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

REPLY BRIEF OF DEFENDANT-APPELLANT CITY OF MADISON

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STATEMENT OF FACTS

The following statement of facts are (a) pertinent to the City's Reply Brief and/or (b) made to correct erroneous or irrelevant facts in Respondents' Brief.

In 1979, the City looked to utilizing stagehand assistance at the Civic Center on a *temporary* basis. *R. 47, Exh. T, at 004 (emphasis added).* Correspondence shows the City believed "there would be an *occasion* to employ persons who are members of IATSE Local 251." *Id., at 005 (emphasis in original).* The ETF Board found the following with regard to how the City established its relationship with the IATSE 251 hiring hall and their members:

- The City modeled its relationship with IATSE 251 based on the relationship IATSE 251 had with Frank Productions. The City paid, as the prevailing wage rate, the wages negotiated by Frank Productions with IATSE 251. *A-App 1, page 003, ¶6.*

- The City received referrals from IATSE 251 business agents for Stagehands to fill show requests in the same manner as Frank Productions and the Kohl Center. *A-App 1, page 003, ¶7.*

- []][S]tagehands were not "hired" through the City's hiring process. *A-App 1, page 004, ¶13.*

- The stagehands knew that the City did not consider them to be employees of the City and was not giving them benefits. The knew that some of the people with whom they worked were City employees who received vacation, sick leave, health insurance, and pension [WRS}. Rudy Lienau of the City testified Cleven discussed with him *over the years* the union's desire to have the stagehands receive benefits as City employees. *A-App 1, page 004, ¶16 (emphasis added).*

At page 7 of their Brief, Respondents try to advance the same argument they have been trying throughout this litigation – that when the WERC decision came out on January 23, 2007[1] that the City should have enrolled the stagehands in the WRS because they were deemed employees for purposes of bargaining under WIS. STAT. §111.79(1)(i).

The Circuit Court addressed this argument at pages 8, 9 and 10 of the Decision and Order. *A-App 2, pages 008, 009 and 010.* The Circuit Court concluded:

[1] IATSE's first petition, filed on June 6, 2003 named the Madison Cultural Arts District as the employer. The WERC ruled IATSE stagehands were not employers of the Madison Cultural Arts District and dismissed the petition. IATSE re-filed the petition on January 5, 2006 naming the City of Madison as the employer.

> Being a "municipal employee" within the meaning of Wis. Stat. §111.70(1)(i) gives that employee the right to organize and bargain collectively. Wis. Stat. §111.70(2). It contains no consequences for an employee's standing to receive retirement benefits or be enrolled in WRS. The determination that Plaintiffs are employees for collective bargaining purposes does not necessarily mean that they are employees for purposes of WRS. Likewise, a determination that Plaintiffs are employees for purposes of collective bargaining does not create an obligation for the City to report Plaintiffs to WRS.
>
> Thus, under the language of Wis. Stat. §40.06(5), it is the 2013 ETF Board decision that controlling for purposes of accrual of the claim, not the 2007 WERC decision.

Respondents spend pages 8-11 of their Brief re-hashing the procedural posture of the Case. Respondents state at page 8 of their Brief "the City did not report any of the hours and earnings for work performed by them [stagehands] before January 1, 2010. The City's reporting was consistent with the new labor agreement. Respondents concede these facts at page 8 of their Brief.

Respondents claim the City "ignored ETF's order and did not report Plaintiffs as participating

employees." However, Respondents fail to mention the delay was because "[a]ppeals related to the ETF Board's decision were not exhausted until after the Wisconsin Supreme Court denied Plaintiffs [now Respondents] petition for review on May 11, 2015. *A-App 2, page 011*. Respondents filed lawsuits shortly thereafter. *Respondents' Brief at page 9*.

Respondent's factual statements at pages 11 through 16 contain inaccurate or irrelevant facts relating to this appeal. Respondents are simply incorrect that Respondents "would not have been required to pay taxes" if the City had reported them and withheld WRS contributions before 2010. Prior to the passage of Act 10/Act 32, WRS contributions were collected post tax so it would not have reduced Respondents' taxable income. *R. 43, ¶¶ 5-6*. Despite this erroneous fact being corrected by the City in earlier pleadings, Respondents continue with this misleading, and incorrect, argument throughout their Brief.

