STATE OF WISCONSIN
SUPREME COURT

APPEAL NO. 2011AP765-W

STATE OF WISCONSIN and
STATE OF WISCONSIN EX REL. MICHAEL D. HUEBSCH,
Secretary of the Wisconsin Department of Administration,

PETITIONERS,

V.

CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE MARYANN SUMI, Presiding,
ISMAEL R. OZANNE
District Attorney for Dane County,
JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS,
SCOTT SUDER,
MARK MILLER,
PETER BARCA,
DOUGLAS LAFOLLETTE,
JOINT COMMITTEE ON CONFERENCE,
WISCONSIN STATE SENATE and
WISCONSIN STATE ASSEMBLY,

RESPONDENTS.

APPEAL NO. 2011AP613-LV
TRIAL COURT CASE NO. 2011CV1244

STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE,

PLAINTIFF–RESPONDENT,

V.

JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS,
SCOTT SUDER,

DEFENDANTS,

AND

DOUGLAS LAFOLLETTE,

DEFENDANT–PETITIONER–MOVANT

DISTRICT ATTORNEY'S COMBINED MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR RECUSAL BY JUSTICE MICHAEL GABLEMAN AND MOTION FOR RELIEF FROM JUDGMENT

INTRODUCTION

Respondent, Ismael R. Ozanne, District Attorney for Dane County, Wisconsin, and Plaintiff-Respondent, State of Wisconsin ex rel. Ismael R. Ozanne ("District Attorney"), respectfully submits this Memorandum of Law in support of his Motion for Recusal by Justice Michael Gableman and his Motion for Relief from Judgment. The District Attorney seeks relief in five parts:

1. An Order by Justice Gableman recusing himself from participation in this Matter; or,
2. In the alternative, an Order from this Court disqualifying Justice Gableman from participation in this Matter;
3. An Order vacating this Court's June 14, 2011 Order, reported at 2011 WI 43, 334 Wis.2d 70, 798 N.W.2d 436; or,
4. In the alternative, oral argument on whether the District Attorney has sufficiently stated a claim for relief pursuant to Wis. Stat. 806.07(1)(h), and whether a further evidentiary hearing is required; and,
5. An Order directing the Dane County Circuit Court, Judge Maryann Sumi presiding ("Circuit Court"), to reinstate its prior orders *nunc pro tunc* to June 5, 2011.

STATEMENT OF FACTS

This Matter came before the Court through Petitioners, State of Wisconsin and Michael D. Huebsch, Secretary of the Wisconsin Department of Administration's ("Secretary Huebsch") Petition for a Supervisory Writ in the matter of *State of Wisconsin, et al., v. Circuit Court for Dane County, et al.*, 2011AP765-W, asking this Court to direct the

Circuit Court to vacate certain orders of the Circuit Court. Simultaneously, this Court considered and denied a Certification from the Court of Appeals of a petition for leave to appeal in the separate matter of *State of Wisconsin ex rel. Ozanne v. Fitzgerald, et al.*, 2011AP613-LV. Ultimately, this Court recast Secretary Huebsch's Petition as a Petition for Original Jurisdiction; and, on June 14, 2011, issued an Order vacating and declaring void *ab initio* all orders and judgments of the Circuit Court entered in Dane County Case No. 2011CV1244. Justice Michael Gableman voted to issue the majority's *per curiam* opinion.

At the time of the June 14, 2011 Order, the District Attorney knew that Justice Gableman had been represented in an ethics matter by Michael Best & Friedrich, LLP ("MBF"), and by Attorney Eric McLeod ("McLeod"). *See* December 30, 2011, Affidavit of Ismael R. Ozanne ("Ozanne Aff."), ¶ 2. The District Attorney also knew at that time that MBF and McLeod represented Secretary Huebsch in concert with the Wisconsin Department of Justice in the instant Matter. *See* Ozanne Aff., ¶ 3. Indeed, McLeod (and a member of the State Department of Justice) signed Secretary Huebsch's Petition for Supervisory Writ and Secretary Huebsch's Reply Brief in support of his petition. *See* Secretary Huebsch's

