STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

NORMAN SANNES,

Plaintiff,

v.

MADISON METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION, MADISON METROPOLITAN SCHOOL DISTRICT

and

MADISON TEACHERS INC.,

Defendants.

Case No.: 15-cv-974
Case Code: 30701
Declaratory Judgment

MMSD DEFENDANTS' COMBINED MOTION FOR SUMMARY JUDGMENT, BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Motion

Defendants Madison Metropolitan School District Board of Education (the "Board") and Madison Metropolitan School District (the "District"), by and through their attorneys, Boardman & Clark LLP, hereby move the Court for summary judgment pursuant to Wis. Stat. § 802.08 and respond to plaintiff's motion for summary judgment as set forth below.

Introduction

Plaintiff Norman Sannes ("Sannes") filed this lawsuit on April 13, 2015 as a "taxpayer action" against the Board and the District (collectively, "MMSD") and Madison Teachers Inc. ("MTI"), the union that represents five certified collective bargaining units of District employees. Sannes's Complaint challenges the legality of the collective bargaining agreements entered into between MTI and the District for the 2014-2015 and 2015-2016 school years (the "CBAs"). He asserts that the CBAs were bargained for and entered into in violation of certain

provisions of Wis. Stat. § 111.70, as amended by 2011 Act 10 and 2011 Act 32 (collectively, "Act 10"), regarding collective bargaining for public employees. Sannes seeks a declaratory judgment that the CBAs are "unlawful, invalid and void," and injunctive relief to prevent payments and costs under the CBAs and to "preserve the status quo."

Why Defendants Are Entitled to Summary Judgment

- Although Act 10 became law in Wisconsin on July 1, 2011, MTI subsequently brought a lawsuit in Dane County Circuit Court challenging the constitutionality of certain of its provisions.

- On September 14, 2012, the Judge Juan Colás issued a final order (the "Order" or "Judge Colás's Order") holding that certain provisions of Act 10 that MTI challenged in the lawsuit violated the Wisconsin and United States Constitutions and were therefore "null and void" and "without effect."

- The Order was appealed, but it was not stayed during the appeal, despite numerous attempts by the defendants to obtain a stay. Two years later, that Order was reversed by the Wisconsin Supreme Court.

- *Slabosheske v. Chikowske*, 273 Wis. 144, 150, 77 N.W.2d 497 (1956) and its progeny, govern the effect of a circuit court's final order while an appeal is pending and there is no stay of the final order.

- *Slabosheske* and its progeny hold that circuit court final orders, like Judge Colás's Order, are entitled to their full force and effect unless and until they are reversed. And, even if they are reversed, ***all*** actions taken in reliance on them are justified and any obligations entered into prior to reversal are enforceable even after reversal.

- *Slabosheske* itself involved the enforceability of a contract entered into in reliance on a circuit court order that was later reversed. The supreme court held that contract was still valid and enforceable even though it relied on an erroneous and later-reversed circuit court judgment.

- Therefore, because MTI and the District negotiated and executed the CBAs in reliance on Judge Colás's Order before the Order was reversed, the CBAs were lawfully negotiated and executed and remain enforceable even after reversal.

- Although Judge Colás's Order was later reversed by the Wisconsin Supreme Court, it was not reversed until ***after*** the CBAs were executed, which means that they are enforceable and entitled to their effect, just as the contract in *Slabosheske*. MMSD is therefore entitled to summary judgment and Sannes's Complaint should be dismissed with prejudice.

Statement of Facts

In 2011, the Wisconsin Legislature passed Act 10 to amend Wis. Stat. § 111.70, which governs collective bargaining between public employers and the certified collective bargaining agents of their employees. 2011 Wis. Act 10; 2011 Wis. Act 32. Act 10 was signed into law by Governor Scott Walker and became effective on July 1, 2011. 2011 Wis. Act 10, § 9332.

Following the passage of Act 10, a number of lawsuits were filed challenging portions of the new law as unconstitutional. (Compl. ¶ 12; Answer ¶ 12.) Among these was a lawsuit filed on August 18, 2011 in Dane County Circuit Court by MTI (and others) against Governor Walker (and others), Case No. 11-cv-3744 (hereinafter "*MTI v. Walker*"). (Packard Aff., ¶ 2, Ex. 1.)[1] That case was heard by Judge Juan B. Colás. (Packard Aff., ¶ 3, Ex. 2.) On September 14, 2012, Judge Colás issued the Order, which found that portions of Act 10 violated the Wisconsin and United States Constitutions on their face and were therefore "null and void" and "without effect." (Packard Aff., ¶¶ 3-4, Exs. 2-3.) The portions of Act 10 invalidated by the Order included the provisions that underlie Sannes's claims in this case.[2] (Packard Aff., ¶¶ 3-4, Exs. 2-3; Compl. ¶¶ 1, 27-42.)

The defendants appealed Judge Colás's Order and sought stays pending appeal at every level. The circuit court, court of appeals, and Wisconsin Supreme Court all denied the defendants' motions for stay. (Packard Aff., ¶¶ 5-9, Exs. 4-8.) In addition, on July 9, 2013, the Wisconsin Employment Relations Commission ("WERC") issued Emergency Rules (EMR1310) implementing portions of Act 10. (Packard Aff., ¶ 9, Ex. 8, p. 2; Matthews Aff., ¶ 6.)

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[1] For purposes of supporting his motion for summary judgment, Sannes has relied on the record from *Blaska v. Madison Metropolitan School District Board of Education, et al*, Case No. 2014-cv-2578, which, as the Court is aware, involves the same defendants and largely the same issues as this case. MMSD has done the same, and it is therefore submitting the same affidavits in support of its motion for summary judgment in this case as it did in *Blaska*. All the affidavits from *Blaska* are attached to the affidavit of Sarah A. Zylstra, submitted with this pleading.

[2] The Order was a final order as defined by Wis. Stat. § 808.03(1). (Packard Aff., ¶ 3, Ex. 2.)

Referencing Judge Colás's Order, those Rules explicitly stated that they were "not applicable to the Plaintiffs in Case 11CV3744 unless and until the Circuit Court's decision is no longer in effect." (*Id.*) The Wisconsin Supreme Court eventually overturned Judge Colás's Order in a July 31, 2014 decision that upheld Act 10 "in its entirety." *MTI v. Walker*, 2014 WI 99, ¶ 3, 358 Wis. 2d 1, 851 N.W.2d 337.

In the nearly two years between Judge Colás's September 14, 2012 Order and the Wisconsin Supreme Court's July 31, 2014 decision reversing the Order, MTI and MMSD relied on the Order to collectively bargain and enter into the CBAs at issue here. (Cheatham Aff., ¶¶ 2-6; Matthews Aff., ¶¶ 3-8.) The District and MTI collectively bargained the 2014-2015 CBAs during September of 2013, reaching a tentative agreement on September 27, 2013. (Cheatham Aff., ¶ 5; Matthews Aff., ¶ 7.) MTI ratified the 2014-2015 CBAs on October 2, 2013. (*Id.*) The District and MTI collectively bargained the 2015-2016 CBAs during May and June of 2014, reaching a tentative agreement on June 2, 2014. (Cheatham Aff., ¶ 6; Matthews Aff., ¶ 8.) MTI ratified the 2015-2016 CBAs on June 4, 2014. (*Id.*) Thus, all of the CBAs had been agreed upon and executed ***prior*** to the supreme court's decision reversing Judge Colás's Order and upholding Act 10. MTI and the District have not collectively bargained since the supreme court's July 31, 2014 ruling. (Cheatham Aff. ¶ 7; Matthews Aff., ¶ 9.)

Summary Judgment Standard

The summary judgment standard is well-known and repeated often. Summary judgment shall be granted when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

> [O]nce sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial "to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrell*, 477 U.S. 317, 322 (1986). The party moving for

> summary judgment need only explain the basis for its motion and identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that it believes demonstrate the absence of a genuine issue of material fact; the moving party need not support its motion with affidavits that specifically negate the opponent's claim. *Celotex*, 477 U.S. at 323.

Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 289-92, 507 N.W.2d 136 (Ct. App. 1993). A factual issue is genuine and material only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). Moreover, a genuine issue of material fact may be established only by such evidence as would be admissible at trial. *Moulas v. PBC Productions, Inc.*, 213 Wis. 2d 406, 411, 570 N.W.2d 739 (Ct. App. 1997). Hearsay, personal opinions, speculation, and conclusory statements are not sufficient. *Id.* at 417.

Argument

I. MMSD is entitled to summary judgment.

A. Sannes cannot establish that the CBAs violate Act 10, because they were negotiated and executed when the relevant portions of Act 10 were without effect for MMSD and MTI.

