

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 9

DANE COUNTY

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DAVID BLASKA,

Plaintiff,

RECEIVED  
10/1/15

v.

Case No. 14 CV 2578

MADISON METROPOLITAN  
SCHOOL DISTRICT BOARD  
OF EDUCATION, MADISON  
METROPOLITAN SCHOOL  
DISTRICT, and MADISON  
TEACHERS, INC.

FILED

SEP 28 2015

DANE COUNTY CIRCUIT COURT

Defendants.

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**DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

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STATEMENT OF THE CASE

Plaintiff David Blaska, a taxpayer in the Madison Metropolitan School District, sues for a declaratory judgment under § 806.04, Stats., and for an injunction under § 813.02, Stats., voiding and prohibiting the enforcement of several 2015-2016 contracts collectively bargained by defendants Madison Metropolitan School District and Madison Teachers, Inc.<sup>1</sup>

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<sup>1</sup> At oral argument, the parties stipulated to dismissing this action against Madison Metropolitan School District Board of Education, which the court accordingly ordered. Additionally, with some hesitancy, plaintiff's counsel conceded that the claims for declaratory and injunctive relief addressing the 2014-2015 collective bargaining agreements were likely moot, having expired six weeks earlier on June 30, 2015. See *Ziemann v. Vill. of N. Hudson*, 102 Wis. 2d 705, 712 (1981) (claim for relief is moot where judgment thereon cannot have any practical legal effect on an existing controversy). Plaintiff's hesitancy may have emanated from the doctrine that a court may decide a moot issue where the issues are of great public importance. *Id.* Here, any issues of great public importance arising from the 2014-2015 collective bargaining agreements likewise inhere in the 2015-2016 agreements, so there is nothing to be gained from addressing the expired contracts.

Before the court are cross motions for summary judgment filed by all parties. The motions have been fully briefed and factually supported. Oral argument was held on August 13, 2015. The record reveals no disputed issue of material fact requiring further evidentiary proceedings. Instead, the motions present purely legal issues ripe for decision.

Because plaintiff Blaska has failed to satisfy the legislature's express statutory condition precedent to filing this lawsuit under § 118.26, Stats., (incorporating § 893.80, Stats.), his motion for summary judgment against defendant Madison Metropolitan School District is DENIED. Defendant Madison Metropolitan School District's motion for summary judgment dismissing plaintiff's claims with statutory costs is GRANTED for the same reason.

Madison Metropolitan School District nonetheless remains a necessary party to any declaratory judgment and injunction action relating to its contracts. Worded differently, absent the School District, the court cannot order declaratory and injunctive relief in this action on the School District's collective bargaining agreements, because this court may not enjoin or declare the contractual rights and obligations of a non-party. Accordingly, dismissal of the School District due to plaintiff's procedural failings under § 118.26 and § 893.80, Stats., requires dismissal of this action against the remaining defendant, Madison Teachers, Inc. Plaintiff's motion for summary judgment against Madison Teachers, Inc. is thus DENIED and the reciprocal summary judgment motion of Madison Teachers, Inc. is GRANTED, dismissing plaintiff's claims against it with statutory costs.

#### STATEMENT OF UNDISPUTED FACTS

In 2011, the Wisconsin Legislature enacted a series of changes to § 111.70, Stats., known collectively as "Act 10." Act 10 became effective on **July 1, 2011**.

As material here, Act 10 prohibits municipal employers, including school districts, from bargaining with unions representing their employees on any factors or conditions of employment except total base wage (not including, *inter alia*, overtime, premium pay, merit pay, pay schedules or automatic pay progression). See § 111.70 (4)(mb).

Act 10 was subjected to several legal challenges, including an action in the Dane County Circuit Court, Branch 10, before Judge Juan Colás, *Madison Teachers, Inc. v. Scott Walker*, 2012 WL 4041495. On **September 14, 2012**, Judge Colás issued a decision and order essentially invalidating Act 10's collective bargaining restrictions on constitutional grounds.

Eight months later on **May 15, 2014**, relying on Judge Colás's decision, the Madison Metropolitan School District Board of Education voted to enter into collective bargaining with its certified teachers' union, defendant Madison

Teachers, Inc., with an eye towards reaching collective bargaining agreements for the 2015-2016 school year. That same day, the Wisconsin Institute for Law & Liberty, Inc. ("WILL, Inc."), by its President & General Counsel Richard M. Esenberg, e-mailed the following letter to the "School Board Members of the Madison Metropolitan School District" on WILL, Inc. letterhead:<sup>2</sup>

May 15, 2014

School Board Members of the **VIA EMAIL**  
Madison Metropolitan School District  
545 W. Dayton St.  
Madison, WI 53703-1967

Re: Illegality of extending the collective bargaining agreements with MTI

Dear Board Members of the Madison Metropolitan School District:

This week, it was reported that Madison Teachers Inc. ("MTI") is lobbying you to extend the existing collective bargaining contract until June 2016. Last October, the current contract was extended for the 2014-2015 school year. Given that the Wisconsin Supreme Court is set to rule on *MTI v. Walker* any day now – and given the other state court and federal court decisions now in place, it is a near certainty that Judge Colas' decision will be overturned. As a result, the timing of the request by MTI is obviously intended to evade the upcoming decision by the Wisconsin Supreme Court.

Act 10 has been upheld in every court that has considered it, except for Judge Colas. It was ruled to be constitutional by the U. S. Court Of Appeals for the Seventh Circuit, the U.S. District Court of the Western District of Wisconsin, and by Dane County Circuit Court Judge John Markson. Consequently, the likelihood of Act 10 being declared constitutional in the Wisconsin Supreme Court is extremely high.

