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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 Wisconsin Department of Public Instruction,

Respondents.

Original Action

BRIEF IN OPPOSITION TO MOTION TO INTERVENE

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INTRODUCTION

Ten months ago Petitioners filed a Petition to commence this original action. Six months ago the parties briefed the ancillary issues of who should represent the Respondents and whether the Governor was a necessary party. Five months ago this Court granted the Petition. Four months ago this Court held oral argument on the ancillary issues. Three months ago this Court decided the ancillary issues. Two months ago this Court set a briefing schedule. One month ago Petitioners filed their opening brief.

Only after all those events had passed did seven individuals file a motion to intervene. Nothing prevented the Proposed Intervenors from trying to join this case at an earlier date. Instead, they are asking to join the case and be treated as a full party – as opposed to participating as an amicus – after the briefing is already halfway finished. They do not even attempt to explain or justify their delay.

Aside from being untimely, Proposed Intervenors' Motion is deficient on its face, as it fails to mention, much less establish, a key element of intervention. Potential intervenors must establish that their legal

interests are inadequately represented by the existing parties, and Proposed Intervenors did not do so.

Notwithstanding the Proposed Intervenors' admitted legal interest in the outcome of this case, their Motion to Intervene should be denied. Their participation is not necessary, and if they wish to be heard, they can file an *amicus* brief like any other person with an interest in this case.

ARGUMENT

There are two forms of intervention: permissive and as-of-right. The as-of-right statute, § 803.09(1), reads as follows:

> Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

The language of the statute can be broken down into four clear elements: (1) the movant must have an interest related to the subject of the action; (2) the disposition of the action will affect that interest; (3) that interest will not be adequately represented by the existing parties; and (4) the motion is timely. *M&I Marshall & Ilsley Bank v. Urquhart Cos.*, 2005 WI App 225, ¶7, 287 Wis. 2d 623, 706 N.W.2d 335.

Proposed Intervenors' Motion fails to designate which of the two forms of intervention it is seeking. However, it appears to be a request for intervention as-of-right, as it speaks (briefly) of the Proposed Intervenors' "vested interest" (Mot., ¶4) and generally describes how their interest in a permanent injunction could be affected by this original action (*Id.*, ¶¶1-4). Those arguments correspond to the first and second elements of intervention as-of-right. Yet while the Motion does reference timeliness (an element of both forms of intervention), it eschews tell-tale language from the permissive intervention statute such as the court's "discretion," and whether the "movant's claim or defense" shares "a question of law or fact" with the claims in this case. *See* § 803.09(2).[1]

Petitioners agree that Proposed Intervenors have established the first two elements of intervention as-of-right. However, their Motion fails for two reasons. First, it ignores the third element, adequacy of representation, making it facially insufficient. Second, the Motion is not timely, failing the fourth element.

[1] Wis. Stat. § 803.09(2) reads in relevant part:

> Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

I) PROPOSED INTERVENORS' MOTION IS DEFICIENT ON ITS FACE

Proposed Intervenors' Motion to Intervene ought to be denied without even reaching the question of timeliness, because the Motion is deficient on its face. As the movants, Proposed Intervenors have the burden to establish each element of their claim for relief. *M&I*, 2005 WI App 225, ¶7 ("[A] prospective intervenor, in order to prevail, must demonstrate [the four elements]."); *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983) ("[T]he Wisconsin intervention statute establishes a four-part test that the proposed intervenor must meet.") (emphasis added).

As noted above, the third element of intervention as-of-right is that the existing parties will not adequately defend the interest the movant seeks to protect. While "the burden of making that showing should be treated as minimal," the proposed intervenor still must show to the court's satisfaction why their interests are inadequately represented. *M&I*, 2005 WI App 225, ¶18; *see also Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶85, 307 Wis. 2d 1, 745 N.W.2d 1 ("The requirement . . . 'cannot be treated as so minimal as to write the requirement completely out of the rule.'" (quoting *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir.1984)). This showing prevents

the "cluttering of lawsuits with multitudinous useless intervenors." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 403 (1967) (discussing the analogous federal rule).

Proposed Intervenors' Motion fails to even mention, much less establish, this third element. Such sloppiness is fatal to their endeavor, as it was their burden to establish. They cannot leave this court to guess why the Department of Public Instruction and Superintendent Evers might inadequately argue against the Petitioners' claims. *See Industrial Risk Insurers v. American Engineering Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments.").

