

1 STATE OF WISCONSIN: CIRCUIT COURT: KENOSHA COUNTY:
2 BRANCH 1

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4 KRISTI LACROIX, et al.,)
5 Plaintiffs,) CASE NO. 2013-CV-1899
6 -vs-) TEMPORARY INJUNCTION
7 KENOSHA UNIFIED SCHOOL) HEARING (Excerpt)
8 DISTRICT, et al.,)
9 Defendants.)
10 -----

11 THE HONORABLE DAVID M. BASTIANELLI
12 JUDGE PRESIDING

13 APPEARANCES

14 ATTORNEYS RICHARD M. ESENBERG and CJ SZAFIR,
15 Wisconsin Institute for Law & Liberty, Inc., appeared on
16 behalf of the plaintiffs.

17 ATTORNEY NATHAN J. McGRATH, National Right to
18 Work Legal Defense Foundation, appeared pro hac vice for
19 the plaintiffs.

20 ATTORNEY JoAnn M. HART, Boardman & Clark, LLP,
21 appeared on behalf of Kenosha Unified School District
22 and Kenosha Unified School District Board of Education.

23 SHERONDA GLASS, Assistant Superintendent of
24 Business Services for the district, appeared.

25 ATTORNEY LESTER A. PINES, Cullen, Weston, Pines &
Bach, LLP, appeared on behalf of Kenosha Education
Association.

DATE OF PROCEEDINGS:
December 12, 2013

COPY

Tracy A. Czarnecki-Kozmer, RPR
Official Court Reporter, Branch 1

1 (Excerpt of proceedings)

2 THE COURT: You know, back to back. Got to
3 cut it off somewhere. Okay.

4 Let's deal with notice requirements first.
5 The statute basically notes that under 893.80(1d), it
6 essentially applies with certain exceptions under that
7 particular statutory number that no action may be
8 brought or maintained against any volunteer fire company
9 organized under Chapter 213, political corporation,
10 governmental subdivision or agency thereof nor against
11 any officer, official, agent or employee of the
12 corporation, subdivision or agency for acts done in
13 their official capacity or in the course of their agency
14 or employment upon a claim or cause of action unless,
15 and then sub (a) provides that within 120 days after the
16 happening of the event giving rise to the claim, written
17 notice of the circumstances of the claim signed by the
18 party, agent or attorney is served on that political
19 organization. Provides essentially failure to give the
20 requisite notice shall not bar action on the claim if
21 that political organization, I'll use the short term,
22 had actual notice of the claim and the claimant shows to
23 the satisfaction of the Court that the delay or failure
24 to give the requisite notice has not been prejudicial to
25 that political organization.

1 Now, the parties have cited to the Court
2 numerous cases regarding their respective positions.
3 For example, the defendants have cited to the Court the
4 case of *E-Z Roll Off, LLC vs. County of Oneida*, 2011 WI
5 71 for the proposition that claims for declaratory
6 judgment brought pursuant to Section 805.04 and the
7 antitrust statutes are subject to the notice of claim
8 requirements of Section 893.80. That's at page 6 of the
9 defendant's brief.

10 In looking at the *E-Z Roll Off* case, I'm not
11 sure it was that broad as it related to claims for
12 declaratory judgment under 805.04. That might involve
13 something else besides an antitrust cause of action.
14 The *E-Z Roll Off* case basically involved a waste hauling
15 company's action against the county seeking two things:
16 monetary damages and then declaratory judgment; that the
17 county's agreement with the competing waste hauling
18 company constituted a legal restraint of trade in
19 violating of the state's antitrust statute.

20 The decision by the Court primarily dealt
21 with three things in terms of the holdings: First,
22 antitrust damage actions are not exempt from the notice
23 of claim requirements set forth in the statute governing
24 claims against governmental bodies. And continuing
25 violation doctrine did not apply since the company did

1 not meet a 120-notice requirement. And they also failed
2 to show the county suffered no prejudice because of the
3 late notice claim. It didn't really address that any
4 matter under declaratory judgment, 805.04, is always
5 susceptible to the 120-day requirement in that regard.

6 In relation to the 120-day requirement in
7 that statute, the Court earlier noted the case of *Willow*
8 *Creek Ranch, LLC vs. Town of Shelby*, 235 Wis.2d 409.
9 That action involved a landowner bringing an action
10 against a town seeking both declaratory judgment
11 regarding its right to operate a game bird farm on its
12 property and an injunction barring the town from
13 interfering with that operation. And then a subsequent
14 suit they were seeking some compensatory damages. But
15 the Court had occasion to discuss the questions of,
16 first, whether there was immunity; and secondly, the
17 applicability of the 120-day requirement.