Sannes asks the Court to invalidate the CBAs because they violate Act 10. This argument is a nonstarter, however, because the CBAs were negotiated and executed at a time when the portions of Act 10 relied upon by Sannes were "null and void" and "without effect" for MTI and the District (the only entity with whom MTI bargains) due to Judge Colás's Order, which found those portions of Act 10 facially unconstitutional. While that Order was later reversed, Wisconsin law is clear that MMSD and MTI were entitled to rely on and take actions in accordance with the Order until it was reversed, and that contracts entered into in reliance on the Order are valid and effective.

As the court of appeals has explained, a trial court's judgment is "valid until reversed." *Harris v. Harris*, 141 Wis. 2d 569, 584, 415 N.W.2d 586 (Ct. App. 1987). This is the case even if it is erroneous. *Slabosheske v. Chikowske*, 273 Wis. 144, 150, 77 N.W.2d 497 (1956). The only exception to this rule is in the case of a judgment that is void due to the trial court's lack of jurisdiction, in which case the judgment "is a mere nullity" and "is not binding on anyone." *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 127-28, 586 N.W.2d 68 (Ct. App. 1998), *aff'd*, 228 Wis. 2d 1, 596 N.W.2d 786 ("A judgment entered in excess of the court's jurisdiction is void."). That exception is not applicable here, as there is no contention (nor could there be) that Judge Colás lacked jurisdiction to enter the Order. As a final order from a circuit court that properly had jurisdiction of the parties, Judge Colás's Order is considered "voidable." *See id.* A voidable judgment "has the same effect and force as a valid judgment until it has been set aside." *Id.* at 128. Moreover, "a voidable judgment protects actions taken under it before it is reversed." *Id.*

The effect of Judge Colás's holding that portions of Act 10 were facially unconstitutional was that those portions no longer had any "legal effect or existence." *Hunter v. School District of Gale-Ettrick-Trempealeau*, 97 Wis. 2d 435, 444, 293 N.W.2d 515 (1980) ("A legislative act that has been ruled unconstitutional has no legal effect or existence."); *see also State v. Konrath*, 218 Wis. 2d 290, 304 n.13, 577 N.W.2d 601 (1998) (quoting Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 236 (1994)) ("If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application."). As such, in collectively bargaining and entering into the CBAs in the wake of Judge Colás's Order, those portions of Act 10 relied on by Sannes had no application to MTI and MMSD until the Wisconsin Supreme Court eventually reversed

the Order on July 31, 2014. Therefore, because the CBAs were bargained for and executed after Judge Colás's Order rendered inoperable certain prohibitions on collective bargaining found in Act 10, but before the supreme court's decision reversing the Order, they do not violate Act 10 and are entitled to their effect.

The necessity of this result is well illustrated by the Wisconsin Supreme Court's decision in *Slabosheske*, 273 Wis. 144. *Slabosheske* involved a challenge to the enforceability of a promissory note against a school district. The challenge was based on a complicated set of facts involving two school districts, District 2 and District 7. *Id.* at 146. Initially, District 2 and District 7 were separate districts. *Id.* However, in 1949, the school committee that governed District 7 elected to dissolve District 7 and consolidate it with District 2. As a result, for the 1949-1950 school year, District 7 ceased to operate and its students attended school in the consolidated District 2. *Id.*

At the time, the statute governing the dissolution and consolidation of school districts provided that a dissolution and consolidation "shall not become effective" unless approved by a referendum to be held *after the consolidated district had been in operation for one year*. *Id.* at 146-47. Consequently, in September of 1950, after the consolidated District 2 had been in operation for one year, a referendum was held to approve the dissolution of District 7 and its consolidation with District 2. *Id.* at 147. That referendum failed to approve the dissolution and consolidation. *Id.* A lawsuit was then brought challenging the validity of the referendum, and the circuit court issued a final decision on July 25, 1951 affirming the referendum. *Id.*

Relying on the circuit court's final decision upholding the referendum, District 7 reconstituted itself for the 1951-1952 school year. *Id.* In August of 1951, a school board for District 7 was elected and given authority to borrow money to pay school expenses. *Id.* at 148.

In September of 1951, District 7 borrowed $2,000 from Slabosheske and another individual (collectively, "Slabosheske"), and the loan was documented by a promissory note. *Id.*

As all of this was taking place, the circuit court decision that upheld the validity of the referendum was being appealed. *Id.* at 147. And, on January 8, 1952, the Wisconsin Supreme Court reversed the circuit court and invalidated the referendum. *Id.* The supreme court determined that the dissolution of District 7 and its consolidation with District 2 remained valid. *Id.* at 149. Based on this decision, District 7 terminated its operations after January 8, 1952, and its pupils resumed attendance in the consolidated District 2. *Id.*

After this, District 7 defaulted on Slabosheske's promissory note. *Id.* Slabosheske brought suit seeking payment from District 2 as the successor to the assets and liabilities of District 7 or, in the alternative, from the individuals who had originally signed the note as representatives of District 7. *Id.* The defendants contended that they were not obligated to pay the note. They argued, in essence, that the effect of the supreme court's reversal of the circuit court was that they could not be liable on the note because the re-established District 7 never had a legal existence and, therefore, neither it nor its purported representatives had the capacity to enter into the note. *Id.* The defendants maintained that District 2 was the only legally competent school district that existed during the pendency of the re-constituted District 7, and therefore the note between Slabosheske and District 7 was "null and void." *Id.* at 149-50.

The Wisconsin Supreme Court flatly rejected the defendants' arguments on the basis that they ignored the "well-known and fundamental legal principle that when a court has jurisdiction of the parties and the subject matter[,] its judgment, however erroneous, is a complete justification, until reversed or set aside, of acts done in its enforcement and a protection to those who acted in good faith in reliance upon it." *Id.* In its decision, the court surveyed the wide

range of sources and authorities supporting this rule, emphasizing that, even if erroneous, a circuit court judgment that is later reversed "constitutes a sufficient justification for all acts done in its enforcement until reversed or set aside by competent authority." *Id.* at 150-53 (quotations omitted). The court explained that until the circuit court's decision was reversed on appeal, "[t]hose who dealt with [District 7] in reliance upon its apparent status, such as the plaintiffs, are protected by the circuit court judgment." *Id.* at 152-53. The court therefore found the note valid and enforceable even after the circuit court's order had been reversed:

> In summary we conclude that the referendum, confirmed by the judgment of the circuit court, made the consolidation order ineffective and reactivated the former District 7 until the judgment was reversed; that a pending appeal, without more, did not prohibit the exercise of the functions of District 7 which were not dependent on process of the court from which the appeal was taken; that the unreversed judgment justified the acts done in reliance on it and protected the plaintiffs who dealt with District 7 relying on the apparent authority confirmed in its officers by the judgment.

Id. at 157.

Slabosheske's teachings have been routinely followed. *See, e.g.*, *State v. Campbell*, 2006 WI 99, ¶ 42, 294 Wis. 2d 100, 718 N.W.2d 649; *Harris*, 141 Wis. 2d at 584-85; *Kett*, 222 Wis. 2d at 127-28; *Virnich v. Vorwald*, 664 F.3d 206, 216 (7th Cir. 2011). And the policy underlying *Slabosheske* only makes sense. Consider the alternative. It would not only allow a party to a circuit court ruling to disregard that ruling if the case is appealed, but also imply that a party ***should*** disregard the ruling if it speculates that the case might be reversed. Such a rule would relegate circuit court judges to the position of mere advice columnists. Our judiciary's authority is not so easily disregarded—it is an *equal* branch of government.

The rule of *Slabosheske* fully affirms the validity of the CBAs in this case. Judge Colás's Order held that the provisions of Act 10 on which Sannes's Complaint rests were "null and void" and "without effect." (Packard Aff., ¶¶ 3-4, Exs. 2-3; Compl. ¶¶ 1, 27-42.) As a result, until the

Order was reversed, those portions of Act 10 had no "legal effect or existence." *Hunter*, 97 Wis. 2d at 444; *Slabosheske*, 273 Wis. at 150. This is true despite the fact that the Order was appealed (as the Order was not stayed pending appeal). *Slabosheske*, 273 Wis. at 150. Further, as in *Slabosheske*, those acting in reliance on the Order were "protected by the circuit court judgment." *Id.* Thus, MTI, the party in whose favor the Order was issued, and the District, with whom MTI bargained, were entitled to rely on the Order to collectively bargain and enter into the CBAs until the Order was reversed. Further, WERC guidance strengthened that reliance, as its Emergency Rules stated explicitly that the Rules were not applicable to the plaintiffs in *MTI v. Walker* "unless and until the Circuit Court's decision is no longer in effect." (Packard Aff., ¶ 9, Ex. 8, p. 2; Matthews Aff., ¶ 6.)

