STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

David Blaska,

Plaintiff,

v.

Case No. 14-CV-2578

Madison Metropolitan School District Board of Education,
Madison Metropolitan School District, and
Madison Teachers Inc.

Defendants.

REPLY OF PLAINTIFF DAVID BLASKA IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND AN INJUNCTION

INTRODUCTION

The Defendant Madison Metropolitan School Board (the "Board") and the Madison Metropolitan School District (the "District")(collectively "MMSD") spend a great deal of time on what they are not arguing. They are not, we are told, attempting to give the now reversed decision of the circuit court in *Madison Teachers* precedential value. They are not, they say, using it to bind persons who were not parties to the case. They are not, finally, trying to extend the erroneous decision past the date of its reversal. They are not using an erroneous interpretation of our state's Constitution to delay their compliance with the law by five years. There is, they say, nothing to see here.

But they are all of these things. The Circuit Court in *Madison Teachers* wrongly declared Act 10 to be unconstitutional. It never held – because it was not asked – that MMSD must or even may enter into a collective bargaining agreement contrary to its terms. It never held – because it could not – that nonparties – such as school districts like MMSD or taxpayers like Blaska – were not free to assert its constitutionality and to invoke its terms. The only way that

either could happen would be if the Circuit Court decisions had precedential value or issue preclusive effect. Yet the Defendants do not make either argument.

The Defendants contend that there is some right to rely on a declaratory judgment notwithstanding that it has been appealed, even if it forecloses the rights of nonparties. MMSD and MTI do not merely say that they were entitled to rely on the Circuit Court's decision such that they cannot be penalized for actions taken prior to its reversal (because Blaska does not seek such relief, that issue is not before the court.) Rather, they say that a decision that has now been reversed entitles them to continue to implement the 2014-2015 collective bargaining agreements and to go ahead and implement the wholly executory 2015-2016 agreements. They need not take any steps to conform to what we now know to be the applicable law. By bringing a case that it ultimately lost, MTI now claims – and MMSD agrees – that a circuit court has the power to delay the application of the law for almost two years after its decision has been reversed – and five years after the legislature's effective date. They say it can excuse continuing to administer the prospective terms of a noncompliant contract after the date of reversal and even to begin a noncompliant contract almost a year after reversal.

In making this extraordinary claim, the Defendants rely on one old case, *Slabosheske v. Chikowske*, 273 Wis. 144, 77 N.W. 2d 498 (1956).[1] But *Slabosheske* is a very different case. It

[1] The Plaintiff addressed *Slabosheske*'s supposed "progeny" (actually two cases) at pp. 12-13 of his response brief. Neither case helps the Defendants. In addition to our earlier arguments, it should be noted that *Kett v. Community Credit Plan*, 222 Wis.2d 117, 586 N.W.2d 68 (App. 1998) involved an attempt by a lender to rely on a vacated default judgment of replevin to avoid liability under the Wisconsin consumer protection laws. It could not do so because the judgment was void and not voidable. But even if it were merely voidable, no one supposes that the lender could have kept the consumer's vehicle or the proceeds of sale in reliance on a now vacated judgment. *Virnich v. Vorwald*, 664 F.3d 206 (7th Cir. 2011) held that a plaintiff's claim was barred by issue preclusion. Defendants do not urge issue preclusion – offensive collateral estoppel – here and could not. While the Defendants have not attempted to develop an argument for issue or claim preclusion and it is not necessary to develop a response to an argument that has not been made. But a claim that Blaska is somehow barred from "relitigating" the constitutionality of Act 10 is incoherent. It would, at the very least, founder on the absence of privity, inconsistent decisions on the same issue, lack of finality and reversal on appeal and the importance of

involved an attempt by a school district to borrow money and not pay it back. This would have unjustly enriched the district and deprived its lender not only of a prospective contractual arrangement, but a vested right to payment. Moreover, the party seeking to avoid the impact of a reversed declaratory judgment was the very party who was subject to it – who in fact had benefited from it and now was seeking to use it as a sword to foreclose the rights of others. Indeed, the subsequent decision of the Wisconsin Supreme Court in *Newhouse v. Citizens Security Mutual Insurance*, 176 Wis. 2d 824, 501 N.W. 2d 1 (1993), makes clear that a reversed decision of a Circuit Court cannot foreclose anyone's rights once it has been reversed. It makes clear that sometimes you rely on a decision subject to appeal at your own risk. Finally, *Slabosheske* protected good faith reliance by the district's lender. Here, MMSD and MTI, knowing that every other court to have considered Act 10's constitutionality had upheld it, took the extraordinary step of entering into a CBA that would not go into effect for over a year in a desperate attempt to beat the clock and delay compliance with the law.

