RECEIVED
09-21-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT III
APPEAL CASE NO. 2020AP940

BROWN COUNTY,
Plaintiff-Respondent,
v.

BROWN COUNTY TAXPAYERS
ASSOCIATION and

FRANK BENNETT,
Defendants-Third-Party Plaintiffs-Appellants,
v.

PETER BARCA, SECRETARY,
WISCONSIN DEPARTMENT OF REVENUE,
Third-Party Defendant-Respondent.

Appeal from the Circuit Court for Brown County
Case No. 18-CV-640
The Honorable John P. Zakowski Presiding

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS'
REPLY BRIEF

Richard M. Esenberg, WI Bar No. 1005622
Anthony F. LoCoco, WI Bar No. 1101773
Lucas T. Vebber, WI Bar No. 1067543
WISCONSIN INSTITUTE FOR LAW & LIBERTY
330 East Kilbourn Ave., Suite 725
Milwaukee, WI 53202-3141
414-727-9455; FAX: 414-727-6385
Attorneys for Defendants-Third-Party Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES ii

ARGUMENT 1

I. THE COUNTY SALES TAX VIOLATES THE PLAIN LANGUAGE OF WIS. STAT. §77.70 2

II. THE EXTRINSIC EVIDENCE FAVORS BCTA'S INTERPRETATION 4

III. THE LEGISLATURE RESTRICTED HOW COUNTIES MAY USE SALES TAX REVENUE 6

IV. THE ATTORNEY GENERAL'S INTERPRETATION OF §77.70 IS WRONG, BUT THE COUNTY'S TAX IS UNLAWFUL UNDER THAT READING ANYWAY 7

V. BROWN COUNTY DID NOT BORROW TO PAY FOR ITS NEW PROJECTS 7

VI. ANY ONGOING REDUCTION IN BROWN COUNTY'S PROPERY TAX LEVY DOES NOT ARISE BY DIRECT OPERATION OF THE COUNTY SALES TAX 10

VII. THIS COURT SHOULD REJECT THE COUNTY'S ATEXTUAL ARGUMENTS 11

CONCLUSION 13

CERTIFICATION OF MAILING 16

FORM AND LENGTH CERTIFICATION 17

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §809.19(12) 18

TABLE OF CITED AUTHORITIES

CASES

Cartwright v. Sharpe, 40 Wis.2d 494, 162 N.W.2d 5 (1968) 5
Grunwald v. Halron, 33 Wis. 2d 433, 147 N.W.2d 543 (1967)..... 9
Hopper v. City of Madison, 79 Wis. 2d 120, 256 N.W.2d 139 (1977) 8
Kraemer Bros. v. U.S. Fire Ins. Co., 89 Wis. 2d 555, 278 N.W.2d 857 (1979) 9
Wenke v. Gehl Co., 2004 WI 103, 274 Wis. 2d 220, 682 N.W.2d 405..... 12

LEGISLATION

Wis. Stat. §66.0602 .....3-4, 13
Wis. Stat. §67.045(1)..... 9
Wis. Stat. §77.70 .....*passim*
Wis. Stat. §77.705-.706 4
Wis. Stat. §906.02 8
Wis. Stat. §908.03(16)..... 5
Wis. Stat. §909.02(6)..... 5

OTHER AUTHORITIES

2B Sutherland Statutory Construction §49:1 (7th ed.).....5-6

ARGUMENT

This Court has before it two competing interpretations of twenty words in the Wisconsin Statutes: "the county sales and use taxes may be imposed only for the purpose of directly reducing the property tax levy." Wis. Stat. §77.70. Under BCTA's interpretation, this language mandates that counties apply sales tax proceeds to actually reduce their property tax levies. Under the County's interpretation, counties may use sales tax proceeds to pay for new spending projects because the county would supposedly otherwise have raised the property tax levy to pay for those items. And since the County cannot directly raise the levy to pay for these projects because of state-imposed levy limits, it must further argue that, theoretically, it could have borrowed to pay for them and the ensuing debt service could be covered by property taxes. By this belt and suspenders approach, the limits of § 77.70 are no limits at all.

