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

DEFENDANT-RESPONDENT, GARDINER APPRAISAL SERVICE, LLC'S, RESPONSE BRIEF

Mitchell R. Olson, WI Bar No. 1030756
AXLEY BRYNELSON, LLP
2 E. Mifflin St., Ste. 200
Madison, WI 53703
Telephone: 608-257-5661
Facsimile: 608-257-5444
email: molson@axley.com
Attorneys for Defendant-Respondent,
Gardiner Appraisal Service, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

ISSUES PRESENTED

I. Are the Wisconsin property taxation statutes (§§70.47(7), 74.37(4)(a)) and Wisconsin Property Tax Assessment Manual, which require an interior viewing of a property as a prerequisite of a property owner's ability to appeal to the Board of Review and subsequent appeal to Circuit Court, unconstitutional as applied in this matter.

Answered by the Circuit Court: The circuit court concluded that the State of Wisconsin's laws and procedures for property tax assessment were not unconstitutional.

II. Did the Defendants, Town of Dover and Gardiner Appraisal Service, violate 42 USC §1983, in the process of assessing the Plaintiffs' property?

Answered by the Circuit Court: The circuit court concluded that there was no violation of 42 USC §1983 with respect to the appraisal of the Plaintiffs' property.

III. Did Defendant, Gardiner Appraisal Service, violate Wis. Stat. §70.501 through the assessment of the Plaintiffs' property?

Answered by the Circuit Court: The circuit court concluded that Gardiner Appraisal Service did not violate Wis. Stat. §70.501.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Gardiner Appraisal Service does not request oral argument, because the briefs fully present and meet the issues on appeal such that additional oral argument would be of marginal value. Wis. Stat. §809.22(2)(b).

The decision of this Court may qualify for publication because Wisconsin case law does not directly address the issues raised, and the issue of property taxation is of substantial and continuing statewide importance. Wis. Stat. §809.23(1).

STANDARDS OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. §802.08(2); *see also* M&I First Nat'l Bank v. Episcopal Homes Management, Inc., 195 Wis. 2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App.1995). Summary judgment methodology is well-established. The Court should examine the summary judgment submissions to determine whether there actually is any "genuine issue of

material fact," and if not, "whether a party is thereby entitled to 'judgment as a matter of law.'" Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993); Tamminen v. Aetna Cas. & Sur. Co., 109 Wis. 2d 536, 550, 327 N.W.2d 55 (1982).

Once a prima facie case for summary judgment is established, the opposing party "may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." Board of Regents v. Mussallem, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980). If the party opposing summary judgment fails to offer specific evidentiary facts to demonstrate a genuine issue for trial in response to the movant's submissions, then summary judgment "shall be entered against such party." Larson v. Kleist Builders, Ltd., 203 Wis. 2d 341, 345, 553 N.W.2d 281 (Ct. App. 1996). An asserted factual dispute must be material; that is, it must concern a fact that affects the resolution of the controversy. Clay

v. Horton Mfg. Co., Inc., 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992).

The Court of Appeals reviews a trial court's award of summary judgment de novo, applying the standards of Wis. Stat. §802.08(2). Robinson v. City of West Allis, 2000 WI 126, ¶26, 619 N.W.2d 692.

Both issues of constitutionality of a statute and statutory interpretation are reviewed de novo. Wis. Med. Soc'y v. Morgan, 2010 WI 94, ¶36, 787 N.W.2d 22; Racine Harley-Davidson v. State Div. of Hearings & Appeals, 2006 WI 86, ¶11, 717 N.W.2d 184. An appellate court decides questions of law independently, without deference to the decisions of the trial court. State v. Vanmanivong, 2003 WI 41, ¶17, 661 N.W.2d 76. However, an appellate court values a circuit court's decision on a question of law. Holman v. Family Health Plan, 216 Wis.2d 100, 108, 573 N.W.2d 577 (Ct. App. 1997).

STATEMENT OF THE CASE

Gardiner Appraisal Service, LLC ("Gardiner") contracted

with the Town of Dover to perform a revaluation of all real property in the town. Gardiner strictly abided by the directive of the Wisconsin Statutes and Wisconsin Property Tax Assessment Manual, including notification of all property owners that an interior view of their property was required, and if access were not allowed, the property owner waived their right to contest the assessment for their property.

The Plaintiffs here refused to allow Gardiner to inspect the interior of their home. Gardiner, as a result, made an estimated appraisal based on well-established principles in the appraisal field. That appraisal was not excessive nor made with intent to impose an assessment beyond a reasonable amount. It certainly was not made to personally punish the Plaintiffs, with whom Gardiner has no relationship separate from the thousands of other property owners it deals with when assessing property.

The Plaintiffs, based on their election to deny an interior view, per Wisconsin law, were prohibited from challenging the assessment at the Board of Review. The Plaintiffs then

commenced this action against the Town of Dover claiming violations of their constitutional rights. Plaintiffs also asserted claims against the Town of Dover and Gardiner for violation of 42 USC §1983, and against Gardiner for violation of Wis. Stat. §§70.501 and 70.503.

The Trial Court, Judge Phillip Koss, on cross-motions for summary judgment, granted summary judgment in favor of the Town of Dover and Gardiner, dismissing all claims asserted by Plaintiffs. The Court found no constitutional violations, sec. 1983 violations, nor Wis. Stat. secs. 70.501 and 70.503 violations.

The only claims against Gardiner in this lawsuit are based on sec. 1983 and Wis. Stat. secs. 70.501 and 70.503. This Brief primarily will address those claims.

