STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Norman Sannes,

Plaintiff,

v.

Case No. 15-CV-974

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

Defendants.

PLAINTIFF NORMAN SANNES' BRIEF OPPOSING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND REPLY BRIEF IN SUPPORT OF THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

There is no dispute as to the parties or the procedural facts. The Defendants, Madison Metropolitan School District Board of Education (the "Board") and Madison Metropolitan School District (the "District") have moved for summary judgment on four grounds: (1) they say that they were free to collectively bargain with the union, Madison Teachers Inc. ("MTI") even after the effective date of Act 10 because of a decision by Judge Colas in a different case and that this means they may continue to implement – and even begin a new – contract that does not comply with the law long after the reversal of Judge Colas' decision; (2) they renew an argument that they have already lost – that the Plaintiff lacks standing; (3) they argue that this case should be dismissed because a similar case (*Blaska*) is pending before a different branch of the Dane County Circuit Court; and (4) they argue that the plaintiff's claims challenging the 2014-2015 Collective Bargaining Agreements (CBAs) are moot because those CBAs have expired.[1] The arguments raised by the Defendants are without merit because: (1) Act 10 applied to the Board

[1] The Defendant Madison Teachers Inc. ("MTI") has joined the motion of the Board and the District and adopts their argument. MTI has not filed a separate brief.

and the District at all times after it was adopted and the decision of a circuit court in a different case does not excuse them from complying with the law, (2) the Plaintiff has taxpayer standing, (3) *Blaska* is a separate and distinct case and the defendants have previously refused on two occasions to join this case and *Blaska*, and (4) claims with respect to the 2014-2015 CBAs are not moot because courts can rule on government actions even though those actions have been completed. This brief will show that the Plaintiff's motion for summary judgment and an injunction should be granted and that the Defendants' motion for summary judgment should be denied.

ARGUMENT

The Board and the District do not assert that the CBAs comply with Act 10. To the contrary, they concede that the CBAs violate Act 10 in numerous ways. Rather, the Board and the District argue that Act 10 did not apply to them when they collectively bargained the CBAs based upon a decision by Judge Colas in a case to which neither the Board nor the District were parties. They argue that this decision – now reversed – not only excuses the bargaining of and entry into non-Act 10 compliant CBAs prior to the reversal of such decision, but allows them to continue to enforce such unlawful agreements even after Act 10 has been upheld by the Wisconsin Supreme Court. This Court should reject that argument.

I. THE BOARD AND THE DISTRICT CANNOT RELY UPON THE DECISION OF JUDGE COLAS IN THE *MADISON TEACHERS* CASE.

A. The Decision by Judge Colas Was Not Binding on Non-Parties.

The Defendants have quite a burden here. How can it possibly be that a circuit court decision issued in October 2012 and reversed on July 31, 2014 can be used to justify the ongoing implementation of an illegal contract after it has been reversed? How can it justify implementing

an entirely new contract that did not begin until more than a year after its reversal. It is undisputed that the decision of Judge Colas was not binding precedent. *See Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995) ("[A] circuit court decision is neither precedent nor authority . . . ."); *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 750 N.W.2d 492 ("[A]lthough circuit-court opinions may be persuasive because of their reasoning, they are *never* 'precedential.'"). It is equally undisputed that once the sole favorable circuit court decision was reversed, it is as if it never happened. *Heritage Farms, Inc. v. Markel Ins. Co*., 2012 WI 26, ¶44, 339 Wis.2d 125, 810 N.W.2d 465 ("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"). Whether it was void or merely "voidable," it is certainly gone now.

This creates two fatal problems for the Defendants on the merits. The first is that Judge Colas' decision could never have foreclosed the rights of other parties, such as the Board or District or the Plaintiff here.[2] That it had no precedential value means that other circuit courts, presented with the same issue, need not have followed Judge Colas' opinion and were always free to reach an independent decision. In fact, that is exactly how other circuit courts have regarded the matter. *See, Wisconsin Law Enforcement Ass'n v. Walker*, Dane County Circuit Court No. 12CV4474, Decision and Order dated October 25, 2013 (July 14, 2015 McGrath Aff., Ex. 7) (At page 4, Judge Markson acknowledges that he was aware of Judge Colas' decision but he declined to follow it); *Lacroix v. Kenosha Unified School District,* Kenosha County Circuit Court No. 13-CV-1699 (July 14, 2015 McGrath Aff., Ex. 9) ("This court has not found any

