COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT 2
APPEAL CASE NO. 2015AP1523

Vincent Milewski and Morganne MacDonald,
Plaintiffs-Appellants,

v.

Town of Dover; Board of Review for the Town of Dover, and Gardiner Appraisal Service, LLC, As Assessor for the Town of Dover,
Defendants-Respondents.

Appeal from the Circuit Court of Racine County
Honorable Phillip A. Koss Presiding
Case No. 14-CV-1482

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANTS VINCENT MILEWSKI AND MORGANNE MACDONALD

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INTRODUCTION

As both the United States and Wisconsin Supreme Courts have long recognized, "overriding respect for the sanctity of the home has been embedded in our traditions since the origins of the Republic." *State v. Ferguson*, 2009 WI 50, ¶17, 317 Wis. 2d 386, 767 N.W.2d 137, *quoting Payton v. New York*, 445 U.S. 573, 586 (1980). It is "axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. *Id.*, *citing State v. Richter*, 2000 WI 58, ¶28, 235 Wis. 2d 524, 612 N.W.2d 29.

The need to enforce regulations or impose taxes does not suspend this protection. In *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), the United States Supreme Court declared that warrantless administrative inspections of homes were impermissible under the Fourth Amendment. Nor may the state impose costs on persons for exercising their constitutionally protected freedoms. *See Dunn v. Blumstein*, 405 U.S. 330, 341-42 (1972) (government may not force individuals to choose between the "unconditional personal right" to travel and the right to vote) and cases cited at pp. 26-27, *infra*.

Yet Wisconsin law requires homeowners to submit to warrantless inspections as part of the property tax assessment process. If they refuse, they may not challenge the resulting assessment. Ever. In Wisconsin, the cost of insisting on the right to "be secure" in their homes, U.S. Const. amend. IV, is the loss of due process rights, U.S. Const. amend. XIV, and whatever taxes the government decides to impose.

STATEMENT OF ISSUES

Issue 1: Whether the combination of Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) (which together require property owners to permit interior inspections of homes or forfeit their right to challenge their assessment, first at the Board of Review hearing and then in court) is unconstitutional as applied to the Plaintiffs.

Circuit Court's Decision: The circuit court decided that these statutes are not unconstitutional as applied to the Plaintiffs.

Issue 2: Whether the Defendants were entitled as a matter of law to judgment ruling that they did not deprive the Plaintiffs of their constitutional rights in violation of 42 USC § 1983.

Circuit Court's Decision: The circuit court concluded that the Defendants did not deprive the Plaintiffs of their constitutional rights in

violation of 42 USC § 1983. The court ruled that the statutory prohibition on challenging an assessment was not unconstitutional, and therefore the Town of Dover and the Board of Review for the Town of Dover (collectively, "Town") did not violate the Plaintiffs' rights by enforcing those statutes. The court also ruled that Gardiner Appraisal Service, LLC ("Gardiner") did not retaliate against the Plaintiffs for asserting their constitutional rights or assess their property in a discriminatory manner in violation of the Equal Protection Clause.

Issue 3: Whether Gardiner was entitled as a matter of law to judgment ruling that it did not violate Wis. Stat. § 70.501 by intentionally over-assessing the plaintiffs' property or failing to perform a legal duty.

Circuit Court's Decision: The circuit court concluded that Gardiner did not violate § 70.501.

STATEMENT ON ORAL ARGUMENT

The Court should hear oral argument in this case. Given the complexity and novelty of the issues presented, briefing may be insufficient under Wis. Stat. (Rule) 809.22(2)(b) to "fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side."

STATEMENT ON PUBLICATION

The Court should publish the decision in this matter under the considerations of Wis. Stat. (Rule) 809.23(1)(a). It is likely to announce a new rule of law on whether Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) can constitutionally lock a property owner out of challenging their property tax assessments. It is likely to apply established rules of warrantless home searches under the Fourth Amendment to the novel situation of property tax assessments. Finally, the insistence of property appraisers in inspecting private residences and the inability of property owners to challenge their taxes are matters of substantial and continuing public interest.

STATEMENT OF THE CASE

This case, broadly speaking, presents two issues. The first is whether the government can constitutionally prohibit property owners from challenging their tax assessments if they do not allow an assessor to enter and inspect their home. The second is whether, as a factual matter, the assessor here performed an improper assessment of the Plaintiffs' home.

The Plaintiffs, Town of Dover residents, refused to allow an assessor inside their house to inspect it. When their home was reassessed, it and three other properties in the same subdivision that had not had interior

inspections all had their assessments raised. *Every other property whose owners all had permitted a warrantless entry into their homes had a lowered assessment*. When the Plaintiffs attempted to challenge their assessment at the BOR hearing, they were not permitted to do so because they had refused the interior inspection.

The Plaintiffs then filed this lawsuit. The Complaint raises five claims. Claim 1 seeks a declaratory judgment that the statutes prohibiting them from challenging their assessment before the BOR or in court are unconstitutional as applied to them. Claim 2 is a 42 USC § 1983 claim against the Defendants, alleging that Gardiner violated their Fourth and Fourteenth Amendment rights by raising their assessment in retaliation and by assessing their property in a discriminatory manner, and alleging that the Town violated their Fourth and Fourteenth Amendment rights by refusing to permit them to challenge their assessment. Claim 3 seeks a declaratory judgment that their assessment violates the Uniformity Clause of the Wisconsin Constitution. Claim 4 is a claim for excessive assessment under Wis. Stat. § 74.37(3)(d). Claim 5 seeks damages against Gardiner under § 70.503 for a fraudulent valuation in violation of § 70.501.

The Plaintiffs moved for partial summary judgment declaring that the Town and its Board of Review violated the Plaintiffs' rights by failing to permit them to challenge their property assessment, that Sections 70.47(7)(aa) and 74.37(4)(a) are unconstitutional as applied to the Plaintiffs, and that the Town is liable to the Plaintiffs under 42 USC 1983. The Plaintiffs believed factual issues precluded summary judgment on all of their claims against Gardiner and Claims 3 and 4 against the Town. Furthermore, Claims 3 and 4 are dependent on the threshold issue presented in Claims 1 and 2 of whether the Plaintiffs can even challenge their tax assessment in court.

Gardiner moved for summary judgment dismissing all claims against it. The Town moved for Judgment on the Pleadings and/or Summary Judgment asking the entire Complaint to be dismissed.

On May 6, 2015, the circuit court, the Honorable Phillip A. Koss, presiding on special assignment,[1] held a hearing on the parties' motions. After taking argument, the court issued an oral ruling granting the Defendants' motions and denying the Plaintiffs' motion. The court permitted the Plaintiffs to amend the Complaint for the sole purpose of

[1] The case was assigned to Walworth County Circuit Court Judge Koss after all Racine County judges recused themselves from the matter.

adding the 2014 tax year to the case. On June 11, 2015, the Circuit Court entered an order denying the Plaintiffs' motion, granting the Town's "motion for summary judgment and/or judgment on the pleadings,"[2] and granting Gardiner's motion for summary judgment. On July 24, 2015, the Plaintiffs filed a timely notice of appeal.

