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STATE OF WISCONSIN
DISTRICT 3
APPEAL CASE NO. 2019AP1528

Voters with Facts, J. Peter Bartl, Dawn Bergstrom, Cynthia M. Burton, Maryjo Cohen, Jo Ann Hoeppner Cruz, Leah Kubetz, Rachel Mantik, Janeway Riley, Christine Webster, Dorothy A. Westermann and Janice M. Wnukowski,

Plaintiffs-Appellants,

v.

City of Eau Claire and City of Eau Claire Joint Review Board,

Defendants-Respondents.

Appeal from the Circuit Court of Eau Claire County
Case No. 19-CV-192

PLAINTIFFS-APPELLANTS BRIEF

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INTRODUCTION

Plaintiffs-Appellants (collectively, "Voters") are taxpayers who challenge the decision to create tax incremental financing district ("TID") #12 by the City of Eau Claire (the "City") and the City of Eau Claire Joint Review Board (the "JRB" and, collectively with the City, "Eau Claire"), which have statutory responsibility for TID #12. The Circuit Court dismissed Voters' request for common law certiorari review of Eau Claire's decision as time-barred, however, before getting to the merits of whether TID #12 satisfied Wisconsin's TID law, Wis. Stat. § 66.1105. In doing so, the Circuit Court ignored the statutory time limits governing Voters' claim, as well as black letter law, and extended the holdings from a line of inapposite cases.

According to Eau Claire, the Wisconsin Supreme Court has fashioned an inflexible and invariant limitations period requiring that "certiorari proceedings must be commenced within six months of the action sought to be reviewed, and parties who fail to so commence the proceedings are guilty of laches." *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 575-76, 252 N.W.2d 28 (1977) (citing *State ex rel. Czapiewski v. Milwaukee Serv. Comm'n,* 54 Wis. 2d 535, 539, 196 N.W.2d 742 (1972); *State ex rel. Casper*

v. Board of Trustees, 30 Wis. 2d 170, 174-75, 140 N.W.2d 301 (1966)) (collectively referred to herein as "*Mentkowski, et al.*"). In each of these three cases, the Supreme Court concluded that a garden-variety certiorari claim was barred by laches because it had not been commenced within six months of the challenged decision. Eau Claire argued, and the Circuit Court held, that the holdings together constituted a judicially-fashioned, hard-and-fast "rule" that should be extended to cover any and all claims seeking certiorari review of the creation of a TID. But the Circuit Court should not have extended any such "rule" beyond the three cases, none of which involved an issue as complex as whether a TID comports with Section 66.1105. Whatever presumption the Supreme Court might have relied on in reaching the decisions in those cases can hardly establish a period of limitations applicable in every case regardless of whether the requirements for laches have otherwise been met.

More fundamentally, a judge-made rule cannot override a legislative determination of when an action is or is not time-barred. In this case, Voters were compelled to comply with the statutory notice of injury and claim requirements of Wis. Stat. § 893.80, which displaces the six-month "rule" that Eau Claire cites from *Mentkowski, et al*. That statute was enacted after

Mentkowski, et al. were decided and governs the time for bringing a lawsuit against a municipal entity on a state law cause of action, like Voters do here.[1] The provisions of Section 893.80 (including a statutory limitations period of six months that Eau Claire chose not to take advantage of) conflict with the six-month "rule," and application of both to Voters' claim would effectively amend or supplant the statute with a judge-made limitations period.

Under *Mentkowski, et al.,* and as borne out in subsequent caselaw, the six-month "laches" limitation does not apply where statutory requirements on timeliness like those of Section 893.80 exist. Furthermore, even if the notice of claim statute did not apply, the six-month limitation from *Mentkowski, et al.* still cannot govern because it is beyond the power of the judiciary to impose a fixed limitations period that applies in all cases without regard to the individual facts in any one case. Only the legislature can do so through enactment of a statute of limitations.

In contrast to statutes of limitations, laches is inherently a case-by-case determination that depends on the specific factual circumstances before

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[1]Eau Claire has so far refused to take a position on the threshold legal issue of whether or not the notice of claim statute even applies. Presumably, this curious refusal is explained by Eau Claire's desire to preserve its right to raise lack of compliance with Section 893.80 as an affirmative defense in some other, future lawsuit, while not conceding its applicability here. As demonstrated herein, if Eau Claire conceded that the statute governed Voters' claim, it could not rely on the "rule" from *Mentkowski, et al.*

a court. Nonetheless, the Circuit Court applied laches without requiring that Eau Claire prove the elements of its affirmative defense.

STATEMENT OF ISSUES

Issue: Whether Voters' action seeking common law certiorari review of the legality of TID #12 was time-barred because it was filed more than six months after the decision to create TID #12.

