STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 WAUKESHA COUNTY

REDDELIEN ROAD NEIGHBORHOOD ASSOCIATION, INC. ("RRNA"), et al.,

Petitioners,

Case No. 10-CV-5341

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Administratively consolidated with

NORTH LAKE MANAGEMENT DISTICT, et al.,

Petitioners,

Case No. 12-CV-1751

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

DNR'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS CASE NO. 5341

I. CASE NO. 10-CV-5341 MUST BE DISMISSED BECAUSE RRNA HAS ABANDONED THE REMAINING ISSUES IT RAISED IN ITS INTITIAL PETITION.

The Wisconsin Department of Natural Resources (DNR) moved to dismiss Waukesha County Case No. 10-CV-5341 because the Reddelien Road Neighborhood Association Inc. (RRNA), by its August 3, 2012 petition, narrowed the issues to be

reviewed from the six issues raised in its initial petition to issues that were either addressed in the contested case proceedings following this Court's remand order or were first raised by the RRNA during those proceedings. As RRNA notes in its restatement of this argument, nothing "remain[s] on the table" from Case No. 10-CV-5341 (RRNA Br. Opp. Mot. Dismiss (hereinafter RRNA BR.) at 2), so DNR respectfully requests that this case be dismissed.

In its response brief, RRNA acknowledges that it "has narrowed the issues by eliminating several issues that were in its initial petition" (*id.* at 10). It states that it now seeks review of only two issues (*Id.*). The first, whether DNR properly addressed TSS removal requirements, was set forth in this Court's remand order and addressed by the ALJ. The second, whether or not DNR allegedly failed to conduct a required analysis under Wis. Admin. Code ch. NR 103 before it issued its November 2010 decision, was an issue that RRNA states it did not identify until April 18-19, 2012 (RRNA Br. at 11).

Since all of the issues in the initial petition were eliminated except one that was remanded and addressed by the ALJ's final reviewable order, no issues from the initial petition remain before the Court. RRNA's argument about when it realized DNR had not conducted a Wis. Admin. Code ch. NR 103 analysis as part of its decision to issue coverage under the general storm water permit reconfirms that RRNA had not identified or raised this issue in the 2010 petition for judicial review that commenced Case No. 10-CV-5341. Raising it now does not keep any part of that petition alive.

RRNA devotes two pages of its brief to an explanation as to why it allegedly "had no way of ascertaining" the absence of a NR 103 analysis prior to January 6, 2012, (RRNA Br. at 11). It complains that DNR's 166-page certified record of that decision was "paper thin," and it argues that it did not learn until it submitted a public records request and cross examined Mr. Hartsook in 2012 that he did not make a determination under ch. NR 103.08(4) prior to granting permit coverage in 2010 (*id.* at 12). RRNA could have submitted a public records request in 2010. If it was focused on chapter NR 103 when it received the record in January 2011, it could have suggested or demanded an addition or correction under Wis. Stat. § 227.55. RRNA's arguments about when it decided to raise a claim related to NR 103 speaks to its litigation priorities, not to the pending motion to dismiss.

Since nothing remains of Case No. 10-CV-5341, it should be dismissed.

II. DNR HAS NOT WAIVED ITS OBJECTION TO THE COURT'S RETENTION OF JURISDICTION POST-REMAND.

When the RRNA asked the Court to remand this case under Wis. Stat. § 227.57(7), it had not asked the Court to retain jurisdiction over the remand decision, thus the parties did not brief the question of whether a court may do so. As the RRNA notes in its brief, the Court announced, "*sua sponte*," that it would retain jurisdiction when it issued its oral ruling granting RRNA's request for a remand (RRNA Br. at 5).

Specifically, the Court said:

> I think the thing to do is for me to retain jurisdiction in case either side is dissatisfied with the outcome of such a hearing, or if there is any reason along the way that it needs to be referred back here.

RRNA Br., App. A at 4-5.

It is clear that the Court wanted to make sure that the contested case hearing took place. It is also clear that the Court wanted to retain jurisdiction if either side was dissatisfied with the hearing outcome. The Court acknowledged that either side could be dissatisfied with that outcome. It is also possible that both sides could have been satisfied.

When the RRNA filed its "Petition for Resumption of Judicial Review," it made it clear that it was not asking the Court to resume its judicial review based on the issues that were not remanded, as discussed in the previous section. Instead, RRNA was asking the Court to review an issue it raised and an issue it discovered and attempted to raise before the ALJ during the 2012 contested case proceedings. DNR promptly filed a response brief arguing in part that the Court could not review the new ALJ decision as part of the initial judicial review proceeding.

RRNA now argues that DNR is raising this argument too late. It argues without citing any law that DNR should have objected when the Court issued its oral ruling, that DNR should have argued that the Court's order should say something different than what the Court stated during its oral ruling, or that DNR should have filed an interlocutory appeal to avoid waiver. Then it argues that DNR raised the issue "too late as a practical matter for this Court or the RRNA's counsel to do anything about it" (RRNA Br. at 3), therefore the

argument should be considered waived pursuant to *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190 (*id.* at 3-6).

