STATE OF WISCONSIN **CIRCUIT COURT** **COUNTY OF DANE**
BRANCH 2

STATE OF WISCONSIN ex rel.
ISMAEL R. OZANNE,

Plaintiff,

Vs.

Case No. 11CV1244

JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS, SCOTT SUDER,
MARK MILLER, PETER BARCA,
DOUGLAS LAFOLLETTE, JOINT
COMMITTEE OF CONFERENCE,
WISCONSIN STATE SENATE and
WISCONSIN STATE ASSEMBLY,

Defendants.

DECISION

INTRODUCTION

This case requires the court to determine whether members of the Wisconsin Legislature violated Wisconsin's Open Meetings Law on March 9, 2011, and if so, whether any governmental actions taken as a result are void. Under the authority of Wis. Stats. § 19.97, this court heard testimony on March 29 and April 1, 2011 on the State's request for declaratory and injunctive relief. The State has shown by clear and convincing evidence that the March 9, 2011 meeting of the Joint Committee of Conference violated §§ 19.82, 19.83 and 19.84 of the Wisconsin Statutes.

Today this court has issued separate Findings of Fact, Conclusions of Law and Judgment. The Findings of Fact set forth the evidence establishing the Open Meetings Law violations. This Decision explains why it is necessary to void the legislative actions flowing from those violations in accordance with the authority given by the Legislature to circuit courts in § 19.97(3) of the Wisconsin Statutes. The Judgment accordingly declares that the March 9, 2011 action of the Legislature's Joint Committee of Conference is void, and that 2011 Wisconsin Act 10 consequently has no force or effect.

TABLE OF CONTENTS

DECISION

I. THE SCOPE OF JUDICIAL RESPONSIBILITY TO REVIEW LEGISLATIVE ACTION

The United States and Wisconsin Constitutions establish three coordinate branches of government: the Executive, the Legislature and the Judiciary. Our democracy works on the bedrock principle that no single branch of government possesses superior power over the other. This concept is referred to as "checks and balances."

It is unquestionable that the Legislature exists to create laws; it is equally beyond question that the duty of the Judiciary is to interpret and apply the rule of law to specific cases. This quintessentially American judicial duty originated in the United States Supreme Court case of *Marbury v. Madison,* 5 U.S. 137 (1803). It is likewise grounded in the Wisconsin Constitution. And, for purposes of this case, it is carried forward in Wisconsin's Open Meetings Law. These authorities confer upon the judiciary—even one circuit court—the responsibility to interpret and apply the rule of law, not just to individuals, but to the actions of government and its representatives.

A. Marbury v. Madison

The United States Constitution, Article III, § 1 vests the judicial power of the United States "in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Taught in every civics

class in our country, the United States Supreme Court's 1803 decision in *Marbury v. Madison* sets the robust Constitutional foundation for judicial authority:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Marbury v. Madison, 5 U.S. 137, 177.

As territories achieved statehood, the framers of State Constitutions, including Wisconsin, ratified and implemented Article III in their own Constitutions.

B. The Wisconsin Constitution

Article VII, § 2 of the Wisconsin Constitution vests the judicial power of this state in a "unified court system consisting of one supreme court, a court of appeals, a circuit court . . ." Article VII, § 8 establishes the authority of the circuit court as follows:

> **Circuit court: jurisdiction.** Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the legislature may prescribe by law. The circuit court may issue all writs necessary in aid of its jurisdiction.

The Wisconsin Supreme Court in *Guardianship of Eberhardy,* 102 Wis. 2d 539, 549-550, 307 N.W. 2d 881 (1981) articulated Wisconsin's longstanding constitutional rule of judicial authority: "The circuit courts of Wisconsin are constitutional courts . . . [u]nlike the relationship between the Congress and the federal courts, under which the Congress may grant or withhold jurisdiction as it

pleases, in Wisconsin the jurisdiction and the power of the circuit court is conferred not by act of the legislature but by the Constitution itself."

And, as the Court observed in *Wisconsin Senate v. Thompson,* 144 Wis. 2d 429, 436-437, 424 N.W. 2d 385 (1988):

> Since *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), it has been recognized that it is peculiarly the province of the judiciary to interpret the Constitution and say what the law is. . .
>
> It is the responsibility of the judiciary to act, notwithstanding the fact that the case involves political considerations or that the final judgment may have practical political consequences.

In other words, a court cannot avoid its responsibility to apply the rule of law out of fear that its action will be controversial or unpopular. "This is of the very essence of judicial duty." *Marbury v. Madison,* 5 U.S. at 178.

Without doubt, the doctrine of separation of powers instructs that the legislative, executive and judicial branches cannot invade another branch's core constitutional powers. But beyond these core constitutional powers lie "great borderlands of power which are not exclusively judicial, legislative or executive. While each branch jealously guards its exclusive powers, our system of government envisions the branches sharing the powers found in these great borderlands." *Flynn v. Department of Administration,* 216 Wis. 2d 521, 546, 576 N.W. 2d 245 (1998). The Open Meetings Law is an example of shared power between the legislative and judicial branches.

C. Open Meetings Law Enforcement

The enforcement provisions of the Open Meetings Law demonstrate that the Legislature has chosen to involve courts in assuring that meetings of all governmental bodies, including the Legislature itself, "shall be preceded by public notice as provided in s. 19.84, and shall be held in open session." Sections 19.83, 19.96 and 19.97, Wis. Stats. In fact, by enacting § 19.97(3) the Legislature took the extra step of explicitly authorizing the circuit court to nullify action taken in violation of the Open Meetings Law.

