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October 10, 2022

Sheila T. Reiff
Clerk, Wisconsin Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
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Re: *Nancy Kormanik v. Wisconsin Elections Commission*, No. 2022AP1720-LV

Dear Court of Appeals:

Intervenor-Defendant-Petitioner Rise, Inc. files this letter brief in response to the Court's October 7, 2022 directive. As explained below, this petition for interlocutory review is subject to Wis. Stat. § 752.21(2) because the action was properly venued in Waukesha County under Wis. Stat. § 801.50(3)(a). As a result, the District IV Court of Appeals is the proper appellate venue for this appeal.

I. Background

Plaintiff Nancy Kormanik filed this action in Waukesha County on September 23, 2022 “seeking a declaratory judgment regarding the proper construction of the Wisconsin Statutes that prohibits a municipal clerk from returning a previously completed and returned absentee ballot to an elector, including Wis. Stat. §§ 6.86(5), (6).” Compl. ¶ 1 (DNC App. at 3). Plaintiff named the Wisconsin Elections Commission (“WEC”) as the sole defendant in this action. Compl., ¶ 3 (DNC App. at 4).

Rise filed a motion to intervene on September 29. The Democratic National Committee (“DNC”) moved to intervene on September 30. The circuit court granted both motions to intervene at the October 5 hearing on Plaintiff's motion for a temporary injunction. On October 7, Rise and the DNC each petitioned for leave to appeal the circuit court's temporary injunction order in the Court of Appeals, District IV, pursuant to Wis. Stat. § 752.21(2).

II. Analysis

“[T]he obligation to venue [an] appeal in the correct district is clear, unequivocal, and mandatory.” *State ex rel. Dept' of Nat. Res. v. Wis. Ct. App., Dist. IV*, 2018 WI 25, ¶13, 380 Wis.

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2d 354, 909 N.W.2d 114. The Court of Appeals “has no discretion with respect to where it must hear the appeal.” *Id.*

Appellate venue is governed by Wis. Stat. § 752.21, which provides:

- (1) Except as provided in sub. (2), a judgment or order appealed to the court of appeals shall be heard in the court of appeals which contains the court from which the judgment or order is appealed.
- (2) A judgment or order appealed from an action venued in a county designated by the plaintiff to the action as provided under s. 801.50(3)(a) shall be heard in a court of appeals district selected by the appellant but the court of appeals district may not be the court of appeals district that contains the court from which the judgment or order is appealed.

Section 752.21(2) is an exception to the general rule that appeals be heard in the court of appeals containing the circuit court from which the judgment or order is appealed. It applies when “the circuit court venue was ‘designated by the plaintiff’ pursuant to Wis. Stat. § 801.50(3)(a).” *DNR v. Ct App, Dist. IV*, 2018 WI 25, ¶16.

Section 801.50(3)(a), in turn, provides that “[e]xcept as provided in paras. (b) and (c), all actions in which the sole defendant is . . . any state board or commission . . . shall be venued in the county designated by the plaintiff.” Under the exception set forth in paragraph (b), “[a]ll actions relating to the validity or invalidity of a rule or guidance document shall be venued as provided in s. 227.40 (1).” Wis. Stat. § 801.50(3)(b).¹ Read as a whole, Section 801.50(3)(a) applies whenever the sole defendant is “any state board commission,” unless the action is challenging the validity of a “rule or guidance document.” Section 801.50(3)(a) therefore governs this appeal, a case where WEC was the sole defendant and where Plaintiff seeks a declaratory judgment regarding various Wisconsin Statutes.

In her Complaint, Plaintiff asserted that venue was proper in Waukesha County under Wis. Stat. § 801.50(3)(b). But Plaintiff was wrong to invoke § 801.50(3)(b) as a basis for venue in Waukesha County because fundamentally her suit is not a challenge to “the validity of [a] rule or guidance document.” Wis. Stat. § 227.40(1). Rather, as Plaintiff admits, “[t]his is an action against the Wisconsin Elections Commission seeking a declaratory judgment regarding the proper construction of the Wisconsin Statutes that prohibits a municipal clerk from returning a previously completed and returned absentee ballot to an elector, including Wis. Stat. §§ 6.86(5), (6).” Compl. ¶ 1 (Rise App. 003). Although she critiques WEC memoranda, this is an action for a declaratory judgment, asking the court to interpret election statutes.

¹ Section 227.40(1) states that “the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides.”

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Neither the Defendant nor the Intervenors conceded that jurisdiction was proper under § 801.50(3)(b). Likewise, the Circuit Court has made no determination that venue would be found under this subsection.

Teigen v. Wisconsin Elections Commission, 22 WI 64, 403 Wis.2d 607, 976 N.W.2d 519, is instructive here.² Just like Ms. Kormanik, Plaintiffs in *Teigen* named WEC as the sole defendant and sought a declaration as to the meaning of certain statutes that plaintiffs asserted prohibited municipal clerks and local election officials from establishing absentee-ballot drop boxes. See *Teigen v. Wis. Elections Comm'n*, Waukesha County Case No. 2021CV958, Doc. No. 2 (Complaint) at 11-12 (June 29, 2021). Also like here, several other parties subsequently intervened as defendants. See *Teigen*, 22 WI 64, p. 2. When the Waukesha County Circuit Court granted judgment to plaintiffs, WEC appealed to Court of Appeals, District IV, citing Wis. Stat. § 752.21(2). Waukesha County Case No. 2021CV958, Doc. No. 144.

Section 751.21(2) applies to the pending matter because the “sole defendant” named by Plaintiff is WEC, which is a “state board or commission.” Just as in *Teigen*, the later interventions by Rise and the DNC does not change the result, and this action therefore falls within § 801.50(3)(a). And venue for this appeal is therefore governed by § 752.21(2), which authorizes the appellant to choose the Court of Appeals district to hear the appeal. As in *Teigen*, Petitioners chose District IV.

Plaintiff’s request for declaratory judgment as to the meaning of Wisconsin Statutes removes this case from the limited exception provided in § 801.50(3)(b). It therefore falls within § 801.50(3)(a), and venue is proper in District IV pursuant to § 752.21(2).

Respectfully submitted,

PINES BACH LLP

Electronically signed by Diane M. Welsh

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*Admitted *pro hac vice* by the Circuit Court.

² The issue of venue was not raised, briefed, or addressed by the Court in *Teigen*. Counsel does not cite this case as legal authority on appellate venue, but instead uses it to illustrate recent practice of this Court.