18 I discussed earlier to some extent a little
19 bit how this interplayed, and -- but what it did note
20 what was the whole purpose of 893.80 to some extent and
21 which is in part immunity and also in part to give the
22 municipality an opportunity to evaluate claims against
23 it, especially where monetary damages are involved in
24 certain causes of action.

25 The plaintiffs had cited to the Court the

1 case of *Auchinleck, A-u-c-h-i-n-l-e-c-k, vs. Town of*
2 *LaGrange*, 200 Wis.2d 585 not for the proposition simply
3 because it was an open meetings law matter, and I'll
4 take it at this point I'm not addressing the open
5 meetings concept that may or may not be applicable in
6 this case, but for more of the reasoning that the cause
7 of action in that dealing with the open meetings law did
8 not involve obviously monetary damages being sought in
9 tort, et cetera. And to an extent since the 120-day
10 period is -- is in many cases, if not most, designed to
11 give the municipality or the party, a governmental
12 party, an opportunity to evaluate, to perhaps
13 investigate and to make a determination of its validity
14 before any expenditure of public funds or ability to
15 bring a lawsuit.

16 But in the *Town of LaGrange* case, the Court
17 did in terms of thought process point out: Likewise,
18 requiring a citizen to wait up to 120 days before
19 bringing enforcement for an open meetings violation
20 frustrates the purpose of the law. During this delay,
21 the municipality could take significant action without
22 public input or scrutiny of the process. Further, the
23 statutory remedy of voiding governmental action taken at
24 an illegal meeting under Wisconsin statutes 19.97(3) may
25 in many cases become moot.

1 Now, there's no question that, and we have
2 talked about the three prongs that are often employed in
3 what was noted in the *Oak Creek case, Oak Creek*
4 *Citizen's Action Committee vs. City of Oak Creek*, 304
5 Wis.2d 702, and whether, for example, under one criteria
6 there was specific statutory scheme for which the
7 plaintiff seeks exemption. And in that case of *Town of*
8 *LaGrange* the scheme obviously was Chapter 19 dealing
9 with open records law.

10 In the case of *Little Sissabagama*,
11 *S-i-s-s-a-b-a-g-a-m-a, Lake Shore Owners Association vs.*
12 *Town of Edgewater*, 208 Wis.2d 259, that case dealt with
13 a situation where a taxpayer attempted to file a writ of
14 certiorari requesting the review of the county's denial
15 of a public trust exemption to real property tax.
16 Essentially the association had filed the necessary
17 documents to have the matter presented on an exemption
18 request. The assessor's office granted it. The county
19 board at that point held a meeting reviewing that
20 decision and denied the tax exempt status at that time
21 seeking reconsideration and then ultimately under
22 Chapter 70, 70.47(13) sought certiorari.

23 One of the arguments raised was well, they
24 didn't comply with 893.80(1), the notice requirement.
25 The Court in that case noted that it required the Court

1 to interpret the interaction between Chapter 70,
2 70.11(20) and the 893.80 statute. In doing so it listed
3 what the purpose of the property held in trust -- in
4 public trust exemption involved, and then it looked at
5 whether or not 893 would apply.

6 The county in that case argued that under
7 *DNR vs. City of Waukesha*, 184 Wis.2d 178, you did
8 require a notice of claim. The Court there though
9 disagreed. It said: Although Waukesha extended 893.80
10 to all actions, including those in equity, not just
11 those seeking monetary damages, we conclude that a
12 notice of claim is no more required when appealing a
13 county board's determination under 70.11(20) than it
14 would be for an inmate filing a habeas corpus action.
15 We reach this conclusion and did for a variety of
16 reasons. Talking about perhaps the purpose of Section
17 893.80 and as noted: It's to make the municipality
18 aware of a claim and afford it an opportunity to
19 compromise and settle a claim without litigation.

20 Then it went on in terms of that particular
21 statute, why it wouldn't be applicable under this fact
22 situation. And then even pointed out that: Even if we
23 were to conclude that 893.80 applies, we would conclude
24 that it's been complied with in this case and will
25 reach -- and will be in each case arising under that

1 particular section. It said: A notice of claim under
2 893.80 does not need to be given if the county had
3 actual notice of the incident giving rise to the action
4 and the requirements of 893.80(1)(b), which has been
5 argued here. The requirements normally of 893.80(1)(b)
6 is that the county must have notice of the claimant's
7 address, itemized relief sought, notice must be
8 submitted to the clerk, claim must be disallowed, et
9 cetera, et cetera, et cetera.

10 In this particular case as it relates to
11 893, what we're really talking about is looking at the
12 concept of 813.02, which deals with temporary
13 injunctions in combination with the declaratory judgment
14 statute and what the facts of this case may be. Here
15 you have a situation where there's a claim being made
16 that an agreement be entered into is illegal and void;
17 and that if we were required to give the 120-day notice
18 requirement similar to the reasoning in the open
19 meetings law, a great deal of harm could occur prior to
20 either getting the claim rejected or approved so to
21 speak, which brings us to the nature of the claim here
22 as it relates to sub (b) of who the claimant may be.