II. THE LEGISLATURE AND ITS COMMITTEES ARE BOUND BY THE OPEN MEETINGS LAW.

A. The Open Meetings Law presumes that all governmental meetings must be open to the public and preceded by notice.

1975 Wisconsin Act 426 created the present form of the Open Meetings Law, §§ 19.81-19.98. The Supreme Court stated that, in repealing and recreating the previous version, the Legislature "intended to broaden the scope of the Open Meetings Law." The Legislature rejected a statutory presumption of closed meetings, "and opted for language that created a presumption of open public meetings of governmental bodies." *State ex rel. Newspapers v. Showers,* 135 Wis. 2d 77, 97, 398 N.W. 2d 154 (1987). Thus, "[e]very meeting of a governmental body must be preceded by public notice and must be held in open session unless an exemption under sec. 19.85, Stats., applies." *State ex rel. Schaeve v. Van Lare,* 125 Wis. 2d 40, 45, 370 N.W. 2d 271 (Ct. App. 1985). In

addition, the Supreme Court in *State ex rel. Badke v. Greendale Village Bd.,* 173 Wis. 2d 553, 580, 494 N.W. 2d 408 (1993) concluded that "a governmental body must meet in a facility which gives reasonable public access, not total access, and that it may not systematically exclude or arbitrarily refuse admittance to any individual."

The purpose of the Open Meetings Law is to protect all citizens' rights to be informed to the fullest extent concerning the affairs of their government. Transparency in government is most important when the stakes are high:

> An Open Meetings Law is not necessary to ensure openness in easy, noncontroversial matters where no one cares whether the meeting is open or not. Like the First Amendment which exists to protect unfavored speech, the Open Meetings Law exists to ensure open government in controversial matters. The Open Meetings Law functions to ensure that these difficult matters are decided without bias or regard for issues such as race, gender, or economic status, and with regard for the interests of the community. This requires, with very few exceptions, that governmental meetings be held in full view of the community.

State ex rel. Hodge v. Turtle Lake, 180 Wis. 2d 62, 75-76, 508 N.W. 2d 603 (1993).

B. There is no general exemption from the Open Meetings Law for legislative proceedings.

When the Legislature enacted the Open Meetings Law it explicitly contemplated that legislative activities would come within the scope of the law. It did so first in § 19.81(3), the legislative declaration of policy:

> In conformance of article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

The Legislature then created § 19.87, which states: "This subchapter shall apply to all meetings of the senate and assembly and the committees, subcommittees and other subunits thereof," except as set forth in subsections (1)-(4). Of these exceptions, only one is arguably applicable here. Section § 19.87(2) provides that "[n]o provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule."

The evidence received and testimony heard on March 29 and April 1, 2011, however, revealed no conflicting senate, assembly or joint rule in effect on March 9, 2011, that would have excused compliance with the public notice requirements the Legislature established in § 19.84(3). The evidence also demonstrated a failure to obey even the two-hour notice allowed for good cause if 24-hour notice is impossible or impractical. Section 19.84(3) unequivocally

states that "in no case may the notice be provided less than 2 hours in advance of the meeting."

It is also notable that neither of the enforcement provisions of the Open Meetings Law, §§ 19.96 and 19.97, remove legislators or legislative acts from the law's enforcement.

C. The Legislature is subject to the same Open Meetings Law enforcement provisions as other governmental bodies.

Defendants Fitzgerald, Ellis, Suder and Fitzgerald (hereinafter "non-appearing defendants")[1] claim that legislative action cannot be voided for violation of the Open Meetings Law; only "the actions of lesser governmental bodies" can be so nullified (March 28, 2011 brief at p. 24). In their view, enforcement against legislators is limited to the $25-$300 forfeiture authorized by § 19.96. These defendants' claimed exemption, however, stands in sharp conflict with § 19.97(3) and the Wisconsin Supreme Court's decisions in *Milwaukee Journal-Sentinel v. Wisconsin Dept. of Administration,* 2009 WI 79, 319 Wis. 2d 439 and *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 239 N.W. 2d 313 (1976). Wisconsin case law persuasively demonstrates that legislative bodies are subject to the same enforcement provisions as "lesser governmental bodies."

The Supreme Court in *State ex rel. Lynch v. Conta* laid the foundation for the rule that the Open Meetings Law applies to legislative action. *Lynch*

[1] These four defendants assert a privilege from service of civil process pursuant to Wis. Const. Art. IV, §15 and therefore have not yet "appeared" in this action. Their interests, however, have been represented by the Attorney General throughout this proceeding. The impact of the non-appearing defendants' legislative privilege is discussed in Part III of this Decision.

concerned legislative committee activities leading to the enactment of the 1975 Budget Bill. While the bill was pending before the Joint Committee on Finance, several members of that committee held private meetings without benefit of the notice required under the Open Meetings Law.[2] The Dane County District Attorney requested the Supreme Court to render a declaratory judgment on whether the attending committee members had violated the Open Meetings Law. The Court interpreted "meeting of a governmental body" to include the private meetings, stating:

> When the members of a governmental body gather in sufficient numbers to compose a quorum, and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other—an evasion of the law is evidenced.

