

J.B. VAN HOLLEN,

Plaintiff,

THE REPUBLICAN PARTY OF WISCONSIN,

Plaintiff-Intervenor,

vs.

CASE NO. 08-CV-4085

GOVERNMENT ACCOUNTABILITY
BOARD, THOMAS CANE, GERALD NICHOL,
MICHAEL BRENNAN, WILLIAM EICH,
VICTOR MANIAN, GORDON MYSE,
KEVIN KENNEDY, and NATHANIEL E. ROBINSON,

Defendants,

THE DEMOCRATIC PARTY OF WISCONSIN,
MADISON TEACHERS, INC., AMERICAN
FEDERATION OF TEACHERS-WISCONSIN,
MADISON FIREFIGHTERS LOCAL 311,
THE MILWAUKEE BRANCH OF THE NAACP, and
MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,

Defendant-Intervenors.

**GOVERNMENT ACCOUNTABILITY BOARD'S BRIEF IN OPPOSITION TO
ATTORNEY GENERAL'S AND REPUBLICAN PARTY OF WISCONSIN'S
MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION.

Plaintiffs' lawsuit, while "full of sound and fury, signif[ies] nothing." *MACBETH*, *Act V, Scene 5*. The Government Accountability Board, its Board members and its staff ("the Government Accountability Board" or "the Board") take their role in ensuring fair

elections very seriously. Neither J.B. Van Hollen (“the Attorney General”) nor the Republican Party of Wisconsin have offered a shred of evidence to support their claims that the Board has failed in its responsibility to take all steps necessary to comply with both State and Federal elections laws including the Federal Help America Vote Act of 2002.

This brief will explain why Plaintiffs’ Motions for Summary Judgment are defective, both procedurally and substantively, and therefore must be denied.

II. RELEVANT PROCEDURAL HISTORY.

The procedural history of this case relevant to the pending Motions for Summary Judgment is short, but complex. The Attorney General filed this lawsuit on September 10, 2008. The Government Accountability Board accepted service of the Summons and Complaint on September 11, 2008. On September 17, 2008, the Attorney General filed and served a Motion for Summary Judgment with supporting brief but no supporting affidavits. The Attorney General also served Requests for Admissions upon the Government Accountability Board that same day.¹

On October 2, 2008, the Court granted the Republican Party of Wisconsin (and several others) intervenor status. On October 6, the Republican Party of Wisconsin chose to be a Plaintiff-Intervenor and adopted the Attorney General’s Complaint as its own (with changes only to the standing allegations).² The same day, the Republican

¹ Contrary to common practice, he also filed these discovery requests with the Court.

² While the Answer or responsive motion to the Republican Party of Wisconsin’s Complaint is not due until 45 days after service, in the spirit of these expedited proceedings, the Government Accountability Board’s Motion to Dismiss that Complaint accompanies this Brief.

Party of Wisconsin “joined” the Attorney General’s Motion for Summary Judgment and filed its own Brief in support of that Motion.

At the October 2, 2008 hearing, the Court set a deadline of October 6 by which the Government Accountability Board and the Defendant-Intervenors were to file an Answer or Motion to Dismiss in response to the Attorney General’s Complaint, and set an expedited briefing schedule for any such motions. The Government Accountability Board filed a Motion to Dismiss as did the Defendant-Intervenors. Those motions are currently being briefed, and the Court will address them at the hearing scheduled for October 23, 2008.

There was no request at the October 2nd hearing for an expedited briefing schedule on the Attorney General’s Motion for Summary Judgment. The Court’s order did not address a briefing schedule on the Republican Party of Wisconsin’s Motion for Summary Judgment, which had not yet been filed. Therefore, pursuant to Dane County Court Local Rule 307, the Government Accountability Board’s Response to the Attorney General’s Motion for Summary Judgment is due today, October 17. This Response also addresses the Republican Party of Wisconsin’s Motion for Summary Judgment.

