

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

DANE COUNTY

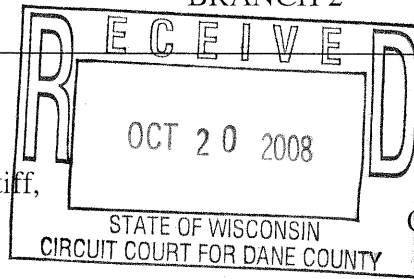
J. B. VAN HOLLEN,

Plaintiff,

v.

GOVERNMENT ACCOUNTABILITY BOARD, et al,

Defendants.



Case No. 08-CV-4085

REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, FOR A
PEREMPTORY WRIT OF MANDAMUS OR, ALTERNATIVELY, DECLARATORY
AND INJUNCTIVE RELIEF

Attorney General J.B. Van Hollen submits the following arguments and authorities in further support of his Motion for Summary Judgment, for a Peremptory Writ of Mandamus or, Alternatively, Declaratory and Injunctive Relief.

I. SUMMARY JUDGMENT IS NOT PRECLUDED BECAUSE OF THE STATUS OF THE PLEADINGS.

The Attorney General agrees that the portion of his Motion for Summary Judgment, for a Peremptory Writ of Mandamus or, Alternatively, Declaratory and Injunctive Relief (hereafter "A.G.'s Motion") which seeks a final judgment is not in an ideal posture at this point in the proceedings. Nonetheless, this case presents a unique situation that is not addressed in the cases cited by Defendants to suggest that summary judgment is premature. Accordingly, while there are certain matters that should not be addressed by the Court, the law does not preclude the Court from making purely legal determinations on issues that have been fully briefed. In particular, the motion for summary judgment can be addressed and decided to the extent that it asks for a

declaration that (a) under HAVA and state law, all voter registrations received since January 1, 2008, must be treated in a uniform and nondiscriminatory manner according to what is already being done for registrations received on or after August 6, 2008; and (b) to the extent the GAB's follow-up identifies registrants who are not eligible to vote, those individuals should be removed from the statewide voter registration list.

By way of explanation, the Attorney General filed this action on September 10, 2008. Among other things, the Complaint asked for immediate injunctive and mandamus relief. Two days later an Emergency Motion for Expedited Proceedings was filed which asked the Court to "immediately schedule a hearing to address all scheduling issues, including expedited deadlines for depositions and document discovery, a hearing on Plaintiff's motion for preliminary relief, and other matters." The Court subsequently scheduled a status conference for September 19, 2008.

Because the upcoming status conference would, presumably, involve discussion of scheduling, and because the Emergency Motion for Expedited Proceedings could be evaluated more fully by further explication of the preliminary relief being sought, the A.G.'s Motion was filed on September 17, 2008. The Attorney General had also asked for expedited discovery. Since the GAB Defendants were also served with Requests for Admission which, again, were expected to be the subject of scheduling discussions, it was hoped that the Court would expedite the proceedings such that pleadings could be completed, discovery could be conducted in a much shorter time frame than has actually occurred and summary judgment could be considered on a full record. *See Hefty v. Strickhouser*, 2008 WI 96, ¶ 42, ___ Wis. 2d ___, 752 N.W.2d 820, 831 (despite the

limitations on summary judgment proceedings provided in the rules, courts have discretion to enter orders deviating from those rules under appropriate circumstances).

In any event, many of the things the Attorney General hoped for did not occur and the A.G.'s Motion is before the Court without evidentiary support outside the record and before all defendants have answered. The Attorney General also acknowledges that the cases which Defendants rely on, primarily *Schmitt v. Osborne*, 80 Wis.2d 19, 257 N.W.2d 844 (1977), hold that summary judgment should not be entered until an answer has been filed. However, those cases can be distinguished because they do not address the present situation where at least one defendant has answered and there are discrete legal issues that are fully briefed and ready for decision.

