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DEPARTMENT OF JUSTICE

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January 15, 2013

Ms. Diane M. Fremgen
Clerk of Court of Appeals
110 E. Main Street, Ste 215
Madison, WI 53703

Re: ***Madison Teachers, Inc., et al v. Walker, et al***
Court of Appeals No: 12AP2067

Dear Ms. Fremgen:

Enclosed please find for filing the original and four (4) copies of the Supplemental Memorandum of Defendants-Appellants in the above-mentioned case. Copies are mailed on this date to all other counsels on record.

Sincerely,

Steven C. Kilpatrick
Assistant Attorney General

SCK:mb
Enclosures
c w/enc.: Attorney Lester A. Pines
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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case 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.

SUPPLEMENTAL MEMORANDUM OF DEFENDANTS-APPELLANTS

INTRODUCTION

On December 28, 2012, the Court of Appeals entered an order requiring the parties to file supplemental memoranda addressing six questions. Defendants-Appellants (hereafter "Defendants") respectfully

submit this initial supplemental memorandum in response to the court's order.

ARGUMENT

(1) THE CIRCUIT COURT NEVER INDICATED THAT IT WAS ENJOINING THE WERC IN ANY RESPECT.

Defendants assert that the circuit court did not indicate, either orally or in writing, that it was enjoining the Wisconsin Employment Relations Commission (WERC) in any respect.[1]

In its Decision on the merits of the case, the circuit court noted that the amended complaint sought both a declaratory judgment **and** injunctive relief.[2] Decision and Order, dated September 14, 2012, p. 2 (R. 53.) In its Order, however, the circuit court only declared that certain statutory provisions were unconstitutional (and null and void). *Id.* at 27. The circuit

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[1] Although the first question of the Court of Appeals refers to enjoining the Wisconsin Employment Relations Commission (WERC), the WERC as an agency is not a party to this action. Rather, the three individual WERC commissioners were named individually as defendants in their official capacities. Because the Court of Appeals refers to the WERC commissioners or employees in its Order, Defendants understand the Court to be referring to these state officers in question one.

[2] Wisconsin Stat. § 806.04(1) provides that "[c]ourts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is sought or claimed." Wisconsin Stat. § 806.04(6) provides that "[f]urther relief based on a declaratory judgment or decree may be granted when necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. . . ."

court did not enjoin any defendants. This language shows that the circuit court had a clear opportunity to grant the injunctive relief sought by Plaintiffs, but did not do so.

Similarly, in a subsequent "Amendment" clarifying its Decision and Order, the circuit court described it as only finding statutes unconstitutional, it did not describe it as enjoining any defendants. Amendment Clarifying September 14, 2012 Decision and Order, dated October 10, 2012, p. 1 (Affidavit of Steven C. Kilpatrick, dated and filed in support of Defendants' Motion for Stay Pending Appeal of Defendants-Appellants (hereafter "Kilpatrick Aff."), Ex. 1). Furthermore, in the Amendment, the circuit court declared that an additional statutory provision was unconstitutional and void, but again, did not enjoin the defendant WERC Commissioners in any respect. Finally, in its decision denying Defendants' Motion for Stay, the circuit court once again described its original Decision and Order as only ruling that certain state statutes were unconstitutional, not enjoining any defendants. Decision and Order Denying Motion for Stay Pending Appeal, dated October 22, 2012, p. 1 (Kilpatrick Aff., Ex. 2).

In sum, the circuit court did not indicate that was enjoining the WERC in any respect.

(2) INJUNCTIVE RELIEF CANNOT BE DEEMED IMPLICIT IN THE CIRCUIT COURT'S ORDER BASED UPON ANY ARGUMENTS OR DISCUSSIONS BEFORE THE CIRCUIT COURT ABOUT THE REMEDY BEING SOUGHT.

Injunctive relief cannot be deemed implicit in the circuit court's order based upon any arguments or discussions before the circuit court about the remedy being sought. The circuit court's order was based on written submissions alone and there were no oral arguments. Plaintiffs did not file any separate motions for a temporary restraining order or preliminary injunction, and thus, did not explicitly argue for an injunction before the circuit court.[3] Moreover, as explained directly above, in its decision on the merits the circuit court expressly stated its understanding that Plaintiffs were seeking both declaratory and injunctive relief, but the court's order only granted declaratory relief. Therefore, if anything, the

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[3] Plaintiffs represented to the circuit court that they sought an order enjoining Defendants. several times. *See e.g.* Am. Compl., p. 26 (R. 3.); Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 38 (R. 19.); Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Summary Judgment and Response Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, p. 63 (R. 44.). The circuit court even acknowledged Plaintiffs' decision not to seek a preliminary injunction. *See* Decision and Order Denying Motion for Stay Pending Appeal, p. 5 (Kilpatrick Aff., Ex. 2).

circuit court's silence was an implicit *denial* of Plaintiffs' argument for injunctive relief. Finally, Plaintiffs' Motion to Amend the Judgment did not fault the circuit court for failing to grant its request for injunctive relief, nor did any of Plaintiffs' briefs opposing Defendants' Motion for Stay make any reference to any injunction.