This presents a major problem as you debate whether to grant MTI's request to collectively bargain and expand the current CBA. Act 10 prohibits terms that are inconsistent with its provisions in any extension, modification or renewal of a preexisting contract. Both the previous extension and a new extension would, thus, violate Act 10.

While MTI might argue that an extension is lawful because the existing decision by Judge Colas has not yet been overturned, that decision has no effect outside of the parties involved in one specific case. Keep in mind that neither you, the School District, the nearly 5,000 individual teachers employed by the School District, nor individual Madison taxpayers, are parties to *MTI v. Walker*. As a result, neither you nor the School District

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<sup>2</sup> It is unclear, but immaterial, whether Mr. Esenberg's letter was e-mailed to the School Board members before or after their vote.

could rely on Judge Colas' decision as a defense to any claim that we, or other counsel, might bring on behalf of a taxpayer and/or teacher.

Moreover, if the Supreme Court overturns Judge Colas' decision, then his declaratory ruling in *MTI v. Walker* would become null and void – as if it never existed. If the CBA is unlawfully extended, then every taxpayer in Madison would have a valid claim arising from the illegal expenditure of tax dollars, and every teacher in Madison would have a valid claim for violation of their rights under Wis. Stat. §111.70 (2).

We remind you that the risk of legal action is a very real one. Last spring we filed a lawsuit against the Milwaukee Area Technical College (MATC) for violating Act 10 by collectively bargaining with the employees' unions, as well as approving a contract that included terms that violated Act 10. More recently, in November 2013, when the Kenosha Unified School District (KUSD) violated Act 10, we filed a lawsuit against the District, School Board and the unions on behalf of a taxpayer and teacher.

We ask that you weigh these costs as you determine the best course of action for the Madison Metropolitan School District, teachers, and taxpayers. Obviously, you cannot be forced to use the tools provided by Act 10 to better serve Madison's children and taxpayers. But you do have to comply with the law, and we hope that you will at least choose to avoid the litigation costs that will likely result from a decision to extend the CBA in violation of Act 10.

Very truly yours,  
WISCONSIN INSTITUTE FOR LAW & LIBERTY

Richard M. Esenberg  
President & General Counsel  
414-727-6367

After the School Board's vote on May 15, 2014, representatives of the School District met and collectively negotiated with Madison Teachers, Inc. as representatives of the teachers. On **June 2, 2014**, the representatives reached tentative collective bargaining agreements for the 2015-2016 school year. On **June 3, 2014**, the membership of MadisonTeachers, Inc.'s five bargaining units ratified the tentative agreements, and on **June 4, 2014**, the School Board unanimously approved them. Accordingly, there are currently several collective bargaining agreements in place between the Madison Metropolitan School District and Madison Teachers, Inc. for the 2015-2016 school year.

The Wisconsin Supreme Court (upon certification by the Court of Appeals, District 4) reversed Judge Colás's decision approximately two months later on **July 31, 2014**.

On **September 10, 2014**, plaintiff David Blaska filed this taxpayer action for declaratory and injunctive relief related to the 2015-2016 collective bargaining agreements.

Additional undisputed material facts will be set forth as pertinent to the analysis and decision.

### ANALYSIS AND DECISION

As a condition precedent to filing an action against a Wisconsin school district, the Wisconsin legislature has required the following:

#### **118.26. Claim against school district**

No action may be brought or maintained against a school district upon a claim or cause of action unless the claimant complies with s. 893.80. This section does not apply to actions commenced under s. 19.37, 19.97 or 281.99.

Wis. Stat. § 118.26.<sup>3</sup> Section 893.80, in turn provides, as pertinent here:

#### **893.80. Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits**

...

(1d) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who

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<sup>3</sup> The explicit statutory exceptions (§§ 19.37, 19.97, and 281.99) relate to enforcement of open records requirements, enforcement of open meetings requirements, and enforcement actions for unsafe drinking water violations. They are thus not implicated in this action.

performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

(1g) Notice of disallowance of the claim submitted under sub. (1d) shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. Failure of the appropriate body to disallow a claim within 120 days after presentation of the written notice of the claim is a disallowance. No action on a claim under this section against any defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employee, may be brought after 6 months from the date of service of the notice of disallowance, and the notice of disallowance shall contain a statement to that effect.

*Fritsch v. St. Croix Cent. Sch. Dist.*, 183 Wis. 2d 336, 343 (Ct. App. 1994) elaborates:

Section 893.80(1), Stats., provides a condition precedent to bringing an action against the school district. No action may be brought or maintained against the school district unless two requirements are met: service upon the school district of a notice of the circumstances of the claim, *see* § 893.80(1)(a), Stats., and a subsequent claim containing claimant's address and an itemized statement of relief sought. Upon receipt of such claim, the school district has 120 days to accept or disallow the claim. *See* § 893.80(1)(b), Stats. Failure to comply with the initial notice of claim requirement does not bar an action if the government had actual notice and the absence of formal notice is not prejudicial. Section 893.80(1)(a), Stats. The itemized statement of relief sought provision, § 893.80(1)(b), at issue here, does not contain a similar prejudice standard.

Accordingly, to maintain this action against the Madison Metropolitan School District, § 893.80(1d) and (1g) expressly require that plaintiff Blaska first (1) serve on the School District a notice of claim and claim, either separately or together, and (2) wait to file the lawsuit until he was either notified by registered or certified mail that his claim was disallowed by the School District, or until 120 days had passed with no such notice of disallowance, whichever occurred first.