[2] The only way that could have happened would have been for MTI, in some subsequent case, to argue that the District or a taxpayer like Sannes were "in privity" with the state and were bound by issue preclusion, i.e., offensive collateral estoppel. The Defendants have not made that argument and could not if for no other reason than the judgment was on appeal.

decision that would support the proposition that a trial court's decision is precedential and has statewide effect. Cases this court has found in fact stated the opposite.") It is thus clear, as a matter of law, that Judge Colas' decision had no effect except on the parties before him and that as to all others, including the Board and the District, Act 10 was the law of the land from the date of its enactment.

The Board and the District, however, say otherwise. This case is different, they say, because MTI (one of the Defendants herein) was a party to the case before Judge Colas. The Board and the District make a two-step legal argument. Step 1: Act 10 could not be applied to MTI because Judge Colas had declared it void in a case to which MTI was a party. Step 2: because the Board and the District were bargaining with MTI, they were free to ignore Act 10. According to the Defendants, taxpayers, like Sannes, had to accept whatever they agreed to. MTI was entitled to use its temporary victory (and permanent defeat) as a sword not only against the state but against every other party.

But the Board and the District are wrong as a matter of law. The Board and the District were not parties in the *Madison Teachers* case and nothing in that case could relieve them of their obligation to follow the law. MTI, which of course was a party, could have threatened to use the declaratory judgment in that case to try to coerce the Board and the District to the bargaining table, but that would have been an idle threat. The Wisconsin Supreme Court ruled, in the context of the *Madison Teachers* case, that Judge Colas' decision <u>did not apply</u> to non-parties. (July 14, 2015 McGrath Aff., Ex. 8, ¶¶ 20-21). 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 non-parties. Thus, even though WERC was a defendant and bound by the declaration of Judge Colas, that declaration only applied to WERC's dealings with MTI

and not WERC's dealings with other parties. The concomitant must also be true. MTI was entitled to the benefit of Judge Colas' declaration but only in its dealings with the defendants in that case, and not in its dealings with non-parties such as the Board, the District or the Plaintiff.

Moreover, if MTI had threatened the Board and the District with litigation, the Board and the District would have prevailed on the merits. Act 10 has been upheld in both the state and federal courts. But litigation by MTI turned out to be unnecessary because the Board and the District elected quite voluntarily to ignore the requirements of Act 10 and, in fact, to treat Act 10 as though it were a nullity. The Board and the District, however, were not free to violate the law and the rights of taxpayers based upon the declaratory judgment ruling by Judge Colas.

The Plaintiff was also not a party to the *Madison Te*achers case decided by Judge Colas and could not have been bound by the court's declaration in that case. The rights of the Plaintiff, and other taxpayers in the school district, cannot be taken away by a declaratory judgment to which they were not a party. *See* Wis. Stat. §806.04 ("no declaration may prejudice the right of persons not parties to the proceeding"). The only parties affected by the declaration of Judge Colas were the parties thereto and only with respect to their dealings with each other.

The cases that the Board and the District cite in support of their argument on this issue do not stand for the broad proposition contended for by the Board and the District. Each of those cases dealt with the effect of a judgment (later reversed) in a subsequent proceeding involving one of the parties to the judgment **and** where the party to the judgment was seeking to avoid the effect of the judgment.

The primary case relied on by the Board and the District is *Slabosheske v. Chikowske*, 273 Wis. 144, 77 N.W. 2d 497 (1956). In that case, the issue was the effect of a circuit court judgment as to whether a school district known as District No. 7 had been properly dissolved.

The circuit court found that District No. 7 had not been properly dissolved and that the District still existed. This decision was later reversed. In the interim, District No. 7 borrowed money and issued a promissory note. The note went unpaid and the holders sued. A defense was raised that District No. 7 did not lawfully exist at the time the note was given and its actions were null and void. In other words, there was an attempt by a party bound by the circuit court judgment to avoid paying a lender who had relied on the judgment in good faith.

