The Wisconsin Supreme Court issued a decision in *Wisconsin Department of Natural Resources v. Wisconsin District IV Court of Appeals* [i] on April 3, 2018 that confirms a more balanced legal process in Wisconsin when businesses challenge the overreach of state regulatory agencies. The case presents an issue of first impression regarding appellate court venue in Wisconsin under Wis. Stat. § 752.21(2), created by 2011 Wisconsin Act 61 and signed into law by Gov. Scott Walker.

At issue, the Wisconsin Department of Natural Resources ("DNR") asserted that an underlying appeal in *Clean Wisconsin, Inc. v. DNR (Kinnard WPDES Permits)*, 2016AP1688 [ii] ("*Clean Wisconsin-Kinnard*") was pending before the wrong Wisconsin District Court of Appeals and sought the Wisconsin Supreme Court to exercise its constitutional supervisory authority [iii] to shepherd the case to the correct appeals court venue. The court granted DNR's petition and removed *Clean Wisconsin-Kinnard* to District II Court of Appeals in Waukesha, the appellate court DNR requested, and away from the District IV Court of Appeals in Madison. The opinion said the District IV venue was explicitly prohibited under the venue statute because the plaintiffs Clean Wisconsin, Inc. had designated the initial venue and thus DNR was required to select a different venue for appeal

DNR's Authority Challenged

The underlying litigation in *Clean Wisconsin-Kinnard* involved the reissuance of a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit under DNR regulatory authority to a dairy farm, Kinnard Farms, Inc., ("Kinnard") located in Kewaunee County. The WPDES was initially re-issued to Kinnard, following a contested case administrative hearing before an administrative law judge, with two new permit conditions imposed by DNR. Kinnard challenged the imposition of those permit conditions for lack of DNR explicit authority. DNR initially rejected the challenge but subsequently agreed to remove the conditions and reissued the WPDES permit to Kinnard.

Clean Wisconsin, Inc., a state-wide environmental advocacy group, and Kinnard's neighbors the Cocharts, challenged DNR's decision to reissue the WPDES permit without conditions. Clean Wisconsin, Inc. filed a petition for judicial review in Dane County Circuit Court, and the Cocharts filed their petition in Kewaunee County Circuit Court—the home counties of Clean Wisconsin and the Cocharts, respectively. Because the Clean Wisconsin petition was filed first, the venue of both petitions was moved to Dane County Circuit Court, where the two cases were consolidated into one case. The court subsequently ruled in favor of Clean Wisconsin and the Cochart's challenge to DNR's reissuance of the WPDES to Kinnard without conditions.

DNR then appealed the Dane County Circuit Court's *Clean Wisconsin* decision, requesting venue in the Wisconsin District II Court of appeals under Wis. Stat. § 752.21(2), which reads as follows:

> (2) A judgment or order appealed from an action venued in a county designated by the plaintiff to the action as provided under § 801.50(3)(a) **shall be heard in a court of**

> **appeals district selected by the appellant but the court of appeals district may not be the court of appeals district that contains the court from which the judgment or order is appealed.** [emphasis added]

However, contrary to the highlighted language in the statute, the Wisconsin District IV Court of Appeals, whose district includes Dane County Circuit Court, took jurisdiction over the *Clean Wisconsin-Kinnard* case. DNR appealed the District IV decision to claim venue over the *Clean Wisconsin-Kinnard* appeal, arguing the venue violated Wis. Stat. § 752.21(2). The Supreme Court agreed with DNR that the case was improperly venued under the explicit statutory section and ordered the case to be moved to the District II Court of Appeals, as initially requested by DNR.

Supreme Court Decision Upheld 2011 Act 61 Court Venue Reforms

The court's majority opinion, authored by Justice Daniel Kelly, turns on recent venue reforms the Wisconsin legislature enacted specifically to balance the rights of litigants in administrative review appeals like the underlying challenge to Kinnard's WPDES permit in *Clean Wisconsin-Kinnard*. The Wisconsin Legislature adopted, and Gov. Walker signed into law 2011 Act 61 ("Act 61") which created Wis. Stat. § 752.21(2) noted above, aimed directly at establishing balance in administrative agency review appeals. Act 61 also amended another important venue provision governing Wisconsin Courts—Wis. Stat. § 801.50(3)(a) —to read:

> Except as provided in this subsection pars. (b) and (c), all actions in which the sole defendant is the state . . . shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law.