April 7, 2011 Petition for Supervisory Writ Pursuant to Wis. Stat. § 809.71 and for Immediate Temporary Relief Pursuant to Wis. Stat. § 809.52, p. 32; *see also* Secretary Huebsch's May 27, 2011 Reply Brief in Support of Petition for Supervisory Writ, p. 44. McLeod alone signed the mandatory certification attached to each document indicating compliance with this Court's rules. *See* Secretary Huebsch's April 7, 2011 Petition for Supervisory Writ Pursuant to Wis. Stat. § 809.71 and for Immediate Temporary Relief Pursuant to Wis. Stat. § 809.52, p. 33; *see also* Secretary Huebsch's May 27, 2011 Reply Brief in Support of Petition for Supervisory Writ, p. 45. Finally, McLeod attended oral argument in this Matter. *See* Ozanne Aff., ¶ 4.

What was unknown to the District Attorney until a December 15, 2011 article appeared in the *Milwaukee Journal Sentinel* ("*MJS*"), was that MBF and McLeod, who directly represented Justice Gableman in his ethics matter, had a fee arrangement that can only be called unusual. *See* Ozanne Aff., ¶ 5, Exh. 1. Specifically, Justice Gableman did not have to pay MBF or McLeod for any legal fees (as opposed to disbursements for actual items of costs) in connection with the representation. Instead, as indicated in the *MJS* article and in a letter sent out by MBF, Justice Gableman was only

obligated to pay for his representation if the Wisconsin Claims Board reimbursed him. See Ozanne Aff., ¶¶ 5, 6, Exhs. 1, 2.[1]

The applicable statute governing Justice Gableman's ability to recover legal fees is Wis. Stat. § 757.99, which states:

> **Attorney fees.** A judge or circuit or supplemental court commissioner against whom a petition alleging permanent disability is filed by the commission shall be reimbursed for reasonable attorney fees if the judge or circuit or supplemental court commissioner is found not to have a permanent disability. A judge or circuit or supplemental court commissioner against whom a formal complaint alleging misconduct is filed by the commission and who is found not to have engaged in misconduct may be reimbursed for reasonable attorney fees. Any judge or circuit or supplemental court commissioner seeking recovery of attorney fees authorized or required under this section shall file a claim with the claims board under s. 16.53.

[1] Not counting the instant matter, it appears that Justice Gableman has participated in the decision of approximately 10 matters since July 2008 in which MBF represented a party or an *amicus* without apparently disclosing the nature of his fee arrangement: *Godoy ex rel. Gramling v. E.I. du Pont de Nemours and Co.*, 2009 WI 78, 319 Wis.2d 91, 768 N.W.2d 674; *Zellner v. Herrick*, 2009 WI 80, 319 Wis.2d 532, 770 N.W.2d 305; *Estate of Sheppard ex rel. McMorrow v. Schleis*, 2010 WI 32, 324 Wis.2d 41, 782 N.W.2d 85; *Milwaukee Symphony Orchestra, Inc. v. Wisconsin Department of Revenue*, 2010 WI 33, 324 Wis.2d 68, 781 N.W.2d 674; *Ehlinger v. Hauser*, 2010 WI 54, 325 Wis.2d 287, 785 N.W.2d 328; *Maryland Arms Limited. Partnership v. Connell*, 2010 WI 64, 326 Wis.2d 300, 786 N.W.2d 15; *Metropolitan Milwaukee Association of Commerce, Inc. v. City of Milwaukee*, 2010 WI 122, 329 Wis.2d 537, 789 N.W.2d 734 (*per curiam* order vacating certification and remanding to Court of Appeals); *Nestle USA, Inc. v. Wisconsin Department of Revenue*, 2011 WI 4, 331 Wis.2d 256, 795 N.W.2d 46; *Andersen v. Department of Natural Resources*, 2011 WI 19, 332 Wis.2d 41, 796 N.W.2d 1; *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20; 332 Wis.2d 85, 796 N.W.2d 717. If Justice Gableman indeed repeatedly failed to disclose this fee arrangement, this failure should not be considered excusable neglect.