The Wisconsin Supreme Court concluded that the plaintiffs who received the promissory note should have been able to rely on the circuit court's judgment that the school district still existed (even though that judgment was later reversed). *Slabosheske*, 273 Wis. at 150. The Supreme Court set forth the legal rule as follows: "Until set aside in a proper proceeding for that purpose, a voidable judgment has the same force and effect as though no error had been committed; *it will support proceedings taken under it.*" *Id*. (emphasis added). Such a rule was necessary according to the Supreme Court in order to protect "those who acted in good faith in reliance upon [the judgment]." *Id*.

Slabosheske is not this case. The Court there did not seek to foreclose the rights of any persons who were not parties to the litigation in which the "voidable" – and subsequently reversed – judgment was obtained. That case did not involve a claim that actions rendered unlawful by final resolution of the case could continue following voiding of the judgment. *Slabosheske* does not say, for example, that District 7 could continue to borrow money or even that it could continue to exist pending repayment of the note. It is inconceivable, for example, that District 7 could have entered into an ongoing credit facility with a lender and continued to draw on it after losing in the Supreme Court. *Slabosheske* held only that the district's ultimate defeat could not be used as a sword to unjustly impair the rights of innocent third parties.

As more fully explained below, this means at minimum, that one cannot continue to rely on a "voidable" judgment after it has been finally voided. But the legal rule as announced by the Supreme Court contains within it two important limitations. It only applies to proceedings taken under the judgment, and only applies where there was good faith reliance on the judgment. Neither condition exists here.

By limiting the legal rule to "proceedings taken under the judgment" the Supreme Court was only deciding what effect a judgment had on a party to a case where the party to the judgment wanted to avoid the effect of the judgment. District 7 was bound by the judgment but wanted to avoid it. That is very different from the Board and the District trying to use Judge Colas' declaration offensively when neither they nor the Plaintiff were parties to the case.

That this limitation exists is made clear in the cases that cite *Slabosheske* (and are in turn cited by the Board and the District).[3] In *Harris v. Harris*, 141 Wis. 2d 569, 415 N.W. 2d 586 (Ct. App, 1987), *Kett v. Community Credit Plan, Inc.* 222 Wis. 2d 117, 586 N.W. 2d 68 (Ct. App. 1998) and *Virnich v. Vorwald*, 664 F. 3d 206 (7th Cir. 2011) the issue was what effect a judgment (later reversed) had <u>on a party</u> to a case where the party wanted to avoid the effect of the judgment. In *Harris*, the court concluded that a maintenance award granted in a divorce case was binding on the parties for the period it was in effect. In *Kett*, it was a repossession judgment. In *Virnich,* it was a receivership proceeding. But all three cases involved parties trying to avoid the effect of a judgment to which they were a party. They have nothing to do with using a judgment against a non-party in a second case. That use (applying a circuit court decision to

[3] As a subset of this argument and intertwined with it, the Board and the District cite several authorities that state the general proposition that when a circuit court rules that a statute is unconstitutional that it no longer has any effect. (Defendants' Br. at 6.) What the Board and the District seem to be saying is that, because *Madison Teachers* was a declaratory judgment action brought against an agency of the state, ***<u>everyone else in the state was somehow bound by it until</u>*** it was ***<u>reversed.</u>*** They cite no precedent for this startling proposition – one that apparently eluded Judge Markson and Judge Bastianelli and even the Supreme Court of this state.

parties in an unrelated case) is called "precedent," and everyone agrees that Judge Colas' decision was not precedent.

There was never a proceeding on the judgment in *MTI v. Walker*. The union never sought to compel the Board and the District to negotiate – an action in which taxpayers might have intervened. They merely went forward, knowing there were cases reaching different results and that what they were about to do could be – actually was likely to be – ultimately declared unlawful.

Not surprisingly, the Supreme Court's reasoning in *Slabosheske* 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, to their detriment. They loaned money to the school district that was the subject matter of the circuit court's judgment in good faith reliance on the circuit court's decision that the district had not been dissolved. There is no such good faith reliance here. The Defendants were not innocently relying upon the decision of Judge Colas and entering into a business transaction based upon that innocent reliance.