Respondents also discuss, at pages 12 and 13 other potential contributions that could have been made going back further than seven years. Respondents appealed that portion of the ETF Board Decision but failed to follow the correct appellate procedure. As the Circuit Court noted in its Decision and Order, the Circuit Court, Court of Appeals and the Wisconsin Supreme Court denied Respondents' appeal. *A-App 2, page 011*. This issue is not before the Court.

Respondents also attempt to bring in unproven statements of harm and monetary loss from another litigation case involving Cleven in which he was the unsuccessful party[2] as well statements involving other Respondents. Respondents also cite to an ETF website regarding the Estate's claim. Most of these supposed "facts" contain no citation to the official

[2] At page 13 of Respondents' Brief, Cleven states he had to spend over $9,000 in attorney fees and costs for his case. His attorney sued pursuant to WIS. STATS. §783.04 (2015-2016), which is clear on its face that statutory attorney's fees and costs apply to the action. The fact Cleven's attorney charged him significantly more than the statutory fee and costs is not relevant to the issues on appeal. *R. 44, Exh. Q, at 021.*

court record because they were never part of the court record. *See Respondents' Brief, at 15*. In addition, the Circuit Court did not consider them in the Decision and Order. Consequently, they should not be considered for purposes of this appeal. *Respondent's Brief at 13-15, 20; A-App 2*.

Respondents also attempt to bring in three individuals are not Respondents in this case and who were never part of this case at any point in time. Respondent's Brief at 14-15 (Jensen, Sarris and Schwoerer). The Circuit Court's Decision and Order involved only the named Respondents. Any attempt to bring facts or claims before this Court relating to individuals not involved in this litigation is improper.

Finally, at page 19, footnote 3, Respondents again mislead the Court in discussing whether the City would have paid their WRS contribution. Respondents state they "were represented employees." However, the facts show that from 1980 to January 1, 2008, respondents were *unrepresented* employees. Respondents became represented

employees in 2008 when the labor agreement took effect. *R. 32, Exh. L*. The City began enrolling stagehands and paying their WRS contribution consistent with the terms of the labor agreement. The City did not pay the employee WRS contribution for unrepresented employees and would not have done so for Respondents during any period covered by this litigation.

ARGUMENT

The Public's Interest Is Harmed By The Imposition Of Estoppel Against The City.

Respondents' estoppel argument, and the Circuit Court's Decision and Order rest on a finding the non-action was the City's failure to report Respondents as participants in the WRS. *A-App. 2, page 015*. To get to that conclusion, Respondents have to ignore the fact City complied with the applicable statutes when it determined stagehands were independent contractors. Respondents also have to ignore the fact that the City's determination rested on a good faith belief stagehand help would be

required on a temporary, occasional, basis. The City did what it was supposed to do under the law and had a reasonable basis for doing so.

Respondents discuss their individual harm but in order to apply equitable estoppel against a municipal body, the public's interest must be examined to see if it would be unduly harmed. *A-App. 2, at 015.* There are several public interests at stake here that would be harmed.

First, is the integrity of the WRS system. The legislature gave individuals the right to appeal their determinations. However, rewarding individuals who sit on those rights for 10 or 20 years and file appeals only when it is strategically expedient for their own self-interests would throw the entire system into havoc. Having the municipal body pick up the employee cost in that situation incentivizes individuals who may have claims to wait in an effort to have the municipal body pay their share – a payment that is not allowed by law now and was discretionary then.

Second, there is the matter of contractual rights. The City and IATSE Local 251 bargained an agreement in good faith that provided the City would not pay the employee share of the WRS contribution until 2010. Respondent Gauthier told the City in bargaining that if the wage package wasn't what they wanted they would file WRS appeals with ETF. If there is unclean hands here, it is Respondents unclean hands because they did not bargain in good faith. Rewarding Respondents by reforming the negotiated labor agreement and relieving them of their bargain sets a dangerous precedent.