STATEMENT OF FACTS

All facts are taken from the affidavits filed in the circuit court and admitted allegations in the Amended Complaint, and are undisputed except as noted.

The Plaintiffs, husband and wife, own a home at 1232 Linden Lane (the "Property"), which is located in Lorimar Estates subdivision within the Town of Dover. (R. 41:2, 4; R. 43:2, 4; R. 42:2; R. 25:1.) Prior to 2013, the Property was assessed at $273,900, with an estimated fair market value of $277,761. (R. 35:3-4; R. 26:22.)

In 2012, the Town decided to perform a new assessment of all real property within the Town for the 2013 tax year. (R. 41:3; R. 42:3; R. 43:3;

[2] The circuit court was not clear on whether it was granting summary judgment or judgment on the pleadings to the Town. Given that the Town did not submit any evidence outside of the pleadings, and the Plaintiffs did not submit any evidence in response to the Town's motion, the lower court's ruling should be considered a judgment on the pleadings. The distinction is probably not relevant, though, because none of the facts relevant to the Town's motion are disputed.

R. 35:3-4; R. 26:7-9.) The Town had previously appointed Gardiner as its "assessor"[3] as that term is used in Wis. Stat. § 70.05 and the rest of chapter 70. (R. 41:2; R. 43:2; R. 26:3-6, 12-14, 25-31.) On July 9, 2012, the Town signed a contract with Gardiner to perform "an appraisal of all specified real property parcels within the Town of Dover." (R. 26:7-9.) The Town had a policy of requiring interior inspections as part of its assessments,[4] as expressed in the contracts between the Town and Gardiner. (*Id.*, 4, 8, 12.)

On or about August 14, 2013, the Plaintiffs received in the mail a notice from "Gardiner Appraisal Service, LLC, Assessors," indicating that "An assessor will stop to view your property on Tues, Aug 20 at 6:10 pm." (*Id.*, 15.) On August 20, 2013, when an employee of Gardiner, Bruce Gardiner, arrived at the Property, Ms. MacDonald offered to open the gate to their yard and told him that he was welcome to view the Property from the exterior, but would not be allowed inside the house. (R. 24:1.) When Mr. Gardiner asked to reschedule a time to inspect the interior of the house,

[3] Gardiner disputes that it is the appointed assessor, claiming instead to be "expert help" hired by the Town. (R. 31:4.) However, all the Record evidence demonstrates Gardiner was the appointed assessor. Gardiner presented no evidence supporting its claim that it was merely "expert help." The circuit court did not rule explicitly on this issue, although it concluded that Gardiner was acting under color of law for purposes of 42 USC § 1983. (R. 47:31, 42 (App. 104, 115).)

[4] Gardiner disputes this fact (R. 31:4) without providing any contrary evidence. The Town admits it. (R. 43:8-9.)

Ms. MacDonald told him that he could reschedule a visit to view the exterior of the house, but would not be allowed inside their home. (*Id.*) Mr. Gardiner left without accepting Ms. MacDonald's offer to enter into the yard and view the exterior of the property, and without questioning her about the interior of her home. (*Id.* at 2; R. 26:18; R. 26:38; R. 26:40-41.)

On October 4, 2013, Gardiner sent the Plaintiffs a certified letter indicating that it had not "viewed the interior of your buildings" and asking the Plaintiffs to schedule a time for viewing. (R. 26:16.) The letter noted that a failure to respond would be considered a refusal, and result in the loss of the Plaintiffs' ability to appear before the Board of Review. (*Id.*) Gardiner did not schedule another viewing (R. 41:3; R. 42:3; R. 25:2; R. 24:2), and at no time interviewed the Plaintiffs or otherwise sought information about the interior of the Property from the Plaintiffs (R. 25:2; R. 24:2; R. 26:41).

Gardiner ultimately valued the Property at $307,100, a 12.12% increase from the previous assessment of $273,900 and a 10.56% increase from the previous year's estimated fair market value of $277,761. (R. 26:19-20, 22.)

The parties dispute the basis of this valuation. In an affidavit, Gregory Gardiner (certified assessor, current employee and former manager/owner/member of Gardiner) stated that without an interior inspection, he could not accurately determine the Property's obsolescence and could not verify whether a remodeling project or other improvement had occurred since the last assessment nine years earlier. (R. 29:4.) Mr. Gardiner listed six considerations he based the new valuation on:

> (a) the possibility of remodeling over a nine (9) year period which was not disclosed and could not be verified; (b) an inability to determine if the effective age of the home increased or decreased; (c) reasonable assumption that homes in which no inspection is permitted will have less increase in effective age than average; (d) that it is not fair assume that there have been no improvements for any home where access has been denied; (e) that assessed values did increase in 2013 for many homes in the Town of Dover and the overall assessed value of improvements increased in 2013 over the prior year; and (f) a thirteen percent increase in value from 2004 to 2013 is not uncommon.

(*Id.*, 4-5.) Mr. Gardiner also stated that "Gardiner used its best professional judgment as to the assessed value of the Plaintiffs' home in 2013" and that "the increase was reasonable" based on the circumstances. (*Id.*, 5.)

The Plaintiffs, in contrast, allege that the valuation was done in retaliation for their refusal to permit an interior inspection and/or as a way

of coercing the Plaintiffs to permit such an inspection. In 2004, when Gardiner was doing a similar revaluation, the Plaintiffs initially refused to permit interior inspection. (R. 26:25-27.) Gardiner then increased the valuation of their Property by approximately 28%. (R. 25:2.) The parties dispute the reason for this increase. Mr. Milewski remembers being told by a representative of Gardiner that it was based on an assumption they had finished their basement. (*Id.*) Linda Gardiner, an employee and member of Gardiner, says Gardiner never made such a statement but believes Gardiner may have stated that when they are denied interior access, they consider the possibility that interior improvements were done as part of the valuation. (R. 32:2.) Mr. Milewski went to the open book session to discuss the valuation, but was told that he would be unable to challenge the valuation until they permitted an interior inspection of their house. (*Id.*, 3; R. 25:2.) The Plaintiffs eventually acquiesced to Gardiner's demand for an interior inspection, and their valuation was lowered. (R. 25:2.)

Suspecting that in 2013 Gardiner had again retaliated against them for refusing to permit an interior inspection, Mr. Milewski went to the Town's open book session and obtained the changed valuations for the Lorimar Estate parcels, comparing those valuations to the previous years'

based on information from Racine County's Geographic Information Systems online site. (*Id.*, 3.) Of 43 parcels in the subdivision, only four (including the Property) had not been subject to an internal inspection by Gardiner. (*Id.*, 3, 10-13; R. 26:23-24, 40.) Gardiner increase the "fair market" valuation of those four parcels, at an average rate of 10.01%; Gardiner decreased the "fair market" values of the 39 remaining parcels in the subdivision, at an average rate of 5.81%. (R. 25:3, 10 (App. 127).)