RRNA misreads and misapplies *Mikrut*, a case that addresses the question of when an appellate court can consider an argument waived, not whether a circuit court should disregard an argument raised before it. In that case, Mr. Mikrut was issued 21 citations for violations of local ordinances related to the storage of junked vehicles and the operation of an unpermitted salvage yard. *Mikrut*, 273 Wis. 2d 76, ¶ 4. He was found guilty, appealed and lost, and the Wisconsin Supreme Court denied his petition for review. *Id.* ¶ 5. Then, more than 17 months after he had been found guilty of the ordinance violations and more than six months after the appellate court upheld the trial court, "Mikrut moved to vacate the judgment, arguing for the first time that the Village did not follow certain statutory mandates in issuing some of the citations." *Id.* ¶ 6. The *Mikrut* court held that challenges to the circuit court's competency other than those dealing with statutory time periods are waived if they are not raised in the circuit court. *Id.* ¶ 30.

Here, DNR has respectfully raised the argument, before this Court, that the Court cannot retain jurisdiction over issues remanded pursuant to Wis. Stat. § 227.57(7). If an appellate court applied the standard in *Mikrut*, it could not find that this argument was waived.

On a practical level, DNR did not raise its objection when it was too late for the RRNA to do anything about it. RRNA has experienced attorneys. They received the ALJ's decision, and that decision reminded them that Wis. Stat. § 227.52 requires persons aggrieved by that decision to file and serve a petition for judicial review within 30 days.

It was not the DNR's job to remind them again or to suggest that the attorneys might want to file a petition before it is too late for them to do so. It is also difficult to believe that nobody at either attorney's law firm could have changed the caption of the Petition for Resumption of Judicial Review and filed and served it in the two days after DNR suggested they think of doing so. It is common practice for attorneys to file a petition for judicial review within 30 days of decisions that their clients wish to challenge -- even when they think they do not have to -- just to preserve their client's rights. It was RRNA's strategic choice not to file and serve a new petition within the statutory timeframe.

It is also not too late for the Court to do anything. The Court can clarify what it meant when it stated it was retaining jurisdiction. It can clarify that it was retaining jurisdiction until the remand proceedings were concluded. It can clarify that it was retaining jurisdiction over the issues that were not remanded. If the Court had spontaneously decided to retain jurisdiction over the ALJ's subsequent decision, it can reconsider that decision in light of the parties' arguments comparing *Soo Line R. Co. v. Revenue Dept.*, 143 Wis. 2d 874, 878, 422 N.W.2d 900 (Ct. App. 1988), and *Gimenez v. State Medical Examining Board*, 229 Wis. 2d 312, 600 N.W.2d 28 (Ct. App. 1999). Raising questions now about what the Court meant when it said it was retaining jurisdiction is consistent with the waiver rule policy articulated in *Mikrut*. *See* 273 Wis. 2d 76, ¶ 16 (raising an issue before the trial court allows the trial court to correct or avoid alleged errors).

III. *GIMENEZ* AND *SOO LINE* REQUIRE THAT RRNA'S PETITION FOR RESUMPTION OF JUDICIAL REVIEW BE DISMISSED.

In its initial brief, DNR argued, based on *Soo Line* and *Gimenez*, that a court may only retain jurisdiction when it orders that additional evidence be taken by the agency pursuant to Wis. Stat. § 227.56(1), not when it remands under Wis. Stat. § 227.57(7).

In its response brief, the RRNA selectively quotes both cases, omitting key phrases that hurt its argument. It does so to suggest that *Soo Line*, a case involving a remand under Wis. Stat. § 227.56(1), should be applied here, instead of *Gimenez*, a case that involves a remand under Wis. Stat. § 227.57 like the case at bar. A complete reading of these cases shows that *Gimenez* applies, and since the RRNA did not properly and timely file and serve a petition for judicial review of the ALJ's decision and order, its petition for resumption of judicial review must be dismissed.

Soo Line involved a challenge to a tax deficiency notice. *See* 143 Wis. 2d at 875. Soo Line appealed the state tax appeals commission's decision to the circuit court, which remanded the case to the commission under Wis. Stat. § 227.19(1) (1983-84) (now Wis. Stat. § 227.56(1)) so that Soo Line could present evidence that was unavailable during the commission's proceedings. *See id.* at 877 & n.1. Wisconsin Stat. § 227.56(1) provides that a party may seek leave to present additional evidence before the agency under certain circumstances, and it provides that the agency "shall file with the reviewing court the additional evidence together with any modified or new findings or decision." *Id.* at 877-878.

In its analysis, the Court of Appeals distinguished remands under Wis. Stat. § 227.56(1) from remands under Wis. Stat. § 227.57. As the RRNA quotes the court,

> The [trial] court did not terminate the judicial proceeding on its merits after reviewing the agency's determination under sec. 227.57, Stats. It deferred the exercise of its review until the administrative proceedings were completed under sec. 227.56(1).

