

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 11

11 FEB 18 11:12:42
DANE COUNTY

**Julaine Appling, Jo Egelhoff,
Jaren E. Hiller, Richard Kessenich,
and Edmund L. Webster,**

CIRCUIT COURT
DANE COUNTY, WI

Plaintiffs,

vs.

**James E. Doyle, Karen Timberlake,
and John Kiesow,**

Defendants.

and

**Katharina Heyning, Judith Trampf,
Wendy Woodruff, Mary Woodruff,
Jayne Dunnun, Robin Timm,
Virginia Wolf, Carol Schumacher,
Diane Schermann, and Michelle Collins,**

Case No. 2010 CV 004434
Case Code: 30701, 30704
Honorable Daniel R. Moeser

Proposed Intervening
Defendants

and

**FAIR WISCONSIN, Inc.,
Glenn Carlson & Michael Childers,
Crystal Hyslop & Janice Czynson,
Kathy Flores & Ann Kendzierski,
David Kopitzke & Paul Klawiter,
Chad Wege & Andrew Wege,**

Intervening Defendants.

REPLY BRIEF OF PROPOSED INTERVENING DEFENDANTS
IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION

INTRODUCTION

Plaintiffs' arguments in response to the Couples' Motion for Reconsideration¹ fail because they are based upon two faulty assumptions:

- Plaintiffs incorrectly assume that the Court made its intervention determination under the permissive intervention standard of Wis. Stat. § 803.09(2) rather than the intervention of right standard of § 803.09(1), even though the Court's December 8, 2010 Decision and Order applied the criteria of § 803.09(1).
- Plaintiffs also incorrectly assume that the Couples' Motion for Reconsideration should be evaluated under the facts as they currently exist rather than the facts as they existed at the time the Couples' filed their Motion to Intervene.

Because these false premises form the foundation of Plaintiffs' arguments, the arguments are entirely without support. Plaintiffs do not and cannot persuasively rebut the Couples' argument that the Court determined that the Couples met the standards for intervention of right, and that consequently the Wisconsin Statutes require their participation as parties to the case.

ARGUMENT

I. THE COURT DETERMINED THAT THE COUPLES MEET THE STANDARDS FOR INTERVENTION OF RIGHT UNDER WIS. STAT. § 803.09(1), SO DISCRETION UNDER WIS. STAT. § 803.09(2) IS IRRELEVANT

Plaintiffs erroneously assume that the Court, in its December 8, 2010 Order, evaluated the proposed intervenors' motions under the standards of Wis. Stat. § 803.09(2), which provides a mechanism for permissive intervention. This assumption is proved incorrect by a

¹ The Couples do not address Plaintiffs' Motion to Reconsider at this time, because the Couples are not yet parties to the action, and because Plaintiffs' Motion is directed to the Fair Wisconsin intervenors, not to them. In any event, the Court has yet to set a briefing schedule for Plaintiffs' Motion.

comparison of the Court's Order with the standard for intervention of right under § 803.09(1). The Court followed the rubric prescribed by § 803.09(1), examining each of the factors and issuing an opinion covering each. The Court did not mention the sole requirement for permissive intervention, eliminating any doubt that § 803.09(1) governs.

Section 803.09(1) provides that a movant "shall be permitted to intervene" if four requirements are met: (i) the motion to intervene is made in a timely fashion; (ii) the movant claims an interest sufficiently related to the subject of the action; (iii) the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (iv) the movant's interest is not adequately represented by the existing parties. *See* Wis. Stat. § 803.09(1); *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. Although the Court did not specifically identify these four factors as elements of the statute, its opinion addressed each factor in the order it appears in § 803.09(1). The Court found that "[t]he motions are timely," satisfying the first factor. (Decision and Order Re: Motions to Intervene, Dec. 8, 2010, at 2) The Court then found that "[t]he interveners have a personal and real interest in defending the Wisconsin domestic partnership laws," satisfying the second factor. *Id.* The Court then found that the intervenors interest in the domestic partnership laws was at risk of impairment because "[w]hatever rights said laws provide the interveners will be lost if plaintiffs are successful," satisfying the third factor. *Id.* Finally, the Court found the fourth factor satisfied by concluding that "the interveners can provide information and perspective that may not be provided by current defense counsel." *Id.* With each of the statutory factors satisfied, all of the intervenors have a right to intervene under § 803.09(1).

Unlike § 803.09(1), §803.09(2) only has one substantive requirement. In order to intervene via permission of the court, a timely movant must only show that his or her claim or

defense and the main action share a common question of law or fact. Wis. Stat. § 803.09(2).

While the Court addressed each of the four § 803.09(1) factors, the Order contains no mention of this one requirement for permissive intervention.

Plaintiffs cite two cases in an attempt to bolster their argument that the Court has discretion to deny the Couples' Motion for Reconsideration under § 803.09(2), but neither of these cases support Plaintiffs' position. The first, *City of Madison v. Wisconsin Employment Relations Commission*, 2000 WI 39, 234 Wis. 2d 550, 610 N.W.2d 94, simply restates the statutory standard for permissive intervention. This standard is inapplicable because, as discussed, the Court evaluated the intervenors' motions under § 803.09(1). The second case, *Fish Creek Park Co. v. Village of Bayside*, 273 Wis. 89, 76 N.W.2d 557 (Wis. 1956), predates the modern intervention statute, which was promulgated in 1975. The case does not discuss *any* intervention statute, and so has no relevance to the Couples' motion to intervene under § 803.09(1).