23 This is a situation to a great extent really
24 addressing an issue in interpretation as a matter of
25 law; i.e., is an agreement being entered into valid

1 assuming that Act 10 is applicable? It's not a
2 situation where we're talking about monetary damages,
3 tort. It is a situation where, I believe, you can in
4 this case, under the facts of this case, and looking at
5 the purpose of 893.80 and the criteria that, firstly,
6 that the notice requirement may not be required. And if
7 it were argued that it may be, I do believe for purposes
8 of this case giving the name of a party as a claimant is
9 really not the issue. The claim being the legal
10 validity of the action being taken. But even under *Oak*
11 *Creek*, if you look at whether specific statutory scheme
12 seeks an exemption, I do believe under the facts of this
13 case the declaratory judgment act along with 813.02
14 would.

15 Secondly, I don't believe it would hinder
16 preference for promoting a proper resolution. And I
17 don't believe you can say that the process for which
18 893.80 was enacted would be furthered by requiring the
19 notice of claim, which I mentioned for the reasons
20 previously given, primarily the *Town of Edgewater* case.

21 So consequently, the Court would deny the
22 motion to dismiss under Section 893.80 because I do not
23 believe it would be applicable or that notice would have
24 been given vis-à-vis the letter to either take or not
25 take action and evaluate what was being presented in

1 terms of, for lack of a better term, quote, "claim,"
2 unquote.

3 Secondly, in relation to this, the -- the
4 parties have raised the issue of standing. In relation
5 to the concept of standing for a declaratory judgment,
6 we obviously need in existence of a justiciable
7 controversy. And in order to have standing to sue, a
8 party must have a personal stake in the outcome of the
9 controversy as seen in the case of *City of Madison vs.*
10 *Town of Fitchburg*, 112 Wis.2d 224.

11 The standing as relates to the plaintiff,
12 Ms. LaCroix, she is a resident of Kenosha County based
13 on the pleadings, apparently resides in Somers. Under
14 federal law, it is clear that a taxpayer having the
15 ability to bring a lawsuit based on how they think funds
16 are being appropriate or not appropriate is very
17 restrictive, if it can almost be done at all, I guess.

18 In the case of *Hart*, 176 Wis.2d 694, the
19 Court noted as it relates to the standing ability of a
20 taxpayer, and that was an issue specifically raised in
21 that case addressing whether or not there could be a
22 transfer of the management of the Milwaukee Public
23 Museum to Milwaukee Public Museum, Inc., a nonprofit
24 corporation, from entering into lease agreements and
25 other matters.

1 The Court noted the general proposition, at
2 least in this jurisdiction, that: In order to maintain
3 a taxpayers' action, it must be alleged that the
4 complaining taxpayer and taxpayers as a class have
5 sustained or will sustain, some pecuniary loss;
6 otherwise, the action will be brought by a public
7 officer. The alleged pecuniary loss need not be
8 substantial in amount. Even a loss or potential loss
9 which is infinitesimally small with respect to each
10 individual taxpayer will suffice to sustain a taxpayer
11 suit.

12 In this particular case, although we're
13 early in the proceedings in terms of the underlying
14 declaratory judgment action, there would appear to be
15 perhaps small amounts, if any, of monies that would
16 directly affect the taxpayer, even on a real estate tax
17 bill, I guess, would, I think, confer at least to her
18 standing in the relation to the contract and
19 expenditures of monies.

20 In relation though I think to the second
21 party, CarrieAnn Glembocki, it had been addressed in
22 terms of potential agreement, which was in effect, I
23 think, until July 31st if I'm not mistaken of this year
24 and what is being presented and whatever the agreement
25 is, although I know in the affidavit there's some

1 dispute as to what the party's position is as to whether
2 you will have to pay union dues or don't, et cetera, as
3 we had a little discussion on that yesterday.

4 But agreement had discussed concepts that
5 all employees covered by this agreement shall become
6 members of the Kenosha Education Association or paid to
7 the association the proportionate share of cost in the
8 collective bargaining process and contract
9 administration.

10 You also have certain arguments presented
11 that I believe she is an employee, a teacher for Kenosha
12 Unified School District. The agreement as a whole is
13 not only monetarily related such as with union dues but
14 conditions of employment and a right to have a say in
15 that issue. I think she does have a stake in the
16 outcome of the controversy as to the legality under the
17 concepts of standing, which is essentially to have a
18 stake in the outcome as I noted earlier.

19 So consequently, I do believe the parties
20 have standing. Therefore, the motion on that ground
21 would be dismissed or denied, not dismissed.

