
PRN ASSOCIATES LLC
and PGN ASSOCIATES LLC,

Plaintiff - Petitioner,

v.

Case No. 05 CV 312

STATE OF WISCONSIN
DEPARTMENT OF
ADMINISTRATION,

Defendant-Respondent.

**BRIEF IN SUPPORT OF THE STATE'S MOTION TO STRIKE PLAINTIFFS'
BRIEF AND SUPPORTING AFFIDAVIT**

This matter is before the Court on the State's motion to dismiss. A motion to dismiss tests the legal sufficiency of the complaint. *Olson v. Ratzel*, 89 Wis. 2d 227, 235, 278 N.W.2d 238 (Ct. App. 1979). A court must analyze a motion to dismiss only on the pleadings, not on any extraneous information. *CTI of Northeast Wisconsin, LLC v. Herrell*, 259 Wis. 2d 756, 761, 656 N.W. 2d 794 (Ct. App. 2002).

Plaintiffs filed an affidavit in support of their responsive brief, which attaches numerous documents. The documents clearly amount to extraneous information and cannot be used to decide a motion to dismiss. *Id.* The brief arguments rely heavily on the documents and also incorporate other, extraneous information; both the brief and the appendix therefore should be stricken. *Id.*

A Chapter 227 review case is a special proceeding, within the definition contained in Wis. Stat. § 801.01(1). *Ashwaubenon v. Public Service Comm.*, 15 Wis. 2d 445, 448, 113 N.W. 2d 412 (1962). Pursuant to Wis. Stat. § 801.01(b), that makes our Civil Procedure Code, Wis. Stats. chs.

801 to 847 applicable to this case, to the extent those statutes do not conflict with Chapter 227. *State v. Walworth County Circuit Court*, 167 Wis. 2d 719, 725, 482 N.W. 2d 899 (1992).

Wis. Stat. § 802.06(2)(b) provides that when, as here, matters outside of the pleadings are presented in connection with a motion to dismiss and are not excluded by the court, the motion shall be treated as one for summary judgment under Wis. Stat. § 802.08, with all parties being given reasonable opportunity to present all pertinent materials to such motion. Summary judgment, however, is inconsistent with a Chapter 227 proceeding. In *State v. Walworth County Circuit Court*, 167 Wis. 2d at 725-726, the Wisconsin Supreme Court confirmed its decision in *Wis. Environmental Decade v. Public Service Comm.*, 79 Wis. 2d 161, 169-170, 255 N.W. 2d 917 (1977), holding that summary judgment is not available in a Chapter 227 proceeding.

According to the Supreme Court, the first reason summary judgment is not available is:

Under [sec. 802.08] the trial court's function is to determine whether there are any issues of fact to be tried However, judicial review of administrative decisions under ch 227 envisages a review upon the record, and there is no trial de novo in the circuit court during such proceedings Only under limited circumstances, such as where the procedure before the agency is challenged as irregular, may the circuit court consider facts outside **the record made before the agency**. [Emphasis Added].

W.E.D., 79 Wis. 2d at 170 (citations omitted). Quoted from *State v. Walworth County Circuit Court*, 167 Wis. 2d at 726.

A second reason the *W.E.D.* court gave in finding summary judgment inapplicable was that, in creating Chapter 227, the legislature provided a comprehensive, fully defined, procedure for judicial review of administrative proceedings. *W.E.D.* 79 Wis. 2d at 170. Obviously, the legislature intended the Chapter 227 provisions should be paramount in the judicial review process.

Plaintiffs cannot therefore convert the motion to dismiss to one for summary judgment in order to get their proffered extraneous information before the Court. The motion to dismiss must be

decided strictly on the pleadings. A motion to dismiss, unlike one for summary judgment, is available in Chapter 227 proceedings. *W.E.D.* 79 Wis. 2d at 171. See also: *State v. Walworth County Circuit Court*, 167 Wis. 2d at 725.

There is a second reason plaintiffs' affidavit, and therefore their brief, must be stricken. As noted in the cases discussed above, the circuit court in a Chapter 227 case acts as an appellate court. Its job is to review the record upon which the agency decision in question is based. It is the agency that provides that record to the court. Wis. Stat. § 227.55. There are provisions for supplementing the record, taking additional evidence or even ordering discovery and a hearing before the court, but that can only be done based upon specific findings the court must make after the agency submits what it considers to be the appropriate record. See Wis. Stats. §§ 227.56 and 227.57(1). The State has not submitted the record in this case; it is entitled to have the legal questions presented by its motion to dismiss decided in order to determine first whether or not this case should or can proceed.

The documents plaintiffs submit do not constitute the record upon which the decision was made in this case. Some of the documents will be part of the record submitted, if the State's motion to dismiss is denied, but some will not be. The record in this case is huge. The documents submitted by plaintiffs are incomplete, slanted because they are taken out of context, and in some cases totally irrelevant and prejudicial (e.g. the *Thompson Order*). Other extraneous information, not attached to the affidavit, but included in the brief (e.g. the Governor's Executive Order # 137, signed on February 3, 2006) is also irrelevant and prejudicial – the decisions in this case should be reviewed on the basis of the law in effect at the time they were made.

The State therefore requests that the brief and affidavit be stricken and that plaintiffs be ordered to submit a new brief limited to the facts and issues contained in the complaint and the motion to dismiss. The State further requests that it then be allowed 15 days to file a reply brief.

Dated: June 23, 2006.

PEGGY A. LAUTENSCHLAGER
Attorney General

RICHARD E. BRAUN
Assistant Attorney General
State Bar #1012419

Attorneys for the State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6201
braunre@doj.state.wi.us