

RISE, INC., *and* JASON RIVERA,

Plaintiffs,

v.

Case No. 2022CV2446

WISCONSIN ELECTIONS COMMISSION,
and MARIBETH WITZEL-BEHL, *in her*
official capacity as City Clerk for the
City of Madison, Wisconsin,

Defendants.

**INTERVENOR DEFENDANT THE WISCONSIN STATE
LEGISLATURE'S SUPPLEMENTAL BRIEF
REGARDING WIS. STAT. § 808.075**

At the December 1, 2022 status conference, this Court ordered the parties to submit briefing addressing whether this Court has jurisdiction to proceed on the Wisconsin State Legislature's ("Legislature") Motion To Dismiss and Plaintiffs' anticipated Amended Complaint, notwithstanding Wis. Stat. § 808.075(3), given the transmittal of the record to the Court of Appeals for Proposed-Intervenor Defendants Michael and Eva White's pending appeal of this Court's denial of their Motion To Intervene. Dkt.141; Wis. Stat. 808.075(3). The Legislature respectfully submits that Wis. Stat. § 808.075(3) does not strip this Court of jurisdiction to proceed on the merits of this case, but notes that the Court of Appeals may vacate adverse orders or

judgments entered after this Court's denial of intervention, should the Whites succeed on their appeal. As such, the Legislature requests that this Court proceed on its Motion To Dismiss. If, however, this Court denies the Legislature's Motion To Dismiss, it should not proceed further with these proceedings until the Whites' appeal is resolved, as a matter of judicial economy, in this Court's equitable discretion.

The Whites' appeal does not deprive this Court of jurisdiction in all relevant respects. Section 808.075(3) limits the power of the circuit courts to take action in a civil case after "the record has been transmitted to the court of appeals," *Madison Tchrs., Inc. v. Walker*, 2013 WI 91, ¶ 18, 351 Wis. 2d 237, 839 N.W.2d 388 (citing Wis. Stat. § 808.075(3)), but this limitation extends only to the circuit court's "jurisdiction *with respect to the subject matter of the judgment or order*" on appeal, as the Supreme Court has expressly held. *Id.* (quoting *In re Estate of Mayer*, 29 Wis.2d 497, 505, 139 N.W.2d 111 (1966)) (emphasis added). Thus, Section 808.075(3) prevents the circuit court from "taking actions that may interfere with the pending appeal," *id.*, ¶ 21, while allowing the circuit court to proceed on other matters unrelated to that appeal, *Estate of Mayer*, 29 Wis.2d at 505. Here, Section 808.075 does *not* bar this Court from taking action on the Legislature's Motion To Dismiss because, while the Whites have appealed the denial of their intervention motion, Dkt.109; *see* Dkt.100, and the record has been transmitted, Dkts.140–42, Section 808.075(3) only bars this Court from taking action "*with respect to*" *that intervention motion*, *Madison Tchrs., Inc.*, 2013 WI 91, ¶¶ 18, 21 (emphasis added); *Estate of Mayer*, 29 Wis.2d at 505. Because intervention is completely "separate from and independent

of” the underlying merits of this case, *Estate of Mayer*, 29 Wis.2d at 505, any action that this Court takes on the Legislature’s Motion To Dismiss will not affect its order denying intervention or “interfere with the pending appeal,” *Madison Tchrs., Inc.*, 2013 WI 91, ¶¶ 18, 21; *Estate of Mayer*, 29 Wis.2d at 505, and thus this Court may proceed on that Motion To Dismiss forthwith, with Section 808.075(3) posing no bar.*

While Section 808.075(3) does not preclude this Court from taking the action described immediately above, the Whites’ appeal may result in the Court of Appeals unwinding certain actions from this Court. When a party successfully appeals a denial of intervention, one remedy available from the Court of Appeals is an “order [to] the circuit court on remand to vacate the orders entered after the court denied the intervention motion.” *Friends of Scott Walker v. Brennan*, 2012 WI App 40, ¶ 57, 340 Wis. 2d 499, 812 N.W.2d 540. Such a remedy is “appropriate” when the circuit court has entered subsequent orders that are “adverse to the intervening party.” *Id.*, ¶ 54. Here, any concern that this remedy could be imposed extends only to

* While Plaintiffs are correct that intervention motions are “special proceedings,” *see, e.g., Grand View Windows, Inc. v. Brandt*, 2013 WI App 95, ¶ 42, 349 Wis. 2d 759, 837 N.W.2d 611, and that final orders in special proceedings are appealable as right under Wis. Stat. 808.03(1), *see State v. Scott*, 2018 WI 74, ¶ 34, 382 Wis. 2d 476, 914 N.W.2d 141, there is explicit authority that Section 808.075 *does* apply in special proceedings, contrary to Plaintiffs’ apparent claim that special proceedings are a categorical exception to Section 808.075, Dkt.145 at 3–5. Specifically, Wis. Stat. 801.01(2) provides that “*Chapters 801 to 847* govern procedure and practice in circuit courts of this state *in all civil actions and special proceedings* whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule.” *Id.* (emphases added); *see also Mayek v. Cloverleaf Lakes Sanitary Dist. No. 1*, 2000 WI App 182, ¶ 15, 238 Wis. 2d 261, 617 N.W.2d 235. Further, Section 808.075(3) applies to a “*case*,” Wis. Stat. § 808.075(3) (emphasis added), a broad term that would encompass both “actions” and “special proceedings,” since a “special proceeding” remains part of the same “case,” *see* Wis. Stat. 801.01(2), even as it is independent of an “action,” *see Voss v. Stoll*, 141 Wis. 2d 267, 271, 124 N.W. 89 (1910). Thus, the statutory text makes clear that Section 808.075 applies to special proceedings, and nothing in *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994), suggests otherwise. All this said, nothing turns on this disagreement in the context of this case, as the Legislature agrees that Section 808.075 does not stay the underlying proceedings in light its own analysis, *supra* pp. 1–3.

proceedings this Court undertakes *after* it decides the Legislature's Motion To Dismiss, as granting that Motion will only benefit the Whites' interests. *See Dkt.77*. Any proceedings on the merits after the Motion To Dismiss could pose serious potential for unwinding those proceedings, and thus should be avoided as a matter of judicial economy, in this Court's equitable discretion.

CONCLUSION

This Court should proceed on the Legislature's Motion To Dismiss while Proposed-Intervenor Defendants the Whites' appeal is ongoing because Section 808.075 does not strip this Court of jurisdiction to hear the merits of this case and any decision on that Motion will not be vacated, should the Whites prevail.

Dated: December 15, 2022

Respectfully submitted,

Electronically signed by Kevin M. LeRoy

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