STATE OF WISCONSIN CIRCUIT COURT DUNN COUNTY
BRANCH 2

FARMVIEW EVENT BARN, LLC, et al.,

Plaintiffs,

v.

Case No. 19-CV-9
Declaratory Judgment: 30701

TONY EVERS, et al.,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Defendants Secretary Peter Barca, Governor Tony Evers, and Attorney General Joshua Kaul move for judgment on the pleadings and dismissal of plaintiffs' complaint on the grounds that there is no justiciable controversy between plaintiffs and Secretary Barca and that the claims against Governor Evers and Attorney General Kaul are barred by sovereign immunity. Plaintiffs have filed a brief opposing the motion, which fails to counter defendants' legal arguments. Therefore, defendants ask this Court to grant their motion and dismiss plaintiffs' complaint in its entirety.

ARGUMENT

I. This Court should dismiss Secretary Barca from this lawsuit because there is no case or controversy between the parties about the meaning of Wis. Stat. § 125.09(1).

Plaintiffs sue Secretary Barca in his official capacity. (Comp. ¶ 6.) "A suit against a public officer or employee in his or her official capacity "'generally represent[s] only another way of pleading an action against any entity of which an officer [or employee] is an agent.'" *Pardeeville Area Sch. Dist. v. Bomber*, 214 Wis. 2d 397, 403, 571 N.W.2d 189 (Ct. App. 1997) (citation omitted). It follows that the personal views of an official capacity defendant as to the meaning or operation of a statute are irrelevant in an official capacity lawsuit. *See Koschkee v. Evers*, 2018 WI 82, ¶ 47, 382 Wis. 2d 666, 913 N.W.2d 878 (R.G. Bradley, J., dissenting).

In their opening brief, defendants argued that Secretary Barca, in his official capacity as Secretary of Revenue, agrees with plaintiffs' interpretation of Wis. Stat. § 125.09(1). (Defs.' Br. 5–14.) Therefore, there is no justiciable controversy between plaintiffs and Secretary Barca in this official-capacity suit.

Plaintiffs respond with five arguments, all of which fail.

First, they argue that "[t]he *Defendants* [sic] primary argument is that there is no case or controversy between the plaintiffs and *them*. However, this case would not be here had *the state* not created the confusion and uncertainty

in the first place. That is, the informal analysis from *the Attorney General* created such confusion and uncertainty for Plaintiffs and their customers that they now come before this court seeking a declaration of their rights under the law." (Pls.' Br. 7 (emphasis added).)

In these three sentences, plaintiffs show that they misunderstand defendants' argument and the law. Defendants argue only that there is no justiciable controversy between plaintiffs and *Secretary Barca*. (Defs.' Br. 5–14.) The justiciability argument is not made on behalf of the other two defendants. And, whatever confusion former Attorney General Brad Schimel's letter may have caused, it had absolutely no effect on whether there is a justiciable controversy between plaintiffs and Secretary Barca because the Attorney General has no authority over the Department of Revenue. Plaintiffs further muddy these waters by using the term "state" to connect the informal analysis of the former Attorney General to the Secretary of Revenue. But the State of Wisconsin is not a party to this lawsuit, and the acts of one state official cannot be imputed to a distinct state agency that he does not lead or serve. Former Attorney General Schimel's views are irrelevant to the only question presented in Part I of defendants' argument—whether there is a justiciable controversy between plaintiffs and Secretary Barca acting in his official capacity.

Second, plaintiffs contend that the justiciable-controversy argument fails because there is no supporting "affidavit from Secretary Barca in which he confirms that he agrees with the Plaintiffs." (Pls.' Br. 9.) They complain that the only affidavits are from Tyler Quam and Rick Uhlig, a Supervisor and Special Agent of DOR's Alcohol and Tobacco Enforcement Unit, respectively. Quam and Uhlig do not, they insist, speak for Secretary Barca. (Pls.' Br. 9–10.)

However, this is an official capacity lawsuit. Secretary Barca's personal views are irrelevant. *See Koschkee*, 382 Wis. 2d 666, ¶ 47. Therefore, an affidavit from Secretary Barca stating his personal interpretation of the statute would be inappropriate in this litigation. Quam's affidavit summarizes and documents the *institutional* interpretation of Wis. Stat. § 125.09(1) that has been applied and proclaimed by the Department of Revenue over the course of forty years. (Quam Affidavit ¶¶ 5–6, 8, Exhs. A–J.) Quam's affidavit is not the expression of Barca's personal views or Quam's personal views; it is the catalogue of DOR's historical practice. The second to last exhibit to the Complaint is the December 2018 letter from former DOR Secretary Richard Chandler to Representative Swearingen. (Comp. Exh. D.) Chandler did not state his personal views in that letter; instead, he recounted in that letter "the longstanding application of the statutes by the Department of Revenue." (Comp. Exh. D.) Significantly—contrary to plaintiff's assertion that the record does not confirm how DOR will interpret the statute going forward—Quam's

affidavit concludes: "The Department's analysis of the statute has not changed since the date of that letter." (Quam Affidavit ¶ 8.) Only this institutional practice and understanding matters. Secretary Barca's personal opinion does not.