71 Wis. 2d at 685-686.

The Court then considered whether a judicial declaration as to the legality of the legislative committee's acts violated the doctrine of separation of powers. The Court held, 71 Wis. 2d at 698, that it did not:

> Section 66.77, Stats., [predecessor to current §§ 19.96-97] itself authorizes actions to be brought against members of any governmental body who knowingly violate that section and represents the expressed will of the legislature in this respect. This court is being asked to construe a statute, not to interfere with the functions or the separate power of the legislative branch of government. In construing the statute as a whole, it is necessary to hold that the legislature intended sec. 66.77 to apply to legislators and legislative committees, subject to expressed statutory exceptions.

[2] At that time, the pertinent notice provision was contained in §66.77(1)(e), Stats.

The Court in *Lynch* was not requested and therefore did not address the voidability of the legislative action. The Court observed, however, that "the time-honored precept, established *Marbury v. Madison,* [provides that] the judiciary may review the acts of the legislature for any conflict with the constitution." *Id.* at 695. *Lynch,* then, stands for the solid proposition that the legislature is not exempt from enforcement under the Open Meetings Law.

The Supreme Court's 2009 decision in *Milwaukee Journal-Sentinel v. Dept. of Administration,* 2009 WI 79, answers the precise question raised in this case, whether and under what circumstances a court may void a legislative act for failure to abide by a statutory directive. The Court in *Milwaukee Journal-Sentinel* invalidated legislation ratifying a collective bargaining agreement because the Legislature failed to comply with the statutory procedure for ratification of collective bargaining agreements, § 111.92(1)(a). That statute requires that any amendments to existing law be introduced by bill separate from the collective bargaining agreement. The collective bargaining agreement at issue attempted to amend the Public Records Law by creating a prohibition on disclosure of the names of Wisconsin State Employee Union (WSEU) employees.

WSEU argued that the Court had no jurisdiction to review the Legislature's compliance with the statutory ratification procedure, contending that § 11.92(1)(a), is a legislative "rule of proceeding" exclusively within the province of the Legislature. The Court rejected this argument, stating:

> Here, we need not decide whether Wis. Stat. § 111.92(1)(a) is a rule of legislative proceeding because a statute's terms must be

> interpreted to comply with constitutional directives. Accordingly, even if the statute might otherwise be characterized as a legislative rule of proceeding, we may interpret the statute and apply it to the legislative action to determine whether that action complies with the relevant constitutional mandates. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Stitt,* 114 Wis. 2d at 367; *McDonald v. State,* 80 Wis. 407, 411-412, 50 N.W. 185 (1891).

2009 WI 79, ¶ 19.[3] The Court went on to invalidate 2003 Wisconsin Act 319, the legislation adopting the collective bargaining agreement and amending the Public Records Law.

Milwaukee Journal-Sentinel provides the controlling authority for our case. Just as the collective bargaining ratification statute was constitutionally-based, the Open Meetings Law is founded on Art. IV, § 10 of the Wisconsin Constitution. The Legislature has decided to apply the Open Meetings Law to itself. Courts have jurisdiction to review whether the Legislature has violated a constitution-based procedural statute, and if so, the authority to declare the legislative action void as the Court did in *Milwaukee Journal-Sentinel.*

The Attorney General makes only passing reference to *Milwaukee Journal-Sentinel* and *Lynch* (March 28 and May 18, 2011 briefs at pp. 23-24 and 16, respectively). Instead, the Attorney General asserts that the voidability provision of § 19.97(3) simply does not apply to legislative action. He relies upon two cases that do not concern the Open Meetings Law: *Goodland v.*

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[3] Justice Roggensack authored the majority opinion for the Court. Justice Bradley's concurrence disagreed with the dissent's view that § 111.92(1)(a) is a rule of legislative proceeding and thus not amenable to judicial review. Justice Bradley wrote, 2009 WI 79, ¶ 75:

> I see the balance differently. In a close case, I conclude that the weighty public policies of notice and transparency in government tip the scale. I would therefore determine that Wis. Stat. § 111.92(1)(a) is not a rule of legislative proceeding, and the court may intervene to examine whether its conditions were met.

Zimmerman, 243 Wis. 459, 10 N.W. 2d 180 (1943) and *State ex rel. La Follette v. Stitt,* 114 Wis. 2d 358, 338 N.W. 2d 684 (1983).

In *Goodland v. Zimmerman,* the acting Governor challenged the constitutionality of legislation before it became law. Holding that there is no such thing as an unconstitutional bill, the Court held that court review must await the violation or deprivation of someone's rights by operation of the law. Then, "in a proper case a court may declare whether the legislature has exceeded its constitutional powers in the enactment of the law complained of." 243 Wis. at 466. In the Open Meetings Law, however, the Legislature has expressly made the law applicable to its own activities, and has empowered the district attorney to seek court relief for violations . *Goodland* neither discusses nor contemplates theses distinctions. Nothing in *Goodland* supports an implied legislative exemption from the voidability provision of § 19.97(3).

In *State ex rel. La Follette v. Stitt,* the Court considered whether legislation should be invalidated simply because of violation of a legislative internal operating rule. In that case, neither house of the Legislature had referred a bill to the joint survey committee on debt management for advice prior to its enactment. The Court stated:

> [W]e conclude we will not intermeddle in what we view, in the absence of constitutional directives to the contrary, to be purely legislative concerns . . . The rationale is that the failure to follow such procedural rules amounts to an implied *ad hoc* repeal of such rules.

114 Wis. 2d at 364-365. The Court limited its decision, however, to procedural rules that do not "codify any constitutional provisions regarding legislative procedures." *Id.* at 367. By contrast, the Open Meetings Law is explicitly founded upon the Wis. Const. Art. IV, § 10 command that "the doors of each house shall remain open, except when the public welfare requires secrecy." Section 19.81(3), Wis. Stats.

