STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

APPEAL NO. 2018AP000512

DAVID GERSBACH, THE ESTATE OF JOSEPH MCWILLIAMS, CHRISTOPHER GAUTHIER AND RALPH JOHNSTON,
Plaintiffs-Respondents,
v.

CITY OF MADISON,
Defendant-Appellant,

DAVE SCHMIEDICKE,
Defendant,
v.

GARY CLEVEN,
Third-Party Defendant-Respondent

APPEAL FROM ORDER DATED FEBRUARY 14, 2018 IN DANE COUNTY CIRCUIT COURT CASE NO. 2016CV1269, THE HONORABLE RHONDA LANFORD, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT CITY OF MADISON

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STATEMENT OF THE ISSUES

Whether A Participating Wisconsin Retirement System (WRS) Employer Can Be Estopped From Collecting The Employee Portion Of Back WRS Contributions Pursuant To Wis. Stat. §40.06(5).

Did Respondents, David Gersbach, The Estate Of Joseph McWilliams, Christopher Gauthier, Ralph Johnston And Gary Cleven, Prove Equitable Estoppel And Unclean Hands By Clear, Satisfactory And Convincing Evidence?

The Circuit Court answered affirmatively.

STATEMENT OF ORAL ARGUMENT

This case meets the criteria for publication pursuant to WIS. STAT. § 809.23. This case presents a statutory construction issue of first impression that is of substantial public interest. The Appellant does not request oral argument.

STATEMENT OF THE CASE

This is a case of first impression to determine the obligations of local governments and their employees when WRS contributions are not paid in

the year when due. The City contends WIS. STAT. §40.05(1)(b) (2003-2004) and WIS. STAT. §40.05(1)(b) (2011-2012) require that employees pay their portion of the WRS contribution.

In addition to State law on benefits, the undisputed facts established that the City has a contractual defense to the claims in suit. The City did not elect to pay the WRS employee contribution for hourly employees – Respondent's classification. After Respondents' Union entered into a collective bargaining agreement with the City, the parties agreed the City would not pay the employee WRS contribution until 2010.

Finally, the City contends the statutory scheme found in WIS. STAT. § 40.06(5) (2016) establishes the payment process when back contributions are due by providing,

> The employer shall collect from the employee the amount which the employee would have paid if the amounts had been paid when due, plus the corresponding interest, and shall transmit the amount collected to the department together with the balance of the amount to be paid, or

> the employer may elect to pay part or all of the employee amounts.

The Circuit Court answered in the affirmative that WIS. STAT. §40.05(1)(b) (2003-2004) and WIS. STAT. §40.05(1)(b) (2011-2012) together with WIS. STAT. §40.06(5), established that Respondents were responsible for paying the employee contributions. The Circuit Court also found the information in the record established that the City would not have paid the employee contribution for Respondents even if they had been classified as employees instead of independent contractors when they were hired. However, the Circuit Court found the City was estopped from collecting the employee portion of the WRS contribution from Respondents because Respondents reasonably relied on the City's representation they were independent contractors to their detriment and because the City's error in not reporting Respondents as employees constituted a wrongful course of conduct.

STATEMENT OF FACTS

This matter came to the Circuit Court on Respondents David Gersbach, Estate of Joseph McWilliams (the Estate), Christopher Gauthier and Ralph Johnston's Complaint for a Writ of Mandamus to compel the City of Madison and Defendant David Schmiedicke to report them as participating employees in the WRS on the dates established in the March 11, 2013 decision of the Employee Trust Funds Board (ETF). *(R. 5, Exh. A, A-App. 1)*

