STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2012AP2067

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 61, AFL-CIO and JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMANN and RODNEY G. PASCH,

Defendants-Appellants.

On Appeal from the Decision and Final Order Dated September 14, 2012 in Dane County Circuit Court Case 11-CV-3774, The Honorable Juan B. Colas, Presiding

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BRIEF OF *AMICI CURIAE* WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION AND COMMUNITY INSURANCE CORPORATION IN SUPPORT OF MOTION FOR STAY

INTRODUCTION

The decision of the Dane County Circuit Court to deny Appellants' motion to stay the Circuit Court's decision and final order declaring various portions of Act 10 unconstitutional must be reversed. The decision was based on a flawed analysis of the factors to be considered in deciding whether to grant a stay and the

Circuit Court's failure to properly apply those factors constituted an erroneous exercise of discretion.

The *amici* herein are comprised of municipal employers throughout the State of Wisconsin who have been, and will continue to be, irreparably harmed by not only the Circuit Court's findings regarding the purported unconstitutionality of Act 10 ("Dane County decision") but the Circuit Court's baseless refusal to stay that decision. The reasoning the Circuit Court employed to deny the stay and the union Respondents' arguments in opposition to a stay of the decision, minimize and misstate the collective bargaining obligations of municipal employers under the Circuit Court's revisionist version of Act 10 and the impact of requiring municipal employers to bargain under the Circuit Court's new bargaining rules.

The freedoms resulting from Act 10's prohibition on collective bargaining with general municipal employees on any subject other than "total base wages" allowed municipal employers to make the fiscal and operational changes necessary to offset the reduced shared revenues and hard levy limits that accompanied Act 10. It is absurd to contend, as the Circuit Court and unions do, that requiring municipal employers to now engage in the lengthy, costly and burdensome process of collectively bargaining wages, hours and conditions of employment *before* a municipal employer may move forward with fiscal and operational changes will not have a detrimental impact on municipal employers. It most certainly will.

Contrary to the very purpose and dictates of Act 10, unions will have the ability to hinder municipal employers from making needed changes when and to

the extent that they are needed. Municipal employers will not be the only victims of the Circuit Court's rewrite of Act 10—the inability to make changes necessary to offset revenue cuts and revenue limits will result in a loss of jobs to employees and jeopardize the ability of local governments to provided needed services to the citizens they serve. The public interest, including general municipal employees, inevitably will be harmed if the Circuit Court's decision is not stayed.

All of the factors to be addressed in deciding whether or not to grant a stay compel reversal of the Circuit Court's refusal to grant a stay.[1] After thoughtful consideration, this Court should conclude that the Circuit Court's refusal to stay its decision constitutes an erroneous exercise of discretion.

ARGUMENT

A. This Court Should Put an End to the Chaos Created by the Dane County Decision.

This brief presents the real, not mythical, facts regarding the scope of bargaining under the Dane County decision and the adverse impacts to municipal employers resulting from it. The detriments, uncertainty and potentially devastating financial impact resulting from the decision are primarily, if not solely, because the version of Wis. Stat. § 111.70 left over after the Dane County decision resulted in a "law" that was neither drafted nor enacted by any legislature – it is a creation of a circuit court judge.

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[1]Appellants have accurately and completely briefed the factors delineated in *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995). The *amici* will not repeat those arguments but, rather, incorporate them as if fully set forth herein.

Act 10 was enacted to provide municipal employers with the ability to offset reductions in shared revenue and imposition of hard levy limits by prohibiting collective bargaining on any subject other than "total base wages." The Circuit Court's approach in imposing its own "line item veto" on Act 10 to require municipal employers to bargain, among other things, "wages" and potentially hours and conditions of employment, resulted in concocted legislation that the Act 10 legislature never contemplated and which no court has ever interpreted.

The confusion created by the new legislation, which is founded on a completely novel determination that Act 10 is unconstitutional because it unlawfully provides greater bargaining rights to non-represented employees than represented employees, is the very reason why in considering whether to grant a stay there is a presumption of constitutionality and likelihood of success on appeal. It is why this factor alone—likelihood of success on the merits—outweighs all others and justifies reversal of the Circuit Court's refusal to grant a stay. A circuit court judge should not be given the power to create chaos on a state-wide basis based on a fundamental misunderstanding that at-will employees have any bargaining rights, much less greater bargaining rights than represented general municipal employees.