Two of the four parcels whose interiors had not been inspected were later inspected by Gardiner, which then lowered their valuations consistent with other parcels in the subdivision. (R. 26:23-24, 40.) One parcel, located at 24219 Lotus, decreased from $257,700 to $200,400, or 22.24%. (*Compare* R. 25:10 (App. 127) *with* R. 38:3 (App. 128).) The other, located at 1248 Larkspur, decreased from $270,300 to $235,600, or 12.84%. (*Compare* R. 25:10 (App. 128) *with* R. 38:3 (App. 128).)

When comparing properties using the 2004 assessment (as Gardiner suggests), the same pattern appears. That data still shows that Gardiner raised the four properties that did not receive interior inspections by substantial and similar amounts (10.65%, 11.65%, 12.12%, and 11.83%). Gardiner decreased the valuations for the two properties whose owners

relented and permitted an interior inspection (22.24% and 12.84%). That data still shows that homeowners who permitted interior inspections had their assessments lowered. Of the 37 owners who consented, only one had their assessment increased, by a mere 0.51%. Overall, Gardiner decreased those 37 properties' valuations by an average of 4.72% from their previous assessments. (R. 38:3 (App. 128).)

The Plaintiffs also allege that Gardiner's valuation of the Property was arbitrary and reflects a desire to "punish" them for standing on their Fourth Amendment rights. Gardiner failed to present any evidence of calculations used to arrive at the valuation, and Gardiner's records for the Property show none. Gardiner's "Valuation Detail" for the Property in 2004 contains a list of a number of valuable features and assigns each a value, which when added up provide the total value of the residence. (R. 35:4.) The 2013 valuation contains the same set of features, but no corresponding value. It merely states a "market value" for the residence of $261,000, with no explanation. (*Id.*, 3.)

The Plaintiffs also dispute Gardiner's claim that it valued the Property as required by the Wisconsin Property Assessment Manual ("WPAM"), further supporting an inference that the assessment was

retaliatory. Gardiner did not inspect the exterior of the Property. (R. 24:1-2; R. 26:18, 36-38.) Had Gardiner done so it would have discovered noticeable deterioration, including rotting fascia and soffits, split and deteriorating cedar siding, and algae staining on the roof. (R. 36:1.) Gardiner's records do not indicate it ever reviewed whether any permits for renovations to the Property had been granted. Had Gardiner done so, it would have learned that no permits had been issued since the 2004 assessment. (R. 36:2.) Finally, Gardiner did not interview the Plaintiffs. (R. 25:2; R. 24:2; R. 26:38.) Had Gardiner interviewed the Plaintiffs, it would have discovered they had made no improvements to the Property since the last assessment, that windows and patio doors were in need of replacement, and that they performed only routine maintenance on the house. (R. 36:1-2.)

On or about November 14, 2013, the Plaintiffs filed an Objection Form for Real Property Assessment with the Town. (R. 25:3, 14; R. 26:17.) On November 25, 2013, Mr. Milewski appeared at the Dover Board of Review ("BOR") hearing, attempting to object to his assessment. (R. 25:3.) The BOR, after substantial discussion, voted unanimously to refuse him the right to appear and contest his assessment, concluding that,

under Wis. Stat. § 70.47(7)(aa), he had "refused a reasonable request by certified mail of the assessor to view [his] property." (*Id.*, 4.) At the BOR hearing, Mr. Milewski argued that § 70.47(7)(aa) did not bar him from challenging his assessment because (1) the request to view the interior of the Property was per se unreasonable; and (2) he had not refused the assessor the ability to view the Property from the exterior, and the statute does not require an interior view. (*Id*.) The BOR rejected those arguments and refused to allow him to appear and contest his assessment. (*Id.*; R. 41:4-5; R. 42:4; R. 43:5; R. 26:17.) An internal Town memorandum indicates this was done on the advice of the Department of Revenue. (R. 26:21.)

The Plaintiffs paid the taxes due on the Property for Tax Year 2013 in two installments, on December 31, 2013 and January 30, 2014. (R. 25:4; R. 26:34; R. 41:5; R: 43:5.) On January 30, 2014, the Plaintiffs served on the Town Clerk a Notice of Claim and Claim under Wis. Stat. § 74.37 against the Town, alleging that their assessment was excessive and violated their Fourth Amendment rights. (R. 25:4, 15; R. 41:5; R. 43:5.) The Town of Dover did not deny or allow the Claim within 90 days after the Claim was filed. (R. 41:5; R. 43:5.)

The Plaintiffs paid the taxes due on the Property for Tax Year 2014 on December 22, 2014. (R. 41:5; R: 43:5.) On January 29, 2015, the Plaintiffs served on the Town Clerk a Notice of Claim and Claim under Wis. Stat. § 74.37 against the Town, alleging that their assessment was excessive and violated their Fourth Amendment rights. (R. 41:5, 19; R. 43:5.) The Town of Dover did not deny or allow the Claim within 90 days after the Claim was filed. (R. 41:5; R. 43:5.)

ARGUMENT

Standard of Review

"Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Kruschke v. City of New Richmond*, 157 Wis. 2d 167, 169, 458 N.W.2d 832 (Ct. App. 1990). "Summary judgment should not be granted unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy." *Waters v. U.S. Fidelity & Guar. Co.*, 124 Wis. 2d 275, 279, 369 N.W.2d 755 (Ct. App. 1985). The court of appeals reviews a grant of summary judgment *de novo*. *Post v. Schwall*, 157 Wis. 2d 652, 656, 460 N.W.2d 794 (Ct. App. 1990).

The constitutionality of a statute is a question of law that is reviewed *de novo*. *Wis. Medical Soc'y v. Morgan*, 2010 WI 94, ¶36, 328 Wis. 2d 469, 787 N.W.2d 22. The interpretation and application of a statute is question of law reviewed *de novo*. *Tannler v. DHSS*, 211 Wis. 2d 179, 183, 564 N.W.2d 735 (1997).

I) THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT WIS. STAT. § 70.47(7)(aa) AND § 74.37(4)(a) COULD CONSTITUTIONALLY BE APPLIED TO THE PLAINTIFFS

The Plaintiffs alleged that Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) are unconstitutional as applied to them, because together they deprive them of property without due process of law and punish them for exercising their Fourth Amendment rights. The circuit court ruled as a matter of law that the statutes were constitutional.

Property owners have the right to formally object to their assessments before the local board of review. Wis. Stat. § 70.47(7). However, "[n]o person shall be allowed to appear before the board of review, to testify to the board by telephone or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property." § 70.47(7)(aa).

Once the board of review process has been completed, a property owner has three options for continuing to challenge their assessment: (1) an appeal to the Department of Revenue, § 70.85 (whose decision can be reviewed under *certiorari* by a circuit court); (2) *certiorari* review of the board of review decision to a circuit court, § 70.47(13); or (3) *de novo* claim on excessive assessment to a circuit court, § 74.37. *See Metropolitan Assocs. v. City of Milwaukee*, 2011 WI 20, ¶¶8-10 & n. 8, 332 Wis. 2d 85, 796 N.W.2d 717. To invoke any of those options, the property owner must first have complied with the board of review requirements. § 70.85(2) ("A complaint under this section may be filed only if the taxpayer has contested the assessment of the property for that year under s. 70.47."); § 70.47(13) ("Except as provided in this subsection and in ss. 70.85 and 74.37, appeal from the determination of the board of review shall be by an action for certiorari . . . ."); § 74.37(4)(a) ("No claim or action for an excessive assessment may be brought under this section unless the procedures for objecting to assessments under s. 70.47, except under 70.47(13), have been complied with.").