Third, plaintiffs point to DOR's not publishing a Fact Sheet on the present issue, and undersigned counsel's refusal to settle this litigation by stipulation. (Pls.' Br. 10.) On these grounds, plaintiffs declare that defendants "are not willing to provide the Plaintiffs with legal clarity regarding the proper interpretation of Wis. Stat. § 125.09(1), making them adverse to the Plaintiffs." (Pls.' Br. 11.)

There are many factors that go into an agency's decision to postpone or withdraw a proposed guidance document, and a decision not to settle a case. As plaintiffs concede, the reasons for these decisions have "no legal significance." (Pls.' Br. 11.) Nor do they have any non-legal significance. In this lawsuit, Secretary Barca has informed this Court that, as a historical matter, DOR has interpreted Wis. Stat. § 125.09(1) to permit the consumption of alcohol beverages at private events at unlicensed event venues as long as the event is truly private, and the alcohol beverages are served free of charge. (Defs.' Br. 2.) Moreover, DOR continues to adhere to that analysis of the statute. (Quam Affidavit ¶ 8.) With these clear declarations of DOR's

interpretation and application of the statute to this Court, plaintiffs' vague inferences of contrary positions are unavailing.

Fourth, plaintiffs argue that they have a justiciable controversy against *Secretary Barca* because *other entities*, notably local law enforcement and the Attorney General, can enforce the statute to plaintiffs' detriment without regard to DOR's official interpretation of the statute. (Pls.' Br. 11.)

However, there is no evidence that local law enforcement has ever attempted to enforce Wis. Stat. § 125.09(1) against plaintiffs or others similarly situated. Even if there were, that does not solve the justiciability problem at issue here—whether there is a case or controversy between plaintiffs and *Secretary Barca*. These hypothetical local enforcers—who, as plaintiffs imagine them, have no relationship to Secretary Barca—are not parties to this litigation. And, the fact that some hypothetical official outside of Secretary Barca's control might take some unauthorized action without Secretary Barca's approval does not create a justiciable claim against Secretary Barca.

As for the Attorney General, plaintiffs' argument fails because the Attorney General may bring an action under chapter 125 only "[u]pon request by the secretary of revenue." Wis. Stat. § 125.145. In other words, the Attorney General cannot act under chapter 125 without Secretary Barca's approval. The Attorney General is not an independent actor with respect to chapter 125.

Fifth, and finally, plaintiffs insist that they have standing to obtain a declaratory judgment because their businesses are at risk. That is a separate question from the one presented here, whether there is a case or controversy between two parties to a declaratory judgment action who agree about the subject of the requested declaration. A claim for a declaratory judgment is not justiciable unless these two factors are satisfied: "(1) The matter is a controversy in which a claim of right is asserted *against one who has an interest in contesting it*; [and] (2) The controversy is between persons *whose interests are adverse*[.]" *Planned Parenthood of Wis., Inc. v. Schimel*, 2016 WI App 19, ¶ 10, 367 Wis. 2d 712, 877 N.W.2d 604 (emphasis added). Plaintiffs' desire or preference for a court decision does not make a case justiciable if the opposing party agrees with plaintiffs' statutory interpretation.

This Court should dismiss Secretary Barca from this lawsuit because plaintiffs do not state a justiciable claim against him.

II. This Court should dismiss Governor Evers from this lawsuit because the claims against him are barred by sovereign immunity.

As with Secretary Barca, plaintiffs sue Governor Evers in his official capacity. Except in certain limited circumstances, sovereign immunity bars official capacity suits against state officers. Pertinent here, to obtain a judicial interpretation of a statute, a declaratory judgment action may be brought against a state officer "charged with administering the statute." *Lister v. Bd.*

of Regents of the Univ. of Wis. Sys., 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976). The *Lister* fiction does not authorize a declaratory judgment action against other officers—i.e., those not "charged with administering the statute"—because it "is based on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority." *Lister*, 72 Wis. 2d at 303. Since Governor Evers is not an officer "charged with administering [section 125.09(1)]," he is not a proper defendant under *Lister*. Therefore, defendants ask this Court to dismiss Governor Evers on sovereign immunity grounds.