As for standing, Defendants assert that administration of impermissible collective bargaining terms will not involve the expenditure of tax dollars, but that is preposterous. Act 10 says that a CBA may not include salary increases other than limited increases in base pay. It cannot provide for employer payments for health insurance premiums or pension payments beyond a certain amount. It cannot govern terms and conditions of employment, such as work rules, disciplinary processes, layoffs and discharges. The CBAs at issue here do all of these things – no one disputes that – and it will certainly cost tax money to implement them.

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giving effect to duly enacted and constitutional litigation. *See generally Kruckenberg v. Harvey*, 2005 WI 43, 279 Wis.2d 520, 694 N.W.2d 879, *Michelle T. by Sumpter v. Crozier*, 173 Wis.2d 681, 495 N.W.2d 327 (1993)

In addition, the Board and the District assert that the Plaintiff is not entitled to summary judgment because he has not established that he is a taxpayer in the Madison School District. However, that is little more than a distraction. The Defendants did not deny Mr. Blaska's taxpayer status in their answers and did not submit any evidence on the point. The Board and the District sought discovery on the issue and in response Mr. Blaska produced copies of his property tax bills to the Defendants back in December 2014 (Blaska Aff. ¶¶1-2, Exs.1-4.)[2]

ARGUMENT

I. ACT 10 IS, AND ALWAYS HAS BEEN APPLICABLE TO THE BOARD AND THE DISTRICT.

The Board and the District contend in their brief that the Circuit Court decision in *Madison Teachers* applied equally to the Board and the District as it did to MTI. According to their argument, they were entitled to rely on that decision (even though there was contrary authority and even though the decision was on appeal) because they were dealing with MTI which was a party to that case. But they do not explain why. They do not claim to be in privity with MTI and could not. Nor could they claim to be in privity with the state defendants in *Madison Teachers*. As noted below, the Supreme Court itself made clear that school districts were not bound by or entitled to rely on the Circuit Court's decision in *Madison Teachers.*

A. Helgeland has no Effect on this Dispute.

The Board and the District make a feint at such an argument by invoking *Helgeland v. Wisconsin*, 2008 WI 9, ¶140, 307 Wis. 2d 1, 745 N.W. 2d 1. The argument is a non-sequitur. That case held only that when challenging the enforcement of a statute or ordinance the declaratory judgment statute does not require that every person whose interests are affected be joined in the action. But they do not explain how that principle applies to this case. The fact that

[2] In addition, Mr. Blaska submits his affidavit herewith affirming that he is a taxpayer in the Madison School District. The Plaintiff submits the Blaska affidavit as further evidence in support of its original PPOF ¶2.

Mr. Blaska was not an indispensable party in the *Madison Teachers* case does not mean that he is bound by the declaratory judgment in that case.

Nor is it possible to imagine what the argument that MMSD did not make could possibly be. The Plaintiff agrees that he did not need to be named in the *Madison Teachers* case for the judgment in that case to be effective against the parties to that case, but that does not decide anything in this case. Assume that Smith and Jones separately sue the State of Wisconsin to preclude the enforcement of Act 23 (the Voter ID statute). The state counterclaims seeking a declaration that the law is constitutional. Smith loses and appeals. Jones is not bound by the declaratory judgment in Smith's claim. Because it was not necessary to join Jones does not make him a privy of Smith.