In summary, property owners who have declined to permit the assessor to "view" their property cannot challenge their assessment before

the board of review, and if they have not done that, they have no right to a day in court. Thus, Sections 70.47(7)(aa) and 74.37(4)(a) together deprive the Plaintiffs of any right to challenge their assessment and obtain a refund of over-paid taxes. The combination of the two statutes is unconstitutional as applied to the Plaintiffs for two reasons. First, they punish the Plaintiffs for exercising their Fourth Amendment right to be free from unreasonable searches. Second, they deprive the Plaintiffs of property without due process of law.

A) Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) Are Unconstitutional as Applied to the Plaintiffs

The circuit court concluded that Sections 70.47(7)(aa) and 74.37(4)(a) are not unconstitutional as applied to the Plaintiffs. (*See* R. 47:41-43 (App. 114-16).) The court ruled that because the Plaintiffs' home was not searched, there was no Fourth Amendment violation. (*Id.*, 18, 32, 36, 43 (App. 105, 109, 116.) The court ruled that there was no deprivation of property without due process of law largely because it believed the Plaintiffs voluntarily gave up their appeal rights by refusing an interior inspection when they were aware of the consequences. (*Id.*, 39, 42 (App. 112, 115).) The court also addressed several government interests it

concluded were served by mandating interior inspections: collecting taxes for government purposes, (*id.*, 39 (App. 112)), having fair and accurate taxes, (*id.*, 43 (App. 116)), and achieving uniform taxes, (*id.*, 38-39 (App. 111-12)). The court concluded that an adequate alternative remedy was available in Wis. Stat. § 70.503, which permits property owners to recover damages from assessors in some circumstances. (*Id.*, 41 (App. 114).) The circuit court erred as to both the Fourth Amendment and due process claims.

1) Punishing Property Owners Who Refuse to Consent to a Search of their Homes Violates their Fourth Amendment Rights

The circuit court concluded that the statutes as applied to the Plaintiffs did not violate their Fourth Amendment rights, solely because the Plaintiffs' property was not searched. (R. 47:18, 32-33, 36, 42 (App. 105-06, 109, 115).) This was plain error. A constitutional claim can be premised on punishment for exercise of a constitutional right. This is most commonly seen in criminal cases, *see, e.g.*, *Griffin v. California*, 380 U.S. 609, 614 (1965) (prosecutors cannot ask jury to draw a negative inference from the exercise of the Fifth Amendment right to remain silent), and First Amendment cases, *see e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)

(government may not retaliate because of a person's speech). But it applies to Fourth Amendment cases as well. *See, e.g.*, *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) (government may not punish a person for refusing to permit an administrative inspection of his home). The state could not, for example, impose a tax on persons who refused to permit a warrantless search of their home. *See Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218, 1230-31 (N.D. Ill. 1998) (law imposing $60 "fee" for obtaining a warrant if owner refused to consent declared unconstitutional).

The Fourth Amendment to the United States Constitution states that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The rights protected by the Fourth Amendment have been incorporated against the states via the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). Furthermore, Article I, Section 11 of the Wisconsin Constitution reads identically, save one punctuation change, and Wisconsin courts ordinarily "construe[] the protections of these provisions coextensively." *State v. Artic*, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430.

The United States Supreme Court has made clear that "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 587 (1980). "[T]he Fourth Amendment," the Court has held, "has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590. Homeowners therefore have a constitutional right to refuse to consent to a government search of their property, and once refused, the government cannot enter without obtaining a warrant unless faced with an emergency situation. *See Donovan v. Dewey*, 452 U.S. 594, 598, n. 6 (1981) ("Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant.").

The right to be free of warrantless searches of one's home is not limited to those accused of committing a crime. *Camara*, 387 U.S. at 530-31 (it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior"). Administrative searches, no less than searches for evidence of a crime, "are significant intrusions upon

the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Id.* at 534.

In *Camara*, municipal inspectors demanded entry without a warrant into a private home in order to inspect the premises for possible violations of San Francisco's building code. *Id.* at 525-26. The renter who resided in the home refused to permit entry, and he was charged with a misdemeanor for violating a city ordinance authorizing city employees "to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." *Id.* at 526. The court found the ordinance unconstitutional because no government interest justified the warrantless, non-emergency search. *Id.* at 534. The Court "therefore conclude[d] that [the renter] had a constitutional right to insist that the inspectors obtain a warrant to search and that [he] may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540. Even though the Court concluded that inspections of all homes in an area without probable cause to believe a violation existed was a

"reasonable" way to ensure compliance with building codes, they still could not be done without a warrant. *Id.* at 533-38.

Lower courts have repeatedly held that laws requiring residential property owners to consent to warrantless inspections are unconstitutional under *Camara*. *See, e.g.*, *Brower v. Vill. of Bolingbrook*, 735 F. Supp. 768, 777 (N.D. Ill. 1990); *Hometown Co-op. Apartments v. City of Hometown*, 495 F. Supp. 55, 60 (N.D. Ill. 1980); *State v. Finnell*, 685 N.E.2d 1267, 1271 (Ohio Ct. App. 1996); *Sokolov v. Vill. of Freeport*, 420 N.E.2d 55, 58 (N.Y. 1981); *Pashcow v. Town of Babylon*, 410 N.Y.S.2d 192, 193 (N.Y. Sup. Ct. 1976); *Wilson v. Cincinnati*, 346 N.E.2d 666, 671 (Ohio 1976). Laws that required a warrant first, on the other hand, have been upheld. *Mann v. Calumet City, Ill.*, 588 F.3d 949, 951 (7th Cir. 2009); *Tobin v. City of Peoria*, 939 F. Supp. 628, 634 (C.D. Ill. 1996); *Hometown Co-op. Apartments v. City of Hometown*, 515 F. Supp. 502, 504 (N.D. Ill. 1981); *but see Crook v. City of Madison*, 168 So. 3d 930, ¶25 (Miss. 2015) (finding administrative inspections unconstitutional because a warrant could be based on terms of the lease instead of probable cause).

Even where a proper warrant procedure is utilized, a law is still unconstitutional if it punishes or imposes a burden on homeowners for

insisting that the government obtain a warrant. *See Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 902-03 (N.D. Tex. 2005) (unconstitutional law required city to obtain a warrant if the owner did not consent, but imposed criminal penalties on the failure to consent); *Black*, 20 F. Supp. 2d at 1230-31 (unconstitutional law imposed $60 "fee" for obtaining a warrant if owner refused to consent).