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 *Heritag*e:

> "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. Sannes 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 (from when it was issued) to prohibit conduct that violates Act 10 after the date of the Supreme Court's decision.[4]

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.) and that the Seventh Circuit Court of Appeals had upheld Act 10 in a second case. *Laborers Local 236 v. Walker*, 749 F.3d 628 (7th Cir. 2014). Both *Wisconsin Law Enforcement* and *Laborers Local 236* rejected the very arguments made by the plaintiffs in *MTI v. Walker*. Of course, they were also aware that *Madison Teachers* itself had been argued before the state Supreme Court and had been submitted for decision. Under those circumstances, any reliance on Judge Colas' decision (which was an outlier) was quite clearly risky and unreasonable.

The undisputed facts are that the 7th Circuit and Judge Markson had upheld Act 10 and the Wisconsin Supreme Court had vacated Judge Colas' order that attempted to apply Act 10 to non-parties. The reasonable inference from those facts is that the Defendants saw the handwriting on the wall and took the extraordinary step of negotiating new collective bargaining agreements that would continue through June 30, 2016 despite the existence of substantial adverse authority.

In addition, on October 3, 2013, Plaintiff's counsel wrote to the District and stated that:

[4] Further, "sunbursting" only protects parties who relied in good faith on the previous decision and there was no good faith reliance here.

> If the School District were to collectively bargain in a way that violates Act 10, it would be exposed to litigation by taxpayers or teachers who do not wish to be bound to an unlawful agreement or to be forced to contribute to an organization that they do not support.

(July 14, 2015 McGrath Aff., Ex 5). Further, on May 15, 2014 (while the Board and the District were bargaining the 2015-2016 CBAs), Plaintiff's counsel wrote another letter to them informing them that Act 10 prohibits terms in collective bargaining agreements that are inconsistent with the provisions of Act 10. (July 14, 2015 McGrath Aff., Ex 6). That letter reminded the Board and the District that "you do have to comply with the law, and we hope that you will at least choose to avoid the litigation costs that will likely result from a decision to extend the CBA in violation of Act 10." (*Id*.) The letter further stated:

> 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). (*Id*.)

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 knew full well that what they were doing was in violation of Act 10 and would be challenged. They knew that Judge Colas' decision was being appealed and did not apply to the Board, the District or potential taxpayer plaintiffs. They deliberately took the chance that Judge Colas' decision would be overturned. They were wrong. Their gamble cannot be used to prejudice other parties.

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. Of course, this Court is free to

disregard Judge Bastianelli's decision, just as Judge Markson and Judge Bastianelli were free to disregard Judge Colas' decision, but that is the point. Except for the parties to the *Madison Teachers* case, no one is or was bound by it. 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.

The Board and the District creatively select one quote from Judge Bastianelli's Decision and use it to suggest that Judge Bastianelli agreed with them on this issue. (Defendants' Br. at 10, 30-31) Specifically, they quote Judge Bastianelli's statement that "There's no question that the plaintiffs in Milwaukee Teachers had the right to rely on the decision of Judge Colas, without a stay and until an appellate court said otherwise." But in the very next sentence Judge Bastianelli said that "The decision of Judge Colas though had no precedential value or statewide effect, particularly in light of its having been appealed." In the next paragraph he held that non-parties to *Madison Teachers* could not rely on Judge Colas' decision to enter into CBAs contrary to Act 10 because Judge Markson and the 7th Circuit had upheld Act 10 and reliance on Judge Colas' decision "was not legally justified."

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. The point is not that the Defendants had to be "clairvoyant" but that it was unreasonable for them 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.

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 to the 2014-2015 agreements or to the 2015-2016 agreements because employees have somehow relied on them (Defendants' Br. at 25). 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. (July 14, 2015 McGrath Aff., Ex. 9) 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. That includes the 2014-2015 and the 2015-2016 CBAs at issue here.

B. Judge Colas' Decision Cannot Excuse a Continuing Violation of Act 10.

Even on the Defendants' view of *Slabosheske,* 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 July 31, 2014 the date of 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.

Just as Mr. Slabosheske could not have continued to lend money to District No. 7 after the trial court decision was reversed and expect to be repaid, the Defendants herein cannot continue to enjoy the fruits of an unlawful contract.

The Defendants, themselves, readily acknowledge this throughout their brief. They argue that Judge Colas' decision was valid "until reversed." *See*, Defendants' Br. at 6-10. Judge Colas was reversed on July 31, 2014. The Wisconsin Supreme Court upheld Act 10 thirteen months ago and the CBAs in this case extend for another eleven months. Indeed, the 2015-2016 CBAs came into effect more than a year after the Supreme Court's decision. There is no basis to allow continuing non-compliance with Act 10.

