COURT OF APPEALS DECISION DATED AND RELEASED FEBRUARY 25, 1997

Court No. 96-1659

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BURNETT COUNTY and JAMES H. TAYLOR, Plaintiffs-Respondents,
v.
AFSCME LOCAL 279-A, Defendant-Appellant.

APPEAL from a judgment of the circuit court for Burnett County: JAMES R. ERICKSON, Judge. Affirmed.
Before Cane, P.J., Myse, and Carlson, JJ.

PER CURIAM. AFSCME Local 279-A appeals a summary judgment entered in favor of James Taylor, circuit judge, and Burnett County (collectively, "the County"). The union argues that (1) a circuit judge can be a municipal employer under 111.70(1)(j), STATS.; (2) a circuit judge is subject to § 111.70; (3) the trial court acted without jurisdiction to determine whether the Burnett County register in probate, a municipal employee, had properly been removed from the bargaining unit by Judge Taylor; and (4) a circuit judge can act in both a judicial capacity and as an agent of the County.

AFSCME also argues that the trial court did not address a single argument it made and erroneously concluded that its defense was frivolous. For the reasons that follow, we reject these arguments and affirm the judgment.

Burnett County Circuit Judge James Taylor issued an order that appointed the register in probate and removed that position from the courthouse worker's collective bargaining unit, AFSCME Local 279-A. AFSCME filed a prohibited practice complaint claiming that the County and Judge Taylor had independently and in concert violated § 111.70, STATS.

The County responded with this declaratory judgment action. Its complaint seeks an injunction prohibiting the union from filing a prohibited practice complaint against circuit judges based upon claims that the judge is a County agent and municipal employer subject to the authority of WERC under § 111.70(3). 1/ The complaint also seeks a legal determination that the County acted in compliance with a lawful directive of Judge Taylor.

AFSCME's answer denies the County's "legal conclusions ... that Taylor is neither an agent of Burnett County, nor a municipal employer." It denies that the "unilateral removal of the Register in Probate from the collective bargaining unit in question was a lawful exercise of authority by Judge Taylor." AFSCME's answer also alleges that

> the Wisconsin Employment Relations Commission has the primary jurisdiction to hear and decide the prohibited practices complaint ... and that persons who are elected as circuit court judges are 'persons' within the meaning of Sec. 111.70(l)(k) and Sec. 111.70(3)(c), Wis. Stats., and are not above the law, and denies that Judge Taylor is entitled to injunctive relief.

AFSCME filed a motion to dismiss the complaint for failure to state a claim. 2/ The County in turn moved for summary judgment that circuit judges do not act as agents of the County, are not municipal employers and are not subject to enforcement powers of WERC under § 111.70, STATS. It also sought a declaration that the County acted in compliance with a lawful directive and order from Judge Taylor and an order that the parties conduct any pending actions before WERC in a manner consistent with the declaratory judgment sought. It further requested costs, disbursements and reasonable attorney fees. It filed signed affidavits of Judge Taylor and Myron Schuster, the personnel director of Burnett County, to support the allegations of the complaint. AFSCME submitted a "reply brief" opposing the motion for summary judgment.

In a written decision, the court concluded the issues are:

> (1) Is a duly elected Circuit Judge legally entitled to appoint a Register in Probate and a Probate Registrar despite provisions of a collective bargaining agreement with the county?
>
> (2) Is the Burnett County Register in Probate a managerial employee and therefore an exception to the definition of municipal employe defined at Section 111.70(l)(i), Wis. Stats.?

The court answered the questions in the affirmative and granted the County's motion for summary judgment. The trial court did not hold an evidentiary hearing and concluded that the issues were

governed by § 851.71(l), STATS., and case law, including *Manitowoc County v. Local 986A*, AFSCME, 170 Wis.2d 692, 489 N.W.2d 722 (Ct. App. 1992). It granted the County relief sought in the complaint.

1. STANDARD OF REVIEW

An appeal of a summary judgment raises an issue of law we review de novo by applying the same standards set forth in § 802.08(2), STATS., employed by the trial court. *Brownelli v. McCaughtry*, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint to determine whether it states a claim and then the answer to determine whether it presents a material issue of fact. *Id*. If they do, we then examine the moving party's affidavits and other supporting documents to determine whether that party has established a prima facie case for summary judgment. *Id*.

If it has, we then review the opposing party's affidavits and other supporting documents to determine whether there are any material facts in dispute that would entitle the opposing party to a trial. *Id*. at 372-73, 514 N.W.2d at 49-50. A party may not rest on mere allegations in the pleadings to establish a genuine issue of material fact. Section 802.08(2), STATS. Based upon our review of the record, we conclude that AFSCME has not demonstrated any genuine issue of material fact that requires a trial.