The City and Defendant Schmiedicke answered the Complaint and filed a Counterclaim against Gersbach, the Estate, Gauthier and Johnston alleging that: (1) the un-rebutted facts in the record established that the City did not pay the employee WRS contribution for non-represented hourly employees such as the stagehands; (2) WIS. STAT. §40.05(1)(b) (2009-2010) provided that the employer may pay the employee share of the WRS contribution but did not compel the employer to pay the employee

portion; (3) the ETF Board admitted it had no power to compel the City to pay the employee portion of the WRS contribution or determine that the City would have contracted with the stagehands to pay the employee portion prior to the effective date of the negotiated labor agreement between the City and IATSE Local 251, a hiring hall representing Madison stagehands[1]. *(R. 3).*

Respondents filed their Motion for Summary Judgment on June 29, 2016. *(R. 7-13).* On June 22, 2016, the City reported Plaintiffs' hours and earnings beginning on the dates established by the ETF Board Decision. *(R. 33 at 3-5.)*

On September 30, 2016, the Circuit Court entered an Order adding Gary Cleven as a Third-Party Defendant to the litigation. *(R. 21).* Cleven is similarly situated to Gersbach, the Estate, Gauthier

[1] The International Alliance of Theatrical Stage Employees Moving Picture Technicians Artists and Allied Crafts of the United States, its Territories and Canada, Local 251 (IATSE Local 251)

and Johnston[2]. The City moved for Summary Judgment on its claims against Gersbach, the Estate, Gauthier and Johnston and Third-Party Defendant Cleven seeking a judgment in the amount of their respective WRS contribution since the City paid their share of the WRS contribution to avoid the City losing State aid. *(R. 31)*.

For purposes of the parties summary judgment motions, there were no facts in dispute. The parties agreed the ETF Board Decision controlled the enrollment dates for Respondents. The City used those agreed upon dates to enroll Respondents in the WRS and ETF used those dates to perform the required contribution calculations. ETF billed the City for the employer and employee share of the WRS contributions together with interest and applicable BAC. *(R. 33, Exhs. A-G)*. Once the City received the bill, it invoiced the Respondents for their share of the

[2] Because Gersbach, the Estate, Gauthier, Johnston and Cleven are similarly situated in terms of facts and law for purposes of this appeal, the City refers to them collectively as Respondents.

WRS payment. Respondents refused to pay. *(R. 32, Exh. K).*

The only issue before the Circuit Court was payment of the employee portion of the WRS contribution. Respondents argued the City should make this payment for them because their counsel told them they did not have to pay. (R. 32, Exh. J at 2). Respondents also offered the statute of limitations, laches and estoppel based on a fiduciary duty as Affirmative Defenses.

The City argued that the undisputed facts admitted at the hearing, the applicable Wisconsin law, and the ETF Board Decision, clearly established Respondents were responsible for paying their share of the WRS Contribution. The City asked for judgments against Gersbach, the Estate, Gauthier, Johnston and Cleven for their respective amount of the employee WRS contribution together with all applicable interest (including BAC) as calculated by ETF.

Although the Circuit Court agreed with the City that the law and facts established Respondents were responsible for paying the employee contribution, the Court applied the doctrines of equitable estoppel and unclean hands to prevent the City from collecting the employee portion of the WRS contribution from Respondents.

For purposes of the City's argument, the City incorporates all of the factual background as outlined by Judge Lanford in her October 26, 2017 Decision And Order On Motions For Summary Judgment into its appeal *(R. 48)* and adds the following additional facts in support of its argument.

Pursuant to WIS. STAT. §40.22(5) (2015-2016), the City is responsible for determining whether an individual meets the eligibility requirements for participation in the WRS. The City determined stagehands working out of the IATSE hiring hall were independent contractors. *(R. 48 at 2).* Independent contractors are excluded from participating in the WRS. *WIS. STAT. §40.02(26)(b)*

(2015-2016). Once a participating employer determines an individual's eligibility for participation in the WRS, if the individual disagrees with the participating employer's decision, they can appeal the determination and have a hearing conducted by an ETF administrative law judge to determine whether the individual is a participating employee. *WIS. STAT. §40.06(1)(e) (2015-2016).* If ETF finds the individual is a participating employee, ETF fixes their enrollment date and the participating employer reports hours and earnings for the employee. If back contributions are reported, the formula found in WIS. STAT. §40.06(5) applies. *(R. 48 at 9-10).*