STATEMENT OF THE FACTS

I. WISCONSIN PROPERTY TAX ASSESSMENT LAW & PROCEDURE

Wis. Stat. Chap. 70 governs property taxation in Wisconsin. The general directive is as follows:

> Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual

> provided under s. 73.03 (2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. In determining the value, the assessor shall consider recent arm's length sales of the property to be assessed if according to professionally acceptable appraisal practices those sales conform to recent arm's-length sales of reasonably comparable property; recent arm's length sales of reasonably comparable property; and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed.

Wis. Stat. §70.32(1) (emphasis added).

The Wisconsin Property Assessment Manual ("WPAM")[1] "serves as the guide for uniform assessment throughout the State." (Intro) "WPAM is developed and maintained by the Department of Revenue, Office of Assessment Practices per sec. 73.03(2a), Wis. Stat., and is updated on an annual basis." (R. 29:Exh. E: Intro) Wis. Stat. § 70.32 "requires that assessors utilize WPAM when valuing real property." (Id.)

Here, Gardiner was performing a full revaluation of the Town of Dover. "A 'revaluation' is the hiring of expert help by a municipality to aid the assessor in making new, equitable

[1] (R. 29: Exhibit E. The Affidavit of Gregory Gardiner incorporates the excerpts of the Wisconsin Property Tax Assessment Manual as referenced in this Brief.)

assessments." (R. 29:Exh. F, p.19)[2] A revaluation is appropriate when "PRC [Property Report Card] is outdated or inaccurate, or assessment uniformity is poor or full revaluation hasn't been done in 10 years …." (R. 29: Exh. E, p. 4-3) ***For full revaluations, the WPAM requires the assessor to "Inspect Interior" of "All Buildings."*** (R. 29: Exh. E, p. 4-3)(R. 29:Exh. F, p. 19-1,19-12)

Per the WPAM, "[t]he statutes require that real … property be valued from actual view or the best information obtainable." (R. 29: Exh. E, p. 14-57)(*See* Wis. Stat. §70.32). "In the case of real property, actual view requires a detailed viewing of the interior and exterior of all buildings and improvements and the recording of complete cost, age, use, and accounting treatments." (R. 29: Exh. E, p. 14-57)(emphasis added).

In keeping a record of every parcel, the assessor is directed to keep accurate parcel data. (R. 29: Exh. E, p. 5-33). "The assessor must therefore make reasonable attempts to obtain and verify the data in each field. This includes sending a request by

[2] The Affidavit of Gregory Gardiner, at Exhibit F, incorporates the "Guide for Property Owners" published by the WI Department of Revenue, as referenced in this Brief.

certified mail to the property owner for a physical viewing of the interior, if unable to gain entry during the normal course of field verification." (R. 29: Exh. E, p. 5-33) (emphasis added) The WPAM also requires that the property record for each parcel contain information as to the basement, physical condition of interior, fireplaces, plumbing fixtures, and the date of most recent interior viewing. (R. 29: Exh. E, p. 5-34). "It is essential that the assessor perform a thorough, detailed, and objective viewing of each property" which is "field verified and accurate." (WPAM, 8-20, 8-21) All such data emphasize the need and import of an interior inspection. (*See* R. 29: Exh. E, p. 8-21 to 8-23)

The WPAM also addresses the "Collection of Property Data" by assessors. "The data collected on each property should be complete, accurate, and consistent. All information should be collected and recorded on the property record cards. When making a field viewing, the lister should: … (6) View the interior

of the building, recording physical data…." (R. 29: Exh. E, p. 19-12)

The WPAM contains language for a model letter to property owners seeking to inspect the interior. The model language includes the statement: "Please note that failure to make an appointment may be considered a refusal to allow an interior viewing in which case we will estimate the quality, condition, and attributes of the interior of your property." (R. 29: Exh. E, p. 13-10) The WPAM gives specific content for the letter at pages 18-18, 18-19.

Appraisers also look to "The Appraisal of Real Estate"[3] to guide their assessment practices. (R. 29: ¶22) "An important part of every appraisal is the description of the type, quality, and condition of the building or buildings on the site and the analysis of the structure's design." (R. 26:Exh. G, p. 219) "The process of analyzing the building improvements encompasses three interrelated tasks: site visit, building description, [and]

[3] (R. 26:Exh. G, incorporates excerpts from "The Appraisal of Real Estate" published by the Appraisal Institute, as referenced in this Brief).

description and analysis of architectural style and functional utility." (Id.) "In the valuation process, the appraiser gathers much of the information needed to describe and analyze the improvements by personally visiting the site of the real estate:

> Careless or inadequate inspection of the physical characteristics and features of the subject and comparable properties can create difficulties for an appraiser in later phases of the appraisal. For example, if a structural problem is overlooked, the conclusions of all three approaches to value could be meaningless. The goal of the site visit is identifying the site and building characteristics that create value.

(Id.)

"The importance of a site visit should not be underestimated." (Id. at 221.) "Much of the primary data and appraiser collects comes from the process of visiting the site and observing the site and improvements." (Id.)

Fannie Mae[4] also requires an inspection for an appraisal "based on the interior and exterior." (R. 29: ¶23)(R. 29:Exh. H, p. 4) "The appraiser is expected to consider and describe the overall quality and condition of the property…." (Id.)

---

[4] (R. 29: Exh. H, incorporates excerpts from "Appraisal and Property Report Policies and Forms Frequently Asked Questions" published by Fannie Mae, as referenced in this Brief).