Finally, as in *Slabosheske*, even after the Order was reversed, the actions of MTI and MMSD taken in reliance on the Order prior to its reversal are entitled to their effect. *Slabosheske*, 273 Wis. at 157. At least one Wisconsin court has already recognized the necessity of this result: "There's no question that the plaintiffs in [*MTI v. Walker*] had the right to rely on the decision of Judge Colas [sic], without a stay and until an appellate court said otherwise." (Packard Aff., ¶ 10, Ex. 9, at 8 (Judge Bastianelli's March 15, 2015 decision in *LaCroix v. Kenosha Unified School District*, Kenosha County Case No. 13-CV-1899).)[3]

B. Sannes cannot meet his burden to establish that he has standing.

MMSD previously filed a motion to strike challenging Sannes's standing to maintain certain allegations in his Complaint regarding the rights of teachers. The Court denied this motion on the basis that Sannes had pled sufficient facts to support taxpayer standing in regard to

[3] In *LaCroix*, a teacher brought suit against the Kenosha Unified School District and the Kenosha Education Association asserting that their collective bargaining agreements violated Act 10. (Packard Aff. ¶ 10.) In considering the issue in the context of *Slabosheske*, the court indicated in the quoted dicta its belief that the CBAs of MTI and MMSD are valid based on the reasoning of *Slabosheske*.

these allegations. The case is now at the summary judgment stage, and Sannes therefore has the burden of coming forward with admissible evidence to demonstrate that he has taxpayer standing to maintain this action. *Krezinski v. Hay*, 77 Wis. 2d 569, 572, 253 N.W.2d 522 (1977) ("The allegations of the pleadings, however, may not be considered as evidence or other proof on a disposition of a motion for summary judgment."). He cannot meet that burden.

First, as discussed in MMSD's previous briefing regarding taxpayer standing[4] (which MMSD hereby incorporates), to establish taxpayer standing, Sannes must demonstrate a "direct and personal pecuniary interest in the litigation." *City of Appleton*, 142 Wis. 2d at 883. Sannes's basis for asserting pecuniary harm is that MMSD illegally expended public funds in bargaining, executing, and administering the CBAs in violation of Act 10. In his Complaint, Sannes alleges as follows in regard to the purported illegal expenditure of public funds:

> The CBAs require continuing payments in violation of Act 10 relating to monetary compensation including fringe benefits agreed to in the CBAs which will impose continuing costs on the School District, and the School District must expend money to administer the CBAs including but not limited to administering the dues deductions for MTI.

Compl., ¶ 40. Sannes cannot put forward admissible evidence to substantiate these allegations.

Absent the CBAs, MMSD would retain authority to pay its employees and provide them with fringe benefits and would do so. (Cheatham Aff., ¶¶ 8-9.) Whether or not Act 10 is in effect, this compensation is not illegal, and the effect of Act 10 would not alter the fact that MMSD compensates its employees as it deems appropriate. Act 10 places no limits on the District's conduct outside the narrow sphere of collective bargaining. *See, e.g.*, Wis. Stat. § 111.70(4)(mb) ("The municipal employer is ***prohibited from bargaining collectively with a collective bargaining unit*** containing a general municipal employee with respect to any of the following . . .") (emphasis added). Therefore, Act 10 does not limit the District's authority to

[4] MMSD filed a Brief in Support of Motion to Strike on June 17, 2015, and a Reply on July 24, 2015.

provide salary increases or benefits unilaterally or through negotiations with employees that occur outside the statutory scope of "collective bargaining."

Unless the unions are certified as collective bargaining agents, all Act 10 provides is that employee unions cannot "force" the employer to negotiate. Outside of statutory collective bargaining, the employer has no duty to listen, respond, negotiate, or bargain with the individual employees or unions. Thus, a ruling here by this Court that the CBAs are void would not prevent MMSD from providing the monetary compensation and fringe benefits to its employees identical to that outlined in the CBAs. As a result, Sannes cannot meet his burden of establishing that the terms of the CBAs will result in an illegal expenditure of public funds.

Similarly, the administration of dues deductions does not result in any illegal expenditure of public funds, because the dues deductions do not result in ***any*** expenditure of public funds—legal or illegal. Dues deductions are administered using MMSD's automated payroll system. (Trendel Aff., ¶ 2.) This is the same payroll system that is used to administer all other types of employee payroll deductions (e.g., deductions for health insurance premiums, retirement contributions, garnishments, etc.). (*Id.* ¶¶ 2-3.) MMSD would maintain and operate this payroll system, and the cost of the system would be the same, even if it were not administering dues deductions. (*Id.* ¶ 4.) Moreover, the particular deductions to which Sannes objects, such as union dues and fair share deductions, do not result in any additional cost to MMSD. (*Id.* ¶ 5.)

Further, Sannes's allegations regarding violations of the rights of teachers cannot demonstrate any illegal expenditure of public funds, because those allegations all pertain to things that ***teachers*** will be required to do, not to any payment of money by ***MMSD***. *See, e.g.*, MMSD Brief in Supp. of Mot. to Strike, at 6-8. Sannes's allegations regarding the rights of teachers do not implicate any spending by the District. Thus, even if Sannes's could somehow

provide evidence to support these allegations in his Complaint, the result would ***not*** be the illegal expenditure of ***public*** funds. Teachers, not taxpayers, would be injured, if anyone were injured. For example, teachers, not taxpayers, would be illegally forced to pay union dues against their wishes; and teachers, not taxpayers, would be illegally required to make fair-share payments. Neither *Hart* nor *S.D. Realty Co.* (cases on which Sannes relied in responding to the motion to strike) stands for the proposition that taxpayers have standing to challenge aspects of a governmental contract that do not result in injury to taxpayers as a class.

Second, Sannes's allegations regarding potential future lawsuits by teachers cannot support taxpayer standing. Again, to establish taxpayer standing at the summary judgment stage, Sannes must come forward with admissible evidence to demonstrate that taxpayers will be harmed by a pecuniary loss. The ***threat*** of ***possible*** lawsuits in the ***future*** is not a pecuniary loss—it is speculation, especially given the facts here. A "remote" and "hypothetical" future injury is not sufficient to support standing. *See Fox v. DHSS*, 112 Wis. 2d 514, 527, 334 N.W.2d 532 (1983). The speculative nature of these allegations is highlighted by the fact that even though we are past the end of the 2014-2015 contract year, Sannes has not identified a single teacher lawsuit challenging the CBAs.

In addition, it would be entirely circular and illogical to grant Sannes taxpayer standing based on the premise that he is pursuing this lawsuit to protect taxpayers from the pecuniary harm of future lawsuits by teachers. There is no pecuniary harm to taxpayers if no such lawsuits are ever filed. Yet, by pursuing his lawsuit, Sannes is ***causing*** taxpayers the very harm that he purports to be protecting them from, as he is seeking to make the arguments that a teacher might make in the context of some hypothetical lawsuit. Granting standing to Sannes on this basis would therefore do the opposite of protecting the interests of taxpayers. Moreover, permitting

the nebulous threat of potential future lawsuits to serve as the basis for taxpayer standing would essentially eliminate the standing requirement for any taxpayer. If taxpayer standing can be justified on this basis, then any taxpayer not directly affected by a governmental act disliked by that taxpayer could challenge that act simply by alleging that someone else who is directly affected by the governmental action could possibly sue the government in the future. Under Wisconsin law, standing is a matter of "sound judicial policy," and such a rule would not fit that mold. *See Coyne v. Walker*, 2015 WI App 21, ¶ 7.

Wisconsin courts consistently have recognized that a taxpayer does not have standing to bring a lawsuit merely because he or she disagrees with a decision made by a governmental body. *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 10, 256 Wis. 2d 859, 650 N.W.2d 81; *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by, DNR v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994). But this is precisely what Sannes and his attorneys are attempting to do in this case under the guise of an assertion of taxpayer standing. If the bar for taxpayer standing is so low that no harm need be shown, it essentially serves as invitation for the judicial system to be commandeered for the purpose of micro-managing governmental decisions. Such a low bar would not only be inconsistent with "sound judicial policy," *see Coyne*, 2015 WI App 21, ¶ 7, it would also threaten to erode separation of powers, *see Barland v. Eau Claire County*, 216 Wis. 2d 560, 573, 575 N.W.2d 691 (1998) ("The separation of powers doctrine states the principle of shared, rather than completely separated powers. The doctrine envisions a government of separate branches sharing certain powers. In these areas of 'shared power,' one branch of government may exercise power conferred on another only to an extent that does not

unduly burden or substantially interfere with the other branch's exercise of its power.") (citations and internal quotation marks omitted).

C. Sannes's Complaint must be dismissed because a lawsuit is pending between MMSD and another taxpayer involving identical issues.