Respondents worked as stagehands at various venues operated by the City, including the Civic Center, the Capitol Theater, Monona Terrace, and, later, the Overture Center during various periods between 1980 and the present. *(R. 48 at 1).* The ETF Board's findings of fact included:

> Respondents knew "the City did not consider them to be employees of the City and was not giving them benefits

(citation omitted). They knew that some of the people with whom they worked were City employees who received vacation, sick leave, health insurance, and pension (citation omitted). Rudy Lienau of the City testified that Cleven discussed with him over the years the union's desire to have the stagehands receive benefits as City employees (citation omitted). Gauthier successfully challenged longtime business agent Cleven for control of the organization, in part, because he promised he would secure a contract with the City." *(A-App. 1 at 3, ¶16).*

The ETF Board also found "there was a jurisdictional dispute between IATSE 251 and AFSCME Local 60 for control of the Stagehands. Although the issue of IATSE 251 having a contract with the City was not new, in pushing the issue of a contract with the City, IATSE 251 was trying to ensure that, as a union, it had a presence at the Overture Center in 2004. IATSE 251 did not want to lose any members to AFSCME Local 60". *(A-App. 1 at 3, ¶15).*

Following the WERC decisions, beginning in 2007, the parties bargained for a contract. The City agreed it would report participating employees and pay the employer contribution beginning January 1, 2008 and also pay the employee contribution beginning January 1, 2010. Part of the negotiation involved having the stagehands be paid a lower wage in recognition of the cost of their health and pension benefits. *(A-App. 1, at 4, ¶17)*

> During negotiations, IATSE told the City that, "if the WRS numbers weren't what the union wanted, they could just go and file appeals with ETF." A majority of IATSE members began filing appeals two months after the collective bargaining agreement with the City was signed, in mid-2010. *(A-App. 1 at 4, ¶18.)*

Once the City reported back wages and hours to ETF, and ETF calculated amounts due and owing by the City and the Respondents, ETF invoiced the City for the total amount, including the employee share. Pursuant to WIS. STAT. §40.06(5), the City sent invoices to Respondents demanding payment of the employee contribution together with interest and BAC. *(R. 48 at 3-4).*

When Respondents refused to pay the employee share of the WRS contribution, ETF forced the City to pay Respondents' share of the WRS contribution. *(R. 3 at 9, ¶15).* If the City had refused to pay Respondent's share and waited until Respondents made their payment to the City before the City transmitted the money to ETF as required by WIS. STAT. §40.06(5), the City would be in default with the

State. At that point, the State would assess a special charge to the City and withhold that amount from the next apportionment of state aids or taxes payable to the City pursuant to Wis. Stats. §40.06(2)(c) and (4)(a) (2015-2016). *(Id., at ¶16).*

When Respondents refused to pay their share, the City had no choice but to pay their share and seek a judgment for the amount of money Respondents owed the City. *(R. 31, R. 48 at 4).*

STANDARD OF REVIEW

The City does not challenge the Circuit Court's decision until page 14, Section V. This appeal is solely over the Circuit Court's exercise of its discretion in forcing the City to pay the employee portion of the WRS contribution, without the possibility of recouping some or all of the money Respondents owe, based on the principles of equitable estoppel and unclean hands. The facts for summary judgment purposes were undisputed. When the Court's findings of fact are not disputed, "'it is a question of law whether equitable estoppel has been

established,'" and we review questions of law de novo" *Nugent v. Slaght*, 2001 WI App 282, ¶29, 249 Wis. 2d 220, 638 N.W.2d 594 (quoting *Milas v. Labor Ass'n of Wis. Inc.*, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997)).

