STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

BROWN COUNTY TAXPAYERS ASSOCIATION, et al.,

Plaintiffs,

vs.

Declaratory Judgment
Case No. : 18-CV-13
Case Code: 30701

BROWN COUNTY, et al.,

Defendants.

DEFENDANT BROWN COUNTY'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Wis. Stat. § 802.06(2)(a)(6), Defendant Brown County, ("Brown County") by its attorneys von Briesen & Roper, s.c., files this reply brief in support of its motion to dismiss the Complaint of the Plaintiffs, Brown County Taxpayers Association ("BCTA") and Frank Bennett ("Bennett") (collectively "the Plaintiffs") for their failure to satisfy the statutory conditions precedent to maintain a claim against a Wisconsin county.

INTRODUCTION

The 120-day time limit for the Plaintiffs to file a notice of claim has expired. Now, Plaintiffs desperately seek to make their untimely suit timely through a statutory exception that has no application to this case. After months of sitting in the background and staying silent on their intent to file suit, Plaintiffs now throw the "kitchen sink" into their response brief in an effort to defeat Brown County's motion to dismiss. First, they argue they did not have to comply with Wis. Stat. § 893.80's Notice of Claim provisions. Second, they argue that if they were required to comply, they did so because Brown County had "actual notice" by virtue of several

advocacy letters and conversations between members of BCTA and Brown County's Board of Supervisors. Notably, none of these letters or conversations indicated Plaintiffs were going to file suit. Finally, they argue that if these passing conversations were not sufficient to constitute "actual notice," they still have time to file a Notice of Claim because their action only accrued on November 7, 2017 or January 1, 2018. Plaintiffs are misguided on all of their arguments.

ARGUMENT

I. This Action Does Not Fall Under Any Exception To The General Rule That Notice Is Required Under Wis. Stat. § 893.80.

There is no dispute that Plaintiffs failed to provide formal written notice under Wis. Stat. § 893.80 before filing the suit. Although Plaintiffs assert that the circumstances of this case did not require a notice of claim under Wis. Stat. § 893.80, they do not cite to a single Wisconsin case which allows a claimant to deviate from the notice of claim requirements when seeking to enjoin an Ordinance. Plaintiffs rely upon *E-Z Roll Off*'s three-part test for their position that there is an exception in this case to the notice of claim provisions. *E-Z Roll Off*'s three part test is:

1. whether there is a specific statutory scheme for which the plaintiff seeks exemption;
2. whether enforcement of § 893.80(1), Stats., would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and
3. whether the purposes for which § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

E-Z Roll Off, LLC v. Cty. of Oneida, 335 Wis. 2d 720, 800 N.W.2d 421, (2011).

For the reasons set forth below, Plaintiffs cannot meet any of the elements of this test.

A. <u>There Is No Specific Statutory Scheme for Injunctions Under Wis. Stat. § 813.02.</u>

Regarding the first element, Plaintiffs argue Wis. Stat. § 813.02 is a "specific statutory" scheme which is exempt from Wis. Stat. § 893.80. (Pl. Br., p. 3).

However, Wis. Stat. § 813.02 is a general statutory provision contained in Chapter 813 of the Wisconsin Civil Procedure Code. Under *E-Z Roll Off's* test of whether it "provides a specific statutory scheme that conflicts with the general intent behind the 120-day time limit provided in Wis. Stat. § 893.80," Wis. Stat. § 813.02 does not provide any specific scheme. *E-Z Roll Off,* 335 Wis. 2d at 736.

Plaintiffs also rely on *Gillen* and *Auchinleck* but both of these cases are distinguishable because Wis. Stat. § 813.02 does not contain a statutory scheme that conflicts with Wis. Stat. § 893.80's notice requirement. In *Gillen,* the Wisconsin Supreme Court recognized claimants may bring an action to enjoin a violation of the public trust doctrine in a navigable water dispute under Wis. Stat. § 30.294. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 826, 580 N.W.2d 628 (1998).[1] Because Wis. Stat. § 30.294 explicitly permitted injunctions for navigable water violations (*i.e.*, it was more *specific* than the general injunction statute, the *Gillen* Court concluded that it was a more specific statute which controlled over Wis. Stat. § 893.80's notice of claim. *Id.* at 826.