Plaintiff Blaska argues that the May 15, 2014, letter from Attorney Esenberg, President and General Counsel for the Wisconsin Institute for Law & Liberty, Inc., satisfies his notice of claim and claim requirements under §§ 118.26 and 893.80. Alternatively, he argues that he is not required to comply with these laws based on a judicially created exemption.

Neither argument succeeds.

I. WILL, Inc.'s Letter as Blaska's Statutory Notice and Claim

WILL, Inc.'s May 15, 2014, letter is the only document plaintiff Blaska identifies as his notice of claim and claim. There are multiple reasons why the letter fails to satisfy §§ 118.26 and 893.80.

A. Section 118.26 expressly requires that “the claimant” comply with § 893.80. It is undisputed that Mr. Blaska had no attorney-client relationship with WILL, Inc. on the date of the letter. He had not retained the corporation or any of its attorneys on that date, nor had he authorized them to represent him in claims against the School District with regard to Act 10. Therefore, the letter cannot represent his claim under § 118.26, nor can he be deemed the “claimant.”

B. Closely related, WILL, Inc.'s letter does not mention Mr. Blaska. There is nothing in the letter to suggest that Mr. Blaska was making a claim.

C. Mr. Blaska's claims in this action are for declaratory relief voiding the 2015-2016 collective bargaining agreements and for an injunction prohibiting their enforcement. Thus, WILL, Inc.'s letter could not have served as Mr. Blaska's notice of claim or claim for this lawsuit because declaratory and injunctive relief claims did not exist on May 15, 2014, as the letter itself implicitly acknowledges. Rather, the letter sets forth only potential, contingent claims, ripening only upon the happening of two subsequent events: (1) reversal of Judge Colás's decision by the Wisconsin Supreme Court, and (2) formation of a new collective bargaining contract between the School District and Madison Teachers, Inc.

Moreover, *if* the Supreme Court overturns Judge Colas' decision, *then* his declaratory ruling in *MTI v. Walker* would become null and void – as if it never existed. *If* the CBA is unlawfully extended, *then* every taxpayer in Madison would have a valid claim arising from the illegal expenditure of tax dollars, and every teacher in Madison would have a valid claim for violation of their rights under Wis. Stat. §111.70 (2).

(Emphasis added). Mr. Blaska essentially offers WILL, Inc.'s letter as a notice of then-nonexistent claims on behalf of a then-nonexistent client. However, the letter, by its own terms, supports the opposite conclusion, i.e.—that it did not constitute a claim by anyone, just the possibility of a future claim:

As a result, neither you nor the School District could rely on Judge Colas' decision as a defense to *any claim that we, or other counsel, might bring* on behalf of a taxpayer and/or teacher.

(Emphasis added).

D. Even if the Court made a finding that the School District has not been prejudiced by the above deficiencies in WILL, Inc.'s letter serving as Mr. Blaska's

notice of claim such that they do not present a bar to this action, Mr. Blaska was still required to comply with the claim requirements of § 893.80(1d)(b). Noncompliance with the claim requirements is not excused by a showing that the District was not prejudiced. See *Fritsch*, 183 Wis. 2d at 343. Section 893.80(1d)(b) requires:

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

Setting aside the question of whether an email to school board members qualifies as “present[ing] to the appropriate clerk or person who performs the duties of clerk or secretary for the [School District],”<sup>4</sup> WILL, Inc.’s letter fails as “an itemized statement of the relief sought . . . .” *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 52-53 (1984) explains why:

Under these definitions, of which we take judicial notice, **it is apparent that sec. 893.80(1)(b), Stats., requires a list, item by item, of the kinds of relief sought. One kind of relief sought might be, as here, money damages. In another case, it might be a demand for relief by specific performance or by injunction.** It should be noted that sec. 893.80 is not a statute only applicable to tort claims or claims for negligence. The opening sentence of sec. 893.80 recites its applicability to any cause of action. Sec. 893.80, when initially enacted by the legislature, applied only to tort claims, but, by ch. 285, Laws of 1977, the procedures were made generally applicable to any claims against the listed governments. Accordingly, the statute provides for a method of securing relief against a city that may be different from, or in addition to, damages.<sup>7</sup>

\*53 Thus, sec. 893.80(1)(b), Stats., requires a list, item by item, if more than one method of relief—more than one type of remedy—is sought against the city. If only one form of relief is sought, *e.g.*, money damages, the statement of the amount sought as damages is sufficient. Separate amounts for pain and suffering, lost wages, medical bills, and future or permanent disability are claims for special damages. They are not different types of relief. They all seek the relief of damages. The statute does not require an itemization of the separate demands for special damages.

(Emphasis added).

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<sup>4</sup> The court also sets aside the observation that the letter did not contain Mr. Blaska’s address, nor could it have, since he was not the claimant on that date. Neither can WILL, Inc.’s address suffice under *State Dep’t of Natural Res. v. City of Waukesha*, 184 Wis. 2d 178, 197-98 (1994), *abrogated in part by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585 (1996), because the corporation did not then represent Mr. Blaska.

Strict adherence to the statute is not required, only substantial compliance. *State Dep't of Natural Res. v. City of Waukesha*, 184 Wis. 2d 178, 197-98 (1994), *abrogated in part by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585 (1996):

To satisfy the notice of claim requirements of sec. 893.80(1)(b), Stats., a claim must: 1) identify the claimant's address; 2) contain an itemized statement of the relief sought; 3) be submitted to the city clerk; and 4) be \*198 disallowed by the city. Two basic principles guide this court's determination of whether a notice of claim is sufficient under sec. 893.80(1)(b), Stats. First, the written claim must be definite enough to fulfill the \*\*896 purpose of the claim statute—to provide the municipality with the information necessary to decide whether to settle the claim. *Figgs*, 121 Wis. 2d at 54, 357 N.W.2d 548. The municipality must be furnished with sufficient information so that it can budget accordingly for either a settlement or litigation. *Van v. Town of Manitowoc Rapids*, 150 Wis. 2d 929, 933, 442 N.W.2d 557 (Ct. App. 1989). Second, notices of claim should be construed so as to preserve bona fide claims. *Figgs*, 121 Wis. 2d at 54–55, 357 N.W.2d 548. “[I]n furtherance of this policy, only substantial, and not strict, compliance with notice statutes is required.” *Id.* at 55, 357 N.W.2d 548.