The elements of equitable estoppel are well known. They are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment. *Milas*, 214 Wis. 2d at 11-12. In examining the conduct of the parties, "[a]mong the factors for consideration . . . is whether the party against whom estoppel is asserted has engaged in fraudulent or inequitable conduct." *Gonzalez v. Tesky*, 160 Wis. 2d 1, 13, 465 N.W.2d 525 (1990) (additional citation omitted).

Respondents bear the burden of proof since they are the ones seeking to avoid paying their share of the WRS contribution and are trying to stop the City from collecting the money it paid on their behalf.

Gabriel v. Gabriel, 57 Wis. 2d 424, 428, 204 N.W.2d 494 (1973) (citations omitted.) To prevail, Respondents' "[p]roof of estoppel must be clear, satisfactory and convincing and is not to rest on mere inference and conjecture." *Somers USA, LLC v. State of Wisconsin Dept. of Transp.*, 2015 WI App 33, ¶13, 361 Wis. 2d 807, 864 N.W.2d 114 (quoting *Gonzalez v. Teskey*, 160 Wis. 2d 1, 13, 465 N.W.2d 525 (Ct. App. 1990)).

For the City to be denied relief under the doctrine of unclean hands, "it must clearly appear that the things from which the [City] seeks relief are the fruit of its own wrongful or unlawful course of conduct." *S&M Rotogravure Serv. v. Baer*, 77 Wis. 2d 454, 467, 252 N.W.2d 913 (1977). In addition, the act on the part of the City must rise to the level of "injustice or bad faith." *Id.*

ARGUMENT

The City Followed The Statutory Scheme Set Forth In WIS. STAT. §40.22(5) (2015-2016) When It Determined Respondents Were Independent Contractors

The City's responsibility under WIS. STAT. §40.22(5) (2015-2016), was to determine whether Respondents were participating employees for purposes of enrollment in the WRS. The City performed its duty and made a good faith determination that individuals from the IATSE Local 251 hiring hall, who filled in when the City needed extra help at the Civic Center and other City facilities, and who worked at many other venues around Madison, were independent contractors.

The Circuit Court concluded Respondents met the first and second elements of equitable estoppel finding "[t]he non-action in this case is the City's failure to report Plaintiffs as participants in the WRS." *(R. 48 at 15)*. Specifically, "because of its failure to correctly classify Plaintiffs as employees

rather than independent contractors induced reasonable reliance in that Plaintiffs would reasonably not expect to have to pay any employee contributions . . .” *Id*. at 16.

There was no “non-action.” There was action. The City acted according to its responsibilities under State law. The Legislature recognized that sometimes a participating employer, despite a good faith determination, may get it wrong. This is why the Legislature provided a mechanism in WIS. STAT. §40.06(1)(E) (2015-2016) whereby an individual can challenge the participating employer’s determination. If Respondents disagreed with the City classifying them as independent contractors their remedy was to file an appeal with ETF – something the established facts show they clearly knew how to do. In addition, the Legislature contemplated back contributions could be an issue which is why it wrote WIS. STAT. §40.06(5) outlining how back contributions should be handled between the employer and employee.

Equitable estoppel examines the actions of the parties. *Milas v. Labor Ass'n of Wisconsin, Inc.*, 214 Wis. 2d 1, 11, 571 N.W.2d 656 (1997). The City would not withhold WRS contributions from individuals it did not consider eligible for enrollment in the WRS. Applying the estoppel doctrine to the City's good faith determination, *at the time Respondents began working at City venues*, is holding the City responsible for something it could not have possibly known at the time it made its determination – that in 2013 the ETF Board would find Respondents were employees. Acquiring this knowledge requires a participating employer to time travel or look into a crystal ball.