Similarly, in *Auchinleck*, the Wisconsin Supreme Court held that the remedies set forth in Wisconsin's Public Records Act were more specific than Wis. Stat. § 893.80 and were thus exempt from the Notice of Claim. 200 Wis. 2d 585, 593, 547 N.W.2d 587 (1996). Unlike *Gillen*

[1] Wis. Stat. § 30.294 specifically states: [e]very violation of the navigable waters chapter is declared to be a public nuisance and **may be prohibited by injunction** and may be abated by legal action brought by any person.

(emphasis added).

and *Auchinleck*, Wis. Stat. § 813.02 does not explicitly allow injunctions for Ordinance or sales and use tax violations. The general identification of an injunction as a remedy in civil procedure simply does not constitute a more specific statutory scheme.

Plaintiffs then attempt to rely on *Nesbitt Farm, LLC, Dixson, Oak Creek,* and *Kapischke* as support for when courts have recognized that a specific statute did not require a notice of claim. Plaintiffs conveniently ignore that in each case, the courts limited their holdings to the specific statutes they were being asked to construe.

- In *Nesbitt*, the Court of Appeals construed Wis. Stat. § 32.05's condemnation procedures as a specific statute. *Nesbitt Farms, LLC v. City of Madison*, 265 Wis. 2d 422, 665 N.W.2d 379 (Ct. App., 2003).

- In *Dixson*, the Wisconsin Supreme Court construed a cause of action for contribution as a contingent claim that "becomes an enforceable right only when one joint tortfeasor pays more than his or her proportionate share of damages." *Dixson ex rel. Nikolay v. Wisconsin Health Org. Ins. Corp.*, 237 Wis. 2d 149, 612 N.W.2d 721 (2000).

- In *Oak Creek*, the Court of Appeals construed Wis. Stat. § 9.20's direct legislation as a specific statute exempt from notice of claim provisions. *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 304 Wis. 2d 702, 738 N.W.2d 168 (Ct. App., 2007).

- In *Kapischke*, the Court of Appeals construed Wis. Stat. § 59.694(10)'s certiorari provisions as a specific statute exempt from notice of claim provisions. *Kapischke v. Cty. of Walworth*, 226 Wis. 2d 320, 327, 595 N.W.2d 42 (Ct. App., 1999).

Again, none of these decisions held that injunctive relief under Wis. Stat. § 813.02 was a "specific statute" which exempted a claimant from § 893.80's notice of claim provisions. Section 813.02 is not equivalent to any of the "specific statutes" in *Nesbitt Farm, LLC, Dixson, Oak Creek,* and *Kapischke.*

Plaintiffs are essentially asking this Court to hold that, as a matter of law, any claimant can avoid the notice of claim provisions by simply requesting injunctive relief under Wis. Stat. § 813.12. (Pl. Br. In Op. To Mt. to Dismiss, p. 3) The practical impact is that governmental entities could become flooded with injunctive relief cases without any prior notice. This Court

should not take that approach because to do so would contravene the purpose of the Notice of Claim statute. Any changes to the notice of claim statute is an act for the Wisconsin Legislature, not this Court.

B. The Enforcement of Wis. Stat. § 893.80 Would Not Hinder The Legislative Policy Preference.

Plaintiffs must also meet the second element: "whether enforcement of Wis. Stat. § 893.80 would hinder a legislative preference for a prompt resolution of the type of claim under consideration." *E-Z Roll Off,* 335 Wis. 2d at 739. Applying the notice of claim requirements promotes, rather than hinders, the Legislature's preference for expediency. Addressing the issue in *E-Z Roll Off*, the Wisconsin Supreme Court noted that without the notice of claim requirements, a claimant in an antitrust action could wait up to six years before seeking relief under Wis. Stat. § 133.18. *Id.* at 740. In contrast, the notice of claim requirements ensure that a claimant will serve notice within 120 days after the event giving rise to the claim. *Id.* Then, if the County disallows the notice of claim, the claimant will be required to promptly sue on their claim within six months rather than have six years. *Id.*

Under this logic, requiring Plaintiffs to comply with the notice of claim guides litigation to a prompt result. In contrast, allowing Plaintiffs to lie in wait and attempt to enjoin a tax—perhaps years after it was created—would do a disservice to the Legislature's stated policy preferences.