The Legislature and its committees are bound to comply with the Open Meetings Law by their own choice. Having made that choice, they cannot now shield themselves from the provisions that give the law force and effect.

III. LEGISLATIVE PRIVILEGE DOES NOT BAR THE TIMELY RESOLUTION OF THE NON-FORFEITURE CLAIMS.

When testimony concluded on April 1, 2011, the non-appearing defendant legislators renewed their request that this case be held open so that they could have their "day in court" following expiration of the exemption from civil process under Wis. Const. Art. 15.[4] This court deferred a final ruling at that time. The parties were asked to provide legal authority on whether the court could proceed to judgment on the non-forfeiture claims asserted in the complaint. The final brief was filed on May 23, 2011.[5]

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[4] The parties (and this court) have used the term "immunity" to describe the protection afforded by Art. IV, §15. The Constitution itself and the cases interpreting it refer instead to "privilege." See: *State v. Beno,* 116 Wis. 2d 122, 341 N.W. 2d 668 (1984); *State v. Burke,* 2002 WI App 291, 258 Wis. 2d 832.

[5] The District Attorney's May 23, 2011 brief at pages 1-2 points out that neither the Attorney General nor the Department of Justice represents any active party, and questions on whose behalf the May 18, 2011 brief was filed. Since the Attorney General has not requested to be made a party, the District Attorney suggests that the court strike the brief. The court declines to do so. This case raises issues of statewide significance. The court will treat the Attorney General's brief as filed *amicus curiae.*

In the meantime, however, the non-appearing defendants have moved to dismiss the complaint for lack of personal jurisdiction because of their legislative privilege. They assert that, even though the statutory time for service has not expired, the legislative session does not have a predictable ending point—in other words, their privilege from service of process could continue indefinitely. They further state that "there is no possibility that legislative immunity will be waived" (May 9, 2011 brief, page 2).

By these statements, the non-appearing defendants have now extinguished any remaining justification for postponing final judgment, at least on the non-forfeiture claims. Despite protestations that they have been denied their day in court to present defenses, they are now seeking to be dismissed entirely from this case.

They further request that the entire case be dismissed, contending that the goal has been accomplished: putting the Legislature "on notice that members attending any future proceedings should be cognizant of and follow the Open Meetings Law—perhaps to the point of excessive notice" (May 18, 2011 brief at page 29). This flawed reasoning, if adopted, would deprive the Open Meetings Law of any effectiveness in the very cases it is needed most.

There is a fair and logical way to preserve the legislators' defenses without further stalling the resolution of the State's separate claim for declaratory relief under Wis. Stats. § 19.97(2) and (3). The State's claim for declaratory relief as to the validity of the legislative action may proceed while the

personal claims for forfeitures against individual legislators are held in abeyance, as discussed below.

A. Personal claims against the legislators should be held in abeyance.

The court agrees that it must have personal jurisdiction over the non-appearing defendants to be able to adjudicate the personal claims against them. That does not mean, however, that the entire case must stop in its tracks until the non-appearing defendants are subject to service of process.

Pursuant to Wis. Stat. § 19.96, the State seeks forfeitures against defendants Fitzgerald, Ellis, Suder and Fitzgerald, and to that extent they risk personal liability. Section 19.97(2), however, provides:

> In addition and supplementary to the remedy provided in s. 19.96, the attorney general or the district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96, to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances.

This statute thus authorizes the § 19.97 enforcement action to be severed and proceed separately from the forfeiture claims against the individual legislators. The individual forfeiture claims may be held in abeyance while the non-forfeiture claims proceed.

B. The State's claims for declaratory relief may proceed without the legislators.

Section 803.03, Wis. Stats., (hereinafter "joinder statute") instructs courts how to proceed when a person needed for a just and complete adjudication of a claim cannot be made a party to a pending action. The joinder statue applies

here because the legislators assert that their legislative privilege means that they cannot be made parties to any part of this action.

The joinder statute requires the court first to determine whether a party is "necessary." If so, the court then "shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Section 803.03(3). The statute provides four factors upon which the court determines whether a case should proceed or be dismissed:

(a) To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;

(b) The extent to which, by protective provisions in the judgment, by the shaping of relief or other measures, the prejudice can be lessened or avoided;

(c) Whether a judgment rendered in the person's absence will be adequate; and

(d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Attorney General argues, on the legislators' behalf, that because they are both "necessary" and "indispensable," dismissal of the entire lawsuit is required. The other parties contend that even if the legislators meet the definition of "necessary" in § 803.03(1) and (2), they cannot be considered indispensable parties after consideration of the four statutory factors.

The leading case interpreting § 803.03(3) is *Dairyland Greyhound Park, Inc. v. McCallum,* 2002 WI App 259, 258 Wis. 2d 210. In that case, plaintiff Dairyland Greyhound Park sought to enjoin the Governor from renewing the state's gaming compacts with Indian tribes. Because of tribal sovereignty, the eleven tribes themselves could not be made parties, making it necessary for the court to determine whether they were necessary, and if so, whether they were indispensable parties. 2002 WI App 259, ¶ 9. The circuit court determined that the tribes were indispensable and granted the Governor's motion to dismiss Dairyland's action.

The Court of Appeals reversed, holding that the tribes were necessary but not indispensable parties, thus allowing the case to proceed in their absence. In so doing, the Court reasoned that the first factor—prejudice to the absent party—was a significant but not controlling factor favoring dismissal. The second factor—whether protective provisions in a judgment could lessen the prejudice—also weighed in favor of dismissal.