As BCTA previously demonstrated, a plain-reading interpretation of §77.70, confirmed by legislative history and early county practice, supports its interpretation of the statute, whereas the County's interpretation amounts to little more than the tired political tactic of calling a smaller increase a "reduction" and requires calling a "direct" reduction one that assumes the

County could clear multiple obstacles that have not even been attempted to borrow money that itself could be covered by property taxes.

The County's sales tax in this case is unlawful because: (1) the County did not apply its sales tax revenues directly to its property tax levy (BCTA's interpretation); and (2) the County could not have paid for its $147,000,000 in new capital projects with property taxes (the County's interpretation), both because it did not have room under its levy limit to increase taxes by that amount and because it cannot establish that it could and would have borrowed to pay for those projects (an exception to levy limits).

The County rounds out its brief with a handful of atextual arguments, asserting that applying §77.70 according to its terms will simply be too hard or will unduly harm the County. These arguments are red herrings. Nothing in the County's parade of horribles has anything to do with the clear language of §77.70 or the simple fact that, no matter how you slice it, $147,000,000 in new spending does not constitute direct property tax reduction.

I. THE COUNTY SALES TAX VIOLATES THE PLAIN LANGUAGE OF WIS. STAT. §77.70

Brown County's responses to BCTA's textual argument fail.

The County says that the Legislature should have been more specific, such as by using the term "offset." What it finds unclear about use of the

term "reduce" or how it is less clear or robust than "offset" is unclear. And the County's interpretation reads the operative text of §77.70 right out of the statute. A county will virtually always be able to use Brown County's interpretation to justify any amount of new spending and an associated increase of the property tax levy. Had it wanted to, the Legislature could have accomplished precisely the same result Brown County advocates for by simply authorizing the imposition of county sales and use taxes with no restriction on reducing property tax levies at all.

The County also relies on statutes not at issue here but to no avail. For example, it says that if BCTA were right the Legislature would have enacted into §66.0602—the statute that imposes limits on county property tax levies—a requirement that counties decrease the levy by the amount of sales tax proceeds, but that is unnecessary because §77.70 already says exactly that. Brown County is eliding a county's property tax *levy* with the county's levy *limit*. The levy limit specifies the percentage by which a county is *allowed* to increase its levy in a particular year and depends on items like net new construction and other adjustments; it is not the same as the levy itself. *See* Wis. Stat. § 66.0602(1)-(2). Wis. Stat. §77.70, on the other hand, requires a reduction *in the levy itself*. There is thus no need for the

Legislature to address §77.70 again in §66.0602. For the same reason, the contents of DOR's Levy Limit Worksheet are irrelevant (unlike DOR's PC-400 form).

Wis. Stat. §77.705-.706 are similarly unhelpful as they are different types of taxes enacted at different times by different legislatures for different purposes. Unlike § 77.70, they were enacted for the purpose of new spending and not limited to the reduction of existing taxes. BCTA has already set forth possible reasons for the differences in approach; but ultimately the question is not whether the Legislature could have amended §77.70 to match the language it later adopted in the stadium tax statutes but instead whether §77.70 is reasonably read to impose a restriction on the use of sales tax funds. As discussed, it is; and the fact that §77.70's language is *more* comprehensive than that of §77.705-.706 works *in favor* of BCTA's interpretation, not against it.

II. THE EXTRINISIC EVIDENCE FAVORS BCTA'S INTERPRETATION

As with BCTA's explication of the unambiguous text, the County has no real answer to BCTA's confirmatory extrinsic evidence such as the

legislative history it provided. So after asking the Court not to look at it,[1] the County suggests that the evidence is inconclusive because the sources do not invoke the County's magic word, "offset." But magic words are not necessary in statutes. Here the words are clear: *only for the purpose of directly reducing the property tax levy*. The word "offset" is not necessary. The County's preferred and unnecessary lexicon aside, the repeated references to reducing property tax bills in the legislative history obviously cut directly against the County's theory that §77.70 is a font of money for new spending.

