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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS VINCENT MILEWSKI AND MORGANNE MACDONALD

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INTRODUCTION

Under the arguments advanced by the Defendants-Respondents, once the government demands entry into a home to do an assessment and the homeowners refuse consent, the government may levy and collect a tax of any amount, and the homeowners can do nothing about it. They are not merely placed at a natural disadvantage in any subsequent appeal, they can make no appeal at all.

Defendants-Respondents see no constitutional injury in this Sophie's Choice – it is just Wisconsin's chosen way to collect taxes and, as such, is beyond reproach. But the British practice of searching homes to collect taxes was one of the main evils the framers sought to prevent with the Fourth Amendment:

> To combat tax evasion, the British and the American colonial governments used general warrants and writs of assistance to look for untaxed goods in homes and other buildings. . . . These general warrants and writs of assistance **were very much opposed** by the Americans and they **were the impetus for the Fourth Amendment prohibition against general warrants and the requirement that searches be reasonable**.

Collins T. Fitzpatrick, *Protecting the Fourth Amendment So We Do Not Sacrifice Freedom for Society*, 2015 WIS. LAW REV. 1, 4-5 (emphasis added); *see also New Jersey v. TLO*, 469 U.S. 325, 335 (1985) ("[T]he

Fourth Amendment was primarily directed [against] the resurrection of the pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown."); *U.S. v. Chadwick*, 433 U.S. 1, 7 (1977) ("These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.").

Gardiner argues primarily that it simply followed the Wisconsin Property Tax Assessment Manual ("WPAM") and, as a result, no liability should attach to its conduct. But the Plaintiffs-Appellants submitted evidence that Gardiner **did not** follow the WPAM, but rather retaliated against the Plaintiffs-Appellants for asserting their Fourth Amendment rights by over-assessing their property. Given the factual disputes on these issues, granting judgment to Gardiner as a matter of law was error.

I. ENTERING A HOME TO ASSESS IT IS A "SEARCH" AND NOT REASONABLE AS IMPLEMENTED IN WISCONSIN LAW

A. Entering a Home to Assess its Interior Is a Fourth Amendment "Search"

The Town argues that this case is controlled by *Wyman v. James*, 400 U.S. 309 (1971), rather than *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). This is a new argument not advanced in the Circuit Court. That the Town has come to it late is no surprise.

Wyman held that benefits under the Aid to Families with Dependent Children program could be conditioned on a home interview. *Camara* held that government agents may not enter a home without consent or a warrant in order to perform building inspections.

The facts in *Camara* are much closer to this case. In both *Camara* and this case the government is seeking to impose some mandatory requirement (compliance with the building code) or exaction (payment of taxes) that cannot be avoided. The government is not, as in *Wyman*, merely withholding a benefit.

This distinction was critical to the result in *Wyman*. The Court noted that those who dispense charity have an "interest in and expect[] to know how . . . charitable funds are utilized and put to work" and that "[t]he

public, when it is the provider, rightly expects the same." 400 U.S. at 386. The caseworker, it reasoned, was "not a sleuth but rather, we trust, is a friend to one in need," *Id.* at 323, who helped ensure that welfare funds intended to benefit children actually did so, *Id.* at 318. If a home interview was refused, there would be no penalty. Aid would simply cease or never begin. *Id*. at 317-18.

But the Plaintiffs-Appellants have not applied to the Town to receive any benefits. They cannot forego paying taxes any more than the building owners in *Camara* could avoid compliance with the building code. If they refuse to consent, the government will not simply go away and leave them alone. This is not even a case (like that posed in *Wyman*, 400 U.S. at 324) where a taxpayer must prove entitlement to a deduction – something that she has claimed and for which she has the burden of proof. *See Interstate Transit Lines v. Comm'r of Internal Revenue*, 319 U.S. 590, 593 (1943) ("[A]n income tax deduction is a matter of legislative grace and . . . the burden of clearly showing the right to the claimed deduction is on the taxpayer.")