It is established that summary judgment is proper when the court is presented with an issue of statutory construction. *Lang v. Kurtz*, 100 Wis.2d 40, 44, 301 N.W.2d 262 (Ct. App. 1980). In this case, the Court will be deciding a number of legal issues in the context of the motions to dismiss. At a minimum, the status of the pleadings do not prevent the Court from deciding these legal issues as between the Plaintiffs and the MTI Defendants, who have answered. As for the other defendants, the purposes behind a rule requiring a responsive pleading would not be served because there are issues of law that do not depend on a resolution of any factual disputes, and those issues will already be decided in the context of the motions to dismiss. Moreover, the only "factual" predicate for such declaratory relief is that there be an actual and existing controversy that is ripe for adjudication. Those predicates are clearly established in the Court record by the motions to dismiss and related filings. In these unique and unusual circumstances, the

Schmitt case and similar authorities can be distinguished and the Court may enter a final declaratory judgment on issues that are strictly legal.

II. AFFIDAVITS ARE NOT NECESSARY.

Defendants also take issue with the summary judgment portion of the A.G.'s Motion because it is not supported by affidavits. Again, the motion is not being heard under the anticipated conditions and any portions of the summary judgment motion that involve substantive factual issues are not properly before the Court. However, that does not render the Court powerless to take action.

In this case, no affidavits are needed because there are discrete issues that involve legal, not factual, questions. Defendants cite Wis. Stat. § 802.08(3) for the proposition that affidavits and evidentiary materials are required whether or not the case involves fact issues. This is not true. Section 802.08(2) states:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, *together with the affidavits, if any*, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(Emphasis added). Likewise, section 802.08(3) does not require affidavits, but merely specifies the basis for affidavits if they are submitted.

III. NON-SUMMARY JUDGMENT RELIEF HAS NOT BEEN OPPOSED.

In addition to summary judgment, the A.G.'s Motion also sought a preemptory writ of mandamus and a preliminary injunction. The GAB Defendants, the only ones to whom this relief may be directed, have not opposed these portions of the A.G.'s Motion.

Unlike summary judgment relief, there is no requirement that a motion for preemptory writ of mandamus and/or preliminary injunction be submitted after pleadings

are complete. In fact, the very nature of this relief is to enter an order early in the proceedings to protect important interests.

In the present case, the GAB Defendants have not disputed the Court's ability to enter a preemptory writ or injunction ordering GAB to withdraw any directive it has issued that limits "HAVA checks" to registrations received on or after the August 6, 2008. It may also declare what is needed to bring Wisconsin into compliance with HAVA and then direct the GAB Defendants to take all reasonable measures to achieve HAVA compliance pursuant to GAB's responsibilities under Wis. Stat. §§ 5.05(1), 6.36(1). If, subsequently, further proceedings were needed to determine what is or is not reasonable, the Court could conduct those proceedings and receive evidence.

The MTI Defendants suggest that "mandamus does not lie where an administrative remedy is provided by law." However, one of the two cases cited, *Mount Horeb Community Alert v. Village Bd. of Mt. Horeb*, 2003 WI 100, 263 Wis. 2d 544, 665 N.W.2d 229, doesn't even address, much less support this claim. The other case, *Madison Airport Co. v. Wrabet*, 231 Wis. 147, 285 N.W. 504 (1939), is off-point because it does not address a situation where the Legislature has expressly empowered the Attorney General under Wis. Stats. § 5.07 to seek mandamus relief or where any recourse to an administrative remedy would be useless and futile.

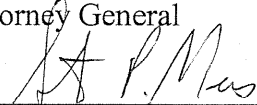
CONCLUSION

On October 23, 2008, this Court will decide the key legal issues that will determine whether or not the November 4, 2008, federal election, and subsequent federal elections, will be conducted according to the statutory mandates of the Wisconsin Legislature and Congress, or according to the legally-baseless preferences of GAB. If the

Court concludes, as it should, that GAB must treat all post-HAVA voter registrations in a uniform and nondiscriminatory manner, the A.G.'s Motion allows the Court to enforce the law without further delay until such time as it may be irrelevant to the next election.

Dated this 20th day of October, 2008.

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