STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

APPEAL NO. 2018AP000512

DAVID GERSBACH, 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, 2108 IN DANE COUNTY CIRCUIT
COURT CASE NO 2016CV1269,
THE HONORABLE RHONDA LANFORD, PRESIDING**

BRIEF OF PLAINTIFFS-RESPONDENTS AND THIRD-PARTY DEFENDANT-RESPONDENT

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STATEMENT OF ISSUES

The issues in this appeal are:

- Is the City's counterclaim for the recovery of the employee's portion of the WRS contributions that the City failed to withhold from Plaintiffs' compensation, and interest that accrued on those contributions barred by the doctrines of equitable estoppel and unclean hands?

The circuit court answered "yes".

- Is the City's counterclaim for the employee portion of the Plaintiffs' WRS contributions and interest barred because it was the result of the City's breach of its fiduciary duties?

The circuit court answered "no".

Is the City's counterclaim barred by Wis. Stat. § 893.93(1)(a) because the City knew or reasonably should have known plaintiffs were employees eligible for enrollment in the WRS and contributions were not made in the year due more than six years prior to the commencement of its counterclaim,

The circuit court answered "no".

STATEMENT OF ORAL ARGUMENT

This case meets the criteria for publication pursuant to Wis. Stat. § 809.23. The case involves issues of statutory interpretation and the application of an established rule of law to a factual situation significantly different from those in published decisions that are of substantial public interest.

STATEMENT OF THE CASE

Plaintiffs-Counterclaim Defendants David Gersbach, Estate of Joseph McWilliams, Christopher Gauthier, and Ralph Johnston and Third Party Defendant Gary Cleven were

employees of the City of Madison who had worked as stagehands at the Civic Center/Overture Center for various periods between 1980 and December 2011.[1] (Record Document 1, ¶¶ 1-4 and 7; and Record Document 3, ¶¶ 1-4 and 7; Hereafter R. ____, ¶ ___) Defendants are the City of Madison and David (a/k/a "Dave") Schmiedicke, the City's designated agent for the WRS. (R. 1, ¶¶ 5-6; R. 3, ¶ 6)

Plaintiffs commenced this action seeking a court order requiring the City and David (a/k/a "Dave") Schmiedicke to report their hours and earnings to the WRS as ordered by the Final Decision and Order of the Employee Trust Funds Board ("ETF") issued on March 11, 2013. (R. 1) [2] The City answered and asserted a counterclaim. The City answered it was not obligated to comply with the ETF's order to report Plaintiffs for enrollment in the WRS until they paid the City the employee portion of their WRS contributions and interest. (R. 3, pp. 6-9, ¶¶ 17 and 18) The counterclaim requested the court order Plaintiffs to transmit to the City "the amount which the employee would have paid if the amounts had been paid when due, plus the corresponding interest." (R. 3, p. 9)

Plaintiffs moved for summary judgment. (R. 7 and 8) Defendants responded the motion was moot because a few days before the motion was filed, the City reported their hours and earnings to the WRS, and moved for summary judgment on its counterclaim. (R. 14, p. 3; and p. 5)

The City dismissed its counterclaim in Cleven v. City of Madison, Case No. 15-CV-1520 without prejudice, then moved in this action to file a third-party complaint against Cleven, and the

[1] Hereafter referred to collectively as Plaintiffs or individually by their last name.
[2] Prior to this action, Cleven had commenced a similar mandamus action to enforce the March 11, 2013 Final Decision and Order of the Employee Trust Funds Board on behalf of himself and Gersbach, McWilliams, Gauthier and Johnston and other similarly situated stagehands. (Cleven v. City of Madison, et al., Case No. 15-CV-1520).

ETF. (R. 16) The motion was granted and on November 22, 2016, the City filed a third-party complaint adding Cleven asserting it was entitled to recover the employee portion of the WRS contributions and interest and BAC in the amount of $207,902.52. (R. 23, p. 5, ¶ 18, and Wherefore clause) The City requested the Court issue an Order and Judgment:

> (a) Requiring ... Cleven to immediately comply with the requirements of §40.06(5), Wis. Stats., and transmit to the City "the amount which the employee would have paid if the amounts had been paid when due, plus the corresponding interest";
> (b) If Cleven fails to do so, to enter judgment against Cleven for the amount of the employee's share with interest that the City will be compelled to pay to the ETF:

(R. 23, p. 6)

Cleven answered asserting various affirmative defenses including the City's counterclaim was barred by statutes of limitations and laches. (R. 26)

The parties each filed motions for summary judgment. (R. 31, and R. 34-35) On October 26, 2017, the court granted Plaintiffs' motion for summary judgment dismissing the City's counterclaim finding it was barred by the doctrines of equitable estoppel and unclean hands rather than a breach of fiduciary duties, and that the City's claim was not barred by Wis. Stat. § 893.93(1)(a) or laches. (A-App. 2)

STATEMENT OF FACTS

Plaintiffs worked as stagehands at the Civic Center/Overture Center for various periods between 1980 and December 2011. (R. 1, ¶¶ 1-4 and 7; and R. 3, ¶¶ 1-4 and 7) The City of Madison is a participating employer subject to the provisions of Wis. Stat. Chapter 40 governing the Wisconsin Retirement System. (R.1, ¶ 5). David (a/k/a "Dave") Schmiedicke is the City's designated agent for the WRS. (R. 1, ¶¶ 5-6; R. 3, ¶ 6)

Plaintiffs were compensated for their services by the City's payroll and provided W-2s. (A - App. 1, p. 8, ¶ 27) Under the statutory exception for independent contractor in Wis. Stat. § 40.02(26), an individual is excluded from the definition of employee only if he is operating an independent business if his "services to a participating employer are not compensated for on a payroll of that employer." Wis. Stat. § 40.02(26)(b). (Id.)(emphasis added)

David Gersbach

David Gersbach was born on June 16, 1943. (R. 12, ¶ 2) Gersbach was first employed as a stagehand by the City on or about January 20, 1980. (Id., ¶ 3) Gersbach met the statutory 600-hour eligibility requirement to be a WRS participant in 1990. (Id., 3)

Estate of Joseph McWilliams

Joseph McWilliams was born July 29, 1943 and died November 29, 2013. (R. 11, ¶ 2) McWilliams began his employment with the City as a stagehand in 1987. (A-App. 1, p. 14, ¶ 54 and A-App. 1, p. 16) McWilliams met the eligibility requirement for enrollment in the WRS in 1991. (A-App. 1, p. 18, ¶ 69)

Christopher Gauthier

Christopher Gauthier qualified to be enrolled in the WRS on September 26, 2004 based on his employment with the City as a stagehand. (R. 10, p.2, ¶ 4, Exh. 1) The City started reporting hours and earnings for Gauthier on or about January 1, 2010 and reported his hours through December 31, 2011 when the City stopped its operation of the Overture Center. (Id., ¶ 5) The City did not report Gauthier's hours and earnings to the WRS for the years he was eligible prior to January 1, 2010 even though his eligibility date, hours worked, and wages had been established and were not in dispute. (Id., ¶ 6)

Ralph Johnston

Ralph Johnston was born on April 29, 1948. (R.9, ¶ 2) Johnston qualified for enrollment in the WRS in 2003, but was limited to September 24, 2003, seven (7) years before the filing of his WRS appeal. (A-App. 1, p. 18, ¶ 69; and p. 22)