II. THE STATUS OF THE FAIR WISCONSIN GROUP AS DEFENDANTS DOES NOT AFFECT THE RIGHT OF THE COUPLES TO INTERVENE

In addition to arguing that the Court has discretion to exclude the Couples under § 803.09(2), Plaintiffs incorrectly argue that the admission of the Fair Wisconsin group means that the Couples are now asking to join a case in which their interests are adequately represented. This argument is based upon the erroneous assumption that the Couples' Motion for Reconsideration is "a new petition for relief." (Pls.' Br. 2.) The Couples' Motion asks the Court to reconsider a decision made contemporaneously with the decision to admit the Fair Wisconsin group. The Court should reevaluate the decision to exclude the Couples as of the time the decision was originally made, because to do otherwise would be illogical. Plaintiffs argue that the Court should use the admission of the Fair Wisconsin group to determine the outcome of a

reevaluation of the very decision that led to the admission of the Fair Wisconsin group. It makes no sense to do so; Plaintiffs' argument should be rejected.

Plaintiffs cite *Roth v. La Farge School Dist. Bd. Of Canvassers*, 2001 WI App 221, 247 Wis. 2d 708, 634 N.W.2d 882, as support for the argument that the intervention of the Fair Wisconsin group precludes intervention of the Couples, but this case does not remedy the logical failure of Plaintiffs' argument. Plaintiffs cite a portion of *Roth* that states in dicta the uncontroversial proposition that courts may limit the number of parties intervening under § 803.09(1) if existing parties adequately represent their interests. *Id.* at ¶ 24. This proposition is uncontroversial because it is part of the text of § 803.09(1), which denies movants the right to intervene if their interests are adequately represented by existing parties. *Roth* does not help Plaintiffs because the Fair Wisconsin group were not "existing parties" at the time the Couples moved to intervene. The flaw the Couples hope to remedy in their current motion is the admission of one set of rightful intervenors and the simultaneous exclusion of another set of rightful intervenors at a time when the rights of neither set were adequately represented. To say that the Couples' interests are now adequately represented misses the point entirely. Moreover, at the same time that Plaintiffs are arguing that the Couples' interests are adequately represented by the Fair Wisconsin group they are moving to reconsider the decision to allow them intervention. Their motion highlights the importance of allowing both groups the right to intervene. As with the question whether current counsel for the government defendants will continue to serve in that role, the continued presence of the Fair Wisconsin intervenors is not assured. The Couples should be granted intervention to protect their rights.²

² Even judged based on the present circumstances, the Couples' interests are unique and distinct in certain ways from the interests of the Fair Wisconsin couples. (*See* Couples' Br. in Support of Motion for Reconsideration at 5-6.)

In conjunction with their adequacy argument, Plaintiffs make the *ad absurdum* argument that the Couples' position would allow every registered domestic partner in Wisconsin to intervene as of right. This argument ignores the practical reality that the Court is only faced with an additional five couples who wish to join the suit. It is irrelevant how many intervenors could theoretically join; only five couples actually want to join. Plaintiffs' argument also ignores the first element necessary to show a right to intervention: timeliness. While there was little question that the Couples and the Fair Wisconsin group filed timely motions to intervene, any filing by new intervenors at this point could be rejected by the Court as untimely. The total number of additional intervenors of right possible in this action is capped at five couples, so Plaintiffs' argument is without merit.

III. *AMICUS CURIAE* STATUS DOES NOT PERMIT THE COUPLES TO ADEQUATELY PROTECT THEIR RIGHTS

Plaintiffs' final contention is that the Couples will be able to represent their interests adequately as *amici curiae*. Plaintiffs are once again incorrect. As *amici curiae* the Couples could submit a brief and do little else. As full participants in the lawsuit, the Couples would have the right to participate in discovery, to present evidence to the Court, to cross-examine Plaintiffs' witnesses, and to take part in all other aspects of the litigation. One of the Court's findings in its December 8, 2010 Order was that the intervenors can provide information and perspective not available from other sources. The most helpful method of providing information and perspective is through testimony – either in court or by affidavit, which the Couples would be unable to give as *amici curiae*. Because so many rights and privileges are unavailable to *amici*, Plaintiffs' argument that the Couples would be able to adequately protect their interests as friends of the court is untenable.

CONCLUSION

For the foregoing reasons and those stated in the Couples' opening brief, the Couples respectfully request that the Court grant their Motion for Reconsideration and allow them to intervene as of right as defendants.

Dated this 16th day of February, 2011.

Laurence J. Dupuis (WBN 1029261)
ACLU of Wisconsin Foundation, Inc.
207 East Buffalo Street, #325
Milwaukee, WI 53202
(414) 272-4032
(414) 272-0182 Facsimile

John A. Knight*
American Civil Liberties Union
Foundation
180 North Michigan Avenue
Suite 2300
Chicago, IL 60601
(312) 201-9740
(312) 288-5225 Facsimile



Linda E.B. Hansen (WBN 1000660)
David J.B. Froiland (WBN 1031370)
Daniel A. Manna (WBN 1071827)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
(414) 271-2400
(414) 297-4900 Facsimile

David B. Goroff*
FOLEY & LARDNER LLP
321 North Clark
Chicago, IL 60654
(312) 832-5160
(312) 832-4700 Facsimile