Wisconsin's "first-to-file" rule requires dismissal of this action due to the pending lawsuit of *Blaska v. Madison Metropolitan School District Board of Education, et al*, Case No. 2014-cv-2578 (pending before Judge Richard Niess), which was brought by a different MMSD taxpayer (David Blaska) who raised the same issues as Sannes against the same defendants.[5] Under the first-to-file rule, when two actions involving the same issues are pending between the same parties, only the first court to obtain jurisdiction retains jurisdiction to resolve the controversy, and the second court must therefore dismiss the case before it. *See* Wis. Stat. § 802.06(2)(a)(10) (identifying as a defense, "Another action pending between the same parties for the same cause"); *Syver v. Hahn*, 6 Wis. 2d 154, 159-60, 95 N.W.2d 161 (1959) ("Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.").

Here, while Sannes and Blaska are obviously not the same individual, both are only suing in their capacity as a taxpayer. One fundamental premise of taxpayer lawsuits is that they may be brought only to seek redress for injuries suffered by taxpayers as a class. *See, e.g., S. D. Realty Co. v. Sewerage Commission*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961). Therefore,

[5] The first-to-file rule requires dismissal now because both cases are currently pending. To the extent Judge Niess's ruling in *Blaska* results in a dismissal of that case before this Court acts, this argument may become moot because there will be no other case pending between the same parties.

where, as here, two different taxpayers have brought the same claims seeking redress for the same alleged taxpayer injuries, they are, by operation of the law of taxpayer standing, the same plaintiff. This common-sense principal is not only supported by Wisconsin's taxpayer standing jurisprudence, it has also been recognized in other jurisdictions. *See, e.g.*, *El Paso Natural Gas Co. v. State*, 123 Ariz. 219, 222, 599 P.2d 175 (1979) ("[P]laintiffs in the instant suits are not the same persons who were plaintiffs in the *Ross* case, supra, but in contemplation of law they are the same since all plaintiffs in these suits sued in their capacity as taxpayers.") (citations and internal quotations marks omitted); *In re Petition of Gardiner*, 67 N.J. Super. 435, 448, 170 A.2d 820 (1961) ("A taxpayer attacking governmental action in which he has no peculiar personal or special interest is taken to be suing as a representative of all taxpayers as a class. The general rule is that in the absence of fraud or collusion a judgment for or against a governmental body in such an action is binding and conclusive on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest.").

D. Claims challenging the 2014-2015 CBAs are moot, because those CBAs have expired.

Sannes is seeking only declaratory and injunctive relief as to the CBAs; he is not seeking damages. *See* Pl. Br,[6] at 14-15. The 2014-2015 CBAs that he challenges expired on June 30, 2015. (McGrath Aff., ¶ 5, Ex. 3.)[7] As such, all issues regarding the enforceability of those agreements are now moot. *See Kabes v. School Dist.*, 2004 WI App 55, ¶ 3 n.1, 270 Wis. 2d 502, 677 N.W.2d 667. Therefore, Sannes's claims regarding the 2014-2015 CBAs should be dismissed.

[6] The abbreviation "Pl. Br." refers to Sannes's initial summary judgment brief filed on July 14, 2015.
[7] All citations to the "McGrath Aff." are to the McGrath Affidavit filed in this case on July 14, 2015.

II. Sannes's motion for summary judgment should be denied.

Sannes has filed a motion for summary judgment, and this brief serves as MMSD's response to that motion. As discussed below, Sannes has not put forward any basis to justify an award of summary judgment in his favor, and, as such, his motion should be denied.

Sannes makes several arguments in support of his motion for summary judgment, but none are availing. His first argument is premised on MMSD not only being clairvoyant, but also being willing to intentionally disregard a final order of a circuit court. Sannes argues that after Judge Colás issued the Order in *MTI v. Walker* holding that portions of Act 10 (including those at issue here) violated the Wisconsin and United States Constitutions and were therefore "null and void" and "without effect," MMSD should have known (based on other Act 10 litigation involving different substantive issues) that the Order would eventually be reversed and should therefore have ignored the Order. Beyond being offensive to the authority of circuit courts and presupposing that MMSD knows the future, this argument completely disregards binding authority (e.g., *Slabosheske*) that holds that a final order of a circuit court—whether erroneous or not—is entitled to its effect, as are all actions taken in reliance on such an order.

Sannes's next erroneously argues that neither MMSD nor MTI can rely on Judge Colás's Order. That argument fares no better. Ignoring the law that actually governs this dispute, Sannes takes a "square-peg-in-a-round-hole" approach by drawing tenuous analogies to inapplicable law. For example, Sannes relies heavily on a case that addresses the effect of a court's overruling a common law rule (as opposed to overruling a particular circuit court order, which is what is at issue in this case) to argue that not even MTI could rely on Judge Colás's Order in negotiating the CBAs. Sannes also cites a case analyzing an insurer's contractual duty to defend an insured, another issue that is not applicable to this dispute, to try to counter *Slabosheske*. Moreover, in addition to relying on inapplicable law, all of Sannes's arguments are

grounded on a false premise that the relevant portions of Act 10 were "in effect" as of June 29, 2011. But this is not so for the defendants in this case. Due to Judge Colás's valid and binding Order, the relevant portions of Act 10 did not apply to MMSD and MTI until July 31, 2014 when the supreme court issued its decision reversing the Order. At that point, the CBAs had already been negotiated and executed and therefore remain valid until they expire (as shown in Section I.A, above).

Finally, apart from the failure of his legal theories, Sannes has also failed to present admissible evidence necessary to establish several elements of his claims, and he has failed to meet his burden to establish the elements necessary for injunctive relief. As such, Sannes's motion for summary judgment should be denied, MMSD's motion for summary judgment should be granted, and Sannes's complaint should be dismissed with prejudice.

A. MMSD and MTI were entitled to rely on Judge Colás's Order.

Sannes makes several arguments asserting that MMSD and MTI were not entitled to rely on Judge Colás's Order in *MTI v. Walker*. These arguments fail to overcome the controlling Wisconsin law on the issue, including *Slabosheske*, which is discussed above in detail. Furthermore, the authority that Sannes cites in an attempt to circumvent this binding law is simply not applicable to this case.

1. Even if MMSD were a non-party, MMSD was entitled to rely on Judge Colás's Order in *MTI v. Walker*.

Sannes argues that MMSD cannot rely on Judge Colás's Order because MMSD was not a party and even if MMSD were, two Court of Appeals cases—*Kuhn* and *Raasch*—indicate that MMSD could not rely on the circuit court's order. Sannes is incorrect for two reasons.

First, *Slabosheske* squarely refutes the argument that a non-party who entered into a contract with a party cannot rely on the court's decision. *Slabosheske* itself involved the

enforceability of an agreement between a party and a non-party following reversal of a circuit court ruling on which the agreement was premised. The Wisconsin Supreme Court upheld the ongoing validity of that agreement, even post-reversal. *Slabosheske*, 273 Wis. at 157. The facts are exactly the same here. Further, MTI ***was*** a party and the District is the ***only*** entity with whom MTI is certified to collectively bargain. The Order gave MTI the ability to bargain without the constraints in Act 10 that Judge Colás found unconstitutional. That, by definition, means bargaining and entering into collective bargaining agreements with the District.

Second, neither of Sannes's two cases—*Kuhn* and *Raasch*—are on point. He cites both of them for the uncontroversial proposition that circuit court decisions are not precedential. *See Raasch v. City of Milwaukee*, 2008 WI App 54, ¶ 8, 310 Wis. 2d 230, 750 N.W.2d 492; *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993). But MMSD does not cite Judge Colás's Order as ***precedent***; it is not suggesting that ***another court*** is bound to follow that Order in resolving a similar dispute to that resolved by Judge Colás's Order. *See, e.g.*, *Black's Law Dictionary* 1176 (6th ed. 1990) (defining precedent as "[an] adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. . . ."). Rather, MMSD's reliance on the Order is based on another uncontroversial tenant of Wisconsin law: that because the circuit court had jurisdiction and duty to decide the constitutional questions before it, its Order bound the parties before it, and until the Order was reversed, it was a valid and enforceable judgment on which MMSD and MTI were entitled to rely. *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 217, 466 N.W.2d 861 (1991); *Just v. Marienette County,* 56 Wis. 2d 7, 26, 201 N.W.2d 761 (1972); *Slabosheske*, 273 Wis. at 150; *see also Kett*, 222 Wis. 2d at 128 ("A voidable judgment,

on the other hand, has the same effect and force as a valid judgment until it has been set aside."). Sannes's precedent argument misses the mark.