*See also City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 621-23 (1998).

Here, there was no substantial compliance by Mr. Blaska or WILL, Inc., because the letter presents no “itemized statement of the relief sought” at all. It warns only about the risk of future litigation by “every taxpayer in Madison . . . arising from illegal expenditure of tax dollars” and by “every teacher in Madison . . . for violation of their rights.” A threat of litigation, by itself, is not “an itemized statement of relief sought.” Does the letter portend suits for damages, including class actions? The language is too cryptic to say. References to equitable remedies, such as those sought here, are entirely absent, even by implication. With such a letter, how does the School District, in the words of our Supreme Court in *City of Waukesha*, “budget accordingly for either a settlement or litigation?” Certainly the budgeting considerations are vastly different depending on whether the litigation potential emanates from an out-of-county, not-for-profit advocacy organization without standing or from a class action involving every Madison Metropolitan School District teacher or taxpayer.

Under *Figgs*, at the very least, if one seeks declaratory and injunctive relief but no monetary damages, as Mr. Blaska does, “substantial compliance” requires that the “itemized statement of the relief sought,” i.e. the claim itself, actually say so, or at least provide some clue. WILL, Inc.’s letter does not, which

is not surprising because again, when it was written, there was no contract to declare void or enjoin; i.e., there was no contractual claim existing at all.<sup>5</sup>

Indeed, rather than a claim by Mr. Blaska against the school board or district (claims which did not then exist), WILL, Inc.'s letter is more correctly viewed as a lobbying effort, intended to influence future school board or school district actions. Such is entirely appropriate, but it does not, in and of itself, allow a subsequent lawsuit to leap-frog the longstanding, unambiguous requirements imposed by our legislature as a condition precedent to suit.

E. Even if plaintiff Blaska could clear these hurdles such that WILL, Inc.'s letter could be deemed to satisfy his obligations under § 118.26 and § 893.80(1d)(b), his suit still must be dismissed. This is because the action was filed before the claim was disallowed, either expressly or, as a matter of law, by the passage of 120 days without a disallowance. “This is fatal to an action based on matters underlying the claim.” *Selerski v. Vill. of W. Milwaukee*, 212 Wis. 2d 10, 20 (Ct. App. 1997). Section 893.80(1g) provides:

(1g) Notice of disallowance of the claim submitted under sub. (1d) shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. Failure of the appropriate body to disallow a claim within 120 days after presentation of the written notice of the claim is a disallowance.

Plaintiff's counsel conceded at oral argument that neither he nor Mr. Blaska received notice of disallowance of the “claim” by registered or certified mail, and it is undisputed this action was commenced on September 10, 2014—less than 120 days after WILL, Inc.'s May 15, 2014, letter was emailed to the school board members. His contention that disallowance occurred within the meaning of the § 893.80(1g) when the collective bargaining agreements were finalized, without more, finds no support in the statute or case law.

## II. Plaintiff's Action is Not Exempt from § 893.80(1d) Requirements

Plaintiff's next argument under §§ 118.26 and 893.80(1d)—his principal argument in fact—is that he is not required to comply with the statutes as a condition precedent for his action.

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<sup>5</sup> At oral argument, plaintiff's counsel argued that at the time of the letter, a claim to enjoin collective bargaining by the defendants was ripe, because the School Board had voted to approve bargaining. Although plaintiff's counsel may very well be correct, the letter still does not suffice as a claim sufficient to substantially comply with § 118.26, as a prerequisite to this action by Mr. Blaska. This is true for at least two reasons. First, Mr. Blaska's suit does not seek to enjoin collective bargaining by the parties. Rather, he seeks to undo the results of past collective bargaining. Second, WILL, Inc.'s letter does not even suggest it is making a claim to enjoin collective bargaining—it warns only of suits or claims that WILL, Inc. or others “might bring” should (1) collective bargaining occur and result in a contract and (2) Judge Colás's decision be reversed.

Mr. Blaska makes three arguments, which are pretty much variants of the same theme that the notice and claim statutes serve no useful purpose in actions such as this and are even counterproductive.

First, he contends the statutes do not apply to actions seeking solely equitable relief such as declaratory judgment and injunctions. Second, he invokes a judicially-created exemption to the statutes for certain actions. Third, at oral argument, he posited that any time a taxpayer believes that his or her school district has entered into an illegal contract, the taxpayer may sue for a declaratory judgment voiding the contract and an injunction against its enforcement without regard to §§ 118.26 and 893.80(1d).

The arguments do not withstand scrutiny.

We begin with the observation that § 118.26 is unambiguous in its wording and applies to all actions against school districts, with only three exceptions which are specific, limited, and inapplicable here:

**118.26. Claim against school district**

No action may be brought or maintained against a school district upon a claim or cause of action unless the claimant complies with s. 893.80. This section does not apply to actions commenced under s. 19.37, 19.97 or 281.99.