III. BOTH SUMMARY JUDGMENT SUBMISSIONS ARE PROCEDURALLY FLAWED.

Summary judgment in Wisconsin is governed by Wis. Stat. §802.08. When a motion for summary judgment is made, a court shall grant it “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.” *Wis. Stat. §802.08(2)*. The first analytical step is “to discern whether the pleadings set forth a claim for relief as well as a material issue of fact.” *Swatek v. County of Dane*, 192 Wis. 2d 47, 61-62, 531 N.W.2d 45 (1995).

Both motions fail at this first step: the issues have not been joined. The Board has not yet filed an Answer to either Complaint, and will not be required to do so unless and until its pending Motion to Dismiss is denied. *Wis. Stat. §802.06(1)*. Therefore, the Court cannot begin with the necessary examination of the pleadings to determine whether there are any material issues of fact.³ “Hearing a motion for summary judgment before the pleadings are complete is not authorized by the statute [Wis. Stat. §802.08].” *City of La Crosse v. Jiracek Companies, Inc.*, 108 Wis. 2d 684, 690 (329 N.W.2d 441 (Ct. App. 1982), *petition for review denied*).

The Attorney General’s and Republican Party of Wisconsin’s motions are premature and must be denied, just as the motion for summary judgment in *Schmitt v. Osborne*, 80 Wis. 2d 19, 257 N.W.2d 844 (1977):

[T]he trial court dismissed the plaintiff’s motion for summary judgment. The motion was not denied on its merits but simply dismissed and we believe properly so. Because of the pendency of the demurrer the defendants were not required to answer and have not done so. The contested issues as they appear after an answer has been filed are an important and necessary concern in ruling on a motion for summary judgment. . . . We believe that in this case the motion for summary judgment was premature.

³ The Republican Party of Wisconsin claims that the facts of the case are “virtually undisputed,” and goes on to recite a handful of allegations. *Republican Party of Wisconsin SJ Brief at 6*. The Attorney General makes similar claims and allegations. *Attorney General SJ Brief at 1, 2, 5, 6*. The Court should disregard those claims: there is no basis for those statements, and no evidence offered to support those allegations. Without an answer, the Plaintiffs can only speculate about what facts are undisputed.

Id. at 25.

Summary judgment is not to be used as a “short cut to avoid a trial and to obtain quick relief at the expense of a searching determination for the truth.” *Grognet v. Fox Valley Trucking Service*, 45 Wis. 2d 235, 240, 172 N.W.2d 812 (1969). In particular, when a court is faced with an application to enjoin activities relating to voter registration only weeks before an election, careful fact finding and analysis of those facts is necessary. *Purcell v. Gonzalez*, 549 U.S. 1, 7-8 (2006).

The Government Accountability Board and the voters of Wisconsin are entitled to that fact finding and deliberative analysis. The bald allegations made by the Attorney General in his Summary Judgment Brief⁴ are serious, and without any evidentiary basis. For instance, he claims that “the tally [of votes] will be tainted by illegal, ineligible and fraudulent voters.” *Attorney General’s SJ Brief* at 6. Where is the evidence that the voter rolls include “illegal, ineligible and fraudulent voters”? Where is the evidence that the efforts demanded by the Attorney General would remove this alleged taint? It is fair to assume that the Attorney General has failed to provide this evidence because there is none. The Republican Party of Wisconsin makes similar allegations, without any evidence to support them: “the deciding votes may well be

⁴ Formally titled *Plaintiff’s Brief in Support of Motion for Summary Judgment for a Peremptory Writ of Mandamus or, Alternatively, Declaratory and Injunctive Relief*, referred to herein as “*Attorney General’s SJ Brief*.”

votes cast by ineligible voters registered illegally that could have been prevented.”

*Republican Party of Wisconsin’s SJ Brief at 4.*⁵

Clearly, both the Attorney General and the Republican Party of Wisconsin are operating under the journalistic law of the wild west, “when the legend becomes fact, print the legend.”⁶ But the rules governing legal proceedings are to ensure cases are decided on facts, not legends. This is not the wild west. The Court should enforce the rules to protect the interests of the voters of Wisconsin and the Government Accountability Board, and to ensure that the legal process and voting process are not hijacked by political gamesmanship.