2. MMSD's reliance on the Order did not violate taxpayer rights.

Sannes next makes the undeveloped and completely circular argument that MMSD cannot rely on Judge Colás's Order because doing so would violate the rights of taxpayers who were not party to *MTI v. Walker*. Setting aside the fact that this argument presumes that the rights of taxpayers have been violated—a central dispute in this litigation—Sannes's argument has already been flatly (and repeatedly) rejected by the Wisconsin Supreme Court:

> This court has determined that the Declaratory Judgment Act does not require the joinder as parties, in a declaratory action to determine the validity of a statute or ordinance, of any persons other than the public officers charged with the enforcement of the challenged statute or ordinance. We have not construed Wis. Stat. § 806.04(11) to require that where a declaratory judgment as to the validity of a statute or ordinance is sought, every person whose interests are affected by the statute or ordinance must be made a party to the action. If the statute were so construed, the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative enactments, either state or local, since such enactments commonly affect the interests of large numbers of people.

Helgeland v. Wisconsin, 2008 WI 9, ¶ 140, 307 Wis. 2d 1, 745 N.W.2d 1 (citations and internal quotation marks omitted). A contrary rule would mean that all Wisconsin taxpayers would need to be joined to every circuit court action challenging a legislative enactment or governmental action. That is not the law.

3. Other Act 10 litigation is irrelevant.

Citing several nonbinding court decisions rejecting other challenges to Act 10 provisions, Sannes argues that MMSD and MTI should have predicted that Judge Colás's Order would eventually be reversed and therefore should not have acted on that Order in negotiating and reaching the CBAs. Sannes asserts that MMSD and MTI "decided to cherry pick" by relying on Judge Colás's Order rather than relying on decisions in other Act 10 litigation that were not

binding on either party, and that because they must have been aware of these other cases, they did this "at their own risk." Pl. Br. at 11. Sannes's argument is illogical.

"Cherry picking" implies that the parties to *MTI v. Walker* and MMSD had a "choice" to disregard Judge Colás's declaration of unconstitutionality. Not so. Had MMSD "chosen" to disregard Judge Colás's Order and refused to bargain with MTI, MTI could have brought a prohibited practice complaint against MMSD at the Wisconsin Employment Relations Commission. The Commissioners, as the "public officers charged with the enforcement of the challenged statute," *Helgeland*, 2008 WI 9, ¶ 140, were named parties in *MTI v. Walker* and thus there can be no argument that they were not bound by the Order. Thus, had the issue come to the WERC, it would have been bound to follow the law as it had been declared by Judge Colás—that certain provisions of Act 10 were "null and void" and "without effect"—and therefore to find that MMSD had to bargain with MTI as though those provisions were never enacted. *See MTI v. MMSD*, 197 Wis. 2d 731, 541 N.W.2d 786 (Ct. App. 1995) (circuit court's decision interpreting a MERA provision binds WERC where it is required to apply the statutory law: "That decision supplies the meaning of the term which WERC must apply"); *see also Getka v. Lader*, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976) ("Where a court has jurisdiction over the subject matter and the parties, the fact that an order or judgment is erroneously or improvidently rendered does not justify a person in failing to abide by its terms. The subsequent appeal and reversal of the injunction here does not alter the obligation of the defendants in this case to initially comply with such injunction until it was stayed or set aside.") (footnote omitted). Even in a quasi-judicial capacity, an administrative agency like the WERC has no authority to overrule or ignore a court's interpretation of a statute, let alone a court's determination that a statute is unconstitutional. *See MTI,* 197 Wis. 2d at 762. Even the WERC (the agency charged with

implementation and enforcement of Act 10) recognized that. In its emergency rules EMR1310 the WERC acknowledged that those changes were not applicable to MTI "unless and until the Circuit Court's decision is no longer in effect." (Packard Aff., ¶9, Ex. 8, p. 2.)

Further, Judge Colás's Order considered the parties' arguments in the *MTI v. Walker* case in the specific context of the teachers and other employees of MMSD that MTI represented. Judge Colás's Order gave MTI the ability to bargain without the constraints of the challenged Act 10 provisions, which meant the right to bargain with MMSD, the only entity with which MTI was certified to bargain. If Judge Colás had upheld Act 10 while others obtained a ruling in a different case finding Act 10 unconstitutional, absent an order from that other court enjoining enforcement of Act 10, MTI and MMSD would have had no choice but to follow Judge Colás's ruling. But that is not what happened.

4. MTI was entitled to rely on Judge Colás's Order.

Sannes next cites two cases—*Heritage Farms* and *Newhouse*—in support of an argument that "even MTI, which was a party to [*MTI v. Walker*], cannot rely on [Judge Colás's Order] here." Pl. Br. at 11. Neither case supports this assertion, because neither case addresses any of the issues in this lawsuit.

a. *Heritage Farms* has no application here.

Heritage Farms, Inc. v. Markel Ins. Co., 2012 WI 26, 339 Wis. 2d 125, 810 N.W.2d 465, addressed whether the supreme court's construction of a particular statute was entitled to retroactive effect. In analyzing this issue, the court explained that under the Blackstonian doctrine, as a general matter "***a new rule of law*** applies retroactively." *Id.* ¶ 44 (emphasis added). The court explained that this doctrine "is traditionally implicated in cases in which the court decides to overrule or repudiate an earlier decision," i.e., "past precedent." *Id.* ¶¶ 44-45. In his effort to force retroactive effect of the Supreme Court's July 31, 2014 reversal of Judge

Colás's Order here, Sannes once again advances an incorrect definition of "precedent." As Sannes himself argues, a circuit court's ruling is not precedent. Reversing a lower court's decision is not overruling precedent. The Blackstonian doctrine has nothing to do with reversal of a lower court's decision in the same case; Sannes's suggestion that it does is misguided.

The distinct nature of the issue in *Heritage Farms* is also explained in *State v. Picotte*, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, which the *Heritage Farms* court relied on in its analysis. *See* 2012 WI 26, ¶ 44 (citing *Picotte*). As *Picotte* explained, the question of the prospective versus retroactive effect of a court decision arises in cases where question at issue is the "overruling of a common-law rule." 2003 WI 42, ¶ 42.

Thus, the issue in *Heritage Farms* is distinct from the issue in this case. Here, the question is what effect Judge Colás's Order had on MMSD and MTI. This is not an issue of a court overturning past precedent or an established rule of common law. Rather, this case involves the effect of a circuit court ruling on a party in that case and that party's actions taken in reliance on that ruling while it was effective. This question is controlled by *Slabosheske*.

b. Even if *Heritage Farm* were applicable, "sunbursting" would apply here.

Moreover, even if this case involved the issue addressed in *Heritage Farms*, given the facts here, the Supreme Court's Act 10 ruling would ***still*** apply only prospectively to MTI and MMSD (i.e., to contracts entered into after July 31, 2014, the day the supreme court reversed the circuit court). The court in *Heritage Farms* explained that it is appropriate to apply a new rule of law prospectively only (which the court labeled "sunbursting") in circumstances where it is necessary to "alleviate the unsettling effects of a party justifiably relying on a contrary view of the law." *Id.* ¶ 45. Whether it is appropriate to sunburst a particular decision requires an analysis of the equities, including consideration of the following: (1) whether the court's holding

establishes a new rule of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression, the resolution of which was not clearly foreshadowed; (2) whether retroactive application would further or impede the operation of the new rule; and (3) whether retroactive application could produce substantial inequitable results.

In this case, *Slabosheske* controls this analysis and requires that the court cannot retroactively undo an agreement entered into in reliance on a decision from a circuit court. But, even if *Slabosheske* were not considered, the three factors outlined above would favor sunbursting of the supreme court's decision overturning Judge Colás's Order.

First, in negotiating and executing the CBAs, MMSD and MTI relied on Judge Colás's Order finding that portions of Act 10 were "null and void" and "without effect." When the Supreme Court reversed that Order, it changed the rules on which MMSD and MTI had relied: it put in place rules to which these parties had never previously been subject.

Second, sunbursting the supreme court's reversal of the Order will not impede Act 10. In fact, it is ***consistent*** with the manner in which the challenged provisions of Act 10 were intended to go into effect. Act 10 was never intended to become uniformly applicable on the same date or to disrupt collective bargaining agreements that were already in place. Rather, the new collective bargaining limitations in Act 10 were designed to be phased in as existing collective bargaining agreements terminated or were renewed. *See* 2011 Act 10 § 9332 (the relevant sections of Act 10 "first apply to employees who are covered by a collective bargaining agreement . . . on the day on which the agreement expires or is terminated extended, modified, or renewed, whichever occurs first."); *see also* Wisconsin Legislative Council Act Memo Re: 2011 Wisconsin Act 10, p. 9, http://docs.legis.wisconsin.gov/2011/related/lcactmemo/act010, last viewed June 1, 2015 ("The provisions of Act 10 relating to collective bargaining first apply to employees who are

covered by a collective bargaining agreement that contains provisions inconsistent with the Act's provisions on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first.").