The Supreme Court held that because the initial petitioner in the underlying case, Clean Wisconsin, Inc., designated Dane County Circuit Court as the court in which to file its petition, and because the Cochart's petition was subsequently filed in Kewaunee County Circuit Court, but was removed to Dane County Circuit Court and consolidated with the Clean Wisconsin petition, the combined administrative challenge was properly venued in Dane County Circuit Court under Wis. Stat. § 801.50(3)(a), by designation of the initial petitioner. The decision said that although Clean Wisconsin was required to file in Dane County under Wis. Stat. § 227.53(1)(a), filing in the circuit court of Clean Wisconsin's county of residence still falls under the definition of "designated" in Wis. Stat. § 752.21(2). Therefore, the initial designation of circuit court venue by Clean Wisconsin at the trial court then invoked DNR's choice of appeals court venue under Wis. Stat. § 752.21(2), as highlighted above.

The court majority observed that the "entire purpose of the act [Act 61] was to change the treatment of venue in both the circuit and appellate courts when the state is the sole defendant."[iv] Under prior venue law, all administrative appeals were automatically venued in Dane County Circuit Court as the trial court. Any appeals of those circuit court decisions went automatically to the District IV Court of Appeals, the appellate district in which Dane County is located.

After Act 61, however, as occurred in the underlying Kinnard case, challengers to administrative agency decisions must file their judicial review petitions in the county of their residence (as here,

Clean Wisconsin, Inc. filed in Dane County, and the Cocharts in Kewaunee County). Then, since the challenger or plaintiff in the initial suit designated the circuit court venue, the appellant may choose the appellate court venue, but with the restriction that the appeals court must be a district other than the one where the circuit court that heard the case is located.

Act 61 Creates a More Balanced Court System for Wisconsin Businesses

While this decision may seem technically complex, it affirms the legislature and governor's Act 61 venue reforms, enhancing Wisconsin businesses potential for receiving balanced consideration by the courts when challenging state administrative agency decisions. Simply put, these reforms, as affirmed by the Wisconsin Supreme Court, open Wisconsin circuit courts across the state to their local citizens and guarantee that all four Wisconsin appellate court districts will also be open to citizens and businesses most directly impacted by state regulatory decisions.

Under the Act 61 reforms, citizens challenging a state administrative agency decision now have their challenges heard by their home county's circuit court—not Dane County's judges. To balance citizens' rights to designate initial circuit court venue, it is now the right of the state as an appellant, under Act 61, to choose the venue for the Court of Appeals (here the District II Court of Appeals)—versus District IV, the appeals district in which the Dane County Circuit Court is located, and in which the DNR is now prohibited from filing this specific appeal.

Consequently, the Act 61 reforms, as affirmed by the Wisconsin Supreme Court, guarantee citizens the right to a more diverse array of both circuit and appellate court judges to hear their initial challenges and appeals of state administrative regulatory review cases. The former court venue structure created a "monopoly" jurisdiction of administrative agency challenges, funneling those cases to often entrenched Dane County Circuit Court and District IV Appeals Court judges.

Where judges hearing administrative agency decision challenges and reviewing them at the appellate level continue to apply the statutory law and administrative agency rules as written and reviewed by the legislature, litigants should not see a great deal of variation in the legal outcomes reached. However, where judges may have been overstepping and expanding the bounds of state agency authority, challengers to these agency regulations may begin to see more balance in the legal outcomes reached.

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[i] 2018 WI 25

[ii] Case No.: 2016AP1980-W State of Wisconsin ex. rel. Department of Natural Resources, Petitioner, v. Wisconsin Court of Appeals, District IV, Clean Wisconsin, Inc., Lynda A. Cochart, Amy Cochart, Roger D. DeJardin, Sandra Winnemueller, Chad Cochart and Kinnard Farms, Inc., Respondents

[iii] Wis. Const. Art VII, § 3 (1) The supreme court shall have superintending and administrative authority over all courts. (2) The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction. (3) The supreme court may review judgments and orders of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals.

[iv] *Id*. p. 18, ¶ 26