Consideration of the third and fourth factors, however, caused the Court to conclude that the tribes were *not* indispensable parties and that Dairyland's claim should proceed. The Court determined that a judgment rendered in the absence of the tribes would nonetheless be adequate because "it would resolve the dispute between Dairyland and the Governor regarding the Governor's authority or lack thereof to extend or renew the compacts." *Id.* at ¶ 30. It was the fourth factor, however—whether plaintiff would be left without an adequate

remedy that "tip[ped] the scales in favor of permitting the action to continue." *Id.* at ¶ 31. The Court concluded, 2002 WI App 259, ¶ 35:

> The present litigation does not simply seek to resolve a dispute among private actors. . . There can be little question that the citizens of Wisconsin have a considerable interest in ensuring that state officials act in accordance with the peoples' will as expressed in the state constitution . . . We conclude that, in equity and good conscience, this action, like those we have cited in California and New York, must be allowed to proceed in the absence of the tribes, notwithstanding the potential prejudice to their interests.

The Court's reasoning in *Dairyland* applies with even greater force in the present case.[6]

First, any "prejudice" to the non-appearing parties if the declaratory portion of the case moves forward is questionable at best. They, as well as the rest of the citizens of Wisconsin, should not have to await the expiration of legislative immunity for a determination as to the validity of the legislative acts on March 9 and 10, 2011. With the legislators' admission that they will assert legislative immunity indefinitely, the record is complete. There is no purpose served by holding the record open for further testimony and briefing that will in all likelihood never occur. The Judgment entered today allows an appeal to proceed as a matter of right. None of the parties, present or absent, are harmed by that result.

Second, any potential prejudice to the non-appearing defendants' interests is avoided if the forfeiture claims against them are severed and held in abeyance.

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[6] The Attorney General's brief mentions *Dairyland* but does not address the test for determining whether a party is indispensable established in that case. (May 18, 2011 brief at pages 25-30).

abeyance. A declaration that the Open Meetings Law has been violated by a governmental body does not establish any individual legislator's liability because § 19.96 requires the State to prove that a member "knowingly" violated the law. And, as stated in § 19.81(4), forfeiture claims are held to a higher standard of proof than actions brought under the § 19.97(2) and (3) enforcement provisions:

> **19.81 Declaration of policy.**
>
> **(4)** This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretation thereof.

Thus, any prejudice to individual legislators' interests is prevented by limiting the Judgment to a determination of the validity of the governmental body's actions under § 19.97(3).

Third, *Dairyland's* discussion of the adequacy of judgment is directly applicable here. As in *Dairyland,* determination of the validity of the Committee's March 9 action resolves the dispute regarding the Legislature's authority to enact 2011 Wisconsin Act 10. And, as noted above, the case may proceed to direct appeal.

Finally, as in *Dairyland,* the State will be denied an adequate remedy if this action is dismissed because of the legislators' assertion of privilege. This is not simply a dispute between private individuals, but an action impacting the rights and responsibilities of all Wisconsin citizens. "Equity and good

conscience," the overriding standard prescribed in § 803.03(3), requires that the non-forfeiture claims move forward.

Because the non-appearing defendants are not indispensable parties to the non-forfeiture claims in this action, the forfeiture claims will be severed and the remainder of the case will proceed.

IV. THE STATE HAS PROVEN THAT THE MARCH 9, 2011 MEETING OF THE JOINT COMMITTEE OF CONFERENCE WAS CONDUCTED IN VIOLATION OF THE OPEN MEETINGS LAW.

This is a civil, not criminal action. Therefore, the State must show Open Meetings Law violations by a preponderance of the evidence, the lowest burden of proof[7]. The State has met its burden of proof.

The Findings of Fact issued with this Decision set forth the evidence establishing that the March 9, 2011 Joint Committee of Conference meeting was conducted in violation of §§ 19.83 and 19.84, Wis. Stats. Section 19.83 requires that "[e]very meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session." Section 19.82(3) defines "open session" as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." The evidence demonstrated that the March 9, 2011 committee meeting was held on less than two hours notice in a location that was not open and accessible to citizens. See: Findings of Fact 14, 15, 16, 22-24, 30, 38, 39, 43, 47, 51-56.

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[7] In *Nommensen v. American Continental Ins.*, 2001 WI 112, ¶ 16, 246 Wis. 2d 132, the Court described the ordinary civil case burden of proof as "'the greater weight of the credible evidence.' This expression of the required quantum of evidence 'is an exact synonym for 'fair preponderance' and much more understandable by the average juror." (citations omitted).

The non-appearing defendants contend that the meeting was exempt under § 19.87(2), which provides that "no provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule." Two days of testimony, numerous exhibits and multiple briefs have revealed nothing that would support a finding that a conflicting legislative rule was in effect at the time. In fact, even Senate Chief Clerk Robert Marchant could identify no specific rule in effect until, when pressed on the point, he testified that only legislative "custom, usage and precedent" conflicted with the § 19.84 specific requirements governing the timing of public notice:

> I don't know that it's in the tradition of the legislature to exclude the public from its proceedings, but with regard to the actual notice of the meeting, I think it's not just tradition, but in the legislative context, the legislature as an institution, its custom, usage and precedent has the effect of rules, and that's the way they've operated, in my understanding.

(April 1, 2011 Tr., page 104).