The challenged agreements, while "inconsistent" with the Act's provisions, do not violate the Act because they were reached while the relevant portions of the Act were not in effect as to these parties. The Act contemplated "inconsistency" and recognizes that such inconsistency is not illegal and does not render the inconsistent agreements void. In this case, the District employees who are members of collective bargaining units represented by MTI are covered by existing collective bargaining agreements—the 2014-2015 and the 2015-2016 CBAs—and it is therefore entirely consistent with Act 10 for the terms of those CBAs to remain in place until the CBAs terminate.[8]

Third, applying the supreme court's July 31, 2014 decision retroactively to void the existing CBAs would be substantially inequitable and would, in fact, harm taxpayers. MMSD and MTI reasonably relied on Judge Colás's Order in entering into the CBAs. The MMSD employees represented by MTI also relied on the Order and CBAs as defining the terms and conditions of their employment for duration of the agreements. It is fair to assume that these employees, like all employees, made investment, career, and other major life decisions in reliance on those agreements. For the rug to be pulled out from under those decisions would be fundamentally unfair.

Further, if the CBAs are invalidated, it is not clear how MMSD will be able to define the terms and conditions of employment for the employees represented by MTI. In the absence of a

[8] Sannes asserts, without citation, that certain of the CBAs "will not even come into existence until July, 2015." Pl. Br. at 15. However, this assertion is not supported by the record. It is undisputed that MTI and the District negotiated and executed the CBAs prior to the Wisconsin Supreme Court's July 31, 2014 decision in *MTI v. Walker* and that all of the CBAs challenged here are currently in place.

CBAs, MMSD has the authority to unilaterally impose terms and conditions of employment, including terms and conditions identical to those outlined in the CBAs. Sannes has taken the contrary position, claiming that the District would be prohibited from unilaterally imposing the terms and conditions described in the CBAs, and he has threatened further litigation against MMSD if this were to occur. Pl. Br. at 19-20. Apparently, Sannes would have the employees work for free, or all quit, shutting down the public school system in the Madison metropolitan area. Thus, the invalidation of the CBAs would certainly result in incredible uncertainty, and lead to MMSD making otherwise unnecessary expenditures of taxpayer funds in order to implement new terms and conditions of employment for District employees (not to mention the cost associated with Sannes's specific threat of litigation).

In sum, *Heritage Farms* does not apply because there is no issue of a court overturning a common-law rule or past precedent. Further, even if it did apply, equity would favor allowing the existing CBAs to run their course.

c. *Newhouse* is equally inapplicable.

Sannes's arguments under *Newhouse v. Citizens Security Mutual Insurance*, 176 Wis. 2d 824, 501 N.W.2d 1 (1993) fare no better. Sannes relies on *Newhouse* to argue that, contrary to the rule of *Slabosheske*, MTI and MMSD were not entitled to rely on Judge Colás's Order to negotiate and execute the CBAs, but *Newhouse* simply does not support this argument.

Newhouse involved an insurer's contractual duty to defend, which has no applicability here. *Newhouse* revolved around a somewhat complicated set of procedural facts. Omann was involved in a farm accident in which his nephew was injured. At the time of the accident, Omann was insured by Citizens Security Mutual Insurance Company ("Citizens") under a homeowner's policy. After the accident, the nephew's parents sued Omann (and others) for negligence. Citizens, which was not initially named as a defendant, separately initiated a lawsuit

against Omann seeking a declaratory judgment that its homeowner's policy excluded coverage for the accident. Citizens was then joined as a defendant in the negligence suit against Omann, and it raised the coverage issue as a defense in that lawsuit. *Id.* at 831.

Before the negligence lawsuit was decided, Citizens prevailed in its coverage suit and was awarded a declaratory judgment that its policy did not provide coverage for the accident. That decision was not appealed. Several months later, Citizens received an identical no-coverage ruling in the negligence lawsuit, and it was dismissed from that case. That decision was appealed by several parties (but not Omann). As this coverage appeal was pending, the negligence case went to trial on the merits. Citizens did not request a stay of the trial pending the appeal of the coverage determination, and it did not participate in the trial. The trial resulted in an award of damages against Omann of almost $600,000. *Id.* at 831-32.

Several months after the trial, the court of appeals determined that the Citizens policy provided coverage. Citizens paid out its policy limit, which covered only a fraction of the damages award against Omann. Omann then assigned any claims he had against Citizens to the parents of his nephew, and they brought suit against Citizens alleging (among other things) that it breached its contractual duty to defend Omann in the negligence suit. The parents prevailed in this lawsuit and were awarded almost $725,000 in damages. Citizens appealed. *Id.* at 832-33.

On appeal, the Wisconsin Supreme Court addressed the issue of whether Citizens was entitled to rely on the no-coverage decisions it received from the circuit court in its decision not to provide a defense in the negligence trial. *Id.* at 833-37. In analyzing this issue, the court applied Wisconsin law regarding an insurer's contractual duty to defend. Following *Elliott v. Donahue*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), the court summarized the applicable rule:

> "An insurer does not breach its contractual duty to defend by denying coverage where the issue of coverage is fairly debatable as long as the insurer provides

> coverage and defense once coverage is established." *Elliott*, 169 Wis. 2d at 317. However, when coverage is not determined before a liability trial, the insurer must provide a defense for its insured with regard to liability and damages. *Id.*, 169 Wis. 2d at 318.

Newhouse, 176 Wis. 2d at 836. The court further explained that Wisconsin courts had established a clear procedure for an insurer to follow when a coverage determination is not final at the time of a trial: the insurer should request a stay of the trial pending the outcome of the coverage determination. *Id.* The court specifically noted that this rule applies even when there is a coverage determination at the circuit court level if that determination has been appealed. *Id.* The court explained that when an insurer does not follow this procedure (as was the case for Citizens), it "runs the risk of breaching its duty to defend." *Id.*

Newhouse was decided under legal principles that have no application in this case. None of the parties in this case are insurers, and none of the claims involve the issue of an insurer's contractual duty to defend its insured. As such, the Court should disregard Sannes's arguments regarding *Newhouse* and apply the rule of *Slabosheske*, which is controlling in this case.

d. *Newhouse* principles support MMSD's position.

To the extent any part of *Newhouse* could possibly have any application here, it supports MMSD's position, not Sannes's. *Newhouse* suggests that a party should obtain a stay if it wants a circuit court decision to not have effect pending appeal. Here, stays of Judge Colás's Order were sought repeatedly at the circuit court and appellate court levels. They were ***denied***. Moreover, *Newhouse* holds that an insurer cannot expunge a contractual duty it makes to its insured to defend the insured through litigation until there is a final unappealable decision on the duty to defend. In doing so, *Newhouse* re-affirms that parties will be held to the contractual promises they make to each other. Here, MMSD made contractual promises to MTI and vice versa, and those deserve protection.

5. Sannes cannot distinguish *Slabosheske.*

Sannes next attempts to distinguish *Slabosheske*, but this effort fails. Pl. Br., at 12-13. He argues that the rule of *Slabosheske* should be narrowly construed as follows: "the rule with respect to judgments that are reversed on appeal is that a person may enforce such a judgment **against a party to the judgment**, until the judgment is reversed." Pl. Br., at 13. This argument demonstrates a misunderstanding of *Slabosheske*.

Slabosheske did not involve the enforcement of a judgment, but rather involved the enforcement of ***a contract entered in reliance*** on a judgment. The same is true here. MMSD and MTI entered into the CBAs in reliance on Judge Colás's Order. Just as in *Slabosheske*, those contracts are enforceable. *See* 273 Wis. at 152-53 ("Those who dealt with [District 7] in reliance upon its apparent status, such as the plaintiffs, are protected by the circuit court judgment.").

In addition, Sannes's contention that MMSD is attempting to enforce the CBAs against a "non-party, the Plaintiff" is misguided. MMSD has not brought an action to enforce the CBAs against Sannes or any taxpayer. Rather, it is defending itself for actions taken in reliance on a circuit court order—that is, entering into contracts, which remain valid and enforceable as between the parties that executed them: the District and MTI. Sannes, however, has raised the issue that this is not proper due to the later reversal of Judge Colás's Order. This is no different than the scenario at issue in *Slabosheske*, which also involved an argument that an agreement was enforceable and a counterargument that it was not enforceable due to the reversal of a circuit court judgment. In *Slabosheske*, the court rejected the challenge to the contract on the grounds that the agreement remained enforceable despite the reversal, because the agreement was protected by the decision of the circuit court that was in effect when the agreement was made,

even if that decision was ultimately determined to be erroneous. Because *Slabosheske* is a decision of the Wisconsin Supreme Court, this Court must reach the same result in this case.[9]

Sannes also erroneously contends that the Wisconsin Supreme Court specifically held that MMSD cannot rely on the Order. Pl. Br., at 13-14. Sannes's citation of a per curium order is not only improper, *see* Wis. Stat. §809.23(3)(a), it mistakes the holding of that order. The Wisconsin Supreme Court did not hold that Judge Colás's original September 14, 2012 Order in *MTI v. Walker* did not apply to non-parties. Judge Colás's original Order granted a declaratory judgment but not any injunctive relief. A year after the Order, Judge Colás issued a contempt order against the two WERC Commissioners who were defendants in *MTI v. Walker*. (McGrath Aff., ¶ 10, Ex. 8.) The per curiam order Sannes cites in his initial brief (at 13-14) addressed whether this contempt order was properly issued when the appeal of Judge Colás's original Order was pending before the supreme court. The supreme court determined that it was not, because the contempt order expanded Judge Colás's original Order (which had granted only a declaratory judgment) by granting a new type of relief (an injunction). (*Id.* ¶ 20.) The per curiam order never discussed whether Judge Colás's Order applied to non-parties, much less hold that it did not. Rather, the per curiam order focused on the expansion of relief from the original September 14, 2012 Order. (*Id.* ¶ 20 & n.5.)