Respondents Sitting On Their Rights Is Not Reasonable Reliance

To apply estoppel against the City, Respondents have to prove they reasonably relied, either by action or non-action, on the City classifying them as independent contractors. That proof must be clear and convincing and not rest on inference or

conjecture. The Circuit Court found Respondents met the third and fourth elements of equitable estoppel concluding Respondents reasonably relied on the City's determination to their detriment. There are no factual citations to the record in support of this conclusion. That is because the undisputed facts of the case do not support this finding. Instead, the undisputed facts show Respondents sat on their rights for strategic reasons. Examining the actions of the Respondents it is clear they acted solely for their benefit at all times.

The ETF Board, after hearing the testimony of the parties, found the following:

- Respondents knew the City did not consider them employees.
- Respondents knew they worked alongside City employees who had benefits including pension benefits.
- When Overture opened in 2004, Respondents were worried about losing work to rival union AFSCME Local 60.
- Respondent Gary Cleven, who was the IATSE Local 251 business agent, failed to secure a contract with the City.

- Chris Gauthier challenged Cleven for the business agent position on the promise he would secure a contract with the City.

- The WERC certified IATSE Local 251 as the bargaining agent for the stagehands in 2007.

- The City and IATSE 251 began bargaining a contract in 2007.

- During the negotiations, Gauthier told HR Director Brad Wirtz, "if the WRS numbers weren't what the union wanted, they could just go and file appeals with ETF."

- IATSE 251 members ratified the labor agreement.

- Two months after IATSE Local 251 ratified the labor agreement, IATSE 251 members, including Respondents, began filing appeals with ETF saying the City improperly classified them as independent contractors.

(Appellate Brief, pages 9-10).

For years, Respondents knew the City did not consider them employees. They could have filed appeals at any time. They chose not to do so. They could have filed appeals after the WERC decision in 2007. They chose not to do so. Defendants could have filed their appeals during bargaining. They chose not to do so. Defendants could have filed their appeals after IATSE 251 and the City reached an agreement

on the labor contract. They chose not to do so. Respondents filed their appeals after IATSE Local 251 membership ratified the labor agreement. Respondents claim they did not take action because they relied on the City's representation is false and unsupported by the evidence in the record. Respondents did not take action because it was advantageous for them not to act until their members ratified the labor agreement.

Missing from the Circuit Court's analysis is the role Respondents played when they sat on their rights until after the labor agreement was ratified. Waiting was, of course, their choice but in choosing to wait they cannot now bemoan the fact that the amounts they owe increased over the years due to their inaction. The undisputed facts in the record establish that Respondents' priorities, in order, were: (1) edging a rival Union out of work at the Overture Center; (2) getting a labor contract with the City; (3) using the threat of filing WRS appeals as a bargaining chip during negotiations to get more

money; (4) ratifying the labor agreement and; (5) filing WRS appeals because they did not get the wage package they wanted in bargaining. *(Appellate Brief, pages 9-10)*.

The Circuit Court concludes Respondents are prejudiced because they might have "to pay a completely unexpected expense at this late juncture" but the situation is of Respondents own making. *(R. 48 at 17)*." Respondents' predicament is analogous to that of the defendant in *City of Madison v. Lange*, 140 Wis. 2d 1, 408 N.W.2d 763 (1987). In that case, the City filed a claim against a former welfare recipient seeking to recoup payments it made. Lange contended the City should be equitably estopped from seeking the payments because a City employee told her repayment was voluntary. *Id.*, at 3.

Lange argued she was harmed because, had she known she would have to repay the loan, she would have pursued "other options." *Id*. at 7. Specifically, Lange argued she lost the opportunity to "structure her budget and pursue her personal plans.

. ." *Id.* at 8. The Court of Appeals held Lange failed to carry her burden of proof on the equitable estoppel claim because "interference with her personal budget planning is insufficient to establish detriment to the required degree of proof." *Id*. The Court went on to say "we do not see Lange's receipt of subsistence funds and needed medical treatment – even with the requirement that she pay the city back when financially able to do so – as a detriment in any sense of the word." *Id., (footnote omitted).*

Like Lange, Respondents reaped the benefit of retirement benefits when the ETF Board ruled in their favor. Those benefits, by law, carried a responsibility – the responsibility of employees to contribute to their retirement.