Circuit Court's Decision: The Circuit Court ruled that Voters' action for common law certiorari review was time-barred under the holdings of *Mentkowski*, *et al.*, which, the Circuit Court stated, fixed an absolute six-month limitations period for seeking common law certiorari review of the decision to create a TID.

STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary in this case because briefing is likely to be sufficient 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. § 809.23(1)(a) because the decision will likely 1) enunciate a new rule of law or modify, clarify or criticize an existing rule;

2) apply an established rule of law to a factual situation significantly different from that in published opinions; and/or 3) resolve or identify a conflict between prior decisions.

STATEMENT OF THE CASE

This is an appeal from a judgment entered on August 13, 2019 in Eau Claire County Circuit Court, Michael Schumacher, Judge, which dismissed Voters' claim for common law certiorari review as time-barred by laches. The Circuit Court concluded that a six-month limitations period governed under *Mentkowski, et al.*, and that Eau Claire was not required to prove its affirmative defense of laches.

STATEMENT OF FACTS

Voters comprise an association of grassroots citizen volunteers and Eau Claire taxpayers, along with other individuals and LLCs who own property in the City and pay property taxes to the City, the Eau Claire Area School District, Eau Claire County, and/or the Chippewa Valley Technical College District. (R.1, at 3, ¶¶ 3-15.) TID #12 was created in September 2017 to support a development in downtown Eau Claire, and Voters question its legality under Section 66.1105. (*Id.*, at 2-3, ¶¶ 1-2.)

The facts relevant to the Circuit Court's decision are set forth on the face of the Complaint and are not in dispute:

- On September 12 and 15, 2017, the City Council and JRB, respectively, approved the creation of TID #12. (R.1, at 7, ¶ 27.)

- On January 12, 2018, Voters served their "Notice of Claim & Injury" on the City Clerk pursuant to Wis. Stat. § 893.80(1d). (*Id.*, ¶ 39.)

- Because Eau Claire did not respond to the "Notice of Claim & Injury," Voters' claim was deemed to have been denied under Section 893.80(1g) as of May 13, 2018. (*Id.*, ¶ 39.)

- Voters filed their Complaint on April 17, 2019. (*Id.*)

Eau Claire answered on May 7, 2019, denying Voters' allegations on the merits of the decision to create TID #12 and raising various affirmative defenses, including laches. (R.6, at 8.) At the same time, Eau Claire also moved for judgment on the pleadings pursuant to Wis. Stat. § 802.06(3), arguing, *inter alia*, that Voters' claim expired in March 2018. (R.7, at 12.)

The parties briefed Eau Claire's motion and a hearing was held on July 17, 2019. (R.22.) At the conclusion of the hearing, the Circuit Court stated, "I'm granting the motion with regard to the six-month rule."[2] (R.22,

[2]The Court summarily rejected the other grounds raised in Eau Claire's motion, stating that Voters had standing and had adequately plead their claim, and that *Voters With Facts v. Eau Claire,* 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131 ("*Voters I*") had no preclusive effect on the claim. (R.22, at 40-41.) *Voters I* is a decision from a separate, earlier lawsuit in which Voters challenged two different TIDs (TIDs #8 and 10) created by Eau Claire.

at 40.) After reciting the relevant timeline set forth in the Complaint, the Court observed, "I think we are kind of on unbroken ground here in some regards. Nobody's been able to find or cite a case where the six-month rule did not apply to a certiorari case. Nobody's been able to find a certiorari case where 893.80 was applied." The Circuit Court also noted that no court had ruled on whether the six-month "rule" applied to a TID or, for that matter, whether Section 893.80 did either. (R.22, at 41–43.)

The Circuit Court cited Paragraph 70 of *Voters I*, which stated that no statutory appeal process existed for reviewing the formation of a TID and thus, common law certiorari review of Eau Claire's decisions regarding TID's #8 and #10 was appropriate. (R.22, at 42.) The Circuit Court noted that Paragraph 70 of *Voters I* cited, *inter alia*, a dissent from then-Court of Appeals Judge Patience Roggensack in *State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796. Although *Voters I* cited the *Olson* dissent for the proposition that common law certiorari review was appropriate for challenging a TID, which is not disputed here, the six-month "rule" was not at issue in *Voters I* or in either the majority opinion or dissent in *Olson*. The Circuit Court cited the dissent for a different proposition – namely, whether a claim could be time-barred if not brought within six

months. But the fact that the Supreme Court cited the *Olson* dissent for one thing does not, of course, mean that it would endorse different language in the dissent.

