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September 24, 2015

RECEIVED 9/29/15

VIA HAND DELIVERY

Diane Fremgen, Clerk
Wisconsin Supreme Court
110 E. Main Street, #215
Madison, WI 53701

Re: Peggy Z. Coyne, et al. v. Scott Walker, et al.
Case No. 2013AP416

Dear Ms. Fremgen:

Enclosed please find the original and nine copies of Plaintiffs-Respondents' Motion to File a Supplemental Brief and to Re-Set the Date for Oral Argument in the above-referenced matter. Please file stamp the extra copy and return it to the messenger.

By copy of this letter and enclosure, copies have been served on all counsel of record via First Class U.S. Mail on this date.

Thank you for your attention to this matter. Kindly contact me with any questions or concerns.

Very truly yours,

CULLEN WESTON PINES & BACH LLP

Susan M. Crawford

SMC:jp
Enclosures
cc: AAG Daniel P. Lennington/AAG David V. Meany/Deputy AG Andrew C. Cook
Randall R. Garczynski
Janet A. Jenkins/Ryan Nilsestuen
Richard M. Esenberg/C.J. Szafis/Michael Fischer/Thomas Kamenick ✓

STATE OF WISCONSIN
SUPREME COURT

Case No. 2013AP416

PEGGY Z. COYNE, MARY BELL, MARK W. TAYLOR, COREY OTIS, MARIE K. STANGEL, JANE WEIDNER and KRISTIN A. VOSS,

Plaintiffs-Respondents,

v.

SCOTT WALKER and SCOTT NEITZEL,

Defendants-Appellants-Petitioners,

and

ANTHONY EVERS,

Defendant-Respondent.

ON APPEAL FROM THE OCTOBER 30, 2012, DECISION BY THE DANE COUNTY CIRCUIT COURT, CASE NO. 11-CV-4573, THE HONORABLE AMY R. SMITH, PRESIDING

PLAINTIFFS-RESPONDENTS' MOTION TO FILE A SUPPLEMENTAL BRIEF AND TO RE-SET THE DATE FOR ORAL ARGUMENT

Plaintiffs-Respondents Peggy Coyne, et al., by Cullen Weston Pines & Bach LLP, their attorneys, hereby move the Court to issue an order:

A. Granting leave to Plaintiffs-Respondents to file a supplemental brief not to exceed 30 pages in response to the reply brief submitted by the

Defendants-Appellants-Petitioners (hereinafter, "the State") and the nonparty brief that the Court accepted on September 23, 2015, and to be filed within 30 days of the date of the Court's order on this motion.

B. Postponing the oral argument that is scheduled for October 12, 2015 and setting a new date for oral argument; and

C. Ordering that nonparties may file motions for leave to file nonparty briefs within a time set by the Court.

As grounds for this motion Plaintiffs-Respondents respectfully represent as follows:

1. In its brief in chief, the State did not argue that *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996) (hereinafter "*Thompson*") should be overruled. Rather, it argued that "[t]his Court's earlier holding in *Thompson* is limited to its own facts and is not applicable here." *See* State's Brief at 39-45.

2. In a motion filed on September 14, 2015, one week before the State filed its reply brief, a group of nonparties moved for leave to file a nonparty brief, the principal argument of which was that this Court should overrule *Thompson*. The nonparties expressly acknowledged that the State had not argued that this Court should overrule *Thompson*. *See* Motion For Leave to File *Amicus* Brief, ¶ 8. The Plaintiffs-Respondents opposed the motion on the grounds that the proposed brief interjected a new issue not raised or briefed by the parties.

3. On September 23, 2015, the Court granted leave to the nonparties to file a brief and accepted their proffered brief. Thus, the nonparties' argument that *Thompson* should be overruled is before the Court, even though the issue was not previously raised or briefed by the parties.

4. The State's reply brief was filed on September 21, 2015, and received by Plaintiffs-Respondents by U.S. Mail on September 24, 2015. Before the State filed its reply brief, it had the opportunity to review the proposed nonparty brief. Then, in its reply brief, the State for the first time argued that the Court should overrule *Thompson*. The State's argument that this Court should overrule long-standing precedent interpreting a provision of the Wisconsin Constitution is wholly different from its initial argument that this case is factually distinguishable from *Thompson*.

5. Given that the Court of Appeals held that Act 21 was unconstitutional under *Thompson*, the State had two options in seeking the reversal of that decision: one, it could have argued that the Court of Appeals was incorrect in concluding that Act 21 was unconstitutional under *Thompson;* and two, it could have argued in the alternative that *Thompson* was wrongly decided and should be overruled.

6. Nevertheless, in its brief in chief, the State chose to argue exclusively that the Court of Appeals was incorrect in holding that Act 21 was

unconstitutional under *Thompson*. It did not argue in the alternative that, if the Court of Appeals was correct that *Thompson* controlled, *Thompson* itself was wrongly decided and should be overturned.

