STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011AP2917

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

DEFENDANTS-APPELLANTS' REPLY BRIEF

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ARGUMENT

I. THIS APPEAL INVOLVES THE REVIEW OF PLAINTIFFS' AS APPLIED CHALLENGE TO WIS. STAT. § 118.134, NOT THE REVIEW OF PLAINTIFFS' FACIAL CHALLENGES TO WIS. STAT. § 118.134.

This appeal involves the review of the circuit court's decision on Plaintiffs' as applied challenge to Wis. Stat. § 118.134 under procedural due process. This appeal does not involve the review of Plaintiffs' facial challenges to Wis. Stat. § 118.134 under equal protection and procedural due process.

In plaintiffs-respondents James R. Schoolcraft and Craig Vertz's[1] brief, they state that the opinion in this case should be published "because the case is one of first impression – the interpretation and constitutionality of Wis. Stat. § 118.134." (Response Brief of Plaintiffs-Respondents at 2, *hereinafter* "Response at ___.")

It is true that this is the first case involving Wis. Stat. § 118.134 to reach the Wisconsin Court of Appeals. In that regard, this is a case of first impression. However, this appeal does not involve a facial constitutional challenge to Wis. Stat. § 118.134.

The circuit court denied Plaintiffs' summary judgment motion as to their facial challenges to Wis. Stat. § 118.134 and declared that Wis. Stat. § 118.134 "is facially constitutional as to Plaintiffs' procedural due process and equal protection claims." (R. 43 at 4; A-App. 63); (*see* R. 37 at 10-11, 19-21; A-App. 49-50,

[1]Plaintiffs-respondents will be referred to as Plaintiffs. Defendants-Appellants State of Wisconsin Department of Public Instruction, Tony Evers, and Paul A. Sherman will be referred to as DPI, Dr. Evers, and Mr. Sherman. Defendants-Appellants will be referred to collectively as Defendants.

58-60). Plaintiffs did not appeal the circuit court's decision denying their summary judgment motion as to facial claims; therefore, the facial constitutionality of Wis. Stat. § 118.134 is not before this Court.

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

The circuit court erred when it granted Plaintiffs' summary judgment motion on their as applied challenge to Wis. Stat. § 118.134 under procedural due process.

First, the circuit court erred as a matter of law in granting summary judgment to Plaintiffs when DPI has never been applied Wis. Stat. § 118.134 to Plaintiffs. DPI only applied Wis. Stat. § 118.134 to the Mukwonago Area School District (the "District").

It is black letter law that to prove an as applied constitutional challenge to a statute that the challenger "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). Although DPI only applied Wis. Stat. § 118.134 to the District, the circuit court nonetheless granted summary judgment to Plaintiffs on their as applied claim. (R. 43 at 4; A-App. 63.)

Second, the District, as a subdivision of the State, is not a "person" within the meaning of the due process clause. *See City of East Saint Louis v. Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Ill.*, 986 F.2d 1142, 1144 (7th Cir. 1993). The circuit court's Order for Judgment states that "the Mukwonago Area School District (the 'District') was denied procedural due

process." (R. 43 at 4; A-App. 63.) This holding was an error of law—a school district is a subdivision of the State, and the State has no standing to pursue a procedural due process claim. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966).

Third, the circuit court erred when it failed to address and apply the presumption of honesty, integrity, and impartiality to Mr. Sherman's role and conduct as administrative law judge. *See Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶ 27, 286 Wis. 2d 252, 706 N.W.2d 110; *Guthrie v. WERC*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983); *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 29-30, 498 N.W.2d 842 (1993); *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114. Had the circuit court properly addressed and applied the presumption in light of the summary judgment record, it would have concluded that Mr. Sherman showed no impermissible risk of bias and was entitled to the presumption of a fair and unbiased decisionmaker that the law recognizes.

Fourth, the circuit court misapplied *Marris*. *Marris* was a decision in which a decisionmaker prejudged a matter, resulting in an impermissible risk of bias. *See Marris*, 176 Wis. 2d at 26 ("Determining whether a board member has prejudged a matter requires an examination of the facts of the individual case."); *see also id.* at 29. The record before the circuit court here confirms that Mr. Sherman did not prejudge the case before him. In particular, Mr. Sherman testified at his deposition that he came into the administrative hearing with a fair mindset and that he had taken no public position regarding Native American mascots. (R. 23 at 62; A-App. 38.)

Fifth, Plaintiffs assert that DPI's public positions regarding Native American mascots indicate that Mr. Sherman's role as administrative law judge showed an impermissible risk of bias that amounted to a procedural due process violation. (*See* Response at 12, 13, 15.) At

least two United States Supreme Court cases rebut Plaintiffs' argument.