II. AS A TAXPAYER, MR. SANNES HAS STANDING TO CHALLENGE THE LEGALITY OF THE CBAs.

The Board and the District also renew the argument they previously raised, and lost, regarding standing. They do, however, attempt to put the argument in slightly new clothes, stating now that Mr. Sannes lacks standing because taxpayers allegedly cannot be harmed by the terms and conditions in the CBAs. The Board and the District assert that they could unilaterally give their employees everything contained in the CBAs and, as a result, there is no harm resulting from them having unlawfully agreed to do so. In essence, the Board and the District say, "no harm, no foul." But the Board and the District are wrong. Mr. Sannes has standing to challenge any illegal action by a government entity that results in any expenditure of taxpayer funds. As a matter of law, any money spent pursuant to an illegal contract causes harm to taxpayers and they have standing to challenge such a contract, even if the money could have been lawfully spent had the proper procedures been followed.

A. As a Taxpayer, the Plaintiff Is Harmed by any Expenditure of Taxpayer Funds Under an Illegal Contract.

The leading case on taxpayer standing under Wisconsin law is *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961). There, the Wisconsin Supreme Court held that taxpayers have standing to challenge any unlawful action by a government entity that results in the expenditure of public funds. As stated by the Wisconsin Supreme Court:

> **Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss.** This is because it results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure. Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit.

15 Wis. 2d at 22, 112 N.W.2d at 181 (emphasis added).

To see why the Board's and the District's argument fails here; this Court need only look at the facts in *S.D. Realty*. *S.D. Realty* involved a challenge that a lease entered into between the defendant Sewerage District and certain developers was illegal and void. Under the terms of the lease, the Sewerage District would use public funds to build a tunnel enclosing part of the Kinnickinnic River. The land above and around the tunnel were subject to the lease in dispute. There was, of course, nothing inherently illegal about the Sewerage District building the tunnel. It could use public funds to do that at any time. However, that otherwise lawful expenditure of public funds was being done pursuant to a contract that was alleged to be illegal. The Wisconsin Supreme Court held that a taxpayer had standing to challenge that contract. Thus, even if the Board and the District could unilaterally give their employees everything contained in the CBAs (and the Plaintiff disputes that as shown below), that would not defeat the Plaintiff's standing as a taxpayer to challenge the illegal CBAs.

Wisconsin's broad grant of standing to taxpayers to challenge illegal contracts was reaffirmed in *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993). In *Hart*, a group of taxpayers challenged a contract transferring the Milwaukee County Museum to a private non-profit organization. The defendants challenged the plaintiffs' standing based on the argument that taxpayers were not harmed by the contract because the contract would actually save taxpayers money. In other words the County made a "no harm, no foul" argument just as the Board and the District do here. In fact, the County contended that it would spend less on the museum after the transfer than before. According to the County, not only was there no harm, there was an affirmative benefit to taxpayers. The Wisconsin Supreme Court, citing *S.D. Realty*, rejected the defendants' argument.

The Wisconsin Supreme Court's decision in *Bechthold v. City of Wauwatosa*, 228 Wis. 544, 277 N.W. 657, 659 on reh'g, 228 Wis. 544, 280 N.W. 320 (1938) provides a third example of why the argument of the Board and the District fails. That case involved a paving contract. The plaintiff taxpayers challenged the paving contract on procedural grounds. The Supreme Court said:

> It appears that the plaintiffs are taxpayers and that under the contract the city at large will have to pay for that part of the resurfacing which lies within the street intersections. That fact is sufficient to meet the requirements of the law that a taxpayer must prove that a loss to him will ensue if the contract is permitted to be performed

Id. If a municipal entity pays out money under an illegal contract that is sufficient to support taxpayer standing. *See also Wagner v. City of Milwaukee*, 196 Wis. 328, 220 N.W. 207, 208 (1928) (enjoining future expenditures of funds under a printing contract,[5] not because there was anything illegal about paying printing shops for their services, but because the contract itself was illegal).