Respondents did not reasonably rely on the City's determination they were independent contractors. Respondents chose not to file appeals because they were being strategic. They did not want any problems with the election. They did not want any problems during bargaining. They did not want

any problems before or during the ratification vote. Once they passed all those hurdles it was time to file the appeals. The City never prevented Respondents from filing appeals. The City did not make any of the decisions regarding when to file the appeals. Respondents made the decisions and now the Respondents want this Court to relieve them of their statutory responsibility and the consequences of their actions.

Applying The Estoppel Doctrine Against The City Harms The Public's Interest

As the City has shown, its conduct in determining stagehands were independent contractors was sanctioned by statute. There are no facts in the record establishing the City's determination was fraudulent, wrongful at the time the act occurred, unlawful or in bad faith as is required to apply equitable estoppel and unclean hands. The Legislature foresaw participating employers may make inadvertent errors and constructed a statutory scheme whereby the

individual could appeal their classification and recoup the back contributions from the employer and employee.

The facts in the record also establish that Respondents did not reasonably rely on the City's representation. Rather, they knew they had appeal rights but they held off filing appeals because it was strategic for them to do so. When they achieved what they wanted – ratification of a labor agreement with the City – Respondents filed their appeals. Respondents have not met their burden of proof on the elements of equitable estoppel.

However, assuming *arguendo* Respondents had met their burden of proof, before the Circuit Court could apply equitable estoppel to the City, it must "balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied." *Wisconsin Dept. of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 639, 279 N.W.2d 213 (1979). This is because the Courts "do not apply equitable estoppel

"as freely against governmental agencies as [we do] in the case of private persons.'" *Village of Hobart v. Brown County*, 2005 WI 78, ¶29, 281 Wis. 2d 628, 643, 689 N.W.2d 83. As the Courts recognize, "it is not a happy occasion when the Government's hands, performing duties on behalf of the public, are tied . . ." *Id.*

In balancing the interests, in addition to examining the role government played in contributing to the situation and any equitable defenses, "the circuit court should take evidence and weigh any equitable considerations including the substantial interest of the citizens of Wisconsin [] [and] . . . the good faith of the other parties . . ." *Forest County v. Goode*, 219 Wis. 2d 654, 684, 579 N.w.2d 715 (1998).

In weighing the interests here, the Circuit Court found "the injustice that would be caused absent application of the estoppel doctrine is significant, especially with regard to Cleven" . . . [o]n the other hand, the public interest in not applying

the doctrine, i.e. the cost savings to the City, does not justify refusal to apply equitable estoppel" *(A-App. 2, page 16)*. The only interests balanced by the Circuit Court were the amounts Respondents owed versus cost savings to the City. As outlined in *Forest County*, additional interests, including the interest of the State of Wisconsin, and the Respondent's own conduct, must be considered.

First, as discussed throughout this brief, the City followed the statutory scheme in the Wisconsin Retirement System when it made a good faith determination stagehands were independent contractors. The City also followed the statutory scheme of the Wisconsin Employment Relations Commission (WERC) when it bargained in good faith with IATSE Local 251 the terms of reporting stagehands to the WRS and electing to pay the employee contribution beginning January 2010. Courts are "firmly committed to the principal that estoppel 'will not lie against a municipality so as to bar it from enforcing a [law] enacted pursuant to the

police power.'" *Hobart*, 2005 WI 78, ¶47. The City never sought from the Respondents anything over and above that which the State statutorily required them to pay. The City "cannot be estopped from asserting public policy as expressed in the statutes." *Grams v. Melrose-Mindoro Joint School Dist. No. 1*, 78 Wis. 2d 569, 581, 254 N.W.2d 730 (1977).