Further, the Residential Guidebook for Summary Appraisal Reports[5], emphasizes the need to inspect a premises to evaluate the "effective age," defined as "the age indicated by the condition and utility of the structure. Effective age can be more, less, or the same as actual age. The effective age estimate takes into consideration abuse, neglect, general maintenance, and all other influences on the physical condition of the improvements and is determined by an appraiser's judgment, not through market derivation." (R. 29: ¶24)(R. 29: Exh. I, at p. 19)

Finally, the "Standard Specifications for Revaluation of General Property Pursuant to Chapter 70, Wisconsin Statutes[6]," provide in part: "The assessor shall inspect the interior of a minimum of 90% of the major buildings of each class of improvements, noting both the interior and exterior features on the proper report card to provide an accurate and complete listing for each improvement." (R. 29: ¶25)(R. 29: Exh. J, at p. 3: No.

[5] (R. 29: Exh. I, incorporates excerpts from the "Residential Guidebook for Summary Appraisal Reports," as referenced in this Brief.)
[6] (R. 29: Exh. J, incorporates the "Standard Specifications for Revaluation of General Property Pursuant to Chapter 70, Wisconsin Statutes," as referenced in this Brief.)

20(c)) The Standard Specifications also affirm that if a written request to inspect the interior of a building is denied, the refusal "shall constitute a loss of appeal of the assessment to the local board of review and further appeal avenues; should the requests to inspect major buildings be denied, the appraiser shall list and value the improvements according to the best information practicably obtainable." (R. 29: ¶25)(R. 29: Exh. J, at p. 4: No. 20(h))

The WPAM incorporates the prohibition set forth in §70.47(7)(aa), Stat., when a property owner refuses a property view: "No person shall be allowed to appear before the BOR, to testify to the BOR 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." (R. 29:Exh. E, p. 18-8; 18-17; 18-21)

Wis. Stat. §70.47(7)(a) establishes that: "No person shall be allowed in any action or proceedings to question the amount or valuation of property unless such written objection has been filed

and such person in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath of all of that person's property liable to assessment in such district and the value thereof."

II. THE ASSESSMENT OF THE PLAINTIFFS' RESIDENTIAL PROPERTY

Gardiner is a private entity engaged by numerous local governments across the State of Wisconsin to perform assessment services for purposes of property taxes. (R. 29: ¶ 6) Gardiner for many years has provided such services to the Town of Dover ("Dover") in Racine County. (R. 29: ¶ 7)

In 2013, Gardiner was acting under a written contract with Dover to perform a Revaluation of the entire town. (R. 29: ¶ 8) The "Revaluation Contract" between Gardiner and Dover specifies that:

- Dover "desires to obtain an appraisal of all specified real property parcels within the Town of Dover, Racine County…."
- "All work shall be accomplished in general accordance with the standard specifications set up for re-valuation or re-assessment of real and personal property pursuant to Chapter 70 of the Wisconsin Statutes."
- "The project would begin in 2012 and be completed for the 2013 Board of Review."

- "Assessors will view the exterior and interior of all structures unless denied access after mailing a request to owner by certified mail."

(R. 29: Exh. A)

With respect to the Plaintiffs' residence, an assessor for Dover was last inside the home in 2004. Plaintiffs had then granted permission for inspection. (R. 29: ¶ 9)

In 2013, Gardiner sent a written notice to Plaintiffs stating that "We must view the interior of your property for the Town wide revaluation program which is in progress." It continues, "An assessor will stop by to view your property on Tues, Aug 20 at 6:10 PM." (R. 29: ¶ 10)

On August 20, 2013, a representative of Gardiner appeared at the Plaintiffs' residence, 1232 Linden Lane, and sought to inspect the interior of the residence. The homeowner denied entry to the interior of the home. (R. 29: ¶ 11)

Thereafter, Gardiner sent a letter to Plaintiffs dated October 4, 2013, stating: "We have not yet viewed the interior of your building located in the Town of Dover on land identified as

tax parcel number, 032022243000, located at 1232 Linden Ln, because you have refused us entry." (R. 29: ¶12, Exh. B) The letter invites the Plaintiffs to schedule an appointment to view the property by a date certain. It notes that "[i]f you fail to schedule an appointment your property will then be assessed according to the Wisconsin State Statutes provided below." Id. (quoting from Wis. Stat. §§70.32(1) and 70.47(7)(aa) – the latter of which prohibits an appearance at the Board of Review upon refusal to view a property). This letter was sent Certified Mail by Gardiner. (R. 29: ¶12, Exh. B)

The Plaintiffs responded with an undated letter admitting that: "Today I received a certified letter from Gardiner Appraisal Service that reiterates their incorrect interpretation of state statutes and threatens to refuse to allow us to appear before the Board of Review if we do not allow them entry into our residence." (R. 29: ¶13, Exh. C) Said letter made clear that no internal viewing of the residence would be allowed. (Id.)