Gary Cleven

Gary Cleven was employed by the City as a stagehand and worked at various City venues, including the Civic Center, the Capitol Theater, Monona Terrace, and later, the Overture Center between 1980 and December 31, 2011. (R. 36, ¶ 9, Exh. 7, ¶¶ 3 and 10) As of January 1, 1983, Cleven worked enough hours to meet the eligibility requirements to be enrolled in the WRS. (A-App. 1, p. 17, ¶ 64)

THE CITY'S STATUTORY OBLIGATION TO ENROLL EMPLOYEES WHO MET THE STATUTORY ELIGIBILITY REQUIREMENTS AND WITHHOLD THE EMPLOYEE PORTION OF THE CONTRIBUTION

Wis**.** Stat**.** § 40.20 creates the Wisconsin Retirement System which provides a variety of retirement annuity options for participants. *See* Wis. Stat. §§ 40.23, 40.24 and 40.25. The state, any county, city, village, town, school district and, other government units are included within and thereafter subject to the provisions of the Wisconsin Retirement System by electing to participate. Wis. Stat. §§ 40.02(28) and 40.21. The City is a participating employer. (R. 1, ¶ 5). Employees of participating employers who meet the statutory eligibility requirements must become "participating employees". Wis. Stat. §§ 40.02 and 40.02(46). Employers are required by Chapter 40 to make a "determination as to whether an employee has met or will meet the actual or anticipated performance of duty or other requirements of (§ 40.22) ... in accordance with the rules of the department." Wis. Stat. § 40.22(5). The WRS Administrative Manual provides:

> An employee who does not meet the WRS eligibility requirements on their date of hire may subsequently become eligible and must be enrolled any time the employer's expectation of either hours to be worked or duration of employment change. A previously WRS ineligible employee must be enrolled in WRS as soon as the expectation exists of meeting the eligibility criteria in subchapter 301. (§ 304) (R. 36, ¶ 10, Exh. 8, p. 5) (emphasis added)

Wis. Stat. § 40.05(1) establishes contributions that are to be made to the Wisconsin Retirement System for participating employees based on their earnings for service credited as credible service which is subject to federal annual compensation limits. A participating employee may not elect to have contributions ... paid directly to the employee or make a cash or deferred election with respect to the contributions. Wis. Stat. § 40.05(1)(b). Contributions are required to be made by a reduction in salary and, for tax purposes, shall be made by a reduction in salary. Wis. Stat. § 40.05(1)(b)

The employee contributions provided in Wis. Stat. § 40.05 are to be deducted from the earnings of each employee ... in the manner and within the time fixed by the department together with the required employer contributions. Wis. Stat. § 40.06(1). Wis. Stat. §40.06(1)(b) provides:

> (b) Each employer shall withhold the amounts specified from any payment of earnings to an employee whose status as a participating or insured employee has not yet been determined under s. 40.22 (1) and shall refund the amount withheld directly to the employee if it is subsequently determined that the employee does not qualify as a participating or insured employee.

Employers are required to transmit required reports before the end of the calendar month following the date the report is due. (Wis. Stat. § 40.06(2)) The WRS calculates the contributions that are required for participating employees based on wage and hour information reported by participating employer and invoices the employer for the required contributions. Interest is charged on accounts receivable if the remittance is not received by the department in the matter and within the time limit fixed by rule or statute. (Wis. Stat. §40.06 (3)). If the amount is not then paid by the

employer, the department certifies the amount due and the department of administration withholds "the amount from the next apportionment of state aids or taxes of any kind payable to the employer ..." (Wis. Stat. § 40.06(4)(a) and (b))

THE CITY KNEW OR REASONABLY SHOULD HAVE KNOWN PLAINTIFFS WERE CITY EMPLOYEES ELIGIBLE TO BE ENROLLED IN THE WRS ON OR BEFORE JANUARY 23, 2007.

On June 6, 2003, the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Alliance Crafts of the United States, its Territories and Canada, Local 251 filed a petition with the Wisconsin Employment Relations Commission (WERC) seeking an election to determine whether certain employees of the Madison Cultural Arts District (stagehands) wished to be represented by Local No. 251 for the purposes of collective bargaining. (R. 36, ¶ 2, Exh. 1; and A-App.1, p. 4, ¶ 14) The City participated in that hearing. (Id., p. 1) On July 13, 2004, the WERC held stagehands who worked at City venues were employees of the City, not independent contractors, and not employees of the Madison Cultural Arts District, and therefore dismissed the petition. (R. 36, ¶ 2, Exh. 1)

On January 5, 2006, Local 251 filed another petition with the WERC seeking an election to determine whether the Stagehands employed by the City at the Overture Center and Monona Terrace wished to be represented for the purposes of collective bargaining. (R. 36, ¶ 3, Exh. 2) The City opposed the petition again arguing that the Stagehands were independent contractors. (R. 36, ¶ 3, Exh. 2, p. 2) On January 23, 2007, the WERC held for the second time:

> The Stagehands are not independent contractors within the meaning of Sec. 111.79(1)(i), Stats., but are municipal employees of the City within the meaning of Sec. 111.700(1)(i), Stats.

(R, 36, ¶ 3, Exh. 2, p. 5)

An election was conducted by the WERC and Local 251 was certified for the purpose of bargaining with the City over wages, hours and conditions of employment of stagehands. (R. 39, ¶ 4) Negotiations began in 2007 in which the City and Union discussed whether the City would pay the employee portion of the WRS contribution. (R. 36, ¶ 11, Exh. 9, pp. 9-10)

The City reported Plaintiffs and other stagehands who met the requirements for enrollment in the WRS as of January 1, 2010. (R. 36, ¶ 9, Exh, 7, ¶ 8-9) However, the City did not report any of the hours or earnings for work performed by them before January 1, 2010. (Id.)

The criteria used by the WRS to determine whether an individual working for a municipal employer is an employee and thereafter eligible to participate in the WRS or an independent contractor and, therefore, not eligible were the same as the criteria used by the WERC to determine whether an individual was an employee or independent contractor. (A-App. 1, pp. 9-10, ¶ 29)

Plaintiffs filed appeals on the following dates with the ETF challenging the City's failure to properly report them as eligible to be enrolled in the WRS:

› Johnston - March 16, 2010;

› Gersbach, Gauthier, and Cleven - July 26, 2010

› McWilliams - September 15, 2010

(A-App. 1, Exh. A, p. 22)

A hearing on their appeals was held before ALJ Jeffrey Boldt on December 13-14, 2011 at which the City conceded Cleven should have been reported as a participating employee as of January 1, 1983. (A-App. 1, p. 17, ¶ 64, and p. 22) A proposed decision was issued by ALJ Jeffrey D. Boldt on July 10, 2012, which ordered Plaintiffs be entered in the WRS as "participating employees" effective on the specified dates. (R. 36, ¶ 5, Exh. 4)

The final decision of the ETF regarding the appeals was issued on March 11, 2013. (A-App. 1) The final decision held because Cleven was eligible to become a participating employee prior to April 27, 1984, he had a vested right to benefits as a participating employee and the seven (7) year limitation period was not applicable to him. (A-App.1, ¶¶ 46-48 and 64) However, the decision held the seven-year limitation period applied to Gersbach, McWilliams, Gauthier and Johnston and, therefore, their enrollment was limited to seven years prior to their appeals. (A-App, p. 18, ¶ 69) The Decision ordered the City to report:

- Cleven as of January 1, 1983;
- Gauthier on the date in 2004 on which he worked 600 hours in the preceding 12-month period;
- Gersbach as of July 26, 2003;
- Johnston on the date in 2003 on which he worked 600 hours in the preceding 12-month period;
- McWilliams as of September 12, 2003.