(3) IT IS NOT POSSIBLE TO CONCLUDE, BASED ON THE RECORD, THAT THE CIRCUIT COURT'S RULING IN THIS CASE WOULD BE BINDING ON NON-PARTY UNIONS OR NON-PARTY MUNICIPAL EMPLOYERS UNDER THE DOCTRINE OF ISSUE PRECLUSION.

Under the doctrine of issue preclusion, a "final judgment" bars the re-litigation of a factual or legal issue that actually was litigated and decided in the earlier action. *See Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). It can act as a bar to subsequent litigation if the question of law that is sought to be precluded was actually litigated in the previous action and was necessary to the judgment. *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). At base, whether to apply issue preclusion in any case is left to the discretion of the trial court. *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶ 15, 281 Wis. 2d 448, 699 N.W.2d 54.

Moreover, the application of issue preclusion to non-parties is not a routine matter and can result in a violation of the non-parties' due process rights. In order to protect the due process rights of non-parties courts must undertake a two-step analysis. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 224-25, 594 N.W.2d 370 (1999). First, the court must determine whether the party against whom issue preclusion is asserted is in privity or has sufficient identity of interest with a party to the prior proceeding. *Id.* at 224. If there is no privity the analysis ends and issue preclusion cannot be applied. *Id.* If the analysis survives the first step, the court must then apply its discretion to determine whether applying issue preclusion in a particular case comports with the notions of fundamental fairness. *Id.* at 225.

1. Circuit courts will most likely conclude that, because this appeal is pending, there is no a final order.

The pendency of this appeal deprives the judgment of finality. Jurisdictions differ as to when a judgment becomes "final" for preclusion purposes. Some hold a judgment final upon entry, others when the time for an appeal has expired and no appeal has been taken. *See* 47 Am. Jur. 2d. Judgments §§ 521-529 (2006). In the latter jurisdictions, if an appeal is pending from a judgment, the judgment is not final for preclusion purposes. *See id.* at § 528.

No Wisconsin Court has expressly addressed this issue. However, at least one court has described a final order for purposes of the related doctrine of claim preclusion as one that "was not appealed and reversed." *See Levin v. Board of Regents of University System*, 2003 WI App 181, ¶¶ 12 & 18, 266 Wis. 2d 481, 490, 668 N.W.2d 779. Moreover, given the waste of judicial and governmental resources (future potential litigants are likely to be municipalities), it simply makes no sense to consider the Circuit Court's judgment final while this appeal is pending. At the very least, any reasonable circuit court would postpone giving preclusive effect to the circuit court's order until the appeal from that order is concluded. *See* 47 Am. Jur. 2d. Judgments § 528, Comment (2006).

This is also consistent with the factors that circuit courts consider when applying issue preclusion. *See Michelle T, supra.* One factor considered is whether the non-parties "could have obtained review of the judgment." *Michelle T.*, 173 Wis. 2d at 688-89 (citing Restatement (Second) of Judgments § 28 (1980)). This factor assumes that the deadline for appeal has either expired or that an appeal has run its course.

2. Privity can only be determined on a case by case basis.

While the issue of privity is a question of law, it is not appropriate to opine as to whether any or all potential future litigants are in privity with a current party. The significant nature of the rights of the non-parties at issue prevents it:

> The due process clauses of the United States and Wisconsin Constitutions prohibit a court from granting preclusive effect to a prior determination of an issue without the precluded party having had the opportunity to contest that issue. If the litigant is not so closely aligned with a party in the prior proceeding as to represent the same legal interest or the litigant's interests cannot be deemed to have been litigated in the prior proceeding, the litigant's due process rights would, as a matter of law, be violated were a court to apply issue preclusion.

Paige K.B., 226 Wis. 2d at 227. Accordingly, the question of privity must be resolved by the circuit court based on the facts of that case, (e.g. who the future litigants are and what their interests are).