Let's use another example. Assume that a same-sex couple had sued the state of Wisconsin in the circuit court for Outagamie County seeking a declaration that Wisconsin law limiting marriage to the union of one man and one woman was unconstitutional. At the same time, another brought a similar claim against the Milwaukee County clerk. *Helgeland* means that there was no need to join the Milwaukee County clerk in Outagamie County. It does not mean that a win in the Outagamie circuit court would have issue preclusive effect on the Milwaukee County clerk.

But hypotheticals are unnecessary. This is, in fact, what happened with respect to Act 10. Several different parties brought suits to challenge Act 10. Judge Colas issued a declaratory judgment but not an injunction. But, Judge Markson came to the opposite conclusion in *Wis. Law Enforcement Assoc. v. Walker*, Case No. 12-CV-4474. Under *Helgeland*, the plaintiff in the *Wis. Law Enforcement* case did not need to be added as a party to the *Madison Teachers* case,

but neither it nor the defendant, were bound by the decision in the *Madison Teachers* case. The same is true for the Board, the District, and Mr. Blaska.

The state Supreme Court confirmed this in *Madison Teachers* itself. When Judge Colas held the defendants in contempt for applying Act 10 to non-parties, the Supreme Court vacated the ruling. It held that the Circuit Court's declaratory judgment decision did not apply to non-parties. *Madison Teachers, Inc. v. Walker*, 2012AP2067, Nov. 21, 2013 Order, ¶20 (APUF ¶ 35) The Supreme Court said that because there was only a declaration and not an injunction that WERC (which was a party to the case) was free to apply Act 10 to others. So if MTI had threatened the Board and the District with litigation for not following the declaration of Judge Colas, the Board and the District would have been free to argue that Act 10 was constitutional. Had Blaska or some other Dane County taxpayer sought to block MTI and MMSD from entering into a non-Act 10 compliant contract, they would have been and are now free to do so. In the absence of an injunction or a final disposition by the Wisconsin Supreme Court, no one else's rights could be foreclosed.

In a similar case from Kenosha County, Judge Bastianelli considered this precise issue at length, including considering the same cases relied upon by the Board and the District herein, and firmly disagreed with the argument advanced by the Board and the District. *Lacroix v. Kenosha Unified School District*, Case No. 13-CV-1899, March 15, 2015 Decision and Order at 6-8; Packard Aff. Ex. 9. Of course, this Court is free to disregard Judge Bastianelli's decision, but that is the point. Except for the parties to the case, no one is bound by a circuit court decision. Moreover, the parties to that case cannot use it offensively as a sword against non-parties. That would make the decision precedent, which it was not. It would require the use of offensive collateral estoppel which even the defendants do not argue would be applicable here.

B. Slabosheske Does Not Stand for the Proposition Asserted by the Board and the District.

As noted above, *Slabosheske v. Chikowske* does not do the work that Defendants want it to do. If it truly was "established precedent" that a declaratory judgment justifies continuing to administer an unlawful contract even after it has been reversed or, as here, to implement a wholly *executory* contract – one that has not even begun - there would be some case somewhere that makes this clear. As we noted before, a contract that is contrary to state law is void. (Plaintiff's Memorandum Supporting Motion for Summary Judgment, p.13.) Even if it may be excused during the pendency of a reversed judgment, that could do no more than make it voidable. *Slabosheske* might be instructive here if it held that an erroneous circuit court decision can allow parties to continue to behave unlawfully after it has been reversed. *Slabosheske* might help the defendants if it had held not simply that money already borrowed had to be repaid by the successor district, but that an agreement with the now dissolved district to lend money in the future must be enforced. It might help if *Slabosheske* had been used to foreclose the rights of a nonparty. But *Slabosheske* did none of these things.

The Defendants have cited no case law to the effect that parties are entitled to proceed with a wholly executory contract or continue to proceed on an existing one after that judgment has been reversed. **They do not cite any case enforcing a circuit court judgment (later reversed) against any person that was not a party to the judgment**. *Slabosheske* does not mean that a party who obtains a temporary victory may commit itself to as much as it can for as long as it can to conduct that will become illegal if the judgment is reversed *and* expect the benefit of their bargain even after they have lost. If there has ever been a case that supports such an extraordinary claim, Slabosheske – or any of its "progeny" – are not it.