IV. THE ATTORNEY GENERAL’S AND THE REPUBLICAN PARTY OF WISCONSIN’S SUBMISSIONS ARE SUBSTANTIVELY AND FATALY DEFECTIVE.

Even if the Government Accountability Board had filed Answers to the Complaints, the issues were joined, and the Court was able to determine both that a claim had been stated and there was a material issue of fact, these motions for summary judgment must fail on the second analytical step: an examination of “the moving party’s . . . affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment under sec. 802.08(2).” *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Neither the Attorney General nor the Republican Party of

⁵ Formally titled *Memorandum in Support of Motion Joining in Plaintiff, J.B. Van Hollen, as Attorney General, Motion for Summary Judgment for a Peremptory Writ of Mandamus, or Alternatively Declaratory Judgment and Injunctive Relief and Seeking Additional Relief*, referred to herein as “*Republican Party of Wisconsin’s SJ Brief*.”

⁶ From the 1962 movie, *The Man Who Shot Liberty Valance*.

Wisconsin has submitted any proof in any form—an affidavit, a deposition, or any other discovery response—from which the Court could find they have presented a *prima facie* case.

Pleadings cannot provide the evidentiary facts needed to support a motion for summary judgment. *In re Construction of Concrete Sidewalks in the Fourth Addition to Cherokee Park Plat v. City of Madison*, 113 Wis. 2d 112, 119, 334 N.W.2d 581 (Ct. App. 1983). Nor can a moving party simply move for summary judgment and assert that the other party lacks evidence to support its position. Instead, “the burden is on the moving party to demonstrate a basis *in the record* that this is so.” *Leske v. Leske*, 197 Wis. 2d 92, 97-98, 539 N.W.2d 719 (Ct. App. 1995) (emphasis in original). Thus, “the party moving for summary judgment must

explain the basis for its motion and identify those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” that it believes demonstrate the absence of a genuine issue of material fact . . .”

Leske, 197 Wis. 2d at 97, quoting *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 292, 507 N.W.2d 136 (Ct. App. 1993), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); see also *Cameron v. Milwaukee*, 102 Wis. 2d 448, 459, 307 N.W.2d 164 (1981) (“It is the moving party who must supply the court with affidavits and supporting papers which establish that summary disposition is in order.”)

“The summary judgment statute requires the moving party to present evidentiary facts—‘something besides the allegations in the pleading.’” *In re Cherokee Park Plat*, 113 Wis. 2d at 119. The moving party must establish the factual record demonstrating that there is no triable issue of material fact. *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981). Or, as the

United States Court of Appeals for the Seventh Circuit said about summary judgment motions:

Roughly speaking, this is the “put up or shut up” moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.

Schacht v. Wis. Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999).

The summary judgment submissions by the Attorney General and the Republican Party of Wisconsin fail because they are devoid of any evidence. Neither of them have “put up” anything in support of their motions. The Attorney General apparently assumes that the Government Accountability Board will concede all of his First Requests for Admissions, which were served along with his Summary Judgment Motion and Brief. He apparently intends to rely on those predicted admissions to provide a factual basis for his Motion. That is simply not authorized by the statutes.

The Attorney General and Republican Party of Wisconsin may attempt to present some evidence to support their Motions with their reply briefs. But, that would be too late. To allow them to wait until their reply to present their evidence would turn the summary judgment process on its head. It would be akin to allowing a litigant to file a summary judgment motion with no evidence, alleging that the other side cannot win, and then forcing the nonmoving party to present its evidence in order to proceed to trial. *See Leske, supra*.

Only if the moving party has put forth evidence demonstrating a *prima facie* case must the nonmoving party put forth its evidence to demonstrate that it is entitled to a trial. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, 241 Wis. 2d 804, 815, 623 N.W.2d

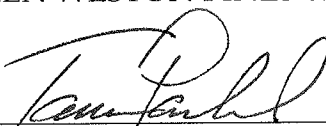
751, *see also Grams*, 97 Wis. 2d at 338. Because neither moving party has put forth any evidence whatsoever, there is nothing for the responding party to rebut. The motions for summary judgment must be denied.

V. CONCLUSION.

The Court should deny the Attorney General's and the Republican Party of Wisconsin's Motions for Summary Judgment.

Dated this 17th day of October, 2008.

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By:  _____

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