STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
January 18, 2019

The Judicial Council met at 9:35 a.m. in Room 328NW, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Sarah Walkenhorst Barber (by phone); Judge Michael R. Fitzpatrick; Diane Fremgen; Judge Eugene A. Gasiorkiewicz (by phone); William C. Gleisner; Christian Gossett (by phone); Duane Harlow; Margo Kirchner; Dennis Myers; Judge Scott Needham (by phone); John R. Orton; Ben Pliskie; Thomas L. Shriner; and Senator Van H. Wanggaard (by phone).

MEMBERS EXCUSED: Justice Annette Kingsland Ziegler; Representative Jim Ott; Judge Robert VanDeHey; Judge Jeffrey Wagner; Devon Lee; Sherry Coley; and Steven Wright; Sara Ward-Cassidy.

I. Roll Call and approval of the Minutes of November 16, 2018.

II. Discussion of the Evidence & Civil Procedure Subcommittee's recommendation to the full Judicial Council that the Council propose to the Legislature an amendment to Wis. Stat. 802.06(1)(b).

Mr. Shriner delivered the following report to the full Judicial Council as Chair of the Council's Evidence & Civil Procedure Subcommittee (ECP) concerning Wis. Stat. 802.06(1)(b), as created by the Legislature in Act 235.

ECP REPORT BY MR. SHRINER

According to Shriner, as instructed by the full Council, the Evidence & Civil Procedure Subcommittee (ECP) has been reviewing changes made to the Rules of Civil Procedure by Act 235. At this time, the ECP has a recommendation to the full Council for a recommended change to Wis. Stat. 802.06(1)(b), which now reads as follows:

> **(b)** Upon the filing of a motion to dismiss under sub. (2) (a) 6., a motion for judgment on the pleadings under sub. (3), or a motion for more definite statement under sub. (5), all discovery **and other proceedings** shall be stayed for a period of 180 days after the filing of the motion or until the ruling of the court on the motion, whichever is sooner, unless the court finds good cause upon the motion of any party that particularized discovery is necessary.

Three words in 802.06(1)(b) are of particular concern to the ECP. Those three words, in bold and underscored in the above quoted language, are "and other proceedings." These words were of concern to us and also of concern to judges that we talked to because 802.06(1)(b) does not just

say that all discovery shall be stayed for 180 days after the motions are filed (or until a court rules on the motion), it says "discovery and other proceedings." And the ECP is concerned that "and other proceedings" may cover a multitude of problems. The ECP cannot see why those three words are in 802.06(1)(b). Our principle concern has been focused on two things that may be encompassed in "and other proceedings."

The first is a very practical problem. In Wisconsin, after a lawsuit is started, the plaintiff has only 90 days to complete service of process on all the defendants. And if a plaintiff does not accomplish that service within 90 days the rules are very clear that as to any unserved defendants the lawsuit has not been commenced. The only solution is to start a new lawsuit and try again. The problem of course is that lawsuits sometimes don't get filed until the end, or very near to the end, of a statute of limitations (SOL). And SOLs can sometimes be short, or they can be shortened unexpectedly. Our concern about "and other proceedings" is that a plaintiff may not be able to complete the service of process and, if the SOL has run, is left without any remedy. In fact, situations may arise where service has not been accomplished on all defendants and then a served defendant can stop service on all defendants merely by bringing on a motion under 802.06(1)(b). And a judge can't fix this problem unless the judge is prepared to immediately deny the motion to dismiss. This is because the "good cause" mentioned at the end of 802.06(1)(b) does not extend to anything except discovery; "good cause" does not include "other proceedings."

The second concern that the ECP has with the three words "and other proceedings" is the fact that "other proceedings" also includes such things as whether a plaintiff needs an injunction or some other form of emergency relief. There are some lawsuits that are started to stop a defendant from doing something that results in irreparable harm. In our view, "and other proceedings" being stayed means that the plaintiff cannot get the judge to stop irreparable harm without violating the automatic stay embraced in 802.06(1)(b) where a covered motion has been brought. In fact, if "and other proceedings" is in force because of an appropriate motion, the plaintiff can't even bring a motion for relief due to irreparable harm.