Even taking into account the extremely unusual terms of Justice Gableman's fee agreement with MBF, it is unclear that MBF (or Justice Gableman) could have recovered fees from the Claims Board because there were no fees to reimburse. Black's Law Dictionary defines "reimburse" to mean "To pay back, to make restoration, to repay that expended; to indemnify, or make whole." BLACK'S LAW DICTIONARY 1287 (6th ed. 1990). Since Justice Gableman had never incurred any fees, there was nothing to pay back, to restore, to repay, or to indemnify. His agreement with MBF ensured that he would remain whole: he would owe $0 for legal fees if he won and $0 for legal fees if he did not win. MBF and McLeod knew that they had provided free representation to Justice Gableman. Justice Gableman knew it too.

ARGUMENT

I. JUSTICE GABLEMAN MUST RECUSE HIMSELF.

The Code of Judicial Conduct states:

> Except as provided in [SCR 60:04(6)] for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and

> circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:
>
> > The judge has a personal bias or prejudice concerning a party or a party's lawyer.

SCR 60:04(4), 60:04(4)(a).

Wis. Stat. § 757.19(2)(g) also requires a judge to recuse himself "When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This is a subjective determination. *See State v. American TV & Appliance of Madison, Inc.*, 151 Wis.2d 175, 182, 185-86, 443 N.W.2d 662 (1989).

When a Supreme Court Justice, against whom this type of disqualification motion is made, is capable of deciding the motion, this Court has limited its review "to whether that individual justice made the determination that the motion required." *See State v. Allen*, 2010 WI 10, ¶ 208, 322 Wis.2d 372, 778 N.W.2d 863 (Roggensack, J.). In reviewing the individual justice's determination, the Court objectively decides if the justice in question went through the required exercise of making a subjective determination. *See id.*; *see also Donohoo v. Action Wisconsin, Inc.*, 2008 WI 110, ¶¶ 24-25, 314 Wis.2d 510, 754 N.W.2d 480; *Jackson v. Benson*, 2002 WI 14, ¶ 2, 249 Wis.2d 681, 639 N.W.2d 545; *City of*

Edgerton v. Gen. Cas. Co. of Wis., 190 Wis.2d 510, 521-22, 527 N.W.2d 305 (1995); *American TV*, 151 Wis.2d at 183.

In the instant Matter, Justice Gableman has not disclosed the existence of any subjective determination made by him whether he either can be impartial or whether it appears he can be impartial in a case involving a firm that provided him a gift of free legal services. At a minimum, Justice Gableman must set forth his reasoning regarding how a jurist can be impartial and appear impartial when he hears a case in which one party is represented by a lawyer and law firm that provided that jurist free legal services. This Court must then review that determination to verify it was done.

Over 30 years ago, this Court considered whether a judge had violated Rule 8 of the then-existing Code of Judicial Ethics (among other violations of the Code of Judicial Ethics) by accepting a "favorable automobile rental arrangement" both before and after he presided over the gift-giver's case. *See In the Matter of Serphahim*, 97 Wis.2d 485, 294 N.W.2d 485 (1980). Rule 8 stated:

> A judge shall not accept gifts from lawyers, groups, or persons whose interests are, are likely to be, or have been before him in his official capacity.

The Court wrote:

> [Rule 8's] violation does not require proof that the gift was accepted with "strings attached." Rule 8 goes beyond prohibiting a judge from accepting a "bribe." It prohibits judges from accepting gifts under circumstances which may give the appearance of impropriety.

Id. at 511-10.

Although the Code of Judicial Conduct has replaced the Code of Judicial Ethics, it is unfathomable to believe that the intent of any changes was to allow judges and justices to accept free legal services from law firms that frequently appear in front of them.

Wis. Stat. § 19.45(3), which applies to state public officials, explicitly states:

> No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official....

