Wisconsin Court Of Appeals Decision reversing the Circuit Court decision in the Mukwonago residents v. DPI case

http://www.wicourts.gov/ca/opinion/DisplayDocument.html?content=html&seqNo=91014

COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2917 **Cir. Ct. No. 2010CV4804**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

JAMES R. SCHOOLCRAFT AND CRAIG VERTZ,

PLAINTIFFS-RESPONDENTS,

MUKWONAGO AREA SCHOOL DISTRICT,

INVOLUNTARY-PLAINTIFF,

V.

STATE OF WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, TONY EVERS AND PAUL A. SHERMAN,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Reversed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. The Wisconsin Department of Public Instruction (DPI) appeals the order granting summary judgment to James Schoolcraft and Craig Vertz in their collateral challenge to the

application of WIS. STAT. § 118.134 (2009-10)[1[1]] to the Mukwonago Area School District (the District). The circuit court reasoned that the contested case hearing between the District and a District resident was not impartially decided, and thus the District was denied due process. We reverse because Schoolcraft and Vertz have no standing to bring a due-process challenge to a procedure they were not a part of.

¶2 WISCONSIN STAT. § 118.134 permits a school district resident to object to the district's use of a race-based team name, logo or mascot by filing a complaint with the superintendent of DPI. District resident Rain Koepke filed a complaint with DPI alleging that the District's use of the "Indians" nickname and associated logo and/or mascot was race-based and promoted discrimination. A contested case hearing was held before Paul. A. Sherman, a DPI school administration consultant. Acting pursuant to authority granted to him by DPI Superintendent Tony Evers, Sherman ordered the District to cease usage of the name and logo. The District opted not to petition for judicial review of the decision and allowed its right to expire. *See* WIS. STAT. §§ 227.52 and 227.53(1).

¶3 Schoolcraft and Vertz reside in the District and are parents of children who either did or currently do attend school in the District. They were not parties to the Koepke matter and did not move to intervene. After the time for seeking judicial review had lapsed, the pair filed this lawsuit requesting injunctive and declaratory relief barring DPI from enforcing WIS. STAT. § 118.134 and challenging the statute's constitutionality and DPI's application of it to the District. The District did not participate in Schoolcraft and Vertz's suit. DPI moved to dismiss their action for lack of standing. The circuit court concluded that Schoolcraft and Vertz had stated a discernible claim because a hike in District taxes to make the ordered changes was at least inferable, and under ***City of Appleton v. Town of Menasha***, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988), a taxpayer who shows "even a slight loss" has standing to challenge the constitutionality of a statute. The court denied DPI's motion.

¶4 On summary judgment, the circuit court rejected Schoolcraft and Vertz's equal protection and facial due process challenges but concluded that the District was denied its right to procedural due

[1[1]] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

process because Sherman was not an impartial decision maker.[2[2]] Concluding that WIS. STAT. § 118.134 therefore was unconstitutional as applied to the District, the court granted summary judgment to Schoolcraft and Vertz. DPI appeals.

¶5 We review a circuit court's decision to grant or deny summary judgment de novo, using the same methodology as the circuit court. *See* ***Katzman v. State Ethics Bd.***, 228 Wis. 2d 282, 290, 596 N.W.2d 861 (Ct. App. 1999). We need not repeat the well-known methodology here, except to state that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2); *see also* ***Rufener v. State Farm Fire & Cas. Co.***, 221 Wis. 2d 500, 504, 585 N.W.2d 696 (Ct. App. 1998).

¶6 DPI first argues that Schoolcraft and Vertz have no as-applied due process claim because, as their own complaint recites, Sherman's determination that the moniker "Indians" fostered discrimination rendered WIS. STAT. § 118.134 unconstitutional as applied *to the District*. We agree with DPI.

¶7 All statutes are presumptively constitutional. ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 119, 595 N.W.2d 392 (1999). To overcome this strong presumption, a challenger must prove the statute's unconstitutionality beyond a reasonable doubt. ***Id.***

¶8 Here, the circuit court held the statute unconstitutional as applied to the District under the particular facts, not that the statute could not be enforced under other circumstances. *See* ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211. In other words, Sherman's apparent partiality denied *the District* the right to a fair contested case hearing.