At least one court has held *Camara* applicable in the context of property tax assessments. *See Schlesinger v. Town of Ramapo*, 807 N.Y.S.2d 865, 11 Misc. 3d 697 (S. Ct. Rockland Co., NY 2006). In *Schlesinger*, the government sought a court order commanding the property owner to permit an interior inspection in order to perform a complete market appraisal. 11 Misc. 3d at 698. Under the circumstances of the case, the court denied the inspection – a great deal of time had passed from the refusal and the appraiser had many other tools at its disposal in order to obtain information about the property's interior. *Id.* at 700-01. While the posture of that case is significantly different than here, *Schlesinger* does demonstrate that the rule of *Camara* – warrantless administrative searches are not permitted – is applicable to the government's desire to inspect the interior of a home for assessment purposes.

That is not surprising. If a warrant is required before looking for health and safety violations that can be detected in no other way, then it must certainly be required before looking for interior improvements that can be detected in much less intrusive ways such as by reviewing building permits or interviewing homeowners. *See infra*, Section II.B.2.

Completely banning the Plaintiffs from challenging their assessment is unconstitutional. That the Plaintiffs are being penalized at a lesser degree than criminal prosecution for insisting on their constitutional freedom does not matter. "'It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . Constitutional rights would be of little value if they could be . . . indirectly denied.'" *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)). *Dunn* held that a year's residency requirement to vote was an unconstitutional punishment levied both on the right to vote and the right to travel. *Id.* at 340-41, 60. *Harman* held that individuals may not be punished by having to complete and file a burdensome certificate for exercising their right to vote without paying a poll tax. 380 U.S. at 542-44. Even a $60 fee is too much to

impose on the exercise of the Fourth Amendment right to refuse to consent to a search. *Black, supra*.

Conditioning a benefit, or imposing a penalty, for the exercise of constitutional rights constitutes an "unconstitutional condition" and runs afoul of a large body of precedent. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not condition privilege of unemployment compensation on relinquishment of First Amendment right to refuse to work on the Sabbath); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) (government may not condition privilege of cheaper postage on relinquishment of First Amendment right of free speech); *Lawson v. Housing Auth. of City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605 (1955) (city may not condition privilege of subsidized housing on relinquishment of First Amendment right of association with "subversive" organizations).

Where the burden placed on homeowners who insist on their Fourth Amendment rights is the complete forfeiture of their due process rights, such a law must be unconstitutional. Section 70.47(7)(aa) states that "[n]o person shall be allowed to appear before the board of review, to testify to the board by telephone or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by

certified mail of the assessor to view such property." This Section punishes citizens who exercise their constitutional right to refuse to consent to a government search of their home. It punishes them initially by eliminating their first, simplest, and cheapest method of challenging their property tax assessment. They cannot present the BOR with any evidence of recent sales or the assessments of comparable properties. No matter how arbitrary, capricious, erroneous, or even intentionally punitive and discriminatory the assessment might be, a property owner cannot challenge the assessment before the BOR.

And this punishment extends far beyond the denial of access to an administrative proceeding before the BOR. If property owners like the Plaintiffs are not permitted to appear before the BOR, they lose the right to challenge their assessment in any other way. Section 74.37(4)(a) prohibits such a property owner from bringing a *de novo* action for excessive assessment. Section 70.85(2) prohibits such a property owner from bringing a complaint to the Department of Revenue. *Certiorari* review under § 70.47(13) requires there to be a decision of the board of review for the court to review. All of these avenues of relief are unavailable to property owners who exercise their Fourth Amendment right to deny the

government entry into their home without a warrant. They cannot appear before the BOR and they have no day in court.

Like the renter in *Camara*, the Plaintiffs exercised their Fourth Amendment rights by refusing to permit Gardiner to search their home without a warrant. The BOR prohibited them from challenging their unlawful assessment under § 70.47(7)(aa). The circuit court prohibited them from challenging their assessment in court. With that effect, Sections 70.47(7)(aa) and 74.37(4)(a) are unconstitutional as applied to the Plaintiffs because those sections punish them for exercising their Fourth Amendment right to refuse to consent to a search of their home. This Court should conclude that their prohibitions are unconstitutional, reverse the lower court, and permit the Plaintiffs to proceed on their § 74.37 claim for excessive assessment.

2) Depriving Property Owners of the Opportunity to Challenge their Property Tax Assessment Deprives Them of Property Without Due Process of Law

The United States Constitution mandates that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty

and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1. The Wisconsin Supreme Court interpreted this clause as a protection of due process and has held that "[w]hile the language used in the two constitutions is not identical . . . the two provide identical procedural due process protections." *County of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

Meaningful access to the courts is a fundamental due process right. *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996). In *Penterman v. Wisconsin Electric Power Co.*, 211 Wis. 2d 458, 473-74, 565 N.W.2d 521 (1997), the Wisconsin Supreme Court described the right of access to the courts as follows:

> It entitles the individual to a fair opportunity to present his or her claim. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 ([7th Cir.] 1984) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). Such a right exists where the claim has a "reasonable basis in fact or law." *Bell*, 746 F.2d at 1261 (citing *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)). Judicial access must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 1495, 52 L. Ed. 2d 72 (1977).

It is therefore unconstitutional to deprive taxpayers of the opportunity to challenge their tax assessments. The Town's excessive

taxation of the Plaintiffs' Property has deprived them of their property. *See McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990) ("[E]xaction of a tax constitutions a deprivation of property."). Due process requires that they have a "fair opportunity" to receive "adequate, effective, and meaningful" access to the courts to argue that the assessment of their Property was improper.

Section 70.47(7)(aa), combined with Section 74.37(4)(a) and the other statutes requiring completion of the board of review process before a tax challenge may be brought to court, deprive the Plaintiffs of that fair opportunity. Section 70.47(7)(aa), as applied by the Defendants, subjects the Plaintiffs to a deprivation – an increased assessment resulting in higher taxes – without *any* opportunity to challenge it.

The U.S. Supreme Court has made it clear that state governments must at least provide a post-deprivation remedy for the recovery of taxes unlawfully levied. *McKesson*, 496 U.S. at 51. Property owners cannot be forced to pay taxes with no method of challenging the legality of that tax:

> To satisfy the requirements of the Due Process Clause . . . [a] State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."

McKesson, 496 U.S. at 39 (citation and footnote omitted).

That the Plaintiffs could have kept their due process rights if they had submitted to a warrantless search of their home does not remedy the problem. Section 70.47(7)(aa), as interpreted by the circuit court, requires property owners to give up their Fourth Amendment rights in order to assert their Fourteenth. It is like a law that would require criminal defendants to waive all challenges to the admissibility of evidence in order to secure a trial. In the civil context, it is like a law that would not only permit a negative inference for a civil defendant's invocation of her Fifth Amendment rights but mandate judgment against her. Such a "Sophie's choice" between fundamental rights is impermissible. *See Dunn*, 405 U.S. at 341-42 (government may not force individuals to choose between the "unconditional personal right" to travel and the right to vote). As noted above, conditioning a benefit, or imposing a penalty, for the exercise of constitutional rights constitutes an "unconstitutional condition." *See supra*, p. 27.