In its responsive brief, the Plaintiff used the hypothetical of an employer who relied on a declaratory judgment invalidating a minimum wage law to justify completing an existing or proceeding with a wholly executory contract that called for a sub-minimum wage. The Board's and the District's response is that the requirements of a minimum wage law cannot be avoided by contract.

Precisely so. Just as a minimum wage law prohibits certain types of agreements, so does Act 10. The provisions of Act 10 cannot, to use MMSD's language, be "waived by a direct agreement between an employer and an employee or through a collective bargaining agreement." MMSD says that there the result would be different if the new minimum wage law allowed existing wage agreements to continue. In that case, they say, an employer who obtained a temporary declaration of unconstitutionality and entered onto an agreement for lower wages could continue to pay subminimum wages long after reversal. This is implausible on its face and inconsistent with the well-established principle that a declaratory judgment that is reversed is no judgment at all. It is inconsistent even with the notion that such a judgment is voidable. And it is certainly inconsistent with the language of Act 10. It exempts only those agreements that were in place upon its effective date which was July 1, 2011. It does not say that it becomes effective only when all litigation challenging its constitutionality is completed.

Heritage Farms, Inc. v. Markel Ins. Co., 2012 WI 26, 339 Wis. 2d 125, 810 N.W. 2d 465 and *Newhouse v. Citizens Security Mutual Insurance,* 176 Wis. 2d 824, 501 N.W. 2d 1 (1993) (Defendants' Br. at 13-19), make clear that the Defendants read *Slabosheske* for far more than it says. With respect to *Heritage*, the Defendants simply ignore the key principle that Wisconsin follows the Blackstonian principle that "'courts declare but do not make law." 2012 WI 26, ¶44. When Judge Colas declared the law as he saw it, in *Madison Teachers*, he was not making law

for everyone in the State of Wisconsin; he was only declaring the law for the parties to that case and only until he was affirmed or reversed. As the Supreme Court said in *Heritage*:

> "when a decision is overruled, it does not merely become bad law, --- it never was the law, and the later pronouncement is regarded as the law from the beginning." (quoting previous decisions).

Id. If the circuit court's decision did not become the law – if, as it turns out, it misstated the law – then it is incongruous to believe that it can excuse an ongoing violation of the law after it is reversed. At least in the absence of an injunction, a circuit court cannot, through error, create a window to disregard the law that persists even after its error has been corrected.

Assume for example that MMSD had chosen to follow the law (as we now know it to exist) and refused to negotiate with MTI. MTI might have then brought an unfair labor practices claim. Perhaps it would have prevailed in the circuit court. Of course it would have been reversed on appeal. This happens under the Municipal Employment Relations Act. But there are no cases that say a union may continue to rely on a reversed circuit court decision during the remaining term of a contract.

This is why *Heritage* is instructive. If one cannot rely on a lower court decision that is consistent with then-existing common law, then one certainly cannot rely on a decision that purports to overcome the presumption of constitutionality and that is inconsistent with every other decision reaching the issue. The Board's and the District's attempt to apply the "sunbursting" principle in *Heritage* to this case is equally without merit. In *Heritage*, the Supreme Court did say that in some circumstances a decision overruling a previous decision could be given only prospective effect, but that does not help the Board and the District at all in this case. Mr. Blaska is not attempting to undo what has been done. He is not seeking damages for conduct that occurred before the Supreme Court upheld Act 10 back on July 31, 2014. He is

requesting that the Supreme Court's decision be applied prospectively to prohibit conduct that violates Act 10 after the date of the Supreme Court's decision.[3]

Nor was there the type of detrimental reliance present in *Slabosheske*. MMSD argues that it is "not clear" how it "will be able to define the terms and conditions of employment outlined in the CBAs." MMSD suggests that Blaska "would have the employees work for free, or all quit." That's nonsense. There is no mystery as to how to proceed. The Board and the District can reopen negotiations with the union and collectively bargain on those items that Act 10 permits to be the subject of collective bargaining. MMSD can unilaterally determine the other terms and conditions of employment although some provisions in the current CBAs would be impermissible even if unilaterally chosen by the MMSD. MMSD cannot, for example, exceed the maximum contribution to the health insurance or pension contributions. It cannot impose fair share payments or payroll deductions. It cannot waive recertification requirements.

