STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011-AP-2917

JAMES R. SCHOOLCRAFT
and CRAIG VERTZ,

Plaintiffs-Respondents,

MUKWONAGO AREA SCHOOL DISTRICT,

Involuntary Plaintiff,

v.

STATE OF WISCONSIN
DEPARTMENT OF PUBLIC
INSTRUCTION, TONY EVERS,
and PAUL A. SHERMAN,

Defendants-Appellants.

ON APPEAL FROM A NOVEMBER 2, 2011,
ORDER FOR JUDGMENT BY THE
WAUKESHA COUNTY CIRCUIT COURT,
HON. DONALD J. HASSIN, JR., PRESIDING
CASE NUMBER 2010-CV-4804

BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT OF THE ISSUES

1. Whether the circuit court erred when it granted summary judgment to plaintiffs-respondents James R. Schoolcraft and Craig Vertz (collectively, "Plaintiffs") on their as applied challenge to Wis. Stat. § 118.134 under procedural due process?

Answer by the circuit court: The circuit court granted summary judgment in favor of Plaintiffs on their as-applied challenge to Wis. Stat. § 118.134 under procedural due process.

2. Whether Plaintiffs can pursue their claims in this declaratory judgment action when chapter 227 of the Wisconsin Statutes provides the exclusive method for judicial review of DPI's October 8, 2010, Findings of Fact, Conclusions of Law, and Order?

Answer by the circuit court: The circuit permitted Plaintiffs to pursue their claims.

3. Whether the circuit court erred when it held that Plaintiffs possess taxpayer standing to assert their claims?

Answer by the circuit court: On December 9, 2010, the circuit court denied the defendants-appellants' State of Wisconsin Department of Public Instruction, Tony Evers, and Paul A. Sherman's (collectively, "DPI's") motion to dismiss Plaintiffs' complaint on the grounds that Plaintiffs lack taxpayer standing. The circuit court reiterated its holding as to taxpayer standing in a memorandum decision and order on summary judgment on September 29, 2011.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

DPI believes that oral argument is unnecessary because the parties' briefs will fully present and meet the

issues on appeal and fully develop the theories and legal authorities on each side.

DPI believes that publication of this Court's opinion is appropriate. This case will interpret Wis. Stat. § 118.134, which has not been interpreted in a published decision.

STATEMENT OF THE CASE

This case arises out of DPI's application of a relatively new law, Wis. Stat. § 118.134, to involuntary plaintiff Mukwonago Area School District (the "District"). The District did not participate in the circuit court below and is not participating on appeal.

Wisconsin Stat. § 118.134 permits a school district resident to object to a school district's use of a race-based nickname, logo, mascot, or team name by filing a complaint with the State Superintendent of Public Instruction. On July 21, 2010, District resident Rain Koepke filed such a complaint. (R. 27 at p. 15.)

After an August 27, 2010, Wis. Stat. chapter 227 contested case hearing conducted by defendant Paul. A. Sherman ("Sherman"), a school administration consultant with DPI, DPI ordered the District to cease its use of the "Indians" nickname and related logos. (R. 10 at pp. 11-17; A-App. 11-17.) Sherman, acting under authority granted to him by State Superintendent of Public Instruction, defendant Tony Evers, entered an October 8, 2010, Findings of Fact, Conclusions of Law, and Order (the "Order" or "DPI's Order"). (*Id.*)

In DPI's Order, Sherman concluded that: (1) the Mukwonago Indians nickname and the logo depicting the head of a male person wearing a feather headdress are unambiguously race-based pursuant to Wis. Admin. Code § PI 45.04(3); (2) the District did not have the permission of a federally recognized American Indian tribe to use the nickname and logo; and (3) the District's use of the

nickname and logo promotes discrimination, pupil harassment, and stereotyping in violation of Wis. Stat. § 118.134. (R. 10 at p. 16.)

In an effort to effectively appeal DPI's Order, Plaintiffs filed this lawsuit challenging both the constitutionality of Wis. Stat. § 118.134 and DPI's application of that law to the District. Plaintiffs' claims are based upon the procedural due process and equal protection guarantees of the federal constitution.

The District did not file a petition for judicial review of the Order under chapter 227.

This appeal centers on the only claim upon which Plaintiffs prevailed in circuit court, namely, their as applied challenge to Wis. Stat. § 118.134 under procedural due process. The circuit court erroneously granted summary judgment to Plaintiffs on this claim when it concluded that there was an impermissible risk of bias on the part of Sherman, who served as administrative law judge at the August 27, 2010, contested case hearing. Specifically, the circuit court held that Sherman was not a fair and non-biased decision maker and that the District—not Plaintiffs—was denied procedural due process.

The circuit court erred when it granted summary judgment to Plaintiffs. The circuit court disregarded the presumption of honesty, integrity, and impartiality that attaches to administrative law judges. The circuit court did not even address the presumption in authoring its decision on summary judgment. Instead, it relied upon evidence in the summary judgment record that was insufficient to overcome the presumption of impartiality, namely, portions of Sherman's deposition testimony that was taken months after he conducted the contested case hearing and issued the Order.

Furthermore, the circuit court erred when it let this case go forward at all. Chapter 227 of the Wisconsin Statutes provides the exclusive method to seek judicial

review of an administrative agency decision. Plaintiffs circumvented the procedures of chapter 227 by filing this declaratory judgment action in circuit court. The case should have been dismissed on that basis alone, but the circuit court denied DPI's motion to dismiss.

Finally, Plaintiffs lack taxpayer standing to pursue their claims, yet the circuit court ruled otherwise. Plaintiffs did not plead sufficient facts to establish, nor did they prove through evidence on summary judgment, that they would be directly and personally harmed financially by the Order.

For all of these reasons, this Court should reverse the circuit court.

I. PROCEDURAL POSTURE.

This case comes to the Court on appeal from the circuit court's November 2, 2011, Order for Judgment. (R. 43 at pp. 3-4; A-App. 62-63.) That order incorporated by reference a September 29, 2011, memorandum decision and order that the circuit court entered granting in part and denying in part Plaintiffs' summary judgment motion. (*See* R. 37; A-App. 40.)

Plaintiffs filed their Complaint and a motion for a preliminary injunction and/or temporary restraining order on November 10, 2010. (R. 2; R. 4.) Plaintiffs' initial Complaint asserted federal constitutional claims under 42 U.S.C. § 1983 against DPI, Tony Evers, and Paul A. Sherman. (R. 2 at pp. 7-9.)

DPI filed a motion to dismiss the Complaint and a supporting brief on November 17, 2010, and a brief opposing Plaintiffs' motion for a preliminary injunction and/or temporary restraining order on November 23, 2010. (R. 6; R. 11; R. 12.)

Also on November 23, 2010, Plaintiffs filed a brief in support of their motion for an injunction and/or

temporary restraining order, and a First Amended Complaint. (R. 11; R. 10, A-App. 1.) Plaintiffs' First Amended Complaint is the operative complaint at issue.

On December 9, 2010, the circuit court held a hearing to address Plaintiffs' motion for a temporary restraining order and DPI's motion to dismiss. (R. 50; A-App. 64.) During the hearing, the circuit court orally denied Plaintiffs' motion for a temporary restraining order. (R. 50 at pp. 38-39; A-App. 101-102.) The circuit court also orally denied DPI's motion to dismiss Plaintiffs' Complaint and First Amended Complaint and held that Plaintiffs possess taxpayer standing to assert their claims. (R. 50 at pp. 9-10, 14; A-App. 72-73, 77.) The circuit court entered a written order denying the motions on December 20, 2010. (R. 15; A-App. 18.)

DPI filed an answer to Plaintiffs' First Amended Complaint on December 15, 2010. (R. 14.)

