STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

KRIST OIL COMPANY, and ROBERT LOTTO
Plaintiffs,
-vs-

BEN BRANCEL, Secretary, Wisconsin
Department of Agriculture, Trade and Consumer Protection, Case No. 16-CV-117
Defendant,
and

WISCONSIN PETROLEUM MARKETERS AND
CONVENIENCE STORE ASSOCIATION,
Intervenor-Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT BRANCEL'S MOTION OPPOSING PLAINTIFF'S REQUEST FOR A JURY TRIAL

The very first sentence of Defendant Brancel's brief is wrong. "This is," he says, "an equitable action." Def. Br. at 1. It is not. It is a statutory action for a declaration pursuant to Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. §806.04. The question of whether the Plaintiffs are entitled to a jury trial begins – and should end – with that statute.

I. THE DECLARATORY JUDGMENT STATUTE GIVES THE PLAINTIFFS A STATUTORY RIGHT TO A JURY TRIAL ON FACTUAL ISSUES IN THIS CASE.

This issue is a question of statutory interpretation. "Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal quotation marks omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.*, ¶46. "In

construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.* (internal quotation marks omitted).

The declaratory judgments act provides that plaintiffs are entitled to a jury trial on those factual issues that would be triable to a jury, just as they would be in any other civil action:

> JURY TRIAL. When a proceeding under this section involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Wis. Stat. 806.04 (9). The literal and most obvious reading of §806.04(9) is that jury trials are allowed in declaratory judgment actions to determine issues of fact. The only qualifying language clarifies that the court should use the same procedures for jury trials that it uses in other civil actions. Thus, the legislature has made clear that nothing in the declaratory judgments act was intended to abrogate the rules that generally apply to jury trials in other civil actions. *See generally* Wis. Stat. ch. 805 "Civil Procedure – Trials." This kind of statutory grant of a jury trial right is expressly recognized in §805.01(1), which states that "[t]he right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute . . . shall be preserved to the parties inviolate." (Emphasis added). The language of §806.04(9) should make it clear that the legislature intended to provide for jury trials in declaratory judgment cases.

Nor does the fact that the Plaintiffs asked for an injunction as one potential remedy transform the basic nature of this case from one at law to one of equity. The Plaintiffs would be entitled to seek a declaration under the declaratory judgments statute whether or not they asserted that as a result of a favorable declaration they might also be entitled to an injunction or any other kind of relief. The statute itself makes it clear that the plaintiffs are entitled to seek a declaration under the statute "whether or not further relief is or could be claimed." Wis. Stat. §806.04(1); *see* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 561, n. 155

(2016) (offering examples of courts granting a declaration but refusing to grant an injunction). Conversely, an injunction is only available *after* a declaration has been made, §804.06(8), and in this case no injunction may be necessary.[1] §806.04(8).

The Plaintiffs claim that Wisconsin's Unfair Sales Act violates their rights to due process and equal protection under the Wisconsin Constitution. They assert that they have suffered harm as the result of the State's violation of their rights – Plaintiff Krist Oil because it does not have the ability to engage in full and free competition and Plaintiff Lotto because he and other Wisconsin consumers must pay higher prices as the result of the statute's anticompetitive effects. As they are authorized to do under the declaratory judgment statute, the Plaintiffs claim that their "rights, status or other legal relations are affected by a statute" and ask this court to rule on the "validity" of the Minimum Markup law by issuing a declaration. *See* Wis. Stat. §806.04(2).

The Plaintiffs believe that this legal question is dependent on factual matters that should be determined by a jury in this case, including whether as a matter of fact the Unfair Sales Act actually does – or even could – further any of the interests claimed by the State. Courts in other cases have properly deferred to a jury to determine disputed issues of fact regarding the rational basis test. *See, e.g., Loesel v. City of Frankenmuth*, 692 F. 3d 452 (6th Cir. 2012) (jury resolved question as to whether an ordinance lacked a rational basis in an equal protection act claim); *Reid v. Rolling Fork Public Utility Dist*., 979 F.2d 1084 (5th Cir. 1992) (jury charged with determining whether there was any rational basis for the public utility district to reject the developer's request for a commitment by the district to provide sewage for the developer's land). Under the plain language of the statute, the Plaintiffs are entitled, as they would be in any other civil case, to

[1] Indeed, one might expect that if the court declares that the Minimum Markup Law is unconstitutional and therefore void, Defendant Brancel might decide that he would be well-advised to stop enforcing it. And if he did not, the question of whether an injunction would be appropriate pending appeal and of what such an injunction should cover would certainly be the subject of a supplemental petition. Such a supplemental proceeding would have to deal with issues not raised or decided in the underlying case involving the declaration itself.

have a jury determine the issues of disputed fact within its normal province. Whether the law is constitutional is of course a question for a judge to answer, subject to the factual determinations made by the jury.