Whether the Board and the District can unilaterally impose other terms and conditions is not disputed in this litigation. But they must do so in a legally acceptable way.[4] MMSD's administration cannot simply announce that the collectively bargained terms are the new terms. At minimum, it will have to do so by a policy adopted by the Board in compliance with the Open Meetings law. This is not a distinction without a difference. Act 10 represents a legislative judgment that process matters. A school district does not have to adopt any particular set of work rules but it has to accept the political responsibility for those it does adopt. It cannot adopt them through negotiation in closed collective bargaining sessions as in the past and it cannot hide

[3] Further, "sunbursting" only protects parties who relied in good faith on the previous decision and, as shown below, and in the Plaintiff's bring in opposition to the Defendants' motion for summary judgment (pp. 13-16), there was no good faith reliance here.

[4] This is why Blaska suggested that the existence of the CBAs may have an impact on what the MMSD may do now. It must revisit the bargained issues in an open meeting. It may not continue to negotiate with unions in secret on terms not permitted by Act 10. But none of these issues are before this court.

behind a "duty" to bargain them or the threat of arbitration. For better or worse, it represents a deliberate decision to move away from providing a privileged position to representatives of employees in setting the terms and conditions of employment to having these matters determined in the same way as the district decides other policy questions.

The Board's and the District's attempt to distinguish *Newhouse* also misses the mark. The Court will remember that *Newhouse* is the case in which the Wisconsin Supreme Court said this about the insurance company's decision to rely on a declaratory judgment while it was under appeal and later reversed:

> Citizens argues that it was entitled to rely on the circuit court's determination that there was no coverage under the policy. However, the circuit court's no coverage determination was not a final decision because it was timely appealed. An insurance company breaches its duty to defend if a liability trial goes forward during the time a no coverage determination is pending on appeal and the insurance company does not defend its insured at the liability trial. When an insurer relies on a lower court ruling that it has no duty to defend, it takes the risk that the ruling will be reversed on appeal.

MTI is in precisely the same position as the insurance company in *Newhouse.* The decision of Judge Colas was not a final decision because it was timely appealed. A party that relies on a lower court ruling takes the risk that the ruling will be reversed on appeal.

The Board and the District say that *Newhouse* does not apply here because it is an insurance company case. That is true, but irrelevant. With respect to reliance on a declaratory judgment subject to appeal, there is not one rule for insurers and another for everyone else. A party that relies on a lower court ruling takes the risk that the ruling will be reversed on appeal – at least with respect to what happens after the reversal. While it is certainly the case that the insurer in *Newhouse* could have sought a stay of the trial pending appeal, MTI and MMSD could have made their collective bargaining agreement contingent on – or subject to – an ultimate decision upholding the circuit court's decision. They chose instead to take the risk of reversal.

This is why the history of other Act 10 cases is relevant to this case (Defendants' Br. at 11-12). The point is not that the Defendants had to be "clairvoyant" but that it was unreasonable to assume they could rely on an affirmance and to commit public funds to an arrangement that would be illegal if the decision was reversed. Indeed, in *Slabosheske*, the Supreme Court's reasoning in very different circumstances involving differently situated parties depended upon the fact that the non-party plaintiffs seeking to use the judgment had relied upon the circuit court's judgment in good faith and to their detriment. To allow a party to use – not its ultimate victory but its defeat – to avoid repayment would have unjustly enriched it.

In this case, the Defendants were very much aware there was a substantial probability they would not prevail on appeal. When the Defendants began collective bargaining on the 2014-2015 agreement in September, 2013, the Seventh Circuit had already declared Act 10 to be constitutional. *WEAC v. Walker*, 705 F. 3d 640 (7th Cir. 2013). In May, 2014 when the Defendants began collective bargaining on the 2015-2016 collective bargaining agreements, they were also aware that Act 10 had been upheld by another branch of the Dane County Circuit Court in *Wis. Law Enforcement Assoc. v. Walker*, Case No. 12-CV-4474, Decision and Order dated October 25, 2013 (Markson, J.). They knew the Seventh Circuit had upheld Act 10 a second time in *Laborers Local 236 v. Walker*, 749 F.3d 628 (7th Cir. 2014). Of course, they were also aware that *Madison Teachers*, itself, had been argued before the state Supreme Court and had been submitted for decision.

