

WISCONSIN SUPREME COURT
MONDAY, JUNE 6, 2011
9:45 a.m.

2011AP765-W State v. Circuit Court for Dane County
2011AP613-LV State ex rel. Ozanne v. Fitzgerald

There are two matters pending in the Supreme Court regarding the passage of 2011 Wis. Act 10, which has been commonly referred to as the budget repair bill. The Court will hear oral argument regarding whether to exercise jurisdiction over either or both matters and regarding the substantive legal issues in both matters.

2011AP613-LV is a certification from the Court of Appeals. The Court of Appeals may certify to the Supreme Court cases that it believes cannot be resolved by applying current Wisconsin law. In this case, the Court of Appeals has certified a request by Secretary of State Douglas M. La Follette to appeal from an order that is not automatically appealable.

2011AP765-W is a petition for supervisory writ, which is simply a type of order. A person may request the Supreme Court to issue a supervisory order to a lower court and the judge presiding therein under certain circumstances. See [Wis. Stat. § 809.51](#). In this case, the State and the Secretary of the Department of Administration have asked the Supreme Court to order the Dane County circuit court to take certain actions in a lawsuit involving the passage of the budget repair bill.

Some background: Both matters pending before the Supreme Court relate to Dane County Circuit Court case No. 11CV1244, State ex rel. Ozanne v. Fitzgerald. In that case, Dane County District Attorney Ismael Ozanne alleged that the March 9, 2011, meeting of the Joint Committee of Conference regarding the bill that eventually became Act 10 violated the Wisconsin Open Meeting Law (the OML), Wis. Stat. §§ 19.81-19.98, because the members of the committee did not give sufficient advance notice of the meeting. Ozanne's complaint asked the circuit court, among other things, (1) to impose forfeitures on four legislators who participated in the March 9, 2011, meeting (Sen. Scott Fitzgerald, Sen. Mike Ellis, Rep. Jeff Fitzgerald and Rep. Scott Suder), (2) to issue an order prohibiting Secretary La Follette from publishing Act 10, and (3) to declare that Act 10 is void because of the alleged violation of the OML.

On March 18, 2011, the circuit court, the Hon. Maryann Sumi presiding, granted a temporary restraining order (TRO) that prohibited La Follette from publishing Act 10.

On March 21, 2011, a petition for leave to appeal the circuit court's non-final order of March 18, 2011, and a request for immediate temporary relief were filed on behalf of Secretary La Follette in the Court of Appeals. The petition asked the appellate court to review and stay the effect of the circuit court's March 18, 2011 order so that Act 10 could be published and thereby take effect as a law.

On March 24, 2011, the Court of Appeals certified this petition for leave to appeal and for temporary relief to the Supreme Court. The Court of Appeals stated that there were two questions of law that should be decided by the Supreme Court in its role as Wisconsin's primary law-developing court: (1) whether voiding a legislative act is an available remedy for a violation of the OML, and (2) whether a court has the authority to enjoin the secretary of state's publication of an act before it becomes an effective law. This certification has been assigned Case No. 2011AP613-LV.

In the meantime, on March 23, 2011, D.A. Ozanne filed an amended complaint in the circuit court, which added Sen. Mark Miller, Rep. Peter Barca, the Senate, the Assembly, and the Joint Committee of Conference as defendants.

On March 31, 2011, after holding an evidentiary hearing, the circuit court issued an amended TRO reaffirming and extending the original March 18, 2011 TRO.

On April 7, 2011, a petition for a supervisory writ against the circuit court and a request for immediate temporary relief staying the effect of the March 31, 2011 amended TRO were filed on behalf of the State of Wisconsin and Michael Huebsch, in his capacity as Secretary of the Department of Administration. The writ petition asks the Supreme Court to make declaratory rulings that a court may not invalidate an act of the Legislature due to a violation of the OML and that a court generally may not restrain actions that are necessary for a legislative act to become an effective law. The petition further asks the Supreme Court to order the Dane County circuit court to conduct all further proceedings in Case No. 11CV1244 in compliance with those declaratory rulings and to vacate its TRO. This petition for supervisory writ and temporary relief has been assigned Case No. 2011AP765-W.

On May 26, 2011, the circuit court issued a decision, findings of fact, conclusions of law, and a judgment. It ruled that the March 9, 2011 meeting of the Joint Committee of Conference violated the OML because the notice of the meeting was not given sufficiently in advance of the meeting and the meeting location was not open and accessible to the public. The circuit court concluded that because the action of the March 9, 2011 meeting of the Joint Committee of Conference was void, the subsequent passage of the amended budget repair bill by the Senate and the Assembly and the signing of the bill by the Governor were void as well. The circuit court's judgment therefore declared that Act 10 is of no force and effect. The judgment stated that it was a final judgment for purposes of appeal as to the validity of the actions taken on March 9, 2011. The circuit court did not yet rule on whether forfeitures should be imposed on Sen. Fitzgerald, Sen. Ellis, Rep. Fitzgerald and Rep. Suder, all of whom asserted in the circuit court that they are immune from being sued during the current term of the legislature.

The Supreme Court has not yet decided whether to exercise its jurisdiction over either the certification or the petition for supervisory writ. It has asked the parties to address a number of both procedural and substantive issues, including (1) whether the circuit court's May 26, 2011 judgment is a final judgment that may be appealed; (2) whether an appeal of the May 26, 2011 judgment is an available remedy and who may pursue such a remedy; (3) whether an exercise of the Supreme Court's original jurisdiction (i.e., hearing a case without first having the matter considered in a trial court) may include the court's appellate power to review a circuit court judgment without an appeal of that judgment having been filed; (4) whether any of the circuit court's May 26, 2011 findings of fact are clearly erroneous; and (5) whether there is any dispute about any facts not covered by the circuit court's findings of fact but relevant to the Supreme Court's consideration of Case No. 2011AP613-LV and Case No. 2011AP765-W.

In addition to these specific issues, the court has asked the parties to be prepared to address the basis of the court's jurisdiction to hear either of the two cases pending before it and the substantive issues in those two cases. Following oral argument, the Supreme Court discusses and deliberates the issues presented, and issues a written decision at a later date.