Finally, what constitutes a Fourth Amendment "search" has significantly expanded since *Wyman* was decided in 1971. For example, in

City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015), the Supreme Court found that the government's viewing of a hotel registry was a "search." *See also Florida v. Jardines*, 133 S. Ct. 1409 (2013) (allowing police dogs to sniff on a citizen's front porch is a search); *U.S. v. Jones*, 132 S. Ct. 945 (2012) (installation of a GPS device on a vehicle is a search). In these cases, all decided in the last three years, the Supreme Court found that conduct far less intrusive than entering a home for the explicit purpose of surveying and cataloging its contents constituted Fourth Amendment searches. Those decisions leave any conclusion in *Wyman* to the contrary no longer valid law as to what constitutes a "search."

B. Wisconsin's Assessment Searches Are Not Reasonable

As noted earlier, one of the primary concerns of the framers was to prevent general searches of homes for taxable goods. They believed that catching tax evaders and raising revenue were not important enough governmental concerns to justify warrantless home searches. Concluding that such searches are nonetheless "reasonable" under the Fourth Amendment would turn that intent on its head.

To go a step further and conclude that it is reasonable to punish the assertion of one constitutional right with the deprivation of another (by

depriving the Plaintiffs-Appellants of property without due process) is even more unsupportable. *See Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)) ("'It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution.'"). Even if a system of warrantless searches could be reasonable by itself, the punishment for failing to acquiesce here is too severe. The government interest in uniform taxation is not at all served by denying owners the right to appeal. In fact, uniformity is **harmed** by a system that allows assessors to make arbitrary assessments they know cannot be challenged.

The Town asks what the requirement of a warrant or probable cause would mean in this context. (Town Br. 8.) It seems to believe that demonstrating a particularized need for entry into a home is meaningless because it aims to enter into everyone's home. In so doing, it pulls mightily on its bootstraps. The measure of citizens' right to "retreat into their homes" is not limited by the voracity with which the state wishes to infringe it. Taxation must conform itself to the Constitution; not the other way round.

Compliance with the Fourth Amendment would require that the government do its best to assess the value of a home using all of the tools available, including interviewing the owners and inspecting building records. It could not assume, as happened here, that the owners are "hiding something." Most importantly, homeowners would be entitled to challenge the assessment. To be sure, their failure to permit an inspection might make success in that challenge more difficult (this would depend on the evidence taken as a whole), but it would not preclude an appeal.

Moreover, the government would remain free to seek a warrant. The Supreme Court has expressly approved of administrative warrants requiring a lower showing than the traditional standard for probable cause. *Camara*, 387 U.S. at 538. If a town needs to enter the homes of the handful of taxpayers who refuse entry (nothing in the record establishes that all municipalities do interior inspections), it can explain why to a magistrate. *See, e.g.*, *Matter of Jacobowitz v. Bd. of Assessors for Town of Cornwall*, 121 A.D.3d 294 (N.Y. App. Div. 2014) (entry into home for assessment is a Fourth Amendment search and requires a warrant issued on a showing of probable cause that the search is reasonable); N.H. Rev. Stat. §74:17

(creating an administrative inspection warrant process if homeowners refuse consent).

The State has many reasonable options to obtain accurate assessments and impose uniform taxes. Demanding entry into private homes, without a warrant, and upon penalty of losing all ability to challenge the imposed tax, is not one of them. The procedures set forth in the Wisconsin statutes are not reasonable, and not constitutional.

C. Further Board of Review Proceedings Are Not an Appropriate Remedy

The Town argues that if this Court finds a constitutional violation, it should remand the case back to the Town's BOR. (Town Br. 16-17.) But the Plaintiffs-Appellants have now paid two years' worth of unlawfully-high taxes, and the BOR has no statutory authority to change an assessment retroactively or refund taxes paid (or award damages on Plaintiffs-Appellants' § 1983 claim). It can only change the Plaintiffs-Appellants' assessment going forward.

