REINS Act, as do the Department of Administration, the Legislative Reference Bureau, and the Joint Committee for the Review of Administrative Rules. But none of these public officials have refused to comply with its terms and none of them are necessary parties under this test.

If this Court agrees with the Petitioners that the REINS Act applies to DPI, then the Petitioners can be accorded complete relief by the issuance of the declaration and injunction which they seek. If this Court disagrees with the Petitioners and denies declaratory and injunctive relief then again complete relief (in that case none) is still accorded to the parties. The Governor’s presence or absence does not affect the availability of complete relief either way.

B. The Governor Has No Interest in this Action that is Impaired or Impeded by His Not Being a Party.

The Governor has not claimed an interest in this action that would make him a necessary party. It is not enough to say that the outcome of a case will somehow “affect” him. The clearest statement of what constitutes such an “interest” is set forth in *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, 258 Wis. 2d 210, 655 N.W.2d 474. In that case the court of appeals determined that the “interest” test for a necessary party sets a fairly high standard. A necessary party – as opposed to one who is merely interested – “has ‘an interest of such direct and immediate character that the [prospective party] will either gain or lose by the direct operation of the judgment.’” *Id.*, ¶15.

Wisconsin courts have held that numerous interests do not amount to a sufficient interest to satisfy the necessary party test. *See Tesch v. Laufenberg, Stombaugh & Jassak, S.C.*, 2013 WI App 103 ¶¶31-43, 349 Wis. 2d 633, 836 N.W.2d 849 (firm that represented client was not a necessary party to client’s suit against former attorney seeking to void a fee agreement even though the former attorney asserted that current firm’s fees would be affected if former firm prevailed); *McNally CPA’s & Consultants, S.C. v. DJ Hosts, Inc.*, 2004 WI App 221, ¶¶23-26, 277 Wis. 2d 801, 692

N.W.2d 247 (Indian tribe that was the sole shareholder of defendant was not a necessary party even though it had a substantial economic interest in the action); *Glaeske v. Shaw*, 2003 WI App 71, ¶45, 261 Wis. 2d 549, 661 N.W.2d 420 (son of the objector to a contested irrevocable trust is not a necessary party); *Wis. State Journal v. UW-Platteville*, 160 Wis. 2d 31, 42-43, 465 N.W.2d 266, 271 (Ct. App. 1990) (subjects of an investigation are not necessary parties in an action to seek public records regarding the investigation).

In all of these cases the party in question would be affected by the outcome of a case, but did not claim some unique position or interest that was not otherwise represented and that would be irretrievably compromised by the outcome. The Governor has no personal interest here. If he were to become a party he would do so in his official capacity and in that capacity, he claims no different interest from that of the State. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (“[A] suit against a state official in his or her official capacity is not a suit against the official, but rather is a suit against the official’s office. As such, it is no different from a suit against the State itself.”).

The record shows that the Governor has directed the Wisconsin Attorney General to represent the State's interest in this case pursuant to Wis. Stat. § 165.25(1m). (See Dec. 11, 2017 Ryan Walsh Declaration at ¶2.) Through that affirmative request, the Governor has demonstrated that he has no interest apart from the interest of the State and no interest that is not adequately represented by the Attorney General.

C. Any Judgment by this Court Would Not Result in any Party Incurring Multiple or Inconsistent Obligations.

No party will be subject to multiple or inconsistent obligations from a judgment by this Court. This Court will determine if the REINS Act is fully applicable to DPI. The decision will be binding and will end the dispute. The result of the decision might be that some parties' rights are different under this decision than they were after *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 (either because this Court clarifies, modifies, distinguishes or reverses *Coyne*), but that is immaterial to the determination of whether the Governor is a necessary party or not.

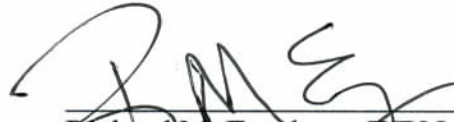
Whether this Court modifies, clarifies, upholds, distinguishes, or reverses *Coyne* will not turn on whether the Governor is a party. The result will be determined by the Court's decision based on the law, and the law does not change based upon the identities of the parties.

CONCLUSION

Based upon the above, the Petitioners believe that the Governor is not a necessary party herein.

Dated this 5th day of March, 2018.

Respectfully submitted,
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