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DISTRICT IV

March 29, 2011

To:

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You are hereby notified that the Court has entered the following order:

2011AP613-LV

Ismael R. Ozanne v. Jeff Fitzgerald (L.C. # 2011CV1244)

Before Lundsten, Higginbotham and Blanchard, JJ.

Late yesterday afternoon, the Attorney General, acting on behalf of Secretary of State Douglas La Follette, asked permission to withdraw his pending petition for leave to appeal a temporary restraining order, along with two accompanying motions for relief. The Attorney General argues that the petition has been rendered moot by actions taken by the Legislative Reference Bureau on March 25, 2011.

The motion for withdrawal raises the question whether this court has the authority to grant such a motion after we have certified the matter to the Wisconsin Supreme Court, but before that court has acted on the certification. For the following reasons, we conclude that it appears we lack such authority and we deny the motion.

After the Attorney General filed the petition, we certified certain important issues he raised to the Supreme Court under WIS. STAT. RULE 809.61. That rule is silent on whether, once a certification is pending before the Supreme Court, this court has authority to grant a withdrawal motion, thereby taking the matter away from the Supreme Court. In seemingly comparable situations, we lack such authority. For example, the rule of appellate procedure relating to a bypass petition specifies that further proceedings in the court of appeals are stayed pending disposition of the petition by the Wisconsin Supreme Court. *See* WIS. STAT. RULE 809.60(3)-(5). It is not apparent why we would have the authority to grant a motion to withdraw while a certification is pending when we lack such authority while a petition for bypass is pending. In both situations, the matter is before the Supreme Court for a decision. In both situations the Supreme Court might, for example, conference on the topic, conduct research, or order additional briefing or argument to assist it in deciding whether to review the matter. That is to say, this matter is not now solely before this court and we doubt the Supreme Court views our power as being so broad that we may unilaterally act to remove the case from both courts.

The Attorney General's motion does not address this issue. He cites the general motion statute, WIS. STAT. § 809.14, but offers nothing on the more specific question regarding this court's authority to grant his motion while a certification is pending.

Moreover, it is apparent that the Attorney General does not merely request an order permitting the withdrawal of his petition; he seeks a ruling on an entirely new question: whether an action by the Legislative Reference Bureau on Friday, March 25, 2011, means that the Act, which is the subject of the injunction, has become law. The Attorney General's desire for a ruling on this issue is apparent because the only ground he offers to justify withdrawal is his legal argument and assertion that the Act has become law.

For the reasons explained above, it appears that we lack the authority to grant the withdrawal motion while our certification is pending and that the Attorney General should have directed his motion to the Supreme Court. If the Attorney General files a motion to withdraw with the Supreme Court and that court disagrees with our evaluation of our authority in this regard, we anticipate that it will so advise us.

IT IS ORDERED that the withdrawal motion is hereby denied.

A. John Voelker
Acting Clerk of Court of Appeals