Third, the public's interest is served by allowing the City the opportunity to collect some or all of the money. It was always the intention of the legislature to have employees pay into their retirement. Allowing the City to take a judgment against Respondents and attempt collection keeps individuals from sitting on their rights, ensures contractual bargains are honored and preserves the

intent of WRS system that employees pay into their retirement.

Because there is insufficient evidence in the record to apply equitable estoppel to the City, and the public's interest outweighs the Respondents' interests, the Circuit Court's decision should be overturned.

There Is No Evidence In The Record To Support The Finding The City Has Unclean Hands

There is no evidence in the record, and Respondents cite none in their Brief, that the City had unclean hands. Documents and testimony before the ETF Board show that in 1979, the City expected that IATSE 251 stagehands would be utilized "on occasion" when City employees were not enough to help set up the shows. There was never any attempt to deceive or mislead.

The City had a good faith honest belief these were temporary independent contractors since the same stagehands worked for the County and the State and were never considered by either of those

entities as their employees. The City set up the same relationship with IATSE Local 251 as the County and the State had utilizing Frank Productions' contract and wage rate as a guide.

The Circuit Court's decision cited no action by the City that would rise to the level of unlawful or wrongful conduct. The Court's only basis for invoking the doctrine was that the City made an error. The City's error was reasonable given the circumstances in which it made the decision.

There is no evidence in the record supporting the application of unclean hands against the City. Accordingly, this portion of the Circuit Court's decision should be overturned.

The Circuit Court Correctly Concluded Respondents' Reliance On The 2007 WERC Decision To Prove Its Claims Was Misplaced.

Throughout Respondents' Brief, they ask this Court to find they were employees, or that the City should have known they were employees, for purposes of the Wisconsin Retirement System because the WERC found they were employees for

purposes of collective bargaining. Defendants base virtually all of their appellate arguments on the WERC decision[3]. As the Circuit Court correctly found, Respondents' reliance on the WERC decision to invoke equitable estoppel, prove unclean hands, establish a fiduciary duty on behalf of the City or establish a cause of action for the City's counterclaim, was misplaced.

Under WERC's Direction of Election, employees who are managerial, confidential and executive employees are not "municipal employees" covered under collective bargaining but those individuals could be employees for purposes of WRS eligibility. The WERC decision looked at a broad group of individuals for purposes of a collective bargaining unit. The determination of whether an individual is WRS eligible is an individualized inquiry based upon

[3] Respondents even attempt to use the City's closing argument submitted as part of the ETF proceedings as "evidence" the City's claim accrued in 2007. This section of the City's brief was a legal argument. It was not fact or law and cannot be used to support or deny summary judgment in this case nor would the Court wish to do so as neither the ALJ nor the ETF Board found the City's argument persuasive enough to include it in the final ETF Board decision.

their particular job and expected hours of work. WIS. STATS. § 40.22(5) vests the employer with determining whether an individual meets the requirements for WRS participation. To allow a collective bargaining decision to effectively negate the City's ability to determine WRS eligibility would be against public policy and the clear meaning of the statute.

In *County of La Crosse v. WERC et al.*, 170 Wis. 2d 155, 488 N.W.2d 94 (Ct. App. 1992) (*overruled* on other grounds by *County of La Crosse v. WERC*, 180 Wis. 2d 100, 508 N.W.2d 9 (1993)[4], the Wisconsin Professional Police Association attempted to bargain a proposal that would have forced La Crosse County to classify its jailers as protective occupation participants and certify their names to the Department of Employee Trust Funds. In acknowledging the case involved the relationship

[4] The sole issue on review was whether a bargaining proposal to make WRS contributions pursuant to §40.05(2)(g)1, Wis. Stats., was a mandatory subject of bargaining. The Court did not review the WRS classification issue. Its decision was based on a different legal theory at oral argument that was not argued to the Court of Appeals.

between the Municipal Employment Relations Act (MERA) and Chapter 40 of the Wisconsin Statutes, the Court of Appeals observed that the "duty imposed on the County to determine the status of participating employees in the Wisconsin retirement system is part of the legislative plan to ensure the integrity of the public employe trust fund." *Id.*, 170 Wis. 2d at 165, 488 N.W.2d at 97. In noting an employee may appeal an employer's determination that the employee is not a WRS participating employee, the Court concluded that:

> The goals of the exhaustion/primary jurisdiction principal – agency expertise and fact-finding facility – are best served by requiring that an employee who wishes to contest the employer's failure or refusal to classify the employee as a protective occupation participant appeal that determination to DETF and ETFB. It violates these goals to substitute for the administrative and judicial processes the collective bargaining process, where the decision as to whether a participating employee shall be classified as a protective occupation participant may be made by an arbitrator lacking the expertise and experience of DETF or ETFB.