C. The Purpose of Wis. Stat. § 893.80 Would Be Furthered By Requiring a Notice of Claim to Be Filed Here.

Finally the notice of claim provides a governmental entity a chance to investigate potential claims, and to compromise and budget for settlement. *Bostco LLC v. Milwaukee Metro Sewerage Dist.,* 350 Wis.2d 554, 835 N.W.2d 160 (2013).

Plaintiffs rely on *Kettner v. Wausau Ins. Cos.*, 191 Wis. 2d 723, 735, 530 N.W.2d 399 (Ct. App. 1995). However, *Kettner* addressed a subsection of Chapter 893's $50,000 limit of liability. *See* Wis. Stat. § 893.80(3). Plaintiffs' citation ignores *Kettner's* reference to sec. 893.80's $50,000 limit of liability and comparison to the notice of claim provision.[2]

Plaintiffs also attempt to rely upon *Little Sissabagama v. Town of Edgewater*. 208 Wis. 2d 259, 559 N.W.2d 914 (Ct. App. 1997). In *Little Sissabagama*, the Court of Appeals held that Wis. Stat. § 893.80 serves no purpose when appealing a County Board's decision under Wis. Stat. § 70.11's property tax exemptions. The Court stated "In view of the fact that all other determinations under § 70.11 are reviewable without a notice of claim, consistency and logic demand that county board determinations under subsec. (20) do not require a notice of claim." 208 Wis. 2d at 266.[3]

Paradoxically, *Little Sissabagama* supports Brown County's argument because it reaffirms that equitable actions are subject to the notice of claims requirements. The *Little Sissabagama* Court reiterated that *DNR v. City of Waukesha* extended Wis. Stat. § 893.80 to include *"those in equity and not just to those actions seeking money damages." Id*. at 265

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[2] The *Kettner* citation reads, in full:

In *Figgs v. Milwaukee,* 121 Wis.2d 44, 53–54, 357 N.W.2d 548, 553 (1984), our supreme court noted that the purpose of the notice of claim requirement in § 893.80, STATS., "is to 'afford the [government] an opportunity to compromise and settle the claim without litigation.' There is nothing in sec. 893.80, STATS., to suggest that the legislature intended any different or additional purpose for this ... statute." (Citation omitted.) Just as the notice of claim requirement is intended for the protection and benefit of the government, so is the limitation of liability contained in § 893.80(3). The purpose of this statute is to protect the government and taxpayers from excessive claims by limiting the government's exposure to potential liability. Thus, unless the government is exposed to liability, the protections of § 893.80 are inapplicable.

Id. at 735 (emphasis added).

[3] Unlike *Little Sissabagama,* the Plaintiffs here are not appealing property tax exemption determinations under a specific statute. *Little Sissabagama* does not provide grounds on which this Court can create a new exception to the Notice of Claim statute.

(emphasis added). There can be no dispute that injunctions are equitable remedies and, absent a specific statutory scheme, they are subject to Wis. Stat. § 893.80's notice of claim requirements.

II. Plaintiffs' Second Argument Fails Because They Cannot Show Brown County Had Actual Notice And Will Not Be Prejudiced.

Second, Plaintiffs also argue Brown County had actual notice of their forthcoming lawsuit and was not prejudiced. That argument could not be further from the truth.