The Circuit Court acknowledged that even though it had been written by the now-Chief Justice of the Supreme Court, a dissent from a Court of Appeals' decision was not binding or authoritative. However, in the absence of other guidance, and in light of *Voters I*'s citation to the dissent, the Court found it to be "helpful and perhaps giving this court some direction on [the] question" before it. (R.22, at 43.)

The Circuit Court concluded, "**The City does not have to prove laches. Rather, the failure to commence the proceedings within six months constitutes laches**." (R.22, at 44 (emphasis added).) Notwithstanding its reliance on an equitable doctrine, the Court admitted that it was "concerned about the equity of that in this particular situation since the plaintiffs did file a notice of claim [under Section 893.80]. Still, I think I'm bound to follow what I think is the law." *Id.*

The Circuit Court then quoted from *Mentkowski*: "This court has applied a definite rule that certiorari proceedings must be commenced within six months of the action sought to be reviewed, and parties who fail to so

commence the proceedings are guilty of laches." (R.22, at 44-45) (quoting *Mentkowski,* 76 Wis.2d at 575-76 (citing *Czapiewski,* 54 Wis. 2d at 539; *Casper*, 30 Wis. 2d at 174-75)). The Court observed that in contrast to the "rule" from *Mentkowski, et al.*, "[t]here is no case that says in a TID case, you've got to be able to prove laches." (R.22, at 45.)

The Circuit Court conceded that "this conundrum whether 893.80 or the six months rule applies here puts the plaintiff in a difficult position."[3] However, "[i]n the absence of some authority holding the six months rule does not apply to some certiorari case or specifically to a [] TID case, I think this court needs to follow the existing case law that I've discussed and conclude that the six months rule does apply to TID cases as it applies to, apparently, all other certiorari cases." (R.22, at 46.)

A final order for dismissal was entered on August 13, 2019, and Voters timely filed their notice of appeal on September 23, 2019. (R.14, 17.)

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[3] As discussed further below, this "difficult position" results from forcing a plaintiff like Voters to try to comply with both the time limitations in Section 893.80 and the judge-made, six-month "rule" from *Mentkowski, et al.*

ARGUMENT

Standard of Review

There is no dispute regarding the relevant facts, which are set forth on the face of the Complaint, and "resolution of the issues presented on this appeal requires that [this Court] construe and apply statutes and analyze case law, all of which involve questions of law, which [this Court] review[s] de novo." *Carolina Builders Corp. v. Dietzman,* 2007 WI App 201, ¶ 13, 304 Wis. 2d 773, 739 N.W.2d 53 (citing *Gaugert v. Duve,* 2001 WI 83, ¶ 15, 244 Wis. 2d 691, 628 N.W.2d 861).

THE CIRCUIT COURT IMPROPERLY CONCLUDED FROM THE FACE OF THE COMPLAINT THAT VOTERS FAILED TO TIMELY FILE THIS ACTION FOR COMMON LAW CERTIORARI REVIEW OF THE CREATION OF TID #12.

The Circuit Court concluded that under the holdings in *Mentkowski, et al.,* Voters failed to file this lawsuit in a timely manner. However, unlike in *Mentkowski, et al.,* a statute -- Wis. Stat. § 893.80 -- provided the applicable time limits for Voters to file their claim. The legislature enacted the relevant provisions of Section 893.80 after *Mentkowski, et al.* had been decided and those cases do not control.

Section 893.80 governs the timing of lawsuits against municipal entities like Eau Claire, and there is no dispute that Voters complied with its

requirements. A claimant in the position of Voters must provide a notice of claim to the municipality, and if the municipality does not act on the claim, it is deemed disallowed. Section 893.80 includes a limitation period (which is also six months) in its Subsection (1g), but the period only applies if the municipality provides written notice of disallowance expressly stating that an action must be brought within the statutory limitation period. It is undisputed that Eau Claire did not provide the requisite notice of disallowance and thus, the Subsection (1g) limitations period never went into effect. The statute itself provides that its provisions are comprehensive and exclusive. *See* Wis. Stat. § 893.80(5) ("[e]xcept as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against" a municipal entity).

Section 893.80 precludes the possibility of a judicially-created, six-month limitation period that is applied in all cases without regard to whether the elements of an equitable affirmative defense like laches have been proven. That *Voters I* cited a Court of Appeals dissent, which in turn cited *Czapiewski* and *Casper,* does not change the legal analysis because neither the six-months "rule," nor Section 893.80, nor the timeliness of certiorari claims generally, were discussed or at issue in *Voters I* or *Olson.*

Even if this were not the case, the excerpted language from *Mentkowski*, *et al.* that the Circuit Court relied on cannot be divorced from the facts in those cases. Unlike the circumstances before this Court, those cases involved individualized relief sought by government employees or their families. Thus, besides the subsequent enactment of Section 893.80, Voters' situation is also distinguishable because an action by taxpayers challenging the decision to create (and begin operating) a TID requires a longer, more in-depth pre-suit investigation and deliberation than an action asserting a discrete, limited claim as in *Mentkowski*, *et al.*