The Circuit Court has the authority to retroactively set the proper assessment and order the Town to refund the unlawfully-collected taxes. *See* Wis. Stat. §§74.37(3), 74.39(3). Given that the court would owe no deference to the BOR in this *de novo* review, *Metropolitan Associates v.*

City of Milwaukee, 2011 WI 20, ¶ 2, 332 Wis. 2d 85, 796 N.W.2d 717, BOR review would be a waste of time.

II. GARDINER WAS NOT ENTITLED TO SUMMARY JUDGMENT.

The Plaintiffs-Appellants asserted two separate claims against Gardiner; (1) that Gardiner assessed their property in a discriminatory and retaliatory manner in violation of 42 U.S.C. § 1983, and (2) that Gardiner intentionally over-assessed their property and failed to perform duties required by an assessor in violation of Wis. Stat. §70.501. In support, the Plaintiffs-Appellants submitted evidence that:

- within their subdivision, Gardiner uniformly raised the assessments of all properties that did not have interior inspections and uniformly lowered the assessments of properties that had interior inspections;[1]

- Gardiner had a pattern and practice of lowering the assessments of property owners who initially refused but later relented and permitted an interior inspection;

- Gardiner failed to submit any evidence that substantiated its assessment of the Plaintiffs-Appellants' Property of $307,100;[2] and

[1] Gardiner argues that two of the Plaintiff-Appellants' numbers are "wrong." (Gardiner Br. 43.) The numbers are shown in R. 38:3 (App. 128), and demonstrate the decrease between Gardiner's initially-raised and subsequently-lowered assessments.

[2] Gardiner claims the Plaintiffs-Appellants did not raise this argument in the lower court. (Gardiner Br. 40-41.) Plaintiffs-Appellants did. (*See* R. 33:3-4, 12-13.)

- Gardiner failed to take steps required by assessors under the Wisconsin Property Assessment Manual.

The Circuit Court was required to view the evidence in the light most favorable to the Plaintiffs-Appellants and grant summary judgment to Gardiner **only if** the undisputed 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. But it improperly weighed the competing evidence and concluded that Gardiner's version of facts was correct.

A. The Plaintiffs-Appellants Have a Valid 42 USC § 1983 Claim Against Gardiner

Gardiner argues that the Circuit Court's decision was proper because it was not Gardiner who took away the Plaintiffs-Appellants' Fourth and Fourteenth Amendment rights (if any rights were taken) but rather Wisconsin law that did so. (Gardiner Br. 25-29.) But the Plaintiffs-Appellants' § 1983 claim is not that Gardiner deprived the Plaintiffs-Appellants of their due process rights to challenge their assessment, but that it deprived them of their Fourth and Fourteenth Amendment rights by raising their assessment in retaliation for exercising a constitutional right

and by assessing their property in a discriminatory manner. That conduct was not performed by the Town, but by Gardiner.

The Constitution protects the Plaintiffs-Appellants' right to refuse entry, and prohibits Gardiner from punishing anyone for exercising that right. Yet Gardiner admits this is exactly what it did. Gardiner's own affidavit admits that when it comes to property owners who refuse to permit entry, they guess high by assuming "less increase in effective age than average" and undisclosed improvements. (R. 29:45.) Those statements show that Gardiner is not guessing high based solely on the **inability** to view the interior of a home (as might be the case if the assessor simply cannot contact the owner or the property is abandoned) but also on the **refusal** of permission to view the interior. In other words, owners who assert their Fourth Amendment rights are treated worse not only than owners who consent to search, but owners who cannot be contacted.

Gardiner next argues that it never entered the Plaintiffs-Appellants' property and, therefore, never conducted an illegal search. (Gardiner Br. 30-31.) Again, the Plaintiffs-Appellants' claim against Gardiner is not for an illegal search, but for retaliation and over-assessing their Property. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. at 341 (quoting *Harman v. Forssenius*,

380 U.S. at 540 ("'[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.'").

Finally, Gardiner argues that the Plaintiffs-Appellants did not exhaust their administrative remedies. (Gardiner Br. 28.) The administrative remedy exhaustion doctrine does not apply to § 1983 claims. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982).