Moreover, it is most likely that the potential future litigants are not in privity with these parties. In *Paige K.B.* the Wisconsin Supreme Court reviewed prior Wisconsin and U.S. Supreme Court cases and concluded that privity can only be found when the non-party "is so closely aligned that they represent the same legal interest" as in cases where the non-party "prosecutes or defends a suit in the name of another to establish and protect his own right, or … assists in the prosecution or defense of an action in aid

of some interest of his own [and] has had an opportunity to litigate his or her interests." *Id.* at 226-27 (internal quotes and citations omitted).

Here, there is nothing in the record to support any conclusion that non-party municipalities are so closely aligned with the current defendants that their due process rights can be brushed aside wholesale by this court. Indeed, as the Court is aware the City of Milwaukee has attempted to intervene to oppose the position of the Defendants and the City of Madison has sought amicus status to do the same. Nor is there any way based on the current record to conclude that all non-party unions share the interests of the Plaintiffs.

3. Moreover, circuit courts are vested with discretion when applying issue preclusion.

Even if there were a final judgment and there were privity between the potential future litigants and the current parties, circuit courts are granted discretion in whether to apply issue preclusion. *Paige K.B.*, 226 Wis. 2d at 225. That discretion, while bounded by the applicable legal standard, is very broad. *Id.* at 233 ("A circuit court properly exercises its discretion if it examines the relevant facts, applies the proper standard of law and, using a rational process, reaches a conclusion that a reasonable judge would reach.").

In applying their discretion, circuit courts are called to apply concepts of equity and fundamental fairness to determine if it is just to deprive litigants of the right to argue their case. *Mrozek*, 2005 WI 73, ¶ 17 ("the circuit court must . . . conduct a fairness analysis to determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand"). Here, circuit courts are likely to refuse to apply issue preclusion while the appeal is pending because it could yield a result that is inconsistent with the ultimate ruling of this Court or the Supreme Court. That will necessitate additional litigation of the issue, either on a motion for reconsideration or in an appeal from that case. This flies in the face of the very purposes of the doctrine, which is to conserve judicial resources and prevent the re-litigation of a legal issue that was litigated and actually decided in the earlier action. *See Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

(4) IF ONLY THE PARTIES ARE BOUND BY THE ORDER ON APPEAL, AND IF A STAY IS NOT ISSUED, THE PARTICIPATION OF THE WERC COMMISSIONERS IN THIS LAWSUIT HAS NO EFFECT ON THE CHALLENGED ORDER'S IMPACT ON FUTURE POTENTIAL OR ACTUAL CONTRACT NEGOTIATIONS BETWEEN MUNICIPAL EMPLOYERS AND UNIONS WHO ARE NOT PARTIES TO THIS ACTION.

If only the parties are bound by the circuit court's order on appeal, and if a stay is not issued, the participation of the WERC commissioners in this lawsuit will have no effect on the order's impact on potential future or actual contract negotiations between non-party municipal employers and unions.

Contract negotiations between such non-parties will be governed by the Municipal Employment Relations Act (MERA), Wis. Stat. §§ 111.70 – 111.77, as amended by 2011 Wisconsin Acts 10 and 32. Although it might be argued that the WERC could not adjudicate prohibited labor practices complaints or petitions for declaratory rulings arising from such contract negotiations, *see* Wis. Stat. §§ 111.07(1) & 111.70(4), in a manner inconsistent with the circuit court's decision and order in this case, if the order is binding on the individual WERC commissioners, an argument can also be made that the WERC commissioners could not be bound by the

circuit court's order when exercising their quasi-judicial powers in other cases (especially when the circuit court order at issue contains no injunction). *See State v. Lindsey*, 203 Wis. 2d 423, 440, 554 N.W.2d 215 (Ct. App. 1996) ("Wisconsin's separation of powers principle prohibits a substantial encroachment by one branch of government on a function that has been delegated to another branch."); *Layton Sch. of Art & Design v. Wisconsin Employment Relations Comm'n*, 82 Wis. 2d 324, 348, 262 N.W.2d 218 (1978) (delegation of quasi-judicial authority by legislature to an administrative agency is proper); *Wisconsin Dept. of Revenue v. Hogan*, 198 Wis. 2d 792, 816, 543 N.W.2d 825 (Ct. App. 1995) (legislature creates administrative agencies as part of executive branch of government).

In any event, because the state's circuit courts have concurrent jurisdiction with the WERC to adjudicate prohibited practice complaints and to issue declaratory rulings or declaratory judgments, the non-party municipal employers and unions would have an alternative forum to resolve such issues, without resort to the WERC.