Of course, this court must apply the plain language of the statute as written without resort to rules of construction.<sup>6</sup> Thus considered, on its face § 118.26's categorical inclusion of all types of actions against school districts (except three) plainly offers no support for plaintiff's exemption argument except to the extent that the incorporation of § 893.80 and its interpretive case law bear on the issue.

Consideration of § 893.80(1d)'s requirements also begins with the plain language of the statute. Subject to exceptions explicit in the statute but inapplicable here,

*no action may be brought or maintained* against . . . governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action **unless** . . . [notice of claim and claim provisions under (1)d(a) and(b), and (1g) have been satisfied]

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<sup>6</sup> "We do not look beyond the plain and unambiguous language of a statute." *L.L.N. v. Clauder*, 203 Wis. 2d 570, 593, 552 N.W.2d 879, 889 (Ct. App. 1996).

The plain language itself brooks no exceptions. Our Supreme Court has expressly recognized its all-encompassing applicability. See e.g. *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 622-23 (1998):

This court recently held that Wis. Stat. § 893.80(1) “applies to all causes of action, not just those in tort and not just those for money damages.” *Waukesha*, 184 Wis. 2d at 191, 515 N.W.2d 888. In *Waukesha*, this court found that the plain language of the statute dictates that § 893.80(1) applies to all actions: “no action” may be brought against a governmental subdivision unless the claimant complies with the notice requirements of the statute. *See id.*<sup>3</sup>

\*\*715 \*623 Although the court need not look beyond the statute if the language is plain, further review of legislative history supports the sound holding of *Waukesha* that the notice of claim requirements apply to “all actions.”<sup>7</sup>

See also *Elkhorn Area Sch. Dist. v. E. Troy Cmty. Sch. Dist.*, 110 Wis. 2d 1, 6-7 (Ct. App. 1982) and *Mannino v. Davenport*, 99 Wis. 2d 602, 615 (1981):

The requirements of sec. 893.80(1)(a), Stats., produce \*7 harsh consequences. Nonetheless, as the Wisconsin Supreme Court noted about another notice of injury provision, “the terms of this legislative enactment must be applied in accord with their plain meaning, and we are not free to ignore their import.”

Indeed, out of deference to legislative intent expressed in the all-encompassing language of § 893.80(1d) and (1g), our appellate courts have understandably been parsimonious in creating exceptions to the notice and claim provisions, limiting them to circumstances only where compliance with the requirements of § 893.80(1d) and (1g) frustrates statutory remedies created in other acts by the legislature. More on this below at page 14.

So there is no support in the case law for the blanket assertion that § 893.80(1d) does not apply to declaratory judgment or injunction actions.<sup>8</sup> In fact,

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<sup>7</sup> City of Racine’s footnote 3 in the quoted passage takes pains to note:

The dissent asserts at page 721 that after this court’s holding in *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994), we held that that opinion was too broadly written. No such language appears in *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W.2d 587 (1996). In *Auchinleck* this court did say that the holding of *Waukesha* was too broad but only “to the extent it is interpreted as applying to open records and open meetings actions . . . .” 200 Wis. 2d at 597. The holding of *Auchinleck* narrowly applies to the statutes at issue in that case.

<sup>8</sup> To be sure, *State Dep’t of Natural Res. v. City of Waukesha*, 184 Wis. 2d at 193, n.10 questioned the applicability of notice of claim and claim provisions to those actions seeking preliminary injunctions, but did not rule on the issue because the DNR did not seek preliminary

the case law is to the contrary. Consider, for example, the Supreme Court's holding in *City of Racine, supra* at 620.

RATE appealed the circuit court order granting the City's summary judgment motion. Pursuant to Wis. Stat. § (Rule) 809.61, the court of appeals certified to this court the issue of whether compliance with Wis. Stat. § 893.80, notice of claim, is a necessary prerequisite to a counterclaim for ***declaratory relief*** against a municipality by an intervening or involuntary party. We conclude that compliance with § 893.80(1)(b) is a \*\*714 necessary prerequisite to all actions brought against the entities listed in the statute, including governmental subdivisions, whether a tort or non-tort action, and whether brought as an initial claim, counterclaim or cross-claim. Except as provided by statute or case law interpreting those statutes, a party must file a notice of claim and follow the statutory procedures set forth in § 893.80(1)(b) before bringing any action against a governmental subdivision.

(Emphasis added). In *Dixson ex rel. Nikolay v. Wisconsin Health Org. Ins. Corp.*, 237 Wis. 2d 149, 159 (2000), the Supreme Court reiterated the applicability of § 893.80(1d) to claims for declaratory and injunctive relief, citing *City of Racine, supra* and *State Dep't of Natural Res. v. City of Waukesha*, 184 Wis. 2d 178, 197-98 (1994), *abrogated in part by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585 (1996). See also *E-Z Roll Off, LLC v. County of*

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relief. The topic was revisited in *E-Z Roll Off, LLC v. County of Oneida*, 335 Wis. 2d 720, ¶ 26 (2011):

In *Gillen*, we held that when a statute allows a claimant to seek immediate injunctive relief, that statute irreconcilably conflicts with the general notice of claim \*\*430 provisions of Wis. Stat. § 893.80, “which requires a plaintiff to provide a governmental body with a notice of claim, and to wait 120 days or until the claim is disallowed before filing an action.” *Gillen*, 219 Wis. 2d at 822, 580 N.W.2d 628. The *Gillen* court concluded that, because application of the 120-day time limit imposed by Wis. Stat. § 893.80(1)(b) clearly frustrated the plaintiffs' specific right to immediate injunctive relief, the procedures setting forth injunctive relief took precedence over the general notice provisions of § 893.80.