2. WHETHER JUDGE TAYLOR ACTED AS A MUNICIPAL EMPLOYER

AFSCME argues that a circuit judge can be a "municipal employer" within the meaning of § 111.70(1)(j), STATS. The application of a statute to a particular set of facts presents a question of law. *Bucyrus-Elie Co. v. DILHR*, 90 Wis.2d 408, 417, 280 N.W.2d 142, 146-47 (1979). A "municipal employer" means "any person acting on behalf of a municipal employer within the scope of the person's authority, express or implied." Section 111.70(1)(j), STATS.

AFSCME contends that a county board of supervisors has been given power to establish a county employee's conditions of employment. In addition to § 111.70(1)(j), STATS., AFSCME relies on four authorities: *Richards v. Board of Education*, 58 Wis.2d 444, 460, 206 N.W.2d 597, 605 (1973); 63 Op. ATT'Y GEN. 150-51 (1974); §§ 59.15(2)(c) and (4); and § 59.07(20), STATS. 1993-94. 3/ AFSCME argues that a probate registrar is a county employee and, to the extent that a circuit judge acts with respect to that employee, the judge is a municipal employer. It also argues that the county board of supervisors' authority with respect to conditions of

employment "preempts any other statutory delegation of authority relating to the same employee." We are unpersuaded.

In *Iowa County v. Iowa County Courthouse*, 166 Wis.2d 614, 619-20, 480 N.W.2d, 499, 501 (1992), our supreme court held:

> a circuit court judge is not a "municipal employer...
>
> A circuit court judge is the local presence of the state. The judge is not a county employee or an agent of the county. See *State ex rel. Gubbons v. Anson*, 132 Wis. 461, 464, 112 N.W. 475 (1907). In other words, a circuit court judge is not within the statutory definition of a "municipal employer" and as such is not a party to and cannot be bound by the provisions of a collective bargaining agreement entered into by Iowa County and Local 413 which purport to regulate the appointment -of a register in probate.

We are bound by supreme court decisions. See *State v. Lossman*, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984). We conclude that Judge Taylor did not act as a municipal employer when appointing the register in probate.

Also, in *Manitowoc County*, 170 Wis.2d at 693, 489 N.W.2d at 722, we concluded that a circuit judge had the statutory authority to enter an order that appointed a register in probate, assigned certain duties and powers to that position, and decreed that the register in probate is not a municipal employee under § 111.70(1)(j), STATS. We concluded that the order was a valid exercise of the court's statutory powers under § 851.71(1), STATS., because "the authority conferred by this statute prevailed over any contrary provisions of a collective bargaining unit." *Id*. at 699, 489 N.W.2d at 725. 4/ This court is bound by the precedential effect of its own opinions. *In re Court of Appeals*, 82 Wis.2d 369, 371, 263 N.W.2d 149, 149-50 (1978).

In all material respects, Judge Taylor's order is indistinguishable from the order at issue in Manitowoc County. We conclude that Judge Taylor's lawful exercise of statutory authority under § 851.71(1), STATS., did not transform him into a municipal employer. Under *Manitowoc County*, the legislature's specific grant of authority to the circuit court to appoint the probate register overrides the more general provisions of ch. 59, STATS.

In its reply brief, AFSCME argues that *Iowa County* and *Manitowoc County* can be distinguished. 5/ AFSCME argues that the cases can be distinguished because here "the undisputed motive that prompted [Judge Taylor's order] is a desire to remove a municipal employee from a bargaining unit..." This distinction is unpersuasive. *Manitowoc County* and § 851.71(1), STATS., are silent with respect to motive; AFSCME cites no authority that motive converts a circuit judge into a municipal employer under § 111.70, STATS. Consistent with *Manitowoc County* and *Iowa County*, we conclude that the legislature, under § 851.71, STATS., has specifically authorized the circuit judge authority to appoint the probate registrar and assign her duties and, in doing so, the judge does not become a municipal employer.

3. WHETHER JUDGE TAYLOR IS SUBJECT TO § 111.70, STATS., WHEN HE APPOINTS A PROBATE REGISTRAR

Next, AFSCME argues that a circuit judge, when acting outside his judicial capacity, is subject to the same laws that apply to all other persons, including § 111.70, STATS. It cites a series of cases that hold judges accountable when they violate civil rights of employees, for example. 6/ It argues that there is no dispute that Judge Taylor had the statutory authority to assign the duties to the probate registrar, but "[t]he question here was whether he had exercised that authority with an improper motive or in order to accomplish an unlawful purpose." We disagree. We conclude that under *Manitowoc*, a circuit judge may appoint a probate registrar, assign duties and decree that the position is not one of a municipal employee even if the motive is to remove the position from the bargaining unit.