Finally, Sannes contends that the final Decision, Order and Judgment issued by Circuit Court Judge David M. Bastianelli on March 15, 2015 in *LaCroix v. Kenosha Unified School District*, Kenosha County Case No. 13-CV-1899, supports his position that MMSD cannot rely on Judge Colás's Order. But the opposite is true. Judge Bastianelli's decision shows that he

[9] To hold otherwise would eviscerate the rule of *Slabosheske*, which sought to protect the validity of circuit court judgments. What would be the value of Judge Colás's Order to MTI (a party in *MTI v. Walker*) if MTI is not able to rely on the Order to engage in bargaining as permitted by the Order with the ***only*** employer it bargains with?

recognized that the impact of the Order on the parties in *LaCroix* (none of whom were parties in *MTI v. Walker* or bargained with any parties in that case) was distinct from its impact in this case. He correctly distinguished this case, stating: "There's no question that the plaintiffs in [*MTI v. Walker*] had the right to rely on the decision of Judge Colas [sic], without a stay and until an appellate court said otherwise." (Packard Aff., ¶ 10, Ex. 9, at 8.)

B. The CBAs do not violate Act 10.

Sannes next argues that the CBAs are void because they violate Act 10. Most of Sannes's arguments on this point are addressed above in Section I of this brief. Sannes does, however, raise one argument that is not squarely addressed above. He cites several cases for the proposition that because the CBAs include terms that are "expressly prohibited" by Act 10, the CBAs are illegal contracts that are unenforceable under Wisconsin law. Pl. Br., at 15-16. Sannes contends specifically that fair share and dues deductions are expressly prohibited by Act 10 and that these provisions therefore cannot be enforced. But this argument does not provide a basis on which to invalidate the CBAs for several reasons.

First, the fact that a collective bargaining agreement may require a municipal employer to perform acts that could not ***now*** be negotiated due to prohibitions in Act 10 (such as fair share and dues deductions) does not mean that such acts are not, in themselves, prohibited by Act 10. In fact, such situations are ***anticipated*** by Act 10. As discussed above, Act 10 was drafted so that the new restrictions on collective bargaining would be phased in as existing collective bargaining agreements expired. 2011 Act 10 § 9332. As such, Act 10 contemplated that municipal employers would continue to engage in conduct "expressly prohibited" by Act 10 under existing collective bargaining agreements even after Act 10's effective date. This phase-in rationale, which the legislature chose to include as part of Act 10, applies equally to MTI and MMSD under the facts of this case, given the ruling of Judge Colás. It is therefore consistent

with Act 10 to permit the CBAs, which were negotiated and executed when the relevant provisions of Act 10 were, at least for these parties, "null and void" and "without effect," to run their course, including the fair share and dues deductions that Sannes asserts in this lawsuit are expressly prohibited by Act 10.

Moreover, this result is also consistent with the holding of the Wisconsin Supreme Court that "collective bargaining agreements and statutes also governing conditions of employment must be harmonized whenever possible." *Glendale Professional Policemen's Assn. v. Glendale*, 83 Wis. 2d 90, 106, 264 N.W.2d 594 (1978). Under this rule, courts "will enforce the rights the parties have bargained for unless their agreement is in 'irreconcilable conflict' with a state statute." *Brown v. AFSCME*, 2007 WI App 247, ¶ 11, 306 Wis. 2d 213, 742 N.W.2d 916 (quoting *Glendale*, 83 Wis. 2d at 106).

This point also illustrates why Sannes's analogy comparing this case to an employer and employee agreeing to wages below minimum wage is a false one. *See* Pl. Br. at 3. Unlike Act 10 and the CBAs in this case, an agreement between an employer and an employee for payment of sub-minimum wages cannot be harmonized with the law. It is well established that minimum wage and overtime protections may not be waived by a direct agreement between an employer and an employee or through a collective bargaining arrangement. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945); *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 740-41 (1981). Of course, if (a) that were not the current law; and (b) a new law was passed imposing such a requirement; and (c) that new law included provision similar to 2011 Act 10 § 9332, which allowed existing wage agreements to continue until expiration or modification before the new law applied to the contracting parties; and subsequently (d) the new law was found unconstitutional; and then (e) the employer and employee reached a new agreement

providing for wages that would otherwise not be allowed under the new law; and then (f) the lower court were reversed, causing the new law to again become effective, then the analogy would be complete. In such circumstance, the contracts made while the law was not in effect would be enforceable. That would not be "astonishingly illogical" at all.

Sannes's analogy as written, however, is simply a red herring. Rather than focusing on the facts in the record, and the controlling case law, Sannes is attempting to have the Court decide this case on alternative facts and inapplicable law. The Court must reject those efforts.

Finally, as explained in Section I.B of this brief, Sannes does not have standing to assert any claims regarding the fair share and dues deductions of teachers because he cannot demonstrate the pecuniary harm to taxpayers necessary to support taxpayer standing in regard to these claims. Teachers make those payments and it costs MMSD (and by extension taxpayers) nothing. Therefore, Sannes cannot seek to invalidate the CBAs on these grounds.

C. Sannes has not met his burden for a temporary or permanent injunction.

Sannes seeks both a temporary and permanent injunction prohibiting further enforcement of the CBAs. Injunctive relief is "not to be issued lightly" and is appropriate only where the cause is "substantial." For such relief, Sannes has the burden of proving:

1. A reasonable probability of success on the merits (for a temporary injunction);
2. That he lacks an adequate remedy at law;
3. That future conduct of the defendants will violate his rights as a taxpayer and he will suffer irreparable harm if the injunction is not issued (for a temporary injunction, this requires proof that an injunction is necessary to preserve the status quo); ***and***
4. That, on balance, equity favors issuing the injunction.

Pure Milk Products Coop., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519-20, 259 N.W.2d 310 (1977).

1. Sannes has not demonstrated a likelihood of success on the merits.

This element is addressed by MMSD's briefing above, which demonstrates not only that Sannes is not likely to succeed on the merits, but also that summary judgment should be entered in favor of MMSD.

2. Sannes does not lack an adequate remedy at law.

Here, Sannes has an adequate remedy at law, which precludes injunctive relief. In this lawsuit, Sannes seeks a declaratory judgment, which provides Sannes with an adequate remedy at law. He has not demonstrated that MMSD would fail to comply with a declaratory judgment entered by this Court. In addition, Sannes's lack of taxpayer standing precludes injunctive relief as well. Because Sannes has not established standing to bring a suit in law or in equity, he cannot lack an adequate remedy at law.

3. Sannes has not demonstrated that he will be irreparably harmed if the CBAs continue to be enforced.

This element imposes a different standard for temporary and permanent injunctions, and Sannes cannot succeed under either analysis.

a. Sannes cannot demonstrate that a temporary injunction is necessary to preserve the status quo.

A temporary injunction will be issued only when necessary to preserve the status quo. *Werner*, 80 Wis. 2d at 520. Here, the status quo is that the CBAs are currently governing the terms and conditions of employment of the District employees represented by MTI. Sannes seeks to impose different terms and conditions on the District and its employees through a temporary injunction. Sannes is seeking to disrupt the status quo, not preserve it. Further, a temporary injunction would impose a great deal of uncertainty and havoc for MMSD, MTI, and the employees whose employment is currently governed by the CBAs. As discussed above, Sannes has taken the position that if the CBAs are invalidated, MMSD would not be permitted to

legally impose any of the terms of the CBAs on District employees. Rather, according to Sannes, MMSD would have to "decide on new terms and conditions" and "do so in a manner consistent with Act 10." Pl. Br. at 17. It is not clear what this means, but enjoining the CBAs certainly would not be the preservation of the status quo. Sannes is seeking to change the existing relationship between the employees represented by MTI and MMSD. This is not an appropriate application for a temporary injunction.

b. Sannes cannot establish that he will suffer irreparable harm necessary to justify a permanent injunction.