The circuit court thought that requiring interior inspections served the government interest of having accurate and fair taxes, and that letting people opt out of interior inspections hurts the uniformity of assessment

required by the Wisconsin Constitution. (R. 47:38-39, 43 (App. 111-12).) But by that logic, this interest in administrative efficiency and ease could justify requiring the forfeiture of Fourth Amendment rights in many contexts. It will always be easier to achieve regulatory objectives – to enforce zoning laws and health and safety rules – if the government can enter a home without a warrant.

But *McKesson Corp.* leaves no room for the possibility that government could ever exact a tax without providing for a post-deprivation remedy to seek a refund. While the adequacy of a post-deprivation remedy can be questioned, *see, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing a three-part test to determine what procedures are required when there has been a deprivation of life, liberty, or property), *McKesson Corp.* establishes that the minimum a state must provide for the deprivation of property via taxation is the "opportunity to challenge the accuracy and legal validity of their tax obligation" and obtain a "clear and certain remedy" after the tax has been collected. *McKesson*, 496 U.S. at 39. Wisconsin fails to do that.

The circuit court viewed Wis. Stat. § 70.503 as an adequate remedy to address over-assessment. (R. 47:41 (App. 114).) It is not. Section

70.503 creates a private cause of action to seek damages against an assessor caused by an intentional over-assessment or the assessor's failure to perform a legally-required duty. *See infra,* Section II.B. But it does not provide a method to actually change the assessment going forward; that can only be done via a § 74.37 action for excessive assessment or *certiorari* review of a board of review or Department of Revenue determination. Nor can the owner obtain the "clear and certain remedy" of a tax refund from the municipality. More importantly, that avenue is only available when the assessor misbehaves. What if the assessor just makes an honest mistake and the assessment is too high? That property owner cannot use § 70.503 to seek a remedy.

Sections 70.47(7)(aa) and 74.37(4)(a) together violate the Plaintiffs' right to due process of law. In fact, they leave them with no meaningful process at all. This Court should conclude that their prohibitions are unconstitutional, reverse the lower court, and permit the Plaintiffs to proceed on their § 74.37 claim for excessive assessment.

B) By Refusing to Permit the Plaintiffs to Challenge their Assessment at the Board of Review, the Town Deprived the Plaintiffs of their Constitutional Rights in Violation of 42 USC § 1983

If the circuit court was correct that Sections 70.47(7)(aa) and 74.37(4)(a) are not unconstitutional as applied to the Plaintiffs, it was also correct that the Town did not deprive the Plaintiffs of their constitutional rights in violation of 42 USC § 1983 (whether Gardiner did so is dependent on other facts and law). But if this Court concludes the circuit court erred in its constitutional analysis, the undisputed facts show that the Town did in fact violate § 1983.

Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." A municipality can be a "person" for purposes of § 1983 and will be liable if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated." *Monell v. Dep't of Soc. Services of City of New York*, 536 U.S. 658, 690 (1978). A municipality can also be liable "for constitutional

deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Id.* at 691.

The Town has a policy or custom of requiring assessors to view the interiors of the properties they assess. The Town required Gardiner, by contracts signed by the Town Chairman and the Town Clerk, to perform interior inspections of properties during its assessments.

Enforcement of that policy deprived the Plaintiffs of their constitutional rights to be free from unreasonable search and seizure and due process of law. If the Town had not insisted on interior inspections without a warrant, the Plaintiffs would not have had to refuse such an inspection, and they would have been permitted to challenge their assessment at the BOR meeting and later in court. Instead, they were punished for exercising their Fourth Amendment rights and deprived of the right to challenge their assessment in court.

The BOR has a policy or custom of not permitting property owners who refuse interior inspections to challenge their assessments. This is evidenced by the BOR's decisions, in 2013 and in 2004 (the last time a

town-wide assessment was performed) to refuse to permit the Plaintiffs to challenge their assessment for those reasons.

Enforcement of that policy deprived the Plaintiffs of their constitutional rights to be free from unreasonable search and seizure and due process of law. Absent that policy, the Plaintiffs would have been permitted to challenge their assessment at the BOR meeting and later in court. Instead, they were punished for exercising their Fourth Amendment rights and deprived of the right to challenge their assessment in court.

Therefore, the Town and the BOR deprived the Plaintiffs of their constitutional rights in violation of 42 USC § 1983. This Court should reverse the lower court and direct it to enter judgment declaring so and permitting the Plaintiffs to recover damages and attorney fees as permitted by law.

II) THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT GARDINER WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW

The circuit court granted summary judgment to Gardiner, concluding that undisputed facts entitled Gardiner to judgment as a matter of law. Specifically, the court concluded that Gardiner's valuation was reasonable (R. 47:41, 44 (App. 114, 117)), that the assessment was neither false nor

retaliatory (*id.*, 33, 34, 41 (App. 106, 107, 114)), and that there was no dispute of material fact with regard to the assessment (*id.*, 31, 44 (App. 104, 117)). As a result, the court found as a matter of law that Gardiner did not violate Wis. Stat. § 70.501 or 42 USC § 1983.

However, the circuit court failed to apply the proper standard for granting summary judgment. Summary judgment may only be granted if there are no material factual disputes. Wis. Stat. § 802.08(2). In determining whether there are factual disputes, the court must view all evidence in the light most favorable to the non-movant (on these issues, the Plaintiffs), and grant summary judgment to a defendant only if the facts "conclusively show that the plaintiff's action has no merit and cannot be maintained." *Smaxwell v. Bayard*, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923.

The circuit court erred here because the Plaintiffs submitted sufficient evidence from which a reasonable jury could conclude that Gardiner retaliated against the Plaintiffs for asserting their Fourth Amendment rights, that Gardiner deprived the Plaintiffs of equal protection of the laws, and that Gardiner violated § 70.501 by intentionally over-assessing the Property. Furthermore, the undisputed evidence shows that

Gardiner violated § 70.501 by failing to perform assessment duties required of it by law.

A) Undisputed Facts Do Not Show that Gardiner Did Not Deprive the Plaintiffs' of their Constitutional Rights.

The Plaintiffs alleged that Gardiner deprived them of their Fourth Amendment rights by punishing them for asserting those rights in violation of 42 USC § 1983. The circuit court concluded, first of all, that the Fourth Amendment was not implicated in this case because there was no search of the Plaintiffs' residence. (R. 47:18, 32-33, 36, 42 (App. 105-06, 109, 115).) This was clear error, as explained above. *See supra*, Section I.A.1. An excessive tax operates in the same punitive manner as a fee imposed on owners who refused to permit a warrantless search of their home. *See Black*, 20 F. Supp. 2d at 1230-31 ($60 fee for such a refusal unconstitutional).

The circuit court also concluded that Gardiner did not retaliate against the Plaintiffs. (R. 47:33, 34 (App. 106-07).) But there is ample record evidence that would support a contrary conclusion. A reasonable jury could have concluded that Gardiner did retaliate.