The *Lister* fiction is an exception to the bedrock sovereign immunity principle and therefore must be applied sparingly, in accordance with its limited scope, which is to allow suit against an official who, like Secretary Barca, directly administers a challenged statute. *Cf. Orff v. U.S.*, 545 U.S. 596, 601–02 (2005) (statutory waivers of sovereign immunity must be strictly construed in favor of the sovereign); *Martineau v. State Conserv. Comm'n*, 54 Wis. 2d 76, 79–80, 194 N.W.2d 664 (1972) (same). Plaintiffs ask this Court to apply the exception expansively, under a kind of "unitary executive" theory, and to hold that, as the chief executive of the state, Governor Evers is appropriately sued in any declaratory judgment action regarding any challenge to any state statute. (Pls.' Br. 13–14.) But this is not the proper interpretation of *Lister*, in which the supreme court very carefully and

deliberately carved out a limited sovereign immunity exception permitting suit only against those officers arguably "acting outside the bounds of [their] constitutional or jurisdictional authority." *Lister*, 72 Wis. 2d at 303. There is no published appellate decision applying the *Lister* fiction to allow suit against the Governor where, as here, another state officer is statutorily authorized to administer the challenged statute. In the absence of any precedent allowing such a suit, this Court should hold that plaintiffs' claim against Governor Evers is barred by sovereign immunity.

Plaintiffs cite several cases in which previous governors did not assert sovereign immunity in declaratory judgment actions. (Pls.' Br. 14–15.) Sovereign immunity is an affirmative defense; a government litigant is not required to raise it in every case. *See Aesthetic & Cosmetic Plastic Surgery Ctr., LLC v. Wis. Dep't of Transp.*, 2014 WI App 88, ¶ 23, 356 Wis. 2d 197, 853 N.W.2d 607. In the cases cited, the issue was not litigated, as plaintiffs concede, so no rule of law can be inferred from each governor's decision not to assert the defense. Governor Evers will not speculate why his predecessors did not raise it in those cases.

This Court should dismiss Governor Evers from this lawsuit on the ground of sovereign immunity.

III. This Court should dismiss Attorney General Kaul form this lawsuit because the claims against him are barred by sovereign immunity.

As with the other defendants, plaintiffs sue Attorney General Kaul in his official capacity. And, as with Governor Evers, plaintiffs' claims against Attorney General Kaul are barred by sovereign immunity.

Plaintiffs cite provisions of chapter 125 to argue that the Attorney General is statutorily empowered to "enforce his own interpretation of the [statute]" "regardless of the DOR's position on the meaning of 'public place' under Wis. Stat. § 125.09(1)." (Pls.' Br. 16.) That is simply not true. The Attorney General may participate in an enforcement action only if the DOR Secretary asks him to; he has no independent enforcement authority. The statute could not be clearer. Section 125.45 of the Alcohol Beverages chapter states: "*Upon request by the secretary of revenue*, the attorney general may represent this state or assist a district attorney in prosecuting any case arising under this chapter." Wis. Stat. § 125.145.

Plaintiffs go on to revisit the non-binding letter former Attorney General Schimel sent to Representative Swearingen. That letter may have, to plaintiffs' minds, "led to this litigation." (Pls.' Br. 16.) But it did not and could not vest in Attorney General Kaul or any other occupant of his office the authority to prosecute cases arising under chapter 125 without a request from the DOR Secretary. Where the Attorney General lacks the independent authority to act

under the statutes, a letter stating the personal views of one Attorney General does not and cannot create for himself or his successors non-statutory enforcement authority. Lacking that authority, he does not fall under the limited exception to sovereign immunity for purposes of this action.

IV. This Court should not address the issue of summary judgment on the merits at this time.

The present motion on the pleadings asks this Court to dismiss plaintiffs' claims against the three defendants on grounds of justiciability and sovereign immunity. It does not ask this Court to address the merits of these claims or to dismiss the case on the merits, which is consistent with this Court's scheduling order. Foreseeing the possibility that this Court might not grant the present motion in full, the parties stipulated that "other dispositive motions," i.e., summary judgment motions, could be filed after the briefing and ruling on the present motion are concluded. (Jt. Ltr. dated 6/17/19.) That stipulation is reflected in the amended scheduling order. (Order dated 6/12/19; Jt. Ltr. dated 6/17/19; Am. Order dated 6/18/19.)

Defendants recognize that a judgment on the pleadings will ordinarily be converted to a summary judgment motion if "matters are presented to and not excluded by the court." Wis. Stat. § 802.06(3). However, where, as here, the motion for judgment on the pleadings does not address the merits, and where the parties have stipulated (with the Court's approval) to additional summary

judgment briefing if the present motion is not granted in full, the conversion of the motion to a summary judgment motion on the merits is not appropriate.

This Court should not convert defendants' motion for judgment on the pleadings to a summary judgment motion on the merits at this time. Rather, it should follow the existing schedule that leaves the merits for future briefing, if necessary.

CONCLUSION

For the reasons stated, this Court should dismiss plaintiffs' complaint against all the defendants in its entirety.

Dated this 27th day of August, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Maura FJ Whelan
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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the *Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of August, 2019.

Electronically signed by:

s/ Maura FJ Whelan

MAURA FJ WHELAN
Assistant Attorney General