

**FILED
03-10-2021
CIRCUIT COURT
DANE COUNTY, WI
2021CV000589
Honorable Nia Trammell
Branch 6**

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH __

DANE COUNTY

ANDREW WAITY
7230 Colony Drive
Madison, Wisconsin 53717

SARA BRINGMAN
107 Sutherland Court, Unit 103
Madison, Wisconsin 53704

MICHAEL JONES
110 Milo Lane
Madison, Wisconsin 53714

JUDY FERWERDA
264 Grand Canyon Drive
Madison, Wisconsin 53705

Plaintiffs,

v.

Case No. _____

Case Code: 30952

ROBIN VOS, in his official capacity,
Room 217 West
State Capitol
Madison, Wisconsin 53702

DEVIN LEMAHIEU, in his official capacity,
Room 211 South
State Capitol
Madison, Wisconsin 53702

Defendants.

COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

Plaintiffs, by Pines Bach LLP, their attorneys, as a complaint against Defendants,
allege as follows:

INTRODUCTION

1. This action is brought by the Plaintiffs, who are Wisconsin taxpayers, pursuant to the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04. Plaintiffs seek a judgment declaring that the contracts attached hereto as Exhibits A and B are void *ab initio* because they were entered into in violation of the specific limitations, described in Wis. Stat. §§ 13.124 (1) and (2), on the ability of the Speaker of the Wisconsin Assembly and the Majority Leader of the Wisconsin Senate to engage legal counsel other than from the Wisconsin Department of Justice.

2. The contracts at issue were entered into by Defendant Robin Vos, in his official capacity as the Speaker of the Assembly on behalf of the Wisconsin Assembly (hereinafter “Vos” or “Robin Vos”), and Defendant Devin LeMahieu, in his official capacity as Majority Leader of the Wisconsin Senate on behalf of the Wisconsin Senate (hereinafter “LeMahieu” or “Devin LeMahieu”), with the law firms of Consovoy McCarthy PLLC (in association with Adam Mortara) (Exhibit A, hereinafter “the Consovoy contract”) and Bell Giftos St. John LLC (Exhibit B, hereinafter “the BGSJ contract”). Neither Wis. Stat. §§ 13.124 (1) and (2) nor any other statute nor any power or right granted to the legislative branch of Wisconsin government through the Wisconsin Constitution provides the Speaker of the Wisconsin Assembly or the Senate Majority Leader with the authority to engage outside counsel as they did for the services described in Exhibits A and B or to authorize payment for any services under such contracts.

3. As supplemental relief under Wis. Stat. § 806.04 (8), the Plaintiffs also seek a permanent injunction enjoining Robin Vos and Devin LeMahieu from authorizing any payment for services performed under the Consovoy and BGSJ contracts, and also enjoining Vos and LeMahieu, in their official capacities, from engaging any legal counsel other than the Wisconsin Department of Justice unless there is an existing action in which the Assembly, the Senate or the Legislature is a party or in which any of them have an interest.

PARTIES

4. Plaintiff Andrew Waity is an adult resident of the State of Wisconsin and a Wisconsin taxpayer whose address is 7230 Colony Drive, Madison, Wisconsin 53717.

5. Plaintiff Sara Bringman is an adult resident of the State of Wisconsin and a Wisconsin taxpayer whose address is 107 Sutherland Court, Unit 103, Madison, Wisconsin 53704.

6. Plaintiff Michael Jones is an adult resident of the State of Wisconsin and a Wisconsin taxpayer whose address is 110 Milo Lane, Madison, Wisconsin 53714.

7. Plaintiff Judy Ferwerda is an adult resident of the State of Wisconsin and a Wisconsin taxpayer whose address is 264 Grand Canyon Drive, Madison, Wisconsin 53705.

8. Defendant Robin Vos is the Speaker of the Wisconsin Assembly whose business address is Room 217 West, State Capitol, Madison, Wisconsin 53702. He is sued in his official capacity.

9. Defendant Devin LeMahieu is the Majority Leader of the Wisconsin Senate whose business address is Room 211 South, State Capitol, Madison, Wisconsin 53702. He is sued in his official capacity.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this dispute pursuant to Article VII, Section 8 of the Wisconsin Constitution and Wis. Stat. § 753.03, which provide for subject matter jurisdiction over all civil matters within this state.

11. Defendants, as state officers, are subject to this Court's jurisdiction. *See Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976).

12. Venue is proper in Dane County because it is the county where the claims arose. Wis. Stat. § 801.50 (2)(a).

FACTS

13. On or about December 23, 2020, Vos and LeMahieu entered into Exhibit A, a contract for legal services with a law firm known as Consovoy McCarthy PLLC, in association with Adam Mortara, which states, in relevant part as follows:

This Engagement Agreement sets forth the terms under which Consovoy McCarthy PLLC ("CM") in association with Adam Mortara ("Mortara") (collectively, "CM&M") will represent the Wisconsin State Assembly and Wisconsin State Senate (the "Legislature" or "you") in **possible** litigation related to decennial redistricting (the "Litigation"). CM&M's engagement hereunder is limited to representing the Legislature in the Litigation through trial and, if requested, on appeal.

