FILED
01-02-2024
CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

BY THE COURT:

DATE SIGNED: January 2, 2024

Electronically signed by Ryan D. Nilsestuen
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

BRANCH 10

Rise, Inc. and Jason Rivera,
Plaintiffs

vs.

Wisconsin Elections Commission et al.
Defendants

Decision on Motions on Summary Judgment

Case No. 2022CV2446

INTRODUCTION

Section 6.87 of the Wisconsin Statutes provides for absentee voting procedures. Among other requirements, an elector completing an absentee ballot must do so in front of a witness. Wis. Stat. § 6.87(4)(b)1. The witness must then complete and sign a written certification. Wis. Stat. § 6.87(2), (4)(b)1. An absentee ballot may not be counted if the certification is missing the witness's "address." Wis. Stat. § 6.87(6d). These related provisions are called the "Witness Address Requirement." State law does not define "address."

Plaintiffs Rise, Inc. and Jason Rivera ("Plaintiffs") seek a declaratory judgment and corresponding injunctive relief regarding the meaning of "address of a witness." Before the Court are cross motions for summary judgment. For the reasons stated below, the Court is granting the Plaintiffs' motion for summary judgment and denying the cross motions for summary judgment filed by the defendant Wisconsin Elections Commission ("Defendant" or "WEC") and intervenor defendant Wisconsin State Legislature ("Intervenor").

BACKGROUND AND FINDINGS OF FACT

The material facts are not in dispute. For several years, the WEC issued guidance to Wisconsin's approximately 1,800 election clerks on what constituted a "complete address" for purposes of the Witness Address Requirement. Specifically, the guidance informed clerks that an address consisted of a street number, street name, and the name of the municipality. If a witness's address did not contain all three components, the guidance further directed clerks to take corrective actions to remedy the error, including filling in reasonably discernable information from outside sources

or by contacting the voter. The guidance was utilized for 31 statewide elections. *See* Wisconsin Elections Commission, *Election Results Archive*, https://elections.wi.gov/elections/election-results/results-all (Listing all elections between 2016 and September 2022) (Last viewed Dec. 19, 2023). On September 13, 2022, the Waukesha County Circuit Court enjoined the WEC from providing clerks with guidance or instructions to cure such errors. *White v. Wis. Elec. Comm'n,* 22-CV-1008 (Waukesha Cnty. Cir. Ct., Sep. 13, 2022). The *White* court did not alter WEC's three-component definition of address. The WEC subsequently provided new guidance to clerks which reaffirmed its three-part definition for an address.

Since the *White* decision, clerks have interpreted what constitutes a complete address differently. The clerk for the City of Madison, for example, interprets "address" to mean a street number, street name, and either the municipality or ZIP code. The clerk for Green Bay, by contrast, requires a street number, street name, municipality, and either a ZIP code or state.

LEGAL STANDARD

The methodology for summary judgment is well-established. The court first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. *Preloznick v. City of Madison*, 113 Wis.2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, the court then examines the moving party's submissions to determine whether they establish a prima facie case for summary judgment. *Id*. If the moving party has done so, the court then examines the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. *Id*. Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). The purpose of summary judgment procedure is to determine the existence of genuine factual disputes in order to avoid trials where there is nothing to try. *Yahnke v. Carson*, 2000 WI 74, ¶ 10, 236 Wis. 2d 257, 264.

The purpose of a declaratory judgment is to address a justiciable controversy in court before a threatened harm occurs. *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610, 624–25 (1976). Summary judgment appropriately resolves a declaratory judgment when the claim turns on a question of law. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 33, 309 Wis. 2d 365, 382. A declaratory judgment action is the "exclusive" means of challenging the validity of an administrative rule or guidance document. Wis. Stat. § 227.40.

DISCUSSION

In their first amended complaint, the Plaintiffs urge the Court to interpret "address of a witness" in Wis. Stat. § 6.87 to mean "a place where the witness can be communicated with." Dkt. 160:7. The WEC and the Intervenor argue this definition is improper. Instead, they argue that "address" means a person's street number, street name, and municipal name, which is the same definition used in the aforementioned guidance.