At no time after the October 4th letter did the Plaintiffs contact Gardiner to arrange an internal viewing of their residence. No such inspection ever occurred as part of the 2013 revaluation. (R. 29: ¶14)

Gardiner never demanded entry into the Plaintiffs' home. All communications respectfully asked for an appointment to enter and assess the home, and explained the consequences of denial under Wisconsin law. (R. 32: ¶4)

According to Linda Gardiner, principal at Gardiner Appraisal, an assessor cannot just "ask the homeowner" about their interior and eliminate the need for an interior inspection. There is no policy or accepted practice in Wisconsin to assess property based on interviewing property owners. The assessor has a need to see the quality and condition of the improvements to make a fair and accurate assessment. This is comparable to a consumer purchasing a home without ever looking at the interior, and only relying on a description by the seller. No rational buyer

would do so. That is certainly why Wisconsin law calls for inspections of the interior. (R. 32: ¶5)

Plaintiffs contend that Gardiner said the reason for an increase in assessed value in 2004 was "based in part on the assumption that the Plaintiffs had finished their basement." Gardiner never made such a statement to Plaintiffs. Gardiner's records never show a basement remodel. Gardiner never relied on such information. What Gardiner may have said was that, when denied interior access, they have to make an assessment based on numerous factors, including the possibility that interior improvements (such as a remodel) may have been completed but that cannot be verified. (R. 32: ¶6)

The Plaintiffs appeared at the Dover Board of Review on November 25, 2013 seeking to object to the assessment on their property. The Board of Review rejected this request, finding that Plaintiffs had refused a reasonable request by certified mail of the assessor to view the property, and therefor waived their appeal rights before the Board of Review. (R. 29: ¶15)

In making its assessment of the Plaintiffs property at 1232 Linden Lane, Gardiner did not intentionally establish an assessed value at more than its true value as prescribed by law. Gardiner was not motivated to set the value at an incorrect amount. (R. 29: ¶16)

Because Gardiner was not permitted into the home in 2013, Gardiner could not accurately determine the effective physical, functional and economic obsolescence of the structure, curable or non-curable. Without the accurate information, it was not possible to do an accurate cost, market, or income approach to valuation. Gardiner could not verify whether any remodeling had been performed in the prior nine (9) years. A single remodel project, like a kitchen or bath, could have significantly increased the value of the home. On average, approximately 70 percent of a home's value is on the interior. Gardiner could not verify whether any such remodeling or improvements were made over those nine (9) years. (R. 29: ¶17)

The Plaintiffs' improvements were assessed at the exact same amount, $227,800 from 2004 through 2012. In 2013, Gardiner changed the assessment on improvements to $261,000. (R. 29: Exh. D) Gardiner reached this number after considering: (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 to 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. (R. 29: ¶18)

Per the testimony of Mr. Gardiner, Gardiner used its best professional judgment as to the assessed value of the Plaintiffs'

home in 2013. Gardiner believes the increase was reasonable given the entirety of the history and circumstances cited herein, as a change from 2004 to 2013 assessed value. (R. 29: ¶19)

III. TRIAL COURT'S DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The trial court issued an oral decision on May 6, 2015. (R. 47) The court granted summary judgment in favor of Defendants, and denied summary judgment in favor of plaintiffs. (R. 47:52)

The Court first concluded that there was no Fourth Amendment violation. (R. 47:32-33) The Court next considered whether Wisconsin statutes §§70.47(7(aa) and 74.37(4)(a)) are unconstitutional. (R. 47:35) Noting the heavy burden on the plaintiffs, the lack of any precedent challenging the statutory scheme, and the goal of uniformity of taxation, the Court concluded the statutory process calling for interior inspection causes an intrusion that is minimal, not nefarious, and designed to serve all citizens. (R. 47:38-9) The Court further found that there was no excessive assessment. (R. 47:41) The Court

concluded that the statutes are not unconstitutional. (R. 47:41-44)

Next, because the Court did not find any deprivation of a constitutional right, there could be no violation of section 1983. (R. 47:42-43)

With respect to Gardiner's motion for summary judgment, the Court concluded that sec. 70.501 operates as an ordinance violation, and that the plaintiffs, as private citizens, cannot commence an action to enforce same. (R. 47:44)

Further, with respect to the claim for violation of sec. 70.503, the Court found it was a specific intent type of offense. The court concluded there was insufficient evidence of a "false or intentionally high assessment here." (R. 47:44) The Court noted that the unrebutted affidavit of Mr. Gardiner supported a finding of no intent to wrongfully assess the property. (R. 47:44)

ARGUMENT

I. PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE NOT ASSERTED AGAINST GARDINER.

The Plaintiffs' Complaint did not state any direct claims against Gardiner addressing issues of constitutionality. The Plaintiffs likewise did not seek summary judgment against Gardiner on such claims. Accordingly, Gardiner had not directly argued those issues before, and does not do so here in detail. Gardiner does adopt and incorporate those arguments presented by the Town of Dover, to the extent applicable.

Gardiner will respond to one argument linked to Wis. Stat. §701.53, which Gardiner is alleged to have violated. The Plaintiffs' entire argument is predicated on Gardiner causing an "unlawful assessment." (App. Brief, p. 29) As set forth herein, there is no evidence that Gardiner engaged in unlawful practices when attempting to assess the Plaintiffs' property under the difficult circumstances the Plaintiffs created. Plaintiffs bemoan the lack of a remedy, but there is no wrong to remedy.

Further, as recognized by the trial court, the Wisconsin Legislature has created a remedy for situations where there actually is evidence of intentional conduct setting an assessment at a value of more or less than the true value prescribed by law. Wis. Stat. §70.501. (R. 47:41) That remedy appears adequate to cover all damages arising therefrom. Wis. Stat. §70.503.

Thus, the Plaintiffs' have been left with a legitimate remedy in the event that a municipal assessor intentionally acts to set a false assessment, and does not follow state mandated professional practices. However, because Gardiner did reasonably attempt to abide by state law and professional standards, and set a legitimate assessment here, it has no liability under Wis. Stat. §§70.501 and 70.503.