The parties currently do not know whether or in what venue the Litigation will occur.

Scope of Representation

The Legislature is also retaining Bell Giftos St. John LLC (“BGSJ”) to represent it in the Litigation. CM&M is being retained to work alongside BGSJ. Mortara will provide overall strategic litigation direction, take key fact and expert discovery, and serve as lead trial counsel at trial, while BGSJ and CM will provide additional day-to-day litigation resources.

Mortara hereby commits that the Litigation will take precedence over other clients as to trial scheduling matters, and that in the event of an irresolvable trial date conflict between you and another client, he will be lead trial counsel in this matter.

(emphasis added)

14. There is currently no action pending in any court in Wisconsin or in the federal courts of the United States related to the State of Wisconsin’s decennial redistricting, a fact which the parties to the Consovoy contract recognize because the contract refers to “possible litigation” about Wisconsin’s redistricting plan, and notes that the parties to the contract do not know whether there will be any such litigation. Consequently, there currently is no “action” to which either the Wisconsin Assembly or Wisconsin Senate is a party, or in which either has an interest.

15. On or about January 6, 2021, Vos and LeMahieu entered into Exhibit B, a contract for legal services with a law firm known as Bell Giftos St. John LLC, which states, in relevant part, as follows:

The purpose of this letter is to confirm the scope and terms of representation.

Identity of the Clients. Our clients in this matter are the Wisconsin State Senate, by and through Senator Devin LeMahieu, and the Wisconsin State Assembly, by and through Representative Robin Vos. It is our understanding that each of you is authorized to retain counsel on behalf of your respective legislative houses.

Unless and until the Wisconsin State Senate and Wisconsin State Assembly designate otherwise, we will take direction on this matter through those organizations' duly authorized agents: Senator LeMahieu as it relates to the Wisconsin State Senate; Representative Vos as it relates to the Wisconsin State Assembly.

Scope of Representation. Bell Giftos St. John LLC agrees to provide legal advice to, represent, and appear for and defend the Wisconsin State Senate and Wisconsin State Assembly on any and all matters relating to redistricting during the decennial period beginning on January 1, 2021. Services within the scope include all services in furtherance of this attorney-client relationship relating to redistricting. Such services include, for example, providing legal advice to the client (through its members or staff as designated by Senator LeMahieu and Representative Vos) regarding constitutional and statutory requirements and principles relating to redistricting. It also includes appearing for clients in judicial or proceedings relating to redistricting, should such an action be brought, or administrative actions relating to redistricting, such as the rule petition currently pending before the Wisconsin Supreme Court. It also includes providing legal advice about the validity of any draft redistricting legislation if enacted. It does not include, however, the drawing of redistricting maps.

(emphasis added)

16. The scope of the BGSJ contract is broader than the Consovoy contract because it not only provides for representation in theoretical redistricting litigation, but also for services to the Senate and Assembly regarding the redistricting process itself. The parties to the BGSJ contract, too, recognize that there currently is no "action" in which the Assembly or the Senate is a party or in which either has an interest.

17. Neither the Consovoy contract nor the BGSJ contract recite any statutory authority for either Vos and LeMahieu to enter into either contract for services with a private law firm on behalf of the Assembly and the Senate. Nor does either contract state any statutory authority through which public funds may be used to pay for the legal services described in them.

18. There is no section of the Wisconsin Constitution that authorizes the Speaker of the Assembly, like Vos, or the Majority Leader of the Senate, like LeMahieu, in their official capacities, to enter into contracts for legal services with private law firms. Nor is there any Wisconsin constitutional authority that allows them to direct that public funds be used to pay for such services.

19. In 2017, however, the Legislature enacted through 2017 Act 369, Section 3, Wis. Stat. § 13.124, which is entitled “Legal Representation.” It is the sole statute that provides any authority for the Speaker of the Assembly and the Majority Leader of the Senate, to “obtain legal counsel other than from the department of justice with the cost of representation paid from the appropriation under s. 20.765 (1) [(a) or (b)].” Wis. Stat. § 13.124 (1)(b) and (2)(b). Wis. Stat. § 20.765 (1) (a) and (b) appropriates a “sum sufficient” only for the functions of the Assembly and Senate respectively (hereinafter referred to as “sum sufficient appropriation”).¹

20. Specifically, Wis. Stat. §§ 13.124 (1)(b) and (2)(b) allow the Speaker of the Assembly, in this case Vos, and the Senate Majority Leader, in this case LeMahieu, to obtain legal counsel “outside of the department of justice”² and use the sum sufficient appropriation to pay such counsel only: “in any action in which the [Assembly or Senate, respectively] is a party or in which the interests of the [Assembly or Senate, respectively] are affected, as determined by the [Speaker of the Assembly or the Senate

¹ Wis. Stat. § 13.124(3)(b) allows the cochairpersons of the Joint Committee on Legislative Organization (JCLO) to obtain counsel “other than from the department of justice” in “any action in which the legislature is a party or in which the interests of the legislature are affected” and provides that the cost of such representation be paid from the appropriation under § 20.765 (1)(a) or (b).