(RRNA Br. at 7, quoting *Soo Line* at 878). The RRNA omits the next two sentences that distinguish remands under Wis. Stat. § 227.56(1) from those under Wis. Stat. § 227.57:

> The commission's [second] order . . . was not a final decision upon remand from the trial court after review under sec. 227.57. It was a modification or reaffirmance of its previous order after consideration of the additional evidence found by the court to be material.
>
> *Soo Line*, 143 Wis. 2d at 878 (emphasis added).

This entire quote is included in *Gimenez*, a case like this one in which a petitioner failed to properly serve the agency with a petition seeking review of an agency decision upon remand. Contrary to RRNA's suggestion that the *Soo Line* and *Gimenez* courts were different courts and *Gimenez* has no bearing on *Soo Line*, the *Gimenez* introduced this very quote from *Soo Line* by confirming it was the same court: "We agreed, stating that: . . . " *Gimenez*, 229 Wis. 2d at 319 (emphasis added).

The *Gimenez* court continued:

> Gimenez argues that *Soo Line* is indistinguishable from the present situation. He states that, like the circuit court in *Soo Line*, this court found the Board's findings inadequate and therefore remanded the matter for additional findings. According to Gimenez, we did not terminate the proceeding on its merits but merely deferred review until the Board had produced a modified decision. These arguments are unavailing.

> The *Soo Line* exception to the § 227.53, STATS., service requirements applies only to cases involving § 227.56 STATS., where additional evidence is to be considered. That statute specifically contemplates further proceedings by the circuit court: "The agency may modify its findings and decision by reason of the additional evidence and *shall file with the reviewing court* the additional evidence together with any modified or new findings or decision." Section 227.56(1) (emphasis added). Therefore, once the agency has considered the additional evidence, it is required to pursue a petition for review with the circuit court. The subsequent review is thus a continuation of the initial action.

229 Wis. 2d at 319-320 (underlining added). The underlined portion of this block quote was omitted by RRNA and replaced with "[§ 227.56 involves a case]" (RRNA Br. at 8). This omission and replacement is inaccurate and misleading.

RRNA later acknowledges that the *Gimenez* court stated that the *Soo Line* exception to the service requirement applied only to cases involving Wis. Stat. § 227.56(1), but it attempts to explain away this clear exception by arguing that "§ 227.57(7) was never before the *Gimenez* court" (RRNA Br. at 8). This is misleading. *Gimenez* was a remand under Wis. Stat. § 227.57(4). *See* 229 Wis. 2d at 321. The *Gimenez* court distinguished remands under Wis. Stat. § 227.56(1) from remands under Wis. Stat. § 227.57. Since *Gimenez* was not a remand under Wis. Stat. § 227.56(1), the court found that exception to the service requirement did not apply, and Dr. Gimenez's post-remand petition was dismissed. *See id.*

In this case, the Court remanded under Wis. Stat. § 227.57, not under Wis. Stat. § 227.56(1). As the DNR argued when the parties briefed the remand issue, a remand order under Wis. Stat. § 227.57 is a final order, and, according to *Van Domelon v. Industrial Comm.*, 212 Wis. 22, 249, N.W. 60 (1933), "If thereafter any person feels

aggrieved by a subsequent order or award of the [agency] in relation to the same application . . ., a new and separate action to review that order or award must be instituted by the person aggrieved." *Gimenez*, 229 Wis. 2d at 320-21, quoting *Van Domelon*, 212 Wis. at 25, and citing *Bearns v. ILHR Department*, 102 Wis. 2d 70, 76-77, 306 N.W.2d 22 (1981) (emphasis supplied by *Gimenez* court).

To obtain review of the ALJ's order, the RRNA was required to file a petition for review pursuant to Wis. Stat. § 227.53. The RRNA did file a petition, but it erred by filing it with this Court as part of this action and by serving it on the agency's attorney in this action rather than by following the filing and service requirements in Wis. Stat. § 227.53. Since RRNA did not commence a new action and serve the DNR in a timely fashion, RRNA cannot now obtain judicial review of the ALJ's decision. *See Gimenez*, 229 Wis. 2d at 321.

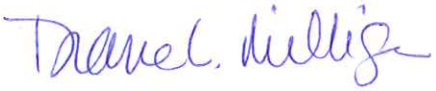
RRNA points out that the Court clearly intended to retain jurisdiction, and DNR agrees. An order is final when it disposes of the entire matter in litigation (*Bearns*, 102 Wis. 2d at 76), and DNR agrees that the Court's January 6, 2012 order was not a final order because the non-remanded issues remained "in litigation." However, when the RRNA abandoned these issues, it removed the issues remaining before the Court. Since there are no issues remaining in litigation before the Court, the Court should issue a final order dismissing Waukesha County Case No. 10-CV-5341.

CONCLUSION

For all of the reasons set forth here, DNR respectfully requests that this Court reject the RRNA's Petition for Resumption of Judicial Review and that it grant DNR's motion to dismiss Waukesha County Case No. 10-CV-5341.

Dated this 3rd day of October, 2012.

J.B. VAN HOLLEN
Attorney General



DIANE L. MILLIGAN
Assistant Attorney General
State Bar #1037973

Attorneys for Respondent State of Wisconsin
Department of Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9595
(608) 267-2250 (fax)
milligandl@doj.state.wi.us