Our Supreme Court succinctly summarized the rules for statutory interpretation. *See State ex. Rel. Kalal v. Cir. Ct. for Dane Cnty.,* 2004 WI 58, 271 Wis. 2d 633. Interpretation begins with the

language of the statute. *Id*. at ¶ 45. The language that is given is common, ordinary, and accepted meaning. *Id*. You normally stop if the meaning is clear. *Id*. Context is also important, so you interpret the language as part of a whole, not in isolation. *Id*. at ¶ 46. You must avoid unreasonable results and surplusage. *Id*. A statute is not ambiguous just because the parties disagree on its meaning. *State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W.2d 506, 510 (1997). Courts assume the Legislature drafts statutes intentionally and understands the implications of its language. *Wagner Mobil, Inc. v. City of Madison*, 190 Wis. 2d 585, 594, 527 N.W.2d 301, 304 (1995). If the language is unambiguous, there is no need to look at extrinsic sources for a meaning, such as legislative history. *State ex. Rel. Kalal*, 2004 WI 58 at ¶ 46. Finally, many words have multiple dictionary definitions. The right definition depends on the context in which the word is used. *Id*. at ¶ 49.

a. The Plaintiffs' definition is consistent with the common, ordinary, and accepted meaning of "address" and the statutory context.

Using that framework, the Court will interpret the meaning of "address of a witness" in Wis. Stat. § 6.87. The Court first turns, as the parties do, to dictionary definitions. The Plaintiffs point the Court to the Merriam-Webster Dictionary, which defines the noun "address" as "a place where a person or organization may be communicated with." *Address*, Merriam-Webster, https://meriam-webster.com/dictionary/address (last viewed December 19, 2023).

The Defendant and Intervenor direct the Court to the Oxford English Dictionary, which defines "address" as "[t]he particulars of the place where a person lives or an organization is situated, *typically* consisting of a number, street name, the name of a town or district, and *often* a postal code; these particulars considered as a location where a person or organization can be contacted by post." *Address*, Oxford English Dictionary, https://doi.org/10.1093/OED/7943537954. (Last viewed December 19, 2023) (Emphasis added). While the Oxford English definition states that a postal code is "often" part of an address, the Intervenor claims this is "not a universal component of an 'address.'" Dkt. 224:41. In other words, the Intervenor argues that the items the Oxford English Dictionary says are "typically" part of an address are universal components, but the items the dictionary says are "often" part of an address are not. It is not clear why something that is "typical" is universal but something that is "often" is not. The plain language of the definition instead demonstrates that neither one are universal components. They are sometimes, but not always, components of an address.

That alone should end the inquiry. Yet the Defendant and the Intervenor have further problems with their preferred dictionary source. The Oxford English Dictionary further defines "address" as "[t]he building or other location where a person lives or an organization is situated." Address, Oxford English Dictionary, https://doi.org/10.1093/OED/9601438769. (Last viewed December 19, 2023). This definition requires none of the particulars the Defendant and Intervenor asks me to find elemental and necessary.

Moreover, the Defendant's and Intervenor's preferred definition runs into conflict with similar terms used throughout the statutes. When the Legislature uses similar but different terms, courts presume they have different meanings, especially when used within the same section. *State v. Smits*, 2001 WI App 45, ¶ 13, 241 Wis. 2d 374, 381. Section 6.87 of the Wisconsin Statutes uses

multiple terms similar to "address of a witness." For example, under Wis. Stat. § 6.87(2), a municipal clerk is required to mail an absentee ballot to an elector with an unsealed envelope. The unsealed envelop shall have "the name, official title and *post-office address* of the clerk upon its face." Wis. Stat. § 6.87(2) (Emphasis added). The Intervenor's preferred Oxford English Dictionary definition of "address" aligns with this term: a post-office address would include a number, street name, town name, and postal code. Dkt. 227:16-17. In other words, where a person "can be contacted by post." The Legislature did not use "post-office address" for "address of a witness." It only used "address." This leads the Court to conclude that "address" contains fewer, not more, particulars. After all, the Legislature knew when to require a number, street name, town name, and postal code when it chose to use "post-office address."

