STATE OF WISCONSIN | CIRCUIT COURT BRANCH 11 | DANE COUNTY

JULAINE K. APPLING, JO EGELHOFF, JAREN E. HILLER, RICHARD KESSENICH, and EDMUND L. WEBSTER,

Plaintiffs,

Case No. 2010-CV-4434
Case Codes: 30701, 30704

v.

JAMES E. DOYLE, KAREN TIMBERLAKE, and JOHN KIESOW,

Defendants,

and

FAIR WISCONSIN, INC., GLENN CARLSON & MICHAEL CHILDERS, CRYSTAL HYSLOP & JANICE CZYSCON, KATHY FLORES & ANN KENDZIERSKI, DAVID KOPITZKE & PAUL KLAWITER, and CHAD WEGE & ANDREW WEGE,

Intervening Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO WITHDRAW FROM THIS ACTION, OR, IN THE ALTERNATIVE, AMEND THEIR ANSWER

Defendants James E. Doyle, Karen Timberlake, and John Kiesow ("defendants"), by their attorney Brian K. Hagedorn, file the following brief in support of their Motion to Withdraw From This Action, or, in the Alternative, Amend Their Answer.

INTRODUCTION

In this suit, plaintiffs allege that Chapter 770, which created a new legal status of domestic partnerships,[1] violates the Wisconsin Constitution. Specifically, plaintiffs assert that this legal status violates Article XIII, Section 13 of the Wisconsin Constitution—the marriage amendment. This provision of the Constitution prohibits the recognition and declares invalid any "legal status identical or substantially similar to that of marriage for unmarried individuals."

After receiving notice of plaintiff's suit (originally filed in the Wisconsin Supreme Court), defendants James E. Doyle, Karen Timberlake, and John Kiesow requested representation from Attorney General J.B. Van Hollen. The Attorney General, however, declined representation. In a written letter to the Governor, which is attached to this brief as Exhibit A, the Attorney General explained that he could not defend the law because it was unconstitutional. (Ex. A, p. 1) He explained that if he represented the State, he would "concede that the law is unconstitutional and consent to an order enjoining the domestic partnership registry program." (Ex. A., p. 3)

Following the Attorney General's decision, Governor Doyle hired outside counsel pursuant to Wis. Stat. § 14.11(2)(a)2. Under Wis. Stat. § 14.11(2)(a), the governor has the authority—but not the duty—to employ special counsel in certain cases "if in the governor's opinion the public interest requires such action." Thus, Governor Doyle, using the authority granted to him and using his discretion under this statute, hired outside counsel to defend the constitutionality of Chapter 770. The defendants, under Governor Doyle's direction, moved for summary judgment on December 22, 2010.

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[1] Wis. Stat. 770.001 states in pertinent part, "The legislature finds that it is in the interests of the citizens of this state to establish and provide the parameters for a legal status of domestic partnership."

Nothing in Wis. Stat. § 14.11(2)(a) requires a subsequent governor to continue employing outside counsel to defend an unconstitutional law, however. Governor Walker, in deference to the legal opinion and unique role of the Attorney General as the State's attorney, does not believe the public interest requires a continued defense of Chapter 770.

Accordingly, the defendants now respectfully ask this Court to 1) dismiss them from this civil action because they are no longer a real party in interest, or 2) grant defendants' leave to amend their answer.

DISCUSSION

I. The Court Should Dismiss the Defendants From This Case Because They Are Not a Real Party in Interest.

At this stage of the proceedings, the defendants are not a real party in interest and should be dismissed from this suit.

This is so because there is no dispute between plaintiffs and the defendants. The defendants do not dispute that Chapter 770 is unconstitutional, and no longer wish to defend this law.

Moreover, the Governor has no duty to defend an unconstitutional law or otherwise appoint counsel when the Attorney General declines to defend a law on the grounds that it is unconstitutional. In general, the Attorney General of Wisconsin represents the State of Wisconsin against challenges to Wisconsin statutes. Wis. Stat. § 165.25. However, if the Attorney General cannot undertake such representation, the Governor must decide whether to appoint counsel for such a defense. Wis. Stat. § 14.11(2)(a).[2] The Governor's decision whether to appoint counsel, however, is

[2] Wis. Stat. § 14.11(2)(a) provides:

discretionary. The statute provides that "[t]he governor, if in the governor's opinion the public interest requires such action, may employ special counsel in the following cases." *Id.* The word "may" makes clear that appointment of counsel under this statute is solely within the governor's discretion.

In addition, pursuant to Wis. Stat. § 19.01(1), the Governor is charged with supporting the Wisconsin Constitution. Thus, if the governor determines that defending a law would be contrary to the state's constitution, he cannot order the defense of the law because of this oath to support the Wisconsin Constitution. *See State ex rel. Sullivan v. Boos, County Auditor of Milwaukee County*, 23 Wis. 2d 98, 101-02, 126 N.W. 29 579 (1964).

In this case, however, the law would not be without a defense if the Court dismissed the defendants from the case. The Court has granted a motion to intervene by parties that will competently argue in opposition to plaintiff's position. The Court will also be accepting additional arguments on behalf of amici who will argue for the constitutionality of Chapter 770.