On May 2, 2011, the circuit court held a telephonic scheduling conference and set a briefing schedule for Plaintiffs to file a motion for summary judgment. (R. 22.)

Plaintiffs filed their motion for summary judgment and supporting materials on June 1, 2011. (R. 23, 24, 25, 26.) DPI filed a brief and other materials in opposition. (R. 27, 28.) Plaintiffs filed a reply brief in support of their motion for summary judgment. (R. 39.)

After briefing on summary judgment was completed, the circuit court ordered the parties to prepare a transcript of the August 27, 2010, contested case hearing. (R. 33.) DPI filed a transcript of the hearing with the circuit court on August 15, 2011. (R. 35)

On September 29, 2011, the circuit court entered a memorandum decision and order that granted Plaintiffs' motion for summary judgment in part and denied it in part. (R. 37; A-App. 40.) Plaintiffs prevailed only on their as applied challenge to Wis. Stat. § 118.134 under

procedural due process. *Id.* at p. 21) A formal order for judgment was to follow.

The circuit court's November 2, 2011, Order for Judgment granted summary judgment to Plaintiffs on their as applied challenge to Wis. Stat. § 118.134. (R. 43 at p. 4; A-App. 63.) The circuit court denied Plaintiffs' motion for summary judgment as to their as-applied and facial challenges to Wis. Stat. § 118.134 under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and as to Plaintiffs' facial challenge to Wis. Stat. § 118.134 under procedural due process. (*Id.*) The circuit court declared that Wis. Stat. § 118.134 is "facially constitutional as to Plaintiffs' procedural due process and equal protection claims." (*Id.*)

DPI appeals. (R. 48.)

II. FACTUAL BACKGROUND.

On June 3, 2010, State Superintendent of Public Instruction Tony Evers designated Sherman to administer and conduct proceedings for complaints filed under Wis. Stat. § 118.134. (R. 27 at p. 5.)

On July 21, 2010, District resident Rain Koepke filed a complaint with DPI pursuant to Wis. Stat. § 118.134 to the challenge the District's use of the "Indians" nickname and related logos. (R. 27 at p. 15.)

On July 23, 2010, in accordance with Wis. Stat. § 118.134 Sherman requested that the District submit to DPI examples of the District's use of the Indians nickname, mascot, logos, and team name. (R. 27 at pp. 15-16.) The District complied with this request on August 9, 2010, and submitted examples to Sherman. (*Id.* at pp. 20-29.)

On August 11, 2010, based upon the District's submissions on July 23, Sherman determined that the District's use of the Indians nickname was unambiguously

race-based under Wis. Stat. § 118.134(1). (R. 27 at p. 31.) He also concluded that the District did not have approval to use the nickname from a federally recognized American Indian Tribe pursuant to Wis. Stat. § 118.134(1m)(a). (*Id.* at pp. 31-32.) Accordingly, Sherman ordered a contested case hearing pursuant to Wis. Stat. § 118.134(1)(b). (*Id.* at p. 32.)

On August 27, 2010, DPI held a contested case hearing to determine whether the District's use of the "Indians" nickname and a logo depicting the head of a male person wearing a feather headdress promotes discrimination, pupil harassment, and stereotyping in violation of Wis. Stat. § 118.134. (R. 35.) The District and complainant Koepke appeared by representatives at the hearing and presented evidence. (*Id*.)

Plaintiffs did not seek to participate in the contested case before DPI, which (if they could demonstrate a "substantial interest") they might have done pursuant to the authority granted by Wis. Stat. § 227.44(2m): "Any person whose substantial interest may be affected by the decision following the hearing shall, upon the person's request, be admitted as a party." Likewise, the District did not assert before DPI any of the federal constitutional claims that Plaintiffs subsequently pursued in circuit court.

During the August 27, 2010, hearing, Sherman heard testimony from numerous witnesses, including graduates of Mukwonago High School and administrators from the District. The Department of Public Instruction called no witnesses at the hearing and presented no

evidence.[1] A transcript of the hearing is part of the record on appeal. (R. 35.)

On October 8, 2010, DPI issued the Order, which determined that the District's use of the "Indians" nickname and logo promotes discrimination, pupil harassment, and stereotyping in violation of Wis. Stat. § 118.134. (R. 10 at p. 16; A-App. 16.) DPI ordered that by October 8, 2011, the District "shall terminate its use of the 'Indians' nickname and the logo depicting the head of a male person wearing a feather headdress." (*Id.* at p. 17.)

On October 8, 2010, DPI's Order was served upon counsel for the District and upon Barbara E. Munson, representing complainant Koepke, pursuant to Wis. Stat. § 227.48. (R. 10 at p. 17; R. 24 at p. 3.) The District had 30 days—until November 8, 2010—to file a petition for judicial review. Wis. Stat. § 227.53(1)(a)2.

On October 25, 2010, the District school board passed a motion during its regular meeting that it would not appeal DPI's Order. Mukwonago Area School District, October 25, 2010, Minutes, at p. 2 *available at http://www.masd.k12.wi.us/cms_files/resources/2010-sb-oct-minutes.pdf* (last visited April 12, 2012). The District did not file a Chapter 227 petition for judicial review.

Plaintiffs filed their Complaint in circuit court on November 10, 2010, two days after the 30 day period to file a petition for judicial review had passed. (R. 2.)

Relevant to the first issue on appeal, Sherman was deposed by Plaintiffs' counsel on January 24, 2011. (R. 23 at pp. 43-73; A-App. 54-61.) The circuit court relied heavily upon Sherman's deposition testimony in concluding that he was not an impartial decision maker

[1]The circuit court's recitation of the facts in its September 29, 2011, memorandum decision and order erroneously states that Sherman heard testimony from "persons called by the Department [of Public Instruction] who gave varying and contradictory opinions[.]" (R. 37 at p. 4; A-App. 43.)

and that his bias resulted in the District being denied procedural due process. (*See* R. 37 at pp. 16-18; A-App. 55-57.)

Sherman testified regarding his role in the August 27, 2010, contested case hearing, the issuance of DPI's Order, the administrative rules promulgated by DPI in Wis. Admin. Code ch. PI 45 that interpret Wis. Stat. § 118.134, and DPI's public position regarding Native American teamnames. In particular, a few portions of Sherman's deposition testimony were significant to the circuit court's conclusion that Sherman exhibited an impermissibly high risk of bias. (R. 37 at pp. 16-18; A-App. 55-57.)

First, Sherman testified regarding his and DPI's positions on the eradication of the use of Native American teamnames by school districts. In its September 29, 2011, memorandum decision and order on summary judgment, the circuit court referenced, in part, the following testimony from Sherman's deposition:

> Q. [Plaintiffs' counsel]: Did you come into the hearing with a fair mind-set?
>
> A. Yes.
>
> Q. Okay. You hadn't come out prior to 2009 or any point in time in your life indicating whether you were either pro Indian mascots versus anti Indian mascots?
>
> A. No.
>
> Q. You've never indicated one way or another to anyone prior to this hearing your position as to whether it's good or bad?
>
> A. To any person?
>
> Q. To any person publicly, how does that sound?
>
> A. Publicly, no.

Q. Okay. You know Dr. Evers or the DPI has?

A. Yes.

Q. Okay. And prior to this hearing, you know the DPI has come out and said we want you all to get rid of the race-based nicknames?

A. Yes.

Q. You knew that going in?

A. Yes.

Q. True?

A. Yes.

Q. And the DPI is your employer?

A. Yes.

(R. 23 at p. 62 (deposition transcript at p. 75, l. 5 to p. 76, l. 3); A-App. 38); (R. 37 at p. 16 n. 18.; A-App. 23.)