[5] The Court also invalidated the actions of the city council, which had asserted the unilateral right to make the payments to the printer anyway, even if there was no valid contract. *Wagner*, 196 Wis. at 328.

Nowhere in their brief do the Board and the District cite a taxpayer standing case that is contrary to *S.D. Realty*, *Hart*, *Bechtold,* and *Wagner*. These cases establish the law of taxpayer standing in Wisconsin as it relates to challenging illegal contracts.

B. The Board and the District Did Not and Could Not Unilaterally Grant MTI What They Did Under The Terms of the CBAs.

The opening proposition that underlies the argument of the Board and the District is that they could have and would have unilaterally established the same terms and conditions of employment as they agreed to after collective bargaining with MTI. This is complete speculation, not based on any evidentiary facts and wrong as a matter of law.

First, the CBAs grant a variety of rights to MTI that the Board and the District cannot lawfully grant, including the following; the CBAs provide that MTI shall automatically be the collective bargaining agent for a variety of employees, even without the annual certification election, required by Act 10 (MMSD 000168-169), the Board and the District agree, in the future, to meet for the purposes of negotiating in good faith (i.e., to collectively bargain) on questions of wages, hours and conditions of employment (MMSD 000169), the CBAs grant MTI the right to participate in all grievances (MSD 000170), the CBAs provide that the Board and the District will automatically deduct dues from employees and pay them to MTI (MMSD 000174), the CBAs require employees of the District to pay so-called fair share dues to MTI against the wishes of the employee (*Id.*) (July 14, 2015 McGrath Aff., Ex 3). The Board and the District are not legally able to give any of these things to MTI. All of them are illegal under Act 10.

Second, there are extensive and elaborate salary provisions in the CBAs, *see*, e.g. MMSD000171-186. (July 14, 2015 McGrath Aff., Ex 3). The Board and the District would have the Court infer that if the Board and District were left on their own, they would have come up with exactly the same extensive rules and provisions on compensation that they collectively

bargained with MTI. If the Board and the District's argument is to be believed, collective bargaining is valueless to employees. They would get exactly the same pay if the amount of pay was decided unilaterally by the employer. That inference is not supported by any evidence in the record and defies common sense.

Third, the CBAs impose costs on the District above and beyond salaries that must be paid by taxpayers. (July 14, 2015 McGrath Aff., Ex 3). The Board and the District only discuss one such cost, the cost of making the payroll deductions required by the CBAs, and simply ignore all of the others. The following illustrative provisions of the CBAs impose costs on the District (which costs must be borne by taxpayers); to pay for physical examinations for teachers (MMSD 000187), to continue to employ teachers determined to be surplus, i.e., not currently needed by the District (MMSD 000188-189), to conduct employee evaluations per the procedures mandated by the CBAs (MMSD 000190), to administer the employee disciplinary procedures mandated by the CBAs (MMSD 000191-192), to pay the retirement benefits and administer the retirement provisions mandated by the CBAs (MMSD 000193), to pay teachers pursuant to the hours, school calendar, vacation and leave provisions collectively bargained in the CBAs (MMSD 000199-207), to pay for and administer the health insurance and disability benefits mandated by the CBAs (MMSD 000209-212). (*Id*.) Each of the above costs is mandated by the illegal CBAs and could be avoided or lowered if the CBAs are declared to be void. As a taxpayer, the Plaintiff has the right to challenge these CBAs.

Fourth, the argument of the Board and the District is akin to that of two competitors caught price-fixing who then argue that no one has standing to challenge their price-fixing agreement because it causes no harm. Each competitor could unilaterally set the same price as

set forth in the illegal price-fixing agreement, so "no harm, no foul." No court, anywhere, has or would accept such an argument.

Fifth, taxpayers are harmed by the aspects of the CBAs which infringe on the rights of teachers. For example, teachers whose wages are reduced by the District for payments of union dues or so-called "fair share" payments would have future claims against the District because those payroll deductions are unlawful under Act 10. This causes increased pecuniary harm to taxpayers.

