

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0759

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

JAMES N. ELLIOTT and
MILWAUKEE BUILDING AND
CONSTRUCTION TRADES COUNCIL,

Plaintiffs-Appellants,

v.

MICHAEL L. MORGAN
and CITY OF MILWAUKEE,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

FINE, J. This is an action brought by James N. Elliott, president of the Milwaukee Building and Construction Trades Council, and by the Trades Council seeking a declaration that the Riverwalk project in the City of Milwaukee has to comply with wage-rate laws set out in § 66.293, STATS., and

the Milwaukee city ordinances. The trial court granted summary judgment to the defendants, ruling that the wage-rate laws did not encompass the Riverwalk project. We affirm because the plaintiffs have failed to join indispensable parties. Accordingly, we do not discuss the other issues in the case, which can only be addressed once all those whose interests will be affected are joined in this action.

The facts material to our decision are not disputed. The Riverwalk project is being developed by two entities: Business Improvement District No. 15 and Milwaukee Riverwalk District, Inc. Creation of Business Improvement Districts is authorized by § 66.608, STATS. A Business Improvement District is governed by a board, appointed by the municipality's "chief executive officer" – a mayor in the case of cities – and confirmed by the municipality's legislative body. Section 66.608(3)(a), STATS. "The board shall have at least 5 members. A majority of board members shall own or occupy real property in the business improvement district." *Ibid.* The Business Improvement District board is authorized to "have all powers necessary or convenient to implement the [district's] operating plan, including the power to contract," if those powers are "specified in the operating plan as adopted, or amended and approved" pursuant to § 66.608. Section 66.608(3)(d), STATS.¹ The agreement for the Riverwalk project vests the board of Business Improvement District No. 15 with authority to obtain property in connection with the project and to construct, as well as "[c]ontrol or own, operate and maintain or cause to be operated and maintained," the project segments that are not designated for control by the city.² Creation of the Business Improvement District was approved by the Milwaukee Common Council in March of 1994. Business Improvement District No. 15 is to be funded by \$8,537,000 in grant funds from the City of Milwaukee, and by \$1,945,000 from special assessments on private property within the district.

The Milwaukee Riverwalk District is a Wisconsin not-for-profit corporation, and is to be funded by \$769,000 in grant funds from the City of

¹ If the operating plan does not grant these powers to the Business Improvement District board, they devolve on the municipality. Section 66.608(3)(d), STATS.

² The project segments that are to be owned by the city are governed by the wage-rate laws that the plaintiffs seek to have applied to the projects segments under the board's aegis, and are not at issue here.

Milwaukee, and by \$100,000 from Midwest Express. The Milwaukee Riverwalk District agreed with the City of Milwaukee to “further[] Riverwalk construction and development along various segments of the Milwaukee River line within the boundaries of” Business Improvement District No. 15.

In its answer to the plaintiffs' complaint, the defendants raised as an affirmative defense that the plaintiffs “have failed to join necessary and indispensable parties.” We agree. RULE 803.03(1), STATS., provides:

Joinder of persons needed for just and complete adjudication.

(1) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process shall be joined as a party in the action if:

(a) In the person's absence complete relief cannot be accorded among those already parties; or

(b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:

1. As a practical matter impair or impede the person's ability to protect that interest; or

2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

Application of the wage-rate laws to Business Improvement District No. 15 and to Milwaukee Riverwalk District would affect their ability to fulfill the objectives of their charter—most notably by increasing the costs of their operations. Simply put, the interests of both Business Improvement District No. 15 and Milwaukee Riverwalk District are at risk in this case; they are entitled to an opportunity to protect those interests. They are indispensable parties to this action.³ The plaintiffs have not argued that joinder of Business

³ The plaintiffs argue that Business Improvement District No. 15 is not an indispensable party because it is “functionally inseparable from the City of Milwaukee itself.” This, of course, begs the question because the interrelationship between the city and Business Improvement District No. 15 is one of the issues underlying the plaintiffs' contention that the wage-rate laws apply. Moreover, a similar argument was made and rejected in the context of paternity actions in *State v. Jody A.E.*,

Improvement District No. 15 and Milwaukee Riverwalk District is not "feasible." Accordingly, we affirm the judgment dismissing this action, but direct that the dismissal be without prejudice. See *Heifetz v. Johnson*, 61 Wis.2d 111, 119, 211 N.W.2d 834, 838 (1973) (failure to join an indispensable party, if feasible, requires dismissal of the action "since the adjudication cannot proceed to judgment without him," although defect not jurisdictional) (citation omitted).

By the Court. – Judgment affirmed.

Publication in the official reports is not recommended.

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171 Wis.2d 327, 491 N.W.2d 136 (Ct. App. 1992), where we held that a mother was an indispensable party to a paternity action prosecuted by the state despite the state's putative representation of the mother's interests. *Id.*, 171 Wis.2d at 341–342, 491 N.W.2d at 141. Failure to join Business Improvement District No. 15 and Milwaukee Riverwalk District will either bind them to a judicial result without an opportunity for them to be heard, or, if they are not so bound, will invite further litigation. The plaintiffs do not contend that the Milwaukee Riverwalk District is not an indispensable party.