II. THE DECLARATORY JUDGMENT STATUTE DOES NOT INCORPORATE A DISTINCTION BETWEEN LAW AND EQUITY

Defendant Brancel would have this Court ignore the straightforward language of the statute, reading it in a way that interjects a test that is not present in the text. He does so by suggesting that the declaratory judgment statute somehow (without actually saying so), incorporates a rule that relates to the Wisconsin Constitution's guarantee of the right to jury trial in certain kinds of cases. The Constitution, he says, guarantees the right to a jury in civil cases only if they are analogous to causes of action arising at law that existed in Wisconsin when the Constitution was adopted in 1848, and there is no constitutional right to jury trial in cases analogous to traditional proceedings in equity.

That is why he calls this case an "equitable action," and that is why he relies on cases that say that cases seeking only injunctive relief are injunctive proceedings in equity, and that there is no constitutional right to a jury trial in those kinds of cases. The Plaintiffs do not dispute that plaintiffs in purely equitable actions have no constitutional right to a jury trial under Wisconsin law. But this is not an equitable action; that rule does not apply here. As the United States Supreme Court has said, "Actions for declaratory judgments are neither legal nor equitable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988).

There is no statutory language indicating that the legislature intended to incorporate the constitutional test into the declaratory judgment statute. The legislature is obviously free to provide for a jury trial in cases that arise under a statute, whether or not the parties have a constitutional right to a jury. *See, e.g., Harvot v. Solo Cup Co.*, 2009 WI 85, ¶¶40-60, 320 Wis.

2d 1, 768 N.W.2d 176 (analyzing whether a statutory jury trial right existed before turning to the question of a constitutional jury trial right). Defendant Brancel offers essentially no authority against the proposition that this is exactly what the legislature has done here.

He does refer to a treatise – Wisconsin Civil Procedure Before Trial – which relies in turn on *Beacon Theaters*, a federal case involving the federal declaratory judgment statute. And he says that there is in fact a black letter rule of law that says that courts in declaratory judgment cases must determine the underlying nature of the case and that jury trails are available only in those kinds of cases where a jury trial is available as a matter of right. But that argument-by-analogy lacks several logical steps (notably, a comparison of the federal declaratory judgment statute (28 U.S.C. § 2201) and relevant Federal Rules of Civil Procedure (FRCP 57, which incorporates FRCP 38 and 39) with the Wisconsin declaratory judgment and jury trial statutes), and more importantly lacks a basis in the Wisconsin statutory language.

Defendant Brancel's rule would in effect require the court in a declaratory judgment action to first determine whether the underlying cause of action is an action at law or an action in equity, as those things were understood when the Wisconsin Constitution was adopted in 1848. A jury would be appropriate only where a declaratory judgment is sought in a case that can be characterized as an "action at law" as opposed to an "equitable action." Def. Br. at 5.

There is no indication that the Wisconsin Legislature intended to incorporate such a complex test in its straightforward language. The federal courts have found it virtually impossible to apply these kinds of distinctions in other contexts, including the nature of claims asserted in declaratory judgment cases.

> Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy. Thus, the rule has placed courts 'in the unenviable position not only of solving modern procedural problems by the application of

> labels that have no currency, but also of considering the nature of suits which were never brought.'

Gulfstream Aerospace Corp., 485 U.S. at 284 (1988), quoting *Diematic Mfg. Corp. v. Packaging Industries, Inc.* 516 F 2d. 975, 978 (2nd Cir. 1975).

Defendant Brancel's proposed test does not exist in the language of the declaratory judgment statute and cannot be reasonably inferred from that language.

III. EVEN IF IT MATTERED, THIS IS NOT AN EQUITABLE ACTION

As demonstrated, the jury trial right expressly granted in the declaratory judgment statute does not incorporate the constitutional distinction between actions at law and proceedings in equity. But even if it did, the application of that test to the Plaintiffs' claims would still permit them to try the case to a jury. Plaintiffs' claim is one that was recognized at law prior to 1848.