II. PLAINTIFFS FAIL TO STATE A SECTION 1983 CLAIM AGAINST GARDINER.

The undisputed evidence supports findings that: (1) there was no underlying constitutional violation, (2) Wisconsin's assessment laws reasonably require a waiver of appeal rights upon denial of interior inspection; (3) Gardiner committed no

wrongful acts; and (4) there is no precedent to support this challenge to a fundamental state real property assessment practice.

A. There Was No Underlying Constitutional Violation.

Plaintiffs cannot proceed against Gardiner on a claim based on 42 USC §1983, absent an underlying violation of the Constitution. The trial court found that there was no such Constitutional violation. (R. 47:35-44) Absent a reversal of that finding, summary judgment must be awarded dismissing the sec. 1983 claim against all Defendants.

B. The Wisconsin Statutory Framework Prevents a Finding of Any Sec. 1983 Violation Attributable to Gardiner.

The Plaintiffs here are seeking to circumvent a clear statutory limitation on the right to appeal a real property tax assessment. Because they deliberately rejected the statutorily-required interior inspection of their home, there are consequences. The first consequence was the prohibition on their objecting at the Board of Review. The subsequent consequence,

relevant here, is the lack of a judicial remedy when there were no proceedings at the Board of Review. Based on the undisputed factual history, the Plaintiffs waived their rights to pursue this appeal.

The law in Wisconsin is clear: "No 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." Wis. Stat. §70.47(7)(aa). The Plaintiffs lost the opportunity to contest their assessment at the Board of Review because of their refusal of such a request to view their property.

Section 70.47(13) sets forth the process for judicial review of a property tax assessment:

> Except as provided in this subsection and in ss. 70.85 and 74.37[7], appeal from the determination of the board of review shall be by an action for certiorari commenced within 90 days after the taxpayer receives the notice under sub. (12). The action shall be given preference. . . . If the

[7] Sec. 70.85 covers review of assessments by the Department of Revenue, and is not applicable. Sec. 74.37 covers claims for excessive assessments. The Plaintiffs have not filed such a claim nor followed the procedures outlined in that section, such that sec. 74.37 is also inapplicable here.

> appellant challenges the value determination that the board made at a proceeding under sub. (7)(c), the court shall presume that the board's valuation is correct, except that the presumption may be rebutted by a sufficient showing by the appellant that the valuation is incorrect. If the presumption is rebutted, the court shall determine the assessment without deference to the board of review and based on the record before the board of review, except that the court may consider evidence that was not available at the time of the hearing before the board, that board refused to consider, or that the court otherwise deems to should be considered in order to determine the correct assessment….

Section 70.47(13) provides the only methods for appeal of a property tax assessment. The Plaintiffs here have not availed themselves to any of those methods. None of those remedies, notably, are available to a party who has failed to proceed with an objection before the board of review. Hermann v. Town of Delevan, 215 Wis.2d 370, 381, 572 N.W.2d 855 (Wis. 1998). As the Hermann Court concluded:

> The tax appeal administrative procedures of chs. 70 and 74 of the Wisconsin Statutes are a highly evolved and carefully interwoven set of statutes providing a comprehensive remedy for individuals seeking redress of excessive assessments. Under this exclusive statutory scheme, an objection before the board of review pursuant to Wis. Stat. 70.47(7) was an express condition precedent to filing the taxpayer's challenging the valuation at which their real property was assessed for taxation. Being a statutory condition precedent, it was necessary for the taxpayers to allege compliance therewith in their complaint. No such objection was alleged. As a result, there are no conditions under which the taxpayers can recover….

Hermann , 215 Wis.2d at 394, 572 N.W.2d 855 (emphasis added).

Wisconsin Courts have made clear that a taxpayer must exhaust his administrative remedies before the Board of Review prior to seeking judicial relief. It is also clear that failure to proceed before the Board of Review is an automatic failure to exhaust administrative remedies. Clear Channel Outdoor, Inc. v. City of Milwaukee, 2011 WI App 117, ¶7-9, 805 N.W.2d 582.

As noted in Clear Channel: "No person shall be allowed in any action or proceedings to question the amount or valuation of property unless such written objection has been filed and such person in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath of all of that person's property liable to assessment in such district and the value thereof." 2011 WI App 117, ¶7, 805 N.W.2d 582 (citing Wis. Stat. § 70.47(7)(a)).

Clear Channel relied on Hermann v. Town of Delevan, which addressed the public policy reasons to compel exhaustion of remedies: "If the owners of taxable property could neglect to

assert their rights before the board of review and then be heard to litigate questions of value in court, the administration of municipal tax laws would be seriously hampered." 2011 WI App 117, ¶16, 805 N.W.2d 582 (quoting Hermann, 215 Wis.2d at 392-93, 572 N.W.2d 855).

The Plaintiffs, in the case at bar, never presented their evidence as required to the Board of Review because of the statutory effect of Wis. Stat. § 70.47(7)(aa). (R. 29: ¶15) These statutes, working in tandem and immediately following each other, can only be construed to prevent all actions to challenge the assessment of property. *See* Wis. Stat. §§ 70.47(7)(a) and 70.47(7)(aa). Because the Plaintiffs here ultimately question the value of their property assessment, their claim must be barred.

As a result, the plaintiffs' efforts to challenge the assessment via 42 U.S.C. §1983 are an end around of the clear statutory system restricting the remedies available to challenge an assessment. That claim must be dismissed as a matter of law.