Second, Sherman testified regarding how the District was to determine what evidence it could have presented to prevail at the August 27, 2010, contested case hearing. The circuit court referenced, in part, the following deposition testimony:

Q. [Plaintiffs' counsel]:. . . Let me next ask, how did Mukwonago know what evidence you wanted to hear? In other words, how is Mukwonago School District supposed to know that you wanted to hear from the teachers as to how they educate in respect to Native Americans?

A. I don't know how they are supposed to know that.

. . . .

Q. Because you're the sole arbiter, judge, jury, whatever you want to call it. You're everything. You're the one sole person.

How is Mukwonago supposed to know what you're looking for?

A. I don't know how they're supposed to know that.

. . . .

Q. Okay. And I apologize for doing this, but I want to make sure we have a clear record. It's your testimony that outside of education, you don't know under any other scenario how Mukwonago could have won this hearing, true?

A. I don't like that question.

. . . . [objection omitted]

Q. You want me to repeat it or try to rephrase it?

A. Can I just put it this way?

Q. Sure.

A. I believe that the district could demonstrate to my satisfaction that their logo and nickname and the use thereof did not promote stereotyping, harassment, or discrimination, all right. Beyond that, all I can say is that the evidence that the Mukwonago School District brought forward did not do that.

Q. But how could they have proven it? That's what I need to know. That's where I'm struggling.

. . . . [objection omitted]

Q. Outside of the educational part that you talked about.

A. I don't know.

(R. 23 at p. 58 (deposition transcript at p. 58, ll. 9-22; p. 59, l. 16 – p. 60, l. 20); A-App. 34); (R. 37 at pp. 17-18; A-App. 56-57.)

Additional portions of Sherman's deposition testimony will be addressed below.

STANDARDS OF REVIEW

Issue 1 (summary judgment): When reviewing the grant of summary judgment, an appellate court applies the same methodology as the circuit court and considers the issues *de novo*. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

Issue 2 (chapter 227): Statutory interpretation is a question of law reviewed *de novo*. *German v. DOT*, 2000 WI 62, ¶ 7, 235 Wis. 2d 576, 612 N.W.2d 50 (citation omitted).

Issue 3 (taxpayer standing): The determination of whether a party possesses standing involves a question of law that is reviewed *de novo*. *See Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 14, 300 Wis. 2d 290, 731 N.W.2d 240 (citation omitted).

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO PLAINTIFFS ON THEIR AS APPLIED CHALLENGE TO WIS. STAT. § 118.134 UNDER PROCEDURAL DUE PROCESS.

The circuit court erred when it granted summary judgment to Plaintiffs on their as applied challenge to Wis. Stat. § 118.134 under procedural due process. The circuit court held that defendant Paul A. Sherman was not a fair and non-biased decision maker and that this fact resulted in the District, not Plaintiffs, being denied

procedural due process. (R. 37 at p. 18; A-App 57.) Strangely, DPI never applied Wis. Stat. § 118.134 *to Plaintiffs*, yet the circuit court granted summary judgment to Plaintiffs. This constituted reversible error.

The circuit court relied primarily upon Sherman's sworn deposition testimony in reaching its conclusion on summary judgment. (*See* R. 37 at pp. 16-18; A-App. 55-57.) In doing so, the circuit court failed to weigh Sherman's testimony in light of the legal presumption that administrative decision makers act with honesty and integrity and are impartial and fair. The circuit court did not even acknowledge this presumption in its written decision on summary judgment, let alone analyze the applicability of the presumption and conclude that Plaintiffs had satisfied their heavy burden of overcoming it. The circuit court disregarded applicable law.

The circuit court erred and should be reversed. The evidence demonstrates that Sherman was a fair and impartial decision maker and that his conduct of the August 27, 2010, contested case hearing and issuance of DPI's Order comported with procedural due process.

A. Legal Standards.

1. Procedural Due Process.

Courts undertake a two-part inquiry to determine whether a procedural due process claim exists:

> When a procedural due process violation is claimed, the first question is whether the plaintiff has been deprived of a constitutionally protected interest in life, liberty or property. If such a deprivation has occurred, we reach the second level of analysis: what process was provided and whether it was constitutionally adequate.

Robinson v. McCaughtry, 177 Wis. 2d 293, 300, 501 N.W.2d 896 (Ct. App. 1993) (citation omitted).

Issue one of this appeal concerns both elements of the procedural due process inquiry. First, were Plaintiffs deprived of a constitutionally protected interest? Second, was the process DPI employed constitutionally adequate? The answers are No and Yes, respectively.

A basic element of constitutional due process is a fair hearing conducted before a fair tribunal. *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶ 27, 286 Wis. 2d 252, 706 N.W.2d 110 (citation omitted). "It is . . . undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker." *Guthrie v. WERC*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983). An adjudicator in an administrative hearing comes within the ambit of the due process requirement of an unbiased decisionmaker. *Marder*, 286 Wis. 2d 252, ¶ 27 (citation omitted); *State ex rel. DeLuca v. Common Council of the City of Franklin*, 72 Wis. 2d 672, 684, 242 N.W.2d 689 (1976)). Violations of due process are not limited to bias or unfairness in fact, but in very limited circumstances may occur "when the risk of bias is impermissibly high." *Id.* (citation and internal quotation marks omitted).

2. Administrative Decisionmakers Are Presumed To Act With Honesty And Integrity And To Be Fair, Impartial, And Not Biased.

Reviewing courts must presume that administrative decisionmakers act with honesty and integrity. *See Marder*, 286 Wis. 2d 252, ¶ 29; *Guthrie*, 111 Wis. 2d at 455; *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 29-30, 498 N.W.2d 842 (1993) (citations omitted). In *Marder*, our supreme court observed that "absent a showing to the

contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Marder*, 286 Wis. 2d 252, ¶ 29 (citation and internal quotation marks omitted).

When analyzing a claim that an adjudicator was biased, a reviewing court must presume that the judge was fair, impartial, and capable of ignoring any biasing influences. *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114 (citation omitted). The presumption is rebuttable. *Id.* (citation omitted).

In *State ex rel. DeLuca v. Common Council of the City of Franklin*, the supreme court explained that a person objecting to a decisionmaker's impartiality has a "heavy burden" and must overcome the presumption that the decisionmaker, "as a responsible . . . officeholder and entrusted with great public responsibility, would adhere to his oath and reach a final decision only on the basis of the evidence presented at the hearing." *DeLuca*, 72 Wis. 2d at 684, 690. To overcome this presumption, a party must point to "special facts and circumstances to demonstrate that the risk of unfairness was intolerably high *See id.* at 691-92.

B. The Circuit Court Erred In Granting Summary Judgment To Plaintiffs When DPI Had Never Applied Wis. Stat. § 118.134 To Plaintiffs.

Perhaps the most peculiar aspect of Plaintiffs' procedural due process claim is that Plaintiffs were not parties to the administrative proceedings that they claim violated their procedural due process rights. Given that the statute in question, Wis. Stat. § 118.134, was never applied to Plaintiffs, they had no procedural due process claim. *See Robinson*, 177 Wis. 2d at 300 ("the first question is whether *the plaintiff* has been deprived of a

constitutionally protected interest in life, liberty or property") (emphasis added).

To prove an as applied procedural due process violation, "[t]he challenger, however, has the burden . . . of proving the statute, *as applied to it*, is unconstitutional beyond a reasonable doubt." *Soc'y Ins. v. LIRC*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385 (emphasis added and citation omitted). This statement of the law illustrates a fatal problem with Plaintiffs' procedural due process claim: DPI never applied Wis. Stat. § 118.134 to Plaintiffs.