As in *DNR v. Waukesha* and *E-Z Roll Off*, Mr. Blaska did not sue for immediate injunctive relief in his Complaint and did not move for a temporary injunction at the outset of this case. In fact, his first mention of temporary injunction was in his summary judgment motion on May 1, 2015, almost 8 months after the case was filed. Even then, the belated request was contingent: “If for any reason the Court determines that this case is not ready for final disposition, the Plaintiff requests a temporary injunction prohibiting implementation of the CBAs during the pendency of this proceeding.” Motion for Summary Judgment and for Injunction and Supporting Memorandum Filed by the Plaintiff David Blaska,” 1. Since the contingency has not occurred, i.e., this court has not found that “this case is not ready for final disposition,” implementation of a temporary injunction “during the pendency of this matter” (which is no longer pending) is considered no further. Regardless, since a temporary injunction is usually entered to preserve the status quo *pendente lite*, and a temporary injunction in this case would do the opposite, it is questionable whether plaintiff has demonstrated the grounds for same. This is all the more true considering that denial of a temporary injunction here, had one been requested, would not have rendered a permanent injunction futile. See, e.g. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 518-20 (1977).

*Oneida*, 335 Wis. 2d 720, ¶ 28 (2011) (“declaratory relief is not, by its nature, in conflict with providing governmental entities a 120–day period to review a claim”); *Ecker Brothers v. Calumet County*, 321 Wis. 2d 51, 58 (Ct. App. 2009) (applying § 893.80 to a declaratory judgment action).

Nor does this court find any authority for plaintiff’s contention, expressed at the conclusion of oral argument, that any taxpayer action against a school district for declaratory or injunctive relief alleging an illegal contract may proceed without satisfying the condition precedent in § 118.26. Again, the plain meaning of the statute, as supported by the case law interpreting it, is to the contrary. Indeed, accepting plaintiff’s argument would largely defeat the purpose of the statute by exposing school districts to a potentially unlimited number of surprise lawsuits by disgruntled taxpayers (of which there are undoubtedly many), relating to any school district contract (of which there are undoubtedly many), without the prior beneficial opportunity provided by § 118.26 to budget for the attorneys fees and costs attendant to such litigation. Such radical rejection of the plain statutory meaning and years of precedent is not the province of this court, and is accordingly rejected.

It is certainly true, however, that necessity born of clashing statutes has forced the Supreme Court to create limited exceptions from the notice and claim requirements of § 893.80(1d) and (1g) for certain types of cases.

We initially recognized in *Department of Natural Resources v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994), the plain meaning of Wis. Stat. § 893.80: “[t]he language of the statute clearly and unambiguously makes the notice of claim requirements applicable to all actions.” However, we subsequently acknowledged in *Auchinleck* that our holding in *Waukesha* had been “too broad.” *State ex rel. Auchinleck v. Town of LaGrange*, \*\*429 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (exempting claims for open records violations and open meetings violations from the application of Wis. Stat. § 893.80).

*E-Z Roll Off, LLC v. Cnty. of Oneida*, 335 Wis. 2d 720, ¶ 21.

But these exceptions are limited to those situations where a separate statutory scheme adopted by the legislature is expressly or necessarily incompatible with the notice and claim requirements in § 893.80.

Although seemingly all-encompassing, the command in Wis. Stat. § 893.80(1)(b) that “no action” may be brought unless a claim with the information required by that provision is filed has been modified to exclude those actions where the § 893.80(1)(b) process contravenes some other legislative mandate.

*Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 304 Wis. 2d 702, ¶ 6 (Ct. App. 2007).

The Wisconsin Supreme Court has adopted a three factor analytical framework to determine which specific statutory claims are exempt from the otherwise all-encompassing notice and claims requirements in § 893.80. Thus:

A number of cases following *Auchinleck* created additional exceptions to the notice of claim requirements. *See Gillen v. City of Neenab*, 219 Wis. 2d 806, 822–23, 580 N.W.2d 628 (1998) (exempting actions to enjoin violations of the public trust doctrine under Wis. Stat. § 30.294); *Little Sissabagama Lake Shore Owners Ass'n, Inc. v. Town of Edgewater*, 208 Wis. 2d 259, 265, 559 N.W.2d 914 (Ct. App. 1997) (exempting actions to appeal a county board's determination regarding the requirements for tax-exempt status under Wis. Stat. § 70.11(20)(d)); *Gamroth v. Vill. of Jackson*, 215 Wis. 2d 251, 259, 571 N.W.2d 917 (Ct. App. 1997) (exempting actions to appeal special assessments under Wis. Stat. § 66.60(12)(a)).

In *Town of Burke*, 225 Wis. 2d 615, 593 N.W.2d 822, the court of appeals provided a structure for analyzing our notice of claim jurisprudence. After examining our prior notice of claim case law, the court of appeals concluded that three factors should be considered when determining whether to exempt a specific statute from the notice of claim requirements: (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of the notice of claim requirements found in Wis. Stat. § 893.80 would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which § 893.80 was enacted would be furthered by requiring that a notice of claim be filed. *Id.* at 625, 593 N.W.2d 822. Applying this framework, the *Town of Burke* court concluded that the municipal annexation procedures set forth in Wis. Stat. § 66.021 were exempt from the notice of claim requirements. *Id.* at 626, 593 N.W.2d 822.

The three factors articulated in *Town of Burke* have since become the accepted framework by which our appellate courts have considered exceptions to the notice of claim requirements found in Wis. Stat. § 893.80. *See Ecker Bros. v. Calumet Cnty.*, 2009 WI App 112, ¶ 6, 321 Wis. 2d 51, 772 N.W.2d 240; *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 7, 304 Wis. 2d 702, 738 N.W.2d 168; *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 9, 265 Wis. 2d 422, 665 N.W.2d 379. We find the *Town of Burke* test appropriate and therefore apply it to determine whether antitrust actions brought pursuant to Wis. Stat. § 133.18 are exempt from the notice of claim requirements found in § 893.80.