The chaos is further complicated by the disingenuous and belittling approach taken by the Respondents regarding the impact of the decision on municipal employers. Respondents willfully ignore and, in some instances,

misstate the devastating impact of the decision on municipal employers. As evidenced by this brief and the accompanying appendix materials,[2] as well as the affidavits filed with the Circuit Court, the Dane County decision puts local government in an impossible position and *requires* them to expend scarce resources chasing down "what ifs" and defending spurious claims arising out of the decision.

This Court should put an end to the chaos and stay the decision. It is nonsensical to require municipal employers to bargain over subjects that will become prohibited if Act 10 is reinstated or allow them to enter into agreements which will be void once the Dane County decision is overturned. It makes even less sense to require municipal employers to expend thousands of dollars defending prohibited practice complaints and other litigation based on the Dane County decision.

B. Myths and Realities

The Circuit Court and Respondents go to great lengths to minimize the impact the Dane County decision has on municipal employers. Their position, however, ignores the realities of the collective bargaining process and catastrophic downstream costs that will be imposed on municipal employers in the absence of a

[2]The Appendix submitted with this Brief contains samples of union correspondence demanding that local governments engage in negotiations under the Dane County decision as well as a prohibited practice complaint filed with the WERC for a refusal to bargain based on the decision. The Appendix is but a small sample of the demands, threats and requests that local governments are receiving on an almost daily basis. The Court may take judicial notice of the complaints and correspondence. *See Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, 303 Wis. 2d 295, 336, 735 N.W.2d 448, 469; *Perkins v. State,* 61 Wis.2d 341, 346, 212 N.W.2d 141 (1973).

stay. Despite Respondents' efforts to convince this Court to the contrary, the public interest will be harmed if the Dane County decision is not stayed. Funds will be expended by municipal employers either bargaining or defending claims based on their refusal to bargain.

The following exposes the myths behind many of the statements and assumptions in the Circuit Court's decision and the Respondent's arguments.

MYTH #1: The Circuit Court decision requiring municipal employers to bargain mandatorily over "wages" and permissively on hours and conditions of employment does not impose any burden on municipal employers because it simply requires municipal employers to bargain in good faith until impasse. *Dane County Circuit Court Decision Denying Stay, p. 7; Respondents' Brief, pp. 31-33.*

REALTY #1: The Dane County decision effectively prevents municipal employers from making needed fiscal and operational changes.

A municipal employer's "cost of doing business" will rise significantly as a result of the Dane County decision. Under Act 10, municipal employers had flexibility to make necessary changes in areas such as health insurance, antiquated pay schedules and overtime rules and paid time off in order to address short term and long term operational and budgetary concerns. Employers could make these changes when and how they wanted, based upon need and consistent with constituent demands.

Under the "Act 10" drafted by the Circuit Court, municipal employers are precluded from making necessary changes in all of these areas unless and until they bargain the changes in "good faith" with unions. This bargaining process is neither simple nor quick. Prior to moving forward with changes, municipal

employers would be required to: (1) bargain in "good faith" regarding "wages" and any permissive subjects of bargaining; (2) participate in mediation under Wis. Stat. 111.70(4)(cm) upon the request of the union in the event "good faith" bargaining does not result in a resolution; (3) bargain until "impasse" which is no longer defined under Wis. Stat. § 111.70; and (4) arguably at some point following impasse, unilaterally implement changes.

Anyone remotely familiar with the bargaining process understands that the foregoing steps, even in the absence of interest arbitration, could take more than a year to accomplish and cost thousands of dollars in the bargaining process alone. These costs do not include inevitable costs and delays that will be incurred litigating issues such as good faith bargaining, the proper scope of the duty to bargain and the definitions of "wages" or "hours and conditions of employment" under the Circuit Court's new law.