Further, the Board and the District had received written notices from Plaintiff's counsel on October 3, 2013 and May 15, 2014 advising them that entering into collective bargaining with MTI would violate Act 10 and that if they did so litigation would follow. The May 15th letter specifically stated that "Moreover, if the Supreme Court overturns Judge Colas' decision, then

his declaratory ruling in MTI v. Walker would become null and void – as if it never existed. If the CBA is unlawfully extended, then every taxpayer in Madison would have a valid claim arising from the illegal expenditure of tax dollars, and every teacher in Madison would have a valid claim for violation of their rights under Wis. Stat. §111.70(2)." (APUF ¶ 32.)

A reasonable person would have known – or ought to have known – that collective bargaining agreements extending beyond the contemplated decision in *Madison Teachers* and that were not contingent upon an affirmance might become unenforceable. The Defendants went into the CBAs knowing there was substantial adverse legal authority and with specific notice that litigation would result challenging their actions. That is not good faith reliance.

The defendants claim that it would be "unfair" for Act 10 to apply either during the several weeks left on the 2014-2015 agreement or to the yet to begin 2015-2016 agreement because employees have somehow "relied on it." It is certainly true that Act 10 changed the expectations of municipal employees. Major policy changes often alter the landscape of those whom they affect. But, as the Wisconsin Supreme Court recently observed, the mere expectation of a contractual benefit is not a vested right to which one is entitled. *Schwegel v. Milwaukee County*, 2015 WI 12, 360 Wis.2d 654, 859 N.W. 2d 78. In the *LaCroix* case, the counsel for MTI argued, on behalf of the Kenosha Education Association, that application of Act 10 to alter prospective contractual rights agreed to "in reliance" on Judge Colas' decision in *Madison Teachers* would be an impairment of contract.

Judge Bastianelli quite properly rejected that claim. The legislature did not seek to apply Act 10 to agreements that were in place on June 30, 2011. It did intend it to apply to any agreements entered into, modified or extended after June 30, 2011. Because what it did was constitutional, this Court must give that determination full effect. It need not attempt to undo

what has already happened – even if it could. Mr. Blaska does not want that – but Act 10 should have applied to MMSD and its unions beginning with the 2014-2015 CBA (which was the first new agreement after the effective date). It can no longer be delayed.

C. The CBAs Violate Act 10.

The Board and the District also argue that "the CBAs do not violate Act 10" (Defendants' Br. at 20-22) but the Defendants do not mean what they say. What they actually argue is that Act 10 does not apply to the CBAs, because they were agreed to at a time when Act 10 allegedly did not apply to the Board and the District. But this argument also fails. As shown above, and in the Plaintiff's previous briefs, Act 10 applied to the Board and the District at all times.

In their most recent brief, the Board and the District attempt to rely on the portion of Act 10 that allowed CBAs that existed at the time that Act 10 became effective to remain in place, but that argument does not work here. Act 10 became effective on July 1, 2011 and none of the CBAs at issue in this case were in effect on that date.

2011 Act 10 § 9332 (which the Board and the District rely upon at page 20 of their brief) provides that, following its effective date, Act 10's restrictions "first apply to employees who are covered by a collective bargaining agreement under subchapter IV of chapter 111 of the statutes that contains provisions inconsistent with those sections on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." For employees of the District, that date is no later than June 30, 2014. The collective bargaining agreements which were in effect before that date all expired, and were extended, modified or renewed, first by the 2014-2015 CBAs which took effect on July 1, 2014. On that date all of the provisions of Act 10 became effective for those employees. A subsequent and ultimately reversed circuit court decision does not change the effective date.