Nor did the County provide any new evidence rebutting BCTA's discussion of county practice showing that the counties that "construed [§77.70] when it first became operative," 2B Sutherland Statutory

[1] This Court can consider the sources the County challenges. The County's reference to "hearsay news articles from 1985" (County Br. 45) is an oxymoron, as these articles constitute self-authenticating ancient documents. *See* Wis. Stat. §908.03(16) (ancient documents exception to hearsay rule); §909.02(6) (newspapers and periodicals are self-authenticating). Likewise, the County's objection to Senator Feingold's statement improperly fails to distinguish between "documents that are part of the legislative history and public records," which may be considered, and attempts by legislators to "*retrospectively*" testify as to what the legislature as a whole intended, which may not. *Cartwright v. Sharpe*, 40 Wis.2d 494, 508-09, 162 N.W.2d 5 (1968) (emphasis added). This Court is not barred from assessing the contemporaneous statement of the author of an amendment about the amendment he has introduced any more than it is barred from assessing legislative history generally. In any event, and with respect to all these objections, the County notes that it asked the circuit court to strike BCTA's extrinsic sources. (County Br. 45 n.6.) The circuit court did not do so. If the County was aggrieved by this failure to rule it was free to file a cross-appeal. It did not.

Construction §49:1 (7th ed.) were vastly more likely to pass ordinances consistent with BCTA's interpretation than ordinances devoting funds to new spending.

Finally, the County falsely states that DOR "does not interpret §77.70 to require the dollar-for-dollar offset BCTPA urges." (County's Br. 38.) From the beginning of this litigation, DOR has declined to take a position on the meaning of §77.70 or the parties' respective positions and instead has addressed only remedy in its briefing. (*See, e.g.*, DOR Br. 1.)

III. THE LEGISLATURE RESTRICTED HOW COUNTIES MAY USE SALES TAX REVENUE

Early in its argument the County tries to convince the Court that §77.70 "does not prescribe or restrict how sales and use tax revenue must be spent." (County's Br. 23 (emphasis removed)). It quickly becomes clear, however, that even the County does not believe this claim, as it relies heavily on an AG opinion that explicitly characterizes the language of §77.70 at issue as a "restriction on the use of county sales and use tax revenues." (R.59:169.) Indeed, as will now be discussed, the County spends the bulk of its brief arguing that its tax is lawful because it "fund[s] projects that otherwise would have been funded by a countywide property tax." (County's Br. 18.) If

§77.70 really did not restrict the use of funds, this argument would be needless and meaningless.

IV. THE ATTORNEY GENERAL'S INTERPRETATION OF §77.70 IS WRONG, BUT THE COUNTY'S TAX IS UNLAWFUL UNDER THAT READING ANYWAY

After its half-hearted attempt to argue that the sales tax statute contains no restrictions at all, the County goes all-in on the AG's view that county sales taxes are lawful if they fund projects otherwise fundable through property taxes. BCTA will not repeat its argument explaining why this view renders the operative language surplusage. But the AG's opinion does not solve the County's problems anyway, as the County does not dispute that it did not have room under its levy limits to pay for $18,000,000 in new spending in 2018 and $147,000,000 in new spending overall. These projects were not, in other words, fundable through property taxes because Brown County could not legally raise property taxes high enough to pay for them given the statutory levy limits.

V. BROWN COUNTY DID NOT BORROW TO PAY FOR ITS NEW PROJECTS

Thus the County takes the only way out available to it: because counties can raise their property tax levies to pay for debt service without regard to the levy limit, the County asserts that it "***would have*** funded the

projects identified in the Ordinance by issuing debt, had the County not enacted the Ordinance," calling this a "crucial and undisputed fact." (County's Br. 24.) As we have seen, this *is* an important fact—the County's whole case rides on it. But it most certainly is not "undisputed."