In the ECP's view, there is no reason that we can imagine why the words "and other proceedings" are in 802.06(1)(b). There is no explanation that we can find in the materials furnished by the people who supported or drafted 802.06(1)(b) that justify or explain the inclusion of those words in 802.06(1)(b). And we are concerned about this also because "and other proceedings" might extend beyond commercial or tort cases. There are a wide range of proceedings in Chapter 813 (concerning injunctions) where the whole purpose of a lawsuit is to get an injunction, including cases where domestic abuse injunctions are involved. The rules of civil procedure (and thus 802.06(1)(b)) apply in a whole range of cases where vulnerable people need the intervention of a court to protect them. And a defendant, say in a domestic abuse case, might be able to grind proceedings to a halt merely by bringing on one of the motions contemplated by 802.06(1)(b).

The ECP recommends that the Council communicate to the Legislature the recommendation of the entire Judicial Council asking for the repeal of the words "and other proceedings" in 802.06(1)(b). Normally, the Council makes recommendations to the Supreme Court which has a process for considering those recommendations. We need assistance from our legislative members of the Council as to how best to proceed here.

DISCUSSION CONCERNING ECP REPORT BY MR. SHRINER

Gleisner began the discussion by making several additional observations. First, addressing Senator Wanggaard, Gleisner noted that he sat through most of the Legislative hearings on Act 235. It was

pretty clear from both the oral and written testimony before the Judiciary Committees of the Legislature that the concern of proponents of Act 235 was focused on discovery. Also, looking at the text of 802.06(1)(b), "and other proceedings" only occurs once in the new rule. But if one looks at the last clause of 802.06(1)(b), namely "unless the court finds good cause upon the motion of any party that particularized discovery is necessary," there is no reference to other proceedings. This is textual evidence that "and other proceedings" was to be limited to discovery, or else why wouldn't the Legislature have provided courts with the discretion to provide relief for both particularized discovery and the need for other proceedings?

Senator Wanggaard agreed that the emphasis in adopting 802.06(1)(b) was on discovery. The Senator also acknowledged that "and other proceedings" is not defined in that rule or elsewhere in Act 235. Shriner observed that the problem is also that the stay under 802.06(1)(b) is automatic and mandated by law, so the lack of clarity regarding "other proceedings" is of special concern. Judges follow the law and absent a definition will be inclined to interpret "other proceedings" broadly, and that could be a serious problem, as indicated above. Also, Shriner noted, if you take out the words "and other proceedings" all discovery is still stayed. And if that was the purpose of 802.06(1)(b) the removal of "and other proceedings" will not change the purpose of the rule. Really, "and other proceedings" is irrelevant and a potential source of serious mischief.

Judge Fitzpatrick noted that 802.06(1)(b) is clearly focused on just discovery because courts are given discretion to grant relief as to discovery, but not other proceedings. Judge Fitzpatrick also made reference to rules which were adopted in the recent lame duck session which gives the Legislature the power to intervene in certain lawsuits. Well, if the Legislature deems it necessary to intervene in a particular case that will be frustrated if there is a 802.06(1)(b) stay in place for as long as the stay continues. On the other hand, if the language "and other proceedings" is removed there will not be an impediment to the Legislature's immediate intervention in an important case.

Mr. Shriner elaborated on the point made by Judge Fitzpatrick. If a statute is challenged as unconstitutional and the Attorney General moves to dismiss under 802.06(1)(b), given "and other proceedings" there is no way for the Legislature to intervene until **after** the Attorney General's motion to dismiss has been resolved. Practically speaking, this could mean the Legislature will not be heard on a constitutional challenge of importance to the Legislature.

Mr. Orton pointed out that because 802.06(1)(b) applies to all civil actions, a motion to dismiss under 802.06(1)(b) could, as a result of the "other proceedings" language, stop all proceedings in a divorce action concerning issues such as who gets custody of the kids, what is the temporary maintenance going to be, what is the temporary child support going to be, and so on. Mr. Orton added that just because the words "other proceedings" is removed from 802.06(1)(b) does not mean that a court could still grant a stay of proceedings based on evidence, instead of an inflexible legislative mandate.

Gleisner also pointed out that a stay on discovery would not raise any constitutional issues with 802.06(1)(b). However, a mandated stay of all proceedings could raise constitutional issues where serious harm is threatened but no remedy is available because of the "other proceedings" language in 802.06(1)(b).

Senator Wanggaard responded that in a nutshell, we are looking to repeal just the three words "and other proceedings" without touching any of the other language in 802.06(1)(b)? There was a unanimity of opinion that the repeal of the three words was the only issue on the table. The Senator saw this as just a tweak to a small part of 802.06(1)(b). Mr. Shriner asked how to get this before

the Legislature as soon as possible. The Senator recommended that an LRB draft should be created with an analysis of what effect the removal of the three words would have on the rest of 802.06(1)(b). The Senator said he saw this request to remove "and other proceedings" from 802.06(1)(b) to be more in the nature of a technical adjustment.