Of course, reliance on unwritten "custom, usage and precedent" to fashion an exemption would open the door to evasion of the clear mandate of the Open Meetings Law. Findings of Fact 17, 18 and 19 and supporting exhibits show that no conflicting legislative rule exempted the March 9 meeting from the requirement of timely and adequate public notice under § 19.84.

V. UNDER THE FACTS OF THIS CASE, THE PUBLIC INTERESTS IN OPEN MEETINGS LAW COMPLIANCE OUTWEIGH ANY PUBLIC INTEREST IN SUSTAINING THE VALIDITY OF THE LEGISLATIVE ACTION.

A finding of one or more Open Meetings Law violations leads to the next step, determining the appropriate remedy. Section 19.97(2) authorizes the court to grant equitable relief "as may be appropriate under the circumstances." Section 19.97(3) authorizes the court to declare void any action taken by a governmental body in violation of the Open Meetings law. Such a declaration is not automatic. A court may not declare an action void "unless the court finds, under the circumstances of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken." This requires the court to engage in a "balancing test." *State ex rel. Herro v. Village of McFarland,* 2007 WI App 172, ¶ 25, 303 Wis. 2d 749.

No Wisconsin case directly addresses the factors a court should consider to determine what constitutes "the public interest" in this context. The Wisconsin Supreme Court, however, has developed factors for determining whether a public meeting notice is sufficiently specific as to the subject matter of the meeting. *State ex rel. Buswell v. Tomah Area School Dist.,* 2007 WI 71, 301 Wis. 2d 178. In *Buswell,* the Court considered the sufficiency of the public notice for Tomah Board of Education meetings concerning a master contract for athletic

coaching positions. The Court adopted a "reasonableness" standard to determine the sufficiency of notice in open meetings cases. The Court stated the applicable factors as follows, 2007 WI 71, ¶ 28:

> The reasonableness standard requires taking into account the circumstances of the case in determining whether notice is sufficient. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate.

To be sure, these factors were not established to guide the court's exercise of discretion on the question of voidability of governmental action. Nonetheless, the three factors the Court set forth in *Buswell* are based on the same underlying open meetings principles: "the government must be accountable to the people who underwrite government finances and provide its legitimacy. Having access to information about the workings of government undercuts arguments of subterfuge and ultimately promotes public trust and confidence." 2007 WI 71, ¶ 26.

Applying the first *Buswell* factor requires the court to consider the burden of providing adequate—in this case, timely—notice prior to the March 9, 2011 Joint Committee of Conference meeting. Of the many levels of governmental bodies throughout Wisconsin, the Legislature is probably best equipped to provide timely notice because it does so as a routine matter. Witnesses testified at the March 29 and April 1, 2011 hearings as to their responsibilities to provide and post public notices under the Open Meetings Law. The burden of providing timely notice is minimal.

The second factor asks whether the subject of the meeting was of particular public interest. This factor needs no discussion because it is undisputed that the subject of the March 9 Committee meeting was of great statewide interest.

The third factor asks whether the meeting involved non-routine action that the public would be unlikely to anticipate. On March 9, 2011 it appeared that there would be no action on the Budget Repair Bill because there was not the required quorum. Redrafting the legislation in an attempt to eliminate the non-fiscal portions, and thus alter the quorum requirement, was not something the public would be likely to anticipate. Scheduling a near-immediate vote on the redrafted legislation was not "routine" action under any definition.

If the court were to apply the *Buswell* test to the question of voidability, it would lead to the inescapable conclusion that the action of the Joint Committee of Conference must be voided. Even if the court disregarded the *Buswell* test, however, balancing the public interests in accordance with the standard set forth in §19.97(3) leads to the same result: that the public interest in compliance with the Open Meetings Law outweighs any public interest there may be in sustaining the validity of the action taken.

There is undeniably a public interest in the finality of Legislative action that would weigh in favor of sustaining the validity of the Committee's action. The public is not served by keeping this legislation in limbo; that is why this Decision and its accompanying Findings of Fact, Conclusions of Law and

Judgment are being issued within a few days of the filing of the concluding brief. The Judgment is intended to be final action at the circuit court level.

Section 19.97(3) requires that the public interest in sustaining the validity of the legislative action must be balanced against the public interest in enforcement of the Open Meetings Law. Thus, despite the public interest in finality of legislative action, strong considerations compel the conclusion that the public interests in Open Meetings Law enforcement outweigh the public interest in sustaining the legislative action.

First, the evidence supporting the finding of violation is clear and convincing. This was not a case in which proper notice was missed by a few minutes or an hour. Not even the two-hour notice justified by "good cause," § 19.84(3), was provided. The legislators were understandably frustrated by the stalemate existing on March 9, but that does not justify jettisoning compliance with the Open Meetings Law in an attempt to move the Budget Repair Bill to final action. Moreover, if there is any doubt as to the Committee's awareness of its violation, one need only read the short transcript of the Committee's March 9 proceedings, Exhibit 10.[8]

Second, the Legislature had the opportunity to promptly correct the violation and thus eliminate this case entirely. It could have provided timely notice of a new Committee meeting and convened the meeting in an open and public location. It has not yet done so. Even if the legislators believe that they

[8] Exhibit 10 is appended to this Decision, along with the relevant statutes and a chronology of this case, in the Appendix.

did not violate the Open Meetings Law, convening a new meeting would not require an admission of violation and would have prevented the needless expenditure of taxpayer money to continue this lawsuit.[9]

Third, the rights violated by Open Meetings Law violations are public, not private rights. Those rights belong to all Wisconsin citizens, not just those who could not gain entry to the March 9 proceedings. As Justice Roggensack queried in her concurring opinion in *Buswell,* "does a member of the public who has an interest in the subject matter of the meeting but who has never expressed that interest to others deserve less complete notice?" The answer is no.[10]

Finally, and perhaps most significantly, the court must consider the potential damage to public trust and confidence in government if the Legislature is not held to the same rules of transparency that it has created for other governmental bodies. Our form of government depends on citizens' trust and confidence in the process by which our elected officials make laws, at all levels of government.[11]

For all of these reasons, and under the authority vested in the circuit court by § 19.97(3), it is necessary to void the legislative action on March 9 and 10, 2011.