C. Based on the Undisputed Facts Presented, Gardiner Cannot be Found Liable Under Sec. 1983.

The elements of a 42 U.S.C. §1983 claim require the plaintiffs to establish: (1) conduct by a "person;" (2) who acted "under color of law;" (3) proximately causing; (4) a deprivation of a federally protected right. 42 U.S.C. §1983. The Complaint alleges that "Gardiner, by raising the assessment of the Plaintiffs' Property in retaliation for exercising their constitutional rights, deprived them of the right to be free from unreasonable searches as secured by the Fourth and Fourteenth Amendments to the United States Constitution." (R. 2: ¶55)

This action seeks to circumvent the exclusive statutory remedies available to challenge an assessment in Wisconsin. Even if this action could be pursued, however, it is fundamentally flawed.

On the allegation of a wrongful search and seizure in violation of the Fourth Amendment, there no evidence that Gardiner searched the Plaintiffs' premises. Gardiner never set foot inside the premises as part of the 2013 revaluation.

Moreover, there is no evidence that Gardiner seized any of Plaintiffs' property. The record is abundantly clear that Plaintiffs forbade Gardiner from entering their property. Under these facts, there can be no violation of the Fourth Amendment. (R. 47:32-36)(R.29)(R.32)

The facts here are simple and limited. Gardiner at all times followed the protocol which is established by Chapter 70 and the Wisconsin Real Property Assessment Manual. Gardiner requested an interior inspection. Gardiner was denied. Gardiner did nothing further to force entry or otherwise invade the property rights of Plaintiffs. Instead, Gardiner made an assessment without the benefit of such an inspection, as contemplated by the statutes and manual. Where, in this conduct, is there a tortious invasion of the plaintiffs' constitutional rights?

Gardiner understands that Plaintiffs believe that the system established by Chapter 70 is unconstitutional. Gardiner, however, cannot be held liable for damages for carefully obeying

the directives of Chapter 70 in its existing format. Gardiner is not the State of Wisconsin which adopted Chapter 70 and the WPAM. Gardiner is not the taxing entity, Town of Dover. Gardiner is a professional contractor. Gardiner was obligated to follow those statutes and its contract with Dover – it had no discretion to deviate therefrom. Gardiner cannot reasonably be liable for following the law, as then in place, which governed its manner of assessment. Based on the undisputed facts, Gardiner can have no liability under 42 U.S.C. §1983.

D. There is No Precedent to Support the Plaintiffs' Claims Challenging the Wisconsin Assessment Law.

Ultimately, the Plaintiffs' theory that Dover and Gardiner sought to invade their home or punish them for denial of Gardiner's request to enter to assess the home is without merit. The law in Wisconsin clearly provides for interior inspections of residences as part of the assessment process. The homeowner has the right to deny entry. The homeowner, by exercising that right, denies the assessor full information to make a complete and informed assessment. The assessor is then left to make an

estimated assessment based on their professional experience and assessment practices. If the homeowner does not like his assessment, he cannot appeal it to the Board of Review – but he presumably knows this result when he makes the denial. This is the law in Wisconsin.

The practice of this law is not a violation of any Constitutional right against search and seizure, or any other rights. Assessors have never been found in violation of a homeowner's Constitutional rights in Wisconsin by following the WPAM protocol.

Moreover, there is no case law cited by Plaintiffs from any jurisdiction to support their theory of a Constitutional violation. Plaintiffs misrepresent the only case cited which is purported to be on point, Schlesinger v. Ramapo, 807 N.Y.S. 865, 11 Misc. 3d 697 (2006). Schlesinger is a trial court decision and of no precedence to this Court.

Plaintiffs *suggest* that Schlesinger holds that warrantless administrative searches are not permitted in the context of

government's desire to inspect the interior of a home for tax assessment purposes. (App. Brief, p. 25) However, Schlesinger does not address a statutory construct like Wisconsin nor the bar on appeals imposed in Wisconsin. Rather, Schlesinger dealt with a discovery issue, i.e., an expert witnesses' right to make an inspection in litigation addressing an assessment. Schlesinger does not address the right to appeal related to a denial of an interior assessment, and is readily distinguishable. Id. at 698-99. (R. 47:43)

The procedural mandates set forth by the Wisconsin Legislature have been in place for many years, and have been followed across the State through countless assessments of properties, without any reported incident, injury, or claim, to date. There is absolutely nothing about the facts of the subject assessment which suggest the scope and spirit of Chapter 70 was not followed in this case. Gardiner's conduct in no way can be construed a violation of sec. 1983. Summary judgment was properly granted.

IV. THE UNDISPUTED FACTS DEMONSTRATE THAT GARDINER DID NOT VIOLATE WIS. STAT. §§ 70.501 AND 70.503.

A. Gardiner's Assessment Practice Does Not Constitute a Violation of Wis. Stat. §70.503.

Wis. Stat. §70.503 applies in the event an assessor "is guilty of any violation or omission of duty as specified in ss. 70.501 and 70.502…." A guilty party "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 remedies given by law in actions for damages to tortious or wrongful acts." Wis. Stat. §70.503.