In *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), the FTC reported to Congress that, in its opinion, certain trade practices of cement companies violated provisions of the Sherman Anti-Trust Act. *Id.* at 700. Those same trade practices were at issue in a hearing before the FTC a year later, and the cement industry argued that the FTC was biased, had prejudged the issues, and should be disqualified. *Id.* The Supreme Court held that the FTC's prior public positions regarding the law and the trade practices at issue did not overcome the presumption of fairness afforded to administrative bodies. *Id.* at 702-03.

In *Hortonville Joint School District No. 1 v. Hortonville Education Association*, the Hortonville school board voted to fire teachers that were illegally striking following a breakdown in contract negotiations. 426 U.S. 482, 485 (1976). The Supreme Court held that the school board's actions did not violate the due process rights of the teachers to be provided unbiased decisionmaker, even though the school board had taken positions opposed to the teachers in contract negotiations immediately preceding the strike. *Id.* at 493. The Supreme Court stated: "Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.* (citations and internal quotation marks omitted).

Mr. Sherman expressed no public position regarding Native American mascots. (R. 23 at 62; A-App. 38.) Plaintiffs assert that DPI's position regarding Native American mascots should be imputed to Mr. Sherman, resulting in an impermissible risk of bias and a due process violation. As the *Federal Trade Commission v. Cement Institute* and *Hortonville Joint*

School District No. 1 cases illustrate, there is no due process violation when an agency takes a public position on matters that eventually come before it.

Sixth, Plaintiffs assert that Mr. Sherman's "familiarity with [Barbara] Munson and Munson's past consultant relationship with the DPI is yet another basis for finding that Sherman 'showed an impermissible risk of bias.'" (Response at 13.) The circuit court did not in any way base its procedural due process ruling on Ms. Munson's role in the administrative proceeding before DPI. Nor did the circuit court address in its decision Ms. Munson's contacts with DPI. (*See* R. 37 at 14-19; A-App. 53-58.) Those issues are irrelevant to this Court's review of the correctness of the circuit court's ruling, as they did not form the basis for the circuit court's summary judgment decision.

Finally, Plaintiffs assert that they were not given notice and an opportunity to be heard and to present evidence at the administrative proceeding before DPI. (Response at 15-16.) The circuit court denied Plaintiffs' summary judgment motion as to these claims. The circuit court held: "The Plaintiffs were not parties at the time of the contested hearing, and therefore, were not entitled to notice. The *District* was entitled to notice, and the *District* received that notice to which it was entitled. Accordingly, this Court finds that the hearing was not infirmed by a lack of proper notice." (R. 37 at 13 (emphasis in original); A-App. 52.) The circuit court stated: "The Plaintiffs assert that they were denied the opportunity to be heard on relevant evidence. This argument, like the Plaintiff's [sic] arguments relating to notice, is similarly creative—and similarly unavailing." (*Id.* at 52.)

The circuit court denied Plaintiffs' motion for summary judgment on their notice claim and their right to be heard and present evidence claim under procedural due process. (R. 37 at 12-14; A-App. 51-53.) Plaintiffs did

not appeal the circuit court's decision; therefore, those claims are not before this Court.

In sum, the circuit court erred when it granted Plaintiffs' motion for summary judgment on their as applied procedural due process claim. The decision of the circuit court must be reversed.

III. CHAPTER 227 PROVIDES THE EXCLUSIVE REMEDY TO SEEK JUDICIAL REVIEW OF AN ADMINISTRATIVE AGENCY DECISION.

This case involves Plaintiffs' legal challenges to DPI's October 8, 2010, Findings of Fact, Conclusions of Law and Order ("DPI's Order") requiring the District to terminate its use of the Indians nickname and related logos. Chapter 227 provides the exclusive remedy to seek judicial review of administrative agency decisions. The circuit court erred when it let this case proceed to the merits because Plaintiffs did not follow the procedure of timely filing a chapter 227 petition for judicial review of DPI's Order.

Plaintiffs are correct that DPI has no authority to declare Wis. Stat. § 118.134 unconstitutional. (*See* Response at 17.) However, Plaintiffs completely miss the thrust of Defendants' argument regarding chapter 227 by framing their response in terms of an application of the exhaustion of administrative remedies doctrine. (Response at 17, 18, 19-20.) That doctrine is not at issue in this case.

To be clear, Defendants' argument is *not* that the exhaustion of administrative remedies doctrine applies to bar Plaintiffs' claims. *See, e.g., County of Sauk v. Trager*, 118 Wis. 2d 204, 346 N.W.2d 756 (1984). The exhaustion of administrative remedies doctrine applies when a litigant pursues "judicial intervention before completing all the steps prescribed in the hierarchy of administrative agency proceedings." *Id.* at 210.

Defendants are not arguing that Plaintiffs have failed to complete required steps before DPI prior to filing an action in circuit court. Instead, Defendants' argument for dismissal is based upon the fact that Plaintiffs failed to follow the required procedures to seek judicial review of an administrative agency decision *in circuit court* pursuant to the requirements of chapter 227.