Equally important, while municipal employers are waiting for the bargaining process to be completed and litigation to be resolved, municipal employers may be required to fund existing levels of benefits under a "dynamic status quo" (*i.e.*, the legally-mandated maintenance of prior collective bargaining agreement terms) which they cannot afford. An additional tier of cost will be incurred once, if ever, agreements over wages, hours and conditions of employment are reached. Under Act 10, employers were free to make fiscal and operational changes (other than to total base wages) as often as they pleased. Under the Dane County decision, however, this flexibility is gone. Municipal

employers are tied into any deal for at least one year and, more importantly, have no ability to fix or cure detrimental financial consequences of a bargain without union permission—the purported duty to bargain over "wages" is forever present.

The Circuit Court did not provide municipal employers with any corresponding funding or ability to increase tax revenues to offset the costs of the bargaining process. As a natural result of the additional bargaining requirements and the costs associated with them, municipal employers will be forced to take steps to either cut service levels or lay off employees until the required bargaining process necessary to make the changes can, if ever, be completed. The harm resulting to citizens, taxpayers and employees resulting from these burdens should be avoided through the issuance of a stay.

MYTH #2: The scope of the duty to bargain under Act 10 as revised by the Dane County Circuit Court is clear and will not result in extensive litigation. *Dane County Circuit Court Decision Denying Stay, p. 8; Respondents' Brief, pp. 31-33.*

REALITY #2: There is no precedent for determining the scope of a municipal employer's duty to bargain under the Dane County Circuit Court's draft of Act 10 and union demands to bargain reflect the uncertainty regarding the parties' obligation to bargain and the certainty of litigation over the duty to bargain.

Perhaps the most troubling aspect of the Circuit Court and Respondents' position is their eagerness to claim that the duty to bargain is clear under the Dane County decision. The Circuit Court and Respondents support their position regarding this assumed clarity based on the long history and precedent that was developed under previous versions of MERA.

The problem is that the decisions and practices of yesterday's MERA are of no precedential value. The Circuit Court did not repeal Act 10 as it was enacted into law in July of 2011. Rather, the Circuit Court simply exercised a form of "line item veto" of certain portions of the legislation to create a new version of Act 10. By the admission of the Circuit Court and Respondents, Act 10 remains largely intact.

No one, including the Circuit Court or Respondents, can credibly argue that precedent interpreting prior versions of MERA has any precedential value as it pertains to Act 10—Act 10 completely re-wrote the statute. The entire purpose of Act 10 was to free municipal employers from the constraints of collective bargaining with general municipal employees on aspects of "wages, hours and conditions of employment," not to reinstitute them. Precedent and practice from prior versions of MERA which broadly construed the obligation to bargain simply have no applicability or interpretive value. To the contrary, in order to reflect the intent of the legislature in enacting Act 10, any duty to bargain under judicial recreation of Act 10 must be interpreted to the narrowest extent possible. To construe the Circuit Court's statute any other way would deprive municipal employers, citizens and taxpayers of the benefits of Act 10 and deny the very purpose of the legislation.

The confusion over the scope of the Circuit Court's "new Act 10" is reflected in union demands. Since the Circuit Court issued its decision and order, unions, including those who have been decertified, have been making inconsistent

and conflicting demands on counties, municipalities and school districts to return to the bargaining table. Unions have demanded municipal employers reopen expired collective bargaining agreements which have been supplanted by the provisions of Act 10; have refused to honor or execute base wage bargaining agreements already ratified by the parties; have demanded that municipal employers restore all contractual provisions in place prior to Act 10 retroactively and make them whole for lost wages and benefits; and have demanded municipal employers cease efforts to subcontract work. Neither the Dane County decision nor Act 10 as revised by the Circuit Court judge support the breadth of these unreasonable demands, yet municipal employers will be forced to address and respond to them if a stay is not forthcoming.

The Respondents' claim that the Dane County decision and the uncertainty that follows it will not create litigation is ludicrous. The litigation has already started. On November 16, 2012 a local Teamsters unit filed a prohibited practice complaint against Bayfield County for failing to commence negotiations under the Dane County decision (even though the parties' pre-Act 10 collective bargaining agreement has not even expired). It is only a matter of time that litigation will follow claiming that municipal employers must reimburse union members for any benefits lost since Act 10's effective date and requesting courts or the WERC to enjoin employers from making any fiscal or operational changes which impact employees.