AFSCME apparently argues that its prohibited practices complaint filed with WERC alleging unlawful actions undertaken for the improper removal of a municipal employee from the bargaining unit is proof of unlawful action. This argument misses the mark. In summary judgment procedure, a party may not rest on mere allegations, but must present affidavits "made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Section 802.08(3), STATS. Specific facts must be set forth showing a genuine issue for trial. *Id*. AFSCME has not demonstrated proof of unlawful actions on the part of Judge Taylor. 7/

Next, AFSCME contends that WERC is the appropriate forum to determine the fact question whether the judge violated § 111.70, STATS. Because AFSCME has demonstrated no genuine issue of

material fact, we reject this argument.

4. WHETHER THE TRIAL COURT ACTED WITH JURISDICTION

Next, AFSCME argues that the trial court did not act with jurisdiction to determine whether the register in probate is a municipal employee as defined in § 111.70(1)(i), STATS. It argues that this determination is for WERC, pursuant to § 111.70(4)(d)2. It further argues that Judge Taylor's order denied the union due process, because it did not provide it an opportunity to be heard. We are unpersuaded.

Judge Taylor's order was not the result of a decision making process by a court as a fact finder. Upon Judge Taylor's assignment of duties and decree that the position of probate registrar was not one of a municipal employee, no factual findings were to be made.

Also, within its jurisdiction argument, AFSCME argues that it was error for the trial court to make its summary judgment determination absent an evidentiary hearing. We disagree. In summary judgment procedure, to be entitled to an evidentiary hearing, the opposing party must demonstrate a genuine issue of material fact. Section 802.08, STATS. Because here the underlying facts are not disputed, no evidentiary hearing was necessary and summary judgment procedure was appropriate. 8/

5. WHETHER A CIRCUIT JUDGE MAY SERVE IN OTHER THAN A JUDICIAL CAPACITY

Next, we examine AFSCME's claim that a circuit judge, in addition to serving in a judicial capacity, can also serve as an agent of or otherwise on behalf of, or in the interest of the county in which he is elected. AFSCME argues that whether the act done by him was judicial is to be determined by its character, and not the character of the agent. It contends that a judge performs a variety of executive and administrative functions. *Cf. In re Kamps*, 118, Wis. 2d 482, 484, 347 N.W.2d 911, 912 (Ct. App. 1984) (the power to remove an officer is an executive function by a judge, not a judicial function); *Grob v. Nelson*, 8 Wis.2d 8, 12-13, 98 N.W.2d 457, 459 (1959) ("We held that removal of an officer by a judge was an executive, not a judicial function."); see also *Kurowski v. Krajewski*, 848 F.2d 767, 773 (7th Cir. 1988) ("judges act in an 'administrative capacity' when hiring and firing staff-even staff intimately connected with the judicial office...").

We agree with the general proposition that in certain circumstances, a judge may perform in a capacity other than a judicial capacity. This general proposition does not appear to be in dispute. Nonetheless, this argument also misses the mark. A judge who performs a variety of functions does not necessarily become an agent for the county.

AFSCME also contends that the question whether a judge has acted in some other capacity present questions of fact. If historical facts are not disputed, only a question of law remains. *Manitowoc County*, 170 Wis.2d at 698, 489 N.W.2d at 724. Here, the underlying facts as set forth in the affidavits of Judge Taylor and Myron Schuster have not been met with opposing affidavits or other proof of evidentiary facts. As a result, no issue of fact is joined.

5. WHETHER AFSCME'S DEFENSE WAS FRIVOLOUS

Finally, AFSCME argues that the trial court erroneously determined that it raised a frivolous defense under § 814.025, STATS. We disagree. A frivolous argument is one that is asserted notwithstanding that a reasonably informed and capable litigant would have known it was without a reasonable basis in law or equity, and unsupported by any reasonable contention for the extension or modification of existing law. *Associates Finan. Servs. v. Homik*, 114 Wis.2d 163, 174-75, 336 N.W.2d 395, 401 (Ct. App. 1983). This is an objective standard. *Hessenius v. Schmidt*, 102 Wis.2d 697, 701, 307 N.W.2d 232, 235 (1981).

AFSCME argues that the trial court did not address any of the arguments addressed by AFSCME. We disagree. The trial court addressed the issues in a four-page decision, in which it stated: "This case is clearly governed by well established statutory law as well as Wisconsin case law" and "Section 851.71(l), Wis. Stats., makes the issue very clear." Citing *Iowa County, Manitowoc County, Eau Claire County v. WERC*, 122 Wis.2d 363, 362 N.W.2d 429 (Ct. App. 1984), and *Kewaunee County v. WERC*, 141 Wis.2d 347, 415 N.W.2d 839 (Ct. App. 1987), it stated that " [t]he issue is no longer in question." These cases were cited by Judge Taylor in his order reappointing the probate registrar, as well as the trial court in its written decision.

The court further concluded:

> Defendants have known for years the status of the law

> in the State of Wisconsin on the subject of Registers in Probate. The statute is clear and case law is clear, and has been clear for years. The appearance of frivolous litigation by the defense is quite apparent.