The Plaintiffs demonstrated that Gardiner had a pattern and practice of raising the assessments of property owners who did not permit an interior inspection, while simultaneously lowering the assessments of property owners who did permit an interior inspection. Viewed in the light most favorable to the Plaintiffs, a reasonable jury could infer that the pattern was not accidental, but intentional. Gardiner knew that owners who did not permit an interior inspection could not challenge their assessments, so they knew they would not have to defend those assessments and could "get away" with picking an arbitrary number instead of doing detailed valuation work.

The Plaintiffs also demonstrated that Gardiner had a pattern and practice of lowering the assessments of property owners who initially refused but later relented and permitted an interior inspection. That happened to the Plaintiffs in 2004 and to two other owners in the Lorimar Estates Subdivision in 2013. Viewed in the light most favorable to the Plaintiffs, a reasonable jury could conclude that Gardiner intentionally over-assessed such properties in order to coerce the owners into permitting an interior inspection. The circuit court concluded that the subsequently-lowered assessments demonstrated that Gardiner was reasonable and was

not attempting to punish homeowners who refused to permit an interior inspection. (R. 47:34 (App. 107).) That may be a reasonable conclusion, but not one a trier of fact could reach when viewing the same evidence in the light most favorable to the Plaintiffs. In fact, the evidence tends to confirm the Plaintiffs' allegations that owners who refuse interior inspections are intentionally given higher assessments than those who permit them.

All of Gardiner's actions suggest that their practice is to coerce property owners into giving up their Fourth Amendment rights. The punitively-higher assessments and clear signal that permitting an interior inspection gets you a lower assessment demonstrate a "carrot-and-stick" approach intentionally employed by Gardiner. But the Constitution does not permit the government to hit citizens with a stick for asserting their constitutional rights.

The circuit court also erred by dismissing the Plaintiffs' equal protection claim against Gardiner on summary judgment without even addressing the legal issue. The Plaintiffs alleged that Gardiner deprived them of their constitutional right to equal protection of the laws by assessing their property (as well as the property of others who did not

permit an interior inspection) in a discriminatory manner. The circuit court dismissed this claim without explaining its reasoning, an erroneous exercise of discretion. (*See* R. 47:42 (App. 115).)

Although "owners who refuse an interior inspection" is not a traditionally suspect class, a classification that deprives a group of people of core constitutional rights can violate the Equal Protection Clause as well. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). Essentially, Gardiner penalized those who exercised their Fourth Amendment rights and rewarded those who did not. That should have triggered strict scrutiny and required Gardiner to show how its disparate treatment was narrowly tailored to be the least restrictive means of furthering a substantial government interest. *See U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (describing the strict scrutiny test). While the court mentioned the government interest served by taxation generally (R. 47:43 (App. 116)), the court did not find (and Gardiner did not even argue) how that interest was served in the least restrictive way by raising the assessments of those who did not permit interior inspections. Plainly, it is not.

The circuit court erred by dismissing the Plaintiffs' Section 1983 claims against Gardiner, and should be reversed on that ground.

B) Undisputed Facts Do Not Show that Gardiner Did Not Violate Wis. Stat. § 70.501

Wis. Stat. § 70.501 states that "[a]ny assessor, or person appointed or designated under s. 70.055 or 70.75, who intentionally fixes the value of any property assessed by that person at less or more than the true value thereof prescribed by law for the valuation of the same, . . . or otherwise intentionally violates or fails to perform any duty imposed upon that person by law relating to the assessment of property for taxation, shall forfeit to the state not less than $50 nor more than $250." Under Wis. Stat. § 70.503, "[i]f any assessor, or person appointed or designated under s. 70.055 or 70.75, . . . is guilty of any violation or omission of duty as specified in ss. 70.501 and 70.502, such persons shall be liable in damages to any person who may sustain loss or injury thereby, to the amount of such loss or injury; and any person sustaining such loss or injury shall be entitled to all the remedies given by law in actions for damages for tortious or wrongful

acts." No case explains in more detail what behavior violates § 70.501.[5] The statutory language makes clear that assessors can violate § 70.501 in two separate ways: (1) by intentionally over- or under-assessing a property; or (2) by failing to perform any assessment-related duty.

The Plaintiffs alleged that Gardiner violated § 70.501 in both ways – that Gardiner intentionally over-assessed their Property and that Gardiner failed to perform assessment duties in the manner required by law. The circuit court ruled that Gardiner did not over-assess the Property and followed the statute when making its assessment. (R. 47:43, 44-45 (App. 116, 117-18).) But there is ample record evidence to the contrary. A reasonable jury could have concluded that Gardiner did intentionally over-assess the Property. Furthermore, the *unrebutted* evidence demonstrates that Gardiner did in fact fail to assess the Property using the method required by statute.

1) Whether Gardiner intentionally over-assessed the Property is disputed

[5] The only case to even have touched on these statutes merely mentions in a footnote that none of that case's plaintiff's allegations "even remotely suggest" that an official had engaged in "intentional or fraudulent conduct" in violation of a similar statute applicable to members of the board of review. *Pocius v. Kenosha County*, 231 Wis. 2d 596, 606, n. 3, 605 N.W.2d 915 (Ct. App. 1999).

The Plaintiffs alleged that Gardiner intentionally over-assessed the Property. The circuit court relied entirely on a self-serving affidavit filed by Gregory Gardiner to conclude that Gardiner did not over-assess the Property. But while the affidavit states generally that Gardiner considered some factors when assessing the Property, the affidavit does not explain how Gardiner arrived at a figure of $307,100. And the Plaintiffs have substantial evidence to support their claim, which the circuit court improperly discounted.

The evidence that shows Gardiner retaliated against the Plaintiffs for exercising their Fourth Amendment rights also supports a conclusion that Gardiner intentionally over-assessed their Property. A reasonable jury could conclude that Gardiner intentionally over-assessed owners who refused to permit interior inspections as a method of coercing them into permitting the inspection. Knowing that the assessment could not be challenged, Gardiner could advance an arbitrarily high number, hoping it would encourage the owner to relent.

Gregory Gardiner's affidavit all but admits an intentional over-assessment. Four of the six considerations Mr. Gardiner stated supported Gardiner's valuation of the Property indicate that he assumed the effective

age of the Property had increased less than average and that he assumed significant improvements to the house had been performed. In other words, he intentionally applied a valuation model specifically designed to over-assess a house.

Instead of making assumptions, Gardiner should have done a careful evaluation of the Property based on known and easily-obtainable information. Gardiner's employees refused to enter the Plaintiffs' property to closely view the exterior of the house, and failed to engage the Plaintiffs in an owner interview (a statutory duty discussed more fully below). Gardiner could have learned all the information they complain about not knowing. The failure to do so indicates a cavalier attitude toward making an accurate appraisal, which fits perfectly with an intent to over-assess and coerce an interior inspection.

Finally, Gardiner's own documents lack any support for the $307,100 assessment. The 2013 Valuation Detail baldly states a "market value" of $261,000 for the improvements to the Plaintiffs' land, with no explanation. The 2013 work has none of the detail contained in the 2004 assessment. A reasonable jury could conclude from that failure that the

assessment was not based on a reasoned calculation but rather made arbitrarily and intentionally high.