(A-App. 1, p. 20) The City did not appeal or seek judicial relief of the Final Decision and Order. (R. 36, ¶ 6)

The City ignored ETF's order and did not report Plaintiffs as participating employees. (R. 34, p.14, ¶ 70, R.42, p. 26, ¶ 70) The City did not report Plaintiffs' hours and earnings because it knew it would be invoiced by ETF for the contributions the City should have made on Plaintiffs' behalf together with interest and other charges and that the amount billed would be taken from the City's state aid if it was not paid by the City. (R. 34, p. 14, ¶ 70; R. 42, p. 26, ¶ 70; R. 3, p. 8, ¶¶ 13-16)

Cleven commenced an action on June 9, 2015 seeking a Writ of Mandamus ordering the City and Schmiedicke to report him to the WRS as a participating employee as of January 1, 1983 as ordered by the ETF's Final Decision and Order. (Cleven v. City of Madison, Case No. 2015 CV 1520, (R. 34, p. 15, ¶ 71; R. 42, p. 27, ¶ 71; Cleven also requested the City be ordered to report

Gersbach, McWilliams, Gauthier, Johnston and certain other stagehands. (R. 34, p. 15, ¶ 72; R. 42, p. 28, ¶ 72) The City answered denying it was obligated to report Cleven for enrollment and asserted a counterclaim against Cleven for an unspecified amount of money for contributions it claimed Cleven should have made. (R. 34, p. 27, ¶ 73; R. 42, `¶ 73) The City also moved the court to deny any relief for Gersbach, McWilliams, Gauthier, and Johnston because they were not named parties and the court granted the motion. (R. 34, p. 15, ¶ 74; R. 42, p. 26, ¶ 70)

Cleven moved for summary judgment on his mandamus claim. (R. 34, p. 15, ¶ 75; R. 42, p. 28, ¶ 75) On April 21, 2016, the court ordered the City and Schmiedicke to "immediately (with all reasonable dispatch) report Plaintiff, Gary Cleven's hours of work and wages to the WRS so Cleven can be enrolled as a participating employee as of January 1, 1983." (Id.) On May 11, 2016, the court denied the City's motion for a stay until such time as the court rules on the City's counterclaim against Cleven or until the Court of Appeals resolves the court's April 21, 2016 order. (R. 34, p. 15, ¶ 76; R. 42, p. 28, ¶ 76) The court's written order noted:

> If the court's April 19, 2016, decision proved correct but was stayed at this time, Mr. Cleven would likely have to wait until that determination was made on appeal before being able to take his full state retirement. At a minimum this would significantly reduce the income available to him for retirement. It could potentially prevent him from retiring altogether. Under both scenarios, the aggrieved party could not be made completely whole by a corrective appellate decision. However, it seemed to the court that the greater irreparable harm would be suffered by Mr. Cleven. The City's injury and remedy are both monetizable, whereas the diminution of Mr. Cleven's ability to enjoy retirement is likely not compensable and, given that he is currently 62, is essentially, irreversible.

(Id.)

On June 6, 2016, the City reported Cleven's adjusted enrollment date of January 1, 1983 and his hours and earnings between January 1, 1983 and January 1, 2010 to the WRS. (R. 36, ¶ 7; Exh. 5) On July 15, 2016, ETF sent the City an Employer Invoice Detail Report which detailed

Cleven's hours of service and earnings for the years 1983-2009. (R. 36, ¶ 8, Exh. 6) ETF billed the City $41,505.61 for the employee portion of the WRS contribution for Cleven and $159,328.38 in interest and $7,068.53 BAC for the period from January 1, 1983 through December 31, 2009. (Id. and R. 37, Exh. A, Interrog. No.2, Exh. 2)

The City reported Gersbach, McWilliams, Gauthier, and Johnston to ETF on June 23, 2016. (R. 18, p. 2, ¶ 10) The City received the invoice from ETF for Gersbach, McWilliams, Gauthier and Johnston on August 22, 2016. (R. 18, pp. 2-3, ¶ 11)

After reporting Cleven's wages and hours to ETF, the City filed a Motion to Dismiss its Counterclaim in Cleven's action without prejudice alleging it intended to bring its counterclaim against Cleven for the employee portion of the contributions in this action, so the City's counterclaims could be resolved in one action and the motion was granted. (R. 34, p. 16, ¶ 77; R. 42, p. 30, ¶ 77)

The City's counterclaim against Gersbach, McWilliams, Gauthier and Johnston was filed on May 31, 2016. (R. 3) The City's claim against Cleven was filed on November 22, 2016. (R. 23) The City's counterclaims alleged Plaintiffs received an unlawful benefit as a result of the City's payment of the employee's portion of the WRS contribution and interest to the WRS. (R. 3, pp. 6-9 and R. 29, ¶ 21)

PLAINTIFFS HAVE BEEN HARMED BY THE CITY'S FAILURE TO TIMELY REPORT THEM AS ELIGIBLE TO BE ENROLLED IN THE WRS AND WITHHOLD THE EMPLOYEE PORTION OF THEIR WRS CONTRIBUTIONS

The compensation Plaintiffs were paid since the date they were eligible to be enrolled as participants was taxable income on which they would not have been required to pay taxes if the City had withheld the employee portion of the WRS contribution as it was required to by law. The interest the WRS has billed the City is a result of the City's failure to withhold the employee portion

of contributions that the City had a statutory duty to withhold from their compensation and pay to the WRS on behalf of the Plaintiffs.

Gersbach was injured and the City benefited by not properly enrolling Gersbach. Gersbach worked 269.0 hours in 1989 and 708.0 hours in 1990. He would have been eligible to be enrolled at the time that he worked 600 hours in a 12-month period which would have been sometime in 1990. (R. 39., ¶¶ 5 and 6, Exh. 1 and A-App. 1, p. 18, ¶ 69) Gersbach worked more than 600 hours each year after 1990. However, because the Board's jurisdiction was limited to 7 years prior to the filing of an employee's appeal, Gersbach's eligibility for enrollment was limited to July 26, 2003, seven years prior to the filing of his appeal. (Id.) Between January 1, 1990 and July 26, 2003, when he became eligible to be enrolled pursuant to the ETF's Final Decision, Gersbach worked approximately 16,018.85 hours which were not reported to the WRS. (R. 42, p. 33, ¶ 87) In comparison, in the period between July 26, 2003, the date the City reported Gersbach eligible, and December 31, 2009, the City reported Gersbach worked only 11,255.02 hours. (R. 42, p. 33, ¶ 88)

The City benefited by not having to pay the employer's portion of the WRS contribution for Gersbach's compensation for 16,018.85 hours over a 13 1/2-year period. (Id. and R. 42, p. 34, ¶ 89) Gersbach lost 13 1/2 years of employer and employee contributions, the interest which would have accrued on those contributions, and the service credits he would have earned based on the 13 1/2 years of service between 1990 and July 26, 2003 because the City failed to properly enroll him in the WRS. (R. 42, p. 34, ¶ 90) The amount the City saved by not making 13 1/2 years of contributions for Gersbach is more than enough to cover the employee portion of Gersbach's contribution since July 26, 2003 the circuit court found Gersbach was not obligated to pay.