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[9] The Attorney General's May 18, 2011 brief at pages 28-29 flatly rejects this suggestion, stating: "This is akin to telling a battery victim that they can just walk down the other side of the street and they won't get mugged again."

[10] 2007 WI 71, ¶ 75 (J. Roggensack, concurring).

[11] "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a verified legal right." *Marbury v. Madison,* 5 U.S. at 163.

CONCLUSION

Less than one year ago our Supreme Court stated: "Open records and open meeting laws, that is, 'Sunshine Laws,' 'are first and foremost a powerful tool for everyday people to keep track of what their government is up to . . . The right of the people to monitor the people's business is one of the core principles of democracy.'" *Schill v. Wisconsin Rapids School Dist.*, 2010 WI 86, ¶ 2, 327 Wis. 2d 572, (quoting a March 14, 2010 Wisconsin State Journal editorial).

This case is the exemplar of values protected by the Open Meetings Law: transparency in government, the right of citizens to participate in their government, and respect for the rule of law. It is not this court's business to determine whether 2011 Wisconsin Act 10 is good public policy or bad public policy; that is the business of the Legislature. It is this court's responsibility, however, to apply the rule of law to the facts before it.

Dated this 26th day of May, 2011.

BY THE COURT

Maryann Sumi, Judge
Circuit Court Branch 2

Cc: DA Ismael Ozanne
AAG Maria Lazar
Atty. Roger Sage
Atty. Robert Jambois
Atty. Susan Crawford

APPENDIX

OPEN MEETINGS ENFORCEMENT STATUTES

19.96 Penalty. Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who in his or her official capacity, otherwise violates this subchapter, by some act or omission, shall forfeit without reimbursement not less than $25 nor more than $300 for each such violation. No member of a governmental body is liable under this subchapter on account of his or her attendance at a meeting held in violation of this subchapter if he or she makes or votes in favor of a motion to prevent the violation from occurring, or if, before the violation occurs, his or her votes on all relevant motions were inconsistent with all those circumstances which cause the violation.

19.97 Enforcement. (1) This subchapter shall be enforced in the name and on behalf of the state by the attorney general or, upon the verified complaint of any person, by the district attorney of any county wherein a violation may occur. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state, and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

(2) In addition and supplementary to the remedy provided in s. 19.96, the attorney general or the district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96, to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances.

(3) Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the attorney general or the district attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken. . . .

(5) Sections 893.80 and 893.82 do not apply to actions commenced under this section.

TRANSCRIPT OF PROCEEDINGS

JOINT COMMITTEE OF CONFERENCE EXECUTIVE SESSION

MARCH 9, 2011

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SENATOR FITZGERALD: Okay. We'll, ah, call the Conference Committee, ah, to order and I'll ask, ah, Director Lang, the Committee Clerk, to call the role.

DIRECTOR LANG: Ah, Senator, Senator Fitzgerald?

SENATOR FITZGERALD: Here.

DIRECTOR LANG: Senator, Senator Ellis?

SENATOR ELLIS: Here.

DIRECTOR LANG: Senator Miller? Representative Fitzgerald?

RESPRESENTATIVE FITZGERALD: Here.

DIRECTOR LANG: Representative Suder?

SENATOR SUDER: Here.

DIRECTOR LANG: Representative Barca?

REPRESENTATIVE BARCA: Here.

DIRECTOR LANG: Five present.

SENATOR FITZGERALD: Okay. We have a quorum. Um, in order to move this process along

the Speaker and I have asked Director Lang to prepare a proposal for the Committee's consideration. The proposal is in front of you. Ah, if the Committee approves it the proposal will be drafted as a substitute amendment to Special Session Assembly Bill 11.

REPRESENTATIVE BARCA: Mr. Chairman.

SENATOR FITZGERALD: We have consulted --

REPRESENTATIVE BARCA: Mr. Chairman.

SENATOR FITZGERALD: I have -- let me read this statement. I have consulted with the Legislative Council, the Legislative Reference Bureau and the Legislative Fiscal Bureau and have been advised that this proposal would not trigger the special quorum requirement in Article VIII, Section 8 of the Wisconsin Constitution. At this time I would move to adopt --

REPRESENTATIVE BARCA: Excuse me, Mr. Chairman, wait--

SENATOR FITZGERALD: -- as the Conference report.

REPRESENTATIVE BARCA: Excuse me, Mr. Chairman. Mr. Chairman, excuse me.

UNIDENTIFIED SPEAKER: I'll second

that.

REPRESENTATIVE BARCA: I have a question about the Open Meetings rule being violated.

UNIDENTIFIED SPEAKER: This is wrong.