The circuit court erred in granting summary judgment to Plaintiffs because Plaintiffs never alleged—let alone demonstrated by evidence—that Wis. Stat. § 118.134 was unconstitutionally applied *to them*. They could not plausibly make and prove such an allegation because DPI has *never* applied Wis. Stat. § 118.134 to Plaintiffs. Plaintiffs' First Amended Complaint indicates that Plaintiffs were challenging the way that Wis. Stat. § 118.134 was "applied to the District." (R. 10 at p. 3, 10; A-App. 3:10.) Plus, DPI's Order requires *the District* to cease its use of the "Indians" nickname and logos, not Plaintiffs. (R. 10 at p. 17; A-App. 17.)

The circuit court acknowledged the principle that an as-applied procedural due process claim can only be proven by demonstrating that the statute in question was unconstitutionally applied to a particular plaintiff. The circuit court stated in its September 29, 2011, memorandum decision and order on summary judgment: "To succeed on an as-applied challenge, a plaintiff must prove that the application of the statute to his particular fact situation was unconstitutional." (R. 37 at p. 11 (citations omitted); A-App 50 (citations omitted).)

Working against its own recitation of the law, the circuit court granted summary judgment to Plaintiffs on their as applied procedural due process claim when Wis. Stat. § 118.134 had never been applied by DPI to

Plaintiffs. (R. 37 at p. 21; A-App. 60.) This constituted reversible error.

C. The Circuit Court Erred When It Failed To Apply The Presumption Of Honesty, Integrity, and Impartiality That Attached To Sherman's Role As Administrative Law Judge.

The circuit court erred when it failed to apply the presumption of honesty, integrity, and impartiality that attached to Sherman's role as administrative law judge. *See Marder*, 286 Wis. 2d 252, ¶ 29; *Guthrie*, 111 Wis. 2d at 455; *Marris*, 176 Wis. 2d at 29-30 (citations omitted); *see also Gudgeon*, 295 Wis. 2d 189, ¶ 20 (citation omitted).

The circuit court failed to address the presumption at all and concluded that Sherman exhibited an "impermissible risk of bias" based upon a handful of statements he made in a deposition that occurred several months after he issued DPI's Order. (*See* R. 37 at pp. 17-19; A-App. 56-58.) The circuit court erred in reaching its conclusion on summary judgment without applying the presumption to analyze Plaintiffs' procedural due process claim.

Furthermore, in failing to acknowledge or apply the presumption, the circuit court did not address whether Plaintiffs had met the "heavy burden" of overcoming the presumption. *See DeLuca*, 72 Wis. 2d at 684, 690. This, too, was error.

The only hint that the circuit court was aware of the presumption of honesty, integrity, and impartiality that attached to Sherman's role as administrative law judge is found in a footnoted quote from the *Marris* decision in the September 29, 2011, memorandum decision and order on summary judgment. The circuit court quoted *Marris*: "The court stated: 'Taken together, these statements

overcome the presumption of honesty and integrity that would ordinarily be applied to this case.'" (R. 37 at p. 16, n. 16 (quoting *Marris*, 176 Wis. 2d at 29-30 (citations omitted)); A-App. 55.)

Although *Marris* formed the primary basis for its ruling on summary judgment, the circuit court neglected to analyze and apply the presumption of honesty and integrity referenced in *Marris*. This constituted reversible error.

D. The Circuit Court Incorrectly Applied *Marris* When There Was No Impermissible Risk Of Bias As To Sherman.

The circuit court incorrectly applied *Marris* when the facts of record demonstrate that there was no impermissible risk that Sherman was biased.

In *Marris* the Wisconsin Supreme Court was presented with a set of facts that are distinguishable from this case. Plaintiff Jean E. Marris ("Marris") was dissatisfied with the Board of Zoning Appeals for the City of Cedarburg's (the "Board's") decision that her residential property had lost its legal non-conforming status because total lifetime structural repairs or alterations to the property, as defined by Cedarburg's ordinance, exceeded 50% of the property's assessed value. *Marris*, 176 Wis. 2d at 19. She sought *certiorari* review in circuit court because she believed that she had been deprived a fair hearing when the Board's chairperson was biased against her due to certain comments the chairperson made at a Board hearing. *Id.*

Marris's attorney requested that the chairperson of the Board recuse himself, but he refused. *Id.* at 22-23. Marris believed that the chairperson had prejudged her case because: (1) he referred to her legal position as a "loophole" in heed of "closing."; (2) he suggested to the Board and assistant city attorney that they should try to

"get her [Marris] on the Leona Helmsley Rule."; and (3) he questioned how the Board, in analyzing expenditures made by Marris, could know whether she "bought a door for that building or another building." *Id.* at 27-28.

The Wisconsin Supreme Court concluded that the Board chairperson's comments "created a situation in which the risk of bias was impermissibly high." *Marris*, 176 Wis. 2d at 29. His comments "indicated that he had prejudged Marris's case" and ultimately "deprived Marris of her right to common law due process." *Id.* at 31.

Specifically, the court homed in on the fact that the chairperson suggested to the Board and assistant city attorney that they "get her [Marris] under the Leona Helmsley rule." *Id.* at 29. (Helmsley was convicted of tax evasion in 1989. *Id.* at 29 n.14.) The phrase "get her" indicated prejudgment and a desire to prosecute, rather than a desire to objectively apply the law to the facts of the case. *See id.* at 30. The statement also indicated that the chairperson's intent was to rule against Marris. *Id.* at 31.

This case is unlike Marris's case. Unlike the Board chairperson in *Marris*, Sherman did not prejudge the case filed by complainant Rain Koepke against the District. Sherman testified during his January 24, 2011, deposition:

> Q. [Plaintiffs' counsel]: Did you come into the hearing with a fair mind-set?
>
> A. Yes.
>
> Q. Okay. You hadn't come out prior to 2009 or any point in time in your life indicating whether you were either pro Indian mascots versus anti Indian mascots?
>
> A. No.

> Q. You've never indicated one way or another to anyone prior to this hearing your position as to whether it's good or bad?
>
> A. To any person?
>
> Q. To any person publicly, how does that sound?
>
> A. Publicly, no.

(R. 23 at p. 62 (Sherman deposition transcript at p. 75, ll. 5-16); A-App. 38.)

Sherman did not prejudge the contested case or exhibit any bias regarding a school district's use of a Native American mascot or team name. He did not make statements that he was out to "get" the District. He did not refer to the District's legal position as a "loophole" in need of closing. On the contrary, Sherman testified that he was prepared to judge the case fairly and had not taken a public position regarding Native American mascots. *See id.* This case is materially different from *Marris*.

Nonetheless, the circuit court cherry-picked a set of statements from Sherman's deposition to reach its conclusion that there was an impermissible risk of bias with Sherman as decisionmaker. (R. 37 at pp. 16-18; A-App. 47-48.)

First, in spite of Sherman not taking any position on race-based mascots, the circuit court determined that Sherman's knowledge of DPI's and Dr. Evers's anti-mascot stance and the fact that Sherman was employed by DPI, "was enough to create an impermissible risk of bias." (R. 37 at p. 17; A-App. 47.)

The circuit court was incorrect. Sherman's knowledge of his employers' positions on race-based mascots and his employment with DPI did not create an impermissible risk of bias. Although he was employed as a consultant with DPI, this was not a case where Sherman's role rose to the level of a due process violation

because he had previously acted as counsel to one of the parties to the contested case. *See Guthrie*, 111 Wis. 2d at 460 ("due process is violated . . . where the decisionmaker has previously acted as counsel to any party in the same action or proceeding."). This was a case where Sherman was acting as an appointed administrative law judge under the authority granted to him by Dr. Evers, the State Superintendent of Public Instruction. (R. 27 at p. 5.)