The City also benefited from failing to report Joseph McWilliams in 1991 when he met the WRS eligibility requirement and not making contributions through September 15, 2003, the date seven years before he filed his WRS appeal. (R. 39, Exh. 1, A-App. 1, p. 17, ¶ 69) McWilliams worked approximately 8,689.6 hours in the nearly 13 years between the beginning of 1991 when he became eligible to be enrolled in the WRS, and September 15, 2003 the date the Board found he was eligible to be enrolled). (R. 42, p. 34, ¶ 92) The City made no contributions during years 1991-September 15, 2003 for the employer's portion of the contributions that should have been made for McWilliams. McWilliams lost the benefit of any contributions, interest, and credit for years of service for those years. (R. 42, pp. 34-35, ¶ 93) In comparison, the City reported McWilliams only worked 4,284.11 hours between 2003 and when he last worked in 2008. (Id.)

As a result of the City's failure to enroll Cleven in the WRS prior to 2010, Cleven filed an appeal with the WRS and was required to commence an action in Dane County Circuit Court, Cleven v. City of Madison, Case No. 15 CV 1520, to enforce the award and incurred attorney fees in the amount of $9,277.00 and costs of $251.90 The court awarded costs of only $251.90 and statutory attorney fees of $500.00. (R. 36, ¶ 13, Exh. 11)

Prior to the City reporting Cleven's adjusted enrollment date on June 6, 2016 and his hours and earnings between January 1, 1983 and January 1, 2010, Cleven had only 1.94 years of creditable service. (R. 36, ¶ 9, Exh. 7, ¶ 12) If Cleven had retired before his hours and earnings for the period from January 1, 1983 through December 31, 2009 were reported, he would not have been eligible to receive monthly retirement benefits. Instead, his only option if he retired would be a lump sum payment of approximately $14,308.80. (Id., ¶ 13) If the City had reported his hours and earnings as it had been ordered, he could have retired January 1, 2012 and begun to receive a monthly annuity payment of $1,678,90. (R. 36, ¶ 14, Exh. 12, p. 3) Cleven could not

retire because the City refused to comply with the Board's order unless he paid the employee's portion of the contributions. (R. 36, ¶ 9, Exh. 7, ¶ 15)

Cleven's wife Janet was employed by ETF and was a participant in the WRS as of January 1, 2012 and was making regular contributions from her bi-weekly compensation to the WRS Deferred Compensation Plan. (R. 38, ¶¶ 3-6) Cleven's wife's compensation was sufficient to permit her to make the maximum allowable contribution to the Deferred Compensation Plan in 2012 if Cleven had begun to receive a monthly annuity from the WRS on or about January 1, 2012. (Id., ¶ 6; R. 36, ¶ 15, Exh. 13, pp. 1-3) Cleven's wife's compensation was sufficient for her to make the maximum allowable contribution to the Deferred Compensation Plan in 2013, 2014, and 2015 - 2016 if the City had reported Cleven's hours and earnings as ordered. (Id.) Cleven's wife would have made the maximum contribution and would have invested the amounts she contributed to the Deferred Compensation Plan if Cleven had begun receiving a monthly annuity January 1, 2012 in the same funds in which she was investing her deferred compensation at that time. (R. 38, ¶ 6)

As a result of Cleven's inability to begin receiving monthly annuity benefits as of January 1, 2012, his wife was not able to make the maximum contribution to the Deferred Compensation Plan because the City failed to report Cleven's hours and earnings to the WRS which prevented Cleven from receiving the monthly annuity. It was estimated to a reasonable degree of economic certainty that the Clevens suffered a loss from 2012 to 2017 of more than $200,000.00 as a result of Cleven's wife's inability to make the maximum contributions to the Deferred Compensation Plan beginning in January, 2012 (R. 36, ¶ 15, Exh. 13)

Other stagehands also lost credit for hours worked and contributions on earnings for work performed more than seven years before the filing of their appeals causing the City to reap

additional financial gain by not paying the employer's portion of the contributions for them. Included in the group are:

- Steve Jensen
- John Sarris
- John Schwoerer

(R. 39, ¶ 10, Exh. 2) Jensen worked 660 hours in 1995 and would have been eligible for enrollment in that year. (Id.) He worked a total of 10,610 hours between 1996 and the end of 2002. (Id.) Sarris worked in excess of 600 hours a year from 1998 through 2002 for a total of 4,477.80 hours in that period. (Id.) Schwoerer worked 600 or more hours each year between 1999 and 2002. (Id., ¶ 10, Exh. 2) He would have been eligible in 1999 and hours for all of 2000-2002 totaling 4,170 hours should have been reported. (Id.) Jensen, Sarris and Schwoerer worked a total of 19,257.80 which at $10 per hour would have totaled $192,578. (Id.)

McWilliams died November 29, 2013 before the City even reported his hours and earnings. He was not a City employee when he died and as a result of his death, his estate forfeited the employer contributions that should have been made on his behalf. (See ETF.wi.gov/memberbenefits/deathbenefits) McWilliams himself never was able to enjoy any of the retirement benefits he was entitled to because the City did not report his hours and earnings.

Cleven and Gersbach lost the ability to enjoy retirement because of the City's delay in reporting. Cleven was not able to retire until February, 2017. Gersbach, who is about to be 75 years old, was not able to retire until the City paid contributions on his behalf.

The City's counterclaim/complaint sought a judgment against each of the Plaintiffs for the amount it was billed by the WRS for the employee portion of the contributions, interest, and BAC for each of the Plaintiffs dating back to the date the City should have enrolled them in the WRS. The City seeks a judgment against:

- Gersbach in the amount of $26,630.65 ($13,197.37 for the employee portion of contributions between July 26, 2003 and December 31, 2009; interest of $11,219.38; and BAC in the amount of $2,213.90). (R. 42, pp. 7-8, ¶ 11);

- McWilliams in the amount of $9,827.96 ($4,741.89 for the employee portion of contributions between September 15, 2003 and September 15, 2008; interest in the amount of $4,311.70; and BAC in the amount of $774.37). (R. 42, p. 10, ¶ 20);

- Gauthier in the amount of $3,664.19 ($1,505.43 for the employee portion of the contributions between 2003 and December 31, 2009; interest of $1,740.85 and BAC in the amount of $419.91). (R. 42, p. 11, ¶ 25);

- Johnston in the amount of $10,122.26 for the employee portion of contributions between September 24, 2003 and December 31, 2009, and $8,109.15 for interest and $1,755.27 for BAC (R. 42, p. 12, ¶ 29); and

- Cleven in the amount of $207,902.52 ($41,505.61 for the employee portion of the contributions between January 1, 1983 and December 31, 2009). (R. 42, p. 15, ¶ 39)

ARGUMENT

I. The Circuit Court Correctly Applied Equitable Estoppel and the "Unclean Hands Doctrine"

The appropriateness of the application of equitable estoppel focuses on the conduct of the parties. *Milas v. Labor Ass'n of Wisconsin, Inc.*, 214 Wis. 2d 1, ¶ 16, 571 N.W.2d 656 (1997) A municipality is not immune from the doctrine of equitable estoppel. *Grams v. Melrose-Mindoro Joint School Dist. No. 1,* 78 Wis. 2d 569, 579, 254 N.W.2d 730 (1977) The court noted correctly:

> [E]quitable estoppel is not granted as freely against the government as against private parties. '[E]stoppel may be available as a defense *... if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel.'* Therefore, beyond the ordinary four-part test, when raising an estoppel defense against the government, 'the court 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.'