REPRESENTATIVE BARCA: We were not given two hour's notice, first of all. Secondly, Mr. Chairman, I have like a 24-hour notice here from Attorney General Van Hollen, the current Attorney General--

SENATOR FITZGERALD: Wait. Wait. Let me -- Let me -- Representative Barca. Discussion. Let me recognize you. Discussion. Go ahead.

REPRESENTATIVE BARCA: Okay. Thank you very much. First of all, Mr. Chairman, most importantly before we even get started, obviously I am going to want to have a summary of this bill from, ah, our Director Lang, um, so I understand what's in here.

SENATOR FITZGERALD: It's the same bill you debated for sixty hours.

REPRESENTATIVE BARCA: Oh, there's nothing different?

SENATOR FITZGERALD: Nah, they just

removed items from it.

REPRESENTATIVE BARCA: They removed what?

SENATOR FITZGERALD: They removed items. Nothing new.

REPRESENTIVE BARCA: Oh. So can we get a description of what was removed?

SENATOR FITZGERALD: There is nothing new.

REPRESENTATIVE BARCA: You said things were removed, Mr. Chairman.

SENATOR FITZGERALD: You have it.

REPRESENTATIVE BARCA: I want to know what's removed.

SENATOR FITZGERALD: You have it. You got it.

REPRESENTATIVE BARCA: It seems to me that the body should have --

SENATOR FITZGERALD: You have it.

REPRESENTATIVE BARCA: Our community should know what we've voting on. I don't know what was removed. I need to know that, ah, so I do want a description from Director Lang.

Secondly, I have a couple of motions I would like to make as amendments to this.

SENATOR FITZGERALD: No motions.

REPRESENTATIVE BARCA: Clearly --

SENATOR FITZGERALD: No motions will be exercised.

REPRESENTATIVE BARCA: Conference Committees do have --

SENATOR FITZGERALD: No motions.

REPRESENTATIVE BARCCA: -- an opportunity for people to amend the bill.

SENATOR FITZGERALD: No, there's no motions.

REPRESENTATIVE BARCA: So I want to be able to present those. But before we even get into that, I want to say that this is a violation of the Open Meetings Law.

Ah, it is required -- I got a memo here from our current Attorney General, not a past one, the current one, August of 2010, the attorney -- No Wisconsin court decision, um, ah, will allow meetings unless you have good cause to provide less than 24 hours notice of a meeting. The provision, like all other provisions of the Open Meetings Law, must be construed in favor of providing the public with the fullness --

SENATOR FITZGERALD: Representative

Barca.

REPRESENTATIVE BARCA: --

information --

SENATOR FITZGERALD: Representative Barca.

REPRESENTATIVE BARCA: -- about government affairs that's compatible with conduct of government representatives.

SENATOR FITZGERALD: Representative Barca.

REPRESENTATIVE BARCA: If there's any doubt --

SENATOR FITZGERALD: Clerk, call the role.

REPRESENATIVE BARCA: No, excuse me.

UNIDENTIFIED SPEAKER: No.

REPRESENTATIVE BARCA: No. Listen to me. It says if there is any doubt as to whether good cause exists --

SENATOR FITZGERALD: Call the role.

REPRESENTATIVE BARCA: -- the governmental body should provide 24 hours notice. This is clearly a violation of the Open Meetings Law. Now, if you've been shutting people down, it is improper for you to move forward while this is a violation of

the Open Meetings Law.

UNIDENTIFIED SPEAKER: Aye.

REPRESENTATIVE BARCA: You're not allowing amendments and that is wrong.

UNIDENTIFIED SPEAKER: Aye.

REPRESENTATIVE BARCA: Mr. Chairman, this is a violation of law. This is not just a rule. It is the law.

SENATOR FITZGERALD: We're adjourned.

REPRESENTATIVE BARCA: No, Mr. Chairman, this is a violation of the Open Meetings Law. It requires 24 -- at least two hours' notice.

(SHOUTING)

CASE CHRONOLOGY

- March 16, 2011: Summons, Complaint and Motion for Temporary Restraining Order filed, *State of Wisconsin ex rel. Ismael R. Ozanne v. Jeff Fitzgerald,* et al., Dane County Circuit Court Case 11CV1244.
- March 17, 2011: Court sets hearing on Temporary Restraining Order
- March 18, 2011: Hearing on Motion for Temporary Restraining Order; Legislators Jeff Fitzgerald, Michael Ellis, Scott Suder and Scott Fitzgerald, by counsel, assert legislative immunity. Court grants temporary order restraining implementation of 2011 Wisconsin Act 10 pending further hearing.
- March 22, 2011: Defendants file Petition for Leave to Appeal Non-Final Order in Wisconsin Court of Appeals
- March 24, 2011: Wisconsin Court of Appeals requests Wisconsin Supreme Court to take jurisdiction by certification
- March 29 and April 1, 2011: Circuit Court evidentiary hearing on State's Motion for Temporary Injunction
- March 31, 2011: Wisconsin Court of Appeals denies defendants' request to withdraw their Petition for Leave to Appeal
- March 31, 2011: Circuit Court issues Amended Order that 2011 Wisconsin Act 10 has not been published and is not in effect.
- April 1, 2011: At parties' request, court orders briefing schedule on legal issues; final brief due May 23, 2011.

- April 7, 2011: Secretary of Administration Michael Heubsch, not a party in Circuit Court action, files Petition for Supervisory Writ in Wisconsin Supreme Court.
- May 4, 2011: Supreme Court orders briefs and schedules June 6, 2011 oral argument on whether the Supreme Court should accept jurisdiction of the petition for supervisory writ.
- May 23, 2011: concluding brief filed.