The Plaintiffs' Complaint, Count V, alleges that "Gardiner intentionally fixed the value of the property at more than its true value thereof prescribed by law and failed to perform its statutory duty of valuing the Property from actual view or the best information that the assessor could practically obtain." (R.2: ¶85) The Complaint alleges that Gardiner is personally liable for

the amount of excessive tax which Plaintiffs' attribute to an allegedly excessive assessment. (R. 2:¶86)

The underlying statute here, in relevant part, is Wis. Stat. §70.501, which proscribes conduct "*intentionally fixing* 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 same…." (emphasis supplied)

In response, there is absolutely no evidence that Gardiner intentionally acted to impose an assessment greater than true value. As such, Plaintiffs cannot prevail as a matter of law.

The regulations and guidance for assessors is abundantly clear that interior inspections of real property are a critical part of the assessment process. The WPAM, for full revaluations such as the Dover revaluation, *requires* the assessor to inspect the interior of all buildings. (R.29: Exh. E at p. 4-3;19-1;19-12) This brief, *supra* pgs. 6-11, fully describes the State's direction to assessors requiring interior inspections. The Wisconsin Legislature has deemed such inspections important enough that

Chapter 70 prohibits an owner from challenging their assessment if the owner denies the inspection.

Acting according to those regulations and guidance, Gardiner had to set an assessed value for the Plaintiffs' improvements. Gardiner, through the Affidavit of Gregory Gardiner, makes clear the motivation and rationale for the assessment:

- In making its assessment of the Plaintiffs' property at 1232 Linden Lane, Gardiner did not intentionally establish an assessed value at more than its true value as prescribed by law.
- Gardiner was not motivated to set the value at an incorrect amount. Gardiner issued an assessment based on its best professional judgment without bias or malice or intent to treat the Plaintiffs unfairly.
- Because Gardiner was not permitted into the home in 2013, Gardiner could not accurately determine the effective physical, functional and economic obsolescence of the structure, curable or non-curable. Without the accurate information, it is not possible to do an accurate cost, market, or income approach to valuation.
- Gardiner could not verify whether any remodeling had been performed in the prior nine (9) years. A single remodel project, like a kitchen or bath, could have significantly increased the value of the home. On average, approximately 70 percent of a home's value is on the interior. Gardiner could not verify whether any such remodeling or improvements were made over those nine (9) years.
- The Plaintiff's improvements were assessed at $227,800 from 2004 through 2012. In 2013, Gardiner changed the assessment on improvements to $261,000. Gardiner reached this number after considering: (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 to 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.

- Gardiner used its best professional judgment as to the assessed value of the Plaintiffs' home in 2013. Gardiner believes the increase was reasonable given the entirety of the history and circumstances cited herein, as a change from 2004 to 2013 assessed value.

(R. 29: ¶¶ 16-19)

All of these facts are undisputed. Plaintiffs submitted no affidavit in opposition. These facts, in no fashion, can support or even lead to an inference, let alone prove, that Gardiner is guilty of deliberately assessing property at an inflated level for retaliatory purposes. Such a suggestion is unsupportable. The trial court had no problem so concluding. (R. 47:44)

Professional assessment firms attempt to view thousands of properties every year. Any single property, and the denial to view same, would not create motivation for retribution. Why would a private assessor, whose compensation is not dependent on the individual assessments of any property, and has no personal knowledge of a property owner, set about on a path to

retaliate against a particular homeowner? This allegation defies common sense.

Accordingly, based on the irrefutable testimony from Gardiner, Plaintiffs cannot prove as a matter of law that Gardiner "intentionally fix[ed] 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 same…."

B. Plaintiffs' Attempts to Manufacture a Material Factual Issue or Inference Lack Merit.

1. No Unlawful Search Was Performed by Gardiner.

The trial court correctly concluded that Gardiner did not "search" the plaintiffs' premises. (R. 47:32-33) Plaintiffs nevertheless contend that Gardiner effectively searched the premises by an "excessive tax." (App. Brief, p. 39) This argument fails to recognize that Gardiner is not the taxing authority and does not impose any tax, receive any tax, nor receive the benefit of any tax. The Town of Dover does those

things. Thus, Gardiner did not cause a search or the equivalent thereof, and has no liability as a result.

2. Gardiner Has Not Engaged in a Pattern and Practice of Unlawfully Raising Assessments

Plaintiffs contend that Gardiner "picked" an "arbitrary number" for their assessed value. (App. Brief, p. 40) Plaintiffs also contend that Gardiner set high assessments in instances where they were denied interior access simply to "punish" the homeowners who denied access. (Id.) Both allegations lack all merit.

The Affidavit of Gregory Gardiner sets forth the rationale for how the Plaintiffs' property was assessed absent an interior viewing. (R. 29) There was no challenge by the Plaintiffs at the circuit court level on the question of the minutiae of calculations to reach the assessment. Gardiner disagrees that such minutiae is relevant to the proceedings. When assessing thousands of homes, there is no obligation to set forth in detail every component of the assessed valued determination for every home.

In any event, Gardiner had no opportunity to make a record of those calculations because the issue was not raised. As such, Plaintiffs are presenting a new argument on appeal and should not be permitted to do so. State v. Hayes, 2004 WI 80, ¶21, 681 N.W.2d 203.

Gardiner has to make assumptions to make a reasonable assessment in situations where the critical interior condition is an unknown. Otherwise, a homeowner can deny access and expect to be treated automatically in a way most favorable to them. This cannot be. There is a reasonable presumption that a homeowner who denies access has a motive therefor.