Id., 170 Wis. 2d at 177, 488 N.W.2d at 102.

The Court's holding in *La Crosse* highlights the fact that collective bargaining and WRS eligibility determinations are two distinct claims with differences in proceedings, expertise and fact finding. Further, the Court recognized the public policy implications for employers to continue determining WRS eligibility status of individuals subject to the statutory appeal process. The 2007 WERC decision, as the Circuit Court correctly found, cannot be used to support Respondents' arguments on appeal.

The Circuit Court Correctly Found Equitable Estoppel Did Not Apply On The Basis Of Any Fiduciary Duty.

The Circuit Court correctly found equitable estoppel did not apply on the basis of any fiduciary duty. In urging this Court to reverse that finding, Respondents cite the duties the City has under Chapter 40. *See Respondents Brief, at 28 – 30.* However, the City's duties only apply to *employees*. It is undisputed the City determined Respondents were independent contractors and that independent

contractors are not covered by the WRS. The City had no fiduciary relationship with Respondents during the period of time at issue (pre-March 2013) in this litigation. Respondents concede they can find no case law supporting their position. *Respondents' Brief at 29*.

The Circuit Court's determination equitable estoppel cannot be applied on the basis of any fiduciary duty should be upheld.

The Circuit Court Correctly Interpreted WIS. STAT. §893.93(1)(a) When It Found The City's Counter Claim Accrued With The ETF Decision.

The Circuit Court correctly found the 2007 WERC decision, which addressed collective bargaining, did "not create an obligation for the City to report Plaintiffs to WRS." *A-App 2, page 009*. The Circuit Court also correctly reasoned that based on the plain language of WIS. STAT. §40.06(5), the 2013 ETF board decision was controlling for purposes of the City's counterclaim and that the City filed its counterclaim within the six-year statute of limitations.

Respondents concede the City had a cause of action when there was a claim capable of present enforcement. Despite that, Respondents argue, at page 32 of their Brief, the Court was incorrect when it held the City's claim for a money judgment "cannot be entered if no money is due" but do not explain how or why the Court's reasoning is incorrect. Logically, a judgment for money cannot issue until there is legal determination money is owed along with how much is owed.

Respondents claim the City's cause of action accrued with the WERC decision in 2007. Respondents cite no statutory law and no case law in support of their argument and the case on point, *La Crosse*, does not support their argument. *See pages 13-15, above.*

Respondents incorrectly interpret WIS. STAT. §40.06(5) claiming the "[w]whenever it is determined" language means "the City [should] begin collection efforts when it knows contributions were not made when due." *Respondents' Brief, page 33*. Respondents'

contention disregards the rest of the language in the statue which addresses the "amount which the employee would have paid." The amount the employer and employee would have paid comes from one source – ETF. In this case, it is the March 2013 ETF decision which fixed Respondents' enrollment dates and enabled ETF to perform the required calculations to determine the employer and employee share. ETF's calculations enabled the City to demand payment from Respondents and when Respondents refused to pay, the City had a ripe counterclaim. *A-App 2, pages 002 and 003*.

The Circuit Court applied the undisputed facts to the relevant law and correctly decided the issue. Respondents offer nothing in terms of law or facts that would compel overturning the Court's determination the City's cause of action accrued with the March 2013 ETF Board decision resulting in the City's counterclaim being timely filed.

CONCLUSION

For the reasons cited in the City's Brief and Reply, it respectfully requests this Court overturn the Circuit Court's decision and find in favor of the City.

Dated this 26th day of June, 2018.

/s/ Patricia A. Lauten

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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 2,852 words.

Dated this 26th day of June, 2018.

/s/ Patricia A. Lauten

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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 26th day of June, 2018.

/s/ Patricia A. Lauten

_____

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