This conclusion is reinforced by the use of "complete residential address" in Wis. Stat. § 6.34. This section sets out the requirements for proof of residence by electors serving in the military. In order to establish a military elector's residence, Wis. Stat. § 6.34(3)(b)2 requires an identifying document with a "current and *complete residential address*, including a numbered street address, if any, and the name of a municipality." (Emphasis added) So a "complete residential address," at minimum, includes a numbered street address (i.e., street number and a street name), if any, and the name of a municipality. It is difficult to see how "address" in "address of a witness" could require more information than "complete residential address," but that is exactly what the Defendant and Intervenor are asking the Court to do.

The Plaintiffs' definition, by contrast, does not have these problems. Defining "address" as "a place where the witness can be communicated with" requires less information than "post-office address" or "complete residential address." As such, no conflict occurs between these terms. And this definition avoids surplusage by giving meaning to every word in "post-office address" and "complete residential address." This definition also aligns with the common, ordinary, and accepted meaning of that term, as shown by the Merriam-Webster definition of "address" and even the Defendant's preferred definition, which acknowledges that an address does not always contain all of the listed particulars (i.e., street number, street name, municipality, and postal code).

b. It is unnecessary to look at extrinsic evidence.

The Intervenor also argues that it is the legislative branch's "understanding" that "address" includes street number, street name, and municipality – but not postal code – as shown by 2021 Senate Bill 935 and its "partial veto of WEC's 2016 Guidance." Dkt. 224:8. There are several problems with this contention. A court only uses extrinsic sources for interpretation if the language is ambiguous. That is not the case here, as shown above. Even if it was appropriate to consider extrinsic sources, it is hard to see why the Legislature's passage of a bill in 2022 (which was subsequently vetoed) would help discern the Legislature's intent in 1965, when the Witness Address Requirement was enacted. *See* 1965 Act 666 (creating the witness requirement). Similarly, the action by the Joint Committee on Review of Administrative Rules does not shed any light on the Legislature's intent in enacting the Witness Address Requirement in 1965.[1]

[1] The Intervenor asserts this was done using the Legislature's "partial veto." Only the Governor has partial veto power. Wis. Const. Art. V, § 10.

The Defendant and Intervenor also point the Court to WEC's 2016 guidance on the Witness Address Requirement and forms promulgated by the WEC. Again, it is unnecessary for the Court to consult with extrinsic sources. More importantly, it is the role of the judicial branch to interpret the meaning of a statute. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 54, 382 Wis. 2d 496, 545. As such, an agency's guidance and forms bear no weight on the Court's decision or interpretation of the law.

Finally, the Intervenor directs the Court to a series of bills creating and modifying absentee voting in Wisconsin. While this legislative history is interesting, it does not clarify the meaning of "address" as used in the statute. At most, it shows that the Legislature has gradually relaxed the requirements related to absentee voting over the past century.

c. The Plaintiffs' definition is not "unworkable."

The Defendant and Intervenor finally argue that the Plaintiffs' definition is "unworkable." Specifically, the Defendant argues that the Plaintiffs' preferred definition would violate *Bush v. Gore*, 531 U.S. 98, 100 (2000), because it could result in "substantial disparities in the counting of similarly marked ballots." Dkt. 222:25-26. Similarly, the Intervenor, citing *State v. Buer,* 174 Wis. 120, 126, 182 N.W. 855, 857 (1921), argues that the definition would result in clerks not treating absentee voters with "perfect equality."