(A-App. 2, p. 15)(emphasis added)

Equitable estoppel has four elements: (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. *Dep't of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 634, 279 N.W.2d 213 (1979) The court concluded that the "elements necessary to apply equitable estoppel are present [in this case]" and the conclusion should be affirmed. (A-App. 2, p. 15)

The court applied the correct legal standard, considering the four elements necessary. (A-App. 2, p. 14) It found the non-action in this case was "... the City failure to report Plaintiffs as participants in the WRS" and that:

> "... 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 and thus budget their financial lives accordingly."

(A-App. 2, pp. 15-16)

The court also properly applied the balancing test required when estoppel is sought against the government. The court concluded the "injustice that would be caused if the estoppel doctrine is not applied outweighs the public interests at stake if the doctrine is applied." (A-App. 2, p. 16) The court noted if the counterclaim is granted, the consequence in effect will be to deprive Cleven of almost all of his retirement benefits and

> ... the public interest in not applying the doctrine, i.e. the cost savings to the City does not justify refusal to apply equitable estoppel. This situation is not of the Plaintiffs' making. It is the City who misclassified Plaintiffs for years. Equity demands that

> Plaintiffs not now be forced to pay large sums of money based on the City's error.

(A-App. 3, p. 16)

In addition, the court found the doctrine of unclean hands provided an additional basis for its decision to apply equitable estoppel. (Id.) The court correctly reasoned:

> The City's error in not reporting Plaintiffs as employees constitutes such a wrongful course of conduct. It was the City's fault, and not Plaintiffs', that Plaintiffs were not reported as employees to WRS until 2016, Had Plaintiffs been contributing to WRS for their entire careers, as they should have been, Plaintiffs could have budgeted their financial lives taking those contributions into consideration. To force Plaintiffs to pay a completely unexpected expense at this late juncture, wreaking havoc on their personal finances in one case to the tune of over $200,000, because of the City's error, would perpetrate a fundamental and serious injustice. *See Drown,* 332 Wis. 2d 765, ¶ 7. Plaintiffs' lives should not be upended because of the City's error.

(A-App. 2, p. 16)

The City contends *Village of Hobart v. Brown County*, 2005 WI. 78, *Grams v. Melrose-Mindoro Joint School Dist. No. 1,* 78 Wis. 2d 569, 254 N.W.2d 730 (1977), and *City of Madison v. Lange*, 140 Wis. 2d, 408 N.W.2d 763 compel the reversal of the court's dismissal of its claim. The cases are distinguishable.

The City contends incorrectly that *Village of Hobart v. Brown County*, 2005 WI 78, ¶ 47) stands for the proposition 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.'" To the contrary, *Hobart* states if the county's building of a transfer station violated a zoning ordinance and the Village sought an injunction enforcing the ordinance, the court must weigh the equitable considerations, including the county's equitable defenses. (Id., ¶ 38)

The City relies on *Grams v. Melrose-Mindoro Joint School Dist. No. 1*, 78 Wis. 2d 569, 581, 254 N.W.2d 730 (1977) for the proposition the City "cannot be estopped from asserting public policy in the statutes" asserting the "City never sought anything over and above that which the State statutorily required them to pay." (Br. p.27) *Grams* involved the non-renewal of the contract of a teacher, teaching courses for which she was not certified, where the statute required certification. The court held the powers of school district officers are limited and can only be exercised as the statute provides and Gram's reliance on the superintendent's misstatement of law was unreasonable. (Id., p. 736) In addition, the court noted the trial court did not find the evidence sufficient to create an equitable obligation.

The present case is distinguishable from *Grams*. State law did not require the City to withhold the employee portion of the contribution, rather, it permitted the City to pay the employee portion or collect it from the employee. Notably, during the times relevant to this case "State and local employers 'pick[ed] up' about 99 percent of employee required contributions". *Wisconsin Professional Police Association, Inc., v. Lightbourn*, 243 Wis. 2d, 512, 535, 201 WI 59, 267 N.W.2d 807 (emphasis added) Public policy did not prohibit the City from paying the employer portion of the contributions, and virtually all employers did. [3] Therefore, the court was not prevented from finding equitable estoppel was appropriate to bar the City's claim.

City of Madison v. Lange, 140 Wis. 1, 408 N.W.2d 763 (Wis. App. 1987) is also distinguishable. Lange received general relief from Madison for surgical and dental treatment and

[3] The City argues even if Plaintiffs had been classified as employees they were hourly employees and it would not have paid their contributions. (A-App. 2, pp. 13-14) The evidence regarding whether the City would or would not have paid the employee portion was in dispute. The City did not pay the employee contributions of unrepresented hourly employees, but it did pay the employee portion of the contribution of hourly represented employees. (R.41, pp. 12-13, ¶¶ 29 and 30) The Plaintiffs were represented employees and therefore it is reasonable to assume that the City would have paid the employee portion of Plaintiffs' contributions.

daily living expenses. When she applied she was told repayment was voluntary. The City sought reimbursement based on a statutory right to recoup its payment if the recipient becomes an owner of property. The issue was whether the City was estopped from seeking reimbursement. The court of appeals reversed the circuit court and held Lange's testimony she would not have accepted the money if she knew she might someday have to repay it was not sufficient to establish a defense of equitable estoppel and Lange wholly failed to establish any detriment as a result of the City's representations. *Lange*, 408 N.W.2d at 765 The court stated detriment has been equated with prejudice and "injury or damage" and Lange's claim she was deprived of "other options" and the opportunity to "structure her budget and pursue her personal plans and goals without any repayment obligation" were not persuasive. (Id.) It said Lange received a benefit i.e. the payment for physical and dental surgery that was necessary to her health and it did not see Lange's receipt of subsistence funds and medical treatment -- even with the requirement she pay the City back when financially able to do so -- as a detriment in any sense of the word. (Id., p. 766)

The present case is vastly different from *Lange*. There is plenty of detriment in this case. Plaintiffs were not given a benefit when the City failed to report them for enrollment. They paid taxes on the wages the City should have withheld. If the City had withheld the employee portion of the contributions and paid them to the WRS, it would not have been taxable income. More significantly, those contributions would have earned interest. For Cleven the interest that would have been earned if the City had properly withheld the contributions was $159,328.38. (R. 18, p. 2, ¶ 8) The City seeks to have Cleven repay this interest which would cause Cleven to be damaged because it would drastically reduce his retirement benefits.

Cleven also was not able to retire for nearly five years because of the City's persistent refusal to report his hours and earnings and was prevented from receiving annuity benefits that

would have permitted his wife to have deferred significant income in the WRS Deferred Compensation Plan. As a result the Clevens suffered an estimated loss in excess of $200,000.00. He was also forced to pursue legal actions to enforce his rights.

Gersbach and McWilliams also lost significant years of service and contributions, and interest on both employee and employer portions of the contributions. The City on the other hand benefited by virtue of the application of the seven-year limitation. The City's assertion that this case is analogous to *Lange* simply has no merit.

The City had a statutory responsibility to make a determination whether an individual paid by City payroll was eligible for participation in the WRS. (Wis. Stats., § 40.22(5)) In its brief the City repeatedly asserts it "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 ... were independent contractors." (Br., pp. 8, 15, 26, and 30) No evidence in the record is cited supporting its contention it made such a good faith determination. The City presented no evidence about either who made the decision or when it was made. The ETF's Final Decision and order did not address the issue although it points out:

> Under Wis. Stat., ch. 40, it appears that the common law test is not even reached if the individual is on the employer's payroll. Under the statutory exception for independent contractor under Wis. Stat. § 40.02(26), an individual is excluded from the definition of employee only if he is operating an independent business if his services to a participating employer are not compensated for on a payroll of that employer[.]" Wis. Stat. § 40.02(26)(b), Here, the City concedes that the services were compensated for on the City's payroll. That alone appears to end the analysis for purposes of Wis. Stat. ch. 40. The statute provides for an independent contractor exception only for individuals not on the payroll of the participating employer.