The point is that *the circuit court* has the authority to determine whether DPI's application of Wis. Stat. § 118.134 was unconstitutional pursuant to Wis. Stat. § 227.58(8). Plaintiffs did not pursue relief under chapter 227, as they should have.

Chapter 227 provides the exclusive method for judicial review of administrative agency decisions. *State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 82 Wis. 2d 529, 544-46, 263 N.W.2d 196 (1978); *Kegonsa Joint Sanitary Dist. v. City of Stoughton*, 87 Wis. 2d 131, 145, 274 N.W.2d 598 (1979); *Turkow v. DNR*, 216 Wis. 2d 273, 282, 576 N.W.2d 288 (Ct. App. 1998). Chapter 227 provides the exclusive remedy to challenge administrative agency actions in circuit court, even when the challenge involves a claim that a statute or administrative rule that the agency relied upon is unconstitutional or was unconstitutionally applied. *See* Wis. Stat. § 227.58(8); *First Nat'l Bank*, 82 Wis. 2d at 544; *Kegonsa Joint Sanitary Dist.*, 87 Wis. 2d at 146.

There is a good reason why Plaintiffs did not follow the procedures required to seek chapter 227 judicial review of DPI's Order. By the time Plaintiffs filed their initial complaint on November 10, 2010, the deadline for Plaintiffs to file a chapter 227 petition for judicial review of DPI's Order had passed. Wis. Stat. § 227.53(1)(a) (a petition for judicial review must be filed within 30 days of service of the agency decision). A petition for judicial review of DPI's Order was due to be filed not later than November 8, 2010, which was 30 days

after DPI served the Order on the parties on October 8, 2010. (R. 10 at 17; R. 24 at 3.)

When a petition for judicial review is untimely, the 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 (2005). 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). Even if Plaintiffs' initial complaint could be construed as a chapter 227 petition for judicial review, it was untimely.

Plaintiffs did not follow the required procedures in Wis. Stat. ch. 227 to challenge DPI's Order. Chapter 227 provides "the exclusive method for judicial review of agency determinations." *Turkow*, 216 Wis. 2d at 282. Their complaint, filed on November 10, 2010, was not timely as a chapter 227 petition for judicial review. (R. 2.) Because Plaintiffs did not follow the required procedures, the circuit court erred when it allowed this case to proceed to the merits.

IV. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT PLAINTIFFS HAVE TAXPAYER STANDING.

The circuit court erred when it concluded that Plaintiffs have taxpayer standing. As a practical matter, accepting Plaintiffs' position on taxpayer standing would require Wisconsin courts to find taxpayer standing any time a taxpayer is dissatisfied with a decision by a state agency that results in a school district potentially spending taxpayer dollars. That is plainly not the law as set forth by the Wisconsin Supreme Court in *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988), the case upon which Plaintiffs rely.

Plaintiffs have not alleged and proven "a direct and personal pecuniary loss, a damage to [themselves]

different in character from the damage sustained by the general public." *City of Appleton*, 142 Wis. 2d at 877. As argued in Defendants' opening brief, the allegations in Plaintiffs' amended complaint were insufficient to plead taxpayer standing. Likewise, the only evidence submitted by Plaintiffs to "prove a direct and personal pecuniary loss," *id.*, on summary judgment was an affidavit from the Mukwonago High School's Principal, Shawn McNulty. Mr. McNulty's affidavit is too speculative to form a basis for Plaintiffs' taxpayer standing because it is framed only in terms of what *could* happen regarding the District's budget and expenses and the potential for a referendum to comply with the DPI's Order. (*See* R. 24 at 3-4.)

Plaintiffs argue that "[w]ith regard to Chapter 227, DPI asserts that Schoolcraft and Vertz were required to pursue the relief they seek under Chapter 227 as individuals with 'substantial interests' that were adversely affected by administrative decisions. (Appellant's B. pp. 30 – 31)." (Response at 23.) Plaintiffs misconstrue Defendants' position. Defendants' argument is that Plaintiffs *could have* availed themselves of the procedures in Wis. Stat. § 227.44(2m), but Plaintiffs did not do so. There is no requirement in the law that Plaintiffs *had to* participate in the administrative proceeding before DPI. However, if they wanted to participate and could show that their "substantial interest[s] may be affected by . . . [DPI's] decision following the hearing," Plaintiffs would have been admitted as a party to the contested case hearing. *Id.*

The circuit court erred when it held that Plaintiffs have taxpayer standing to pursue their claims. The decision of the circuit court must be reversed.

CONCLUSION

For the reasons stated in this brief and in Defendants' opening brief, the decision of the circuit court must be reversed.

Dated this 31st day of May 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 2,750 words.

Dated this 31st day of May 2012.

_____

CLAYTON P. KAWSKI
Assistant Attorney General

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 31st day of May 2012.

_____

CLAYTON P. KAWSKI
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