

September 25, 2015

VIA HAND DELIVERY

Diane Fremgen, Clerk
Wisconsin Supreme Court
110 E. Main Street, Suite 215
Madison, Wisconsin 53701

RECEIVED
9/30/15

Re: *Peggy Z. Coyne, et al. v. Scott Walker, et al.*
Case No. 2013-AP-416

Dear Ms. Fremgen:

Please find enclosed the original and nine copies of the Defendant-Respondent's Motion to File a Supplemental Brief, Re-Set the Date for Oral Argument, and Permit Nonparties to File Nonparty Briefs in the above-referenced matter. A copy of this letter and the motion has been served on all counsel of record by First Class U.S. Mail on this same day.

If you have any questions or concerns, please feel free to contact me.

Respectfully,



Ryan Nilsestuen
Attorney
Office of Legal Services

Enc.

cc: Daniel P. Lennington / David V. Meany / Andrew C. Cook
Susan M. Crawford / Lester A. Pines
Randall R. Garczynski
Richard M. Esenberg / C.J. Szafir / Brian W. McGrath ✓

STATE OF WISCONSIN
SUPREME COURT

Case No. 2013AP416

PEGGY Z. COYNE, MARY BELL, MARK W. TAYLOR,
COREY OTIS, MARIE K. STANGEL, JANE WEIDNER
and KRISTIN A. VOSS,

Plaintiffs-Respondents,

v.

SCOTT WALKER and SCOTT NEITZEL,

Defendants-Appellants-Petitioners,

and

ANTHONY EVERS,

Defendant-Respondent.

**ON APPEAL FROM THE OCTOBER 30, 2012, DECISION BY THE
DANE COUNTY CIRCUIT COURT, CASE NO. 11-CV-4573,
THE HONORABLE AMY R. SMITH, PRESIDING**

**DEFENDANT-RESPONDENT'S MOTION TO FILE A SUPPLEMENTAL
BRIEF, TO RE-SET THE DATE FOR ORAL ARGUMENT, AND PERMIT
NONPARTIES TO FILE NONPARTY BRIEFS WITH THE COURT**

Defendant-Respondent Anthony Evers, by his undersigned counsel Ryan
Nilsestuen and Janet Jenkins, hereby move this Court to:

A. Grant leave to the Defendant-Respondent to file, within 30 days of the Court's order on this motion, a supplemental reply brief, not to exceed 30 pages, to respond to the reply brief submitted by Defendants-Appellants-Petitioners (hereinafter "State") and the *amici curiae* brief that the Court accepted on September 23, 2015;

B. Postpone the oral argument, currently scheduled for October 12, 2015, and set a new date for oral argument; and

C. Order that nonparties may file motions for leave to file nonparty briefs within a time set by the Court.

As grounds for this motion, the Defendant-Respondent represents the same grounds set forth by the Plaintiff-Respondents in their motion dated September 24, 2015, as if fully set forth herein, and the following:

1. The State did not argue in their brief-in-chief that this Court should overrule *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996). Instead, the State argued that *Thompson* did not apply to the present dispute. See Def.-Resp.-Pet. Brief at 39-45.

2. As a result, the Defendant-Respondent did not address in his reply brief that *Thompson* was correctly decided and, under the doctrine of *stare decisis*, it should not be overruled. Because overturning *Thompson* would have a profound and detrimental impact on the Defendant-Respondent, the Defendant-

Respondent would have devoted a significant portion of his reply brief to this argument had the State properly raised this matter in its brief-in-chief.

3. On September 14, 2015, several nonparties moved to file a nonparty brief which advocated overturning *Thompson*.

4. Then, on September 21, 2015, the State filed its reply brief and argued, for the first time, that the Court should overrule *Thompson*. See Def.-Resp.-Pet. Reply Brief at 2-5, 13.

5. As a result, the Defendant-Respondent was deprived of an opportunity to forcefully argue that *Thompson* was correctly decided and that *Thompson* should be upheld under the doctrine of *stare decisis*. This runs contrary to principles of fairness protected by the forfeiture rule, and it deprives the Court of fully briefed and developed arguments on this matter. See *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 45, 327 Wis. 2d 572, 598

6. In addition, the State's failure to raise this argument in its brief-in-chief significantly prejudices the Defendant-Respondent's ability to prepare for oral arguments, which are set for October 12, 2015. The Defendant-Respondent received the State's reply brief on September 24, 2015. This provided the Defendant-Respondent with less than three weeks to prepare for questions related to the State's new argument. The time between briefing and oral

arguments was already limited due to the State's motion, dated June 17, 2015, for enlargement of time to file its brief-in-chief.

7. Finally, the State's failure to properly raise this argument in its brief-in-chief deprived other nonparties from briefing the Court on this important matter, which could have a serious and profound impact on Wisconsin's 424 public school districts, 3,775 school administrators, and 59,930 teachers, and 874,414 students.

8. Postponing the oral argument scheduled for October 12, 2015, allowing the Defendant-Respondent to file a supplemental reply brief, and granting leave to allow additional nonparty briefs will remedy the prejudice caused by the State's belated argument and ensure that the Court benefits from fully-developed briefs and oral argument.

Respectfully submitted this 24th day of September, 2015.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION



Ryan Nilsestuen, SBN 1091407

Janet A. Jenkins, SBN 1016916

PO Box 7841

Madison, Wisconsin 53707-7857

Attorneys for Defendant-Respondent Anthony Evers