The Board and the District assert that this last item is only harm to teachers and not to taxpayers but that ignores the fact that they result in future liability by the District (and, as a result, to taxpayers). The Wisconsin Supreme Court in *Hart* found that taxpayer plaintiffs possess standing if they **may** suffer a pecuniary loss from the challenged transaction. 176 Wis. 2d at 699, 500 N.W.2d at 314. Under the rule in *Hart*, even a potential future injury is sufficient. In *Hart*, the Wisconsin Supreme Court rejected the argument that a taxpayer lacked standing to challenge a contract that would save the government money. *Id.* at 699-700. The Court stated that the lowered costs could result in a reduction of services or in the quality of services, and that lower salaries could "lead to the loss of competent personnel," all of which could cause a net pecuniary loss to the taxpayers. *Id.* at 700. For purposes of standing, a taxpayer need not show that a loss will occur, only that it could occur.

The CBAs impose costs on the District and result in the expenditure of taxpayer money. This includes the original cost of negotiating the CBAs, the cost of administering and implementing the CBAs, payments made under the CBAs, and the legal exposure of the District to teachers whose rights are violated by the CBAs. As a taxpayer, Mr. Sannes has the right to challenge the CBAs in this Court.

III. SIMILARITY BETWEEN THE BLASKA CASE AND THIS CASE DOES NOT REQUIRE THIS CASE TO BE DISMISSED.

As the Court is aware, there is a very similar case pending in front of the Honorable Richard Niess, involving the same claim by a different taxpayer. The other case is *Blaska v. Madison Metropolitan School District Board of Education, et al*, Case No. 14-CV-2578. The Defendants contend that this case should be dismissed because of the *Blaska* case based upon what they call the "first to file" rule (Defendants' Br. at 15-16). The Defendants' argument has zero merit.

First, the Defendants cite to Wis. Stat. §802.06(2)(a)10 which sets forth an affirmative defense based upon a "Another action pending between the same parties for the same cause." (emphasis added) But this case and the *Blaska* case have different parties. Mr. Blaska and Mr. Sannes are different people. Under Section 802.06(2)(a)10 there must be an identity of parties.

Assume that two different people sign an identical contract with a lender and both file suit to assert that the contract is an illegal contract of adhesion. Does the second such plaintiff have her claim dismissed because a different plaintiff filed a very similar claim? Of course not. There is no legal authority under Section 802.06(2)(a)10 which supports such a result.

Second, the Defendants cite to an Arizona and a New Jersey case that deal with res judicata. In *El Paso Natural Co. v. State*, 123 Ariz 219, 222, 599 P.2d 175 (1979) and *In re Petition of Gardiner*, 67 N.J. Super 435, 448, 170 A.2d (1961) the courts were dealing with the effects of a final judgment. In those cases the courts held that a taxpayer was bound by a pre-existing final judgment in favor of the taxing authority in a previous case. Those cases have nothing to do with this case.

For those cases to apply, the *Blaska* case would have to be a final judgment, i.e., decided by Judge Niess in favor of the Defendants on the merits (and, for example, not on the Section 893.80 issue), be appealed, and the appeal also be decided on behalf of the Defendants. There is no final judgment here that constitutes res judicata.

Moreover, it should be pointed out that the same argument could be made in the *Blaska* case. If this Court decides the case on the merits, and there is an appeal, the results on appeal would be res judicata in *Blaska*. Why shouldn't Judge Niess stay his case in favor of this one? The answer is that because res judicata does not apply in either case.

Finally, the Defendants argument is quite bold given the Defendants' conduct in this case. Plaintiffs' counsel asked for the Defendants' consent to simply add Mr. Sannes as an additional plaintiff in the *Blaska* case but the Defendants refused to consent. (July 14, 2015 McGrath Aff., ¶ 4, Ex 2). Thus, Mr. Sannes filed his claim as a separate action. Then in a telephone conference with this Court, the Court asked the parties to agree to consolidate the two cases. The Plaintiff agreed but the Defendants refused. It is disingenuous for the Defendants to now request dismissal based on the two cases' similarity when both the Plaintiffs and the Court previously urged consolidation of the cases.

As discussed in more detail below, the Defendants are trying to run out the clock on the 2015-2016 CBAs. The Defendants want to delay a potential adverse judicial decision in this case for as long as they can because once the 2015-2016 CBAs are over, the union will have received the full benefit of the illegal collective bargaining and there will be little that anyone can do about it. They want to avoid and delay this Court getting to the merits. That tactic should not be enabled by the Court.