The Legislature determined that the State Superintendent is a proper judge of a school district's use of a race-based nickname, logo, mascot or team name under Wis. Stat. § 118.134. Wisconsin Stat. § 118.134 states: "if the state superintendent finds that the use of the race-based nickname, logo, mascot, or team name promotes discrimination, pupil harassment, or stereotyping, the state superintendent shall order the school board to terminate its use of the race−based nickname, logo, mascot, or team name within 12 months after issuance of the order." Wis. Stat. § 118.134(3)(a). If Dr. Evers was a proper and non-biased judge for Wis. Stat. § 118.134 cases—as determined by the Legislature—so was his designee, Sherman.

Second, the circuit court focused on Sherman's deposition testimony regarding what evidence the District could have presented to prevail in its case before DPI. The circuit court believed that because Sherman could not articulate what evidence the District could have presented to prevail that he showed an impermissible risk of bias. (R. 37 at pp. 17-18; A-App. 47-48.) The circuit court concluded that Sherman's testimony "indicate[d] that under no articulable circumstances was he prepared to rule in [the District's] favor." (*Id.* at p. 17; A-App. 47.)

The circuit court was incorrect. The circuit court took Sherman's deposition testimony out of context, disregarded certain testimony, and neglected to acknowledge that Sherman's ruling was based upon the facts and evidence actually presented by the parties at the August 27, 2010, contested case hearing.

It is not the role of an administrative law judge to play crystal ball with the law and facts to Monday morning quarterback his decision. That is essentially what the circuit court expected of Sherman when it reviewed his deposition testimony. The circuit court concluded that "Sherman was not prepared, under any scenario, to rule in favor of the District." (R. 37 at p. 18; A-App. 48.) Sherman's deposition testimony does not support the circuit court's conclusion. Sherman testified:

> Q. Okay. And I apologize for doing this, but I want to make sure we have a clear record. It's your testimony that outside of education, you don't know under any other scenario how Mukwonago could have won this hearing, true?
>
> A. I don't like that question.
>
> Q. That sounds like a lawyer talking over there.
>
> MR. KAWSKI: I'll object as to relevance, and you can try to answer or – excuse me. Object as to speculation.
>
> . . .
>
> Q. You want me to repeat it or try to rephrase it?
>
> A. Can I just put it this way?
>
> Q. Sure.
>
> A. I believe that the district could demonstrate to my satisfaction that their logo and nickname and the use thereof did not promote stereotyping, harassment, or discrimination, all right. Beyond that, all I can say is that the evidence that the Mukwonago School District brought forward did not do that.
>
> Q. But how could they have proven it? That's what I need to know. That's where I'm struggling.

MR. KAWSKI: Objection. Speculation. You can try to answer.

Q. Outside of the educational part that you talked about.

A. I don't know.

(R. 23 at p. 58 (deposition transcript at p. 58, ll. 9-22; p. 59, l. 16 – p. 60, l. 20); A-App. 34); (R. 37 at pp. 17-18; A-App. 56-57.)

Sherman went on to testify as to the District's lack of evidence at the contested case hearing regarding its educational programs about Native American history and the use of the Indians nickname and logo, which could have impacted his ruling. He testified:

Q. Okay. And you don't know how they educate their students in terms of Native American history, true?

A. There was some evidence of that at the hearing.

Q. But not enough for you to make a judgment one way or the other, true?

A. That's true.

Q. Okay. And you would agree with me that Mukwonago coming into the hearing didn't know that you wanted to hear from their history teachers as to how they teach about Native American ancestry, true?

A. I can't agree with that, no.

Q. You're saying that they did know?

A. Because they presented that evidence.

Q. Okay. But you wanted to hear more evidence?

A. Right.

> Q. And are you – is it – is it your opinion that the education that Mukwonago provided regarding Native Americans was not sufficient to meet its burden of proof? Does that make sense?
>
> A. I think yes. Yes.
>
> Q. Okay. What was wrong with the education that they were providing their students?
>
> A. There was nothing wrong with their education they were providing their students. It did not address the issue of the nickname or logo.
>
> Q. Their education?
>
> A. Right.
>
> Q. And you think it should?
>
> A. I think that would have been some evidence that I would have considered in making my decision.

(R. 23 at p. 58 (deposition transcript at p. 60, l. 22 to p. 62, l. 1); A-App. 34-35.)

Thus, Sherman could have ruled differently had the District presented additional evidence regarding how it had educated its students on Native American history in conjunction with the District's use of the Indians nickname and logo. The circuit court did not expressly consider this testimony in issuing its ruling on summary judgment as to Sherman's impartiality as a judge. In doing so, the circuit court disregarded persuasive evidence that confirmed that Sherman was an impartial decisionmaker who properly and fairly issued a ruling based upon the facts presented to him by the parties.

The circuit court largely ignored the proper and impartial manner in which Sherman conducted the administrative proceeding before DPI. The complete

documentary record of the chapter 227 contested case proceeding before DPI is not part of the appellate record, but a transcript of the August 27, 2010, hearing is found at R. 35. A review of this transcript reveals no impartiality or bias on the part of Sherman; he evenhandedly administered the proceedings and allowed the District to present in its evidence, make its arguments, and establish its case. (*See* R. 35 at pp. 1-213.) The circuit court disregarded Sherman's conduct of the proceedings and instead focused on slivers of deposition testimony that occurred months after the fact and that were largely based upon speculation. This was reversible error.

In sum, the circuit court erred when it applied *Marris* to conclude that Sherman exhibited an impermissible risk of bias that resulted in a procedural due process violation. The evidence of record demonstrated that Sherman did not prejudge the case, unlike the evidence in *Marris*. Sherman was a fair and non-biased decisionmaker that weighed the evidence before him and issued the type of even-handed ruling that the law presumes that he would issue. Accordingly, the circuit court erred when it granted summary judgment to Plaintiffs on their as-applied procedural due process claim. The circuit court must be reversed.

II. THE CIRCUIT COURT ERRED BY PERMITTING PLAINTIFFS TO PURSUE THEIR CLAIMS BECAUSE CHAPTER 227 PROVIDES THE EXCLUSIVE METHOD FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS.

The circuit court erred when it permitted Plaintiffs to effectively appeal DPI's Order by pursuing their claims in a declaratory judgment action. Chapter 227 of the Wisconsin Statutes provides the exclusive method for judicial review of administrative agency decisions. This

principle rings true even when the statute upon which the agency based its decision is alleged to be unconstitutional.

The circuit court rejected DPI's motion to dismiss Plaintiffs' Complaint and First Amended Complaint in light of chapter 227 and state sovereign immunity principles in an oral ruling on December 9, 2010. (R. 50 at pp. 10, 14; A-App. 73, 77.); (*see also* R. 15; A-App. 18.) Permitting this case to go forward in light of chapter 227's exclusive remedy of judicial review constituted reversible error.

A. Legal Standard.

Chapter 227 of the Wisconsin Statutes provides "the exclusive method for judicial review of agency determinations." *Turkow v. DNR*, 216 Wis. 2d 273, 282, 576 N.W.2d 288 (Ct. App. 1998) (citing *Kosmatka v. DNR*, 77 Wis. 2d 558, 567, 253 N.W.2d 887 (1977); *Kegonsa Joint Sanitary Dist. v. City of Stoughton*, 87 Wis. 2d 131, 145-46, 274 N.W.2d 598 (1979)). "[W]here a statute relating to an administrative agency provides a direct method of judicial review of agency action, such method of review is generally regarded as exclusive, especially where the statutory remedy is plain, speedy, and adequate." *Kegonsa Joint Sanitary Dist.*, 87 Wis. 2d at 145 (citations omitted). Thus, a complaint challenging an administrative agency decision is properly dismissed when chapter 227 judicial review has not been pursued. *Turkow*, 216 Wis. 2d at 283.