² In Wis. Stat. 13.124, “department of justice” means the “Wisconsin Department of Justice.”

Majority Leader, respectively].” Those statutory sections do not allow the Speaker of the Assembly or the Senate Majority Leader to engage legal counsel “outside of the department of justice” in anticipation of an action that does not yet exist.

21. Nor do Wis. Stat. §§ 13.124 (1)(b) and (2)(b) give either the Speaker of the Assembly or the Senate Majority Leader the authority to “obtain legal counsel other than from the department of justice, with the cost of representation paid from the [sum sufficient appropriation]” for general representation and legal advice regarding a matter such as redistricting.

Claim for Declaratory Judgment

22. Plaintiffs reallege paragraphs 1 through 21 above as if fully set forth herein.

23. In Wisconsin, an “action” is a civil proceeding that is commenced when a summons and complaint are filed and timely served or, for certain common law claims such as mandamus or certiorari, when a writ is filed and timely served. *See* Wis. Stat. §§ 801.02 (1), (2) and (5).

24. There is no action pending in any Wisconsin or federal court regarding the upcoming decennial redistricting. Thus, there is no action regarding redistricting in which either the Assembly or the Senate are a party or in which the interests of either the Assembly or Senate are affected.

25. There is no Wisconsin constitutional or statutory provision that allows the Speaker of the Assembly or Senate Majority Leader to obtain general representation from private legal counsel relating to a “possible action” about redistricting. Nor is

there a Wisconsin constitutional provision or statute that allows the Speaker of the Assembly or Senate Majority Leader to engage legal counsel outside of the Department of Justice to provide advice and services about redistricting generally.

26. Nevertheless, Vos and LeMahieu entered into the Consovoy and BGSJ contracts for legal services and representation of the Assembly and Senate in a possible future action about redistricting and, additionally, entered into a contract with BGSJ for advice to the Assembly and Senate about redistricting generally.

27. Because neither Vos nor LeMahieu had any Wisconsin constitutional or statutory authority to enter into any contract for legal representation of the Assembly and Senate in a possible future action about redistricting, such as the Consovoy and BGSJ contracts, those contracts are unlawful and, therefore, void *ab initio*.

28. Likewise, because neither Vos nor LeMahieu had any Wisconsin constitutional or statutory authority to enter into a contract for legal representation of the Assembly and Senate regarding redistricting generally, as they did in the BGSJ contract, that contract is unlawful and, therefore, void *ab initio*.

29. At least \$30,000 of taxpayer funds have been paid unlawfully on the Consovoy contract and, on information and belief, taxpayer funds have been paid unlawfully on the BGSJ contract as well.

30. Consequently, the Plaintiffs as taxpayers have suffered a pecuniary loss and have thereby established taxpayer standing to bring this declaratory judgment claim and be awarded the relief they seek. *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961) (“In order to maintain a

taxpayers' action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss... Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss."); *see Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993) (Even an "infinitesimally small" pecuniary loss is sufficient to confer standing upon the taxpayer).

WHEREFORE, Plaintiffs request relief from the Court as follows:

- A. A judgment declaring that the Consovoy contract and the BGSJ contract are void *ab initio*.
- B. An injunction permanently enjoining the Defendants from authorizing any further payment on the Consovoy and BGSJ contracts for any services performed pursuant to them.
- C. An injunction permanently enjoining Vos in his official capacity as the Speaker of the Assembly or in any other role in his official capacity as a member of the Assembly or as chairperson or cochairperson of any committee, from obtaining legal counsel other than from the Department of Justice with the cost of representation paid from the appropriation under Wis. Stat. § 20.765 (1)(a) or (b) for representation of the Assembly or the Legislature, or either one of them, unless an action has been commenced or initiated in which the Assembly or the Legislature is a party or in which any of them has an interest that is affected by such action.

- D. An injunction permanently enjoining LeMahieu in his official capacity as the Majority Leader of the Senate, or in any other role in his official capacity as a member of the Senate, or chairperson or cochairperson of any committee, from obtaining legal counsel other than from the Department of Justice with the cost of representation paid from the appropriation under s. 20.765 (1)(a) or (b) for representation of the Senate or the Legislature, or either one of them, unless an action has been commenced or initiated in which the Senate or the Legislature is a party or in which either of them has an interest that is affected by such action.
- E. A judgment for the statutory fees, costs, and disbursements of this action.
- F. Such other relief as the Court may deem just and proper.

Respectfully submitted this 10th day of March, 2021.

PINES BACH LLP

Electronically signed by Lester A. Pines

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