AFSCME contends that the trial court "*did not address* any of the arguments advanced by AFSCME Local 279-A, not a single one of them, let alone how it was that they may have fallen short of the mark!" (Emphasis in the original.)

The record does not support this argument. The characterization of the issues presents a question of law. The trial court, like an appellate court, is not required to accept the parties' characterization of the issues. *Cf. State v. Waste Management*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

The issues are framed by the pleadings. *Hansher v. Kaishian*, 79 Wis.2d 374, 385, 255 N.W.2d 564, 570 (1977). The rules of civil procedure reject the approach that pleading is a game of skill where one misstep may be decisive to the outcome. *Canadian Pacific Ltd. v. Omark-Prentice Hydraulics*, 86 Wis.2d 369, 373, 272 N.W.2d 407, 409 (Ct. App. 1978). Nonetheless, summary judgment methodology does not allow enlargement of issues beyond those framed by the pleadings. *C.L. v. Olson*, 140 Wis.2d 224, 239, 409 N.W.2d 156, 162 (Ct. App. 1987). However, the parties have the right to amend their pleadings so that the issues may be properly framed. Section 802.09, STATS. The court may decide the case on the narrowest ground and need not address nondispositive issues. We address only the dispositive issue. See *Waste Management*, 81 Wis.2d at 564, 261 N.W.2d at 151.

We note that a significant portion of AFSCME's arguments is devoted to characterizing the issues and subissues. 9/ For example, in its reply brief, AFSCME argues: "The issue presented here is whether circuit judges always enjoy immunity in employment relations cases." Because the pleadings in this case do not identify judicial immunity as an issue and the trial court did not base its ruling on judicial immunity, AFSCME's argument is wrong.

The parties may safely assume that any subissue not directly addressed in this opinion has been deemed to lack sufficient merit to warrant individual attention. *Id*. at 564, 261 N.W.2d at 151. We conclude that the trial court's decision adequately covered the issues raised by the record in this matter. We agree with its

determination that AFSCME's defense is frivolous for the reasons stated by the trial court.

By the Court.-Judgment affirmed.

This opinion will not be published. RULE 809.23(l)(b)5, STATS.

Endnotes

1/ The record suggests that the injunctive relief is no longer an issue because WERC found no prohibited practice and dismissed AFSCME's prohibited practice complaint.

2/ AFSCME's brief, in support of its motion, identified three issues:

> (1) Can a person who is elected to serve as a circuit judge serve as an agent of the county in which he is elected?
>
> (2) Can a circuit judge be a "municipal employer" within the meaning of Sec. 111.70(1)0), Wis. Stat.?
>
> (3) Is a person who is elected to serve as a circuit judge subject to the laws that apply to other persons and, in particular, the provisions of Sec. 111.70, Wis. Stat.?

3/ Section 59.15, STATS. 1993-94, was renumbered § 59.22 and amended by 1995 Wis. Act 201 §§ 257 to 260, eff. Sept. 1, 1996.

4/ Section 851.71(i) STATS., provides: "In each county, the judges of the county shall appoint and may remove a register in probate."

5/ Although these two cases were specifically cited in Judge Taylor's order and in the trial court's written decision, AFSCME first attempts to distinguish them in its reply brief.

6/ *Forrester v. White*, 484 U.S. 219 (1988); *McMillan v. Svetanoff*, 793 F.2d 149, 154 (7th Cir. 1986); *Harris v. Harvey*, 605 F.2d 330, 336-37 (7th Cir. 1979).

7/ AFSCME also argues that no express agreement is necessary to constitute a conspiracy. However, in its reply brief, AFSCME apparently retreats from its conspiracy allegations, stating:

"acknowledging that 'no conspiracy claim was ever made by the defendant at the trial court level,' Burnett County and James Taylor nonetheless argue at length the merit of the non-existent claim..... We conclude that any implied conspiracy claim is not sufficiently developed to be addressed on appeal.

Also, AFSCME's argument implies that Judge Taylor entered into an agreement with Burnett County to remove the probate registrar from the bargaining unit. However, Judge Taylor's affidavit states that his order was "solely on the circuit court's initiative and pursuant to its authority and existing case precedent." He also stated that before he issued the order, he had no contact with any official of Burnett County relative to the order. AFSCME offers no proofs rebutting this affidavit. As a result, AFSCME fails to raise a genuine issue of material fact.

8/ Within its challenge to trial court jurisdiction, AFSCME argues that Judge Taylor's order violated constitutional rights to due process because AFSCME was not given notice or opportunity to be heard before he signed the order. Because AFSCME does not provide any record citation for this argument, and does not develop this argument, we do not address it on appeal.

9/ See note 7, where we concluded that AFSCME apparently abandoned its conspiracy claim.