Wisconsin Stat. § 227.52 provides, in relevant part: "Administrative decisions which adversely affect the substantial interests of *any person*, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter." "The remedy available to a person aggrieved by an agency decision is set forth in § 227.53(1), STATS., which states, 'Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this

chapter.'" *Turkow*, 216 Wis. 2d at 282 (quoting Wis. Stat. § 227.53(1)).

The statute at issue, Wis. Stat. § 118.134, provides that chapter 227 judicial review is the procedure by which decisions issued by the State Superintendent of Public Instruction are to be reviewed. Specifically, Wis. Stat. § 118.134(3)(c) states: "Decisions of the state superintendent under this subsection are subject to judicial review under ch. 227."

A declaratory judgment action is not proper when a plaintiff circumvents the review provided in chapter 227. In *Turkow*, the court of appeals explained and applied this principle when it dismissed an improper declaratory judgment action filed to challenge an administrative decision by the DNR:

> The DNR relies on *Kosmatka* for the proposition that a declaratory judgment action is not proper when a plaintiff essentially circumvents the review provided in ch. 227, STATS. In *Kosmatka*, the plaintiffs sought a permit for a structure on their lakefront property. After public hearing, the DNR issued findings of fact and an order denying the permit application. Kosmatka did not seek ch. 227 judicial review of the order; rather, he sought and obtained a declaratory judgment that the structure was a pier which could be maintained without a permit. The Wisconsin Supreme Court reversed, and stated: "[T]he granting of a declaratory judgment in favor of the plaintiff had the effect of improperly bypassing the review of the DNR administrative order under Chapter 227, Stats. (1973)." *Id.* at 565, 253 N.W.2d at 891.
>
> Based on state sovereign immunity principles and ch. 227, STATS., we conclude the proper method for challenging the DNR's navigability determination is to pursue the relief afforded in ch. 227, and the DNR's motion to dismiss should have been granted on that basis. We therefore reverse the trial court's decision on the motion to dismiss.

Turkow, 216 Wis. 2d at 282-83.

The Wisconsin Supreme Court has held that the principle that chapter 227 provides the exclusive method for judicial review of agency decisions governs even when an administrative agency's decision or the laws that that decision is based upon are challenged on constitutional grounds. *State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 82 Wis. 2d 529, 544, 263 N.W.2d 196 (1978).

In *First National Bank*, then-Justice Shirley Abrahamson, writing for a unanimous court, interpreted Wis. Stat. § 227.20(1)(a) (1973) and held that "chapter 227 recognizes a party's right to attack an administrative decision by challenging the constitutionality of the legislative enactment which authorizes the agency to act or by asserting that the administrative proceedings deprived him of due process." *First Nat'l Bank*, 82 Wis. 2d at 544; *see also Kegonsa Joint Sanitary Dist.*, 87 Wis. 2d at 146 (in chapter 227 judicial review, "the court has authority to reverse or remand the case to the agency if it finds the agency exceeded its jurisdiction or otherwise violated a constitutional provision."). The *First National Bank* court held that chapter 227 was the "exclusive remedy" to challenge the procedures employed and the decision issued by the Office of the Commissioner of Banking. *First Nat'l Bank*, 82 Wis. 2d at 546.

The analogue to Wis. Stat. § 227.20(1)(a) (1973) in current chapter 227 is Wis. Stat. § 227.57(8), which states in part:

> (8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion . . . *is otherwise in violation of a constitutional or statutory provision*; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Thus, chapter 227 provides the remedies of reversal or remand when an agency's actions constitute a violation of constitutional protections, such as equal protection or procedural due process.

B. Application Of Legal Standard.

Plaintiffs cannot pursue their federal constitutional claims because chapter 227 of the Wisconsin Statutes provides the exclusive method for judicial review of DPI's Order. Plaintiffs attempted to appeal DPI's Order without following the required procedures in chapter 227. Plaintiffs' 42 U.S.C. § 1983 civil rights action is not a timely petition for judicial review of DPI's Order under chapter 227; therefore, Plaintiffs' followed the wrong procedure.

To challenge the Order, Plaintiffs filed a 42 U.S.C. § 1983 civil rights action seeking both declaratory and injunctive relief. (R. 10 at pp. 7-10; A-App. 7-10.) They asserted facial and as-applied challenges to Wis. Stat. § 118.134 under equal protection and procedural due process theories. (*Id*.) Importantly, their legal challenges are based upon "[t]he Defendants [sic] actions and enforcement of Wis. Stat. § 118.134." *Id.* at p. 8, ¶¶ 41, 44.)

The allegations in Plaintiffs' First Amended Complaint describing DPI's "actions and enforcement" relate directly to the administrative proceedings conducted by DPI that ultimately led to DPI's issuance of the Order. (R. 10 at pp. 7-10; A-App. 7-10.) Plaintiffs requested that the circuit court: (1) find that DPI deprived Plaintiffs of constitutional rights; (2) find that all or portions of Wis. Stat. § 118.134 are facially unconstitutional or unconstitutional as applied to the District; and (3) award injunctive and declaratory relief to Plaintiffs barring Defendants from enforcing Wis. Stat. § 118.134 and tolling any deadlines for the District to comply with the Order. *Id.* at p. 9, ¶¶ A-C.)

Plaintiffs challenged the Order by asserting federal constitutional claims against DPI's enforcement of Wis. Stat. § 118.134. Plaintiffs may not assert such claims in a declaratory judgment action because chapter 227 provides the exclusive method for judicial review of administrative agency decisions. *First Nat'l Bank*, 82 Wis. 2d at 544-46; *Kegonsa Joint Sanitary Dist.*, 87 Wis. 2d at 145; *Turkow*, 216 Wis. 2d at 282. Chapter 227 provides the exclusive remedy to challenge administrative agency actions in circuit court, even when the challenge also involves a claim that a statute that the agency relied upon is unconstitutional. Wis. Stat. § 227.57(8); *First Nat'l Bank*, 82 Wis. 2d at 544; *Kegonsa Joint Sanitary Dist.*, 87 Wis. 2d at 146.

Wisconsin Stat. § 227.52 states that "[a]dministrative decisions which adversely affect the substantial interests of *any person*, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter." Wisconsin Stat. § 227.53(1) provides that judicial review is the available procedure. Thus, by its plain language, Wis. Stat. § 227.52 provides that "any person"—including Plaintiffs—whose substantial interests are adversely affected by an administrative agency decision must seek judicial review under chapter 227. Plaintiffs did not do so. Instead, they filed a civil rights action in circuit court.

Plaintiffs filed their civil rights action in light of the fact that Wis. Stat. § 118.134(3)(c) provides that chapter 227 is the mechanism by which the Order can be challenged in circuit court. Wisconsin Stat. § 118.134(3)(c) states: "Decisions of the state superintendent under this subsection are subject to judicial review under ch. 227." Plaintiffs did not pursue the available remedy of judicial review. Instead, they filed a civil rights action in circuit court.

Plaintiffs filed their 42 U.S.C. § 1983 civil rights action in light of the fact that they could have participated in the administrative proceeding before DPI pursuant to

Wis. Stat. § 227.44(2m). Plaintiffs did not avail themselves of this procedure. Instead, they filed a civil rights action in circuit court.