7. The Wisconsin Supreme Court does not overturn its prior decisions casually or lightly. It has developed a very specific set of principles and factors, part of the doctrine of *stare decisis*, for determining when it is appropriate to depart from precedent. *See State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 25, 863 N.W.2d 592, 604, *quoting Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis.2d 60, 665 N.W.2d 257; *Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 52, 717 N.W.2d 216, 223.

8. The State's only possible motivation for holding back its challenge to *Thompson* until its reply brief was an improper one, i.e., to ensure that neither Plaintiffs-Respondents nor Defendant-Respondent would have an opportunity to respond to that argument.

9. It is a well-established rule of appellate practice that a court will not consider arguments raised for the first time in a reply brief, but will instead deem them waived or forfeited. *Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 294 n. 11, 528 N.W.2d 502, 508–09 (Ct. App. 1995). Raising an argument for the first time in a reply brief "thwart[s] the purpose of a brief-in-chief, which is to

raise the issues on appeal, and the purpose of a reply brief, which is to reply to arguments made in a respondent's brief." *Verex Assurance, Inc. v. AABREC, Inc.*, 148 Wis. 2d 730, 734 n. 1, 436 N.W.2d 876, 878 (Ct. App. 1989).

10. Because the State did not argue in its brief in chief that *Thompson* should be overturned, the Plaintiffs-Respondents did not discuss in their brief the doctrine of *stare decisis* as applied to *Thompson*. Moreover, had the State sought to have *Thompson* overruled, the Plaintiffs-Respondents, first and foremost, would have presented an extensive and vigorous argument that *Thompson* was correctly decided and should not be overruled.

11. As the State pointed out in its reply brief, the Respondents have relied on *Thompson* as the controlling precedent in this case. The State's untimely claim that *Thompson* was wrongly decided and should be overruled essentially requires the parties to re-litigate *Thompson*, which for nearly twenty years has stood as this Court's leading decision interpreting Wis. Const. Art. X, §1.

12. Allowing the State's insertion of a momentous new issue in its reply brief, ***without allowing the Respondents to address it,*** would be contrary to the principles of fairness and the policies of judicial administration protected by this Court's forfeiture rule. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 45, 327 Wis. 2d 572, 598, 786 N.W.2d 177, 190-91. Maintaining those principles is vital, especially when the State is belatedly advocating that the Court overturn a

long-standing precedent, an action that this Court does not undertake lightly. A failure to allow full briefing by the parties would compromise the careful review that is necessary whenever this Court considers overturning precedent.

13. Additionally, the State's belated argument to overturn *Thompson* will substantially prejudice the Plaintiffs-Respondents by disrupting their preparations for the October 12, 2015 oral argument. The State is a party and will participate in oral argument, so the Plaintiffs-Respondents must devote significant time and analysis to prepare to respond to questions about the State's new arguments seeking to overrule *Thompson*. Moreover, because the nonparties' argument that *Thompson* should be overturned is different than the State's, Plaintiffs-Respondents must also be prepared to response to questions from the Court about the nonparties' arguments.

14. A schedule that gives Respondents less than three weeks to prepare for a complex oral argument about whether the Court should overturn a long-standing precedent, while simultaneously preparing last-minute briefs on a weighty new issue belatedly raised in the Petitioner's reply brief, is fundamentally unfair.

15. In the interests of fairness, to remedy the prejudice suffered by the Plaintiffs-Respondents because of the State's improper argument in its reply brief, and to allow the Court to have the best possible written and oral

brief, and to allow the Court to have the best possible written and oral presentations, Plaintiffs-Respondents propose that the Court allow them to file a combined supplemental brief not to exceed 30 pages responding to the issues contained in both the reply brief and the nonparty brief within 30 days from the Court's order.

16. Plaintiffs-Respondents further request that the Court postpone the oral argument that is scheduled for October 12, 2015 and re-set it to a date that will allow the Plaintiffs-Respondents sufficient time to file their supplemental brief and to fully prepare for oral argument.

17. Finally, had the State argued in its brief in chief that the Court should overrule its long-standing precedent of *Thompson*, other potential nonparties may have sought to participate to present their perspectives on the policy impacts of such a far-reaching decision. A motion to file a non-party brief must be filed not later than 14 days after the respondent's brief is filed. Wis. Stat. § 809.19(7)(b). Thus, it is too late for other nonparties to move the court for permission to file a brief. However, the Court, under its inherent authority, may consider motions by nonparties to file briefs beyond the timeline provided by the rules. Given the unusual circumstances presented by this case, fairness requires that the Court exercise that authority and set a date for nonparties to seek leave to file briefs in this case.

Dated this 24th day of September, 2015.

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