2) Undisputed facts show Gardiner failed to perform duties required of it by law

The Plaintiffs alleged that Gardiner also violated Wis. Stat. § 70.501 by failing to perform assessment duties it was required to perform by law. Specifically, they alleged that Gardiner did not take the steps laid out in the WPAM to obtain information about the interior of the house using methods other than an interior inspection. The circuit court concluded that Gardiner "complied with the statute." (R. 47:44 (App. 117).) However, the undisputed evidence shows that Gardiner did not take the steps required by the WPAM, which assessors are required by statute to follow.

Section 70.501 makes it illegal for an assessor to "intentionally violate[] or fail[] to perform any duty imposed upon that person by law relating to the assessment of property for taxation." One duty imposed by law on an assessor is to value real property "in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) <u>from actual view or from the best information that the assessor can practicably obtain</u>, at the full value which could ordinarily be obtained therefore at

private sale." § 70.32(1) (emphasis added). Therefore, even if Gardiner did not intentionally overvalue the Property, if it failed in its duties it violated § 70.501 and is liable to the Plaintiffs under § 70.503.

The undisputed evidence demonstrates that Gardiner failed to value the Property in the manner specified in the WPAM from actual view or the best information that Gardiner could have practicably obtained. Gardiner failed to conduct an exterior inspection, failed to conduct a building permit inspection, and failed to conduct a property owner interview.

"The characteristics of the property, including the land, site improvements, buildings, and any other improvements should be visually inspected *where possible* . . . ." WPAM, 7-22 (emphasis added) (R. 35:7). "Building permits should be reviewed to determine any effects on value of a property." *Id.* "In performing improvement analysis, the assessor must make a thorough, detailed, and objective viewing of each property, noting relevant characteristics as they relate to physical condition, effective age, and functional utility." *Id.* at 8-20 (R. 35:8). "Upon entering the field, the assessor should be concerned with the following points: . . . Property owner interview." *Id.* at 8-22 (R. 35:10). The WPAM describes the scope and value of the property owner interview in detail:

> The property owner interview is a *means of receiving additional information on a property* and establishes good public relations. For many property owners, this is the primary contact with the assessor's office. . . . [D]ata should be collected in the most efficient manner possible. The assessor can obtain construction costs, ages of buildings, and sales information from the property owner. At this time sales can also be verified, *and a check made for any changes to the improvements since the date of purchase*. . . . Follow-up for any unanswered questions is also very important. Any important question to ask but often overlooked is "Do you know of any factors that might affect the value of your property?

Id. at 8-22-23 (R. 35:10-11) (emphasis added). "Once the assessor has collected sufficient interior *and exterior* information, it is possible to subjectively consider the improvements and determine the proper grade. *Id.* at 8-23 (R. 35:11) (emphasis added).

Gardiner failed to adequately inspect the entire exterior of the Property. On August 20, 2013, Ms. MacDonald invited Gardiner's assessor to enter the Property and walk around the house to view it from the exterior. The assessor refused. Nor did Gardiner accept the Plaintiffs' invitation to return to the Property at a later date and view the exterior of the Property. Gardiner does not dispute any of those facts.

Had Gardiner properly inspected the exterior of the Property, it would have discovered noticeable deterioration, including rotting fascia and

soffits, split and deteriorating cedar siding, and algae staining on the roof, requiring a lower assessment. *See* WPAM at 8-23-24 (R. 35:11-12) (discussing the effect of physical deterioration on valuation). Gardiner does not dispute any of those facts. Doing an exterior inspection would have provided Gardiner with information about the effective age of the building, which Gardiner assumed, *without evidence*, had increased at a less-than-average rate.

Gardiner does not dispute that it did not review whether any building permits had been granted for the Property since 2004. Had Gardiner done so, it would have discovered that no substantial additions or changes had been made to the Property since the last assessment that would justify increasing the Property's assessment. Doing so would have shown that no significant remodeling or improvements were done, which Gardiner assumed, *without evidence*, had occurred.

Finally, Gardiner failed to use practical methods to obtain additional information about the Property, namely, the property owner interview. Gardiner did not ask Ms. MacDonald or Mr. Milewski any questions about their Property. Gardiner does not dispute this fact.

Had Gardiner interviewed the Plaintiffs, it would have discovered that the Plaintiffs had made no improvements to the Property since the last assessment that would justify increasing the Property's assessment. The basement is still unfinished, as Gardiner saw in 2004. Some of their windows and their patio doors are in need of replacement. They undertook only routine maintenance on their home. Interviewing the Plaintiffs would have provided Gardiner with information about remodeling, improvements, and the effective age of the building, all matters about which Gardiner made assumptions, *without evidence*.

Gardiner did not make its assessment "from actual view or from the best information that the assessor can practicably obtain." Gardiner could have practicably obtained information about the Property by properly viewing the exterior, checking for permits, and interviewing the Plaintiffs. Instead, Gardiner chose to make its assessment based on assumptions that punish citizens who exercise their Fourth Amendment rights. Gardiner's own documents show that there was no careful consideration of the calculations necessary to properly assess the Property, only a blind leap to a conclusion. These were not minor oversights, but a systemic failure to take basic and necessary steps of assessment.

The circuit court concluded that none of these methods are an adequate substitute for an interior inspection. (R. 47:40-41 (App. 113-14).) That is not the court's call to make, nor is it relevant. The legislature and the Department of Revenue have determined what the best methods are. The WPAM requires assessors to use all of those methods. The statute requires assessors to base their valuations on the best information they can obtain, through actual view or other methods. Whether interior inspections are better is irrelevant to the question of whether Gardiner was required to attempt to obtain information in other ways.

The undisputed facts therefore show that Gardiner violated § 70.501 by failing to perform its statutory duty, and the circuit court erred in granting summary judgment to Gardiner. This Court should reverse the lower court with instructions to enter summary judgment in the Plaintiffs' favor on this claim. *See* Wis. Stat. § 802.08(6) ("If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor."). At the very least, this Court should reverse the lower court's grant of summary judgment and let it proceed to trial.

CONCLUSION

The Plaintiffs ask this Court to reverse the lower court, directing it to: (1) deny the Town's Motion for Judgment on the Pleadings and/or Summary Judgment; (2) deny Gardiner's Motion for Summary Judgment; (3) grant the Plaintiffs' Motion for Summary Judgment declaring Wis. Stat. § 70.47(7)(aa) and § 74.37(4)(a) unconstitutional as to the Plaintiffs and that the Town violated 42 USC § 1983; and (4) grant the Plaintiffs summary judgment pursuant to § 802.08(6) declaring that Gardiner violated § 70.501 by failing to perform duties required of it by law.

Dated this 13th day of October, 2015.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 10,269 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: October 13, 2015

/s/ RICHARD M. ESENBERG
RICHARD M. ESENBERG

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: October 13, 2015

/s/ RICHARD M. ESENBERG
RICHARD M. ESENBERG