Plaintiffs filed the instant action, completely bypassing chapter 227, in light of the fact that *First National Bank*, *Kegonsa Joint Sanitary District*, and *Turkow* direct parties whose substantial rights are affected by administrative actions to pursue chapter 227 judicial review. Even when due process or other constitutional violations are asserted based upon wrongful agency action or an allegedly unconstitutional statute, the proper method is to file a chapter 227 petition for judicial review. Wis. Stat. § 227.57(8); *First Nat'l Bank*, 82 Wis. 2d at 544; *Kegonsa Joint Sanitary Dist.*, 87 Wis. 2d at 146. Even when declaratory relief is sought because of allegedly erroneous legal determinations by an agency, the proper method is to file a chapter 227 petition for judicial review. *Turkow*, 216 Wis. 2d at 282. Plaintiffs did not do so. Instead, they filed a civil rights action in circuit court.

There is a good reason why Plaintiffs did not follow the procedures required to seek chapter 227 judicial review of the Order: by the time Plaintiffs filed their initial complaint, the deadline for Plaintiffs to file a chapter 227 petition for judicial review of the Order had passed. *See* Wis. Stat. § 227.53(1)(a) (a petition for judicial review must be filed within 30 days of service of the agency decision). Even if the Court would construe Plaintiffs' Complaint or First Amended Complaint as a petition for judicial review under chapter 227, Plaintiffs' filing was not timely. They filed this action on November 10, 2010. (R. 2.) The deadline to file a chapter 227 petition for judicial review was November 8, 2010. When a petition for judicial review is untimely, the circuit court lacks competency to proceed and the case must be dismissed. *Currier v. DOR*, 2006 WI App 12, ¶ 23, 288 Wis. 2d 693, 709 N.W.2d 520. Strict compliance with statutory filing deadlines is required. *Id.*; *see also Brachtl v. DOR*, 48 Wis. 2d 184, 187-88, 179 N.W.2d 921 (1970).

Plaintiffs did not follow the required procedures in chapter 227 of the Wisconsin Statutes to challenge the Order. It constituted reversible error for the circuit court to let this case proceed to the merits. Accordingly, this Court should reverse the circuit court.

III. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT PLAINTIFFS POSSESS TAXPAYER STANDING TO PURSUE THEIR CLAIMS.

The circuit court erred when it concluded that Plaintiffs possess taxpayer standing to pursue their claims. The circuit court orally denied DPI's motion to dismiss this case on the grounds of lack of taxpayer standing on December 9, 2010. (R. 50 at pp. 10, 14; A-App. 73, 77); (*see also* R. 15; A-App. 18.) The circuit court reiterated its erroneous ruling on taxpayer standing in its September 29, 2011, memorandum decision and order. (R. 37 at pp. 9-10; A-App. 48-49.)

The circuit court should have concluded that Plaintiffs do not possess taxpayer standing based upon the Wisconsin Supreme Court's decision in *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988). *City of Appleton* requires that to demonstrate taxpayer standing "the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different from the damage sustained by the general public." *Id.* at 877. Plaintiffs' Complaint and First Amended Complaint and the evidence that Plaintiffs submitted on summary judgment failed to meet this standard. Accordingly, it was reversible error for the circuit court to conclude that Plaintiffs possess taxpayer standing.

A. Legal Standard.

In Wisconsin, the circuit courts have been granted jurisdiction "in all matters civil and criminal." Wis. Const. art. VII, § 8; *State ex rel. First Nat'l Bank of Wis.*

Rapids v. M & I Peoples Bank of Coloma, 95 Wis. 2d 303, 308 n. 5, 290 N.W.2d 321 (1980). To have standing in Wisconsin courts to assert a claim, a plaintiff must demonstrate that the challenged action caused direct injury to the plaintiff's interest, and must demonstrate that the affected interest is one that is recognized by law. *Wisconsin's Environmental Decade, Inc. v. PSC* ("*WED*"), 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975). Although the requirement of standing is not a jurisdictional prerequisite for litigation in Wisconsin courts, "the doctrine has generally been applied as a matter of sound judicial policy." *First Nat'l Bank*, 95 Wis. 2d at 308 n.5 (citation and internal quotation omitted). "Standing" requires a party to have "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Id.* at 307-08 (citation and internal quotation omitted).

The general Wisconsin rule of standing was succinctly stated in *WED*, 69 Wis. 2d at 10:

> The Wisconsin rule of standing envisions a two-step analysis conceptually similar to the analysis required by the federal rule. The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law.

Plaintiffs have based their taxpayer standing on the Wisconsin Supreme Court's decision in *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988). (R. 10 at p. 3; A-App. 3.) *City of Appleton* indicates why Plaintiffs do not have standing.

In *City of Appleton*, Garth Walling ("Walling"), a resident and taxpayer of the Town of Menasha and Chairman of the Menasha Town Board, moved to intervene in a suit filed by the City of Appleton against the Town of Menasha. *City of Appleton*, 142 Wis. 2d at 873-74. Appleton had annexed several parcels from Menasha, but the municipalities were unable to agree on

the division of assets and liabilities, so Appleton sued under Wis. Stat. § 66.03(5) to have the circuit court make an apportionment. *Id.* at 873. Walling sued to challenge the constitutionality of the apportionment statute because he believed an apportionment would deprive him and other Menasha taxpayers of rights, privileges and property, and of "assets paid for by his tax dollars," and the apportionment would "require[ ] him and other Menasha property owners to pay additional taxes." *Id.* at 873-74.

The Wisconsin Supreme Court noted that the Town of Menasha could not challenge the constitutionality of the statute. *Id.* at 874. This is so because of the principle that "towns and other legislatively created entities of the state cannot challenge the constitutionality of a statute." *Id.* The court went on to set forth an important consideration regarding a plaintiff's assertion of taxpayer standing: "whether Walling's third-party action is a derivative action or a nonderivative action." *Id.* at 875. "The basis of [a] derivative action is that the municipality has been injured and has the primary right to proceed but has refused to bring the action. The individual brings the action because the municipality fails to exercise its own right to sue." *Id.* at 876 (citation and internal quotation omitted). When a taxpayer brings a derivative action, "the taxpayer's rights are coextensive with those of the municipality." *Id.*

On the other hand, a *non*derivative action requires a taxpayer to allege and prove particular facts to show standing. "To bring a nonderivative action, the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public." *Id.* at 877. "If the taxpayer shows even a slight loss, [the Wisconsin Supreme Court] has granted the taxpayer standing to challenge the constitutionality of a statute." *Id.* at 878.

B. Application of Legal Standard.

1. Plaintiffs Cannot Assert Derivative Taxpayer Standing.

Plaintiffs cannot assert derivative taxpayer standing based upon the rights of the District. First, the District decided not to timely appeal DPI's Order in a chapter 227 judicial review proceeding. DPI's Order was issued and served on the parties to the administrative proceeding on October 8, 2010. (R. 10 at p. 17.; R. 24 at p. 3.) The time to seek judicial review of the Order expired on November 8, 2010. *See* Wis. Stat. § 227.53(1)(a)2. The District did not timely appeal, extinguishing its right to challenge the Order upon judicial review under chapter 227.

Second, the District, as an agency or arm of the state, does not possess standing to challenge the constitutionality of state law. *Buse v. Smith*, 74 Wis. 2d 550, 563, 247 N.W.2d 141 (1976) (citations omitted). Like in *City of Appleton*, Plaintiffs cannot claim standing to assert constitutional claims which the District could not itself assert. *See City of Appleton*, 142 Wis. 2d at 877.

2. Plaintiffs Have Neither Pled Nor Proven A Cognizable Claim Under A Nonderivative Taxpayer Standing Theory.

To possess nonderivative taxpayer standing, "the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public." *City of Appleton*, 142 Wis. 2d at 877 (emphasis added). The Wisconsin Supreme Court has placed emphasis on finding that the taxpayer has "sustained a direct and personal pecuniary loss." *Id.* at 878.