Therefore, if only the parties are bound by the circuit court's order, and a stay is not issued, municipal employers and unions would be free to

take their complaints concerning contract negotiations to various circuit courts throughout the state for adjudication. Consequently, there would be no effect of the participation of the WERC commissioners in this lawsuit on future potential or actual contract negotiations.

(5) IT IS NOT POSSIBLE TO CONCLUDE, BASED ON THE RECORD, THAT THE CIRCUIT COURT'S RULING IN THIS CASE WOULD BE BINDING ON NON-PARTY UNIONS OR NON-PARTY MUNICIPAL EMPLOYERS UNDER A THEORY OTHER THAN ISSUE PRECLUSION.

Defendants assert that it is not possible to conclude, based on the record, that the circuit court's ruling in this case would be binding on non-party unions or non-party municipal employees under any theory.

Circuit court decisions are not binding precedent or authority. *See Brandt v. LIRC*, 160 Wis. 2d 353, 365, 466 N.W.2d 673 (Ct. App. 1991); *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993) *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995). "[A]lthough circuit-court opinions may be persuasive because of their reasoning, they are *never* precedential." *Raasch v. City of Milwaukee*, 2008 WI App 54, 310 Wis. 2d 230, 240, 750 N.W.2d 492, 497 (emphasis in original) (internal quotations omitted); *Kuhn*, 181 Wis. 2d at 468. *Cf. Gentilli v. Board of Police and Fire Commissioners*, 2004 WI 60, ¶ 38, 272 Wis. 2d 1, 19, 680 N.W.2d 335

("[g]iven the lack of precedential value of an unpublished circuit court decision . . . [w]ithout appellate review and without published appellate decisions that are precedential in all circuit and appellate courts, the legislative policy of 'uniform regulation of police and fire departments' could not be achieved").

Circuit court decisions are not "published" either. Generally, therefore, the public, legal practitioners, and even circuit courts are unaware of other circuit court decisions. *See Brandt*, 160 Wis. 2d at 364-65, 466 N.W.2d 673 ("Court of appeals decisions, unlike circuit court decisions, are 'published' by various reporter services, and hence the bar does have access to them. The same is not true of circuit court opinions.").

Plaintiffs have argued that the circuit court's order has binding, statewide effect because: (1) circuit courts have subject matter jurisdiction and competence to decide constitutional issues; (2) Wisconsin statutes have statewide effect; and (3) because Defendants are state officials who are responsible for enforcing and implementing statewide the statutory provisions that were declared unconstitutional. As the Court of Appeals itself recognized, however, in its order requiring supplemental memoranda, the mere uncontested propositions that circuit courts can declare statutes

unconstitutional, or that statutes have statewide effect, or that WERC Commissioners are state officials who administer MERA statewide, does not establish that *a circuit court* decision and order declaring statutes unconstitutional has any binding effect on non-parties in other controversies.

Moreover, as the Court of Appeals noted, where the WERC commissioners appeal from a circuit court order which declares certain portions of MERA unconstitutional but which does not enjoin the WERC commissioners in any way, the WERC is not precluded from exercising its quasi-judicial function to interpret and apply MERA as if it were constitutional, or from litigating the constitutional issues in other circuit courts with different parties.

Finally, as noted above, the state's circuit courts have concurrent jurisdiction with the WERC to adjudicate prohibited labor practices complaints and to issue declaratory rulings or declaratory judgments, and the circuit court's order in this case would not bar another circuit court from addressing the same constitutional issues in actions involving a municipal employer and a union that represents its general municipal employees. Certainly, as the Court of Appeals explained in its order, *see*

Order, December 28, 2012, p. 4, Plaintiffs' logic results in the first circuit court in the State of Wisconsin to declare whether a statute is constitutional being superior to all other circuit courts, and Defendants submit that such a result has no legal authority. Indeed, case law holds that only published decisions of the Court of Appeals are binding on other districts of the Court of Appeals, the circuit courts, and administrative agencies. *See Cook v. Cook,* 208 Wis. 2d 166, 560 N.W.2d 246 (1997); *In re Court of Appeals of Wis.,* 82 Wis. 2d 369, 371, 263 N.W.2d 149 (1978). Plaintiffs' logic improperly elevates a circuit court to equal status as an appellate court. That is not the law of Wisconsin.

Accordingly, it is not possible to conclude that the circuit court's decision or order in this case would be binding on non-party unions or non-party municipal employers under any theory.