(A-App. 1, p. 8)(emphasis added)

The statutory standard is so simple that had the City's designated agent for the WRS or a representative of H.R. or the City Attorney's Office read the statute or the administrative manual the WRS provided employers, the City certainly would have recognized stagehands who worked the requisite number of hours should have been enrolled in the WRS. [4] A good faith determination is not the result of failure to make the required analysis.

Even if the City's initial determination was merely a mistake, the City was obligated to correct that mistake after the WERC's July 13, 2004 decision holding stagehands working at City venues were City employees. As a participating employer, the City was required by Chapter 40 to make a "determination as to whether Plaintiffs met or will meet the actual or anticipated performance of duty or other requirements of [§ 40.22] ... in accordance with the rules of the department." (PUF 44; Wis. Stat. § 40.22(5) The WRS Administrative Manual provides:

> An employee who does not meet the WRS eligibility requirements on their date of hire may subsequently become eligible and must be enrolled any time the employer's expectation of either hours to be worked or duration of employment change. A previously WRS ineligible employee must be enrolled in WRS as soon as the expectation exists of meeting the eligibility criteria in subchapter 301. (§ 304) (R. 42, p. 17, ¶ 45)(emphasis added)

The WERC's 2004 decision should have caused the City to re-evaluate the eligibility of stagehands for enrollment in the WRS. The City had the payroll information necessary to determine whether Plaintiffs met the requirements for enrollment. The City did not re-evaluate their eligibility choosing instead to continue to maintain they were independent contractors even though it was clear the factors considered by the WERC were the same factors considered by ETF.

The City not only did not re-evaluate their eligibility in 2004, it continued to refuse to do so after the WERC issued its second decision in 2007, holding stagehands were employees of the

[4] The ALJ's proposed decision noted: "The City apparently did not avail itself of its right to have the IRS determine whether the Stagehands were employees." (R. 36, ¶ 5, Exh. 4, p. 7)

City, even though it knew they were employees who should be enrolled. [5] Even after the City began negotiations with Local 251 in 2007 which included discussion about if, and when the City would pay the employer's portion, the City continued to refuse to enroll stagehands. ETF's Final Decision, found that:

> Following the WERC decisions, beginning in 2007, the parties bargained for a contract. The City agreed that it would report participating employees and pay the employer contribution beginning January 1, 2008, and also pay the employee contribution beginning January 1, 2010 (R. 1194). Part of the negotiation involved having the stagehands be paid a lower wage in recognition of the cost of their health and pension benefits (R. 486).

(A-App. 1, p. 5, ¶ 17)(Emphasis added)

The City failed to do what the Board found it agreed to do by not reporting any stagehands until December 29, 2009, and then failed to report stagehands' time and earnings beginning January 1, 2008 or make any payment of the employer portion until 2010. Had the City done what the Board found it agreed to do, eight years of interest would not have accrued. The City's refusal to report stagehands and pay the employer portion at least beginning January 1, 2008, cannot be characterized as a mere mistake.

The evidence establishes the City was deliberately indifferent to the consequences of its actions. It could have caused interest to stop accruing by reporting these stagehands for enrollment in 2004 when the WERC issued its first decision the stagehands were employees, not independent contractors; or stopped interest from accruing in 2007 when the WERC issued its second decision; or stopped interest from accruing by reporting them as of January 1, 2008 as the Board found the

[5] In its closing argument after the hearing regarding Plaintiffs' appeals, the City argued the ALJ should find: When expectations change, the employee must be enrolled as soon as the expectation exists of meeting the eligibility criteria. In this case, the date of the WERC decision, January 23, 2007, is the date stagehands were "hired". Eligibility should be figured for the 12-month period between January 23, 2007 and January 23, 2008 with all stagehands who meet the 600-hour threshold enrolled as of January 2008. (R. 36, ¶ 4, Exh. 3, pp. 1 and 16-22)

City had agreed in negotiations; or stopped interest from accruing by reporting them when they filed appeals in 2010.

The City conceded at the hearing before ALJ Boldt on December 13-14, 2011 Cleven was eligible to be enrolled and should have been enrolled on January 1, 1983. (A-App. 1, p. 17, ¶ 64) Its failure to enroll Cleven after its concession he should have been enrolled as of January 1, 1983 obviously was not a mere mistake. Its inaction was to protect its own financial interest and was deliberately indifferent to the potentially devastating consequences that decision would have for Cleven. Even after ETF issued its Final Order and Decision ordering enrollment of these stagehands, the City refused for over three (3) more years to comply with the order. Clearly, the circuit court's conclusion the City engaged in inequitable conduct by its failure to report Plaintiffs as participants in the WRS is not erroneous.

The City also contends the court's determination Plaintiffs reasonably relied on its determination they were independent contractors is erroneous, and asserts "the undisputed facts show Respondents sat on their rights (to appeal) for strategic reasons" and "acted solely for their benefit at all times." (Brief, p. 18) The City cites the ETF Board's findings that "Respondents knew the City did not consider them employees and that they worked alongside City employees who had benefits including pension benefits" as the basis of its contention. The City asserts plaintiffs could have filed appeals at any time, but "chose not to do so ... because it was advantageous for them not to act until after the labor agreement was ratified." (Brief, p. 19-20)

The City offers no explanation why Plaintiffs would not believe the City's allegedly "good faith" representations they were not employees and were not eligible for benefits. Cleven testified City managers told him he was an independent contractor and was not eligible to receive benefits paid City employees and he was not provided any information about the eligibility requirements

for participation in the WRS. (R. 36, ¶ 9, Exh. 7, ¶ 4) Cleven did not question what he was told by the City because he believed they knew what they were talking about. (R. 36, ¶ 9, Exh. 7, ¶ 5.) Nor was Cleven provided any information regarding a right to appeal to obtain a decision regarding eligibility. (R. 36, ¶ 9, Exh. 7, ¶ 4) The City offered no evidence it ever provided plaintiffs information regarding a right to appeal its "determination."

Nor does the City identify any evidence supporting its contention somehow it was to their advantage not to appeal if they allegedly knew they could. The assertion there was some "strategic reason" they would delay filing an appeal if they knew they had such a right is disingenuous. Each year that passed without filing an appeal was a year of benefits lost by Plaintiffs because of the application of the seven-year limitation and a year of financial benefit to the City. As noted previously, Gersbach lost 13 1/2 years of contributions and service credits and McWilliams lost almost 13 years of contributions and service credits because of the application of the seven-year limitation. There was no strategic reason either for Cleven to delay filing an appeal if he knew he had such a right. Even if plaintiffs knew they had a right to appeal to ETF and failed to do so, it is not a basis to relieve the City of its responsibility for the damage it caused by its failure to properly fulfill its statutory duties.