IV. CHALLENGES TO THE 2014-2015 CBAs ARE NOT MOOT

The Plaintiff's claims regarding the 2014-2015 CBAs are not moot. The District and MTI engaged in illegal collective bargaining with respect to the 2014-2015 CBAs during September 2013, tentatively reaching an illegal collective bargaining agreement on September 27, 2013. (Cheatham Aff., ¶ 5; Matthews Aff., ¶ 7). This agreement was ratified on October 2, 2013 (*Id.*). The Plaintiff's claims that the collective bargaining was illegal and that the 2014-2015 CBAs are void are not moot.

A case does not become moot simply because litigation takes time. Here, the Plaintiff had to send a notice under Section 893.80 and then wait 120 days for the notice period to expire before he sued. Otherwise, he would be faced with the same §893.80 defense as the Defendants raised in *Blaska*. In the meantime, the 2014-2015 CBA's went into effect, were performed and have since expired. The Defendants now contend that they have successfully run out the clock on any claim as to their illegality. That would be a particularly perverse result if it were supported by the law, but it is not. When defendants violate the law, especially public bodies like the District and the Board, it is appropriate for the courts to declare that such a violation occurred. Citizens need to know a violation occurred and the public body involved has been held accountable.

An issue is moot only when its resolution will have no practical effect on the underlying controversy. *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 171, 255 N.W.2d 917, 924 (1977); *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985). "The purpose of a dismissal for mootness is simply to prevent an unnecessary expenditure of time by the court and the parties." *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at

171. Here, the issues presented with respect to the 2014-2015 CBAs are the same as the issues presented with respect to the 2015-2016 CBAs. No time is wasted by deciding those issues.

Further, the fact that an illegal act has been completed does not give the wrongdoers a pass. Mootness does not reduce to "we got away with it." In *Kabes v. Sch. District of River Falls*, 2004 WI App 55, 270 Wis. 2d 502, 677 N.W.2d 667, the Court of Appeals held that a school district breached an employment contract with two school administrators by reassigning them to a school other than the one listed in their employment contracts. In its decision, the Court of Appeals noted that the contracts had expired during the litigation but the Court of Appeals nevertheless *decided the case on the merits*. The Court of Appeals did so because the "issue presented is of great public importance and is likely to arise again." *Id.*, ¶3, n. 1. *See also State ex rel. Badke v. Village Board of Greendale*, 173 Wis. 2d 553, 567, 494 N.W.2d 408 (1993) (holding that a declaratory judgment action was not moot because "Succeeding on review will do more for Badke than resolve a difference of opinion. Succeeding will, as Badke suggests, teach the Village Board what to do under the law to avoid future violations."); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, 278 Wis. 2d 388, 692 N.W.2d 304 (reversing a circuit court decision regarding mootness, noting that a public body should not be shielded by subsequent events from a declaration that its conduct was illegal and held that to find the declaratory judgment action moot would approve the body's unlawful conduct).

These cases support holding the government accountable in this case as well. The Board and the District acted illegally and as public entities they need to be held responsible by the Courts. The claim with respect to the 2014-2015 CBAs is not rendered moot by the time taken to litigate the issue.

V. THE PLAINTIFF IS ENTITLED TO AN 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 289 (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 36-37) 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.

Lastly, if an injunction is not granted in this case now, then the 2015-2016 CBAs will continue to be performed and might even expire during the litigation. The Defendants will then undoubtedly and inevitably make the same arguments regarding the 2015-2016 CBAs that they are currently making with respect to the 2014-2015 CBAs – namely, that because those CBAs have concluded the Plaintiff's claims are moot and should therefore be dismissed. Although the Plaintiff disagrees that claims with respect to the 2014-2015 claims are moot, *see infra* pages 23-24, approving an injunction at this point is needed to preempt any future mootness claim regarding the 2015-2016 CBAs. Additionally, if an injunction is not granted now, although the Court could still address the Plaintiff's claims on the merits, taxpayer resources would continue to be spent on the illegal CBAs and, thus, any relief granted by the Court would be incomplete

and would not satisfy the primary purpose of this lawsuit, which is ensuring proper and legal expenditure of taxpayer resources.

RELIEF SOUGHT

The Plaintiff requests that his motions for summary judgment and an injunction be granted and that the Defendants' motion for summary judgment be denied.

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