The County bases its claim that it knows—with infallibility—the state of affairs in the alterate universe in which no sales tax ordinance is passed on the following single sentence uttered by its Finance Director: "I am familiar with Brown County's May 17, 2017 Ordinance enacting a Sales and Use Tax for the purpose of funding capital projects which it is my understanding and belief would otherwise have been funded through the issuance of additional debt obligations." (R.44:2.)

BCTA did and does dispute the Director's statement. BCTA pointed out in the circuit court that the affidvavit was "purely speculative, not based on personal knowledge, wholly unfounded, and entitled to no weight." (R.64:17.) As a matter of law, it was and is insufficient to support summary judgment for the County. Wis. Stat. §906.02; *Hopper v. City of Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977) ("Affidavits in support of a motion for summary judgment must contain evidentiary facts, of which the affiant has personal knowledge.").

The Director cannot have personal knowledge of a matter that would have occurred in the future and his "belief" is inadmissible as mere speculation. *Kraemer Bros. v. U.S. Fire Ins. Co.,* 89 Wis. 2d 555, 571, 278 N.W.2d 857 (1979) ("An affidavit made on information and belief does not satisfy the statutory requirement that the affidavit be made on personal knowledge and set forth evidentiary facts as would be admissible in evidence." (citing Wis. Stat. §802.08(3)); *Grunwald v. Halron*, 33 Wis. 2d 433, 441, 147 N.W.2d 543 (1967) ("mere speculation" is not admissible).

Further, the County, itself, abhors the effects that borrowing the funds would have had on the County (County's Br. 49). Given these supposedly adverse effects, it is not so clear at all that the County would have taken the borrowing approach. Moreover, as BCTA explained in its previous brief, state law imposes a variety of extraordinary procedural requirements for borrowing, up to and including the likelihood that the County would have needed to obtain permission from a public referendum or the passage of a resolution authorizing the borrowing by at least a three-fourths majority. §67.045(1)(a), (b). The County neatly avoided all these requirements by passing a sales and use tax. Whether, in this alternative universe, they could have been satisfied is something that no one can know.

A court cannot simply assume that a political body composed of individual members would have had the political will or the practical ability to issue such a large amount of debt. No one knows or could know, for example, what the public response might have been, or what other roadbloacks the County might have hit along the way.

Because the County is unable to establish that it could and would have actually borrowed over one hundred million dollars to pay for the projects, and because the County does not have room under its levy limits to otherwise pay for the projects, it is wrong to say that the projects were fundable through property taxes and that funding them through sales tax revenue thus avoided a hypothetical tax increase.

VI. ANY ONGOING REDUCTION IN BROWN COUNTY'S PROPERTY TAX LEVY DOES NOT ARISE BY DIRECT OPERATION OF THE COUNTY SALES TAX

Though it spends most of its brief arguing that it need not directly reduce the property tax levy, the County dumps into its brief data to convince the Court that it is doing just that. (County Br. 23-25.) BCTA addressed these accounting tricks in its opening brief, along with the County's misleading argument that its mill rate freeze makes a difference here. (BCTA Br. 45-48.) The dollars-and-cents tax "savings" and tax "relief" to which the

County adverts (County Br. 25 (emphasis and citation removed)) are simply the numerical version of its assertion that it is reducing the levy by avoiding hypothetical borrowing. This "relief" is illusory, as it is not caused by operation of the county sales tax. And even were it not illusory, the Legislature considered and rejected a version of §77.70 that would have required only "relief." (BCTA Br. 14.) It mandated instead "direct[]" property tax "reduc[tion]." "Avoiding" borrowing that never occurred does not meet this standard.

Apart from all these defects, the argument fails even on its own terms. The County explains that the "extra costs associated with borrowing" "would have totaled $13,627,943.36 in interest payments over the life of the Ordinance and $47,000,000 in interest payments over the twenty-year life of the debt service." (County Br. 8.) These numbers are far less than the $147,000,000 in tax revenue the County will collect over the life of the Ordinance. In other words, the levy is not being reduced by the amount of the sales tax.