The court properly balanced the public interest in not applying the estoppel doctrine and the harm to the Plaintiffs, and concluded correctly to apply equitable estoppel to bar the City's claim. There is little if any financial harm to the City by applying equitable estoppel to the claims against Gersbach, McWilliams, Gauthier and Johnston because the fiscal benefit the City received as a result of the seven-year limitation on their claims by failing to enroll them when they were eligible was equal to or greater than the amount the City is required now to pay on their behalf. The City saved 13 1/2 years and 13 years of employer contributions for Gersbach and McWilliams

respectively compared to now being required to pay the employee share for six years for Gersbach and five years for McWilliams. (R. 42, p. 7, ¶ 8-9 and p. 9, ¶¶ 16-17)

Cleven had a vested right to retire and receive retirement benefits on January 1, 2012. He was entitled to retire as of that date, but was not able to retire because of the actions taken by the City. (R. 42, p. 36, ¶¶ 96-97) As of January 1, 2012, Cleven had been enrolled in the WRS, but because the City had not reported his hours or earnings for work performed between January 1, 1983 and January 1, 2010, he had only approximately 1.94 years of available service and insufficient earnings to be eligible to receive a monthly annuity from the WRS. (R. 36, ¶ 9, Exh. 7, ¶¶ 14-15; R. 36, ¶ 14, Exh. 12, p. 3)

The sole obstacle to Cleven's enjoyment of his vested annuity benefits beginning January 1, 2012 was the City's refusal to report his hours and earnings from January 1, 1983 to January 1, 2010 to the WRS. The City reported Cleven for enrollment on December 27, 2009, but failed/refused to report his hours and earnings for work between January 1, 1983 and January 1, 2010. (R. 42, p. 13, ¶ 32-33) Cleven appealed to ETF challenging the City's failure to report his pre-January 1, 2010 hours and earnings, and the City "conceded" at the December 13-14, 2011 hearing regarding Cleven's appeal "that Cleven should have been reported as of January 1, 1983". (A-App. 1, p. 17, ¶ 64) The City also conceded that Cleven's enrollment was not affected by the application of the seven (7) year statute of limitations. Given the City's concessions regarding Cleven's eligibility, the final decision of the Board regarding Cleven's eligibility was a certainty. The City had all the required information regarding Cleven's hours and earnings to enable it to report them to ETF as of January 1, 2012, and, in fact, that payroll information had been offered in evidence at the ETF hearing in December 13-14, 2011. (R. 39, ¶ 5-6) Nonetheless, the City refused to report Cleven's hours and earnings for nearly four and one-half more years until it did

so on June 6, 2016, five (5) days after Cleven filed a motion with the circuit court to find the City in contempt and imposition of a sanction of $500.00 a day for each day it did not report his hours or earnings. (Cleven v. City of Madison, Case No. 15 CV 1520)

The harm to Cleven is staggering if he is required to pay the $41,505.61 for the employee portion of the WRS contribution, $159.328.31 in interest, and $7.068.53 for BAC the City seeks for the period January 1, 1983 through December 31, 2009. (R. 23, p. 5, ¶ 18) The amount the City seeks would effectively deprive Cleven of all or nearly all of his retirement benefits. Had Cleven begun receiving the $1,678.90 a month annuity ETF estimated he could have received beginning on January 1, 2012, if his hours and earnings had been reported, and paid the entire amount of the annuity each month to the City, it would require 124 months of his guaranteed 180 months of annuity payments to pay the amount demanded by the City. Cleven would be left with a mere 56 months of guaranteed monthly annuity benefits as his retirement. [6] Such a result is unconscionable.

It was the City that failed to report Cleven for enrollment and failed to deduct the employee portion of the contributions from Cleven and the other Plaintiff's compensation. It was the City that stubbornly refused to report Cleven for four and a half years after conceding he should have been enrolled January 1, 1983 forcing Cleven to engage in extensive litigation. This mess was not made by Cleven or the other Plaintiffs. Equity will not tolerate the result sought by the City and this court should find, as the circuit court did, equitable estoppel requires the dismissal of the City's claims against the Plaintiffs.

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[6] His annuity benefits, however, are taxable income and thus the amount he would have to make payments would have reduced his annuity benefits by an additional twenty (20) percent thereby extending the number of months to repay the amount claimed by the City to nearly 160 months. Also, interest would accrue on a judgment if it is granted and therefore, realistically, if a judgment is entered, Cleven would receive no retirement benefits at all because everything he would receive would be taken by the City and the judgment probably still would not be satisfied. Equity abhors such a result.

All of the elements for the application of the doctrines of equitable estoppel and unclean hands are present. The City's conduct since at least 2007 is wanton and deliberately indifferent to the harm caused to Plaintiffs. The court correctly found the injustice caused if estoppel is not applied out weighs the public interests at stake if it is applied and this court should affirm that finding.

II. There Are Alternative Grounds to Affirm the Dismissal of The City's Counterclaim.

Plaintiffs' also moved for summary judgment on the basis equitable estoppel should be applied because the City breached its fiduciary duties to the Plaintiffs causing the damages to occur and because the claim was barred by Wis. Stat. § 893.93(1)(a). The court found "[t]he elements necessary to apply equitable estoppel are present here, but not on the basis of any fiduciary duty as Plaintiffs argue" and rejected Plaintiffs' contention the City's claim was barred by Wis. Stat. § 893.93(1)(a). This court should find both these alternative grounds support affirming the court's dismissal of the City's counterclaim.

A. The Court Should Find Equitable Estoppel Prevents the City from Collecting the Employee Portion of the Contributions, Interest, and BAC Because the City's Breach of Its Fiduciary Duties to Plaintiffs Caused These Damages to Occur.

The court rejected Plaintiffs' claim equitable estoppel should bar the City's claim because the City breached fiduciary duties created by statute by not enrolling Plaintiffs and withholding contributions after it knew they were employees. The court's opinion contained no elaboration on the issue. This court should find Chapter 40 created a trust; that Plaintiffs were beneficiaries; and the City's duty to enroll Plaintiffs and withhold the employee contributions were fiduciary duties and the City breached those duties by refusing to perform them for the City's own financial interests.

A fiduciary relationship comes into being by manifestation of consent by the fiduciary to act on behalf of another. *Zastrow v. Journal Communications, Inc.*, 2006 WI 72, 291 Wis. 2d 426, 446, 178 N.W.2d 51. A fiduciary relationship arises from a formal legal relationship such as a relationship as a principal and agent ... trust and trustee ... or implied in law due to the factual situation surrounding the transactions and relationships of the parties to each other and to the questioned transactions. *Production Credit Ass'n of Lancaster v. Croft*, 143 Wis. 2d 746, 752, 423 N.W. 2d 544. A fiduciary agrees to assume a position of authority in regard to the affairs of another in which position the fiduciary may have access to the property of the object of the fiduciary's obligation. *Zastro v. Journal Communications*, supra, 291 Wis. 2d at 448.

Plaintiffs contend the statutory duties imposed upon the City by Chapter 40 to act on behalf of the Plaintiffs as participants in the WRS created a fiduciary relationship between the City and the Plaintiffs. There appear to be no cases dealing with the issue. The Wisconsin Retirement System (WRS) is Wisconsin's Retirement Plan for public employees. Chapter 40 created a "public employee trust fund" "to aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age…" Wis. Stat. §40.01(1). The WRS is a public trust that is required to be managed, and administered "solely for the purpose of insuring the fulfillment…of the benefit commitments to participants." Wis. Stat. §40.01(2).