Proposed Intervenors' failure to discuss inadequate representation leaves in place an otherwise "rebuttable presumption[]" of adequate representation: "adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action." *Helgeland*, 307 Wis. 2d 1, ¶¶89-90. Here, both Proposed Intervenors and Respondents seek the continuing validity and applicability of *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, and

by extension the permanent injunction granted and affirmed in that case. Both also seek the Superintendent's exemption from the mandates of the REINS Act. Proposed intervenors have done nothing to rebut the presumption that Respondents, who are zealously pursuing these goals, can and will adequately represent their interests.

II) PROPOSED INTERVENORS' MOTION IS UNTIMELY

Even if this Court concludes that Proposed Intervenors' interests are inadequately represented, it should deny the motion to intervene because a motion for intervention, whether permissive or as-of-right, must be "timely." Wis. Stat. § 803.09(1), (2). The statutes do not define "timely," and the question of timeliness is one of discretion for the court. *Bilder*, 112 Wis. 2d at 550. "The critical factor is whether in view of all the circumstances the proposed intervenor acted promptly." *Id.* A secondary factor "is whether the intervention will prejudice the original parties to the lawsuit." *Id.* Proposed Intervenors did not act promptly, and allowing them to participate as parties would be prejudicial; therefore, their Motion is not timely.

Proposed Intervenors did not act promptly. They could have begun participating at the earliest stages of this case – ten months ago, when the

Petition was filed. While perhaps they could not have intervened as a party, as there was yet no "case," they could have participated as *amici*, as Wisconsin Manufacturers and Commerce did. But certainly once there was a case pending (after this Court granted the Petition five months ago), there was ample opportunity for Proposed Intervenors to attempt to intervene. Instead, they waited until multiple rounds of briefing and an oral argument already occurred. Proposed Intervenors have failed to establish that they acted quickly to intervene. Perhaps the Proposed Intervenors had a good reason for waiting until merits briefing was more than halfway done before moving to intervene. But this Court shouldn't have to guess what those reasons are. The Proposed Intervenors gave none, and it is not this Court's job to hypothesize and fill in that gap.

Furthermore, granting the Motion would cause Petitioners prejudice. Petitioners will have only 10 days to respond to everything Proposed Intervenors have to say. While this is also true of what Respondents say in their response brief, Petitioners were aware of the Respondents' participation when they wrote their opening brief. Petitioners were able to craft their opening brief to address arguments that could be reasonably anticipated to come from the Respondents. But they did not have that

opportunity with regard to the Proposed Intervenors (a particularly good reason why allowing intervention mid-briefing is inappropriate). Petitioners also would have only 3,000 words to respond to potentially 22,000 words of argument from both Respondents and Proposed Intervenors.

Petitioners are being unfairly ambushed by a new set of arguments[2] that they could not have anticipated and will likely have inadequate time and space to address. Because Proposed Intervenors did not act promptly and their intervention would prejudice the Petitioners, their Motion should be denied.

III) IF PROPOSED INTERVENORS' MOTION IS GRANTED, PETITIONERS SHOULD BE GRANTED ADDITIONAL TIME AND ADDITIONAL WORDS FOR THEIR REPLY BRIEF

If this Court grants the Motion to Intervene, it should allow Petitioners additional time and additional words for their Reply Brief. As noted above, Petitioners did not expect additional parties and thus did not devote any of their opening brief to addressing anticipated arguments from such parties. Proposed Intervenors may raise arguments distinct from those

[2] Presumably, Proposed Intervenors will have something different to say about the case than Respondents. If they do not, that is all the more reason to reject their intervention as needlessly duplicative.

of the Respondents that require a response, and Petitioners are unlikely to have time or room to fairly address such arguments within the existing schedule and word limit. Fundamental fairness also necessitates that if the Respondents' side suddenly is given twice the amount of space to make their arguments, Petitioners' side be given additional space as well.

Therefore, Petitioners respectfully request that if this Court grants the Motion to Intervene, it permit Petitioners an additional 3,000 words in their Reply Brief and extend their deadline to 20 days after Respondents' and Proposed Intervenors' briefs are due.

Dated this 25th day of September, 2018.

Respectfully submitted,
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