

Appeal No. 18-AP-0059

SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc., and
Pleasant Lake Management
District,

Petitioners-Respondents

v.

Wisconsin Department of
Natural Resources,

Respondent-Appellant,

Wisconsin Manufacturers &
Commerce, Dairy Business
Association, Midwest Food
Processors Association,
Wisconsin Potato & Vegetable
Growers Association,
Wisconsin Cheese Makers
Association, Wisconsin Farm
Bureau Federation, Wisconsin
Paper Council and Wisconsin
Corn Growers Association,

Intervenor-Co-Appellants.

**PETITIONERS-RESPONDENTS' MOTION TO
STRIKE AND SUPPORTING MEMORANDUM**

Petitioners-Respondents Clean Wisconsin and Pleasant Lake Management District (“Petitioners-Respondents”) hereby move to strike the Wisconsin Legislature’s Response to the Department of Natural Resources’ Motion to Modify Briefing Schedule (“Response”) pursuant to Wis. Stat. § 809.83(2).

Petitioners-Respondents submit this motion to strike the Legislature’s Response because it makes arguments beyond the scope of the motion and therefore is non-responsive to the motion.

BACKGROUND

On April 25, 2019, the Wisconsin Legislature filed a Petition to Intervene. Responses to that Petition were filed by the Department of Natural Resources (DNR) and Petitioners-Respondents on May 6 and 9, respectively. The Court has not yet ruled on the Petition to Intervene.

DNR filed a Motion to Modify Briefing Schedule on May 2, 2019. On May 7, 2019, the Court ordered filing of responses to DNR’s motion, if any, no later than May 13, 2019. Petitioners-Respondents responded on May 9, 2019. The Legislature submitted a response dated May 13, 2019.¹

¹ In addition to the defects raised herein, the Response was not timely filed. On May 7, 2019, the Court ordered filing of responses to the Motion to Modify the Briefing Schedule by May 13, 2019. While dated May 13, 2019, the Court’s online records indicate that the Legislature’s response was filed on May 14, 2019.

ARGUMENT

Wisconsin Stat. Ch. 809 sets forth rules of appellate procedure. “Failure of a person to comply with a court order or requirement of these rules ... is grounds for ... striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.” Wis. Stat. § 809.83(2). The Court must strike the Legislature’s Response because it fails in two ways to follow appellate practice rules on responding to motions.

I. The Legislature did not Respond to DNR’s Motion to Modify the Briefing Schedule.

First, the Court must strike the Response because it is not responsive to the Motion to Modify the Briefing Schedule, which concerns the narrow issue of whether to allow DNR to file briefs on the Respondents’ schedule. *See* DNR Mot. to Modify at 1-2. In allowing parties to respond to a motion, Wis. Stat. § 809.14(1) mandates that responses actually respond to the motion. The Legislature’s Response does not address briefing schedule modifications, but instead the merits of the case and the Legislature’s Petition to Intervene. *See generally* Legislature’s Response. The Court should therefore strike the Response as nonresponsive to the underlying motion, in violation of Wis. Stat. § 809.14(1).

Further, because the Legislature is attempting to use the Response to make arguments regarding the Petition to Intervene, it constitutes an unauthorized pleading on the Petition to Intervene. The Legislature makes clear in the first sentence of the Response that it is addressing the Petition to Intervene. Legislature's Response at 1 (... "the critical importance of intervention by the Legislature . . ."). The Legislature further states in the first paragraph that "[i]t is essential for the Legislature to intervene." *Id.* at 1. Over a third of the Response is a substantive engagement with arguments opposing the Legislature's Petition to Intervene. *Id.* at 5-7. Finally, the Legislature's conclusion states that "the Court should grant the Legislature's petition for intervention" as though this were a pleading on that motion. *Id.* at 7.

Wis. Stat. § 809.14(1) authorizes non-movant parties to file a response to the motion, but it does not provide for further pleadings allowing a reply by the movant. If the Legislature wanted to provide additional arguments to the Court on the Petition to Intervene, it was required to request leave of the Court to do so. By including substantive arguments on the Petition to Intervene in this pleading, the Legislature aims to benefit from an additional round of argumentation not available to the other parties. The Response

therefore violates Wis. Stat. § 809.14(1) because it is an unauthorized reply to the Legislature's Petition to Intervene.

II. The Legislature is not a Party to the Proceedings and is therefore not authorized to Respond to the Motion to Modify the Briefing Schedule.

Second, the Legislature is not a "party" to the proceedings. Statute authorizes a "party" to file a response. *See* Wis. Stat. § 809.14(1). The Legislature moved for intervention, but the Court has not yet acted on this motion. The distinction between parties and non-party "persons" is recognized in Ch. 809 by, for example, the above-quoted provision rendering a "person" subject to sanctions for failure to follow appellate rules of procedure. Wis. Stat. § 809.83(2). Accordingly, the Legislature was not authorized to respond to DNR's motion, and therefore the Court must strike the Response.

CONCLUSION

The Response is a non-germane, inappropriate attempt to advance arguments relevant to a separate motion before the Court for which no such response is authorized. Further, the Legislature is not a party and thus does not have standing to respond to DNR's motion. For these reasons,

Petitioners-Respondents respectfully request that the Court strike the Response.

Dated this 20th day of May, 2019.

Respectfully submitted,



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