A. Brown County Did Not Have Actual Notice.

To prove actual notice, Plaintiffs must show more than constructive notice. *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220-21, 556 N.W.2d 326 (Ct. App. 1996) (stating "actual notice is the equivalent of actual knowledge"). Plaintiffs must show that the County not only had knowledge about the events but also identity and type of damage alleged to have been suffered. *Id.*

Plaintiffs rely on their May 10, 2017 and June 17, 2017 letters they claim to have sent to each Brown County Supervisor and Green Bay City Council "outlining their objection," "questioning the tax," and objecting to the Ordinance Vote. (Pl. Br., p. 7, Second Heidel Aff., ¶ 3-6). However, expressing disagreement and asking the Brown County Supervisor to "put off the vote" on May 10, 2017 (Second Heidel Aff., Ex. A) and asking the Green Bay City Counsel (not even Brown County) in June 2017 to "slow this down for proper evaluation and discussion" (Second Heidel Aff., Ex. B) is not enough under *Markweise* to put the County on notice that the Plaintiffs were going to bring a lawsuit nearly eight months later. Actual notice takes more than expressions of disagreement - to hold otherwise would turn every public comment section of a county board meeting into a "notice of claim" session.[4]

[4] Interestingly, even filing a lawsuit does not stand as a notice of injury. In *Vanstone*, the Court of Appeals has recognized that where pleadings failed to indicate a dollar amount, the notice of claim requirements were not satisfied. *Vanstone v. Town of Delafield*, 191 Wis.2d 586, 530 N.W.2d 16 (Ct. App. 1995).

Perhaps concerned their May and June 2017 letters may not be sufficient to constitute actual notice, Plaintiffs next argue the County knew that BCTA wanted to file a lawsuit in December 2017 because Brown County's Director of Administration Chad Weininger approached BCTA's Second Vice President, Dave Dillenberg, after the annual meeting to discuss "the coming lawsuit." (Pls' Br. at 7). According to Dillenberg's own affidavit, "I did not want to talk about it with him." (Dillenberg Aff., ¶ 9). How can Plaintiffs argue that they told the County about the suit in December 2017 while simultaneously attesting to the fact that they didn't want to talk about it? The only logical conclusion is that Plaintiffs wanted to keep their intentions confidential from the County. This logic is also absurd given that the statute requires written notice to the Clerk.[5]

Wisconsin courts have emphasized that *each person* wanting to sue a governmental entity "must identify himself or herself and present his or her claim to the governmental entity in question before filing any suit." *Townsend v. Neenah Joint Sch. Dist.*, 358 Wis. 2d 618, 856 N.W.2d 644. While much discussion has been devoted to BCTA's failure to file a notice of claim, the Plaintiffs' pleadings and the record is entirely silent as whether co-defendant, Frank Bennett, complied with the notice of claim provisions. The only conclusion that can be reached from the present record is that Mr. Bennett did not comply with Wis. Stat. § 893.80's notice of claim provision either.

As to the alleged telephone calls made to each County supervisor, those are also insufficient. There was no documentation of these hearsay calls to put the County on notice and Wis. Stat. § 893.80 contains no authorization for verbal notices of claim. See also *Moran v. Milwaukee Cty.*, 278 Wis. 2d 747, 693 N.W.2d 121 (2005) (holding that even a report of a

[5] Even the Wisconsin Court of Appeals has rejected a claimant's argument that filing a federal lawsuit "to satisfy the notice of claim requirements ignores the essence of § 893.80, Stats." *Probst v. Winnebago Cnty.*, 208 Wis. 2d 280 289, 560 N.W.2d 291 (Ct. App. 1997).[5]

pedestrian's tripping incident at a county airport did not satisfy the notice of claim statute because it was not signed by the claimant, agent, or attorney, and the report was not served on the county board chair or clerk).

B. Brown County Has Been Prejudiced By Plaintiffs' Delay In Bringing This Suit.

In addition to establishing actual notice, Plaintiffs must also prove there was no prejudice to Brown County by virtue of the lack of notice. *E-Z Roll Off, LLC,* 335 Wis. 2d 720; *Elkhorn Area School Dist. v. East Troy Community School Dist.*, 110 Wis. 2d 1, 327 N.W.2d 206 (Ct. App. 1982). Plaintiffs argue that "most of the County's complaints of prejudice have nothing to do with any alleged lack of notice, but rather stem from harms it might suffer if this Court grants a temporary injunction (e.g., expending resources defending the lawsuit, addressing contractual and budgetary issues if the tax is struck down, having to bond to pay for expenditures). (Pl. Br. at 8) This argument is nonsensical because these harms are exactly those the County is now facing because Plaintiffs failed to file a notice of claim before bringing this suit.