This statute should have placed both MBF and Justice Gableman on notice that an agreement by which Justice Gableman would never pay legal fees, nor owe legal fees for which he could seek reimbursement, would draw scrutiny.

Abraham Lincoln wrote that "a lawyer's time and advice are his stock in trade." Justice Gableman paid for none of that time or any of that advice, nor does it appear he or MBF intended he do so. Reasonable, well-informed people would reasonably question Justice Gableman's ability to be impartial under the facts presented here.

Justice Prosser wrote in his concurring opinion in this Matter:

> This case is an offshoot of the turbulent political times that presently consume Wisconsin. In turbulent times, courts are expected to act with fairness and objectivity. They should serve as the impartial arbiters of legitimate legal issues.

2011 WI 43, ¶ 18.

Respectfully, any litigant in any case deserves to have his case heard by a judge who has not secretly received a valuable gift from the other side's lawyer. For those reasons, the District Attorney respectfully moves for Justice Gableman's recusal. Should Justice Gableman not recuse himself, the District Attorney respectfully requests that this Court revisit the issue of its authority to require recusal of a fellow Justice in light of the facts of this case and this Court's most recent consideration of the issue in *State v. Henley*, 2011 WI 67, ¶ 39, ___ Wis.2d ___, 802 N.W.2d 175, and to determine whether the facts in this Matter require the Court to compel Justice Gableman to recuse himself.

II. THIS COURT SHOULD VACATE ITS JUNE 14, 2011 ORDER.

"Where a justice who participated in a case was disqualified by law, the court's judgment in that case is void." *American TV*, 151 Wis.2d at 179 citing *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, *reh'g granted* 74 N.W. 220 (1898). Although recusal pursuant to Wis. Stat. § 757.19(2)(g) requires a subjective determination, once a judge concludes "for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner," recusal is mandatory. Therefore, if Justice Gableman concludes he should recuse himself or should have recused himself, the June 14, 2011 Order is void. If this Court concludes Justice Gableman should have recused himself or revealed his fee arrangement with MBF and his determination under Wis. Stat. § 757.19(2)(g) before oral argument, the June 14, 2011 Order is void.

Regardless of any decision by Justice Gableman, Wis. Stat. § 806.07(1)(h) grants courts "broad discretionary authority and invokes the pure equity power of the court" to vacate judgments if appropriate. *See Mullen v. Coolong*, 153 Wis.2d 401, 407, 451 N.W.2d 412 (1990). A court should consider the allegations in a motion to vacate brought under Wis.

Stat. § 806.07(1)(h) "with the assumption that all the assertions contained therein are true." *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶ 10, 282 Wis.2d 46, 698 N.W.2d 610. If a court determines that the facts alleged, if true, are so extraordinary or unique that relief may be warranted, a court should then conduct a hearing to determine the veracity of the allegations. *See id.* "[E]xtraordinary circumstances are those where 'the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts.'" *Id.* at ¶ 12 (quoting *Mogged v. Mogged*, 2000 WI App 39, ¶ 13, 233 Wis.2d 90, 607 N.W.2d 662) (further internal quotations and citations omitted). Upon conclusion of that hearing, a court must exercise its discretion whether to grant relief in light of the facts and "any other factors bearing upon the equities of the case." *See id.* The court's goal is to balance the competing values of fairness and finality. *See id.* at ¶ 12.

As part of its decision, a court should consider five factors:

1. Whether a judgment was the result of the conscientious, deliberate, well-informed choice of a claimant;

2. Whether a claimant received the effective assistance of counsel;

3. Whether relief is sought from a judgment to which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments;

4. Whether there is a meritorious defense to a claim; and,

5. Whether there are intervening circumstances making it inequitable to grant relief.

See id. at ¶ 11; see also *State ex rel. M.L.B. v. D.G.H.*, 122 Wis.2d 536, 552-53, 363 N.W.2d 419 (1985)

The District Attorney did not make and could not have made a conscientious, deliberate, well-informed choice to proceed to judgment in this Matter because the District Attorney was unaware of the ethical issues created by the nature of MBF's representation of Justice Gableman. Until recent stories were published in the *MJS*, the facts of that representation were unknown to the District Attorney, nor could they have been reasonably known to the District Attorney. Had the District Attorney known of these facts, he could and would have raised them prior to oral argument in this Matter. *See* Ozanne Aff., ¶ 8.