In short, it would waste the time and resources of the parties and the Court to require the defendants' continued participation in this matter. The Court should therefore grant the defendants' motion to dismiss them from this case.

The governor, if in the governor's opinion the public interest requires such action, may employ special counsel in the following cases:

1. To assist the attorney general in any action or proceeding;
2. To act instead of the attorney general in any action or proceeding, if the attorney general is in any way interested adversely to the state;
3. To defend any action instituted by the attorney general against any officer of the state;
4. To institute and prosecute an action or proceeding which the attorney general, by reason of the attorney general's opinion as to the validity of any law, or for any other reason, deems it the duty of the attorney general to defend rather than prosecute.

II. If the Defendants Are Not Allowed to be Dismissed From this Action, the Court Should Grant Defendants Leave to Amend Their Answer.

While the defendants believe dismissal is appropriate, if the Court rules otherwise, defendants seek leave to amend their answer to reflect their current position on the dispute in this case. Section 802.09(1) of the Wisconsin Statutes requires parties to seek leave of the court to amend a pleading six months after the summons and complaint are filed. The summons and complaint of this case were filed August 18, 2010. Accordingly, the defendants respectfully request that this Court grant its motion to amend the pleadings—if dismissal is not granted—because doing so is in the interest of justice.

Leave to amend an answer should be "freely given at any stage of the action when justice so requires." Wis. Stat. § 802.09(1). The court's interpretation of this provision is clear and consistent: the use of the word "freely" indicates the legislature's intent that, as long as there is compliance with the statute, amendments should be liberally allowed so that actions will be tried on the merits. *Wiegel v. Sentry Indem. Co.*, 94 Wis. 2d 172, 184, 287 N.W.2d 796 (1980); *Lak v. Richardson-Merrell, Inc.*, 95 Wis. 2d 659, 669, 291 N.W.2d 620 (Ct. App. 1980), *rev'd on other grounds*, 100 Wis. 2d 641, 302 N.W.2d 483 (1981). Whether "justice so requires" depends on "whether the party opposing [the] amendment has been given such notice of the operative facts which form the basis for the claim as to enable him to prepare a defense or response." *Korkow v. General Cas. Co.*, 117 Wis. 2d 187, 197, 344 N.W.2d 108 (1984).

Relevant factors courts consider include: (1) how long the case has been pending; (2) the time remaining before trial or hearing; (3) how long the movant was or should have been aware of the grounds for the claim or defense raised by the amendment; (4) whether the movant has previously amended the pleading; (5) if the amendment was not

sought until shortly before the trial or hearing, the reasons for the delay; (6) the opposing party's awareness of the claim or defense raised by the amendment; (7) the opposing party's state of preparation for the claim or defense raised by the amendment; (8) whether the amendment raises a claim or defense; (9) the legal or factual validity of the claim or defense raised by the amendment; (10) whether the matters raised by the amendment present an issue of fact for a jury or an issue of law for the court; (11) if new fact issues are introduced, the adverse party's opportunity to contest those issues; (12) whether allowing the amendment would require a continuance to ameliorate the prejudice or unfairness to the adverse party; and (13) if a continuance would be required, whether it would be unfair to the adverse party or the court. *See* Cynthia L. Buchko et al., *Wisconsin Civil Procedure Before Trial* (3d ed. 2007) (citing numerous Wisconsin cases).

In the case at hand, leave to amend the previously filed answer is appropriate and required in the interest of justice.

First, this litigation was recently commenced on August 18, 2010 during the administration of Governor Doyle. A change in administrations is a significant event that should be given significant weight. To allow the previous administration's analysis to bind a subsequent administration would be contrary to what justice requires. While the current administration took office in January of this year, this case presents important issues that required careful analysis. This preparation time precluded action prior to this date. In addition, because this case is still in the early stages and is not on the eve of trial, the timing does not preclude granting defendants' motion.

Second, the defendants' position is not without merit, but rather relies on the legal opinion of the Wisconsin Attorney General. After studying the provision, the Attorney General concluded that "this law is not capable of a constitutional construction" and that "[t]o defend this law would require [him] to ignore the command of the voters when they passed the recent marriage amendment" (Ex. A., p. 2-3) Certainly the Attorney General's strong conclusion demonstrates that this position is, at a minimum, not without merit.

Third, the defendants should be granted leave to amend their answer because the supporters of Chapter 770 would not be harmed or disadvantaged by this position change. Allowing such amendments in no way precludes the action from being "tried on the merits" because of the presence of interveners in this case. In fact, the reason the interveners likely chose to get involved in this case—and the reason the Court explicitly gave for granting intervention—is because of this scenario, i.e., the election of a governor who would not agree with the litigation strategy undertaken by Governor Doyle.

For the reasons provided above, if the defendants are not dismissed from the case, leave to amend their answer is in the interest of justice and should be granted.

CONCLUSION

This administration does not believe the interests of the State of Wisconsin support a continued defense of Chapter 770. Accordingly, the defendants respectfully ask that the Court dismiss them from this case because they are no longer a real party in interest, or, in the alternative, grant defendants leave to amend their answer.

Dated this 13th day of May, 2011.

By: Brian K. Hagedorn

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