22 I believe on bringing in Kenosha Education
23 Association, the other motion to dismiss we discussed
24 the other day and that's been rectified. Let me look at
25 my notes. I believe outside of standing and the 893 and

1 the other motion involving the proper party have been
2 covered except for the issues then of whether or not
3 there should be or should not be a temporary injunction
4 issued. Was there another motion I might have missed on
5 dismissal?

6 MS. HART: Yes, your Honor. With regard to
7 the board as a duplicative party, I believe that the
8 plaintiffs have essentially agreed to that dismissal of
9 the board; and also I believe that they have either not
10 properly pleaded or have now essentially withdrawn their
11 First Amendment complaint. And we would ask that that
12 be dismissed as well.

13 THE COURT: Okay. I'm not sure they had a
14 First Amendment complaint. They raised it, I think, as
15 an argument of irreparable harm, injunction, but I'm not
16 sure they actually pled it but go on.

17 MR. ESENBERG: I think there's a difference,
18 your Honor, between -- here between a cause of action
19 which, you know, seeks that the Court order something
20 and -- and the various reasons that the Court might have
21 to do that. I think that Miss Glembocki's First
22 Amendment interest, I think, your Honor, is right. They
23 go to the -- at this point to the question of standing
24 and irreparable harm. And there really is no claim in
25 the complaint to dismiss with respect to, you know, as

1 counsel suggests.

2 THE COURT: I guess she seems to indicate
3 that the action duplicates the board with the district,
4 and there was -- I don't know if it was agreement or
5 concession that based on duplication having the board
6 dismissed was --

7 MR. ESENBERG: Right, and that's --

8 THE COURT: -- viable.

9 MR. ESENBERG: -- and that's different. And
10 unless -- unless KEA has some objection to that, that
11 they think the board needs to be in here, then we're
12 happy to proceed against the district.

13 MR. PINES: We don't have any objection.

14 THE COURT: Okay. Then the Kenosha Unified
15 board would be dismissed.

16 MS. HART: Thank you, your Honor. I would
17 just bring to the Court's attention in the complaint the
18 fact that the plaintiffs have requested an order that
19 the collective bargaining agreement -- agreement was the
20 result of a violation of the open meetings law so.

21 THE COURT: Correct. I was not going to
22 take that up anyways at this juncture because I don't
23 think that essentially from my vantage point is a
24 central issue on the temporary injunction being sought.

25 MS. HART: Right, and I believe the

1 plaintiffs have conceded that they haven't properly
2 pleaded --

3 THE COURT: They seem to say that it's not
4 ripe. I understand. It's basically-- I don't know if
5 they said not pleaded as opposed to we put it out there,
6 I know they put it out there in part as a reason for
7 potential, I think, success on the merits, again an
8 argument as opposed to a pleading. I'm not sure, I
9 haven't looked at the complaints for a few days now, of
10 whether that -- I think they were asking that it might
11 be void because of noncompliance but I don't think
12 that's the central issue.

13 MR. ESENBERG: Your Honor --

14 THE COURT: I didn't really address that.

15 MR. ESENBERG: -- yeah, I don't think that
16 we have to get into that now. I think that the -- for
17 that open meetings claim to go forward as I understand
18 it, and I think it may be ripe now because I think the
19 statutory period has passed, but this complaint would
20 have to be amended -- would probably be amended to --
21 one of these smart people that work with me will correct
22 me if I'm wrong but would have to be amended in order to
23 identify the claimant who made the open meetings
24 complaint, allege the expiration of the period and
25 probably also name individual board members. Whether

1 that happens or not --

2 THE COURT: Yeah, I understand but in any
3 event I was not going to really take that up in terms of
4 the issue of today's hearing. Personally I don't think
5 it's really central to what I have to do.

6 MR. PINES: And just -- just so it's clear,
7 the plaintiffs would have to seek leave of the Court to
8 amend their pleadings.

9 THE COURT: They always do. Well, at least
10 let's say now they would because it's already been
11 amended once.

12 MR. PINES: Just so we don't have to face
13 that issue.

14 THE COURT: Yeah, we'll worry about that
15 maybe or maybe not later.

16 MR. ESENBERG: Right.

17 THE COURT: Okay. The next issue then, I
18 think, and correct me if I'm wrong, is really proceeding
19 on the injunction aspect of it, okay?

20 (Proceedings continued)

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1 STATE OF WISCONSIN)
2) SS:
3 COUNTY OF KENOSHA)

4 I, TRACY A. CZARNECKI-KOZMER, an official
5 court reporter in and for the Circuit Court of Kenosha
6 County, do hereby certify that the foregoing is a true
7 and correct transcript of all the proceedings had and
8 testimony taken in the above-entitled matter, as the
9 same are contained in my original machine shorthand
10 notes on said trial or proceeding.

11 Dated this 17th day of December, 2013.

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Tracy A. Czarnecki-Kozmer, RPR

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