Even accepting the allegations in Plaintiffs' First Amended Complaint as true, the First Amended Complaint does not allege facts sufficient to establish a direct and personal pecuniary loss. Furthermore, Plaintiffs failed to *prove* on summary judgment that they have suffered or will suffer a direct and personal pecuniary loss that constitutes a damage different from the damage sustained by the general public. Thus, Plaintiffs do not possess nonderivative taxpayer standing to assert their constitutional claims.

a. Plaintiffs' First Amended Complaint Did Not Plead Facts Sufficient To Establish Taxpayer Standing.

Plaintiffs alleged that they filed their "action on behalf of themselves and other similarly situated taxpayers within the Mukwonago Area School District." (R. 10 at p. 2; A-App. 2.) They did not assert in their First Amended Complaint that their status as taxpayers in the District will cause them a direct and personal pecuniary loss. "Upon information and belief," Plaintiffs made several speculative allegations regarding the impact of DPI's Order, none of which indicate how, whether, or why Plaintiffs will suffer a direct and personal pecuniary loss due to DPI's Order.

Plaintiffs' First Amended Complaint states:

> 36. Upon information and belief, in light of Paul A. Sherman's Order, the District must immediately begin the process of, and begin incurring the costs to, change the District's nickname and mascot/logo in order to comply with the current deadline of October 8, 2011.
>
> 37. Upon information and belief, the District's incurring of the costs associated with the changing of the District's high school nickname and mascot/logo will negatively impact the funding of

> other educational opportunities for students within the District.
>
> 38. Upon information and belief, the District is currently within its budget process and the expenses associated with complying with Paul A. Sherman's Order are immediately being considered by the District's School Board for purposes of determining taxes, a potential referendum and program funding.
>
> 39. The total costs associated with the changing of the nickname and mascot/logo of the District's high school will cost the taxpayers of the District considerable sums of money that approaches $100,000.00. To date, the District has already spent $17,000.00 related to the nickname and logo/mascot issue, which does not include time spent by District officials, employees and staff. This amount is in addition to the amount taxpayers will need to spend on new apparel with a different nickname and mascot/logo to support the District's high school.

(R. 10 at p. 7; A-App. 7.)

First, there is no allegation in Plaintiffs' First Amended Complaint that indicates that requiring the District to change the Indians nickname and logo will cause Plaintiffs to suffer a direct and personal pecuniary loss. The absence of such an allegation is a defect in Plaintiffs' complaint that should have prevented the circuit court from concluding that Plaintiffs alleged facts sufficient to establish taxpayer standing under *City of Appleton*. *See City of Appleton*, 142 Wis. 2d at 877.

Second, Plaintiffs' allegation in paragraph 36 that the District "must . . . begin incurring the costs" is an allegation relating to the District, not Plaintiffs. (R. 10 at p. 7; A-App. 7.) The fact that the District allegedly would incur costs does not harm Plaintiffs.

Third, Plaintiffs' allegation in paragraph 37 that "the District's incurring of the costs associated with the changing of the District's high school nickname and logo

will negatively impact the funding of other educational opportunities for students within the District" does not establish any harm or direct and personal pecuniary loss for Plaintiffs. (R. 10 at p. 7; A-App. 7.) Plaintiffs are not the District, nor have they alleged that they are students whose educational opportunities will be underfunded because of costs that the District might incur. Plaintiffs have alleged only that they are taxpayers in the District. (R. 10 at p. 2; A-App. 2.) These allegations do not demonstrate a direct and personal pecuniary loss.

Fourth, Plaintiffs have pled no facts to suggest that the District plans to increase the tax burden for District taxpayers because of the Order. They did not plead facts to demonstrate that the District will take actions that will cause the tax levy to increase. They have not pled facts to demonstrate that the District plans to hold a referendum to increase taxes. They pled only that the expenses associated with the Order would be "considered" by the District. (R. 10 at p. 7; A-App. 7.) They pled no facts to tie compliance with the Order to any depletion of their tax dollars.

Fifth, Plaintiffs' allegation in paragraph 39 of their First Amended Complaint that "[t]o date, the District has already spent approximately $17,000.00 of taxpayer dollars related to its defense against application of Wis. Stat. § 118.134" does not relate to *compliance* with the Order, but to the District *litigating whether the Order was to be issued by DPI*. It is peculiar that Plaintiffs complained of these litigation costs, which were expended by the District to contest DPI's application of Wis. Stat. § 118.134. These are not compliance costs, but costs expended in an effort to thwart the District's compelled compliance with Wis. Stat. § 118.134. If Plaintiffs were dissatisfied that the District expended these funds, they should have raised that issue with the District. The District's expenditure of these funds does not establish a direct and personal pecuniary loss to Plaintiffs due to the District's compliance with the Order.

In light of the arguments above, the circuit court's ruling on taxpayer standing as to Plaintiffs' First Amended Complaint was erroneous and must be reversed.

b. Plaintiffs Failed To Prove On Summary Judgment That They Possess Taxpayer Standing.

In addition to failing to plead taxpayer standing in their First Amended Complaint, Plaintiffs subsequently failed to "prove a direct and personal pecuniary loss." *City of Appleton*, 142 Wis. 2d at 877. The evidence that they submitted in support of their summary judgment motion did not satisfy this standard, but the circuit court concluded otherwise. (R. 37 at pp. 9-10; A-App. 48-49.)

The only evidence that Plaintiffs submitted to prove their taxpayer standing on summary judgment is a November 19, 2010, affidavit signed by Shawn McNulty, Principal of Mukwonago High School. (R. 24.) The affidavit does not prove a direct and personal pecuniary loss for Plaintiffs. It does not tie the District's compliance with the Order to any loss of tax dollars for Plaintiffs.

Mr. McNulty testified:

> 5. That to date, the District has already incurred expenses of at least $17,000.00, plus associated staff time and resources in challenging and attempting to comply with the procedures of the newly enacted Wis. Stat. § 118.134.
>
> . . . .
>
> 18. That in addition to the hours of District staff that will be required to accomplish the changes ordered by the Department, the District anticipates that approximately another $50,000.00 will need to be expended.
>
> 19. That the District is currently operating under a referendum that provides for the

> District's additional ongoing operational expenses through taxpayer funding.
>
> 20. That the funds expended to accomplish the high school's nickname and logo change will come directly from the operating budget, which will obviously diminish the available cash-flow reserves of the District.
>
> 21. That as the cash-flow reserves of the District are reduced, it *will likely become necessary to present another referendum* for continued funding and absent the approval of such a future referendum, *student educational programs and opportunities may be affected*.

(R. 24 at pp. 3-4 (emphasis added).)

This speculative evidence, framed in terms of what *could* happen regarding the District's budget and expenses and the potential for a referendum to comply with the Order, was the only evidence that Plaintiffs submitted in support of taxpayer standing on summary judgment. Plaintiffs submitted no other evidence to show how District costs were planned to be passed along to them. Accordingly, the circuit court erred when it relied upon this evidence to conclude that Plaintiffs possessed taxpayer standing.

Plaintiffs' First Amended Complaint does not include sufficient allegations to establish nonderivative taxpayer standing. Furthermore, Plaintiffs failed to prove on summary judgment that they have suffered or will suffer a direct and personal pecuniary loss that constitutes a damage different from the damage sustained by the general public. The circuit court erred when it concluded that Plaintiffs possess taxpayer standing. Accordingly, this Court should reverse the circuit court.

CONCLUSION

For the reasons stated herein, DPI respectfully requests that this Court reverse the circuit court.

Dated this 17th day of April 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,975 words.

Dated this 17th day of April 2012.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of April 2012.

_____
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