The participants in the WRS are beneficiaries of the trust and the trust is to be managed for the benefit of the participants. Participating employers are given specific responsibilities including reporting individuals they determine are eligible for enrollment and withholding the employee portion of the contributions, even if it has not made a determination of their eligibility. It was the City's obligation to exercise these responsibilities for the benefit of its employees not for its own financial interests. Chapter 40 requires the City to appoint an agent to administer the provisions

of the statutes. The City's responsibility should be found to be similar to those of plan administrator pursuant to ERISA and the Court should find the provisions of Chapter 40 created fiduciary duties to enroll Plaintiffs and withhold the employee portion of contributions and breached those duties.

Courts have the equitable power to provide "a host of ... 'distinctively equitable' remedies - remedies that were 'fitted to the nature of the primary right' when a breach of fiduciary duty occurs". *Cigna Corp. v. Amana*, 563 U.S. 421, 440, 442 (2011), 131 S. Ct. 1866, 179 L. Ed. 2d 843. As noted in *Cigna*, "a maximum of equity states that equity suffers not a right to be without a remedy". Id. Equitable estoppel and surcharge are remedies extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed on that fiduciary. Id.

Equitable estoppel is particularly appropriate in this case because the harm was created by the City's initial failure to report Plaintiffs for enrollment in the WRS and deduct the required contributions from their compensation and was perpetuated by the City's refusal after 2007 to properly report Plaintiffs when the City knew Plaintiffs were employees who should have been reported. The City's refusal to report Plaintiffs for the nearly 10 years between the WERC's 2007 decision and when it finally reported Plaintiffs caused the interest to escalate dramatically. Had the City reported the Plaintiffs at any point after 2007, its reporting would have stopped interest from accruing. (R. 41, p. 47, Davey Aff., ¶ 4, Exh. C) (See WRS Adm. Manual Sec. 1100) which provides "[i]nterest accrual stops when ETF receives the [Employee Transaction Report]". The City's contention that nonetheless Plaintiffs are responsible for this interest is unconscionable.

B. The Circuit Court's Conclusion the City's Claim Was Not Barred by Wis. Stat. § 893.93(1)(a) Is Erroneous and Should be Reversed.

A cause of action accrues when there is "a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." *Sussman*

v. Gleisner, 80 Wis. 2d 435, 441, 259 N.W.2d 114 (1977). A party is required to exercise reasonable diligence in discovering whether it has been injured and that the injury was probably caused by a particular defendant. *Sawyer v. Midefort,* 227 Wis. 2d 124, 155-156, 595 N.W.2d 423 (1999). This required the City to be as diligent "as the great majority of persons would use in the same or similar circumstances" and "not close [its] eyes to means of information reasonably accessible to [it] and must in good faith apply [its] attention to those particulars within [its] reach" to assert potential claims if it intended to do so. (Id. at 156-157) The City failed to do so.

Plaintiffs contend the City's cause of action accrued more than six years before May 31, 2016, the date it filed its counterclaim against Gersbach, McWilliams, Gauthier, and Johnston and six years before November 22, 2016, the date of its counterclaim against Cleven because the City knew or reasonably should have known even before then they were employees eligible for participation and contributions were not made in the year they were due. (R. 5 and R. 29) The City contends its cause of action against Cleven did not accrue until July 12, 2016 and against Gersbach, McWilliams, Gauthier and Johnston until August 12, 2016, the dates it received invoices from ETF. The court held that "under the language of Wis. Stat. § 40.06(5), it is the ETF Board decision that (was) controlling for purposes of accrual of the claim." (A-App. 2, p. 10)

Wis. Stat. § 893.93(1)(a) provides "[a]n action upon a liability created by statute when a different limitation is not prescribed by law must be commenced within six years after the cause of action accrues." The City's action was based on Wis. Stat. § 40.06(5) which provides in pertinent part:

> *Whenever it is determined that contributions and premiums were not paid in the year when due, ... 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.*
> *(emphasis added)*

The court reasoned incorrectly that:

> ... with regard to a money judgment, such a remedy cannot be entered if no money is due. The City seeks a money judgment against Plaintiffs for the amounts the City has paid for the employee contributions at issue. Counterclaim at 9. For a money judgment claim to accrue, there must be money demanded and established to be payable. There was no demand for money until ETF invoiced the City.

(A-App, 2, p.11)

Chapter 40 places the responsibility for "determining" whether individuals are eligible on the employer and requires employers to re-evaluate that determination whenever circumstances change and to begin withholding the employee portion of contributions when the employer "determines" the individual is eligible. (Wis. Stat. § 40.22(5) and R.36, ¶ 10, Exh. 8, pp. 1-2, and 5) If the employer's determination is found to be incorrect, the amount of the employee contributions is returned to the employer. (Wis. Stat. § 40.06(1)(b))

Wis. Stat. § 40.01(2) provides "[a]ll statutes related to the fund shall be construed liberally in furtherance of the purposes set forth in this section." The court's conclusion the City's right to collect the employee's portion of the contribution occurred when "ETF sent the City the invoice on July 15, 2016 for Cleven and August 15, 2016 for the other plaintiffs" is not a liberal interpretation of § 40.06(5) in furtherance of the purposes set forth in Chapter 40. Instead, it is contrary to the purposes of Chapter 40 because it gave the City the ability to extend the time the City had to commence an action exposing participants for whom contributions should have been paid to a dramatic increase in the amount they could be required to repay the City, thereby significantly eroding the benefits they might receive.

Cleven is a prime example of the consequences that occur as a result of the court's interpretation of § 40.06(5). The City knew or should have reasonably known by 2007, if not 2004, Cleven was eligible and contributions had not been made in the year when due. It is the City's knowledge that should trigger the six-year statute. The City did not attempt collection until nine years after the City had knowledge contributions had not been paid when due and much of that time was the result of the City's refusal to report Cleven's hours and earnings after conceding he should have been enrolled and over three years after being ordered by ETF to enroll Cleven. The delay caused the amount the City claims he owes to escalate and effectively reduce the amount of the benefit he would receive if required to make repayment.

The language in § 40.06(5), "[w]henever it is determined" is consistent with requiring the City to begin collection efforts when it knows contributions were not made when due. The process for collection of contributions that were not made when due is set forth in the WRS Administrative Manual. It begins with the submission of an Employee Transaction Report which then stops further interest from accruing. (R. 41, p. 47, Davey Aff. ¶ 4, Exh. C) ETF then invoices the employer and the employer collects from the employee or pays it itself. (Id.) The City should have commenced this process by submitting an Employee Transaction Report and receiving an invoice and initiating an action or it could have commenced a declaratory judgment action at least by 2007. This interpretation of § 40.06(5) would reduce the employee's exposure to increased interest and contributions that could ravage their benefits. The court's interpretation that the City could delay submitting the appropriate report for nine years is erroneous and contrary to the intent of § 40.06(5) and the purposesmo of Chapter 40 and this court should vacate it and find the City's claims are barred by § 893.93(a)(1) because the City counterclaims were commenced more than 6 years after the City knew or should have known the facts that are the basis of the claims.

CONCLUSION

For the reasons set forth above, this court should affirm the circuit court's finding the City's counterclaim is barred by the doctrine of equitable estoppel and unclean hands. In addition, the court should find the City breached its fiduciary duties to properly enroll the Plaintiffs and withhold contributions on their behalf if it was not going to pay them. Finally, the court should find the City knew or reasonably known more than six years before it filed its counterclaims Plaintiffs were employees and that contributions were not made in the year when due and therefore the counterclaims are barred by Wis. Stat. §893.93(1)(a).

Dated: June 11, 2018

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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 produced with a proportional serif font.
The length of this brief is 10,747 words.

Dated: June 11, 2018

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