Sannes has also failed to demonstrate that he (or more precisely District taxpayers) would suffer any irreparable harm if a permanent injunction is not issued. In support of this element, Sannes first argues that "the District is spending substantial amounts of taxpayer money on a contract that is illegal." Pl. Br., at 18. But Sannes has not come forward with any admissible evidence of these alleged illegal expenditures. Instead, his sole factual basis regarding such expenditures is unsupported by admissible evidence; it is without foundation, speculative, and inadmissible hearsay. *See* Pl. Br., at 6 (¶ 17).[10] Moreover, as explained above (*see* Section I.B), MMSD does not incur any additional costs or make any illegal expenditures of public funds under the CBAs.

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[10] In support of this factual assertion, Sannes cites only Paragraph 6 and Exhibit 4 of the McGrath Affidavit. Paragraph 6 states that Mr. McGrath, Sannes's attorney, attached to his affidavit as Exhibit 4 "an excerpt of the expenses contained in the District's preliminary budget for the 2014-2015 school year which I printed from the District's website." Mr. McGrath also makes statements regarding calculations regarding "expenses for salaries and benefits" that are presumably based on the information contained in the attached Exhibit 4. Mr. McGrath's affidavit does not, however, contain any foundation establishing that Mr. McGrath has any personal knowledge of the assertions made in paragraph 6. Nor does his affidavit establish any foundation to authenticate Exhibit 4, and the documents are hearsay. Consequently, he has failed to present admissible evidence to support this proposed fact. Even if this were admissible evidence, which it is not, it still could not establish irreparable harm. Sannes asserts that this "evidence" demonstrates that the District is illegally expending substantial amounts of taxpayer money "for salaries and benefits." Pl. Br., at 18. But as discussed elsewhere, the District would be spending this money regardless of the CBAs.

Sannes next conflictingly argues that the irreparable harm element can be met "even in the absence of an express showing of irreparable harm," citing *Joint School District No. 1 v. Wisconsin Rapids Educational Association*, 70 Wis. 2d 292, 234 N.W.2d 389 (1975). Pl. Br. at 18. But plaintiff incorrectly states the holding of that case. *Joint School District No. 1* did not hold that an injunction is available to restrain illegal activity without a showing of irreparable harm; it held the opposite—that irreparable harm is a necessary element even for injunctions seeking to restrain illegal activity. The court stated: "Nevertheless, the key prerequisite to injunctive relief—irreparable harm—remains, and a court should not restrain illegal acts merely because they are illegal unless the injury sought to be avoided is actually threatened or has occurred." *Id.* at 311; *see also Werner*, 80 Wis. 2d at 520 & n.7 (citing *Joint School District No. 1* for the proposition that "[i]njunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm").

Moreover, in *Joint School District No. 1*, which involved the issue of whether a circuit court abused its discretion in granting an injunction to halt a teacher strike, the court specifically ***rejected*** the argument "that the fact that the strike was illegal is enough to warrant issuance of the injunction without an express showing of harm." 70 Wis. 2d at 310. The court's ultimate holding, that the circuit court did not abuse its discretion in awarding an injunction against the teacher strike, was premised on a conclusion that the trial court had properly found that the plaintiffs had presented sufficient ***evidence*** to establish irreparable harm. *Id.* at 313.

Even if the court in *Joint School District 1* had accepted the argument that an illegal strike was adequate to justify an injunction "without an express showing of harm," that still would not help Sannes in this case. The discussion of this issue in *Joint School District No. 1* was limited to injunctions seeking to enjoin municipal employee strikes, which is not at issue

here. Further, the court indicated that even if it had adopted the proposed rule that an injunction could be issued without an express showing of irreparable harm, the rule would apply ***only*** where a plaintiff could demonstrate "the potential for immediate and serious harm to public health and safety" (such as in the case of a strike involving police officers or firefighters). *Id.* at 312. Sannes has not presented any evidence that would even come close to meeting this standard. Allowing the CBAs to run their course does not present serious harm to public health and safety.

Sannes next points to potential future claims from teachers as a basis for irreparable harm. But, again, Sannes presents no admissible evidence to substantiate this phantom risk. As explained above (*see* Section I.B), Sannes cannot rely on speculation to establish harm. Indeed, no teacher has brought suit even though the 2014-2015 CBAs have now expired. Moreover, the threat of lawsuits does not demonstrate ***irreparable harm***, because lawsuits pose only a threat of money damages. *Rapids Assocs. v. Shopko Store, Inc.*, 96 Wis. 2d 516, 520-21, 292 N.W.2d 668 (Ct. App. 1980) ("The equitable remedy of injunction is not appropriate except in cases where the plaintiff suffers irreparable injury that cannot be remedied by money damages.").

Sannes's final arguments on irreparable harm are in response to MMSD's position that MMSD could unilaterally impose on those employees represented by MTI the terms and conditions of employment currently described in the CBAs. Sannes disputes this, but points to no authority to support his position. Pl. Br., at 19-20. Instead, Sannes again resorts to an inapt analogy. He asserts that allowing MMSD to unilaterally impose the terms and conditions of the CBAs would be akin to allowing competitors who are found liable for engaging in a price-fixing scheme to then unilaterally impose their fixed prices. Pl. Br., at 17. But MMSD and MTI are not commercial competitors, this is not an antitrust case, and the issue of whether a court in an antitrust action should issue an injunction restraining otherwise lawful behavior raises complex

issues of law and fact that Sannes does not even begin to address with this undeveloped argument. Courts do not consider arguments unsupported by references to legal authority. *See Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. The Court must decide this case on the actual facts and the applicable law. There is nothing in Act 10 or in Wisconsin law more generally that would limit MMSD's ability to unilaterally continue the employment of its employees under the same terms and conditions that are outlined in the CBAs.

Further, in regard to fair share and dues deductions in particular, even if MMSD would not be able to impose these aspects of the CBAs after the CBAs expire (i.e., when Act 10 is fully effective for MMSD and MTI), this still does nothing to help Sannes establish irreparable harm to ***taxpayers***, which he has the burden to show with admissible evidence. As discussed above (*see* Section I.B), while fair share and dues deductions impact ***teachers***, they have no impact on ***taxpayers***; they involve no illegal expenditure of public funds and do not impose any costs on the District. Sannes therefore cannot rely on the allegedly illegal continuation of fair share and dues deductions (or any of the other alleged violations of the rights of teachers) to meet his burden of demonstrating that taxpayers will suffer irreparable harm without the requested injunctive relief. What Sannes is attempting to do is bootstrap the extraordinary remedy of injunctive relief to a claim for a declaratory judgment. But Sannes does not even come close to establishing the basic prerequisites for injunctive relief.

4. The equities do not favor an injunction.

Sannes makes no argument that the equities favor an injunction in this case, and as such he has failed to establish a necessary element for injunctive relief. *Werner*, 80 Wis. 2d at 519-20. Sannes's silence is a recognition that he cannot meet his burden because the equities do not favor an injunction. As discussed above, the CBAs include terms and conditions of employment that were negotiated between the District and MTI and ratified by MTI's members. District

employees therefore have an expectation that they will be employed through the 2015-2016 school year under the agreed-upon terms of employment. They have made decisions, small and large, for themselves and their families based on these expectations. It would be inequitable to deprive them of the compensation and terms spelled out in the CBAs. It would also be inequitable to deprive the District and MTI of their bargained-for agreement. Moreover, invalidating the CBAs would also violate the well-established principles of Wisconsin law (which are grounded in equity) that courts should enforce rights that have been bargained for and harmonize collective bargaining agreements with the statutes whenever possible. *See Glendale*, 83 Wis. 2d at 106; *Brown*, 2007 WI App 247, ¶ 11. Finally, an invalidation of the CBAs would provide no benefit to taxpayers. In fact, as already discussed, an invalidation of the CBAs would likely harm taxpayers because of the cost and uncertainty that would be associated with the District implementing new terms and conditions of employment.

Conclusion

At the time that MTI and MMSD negotiated the CBAs, they were subject to Judge Colás's Order holding portions of Act 10 "null and void" and "without effect." The Order was entitled to full force and effect until it was reversed nearly two years later. Well-established Wisconsin precedent indicates that actions taken in reliance on a circuit court's order are justified and any obligations entered into are enforceable even if that order is later reversed. Sannes cannot show otherwise. In addition, Sannes cannot prove any pecuniary harm and therefore lacks standing to maintain this suit.

For the reasons discussed above, MMSD respectfully requests that the Court grant summary judgment in favor of the defendants, deny Sannes's motion for summary judgment and his requests for injunctive relief, and dismiss Sannes's claims in their entirety and with prejudice.

Dated this 10th day of September, 2015.

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