(6)(A) IF THE ORDER ON APPEAL HAS STATEWIDE EFFECT AND BINDS ALL CIRCUIT COURTS IN ACTIONS INVOLVING MUNICIPAL UNIONS AND EMPLOYERS, AND IF A STAY IS ORDERED BUT THE ORDER EVENTUALLY IS UPHELD ON APPEAL, THERE IS LIKELY NO *LEGAL* REASON WHY UNIONS COULD NOT BARGAIN TO OBTAIN BENEFITS AND WAGES THROUGH RETROACTIVE APPLICATION OF THE LAW, ABSENT THE UNCONSTITUTIONAL PROVISIONS, FOR TIME PERIODS DURING WHICH THE UNCONSTITUTIONAL PROVISIONS WERE IN FORCE.

Assuming that the circuit court's order has statewide effect and binds all circuit courts in actions involving municipal unions and employers, and further assuming that the order is stayed but is eventually upheld on appeal, there is likely no *legal* reason why municipal employers and unions (acting as the municipal employees' exclusive bargaining agents) could not agree that general municipal employees would receive wages and benefits retroactively which exceed those permitted by the provisions of MERA (as amended by 2011 Wisconsin Acts 10 and 32) which are determined to be unconstitutional.

(6)(B) IF THE ORDER ON APPEAL HAS STATEWIDE EFFECT AND BINDS ALL CIRCUIT COURTS IN ACTIONS INVOLVING MUNICIPAL UNIONS AND EMPLOYERS, IF MUNICIPALITIES AND UNIONS ENTER INTO AGREEMENTS THAT PROVIDE BENEFITS AND WAGES WHICH EXCEED THOSE PERMITTED UNDER PORTIONS OF MERA THAT THE CIRCUIT COURT DECLARED UNCONSTITUTIONAL, AND IF A STAY IS NOT ORDERED BUT THE ORDER EVENTUALLY IS REVERSED ON APPEAL, SOME MUNICIPALITIES MAY BE ABLE TO HOLD EMPLOYEES LIABLE FOR AND RECOUP SUCH BENEFITS AND WAGES.

Assuming that the circuit court's order has statewide effect and binds all circuit courts in actions involving municipal unions and employers, assuming that the order is not stayed but is eventually reversed on appeal, and further assuming that municipal employers and unions enter into agreements that provide wages and benefits which exceed those permitted by the provisions of MERA (as amended by 2011 Wisconsin Acts 10 and 32), Defendants can conceive of theories under which municipalities may attempt to recover excess wages and benefits. However, the ability of any particular municipality to succeed on such theories is unknown and will probably differ from municipality to municipality.

Whether the municipal employers could recover from their general municipal employees the portion of wages and benefits that exceed the statutory limits will most likely depend on the terms of their agreement. If the agreement expressly permits the municipal employer to recover the portion of wages and benefits that exceed the statutory limits, once the statutory provisions are finally determined to be constitutional by the appellate courts, the employer arguably could recover the excess wages and benefits.

If the agreement does not expressly permit recovery of such wages and benefits, however, even though a labor contract term by which parties agree to violate a law is void, *see WERC v. Teamsters Local No. 563*, 75 Wis. 2d 602, 612, 250 N.W.2d 696 (1977), the municipal employer would have to resort to non-contractual, judicial remedies seeking recovery on a theory that even though the excess wages and benefits were paid consistent with the labor agreement, they should not have been paid because they exceed what is statutorily permitted by MERA (as amended by 2011 Wisconsin Acts 10 and 32). It is not at all clear that municipal employers could legally recover the excess wages and benefits based on that theory.

Moreover, even if the municipal employers could find a successful theory, actual recovery may be difficult. Employers may be loath to undertake actual collection actions against their employees for reasons of workplace morale. Additionally, some employees may no longer be employed by the municipal employer at the time of the Court of Appeals decision on the merits, and prosecuting claims for back wages against former employees may prove cost prohibitive. And, any attempt to deduct amounts determined due and owing from the future paychecks of current employees could result in a wage claim under Wis. Stat. § 109.03(1). In order to avoid such a claim the employer would likely have to go through the process of getting each employee to agree to a deduction or formally garnishing the employee's wages pursuant to Wis. Stat. Ch. 812. It is not hard to imagine that the parties would heatedly contest the monetary value of the excess benefits.

CONCLUSION

Defendants-Appellants respectfully request that the court conclude that the circuit court's order is not binding on any non-party unions or non-party municipal employers, but that the court also stay the order because of statewide confusion resulting from the widely-held misconception that the

order invalidated portions of MERA (as affected by 2011 Wisconsin Acts 10 and 32) with respect to all general municipal employees and municipal employers.

Dated this 15th day of January 2013.

Respectfully submitted,

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