Plaintiffs' example of "expending resources defending the lawsuit, addressing contractual and budgetary issues if the tax is struck down, having to bond to pay for expenditures" (Pls.' Br. at 8) are the specific harms to the County that Wis. Stat. § 893.80 works to avoid. The Wisconsin Supreme Court has recognized that the ability to consider the costs of a claim, to budget accordingly, and to contemplate settlement are policies underlying the requirement for itemized relief within a notice of claim. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 350 Wis. 2d 554, 608, 835 N.W.2d 160 (2013); see also *Vanstone v. Delafield*, 191 Wis. 2d 586; *Rouse v. Theda Clark Medical Center, Inc.*, 302 Wis. 2d 358, 735 N.W.2d 30, (2007)(recognizing notice of claim enables governmental entities to avoid needless litigation).

The prejudice the County faces from Plaintiffs' delay is substantial. Because the County did not receive a notice of claim, the County assumed no lawsuit was coming and acted reasonably in budgeting for the sales and use tax to be used for its capital projects.

On May 19, 2017, the Ordinance was signed by the Brown County Clerk. (Complaint, ¶ 13.) By Plaintiffs' own admission, the Ordinance explicitly outlined how the proceeds were to be used. (Complaint, ¶ 15). Thus, Plaintiffs had 120 days from May 19 - September 16, 2017- to file a notice of claim. Had Brown County received a notice of claim by September 16, 2017, it would have had nearly a month (before the County's 2018 budget would be published to the public on October 13, 2017) to reconsider its budget or take further steps. (*See* Ehlinger Aff., ¶ 3, Ex. A.) Proper notice would have permitted the County to investigate the validity of the ordinance by seeking a declaratory judgment.[6] (*See* Flynt Aff., ¶ 5; Defs.' Br. at 12.) A declaratory action deciding the validity of the sales and use tax would have allowed the County to prepare an informed budget before publishing it on October 13, 2017. (Ehlinger Aff., ¶ 3, Ex. A).[7]

But, due to Plaintiffs' silence, the County moved ahead with its Budget and without the benefit of notice. The County continued with its fiduciary duty to finalize planning for capital projects and a budget. Currently, the property tax levy and the 2018 budget have been set. With these constraints, the County is in the predicament where it must attempt to defend the sales and use tax while being extremely limited in its ability to adjust its budget if the sales and use tax is enjoined.

[6] The ability to investigate and evaluate the claim is a recognized purpose of the notice of claim statute. *See E-Z Roll Off*, ¶ 34.

[7] Permitting governmental entities the opportunity to compromise, and to take into account the costs of potential settlement and litigation is another key policy rationale underlying the notice of claim statute. *See E-Z Roll Off*, ¶ 34.

III. Plaintiffs' Final Argument That If They Didn't Yet Satisfy Wis. Stat. § 893.80, They Still Have Time to Do So Is Also Incorrect Because The 120-Day Period Began in May 2017 And Has Expired.

Wisconsin Stat. § 893.80(1d)(a)'s notice of injury requirement requires Plaintiffs to have served the "written notice of circumstances" within "120 days after the *happening of the event* giving rise to the claim." (emphasis added); see also *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995) (recognizing party's present right to enforce a claim accrues with "harm that has already occurred or is reasonably certain to occur in the future").

Plaintiffs suggest November 7, 2017 or January 1, 2018 as the dates their cause of action accrued, but fail to provide any citations to legal authority in support of this suggestion. (Pl. Br, p. 9). Plaintiffs argue the facts were only sufficiently developed on January 1, 2018 for them to know they had a claim. Plaintiffs cannot, with any credibility, argue that their cause of action accrued in November 2017 (when the budget was signed into law) or January 2018 (when the tax began to be collected) when their own members admitted they knew about the Board's actions in May 2017.