Further, even if the Court were to accept the argument that Act 10 did not become effective for the Board and the District until July 31, 2014 (the date of the Supreme Court's decision in *Madison Teachers*), the argument fails to support the 2015-2016 CBAs which are the subject of this action. Moving the effective date to July 31, 2014 would still mean that the CBAs that existed on that date and expired and were extended, modified or renewed thereafter by the 2015-2016 CBAs must be Act 10 compliant. The effective date of the 2015-2016 CBAs is July 1, 2015 which is after July 31, 2014. Thus, even on the Defendants' view of the matter, they must be Act 10 compliant but are not.

Judge Colas' decision, at most, excuses actions taken prior to the Supreme Court's decision in *Madison Teachers*. It might prevent recovery of monies unlawfully paid pursuant to a CBA or an effort to collect damages or "undo" some action taken in reliance on the contracts prior to reversal of the decision. But it cannot possibly justify continued enforcement of agreements that violate what has been determined by the Wisconsin Supreme Court to be a constitutional and binding law.

The Defendants, themselves, readily acknowledge this throughout their brief in support of their own motion for summary judgment. They argue that Judge Colas' decision was valid "until reversed." *See*, Defendants' Br. at 11-16. Judge Colas was reversed on July 31, 2014. The Wisconsin Supreme Court upheld Act 10 ten months ago and the CBAs in this case extend for another 14 months. Indeed, the 2015-2016 CBAs do not even come into effect until July 1, 2015 - more than a year after the Supreme Court's decision. There is no basis to allow continued non-compliance with Act 10.

II. THE PLAINTIFF IS ENTITLED TO A TEMPORARY AND A PERMANENT INJUNCTION.

The Plaintiff has met each of the elements necessary for the issuance of a temporary and a permanent injunction. By demonstrating that he is entitled to summary judgment, he has demonstrated that he has a reasonable probability of success on the merits.

By demonstrating that taxpayer money is being spent illegally, he has demonstrated that there is harm sufficient to justify an injunction. The Wisconsin Supreme Court has held that unlawful activity may be enjoined even in the absence of an express showing of actual harm. *Joint School Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n,* 70 Wis. 2d 292, 309-310, 234 N.W. 2d 389 (1975). "The express basis for such holdings is that the fact that the activity has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public." *Id.*

The Board and the District disagree with the Plaintiff's reading of this case (Defendants' Br, at 25-26) but the Plaintiff's reading is correct. In *Joint School District No. 1*, the court approved an injunction prohibiting an illegal strike by teachers. In considering the irreparable harm element the Supreme Court said that the "ban on public employee strikes is deemed indicative of a legislative public policy determination that such activity will cause irreparable harm to the public and therefore may be enjoined without the presentation of evidence of actual harm in a particular case." 70 Wis. 2d at 310-11.

That applies equally here. The legislative ban on collective bargaining, forced union dues, so-called "fair share" provisions, and the other relevant sections of Act 10, are indicative of a legislative public policy determination that such activity will cause irreparable harm to the public and therefore may be enjoined without the presentation of evidence of actual harm in a particular case.

But if actual harm is needed to justify an injunction in this case, it exists. As a taxpayer, the Plaintiff is harmed by the spending of tax money for an unlawful purpose. "A taxpayer [has] a financial interest in public funds" and "*[a]ny* illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *S.D. Realty Co.* 15 Wis. 2d 15, 22 (1961) (emphasis added). Taxpayers sustain a pecuniary loss because an illegal expenditure will either (a) require additional taxes, or (b) cause the governmental unit to have less money to spend on legitimate purposes. *Id.* Here, the District is spending substantial amounts of taxpayer money on a contract that is illegal. More importantly, once this money is spent there is no way for the taxpayers to get the money back. Thus, the harm is irreparable.

The Defendants are acting in a manner expressly forbidden by state law. They were on notice that the contracts were illegal before they entered into them. The result of that conduct is ongoing harm to the Plaintiff as a taxpayer and to the public that can only be prevented by an injunction. No remedy other than an injunction is adequate to prevent this harm.

RELIEF SOUGHT

The Plaintiff requests that his motion for summary judgment and for an injunction be granted.

Dated this 22nd day of June, 2015.

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