The third factor requires this Court to determine whether the case was decided on the merits. Although this Court did allow for briefing on certain issues and for extended oral argument, this Court elected to proceed with a more urgent and rapid procedure than was the norm. *See* 2011 WI 43, ¶ 19 (Prosser, J., concurring). The District Attorney does not contend that the Court failed to fully consider the issues presented to it in the time

allowed. Rather, the District Attorney contends there are now additional and material facts regarding the appropriateness of Justice Gableman's participation in the oral argument and decision of this Matter. As indicated in the District Attorney's June 3, 2011 Letter Memorandum, at the time this Court heard oral argument and issued its June 14, 2011 Order, many potentially disputed facts existed. *See* June 3, 2011 Letter Memorandum filed by Ismael R. Ozanne, pp. 4-5 (also attached as Exhibit 4 to Ozanne Aff., ¶ 9). Thus, the merits of the underlying Open Meetings Law claims were not decided by this Court.

This Court's decision to convert this matter to an original action also changed the scope of its review of the Circuit Court from determining whether the Circuit Court had engaged in a clearly erroneous exercise of its discretion, *see Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶ 35-37, 309 Wis. 2d 365, 749 N.W.2d 211 (citations omitted), that would have caused this Court to look for reasons to uphold the Circuit Court's decision. *See Loomans v. Milwaukee Mutual. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). If this Court had reviewed this Matter through an exercise of its appellate jurisdiction, it would have "search[ed] the record to

determine if it supports the [circuit] court's discretionary determinations." *Randall v. Randall*, 2000 WI App 98, ¶ 7, 235 Wis. 2d 1, 612 N .W.2d 737.

This leads to the fourth prong of the analysis. Wisconsin courts have succinctly stated that:

> The crux of the inquiry is whether, given another chance, the party seeking to vacate the judgment could reasonably expect a different result.

Allstate Ins. Co. v. Brunswick Corp., 2007 WI App 221, ¶ 14, 305 Wis.2d 400, 740 N.W.2d 888.

This test applies both when evaluating the merits of a claim or the merits of a defense to a claim for purposes of Wis. Stat. 806.07(1)(h). *See id.*

It would be speculative to guess what decision a six person Court might have produced or might produce in this Matter. At the same time, anything less than a restoration to the *status quo ante* of June 6, 2011 ratifies the failure of Justice Gableman to disclose his fee arrangement with MBF and his decision to participate in this Matter. The legal issues here loom large: specifically, the vitality of Wisconsin's Open Meetings Law, its application to the Legislature, and the power of the courts to enforce the Open Meetings Law. Also at issue is this Court's own recusal process for

its Justices. Therefore, this Court should vacate the June 14, 2011 Order and place all parties in the position there were in prior to June 6, 2011. Alternatively, this Court should establish a process that would allow any facts material to the application of Wis. Stat. § 806.07(1)(h) to be litigated and submitted to this Court for decision.

Finally, intervening circumstances do not make the requested relief inequitable. This case impacts the meaning of the Wisconsin Constitution, specifically Article IV, § 10, and the power of the Courts to enforce that provision both under their constitutional authority and that granted by Wisconsin's Open Meetings Law. This includes the potential power to void actions taken in violation of the Open Meetings Law pursuant to Wis. Stat. § 19.97(3). There is no reason why any circumstances arising since June 14, 2011 render it inequitable to reconsider this Matter and issue a decision free from the impact of an ethical lapse.

CONCLUSION

To honor Justice Gableman's obligations, and to preserve this Court's stature and integrity, this Court should grant the relief requested.

Dated this day of December 30, 2011.

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