Second, the Wisconsin Retirement System mandates that employees pay into their own retirement accounts. The Legislature strengthened this commitment after Act 10 when it eliminated the employer's discretion in electing to pay the employee share of the retirement contribution. *(A-App. 2 at 6).* Further the statutory scheme in WIS. STATS. §40.06(5) mandates that the "employer *shall* collect from the employee the amount which the employee would have paid if the amounts had been paid when due . . ." *Id. (emphasis added).* These statutory mandates would be rendered meaningless if all a participating employee had to do was refuse to pay their back contributions and stick the participating

employer with the entire bill as Respondents have attempted to do here. The Legislature did not intend such a result.

Third, the parties collectively bargained a final, binding, labor agreement that provided the City would not pay the employee portion of the WRS contribution until January 2010. *(R. 32, Exh. L, page 8).* It was during bargaining that Respondent Gauthier, the IATSE Local 251 business agent, told the HR Director, "if the WRS numbers weren't what the union wanted, they could just go and file appeals with ETF." *(A-App. 1 at 4, ¶18).* The interests here balance in favor of the City in that equitable estoppel should not be used to enlarge the terms of a bargained and ratified contract. Nor should Respondents use their appeals to improperly carve out a benefit for themselves the City never negotiated and never intended to provide.

The City's Determination That Respondents Were Independent Contractors Was Not Wrong Or Unlawful

Once ETF determined the amount the City and Respondents Gersbach, the Estate, Gauthier, Johnson and Cleven owed, the City sought to follow the procedure in §40.06(5) for back contributions. Gersbach, Gauthier, Johnson and Cleven refused to transmit their share of the WRS contribution to the City.

The City then sought a judgment against Gersbach, Gauthier, Johnson and Cleven to enable it to collect all or part of the money it paid on their behalf to ETF. For the unclean hands doctrine to apply, the City's conduct must be wrongful or unlawful. *Security Pacific Nat. Bank v. Ginkowski*, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (1987) ("it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct.") In *Merten v. Nathan*, 108 Wis. 2d. 205, 321 N.W.2d 173 (1982), the

defendant sought to enforce an exculpatory contract against plaintiff who was injured during a horseback riding lesson. The defendant falsely represented he had no insurance covering the riding lessons at the same time plaintiff signed the contract. *Id.*, at 214.

As discussed earlier, the City made a good faith determination Respondents were independent contractors. The City acted according to its obligations under Chapter 40. It did not advance false statements like the defendant in *Lange* to induce reliance on the part of Respondents. It committed no fraud. It did not break the law or lie. The City's actions do not rise to the level of unclean hands.

CONCLUSION

The City made a good faith determination IATSE Local 251 stagehands were independent contractors when IATSE Local 251 sent each stagehand to work at City venues. At the time the City made this decision, Respondents could not have known that in 2013 the ETF Board would change its decision.

Through this period of time, Respondents never appealed the City's determination. Rather, they sat on their rights until it was strategic for them to file the appeals. The Legislature, in writing Chapter 40 made it clear that employees are responsible for paying their share of the retirement contribution. The Legislature, recognizing mistakes could be made in classifications, allowed an individual to challenge that classification. Finally, also recognizing that back contributions may be due, the Legislature provided the process for payment of those contributions when it wrote WIS. STAT. §40.06(5) (2015-2016).

The City was forced to pay Respondents' share of the WRS contribution or risk losing State aid. The City is asking for a judgment against each of the Respondents allowing it the possibility of recouping some or all of the money Gersbach, the Estate, Gauthier, Johnston and Cleven owe. There is no guarantee the City will collect anything as a result of

the judgments but it should be allowed the opportunity to make the attempt.

Dated this 10th day of May, 2018.

_____

Michael P. May, City Attorney
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Attorneys for Defendant-Appellant City of Madison

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,940 words.

Dated this 10th day of May, 2018.

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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 10th day of May, 2018.

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