The Court does not find the cases cited to be applicable to the issue at hand. Starting with *Bush v. Gore*, that case's holding was "limited" to the unique, complex facts of that case. *Bush*, 591 U.S. 98, 109. The standard at issue in *Bush* (*i.e.*, determining voter intent) is very different than what is being proposed here (*i.e.*, determining whether there is sufficient information to locate someone). The latter does not require an exercise in mindreading. It simply asks clerks to make a determination on whether they can locate the person based on the provided information. This is strikingly similar to WEC's own 2016 guidance, which stated: "If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope." Dkt. 4:5.

Regarding *State v. Buer*, the case does not stand for what the Intervenor claims it does. The language quoted by the Intervenor is taken out of context because it is from a sentence which summarizes the argument made by the losing party in the case.[2] In fact, the Wisconsin Supreme Court held that the Legislature could establish *different* election systems in Milwaukee County compared to other counties. *Buer* stands for the principle that voters can expect uniformity within their local voting district, but that variance on a statewide level is expected and logical. This is hardly "perfect equality." Counsel is again reminded of its duty of candor towards the Court. *See* Dkt. #202:3 ft. 1.

[2]The Intervenor erroneously quotes from *Buer* to state that "Wisconsin law mandates that the roughly 1,800 municipal clerks who administer the State's absentee-voting regime treat each absentee voter's ballot with 'perfect equality.'" Dkt 224:19. As explained above, the Wisconsin Supreme Court used "perfect equality" to describe what the plaintiff sought, and it went on to rule that such an expectation was neither logical nor required by the constitution.

The argument is further undermined by other parts of the statute which would be unconstitutional if the Defendant's and the Intervenor's theory is correct. For example, state law permits – but does not require – clerks to return absentee ballots to voters to cure defects in the certification. Wis. Stat. § 6.87(9). State law provides no standards for when clerks should do this; it is purely discretionary. Under the Defendant's understanding of *Bush v. Gore* and the Intervenor's misreading of *State v. Buer*, this statute would be unconstitutional.

Other statutes require subjectivity even if it is not apparent from first glance. Even if the Court were to adopt the Defendant's and Intervenor's three-part definition, there still would be subjectivity. For example, one clerk might consider a witness's handwriting illegible and reject the ballot, while another clerk may have no difficulty deciphering poor penmanship.

Election clerks are not automatons, and it is exceedingly difficult, if not impossible, to remove all subjectivity from a process requiring thousands of election workers to review hundreds of thousands of ballots. For better or for worse, our elections are administered by humans and, as such, there will always be some level of subjectivity in administering election statutes. This does not make such statutes unconstitutional or unworkable.

d. The Plaintiffs' interpretation will not conflict with the Materiality Provision.

The Defendant's and Intervenor's preferred three-part definition would also lead to problems under the Civil Rights Act of 1964. *League of Women Voters v. Wis. Elec. Comm'n,* 22-CV-2472 (Dane Cnty. Cir. Ct., Jan. 02, 2024). By contrast, the Plaintiffs' definition would comply with the materiality provision of the Civil Rights Act. For example, a witness writing "same address as voter" would be rejected under the Defendant's and Intervenor's three-part test, which would violate the Materiality Provision. *Id*. The Plaintiffs' definition would not pose such problems because the clerk would be able to easily discern "a place where the witness can be communicated with" and, as a result, count the ballot.

CONCLUSION

The problem at hand could be resolved if the Legislature passed a bill to define "address." Instead, it is up to the judiciary to make sense of an undefined word used in a variety of different contexts in a convoluted and poorly written statute. The definition preferred by the WEC and the Legislature would establish a simple, bright line rule, but it does not fit within the broader statutory context. In fact, it directly conflicts with several other similar terms. Therefore, this definition is improper and, as used by the WEC, invalid. The Plaintiffs' definition suffers none of these problems and, as a result, it is the proper definition of "address" as used in the Witness Address Requirement.

ORDER

IT IS ORDERED:

(1) The Plaintiffs' motion for summary judgment is **GRANTED**.
(2) The Defendant's cross motion for summary judgment is **DENIED**.
(3) The Intervenor's cross motion for summary judgment is **DENIED**.
(4) The Court will schedule oral arguments on the requested injunctive relief.