The Wisconsin Supreme Court has taken a permissive approach to analogizing claims brought in modern cases to claims under the common law prior to the Wisconsin Constitution's enactment. In *Village Food & Liquor Mart v. H & S Petroleum, Inc*., 2002 WI 92, 254 Wis. 2d 478, 647 N.W.2d 177, the court analogized the plaintiff's charge of unfair competition to the common law remedy in England of "Offences Against Public Trade" and concluded that claims under Wisconsin's Unfair Sales Act (the same statute which the Plaintiffs in this case assert harms them) are triable of right to a jury under Article I, Section 5 of the Wisconsin Constitution.[2]

Here, the Plaintiffs assert that their constitutional rights were violated and they are harmed by the application of the Unfair Sales Act. Instead of committing a violation and raising

[2] "H & S, however, persuasively points us to the well-recognized *Commentaries on the Law of England* wherein Sir William Blackstone included a chapter on "Offences Against Public Trade.". . . We have reviewed this chapter of Blackstone's *Commentaries* and find that the first prong is met: H & S had a constitutional right to have its statutory claim tried to a jury because the cause of action created by the statute existed, was known, and was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848." 2002 WI 93, ¶26.

unconstitutionality of the law as a defense, they bring a pre-enforcement action to learn whether they can engage in the prohibited behavior. Such a lawsuit is often referred to as an "inverted law suit," where the parties are in reversed positions from what one would expect if an action had been brought to challenge a violation of a law. *See Marseilles Hydro Power, LLC v. Marseilles Land and Water Co.*, 299 F. 3d 643, 649 (7th Cir. 2002). If a jury trial would be available in the enforcement action, it is likewise available in an inverted action seeking a pre-enforcement declaration. *Id.* If Krist were sued for violating the Unfair Sales Act, it would be entitled to a jury trial. *Village Food & Liquor Mart*, 2002 WI 92, ¶31. Therefore, in this action, where Krist seeks a pre-enforcement declaration, it is entitled to a jury trial.

Looking at the nature of the claim itself, Plaintiffs' constitutional claim in this case is similar to constitutional challenges arising under 42 U.S.C. § 1983. The United States Supreme Court has made it clear that such challenges are analogous to traditional actions at law, in particular to common law actions for trespass. *See Wilson v. Garcia*, 471 U.S. 261, 276-79 (1985) (characterizing § 1983 actions as most analogous to a tort action for personal injury); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 727 (1999) (Scalia, J., concurring) ("This Court has confirmed in countless cases that a § 1983 cause of action sounds in tort."). Furthermore, "common law tort actions were brought under the writs of trespass and trespass on the case." *City of Monterey*, 687 at 729 (Scalia, J. concurring) (citing S. Milsom, Historical Foundations of the Common Law 283–313 (2d ed.1981)). The original writ of trespass was not limited to property, but encompassed any contravention of a person's rights. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Book III, 208 (1910).

These common law writs were actions at law in Wisconsin when the Wisconsin Constitution was enacted, and were properly triable to a jury.[3]

The right which Plaintiffs claim here – the right to be free from arbitrary and capricious interference with their freedom by the State – is entirely analogous to the rights protected by § 1983. They are claiming that state officials are harming them by enforcing an unconstitutional law against them. This claim is analogous to a claim for wrongful trespass, which is and was a claim recognized at law.

As a result, the Plaintiffs are entitled to a jury trial under Article I, section 5 of the Wisconsin Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' request for a jury trial.

Dated this 7th day of July, 2017.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

Electronically signed by Richard M. Esenberg
Richard M. Esenberg, WBN 1005622
(414) 727-6367; rick@will-law.org
Thomas C. Kamenick, WBN 1063682
(414) 727-6368; tom@will-law.org
Michael Fischer, WBN 1002928
(414) 727-6371; mike@will-law.org
Clyde A. Taylor; WBN 1103207
(414)-727-7414; clyde@will-law.org
MAILING ADDRESS:
1139 E. Knapp St.
Milwaukee, WI 53202
414-727-9455; FAX: 414-727-6385

[3] In contrast, the Defendant Brancel has pointed to no traditional equitable proceeding that is analogous to an action for a declaration. His argument rests on the fact that Plaintiffs have suggested in their complaint that an injunction may be appropriate as supplemental relief. But in contrast to a proceeding in equity, the Plaintiffs have not claimed that the remedy they seek – a declaration – would be inadequate. For the reasons set forth above, no further relief may be necessary or appropriate.