*E-Z Roll Off, LLC v. Cnty. of Oneida*, 335 Wis. 2d 720, ¶¶ 22-24.

Application of the three *Town of Burke* factors to plaintiff Blaska's claims readily demonstrates why this action does not qualify for the judicially created exemption from the notice and claims requirements in §§ 118.26 and 893.80.

## A. Specific Statutory Scheme

The first factor we consider is “whether there is a specific statutory scheme for which the plaintiff seeks exemption” from the notice of claim requirements found in Wis. Stat. § 893.80. *Town of Burke*, 225 Wis. 2d at 625, 593 N.W.2d 822. If a statute provides a specific statutory scheme that conflicts with the general intent behind the 120–day time limit provided in Wis. Stat. § 893.80, then the specific statutory scheme will take precedence. *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 625, 575 N.W.2d 712 (1998).

...

As illustrated in *Gillen*, our appellate courts have generally concluded that a specific statutory scheme conflicts with the notice of claim requirements \*737 found in Wis. Stat. § 893.80 when the specific statute contains a more restrictive limitations period than the 120–day notice of claim requirements. *See id.* at 821–22, 580 N.W.2d 628 (specific statute allowed immediate injunctive relief); *Auchinleck*, 200 Wis. 2d at 592, 547 N.W.2d 587 (specific statute allowed an action to be commenced within 20 days); *Town of Burke*, 225 Wis. 2d at 625, 593 N.W.2d 822 (specific statute required an action to be commenced within 90 days); *Little Sissabagama*, 208 Wis. 2d at 266, 559 N.W.2d 914 (specific statute required an action to be commenced within 90 days); *Oak Creek Citizen's Action Comm.*, 304 Wis. 2d at 709, 738 N.W.2d 168 (specific statute required clerk to take action within 15 days and common council to take action within 30 days).

*Id.* ¶¶ 25, 27.

The specific statutory scheme underpinning plaintiff’s action here is § 111.70 governing prohibited subjects of collective bargaining by the school district.<sup>9</sup> Section 111.70, in turn, is enforced under § 111.07. Nothing in that statute provides any more “restrictive limitations period than the 120-day notice of claim requirements,” nor is immediate injunctive relief specifically authorized. Indeed, the vast majority of the statute lays out the administrative remedy before the Wisconsin Employment Relations Commission, and the only urgency in the statute relates to petitions for enforcement of a Commission order. *See* Wis. Stat. § 111.07(11).

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<sup>9</sup> The general declaratory judgment and injunction statutes, §§ 806.04 and 812.01, *et seq.*, do not support Mr. Blaska’s claim for an exemption from the legislature’s notice and claims suit prerequisites. As noted above, our Supreme Court has explicitly held, “declaratory relief is not, by its nature, in conflict with providing governmental entities a 120–day period to review a claim,” *E-Z Roll Off, LLC v. County of Oneida*, 335 Wis. 2d 720, ¶ 28. The same is true for permanent injunctions, *see, e.g., Dixon ex rel. Nikolay v. Wisconsin Health Org. Ins. Corp.*, 237 Wis. 2d 149, 159 (2000).

The sole mention of a civil action such as Mr. Blaska's is contained in § 111.07(1):

Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but *nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.*

(Emphasis added). Section 111.07(1) can hardly be seen as imposing any time limitation at all, let alone one more restrictive than § 893.80. Thus, the first of the three Town of Burke factors provides no support for judicial exemption to the notice and claims requirements in § 893.80.

### B. Legislative Preference for Prompt Resolution

The second factor we consider is “whether enforcement of Wis. Stat. § 893.80 would hinder a legislative preference for a prompt resolution of the type of claim under consideration.” *Town of Burke*, 225 Wis. 2d at 625, 593 N.W.2d 822. We therefore examine whether the legislature has expressed a preference for prompt resolution of **[unfair labor practices, including prohibited collective bargaining]** actions pursuant to Wis. Stat. § **[111.07 and 111.70]** and, if so, whether applying the 120-day notice of claim requirements would somehow hinder that preference.

*E-Z Roll Off, LLC*, 335 Wis. 2d 720, ¶ 30 (substitution of relevant statutes and claims for relief in Mr. Blaska's action for *E-Z Roll Off's* antitrust statutes and claims highlighted in bold).

In *E-Z Roll Off*, the Supreme Court found that even a specific anti-trust statute, § 133.18(5), requiring that anti-trust actions “shall be expedited in every way and shall be heard at the earliest practicable date” did not trump the notice and claim requirements in § 893.80. *Id.* at 740. Here, both § 111.70 and § 111.07 are entirely silent regarding legislative preference for dispatch in unfair labor practices court actions, such as Mr. Blaska's. Indeed, by offering the option of an administrative enforcement proceeding as an alternative to “the pursuit of legal or equitable relief in courts of competent jurisdiction,” § 111.07(1) appears to expressly eschew a “preference for prompt resolution” of court claims under § 111.70 (4)(mb).

On the other hand, the specific requirement of § 118.26 that actions against school districts comply with § 893.80, unambiguously expresses the legislature's preference that a statutorily compliant notice and claim must precede any lawsuit against a school district by up to 120 days.

The second factor from *Town of Burke*, accordingly, offers no support for plaintiff's claim for exemption from § 893.80's notice and claims provisions.