It makes no sense to allow the confusion regarding the Circuit Court's decision, or the litigation that will arise out of it, to continue. The costs are too great. The Circuit Court's refusal to recognize the harm to municipal employers, their employees, citizens and taxpayers alone requires reversal of the Court's decision to deny the stay.

MYTH #3: Since the decision did not restore binding arbitration, employers can impose a compensation plan and other conditions of employment if bargaining does not produce an agreement. *Dane County Circuit Court Decision Denying Stay, p. 7; Respondents' Brief, pp.*

REALITY #3: The authority of a municipal employer to unilaterally implement its last and best final offer upon impasse was repealed by Act 10; any right that does exist is limited and illusory at best.

The Circuit Court's and Respondents' claim that a municipal employer will be able to unilaterally implement its last and best final offer upon impasse is unsupported. Act 10 specifically repealed § 111.70(4)(cm) 5., 6., 7., 7g., 7r., and 8 which contained the mandatory interest arbitration procedures for general municipal employees to be used when negotiations became deadlocked, *i.e.*, reached an impasse. Thus, WERC no longer has the ability to certify that the parties have reached impasse, nor does WERC have any recognized ability to unilaterally implement the municipal employer's last offer upon impasse.

Even if unilateral implementation is available, it is not the "magic pill" that the Circuit Court or Respondents claim it to be. Under the rules which existed prior to 1978 (when interest arbitration procedures were first enacted in MERA), the employer had the right to unilaterally implement its last best offer upon

impasse. Even when impasse was reached, however, the municipal employer could not unilaterally implement and "walk away" from the bargaining table. Instead, the duty was only temporarily suspended and could return. Changed conditions or circumstances that renew the possibility of fruitful bargaining terminated the suspension of the duty to bargain.

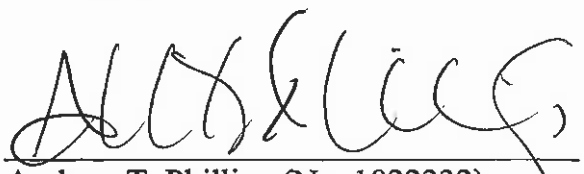
The impasse theory put forth by the Circuit Court and the Respondents offers no meaningful relief from the burdens imposed by the Circuit Court's decision. The theory puts municipal employers in no better position to implement needed fiscal and operational changes and will not prevent the harm that will occur to the public interest as a result of the Dane County decision. The Circuit Court's reliance on this theory as a basis for refusing the stay constituted an erroneous exercise of discretion.

CONCLUSION

Based upon the argument set forth above, together with the materials in the Record and Appendix submitted herewith, the *amici* respectfully request that the Court stay the Circuit Court's decision in recognition of the public and local government's interests in the stay.

Respectfully submitted this 29th day of November, 2012.

WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION and COMMUNITY INSURANCE CORPORATION

By: 

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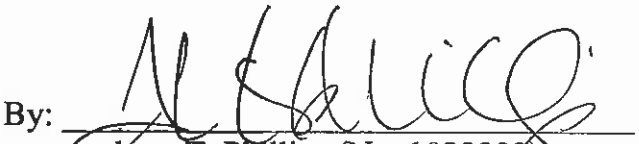
CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,999 words. This certification is made in reliance on the word count feature of the word processing system used to prepare this brief.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 29th day of November, 2012.

WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION and COMMUNITY INSURANCE CORPORATION

By: 

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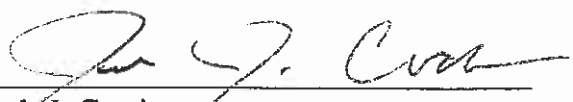
CERTIFICATE OF SERVICE AND MAILING

I, Jacob J. Curtis, certify that on November 29, 2012, I hand-delivered to the Clerk of the Court of Appeals ten (10) copies of the Brief of *Amici Curiae* Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation in the case of *Madison Teachers, Inc., et al. v. Walker, et al.*, Appeal No. 2012AP2067, and caused to be mailed, *via* First-Class U.S. Mail postage pre-paid, three (3) copies to all counsel of record.



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