The Council unanimously approved the revision of 802.06(1)(b), with Senator Wanggaard abstaining. Sarah Barber from the LRB will begin work at once and understands the need to move quickly. As soon as the LRB furnishes a draft, it should be furnished to the Judiciary Committees of the Legislature. Sarah said she will proceed based on the materials furnished for this meeting and based on the report of Mr. Shriner. The Senator said that the LRB draft should be furnished to him and Representative Ott, as chairs of the Senate and Assembly Judiciary Committees respectively, but it should also be sent to the President of the Senate and the Assembly Speaker.

III. Consideration of Amendments Made to the Wisconsin Rules of Civil Procedure and Ch. 893 by 2017 Wis. Act. 369 and other effects of Act 369.

Judge Fitzpatrick gave a report on Act 369. He began by reiterating what he said earlier today. He reiterated that by noting that 802.06(1)(b) is clearly focused on just discovery because courts are given discretion to grant relief as to discovery, but not other proceedings. Judge Fitzpatrick also made reference to rules which were adopted in the recent lame duck session which gives the Legislature the power to intervene in certain lawsuits. Well, if the Legislature deems it necessary to intervene in a particular case that will be frustrated if there is a 802.06(1)(b) stay in place for as long as the stay continues. On the other hand, if the language "and other proceedings" is removed there will not be an impediment to the Legislature's immediate intervention in an important case.

Judge Fitzpatrick also raised issues that were unclear in Act 369. While it is not clear, does this Act mean that every time a pleading challenges the constitutionality of a statute must you serve the Legislature with a pleading, like you are now required to serve the Attorney General? Or do we need to serve the Legislature everytime the construction of a statute is requested? This could mean that the Legislature will be served with an awful lot of pleadings.

Mr. Shriner said that counsel for a plaintiff will have to read the new law created by Act 369 broadly because it is not just limited to constitutional challenges. Act 369 clearly requires notice to the Legislature wherever the construction of a statute is challenged. This is way too broad. This could mean that whenever the meaning of a statute is unclear the Legislature has to be notified. What will be the effect of failing to comply?

Under the old law, if you challenged the constitutionality of a statute and you failed to serve the Attorney General, you had to start over. So, is the same true where the constitutionality of a statute is challenged and you fail to serve the Legislature? What about the situation where you fail to serve the Legislature under Act 369 because of an issue of what a statute means?

Gleisner asked Assistant Attorney General Harlow, a representative of the Attorney General on the Council, is it correct that if you challenge the constitutionality of a statute and fail to serve the Attorney General that may deprive a court of jurisdiction?

Mr. Harlow stated he believed that was correct. Judge Fitzpatrick stated that under Act 369, the AG and the Legislature not only have the right to be heard, they have the right to intervene at any time. This could wreak havoc on a trial court's calendar where the Legislature or the AG decide to intervene at the last minute.

Mr. Orton raised another concern. What about cases where a statute that has been on the books for many years is challenged? For example, he has a case where the construction of a statute is being challenged that has been on the books for 70 years. Moreover, the challenge is occurring half way through a lawsuit. Under Act 369, it would seem that notice has to be given to the Legislature in such a case. This new rule is going to be very problematic for practitioners, courts and the Legislature. Act 369 was not thought through very well.

Mr. Orton suggested that perhaps Act 369 should be referred to the ECP for review. Mr. Orton so moved and it was seconded. With Senator Wanggaard and Sara Walkenhorst Barber abstaining, the Council unanimously voted to refer Act 369 to the ECP for further study.

IV. Discussion of possible strategies to advance the Budget Proposal of the Judicial Council now before the Legislature.

The Senator said that few people realize just how important the Council is to all three branches of government. It is a great bargain. The decision was made to meet with Senator Wanggaard between this and the next meeting to discuss how best to advance the Budget of the Judicial Council.

Judge Gasiorkiewicz stated that he did not think we should pursue the budget further until we receive confirmation from the Supreme Court that they support the work of the Council. Diane Fremgen from the Director of State Courts stated that the Supreme Court supported the Council but would no longer pay to support the Council. Judge Needham then spoke and agreed with Ms. Fremgen. Judge Needham stated that the Chief Justice had stated at a recent Judicial Conference that she supported the work of the Council and the Supreme Court values the work of the Council. However, the Chief Justice stated the Supreme Court will not pay to support the Council.

V. Adjournment.

Meeting adjourned at approximately 11:00 a.m.