B. The Plaintiffs-Appellants Have a Valid Claim Against Gardiner Under Wis. Stat. § 70.503

Wis. Stat. §§70.501 and 70.503 provide a private cause of action if an assessor (1) intentionally over-assesses a property, or (2) fails to perform any assessment-related duty. Based on the Plaintiffs-Appellants' evidence, a reasonable jury could have concluded that Gardiner violated the statute in both ways.

1. Whether Gardiner Intentionally Over-assessed the Property is a Dispute of Material Fact

It is uncontested that every property in the subdivision that refused entry to Gardiner had their assessment increased and that every property that consented had their assessment decreased. That alone raises a

reasonable inference that Gardiner intentionally over-assessed the houses not internally viewed.

Further, Gardiner's own documents lack any support for Gardiner's $307,100 assessment of the Plaintiffs-Appellants' property. Gardiner's Valuation Detail for the Plaintiffs-Appellants' property simply states a value with no explanation or support for the number. (R. 35:3.) That the absence of a documented rationale is mere minutiae (*see* Gardiner Br. 40), may be an argument to a trier of fact. It does not support summary judgment.

Finally, as noted above, Gardiner has admitted they intentionally guessed higher than they otherwise would have, solely because the Plaintiffs-Appellants refused entry. The Circuit Court should not have concluded Gardiner was entitled to summary judgment.

2. Undisputed Facts Demonstrate Gardiner Failed to Perform Duties Required by Law

The Plaintiffs-Appellants submitted facts showing that Gardiner failed to assess the Property using the methods required by statute. The duties imposed by law on an assessor include the duty to value real property "from actual view **or from the best information that the assessor can practicably obtain**." §70.32(1) (emphasis added). Gardiner

argues that "[t]he alternative suggestion to review 'best information' is applicable only where the interior, actual view is not available." (Gardiner Br. 44.) Here, actual view was not available (because the Plaintiffs-Appellants exercised their right to refuse) and Gardiner should have used the alternative methods set forth in the WPAM, including actually viewing the exterior, reviewing building permits, and interviewing the owners.

Gardiner does not dispute that it failed to use those alternative methods. Instead, it claims that the WPAM does not actually require them.[3] This is odd. Gardiner argues that it absolutely had to do an interior inspection **because the WPAM says so**. But the WPAM also says to use other methods as well. Gardiner cannot have it both ways. Either the WPAM offers mere suggestions, or it must be followed. The statutes say it must be followed. §70.32(1) ("Real property **shall be valued** by the assessor **in the manner specified in the Wisconsin property assessment manual** . . . .") (emphasis added).

[3] Gardiner suggests that, among other things, "market trends" should be used to assess a house that cannot be internally viewed. (Gardiner Br. 45.) The only record evidence available shows the market for houses in that neighborhood had **decreased** since 2004, by an average of 4.72%. (R. 38:3 (App. 128).) Raising the Property's assessment by 12.12% creates an inference that Gardiner did not follow proper methods. Similarly, contrary to Gardiner's claim that such an increase "is not uncommon" (R. 29:5), it was the largest increase in the entire subdivision (R. 38:3 (App. 129)).

The Circuit Court concluded (and Gardiner argues (Gardiner Br. 44-45)) that none of the other methods are as good as an interior inspection, but that is beside the point. The Legislature and the Department of Revenue have determined that these are required duties of an assessor. The WPAM requires assessors to take these steps to find the best available information, and Wis. Stat. §§70.501 and 70.503 provide a homeowner with a claim if the assessor fails to do so.

Because Gardiner failed to perform duties required of it by law, Plaintiffs-Appellants are entitled to summary judgment on this claim.

CONCLUSION

This Court should reverse the Circuit 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-Appellants' Motion for Summary Judgment; and (4) grant the Plaintiffs-Appellants summary judgment pursuant to §802.08(6).

Dated this 25th day of November, 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 produced with proportional serif font. The length of this brief is 2,967 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: November 25, 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 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: November 25, 2015

/s/ RICHARD M. ESENBERG
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