

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2015-AP-1523

Vincent Milewski and Morganne MacDonald,

Plaintiffs-Appellants-Petitioners,

and

Town of Dover, Board of Review for the Town of Dover, and Gardiner
Appraisal Service, LLC, as Assessor for the Town of Dover,

Defendants-Respondents,

Appeal from the Circuit Court of Racine County
Circuit Court Case No. 14-CV-1482
The Honorable Phillip A. Koss, Presiding

Defendants-Respondents' Motion for Reconsideration in Opposition to
the State of Wisconsin's Motion to File *Amicus Curiae* Brief or, in the
Alternative, to File a Response to the *Amicus Curiae* Brief

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Defendants-Respondents, Town of Dover and Board of Review for the Town of Dover, by their undersigned counsel, hereby respectfully request that this Court reconsider its December 19, 2016 Order and deny the Motion of the State of Wisconsin to file a non-party brief as *Amicus Curiae* or, alternatively, allow Defendants-Respondents to file a response brief, for the following reasons:

1. The Attorney General moved on December 14, 2016 to file an *amicus* brief and the motion was granted on December 19, 2016 before Defendants-Respondents' opposition deadline. Under § 809.14(2) Defendants-Respondents have 11 days from December 19th to move for reconsideration. Defendants-Respondents urge to reconsider and deny the state's motion because the *amicus* brief does not defend the constitutionality of the statutory sections at issue and raises new arguments and issues the parties have not raised or addressed.

2. While the Attorney General's argument that the Plaintiffs-Appellants-Petitioners should prevail because the Legislature impliedly repealed the statute they are challenging—Wis. Stat. § 70.47(7)(aa)—purports to offer a way for the Court to strike § 70.47(7)(aa) without addressing its constitutionality, the *amicus* brief does not *defend* the constitutionality of the statutory section at issue. *State v. Oak Creek*, which the Attorney General cites, holds that the Attorney General's powers are strictly limited and include an

affirmative duty to *defend* the constitutionality of the state's statutes. 2000 WI 9 (Attorney General lacked standing to *attack* the constitutionality of a statute). Here, the Attorney General is not seeking to defend the constitutionality of § 70.47(7)(aa) and, indeed, takes no position on the constitutional issues. (Br. n. 1). Instead, he is attacking that section on other grounds and thereby supporting Plaintiffs-Appellants-Petitioners. The state cites no authority that the Attorney General has standing and authority to do anything but *defend* the constitutionality of this statute, which, incidentally, the state has been applying through the Department of Revenue (even after 2009), on whose advice the Town Board relied in applying Wis. Stat. § 70.40(7)(aa) in this case. (*See* R. 26:21). The Court in *State v. Oak Creek* holds that Wis. Stat. § 806.04(11), which the Attorney General cites, does *not* confer broader authority on the Attorney General. *Id.* at ¶ 51.

3. Furthermore, in contrast to a typical *amicus* brief, the state's *amicus* brief does not seek to offer a unique perspective on the broad policy impacts of the case that might assist the Court in making a well-informed decision. *See* Judge Neal Nettesheim & Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, Wis. L., May 2007, at 11, 55. Unlike the Department of Revenue, which oversees the tax assessment process, the Department of Justice does not have any unique perspective or expertise to share with the Court beyond defending the constitutionality of the statute.

4. The proposed amicus Brief also raises an issue and argument the Plaintiffs-Appellants-Petitioners never raised before, including directly with the Town, or at the circuit court, the court of appeals, or this Court, and which does not fall within the issues this Court indicated would be addressed when it accepted the Petition for Review. Standing to be heard does not entail the state's right to be heard at any time or on topics not at issue in the appeal. The Attorney General had the opportunity to weigh in at the circuit court and at the court of appeals—when the parties could have addressed his arguments—but chose not to.

5. Defendants-Respondents filed their respondents' brief on November 30, 2016, and do not have an opportunity to file another brief under the Rules of Appellate Procedure. *See* Wis. Stat. § 809.19. Because the Plaintiffs-Appellants-Petitioners have not raised the issue now suggested by the state, Defendants-Respondents did not brief the issue to this Court. They would have included a thorough opposition to that argument if it had been raised.

6. Because the state's new argument has never been raised by any of the parties to this case, the issue should be treated as forfeited and not properly before this Court. "To allow *amici* to raise this issue at this late date, contrary to the wishes of the parties, would be contrary to the principals of fairness and the policies of judicial administration that the forfeiture rule protects." *Schill v.*

Wisconsin Rapids Sch. Dist., 2010 WI 86, ¶ 45, 327 Wis.2d 572, 597-98, 786 N.W.2d 177, 190-91; *see also Cnty. of Barron v. Labor & Ind. Rev. Comm'n*, 2010 WI App. 149, ¶ 30, 330 Wis.2d 203, 221, 792 N.W.2d 584, 593 (“courts need not consider arguments raised only by *amici*”).

7. There is no inherent right to file an *amicus* brief. Wis. Stat. § 809.19(7)(a). This Court is justified in denying motions to file *amicus* briefs that raise constitutional questions that have not been raised by the parties themselves. *See, e.g., In re Kootz's Will*, 228 Wis. 306, 313-14, 280 N.W. 672 (1938). Because the sole issue presented in the *amicus* brief is a new argument and issue, the *amicus* brief would not assist the Court in resolving any issue properly before the Court. Accordingly, the Defendants-Respondents respectfully request that this Court reconsider its Order and deny the motion to file an *amicus curiae* brief.

8. In the alternative, Defendants-Respondents respectfully request leave to file a 3,000 word brief responding to the new arguments raised by the state. *See Sambs v. City of Brookfield*, 97 Wis.2d 356, 361, 293 N.W.2d 504, 507 (1980) (party granted leave to file a brief responding to new issues raised in *amicus* brief). In the interests of fairness, Defendants-Respondents also request additional oral argument time to address those new issues.

Dated this 22nd day of December, 2016.

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