VII. THIS COURT SHOULD REJECT THE COUNTY'S ATEXTUAL ARGUMENTS

Finally, the County makes a number of arguments that do not have anything to do with the meaning of the statute at issue, such as concerns about

the consequences of invalidation of its sales tax or fear that §77.70 will be difficult to administer under BCTA's reading of it. BCTA will not repeat its response to these arguments either (BCTA Br. 37-38, 48-51), but a few points deserve special attention.

First, the County relies on case law stating that the 1998 AG opinion is presumptively correct because §77.70 has been amended since then, but the AG's interpretation has not been overruled. The Wisconsin Supreme Court has explained that the principle of legislative inaction "is subsidiary to a more important principle—that the goal of statutory interpretation is to ascertain and give effect to the statute's intended purpose." *Wenke v. Gehl Co.*, 2004 WI 103, ¶32, 274 Wis. 2d 220, 682 N.W.2d 405. Like other canons of construction, such presumptions may be rebutted and have been here.

Second, like the County's other unfounded fears about lack of administrability (fears notably not echoed by the DOR in this case), the County's repeated statements that "counties lack the authority to issue tax credits that would be necessary if §77.70 required an offset" (County Br. 36) are mere distractions. Individual tax credits would not be the only method of complying with the statute. For example, in a particular budget the County can either apply last year's sales tax revenue to next year's levy or it can

apply an estimate of next year's sales tax revenue to next year's levy (the same kind of estimates municipalities make in any number of budgetary areas). As the PC-400 form shows, it is largely a question of subtracting one number from the other during the budget process, a process already well established by the Legislature.[2]

CONCLUSION

The County decries BCTA's interpretation of §77.70 as producing "needless inefficiency." (County Br. 34.) BCTA will grant the County this much—its approach was certainly efficient. In adopting an expensive sales tax while simultaneously arguing that $147,000,000 in new spending would save its voters money, the County was able to circumvent not only the need to go to its voters for approval to raise its levy limits, §66.0602(4)(a) (one obvious alternative to the borrowing the County claims is its only other option), but the application of its levy limits in general as well as any and all requirements imposed on the borrowing process, had the County chosen to take this last route.

[2] Even Brown County appears to acknowledge that some counties do subtract sales tax revenues from their property tax levies (County's Br. 32, 42), contradicting its assertion that doing so is impossible or fraught with difficulties.

Unfortunately, to achieve these extraordinary efficiencies, the County had to sacrifice a number of other values: transparency, accountability, and the important checks on the exercise of governmental power produced by procedural safeguards—all very inefficient things. But that trade-off was not the County's to make. It was the Legislature's, and it already struck the balance in 1985 when it amended §77.70. This Court should vindicate the Legislature's right to make that choice by interpretating the statute according to its plain terms.

For the foregoing reasons, BCTA respectfully requests that this Court reverse the decision of the Circuit Court and remand for further proceedings.

Dated this 18th day of September, 2020.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

RICHARD M. ESENBERG (BAR NO. 1005622)
ANTHONY LOCOCO (BAR NO. 1101773)
LUCAS T. VEBBER (BAR NO. 1067543)
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202-3141

(414) 727-9455; rick@will-law.org
FAX: (414)727-6385

Attorneys for Defendants-Third-Party Plaintiffs-Appellants

CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 18th, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

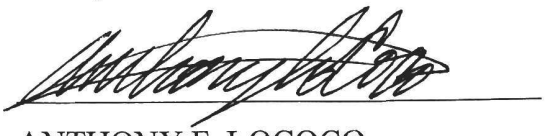
Dated this 18th day of September, 2020.

ANTHONY F. LOCOCO

FORM AND LENGTH CERTIFICATION

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 2,996 words.

Dated this 18th day of September, 2020.



ANTHONY F. LOCOCO

CERTIFICATION 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 18th day of September, 2020.

ANTHONY F. LOCOCO