### C. Furthering the Purposes of the Notice of Claim Statute

The third factor we consider is “whether the purpose for which § 893.80(1) was enacted would be \*741 furthered by requiring that a notice of claim be filed.” *Town of Burke*, 225 Wis. 2d at 625, 593 N.W.2d 822. We have previously held that the notice of claim statute serves two purposes: (1) to give governmental entities the opportunity to investigate and evaluate potential claims, and (2) to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶¶ 23, 28, 235 Wis. 2d 610, 612 N.W.2d 59.

*E-Z Roll Off, LLC v. Cnty. of Oneida*, 335 Wis. 2d 720, ¶ 34.

Although plaintiff may have a point that a pre-suit settlement was unlikely—perhaps even impossible since he seeks no money damages for his claims, only equitable relief which the school district cannot provide in a settlement—it does not follow that requiring plaintiff to adhere to the notice and claims requirements as a condition antecedent to proceeding here does not advance the legislature’s purpose in enacting § 118.26 and § 893.80.

As noted in the quote above, our Supreme Court has repeatedly stated that one of the legislative purposes underpinning § 893.80 is to provide governmental entities the opportunity to budget for litigation. Without a claim from plaintiff Blaska, defendant Madison Metropolitan School District was not provided this opportunity.<sup>10</sup> So even if some of the legislature’s purposes behind enacting § 893.80 are not furthered by requiring a notice and claims from Mr. Blaska, at least one clearly is. Accordingly, the third *Town of Burke* factor is, at best, a tie for plaintiff in the evaluation of his claim for an exemption from the pre-suit procedural requirements of § 118.26 and § 893.80.

Because two of the *Town of Burke* factors weigh against plaintiff’s claim that he is exempt from the notice and claims requirements, and the third cuts both ways, plaintiff’s contention that he falls within the narrow judicially-created exemption to the unambiguous requirements of § 893.80 cannot be sustained.

Having failed to satisfy § 118.26’s condition precedent for filing and maintaining this action, Mr. Blaska cannot proceed against the defendant Madison Metropolitan School District as a matter of law. Accordingly, his case against the School District is DISMISSED.

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<sup>10</sup> Again, WILL, Inc.’s May 15, 2015, letter was of little use for budgeting. Upon receiving it, should the school district have budgeted just enough to obtain a dismissal of a suit filed by WILL, Inc., which has no standing? Or should it have adopted a substantial budget for two damages class actions (one for teachers and one for taxpayers)? Or something in-between? If so, what? The letter provides no guidance.

### III. Plaintiff's Action for Declaratory and Injunctive Relief Cannot Proceed with Only Madison Teachers, Inc. as a Defendant

There are several reasons why dismissal of Madison Metropolitan School District as a defendant in this action also requires dismissal of this case against the remaining defendant, Madison Teachers, Inc.

First, this court may not issue a declaratory judgment with regard to the legality of a contract when one of the parties to the contract is not before the court. Here, the contracts at issue are between the Madison Metropolitan School District and Madison Teachers, Inc. The governing statute on declaratory judgments, in pertinent part, provides:

**11) Parties.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding.

Wis. Stat. § 806.04(11); *see also Rudolph v. Indian Hills Estates, Inc.*, 68 Wis. 2d 768, 773-74 (1975) (footnotes omitted):

We affirm the trial court holding that declaratory judgment does not here lie to effect an \*774 involuntary dissolution of the defendant corporation. Plaintiffs' complaint sought, via the route of declaratory judgment, ' . . . to have the corporate entity called Indian Hills Estates, Inc., dissolved. . . .' The trial court held that a determination of the validity of the defendant corporation's incorporation or right to exist ' . . . would be improper because it would purport to affect the rights of parties not before the court, such as the individual members of the defendant organization itself. . . .' We agree. The applicable statute provides that, where declaratory relief is sought, all persons shall be made parties who 'would be affected by the declaration.'<sup>13</sup> Our court has made clear that an action for declaratory relief ' . . . requires that all the interested parties shall be before the court.'<sup>14</sup>

It goes without saying that the Madison Metropolitan School District has an interest in any declaration regarding the legality of its labor contracts. This is especially true here because the statute upon which plaintiff bases his claim, by its own terms, regulates only the school district, not labor unions:

(mb) *Prohibited subjects of bargaining; general municipal employees.* **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: . . .

Wis. Stat. § 111.70(4)(mb).<sup>11</sup>

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<sup>11</sup> Section 111.70(1)(j) defines "municipal employer" to include school districts.

This last point brings us to the second reason why this action may not proceed without the School District as a party. This court may not enjoin the defendant Madison Teachers, Inc. under a statute that governs only the Madison Metropolitan School District.

Finally, even if the court could proceed with equitable claims against Madison Teachers, Inc. in the absence of the School District, declaratory relief would be a largely academic exercise, a fruitless endeavor. This is so because, under § 806.04(11), “no declaration may prejudice the right of persons not parties to the proceeding,” and therefore the School District would not be bound by any declaration from this court concerning its labor contracts.

Worded differently, declaring contractual rights against just Madison Teachers, Inc. would not terminate the controversy giving rise to this action. Thus, this court would exercise its discretion to decline declaratory relief under § 806.04(6):

**(6) Discretionary.** The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

For these reasons, plaintiff’s motion for summary judgment against Madison Teachers, Inc. is DENIED and the reciprocal summary judgment motion of Madison Teachers, Inc. is GRANTED, dismissing plaintiff’s claims against it with statutory costs.

Dated this \_\_\_\_\_ day of September, 2015.

BY THE COURT:

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Richard G. Niess  
Circuit Judge

cc: Attorney Richard Esenberg  
Attorney Sarah Zylstra  
Attorney Tamara Packard