Plaintiffs repeatedly contend that an assessor can just "ask the homeowner" about their interior and eliminate the need for an interior inspection. There is no policy or accepted practice in Wisconsin to assess property based on interviewing property owners. The assessor has a need to see the quality of the improvements to make a fair and accurate assessment. This is comparable to a consumer purchasing a home without ever

looking at the interior, and only relying on a description by the seller. No rational buyer would do so. That is certainly why Wisconsin law demands inspections of the interior. (R. 32: ¶5)(R.29)

3. Plaintiffs Fail to Present a Valid Equal Protection Claim.

The Plaintiffs' Complaint makes an allegation of a constitutional violation by Gardiner based on the right to equal protection under the law. (R. 2: 56) Yet Plaintiffs, at the trial court level, and before this Court, never articulate a basis for such a claim. (App. Brief, p. 42) Again, this argument should be denied based on waiver. In any event, an isolated plaintiff who perceives himself to be "punished" by an assessment practice specific to his residence fails to qualify for any "protected class" under the law. Plaintiffs offer no legal basis for such a protected class. Plaintiffs have not explained what the protected "class" is, nor that they are members of that class. Perkins v. BOS-MRS Enters., Inc., 2009 WI App 174, ¶9, 776 N.W.2d 288.

4. Plaintiffs Inaccurately Compare the Subject Property to Other Properties.

At page 12 of their Brief, Plaintiffs cite to two properties whose assessments were decreased after an interior inspection. The figures cited therein are wrong. For the Lotus property, the assessment changed from the prior year of $232,900 to $200,400, a change of approximately 14 percent. For the Larkspur property, the assessment changed from $242,000 to $235,600, a change of approximately 3 percent. Plaintiffs claim the changes were negative 22.24% and 12.84%, respectively. (App. Brief, p. 12) The true and correct figures demonstrate that there was no uniform or punitive percentage applied, either before or after the inspections. (R. 32:¶9)

5. Gardiner Assessed in Compliance With Wisconsin Law.

Plaintiffs contend Gardiner failed to value the property from actual view or the best information an assessor can practicably obtain. Plaintiffs misread sec. 70.32 and the WPAM. It is abundantly clear that "actual view" includes interior view,

and that is the preferred and, in fact, required method for appraisers to pursue. (*See supra*, p. 6-11) The alternative suggestion to review "best information" is applicable only where the interior, actual view is not available.

The Plaintiffs wish to rewrite the statutes and create their own assessment process where the assessor can interview them, look at the outside of a house, and look at building permits, and say, "good enough." Such a process is contrary to Chap. 70 and the WPAM.

An interior inspection is the standard and was required. Without it, the assessor has limited actual evidence on which to base its assessment. The vast majority of the home value is in the interior. An external inspection does not address the interior. Building permits, if not lawfully pulled, do not address the interior. An owner interview, with someone arguably motivated to conceal or diminish the interior condition of the home, does provide adequate, accurate information about the interior. And even if they are truthful, their description does not replace the

professional assessment observation of a licensed assessor. Assessors have training to view the condition of the interior and draw professional conclusions therefrom. They are trained, licensed professionals, and serve a legitimate purpose so that all homeowners are treated uniformly and fairly.

Under the Plaintiffs' rationale, every homeowner essentially could self-assess and self-report their own homes. The minor inconvenience of a brief property view, as noted by the trial court in its decision, can be readily justified. (R. 47:40-41)

The bottom line is that there is no requirement that an assessor employ all the methods cited by plaintiffs to craft a lawful assessment. If the homeowner denies access, the assessor can look at past information, market trends, and the many other factors cited by Gardiner, to reach a reasonable assessment. To suggest that a mere increase of 12.7% over a 10 year period is intentionally excessive or punitive goes too far.

C. Plaintiffs Do Not Challenge the Trial Court's Award of Summary Judgment Dismissing a Direct Claim Pursuant to Wis. Stat. §70.501.

Wis. Stat. §70.501 establishes a forfeiture provision payable to the State of Wisconsin. The section applies in the event "any assessor…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 same…." The forfeiture may range from $50 to $250. Wis. Stat. §70.501.

The trial court granted summary judgment finding that Plaintiffs had no independent right to step into the prosecutor's shoes and enforce this ordinance. (R. 47:44) The Appellants' Brief does not contest that finding. Accordingly, the summary judgment dismissing that damages claim should be affirmed. (R. 2: ¶86)

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the circuit court in all respects.

Dated this 12th day of November, 2015.

AXLEY BRYNELSON, LLP

/s/ MITCHELL R. OLSON
Mitchell R. Olson, SB #1030756
2 East Mifflin Street, Suite 200 (53703)
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
molson@axley.com
Attorneys for Defendant-Respondent,
Gardiner Appraisal Service, LLC

CERTIFICATIONS

I. Certification Of Form And Length

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7,885 words.

II. Certification Of Compliance With Rule 809.19(12)

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

Dated this 12th day of November, 2015.

AXLEY BRYNELSON, LLP

/s/ MITCHELL R. OLSON

Mitchell R. Olson, SB #1030756
2 East Mifflin Street, Suite 200 (53703)
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444

CERTIFICATE OF SERVICE

Mitchell R. Olson certifies that on November 12th, 2015, three (3) true and correct copies of the Defendant-Respondent, Gardiner Appraisal Services, LLC's Response Brief were placed in the U.S. mail to the following:

Attorney Michael J. Cieslewicz
Kasdorf, Lewis & Swietlik SC
One Park Plaza
11270 W. Park Place, 5th Floor
Milwaukee WI 53224

Attorney Thomas C. Kamenick
Wisconsin Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee WI 53202-2828

Dated this 12th day of November, 2015.

/s/ MITCHELL R. OLSON
Mitchell R. Olson, SB #1030756