Here, the only logical "event" giving rise to the claim was the passage of the Ordinance in May 2017. Plaintiffs argue that in May 2017, the facts were not sufficiently developed to allow a conclusive adjudication of the declaratory judgment claim because it was always possible that the County Board could adopt a budget that still reduced the tax levy by a sufficient amount or the Ordinance contained significant conditions precedent before the sales tax would be implemented.[8] (Pl. Br, p. 10). However, the Ordinance contained detailed spending plans for the nine specific projects. Upon its passage, and under *Pritzlaff*, Plaintiffs knew that their

[8] Plaintiffs throw in another argument that May 17 cannot be the proper date for the notice of claim because the ordinance was signed by the clerk, county executive, and county board chair on various days between May 19 and May 24. Even assuming that May 24 were the correct date, it makes no difference. The 120-day period has run.

"alleged harm" was reasonably certain to occur and they were capable of assessing whether the County had complied with the law.

The test in Wisconsin is not "conclusive adjudication" but rather whether the harm was "reasonably certain" to occur in the future. *Pritzlaff*, 194 Wis. 2d at 315. Ironically, Plaintiffs own argument proves Brown County's point. On one hand, Plaintiffs rely upon their May 2017 communications to argue Brown County had "actual notice" of their claim but on the other hand argue that they, themselves, didn't know their claims began to accrue in May 2017 for the notice period to commence. Plaintiffs cannot cherry-pick their May 2017 acts to argue Brown County had actual notice of their intent to sue but they themselves didn't know they knew they were going to sue until November 7, 2017 or January 1, 2018.[9] Plaintiffs' argument defies any reasonable logic. Plaintiffs' 120 day notice of claim period commenced in May 2017 and has expired.

IV. <u>This Lawsuit Cannot Continue Without Brown County.</u>

Last but not least, Plaintiffs argue this lawsuit can continue even if Brown County is dismissed and they generously "included the County as a Defendant as courtesy out of perceived fairness." Yet, Plaintiffs are asking this Court to enjoin the County, not DOR, from using the sales and use tax revenues to fund capital projects. If, according to Plaintiff's own admission, such relief is "extraneous and unnecessary," then this Court should deny their request for an injunction. (Pl. Br. In Opp., p.11).

But the record is clear that Plaintiffs' Complaint is that the "County Sales Tax is not being used in its entirety to directly reduce the property tax levy." (Complaint, ¶ 25). That is not

[9] It is also interesting that Plaintiffs are seeking to enjoin the Ordinance, which was adopted in May of 2017, yet are also arguing that the "harm" did not occur until November of 2017, when Brown County adopted its budget. The inconsistencies in Plaintiffs' position make it difficult for the County to understand what Plaintiffs are really seeking here.

a claim against DOR. That is a claim against the County for alleged improper use of sales and use tax revenues.

Plaintiffs argue that "if the sales tax is declared unlawful, it is the DOR that will halt the collection, administration, and distribution of the tax." (Pl. Br. In Opp., p.11). While true, Brown County will be damaged. As such, it is, by definition, a necessary party to this dispute under Wis. Stat. § 803.03(1). Without Brown County, this lawsuit cannot continue.

CONCLUSION

This untimely suit is likely the largest piece of litigation in which Brown County has ever been involved in. If this action continues, it will have long-term negative financial ramifications for Brown County and its citizens. For the reasons set forth above, Brown County respectfully requests the Court dismiss this action on the merits on the grounds that Plaintiffs' failed to comply with Wis. Stat. §893.80's threshold notice of claim provisions and their suit is untimely.

Dated at Milwaukee, Wisconsin, this 9th day of February, 2018.

By: Electronically signed by Andrew T. Phillips

Andrew T. Phillips, SBN 1022232
Steven L. Nelson, SBN 1009779
Smitha Chintamaneni, SBN 1047047

Attorneys for Defendant, Brown County

MAILING ADDRESS:
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
PH: (414) 287-1570 (ATP)
(414) 287-1463 (SLN)
(414) 287-1515 (SC)
FAX: (414) 276-6281
Email: aphillips@vonbriesen.com
snelson@vonbriesen.com
schintam@vonbriesen.com

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