¶9 From the finding of unconstitutionality as applied to the District, Schoolcraft and Vertz claim that DPI also owed them proper notice of the contested case hearing and an opportunity to present evidence there. *See* ***Collins v. City of Kenosha Housing Auth.***, 2010 WI App 110, ¶6, 328 Wis. 2d 798, 789 N.W.2d 342. As the circuit court noted, however, Schoolcraft and Vertz were not parties at the time of the hearing. Only parties to a contested case hearing must be afforded notice and an

[2[2]] Whether or not Sherman performed his duties impartially does not direct our decision; we therefore do not reach the merits of that claim.

opportunity to be heard. *See* WIS. STAT. § 227.44(1), (3). Further, Schoolcraft and Vertz did not seek to be made parties by demonstrating a "substantial interest" that would be affected by the decision. *See* § 227.44(2m).

¶10 Schoolcraft and Vertz also did not petition for judicial review post-decision as a "person aggrieved." *See* WIS. STAT. § 227.53(1). Instead, they filed this lawsuit alleging that WIS. STAT. § 118.134 was unconstitutional as applied to the District. They argue on appeal that the statute "was unconstitutionally applied to Schoolcraft and Vertz because … they were not afforded an impartial decision-maker as require[d] for procedural due process." This contention suggests that Schoolcraft and Vertz view their rights at least to a degree as "derivative," that is, coextensive with the District's. *See* ***City of Appleton***, 142 Wis. 2d at 876. If so, the District's abandonment of its right to proceed provides another reason the pair cannot maintain their suit. *See* ***id.*** at 877.

¶11 A plaintiff must point to a legislative enactment authorizing suit against the state to maintain his or her action. ***Turkow v. DNR***, 216 Wis. 2d 273, 281, 576 N.W.2d 288 (Ct. App. 1998). WISCONSIN STAT. ch. 227 sets forth the consent to sue a state agency and constitutes the exclusive method for judicial review of agency determinations. *See* §§ 227.52 and 227.53(1). Compliance is a jurisdictional matter. ***Kegonsa Joint Sanitary Dist. v. City of Stoughton***, 87 Wis. 2d 131, 144-45, 274 N.W.2d 598 (1979). Where a method of review is prescribed by statute, that method is exclusive and judicial review cannot be pursued through other means. *See* ***State ex rel. First Nat'l Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma***, 82 Wis. 2d 529, 537-39, 263 N.W.2d 196 (1978). This includes the remedies of reversal or remand when an agency's actions amount to a constitutional violation. *See* ***id.***; *see also* § 227.57(8).

¶12 Schoolcraft and Vertz did not avail themselves of the remedy of judicial review set forth in WIS. STAT. ch. 227. The legislature cannot have intended that a person can disregard the mechanisms in place to challenge a rule or statute and attempt an end-run collateral attack on the statute's constitutionality.

¶13 The circuit court nonetheless was persuaded that, under ***City of Appleton***, Schoolcraft's and Vertz's status as taxpayers affords them standing. We are not. In that case, after the City of Appleton annexed portions of the Town of Menasha, the parties could not agree on the apportionment

of assets and liabilities. ***City of Appleton***, 142 Wis. 2d at 873. Appleton filed suit, asking the circuit court to apportion them pursuant to WIS. STAT. § 66.03(5) (1983-84). ***City of Appleton***, 142 Wis. 2d at 873. Menasha taxpayer Garth Walling moved to intervene and filed a third-party complaint alleging that apportionment would deprive him of property by increasing his taxes and challenging the constitutionality of the statute. ***Id.*** at 873-74. The circuit court dismissed his complaint on the basis that he did not have standing. ***Id.*** at 872. The supreme court disagreed and held that, as a taxpayer, Walling had a direct and personal pecuniary interest distinct from Menasha's. ***Id.*** at 883. It reversed the order denying Walling's motion to intervene and dismissing his complaint, and remanded the cause for further proceedings. ***Id.*** at 884.

¶14 This case is different. Schoolcraft and Vertz did not attempt to participate in the Koepke matter. Therefore, even if they might have had taxpayer standing through a nonderivative claim, they did not go that route. This is particularly so when their claim challenges the process in the WIS. STAT. ch. 227 review that they did not participate in. The circuit court correctly concluded that Schoolcraft and Vertz had no right to notice or to present evidence at a hearing they were not a part of. By the same token, they have no standing to claim that any alleged partiality violated their due-process rights.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.