In addition to these distinctions between *Mentkowski*, *et al.* and the present case, a more fundamental consideration is whether courts have authority to fix a per se limitations period for an entire class of claims, as Eau Claire argued and the Circuit Court held. Here, the answer is clearly "no" because, again, Section 893.80 controls. But even apart from Section 893.80, the basis on which a court could establish a hard-and-fast period of limitations independent from the common law requisites for laches is entirely unclear. Voters have found no case in Wisconsin or elsewhere that, in the absence of a statute of limitations, sets the time period by which a class of claims must be filed or be permanently extinguished without regard to the

specific factual circumstances surrounding any individual claim. Rather, fixing a specific time period by which a class of claims must be brought or lost forever, without regard for any fault by the claimant or prejudice to the defendant, is a **legislative** function.

In barring the claims pursuant to the six-month "rule," the courts in *Mentkowski, et al.* all invoked the equitable doctrine of laches as the basis for doing so. However, there is no authority for a court to transform a finding that laches bars a claim in a specific case into a strict limitations period that bars all such claims in every case. Furthermore, the Circuit Court concluded that notwithstanding its concern about the equities of the situation before it, under *Mentkowski, et al.,* it could apply laches without making any finding on the elements of laches, or otherwise requiring that Eau Claire carry the burden of proving its affirmative defense. However, laches requires a fact intensive, case-by-case determination, and the doctrine does not set the time period by which a claim must be brought regardless of individual circumstances. This disregard for black letter law also warrants reversal.

I. Dismissal Was Improper Because Unlike In *Mentkowski, et al.,* Section 893.80 Sets Forth Applicable Limitations Periods, And There Is No Dispute That Voters Complied With Them.

Casper cautioned that the six-month laches rule "has no application where [a] statute provides" relevant limitation periods. 30 Wis. 2d at 175. Here, Section 893.80 "prescribe[s] the time within which the right to [common law certiorari] review must be exercised," *id.*, so the "rule" from those cases does not apply to Voters' claim. Because it is undisputed that Voters complied with the applicable statutory time requirements for bringing this action, their claim cannot be time-barred.[4]

As noted above, Section 893.80(1d) states broadly that "**no action** may be brought or maintained against" a municipal governmental entity

[4] The time limits in Sections 893.80 were not discussed in *Mentkowski, et al.*, but this is likely explained by the fact that such provisions were not in effect when those cases were decided. The first iteration of Section 893.80 -- Wis. Stat. § 331.43 -- was enacted in 1963 and, among other differences from the current statute, it only applied to tort actions against the government. *See Department of Natural Resources v. City of Waukesha,* 184 Wis. 2d 178, 189, 515 N.W.2d 888 (1994). In 1977, Section 331.43 was repealed and renumbered under Wis. Stat. § 895.43 as part of an effort to standardize the notice of claims procedure for all Wisconsin municipal entities. *See City of Racine v. Waste Facility Siting Board,* 216 Wis. 2d 616, 623, 575 N.W.2d 712 (1998). (Before then, notice rules for each entity were contained within the various statutes governing that entity.) Section 895.43 went into effect in 1978 and, in 1980, was reformulated and created as Section 893.80. *See Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 53 & n.13, 277 Wis. 2d 635, 691 N.W.2d 658; *see also Figgs v. City of Milwaukee,* 121 Wis. 2d 44, 52, 357 N.W.2d 548 (1984) ("Sec. 893.80, when initially enacted by the legislature, applied only to tort claims, but, by ch. 285, Laws of 1977, the procedures were made generally applicable to any claims against the listed governments.").

"unless" the claimant first complies with the notice of injury and claim requirements of its Subsections (a) and (b). Wis. Stat. § 893.80(1d) (emphasis added). In *City of Waukesha,* the Wisconsin Supreme Court held "that sec. 893.80 applies to **all** causes of action." 184 Wis. 2d 191 (emphasis added); *see also City of Racine,* 216 Wis. 2d at 620-24. Although the Court later allowed certain, limited exceptions to its applicability, *see, e.g., State ex rel. Auchinleck v. Town of LaGrange,* 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (specific provisions of open records and meetings statutes take precedence over general notice provisions of Section 893.80(1)), the strong presumption is that Section 893.80 governs, and none of the exceptions found by the courts since *Waukesha* are relevant here.[5] And, as discussed in note 1, *supra*, Eau Claire does not contend that Section 893.80 does not apply to this action.

[5] The closest is *Kapischke v. County of Walworth*, but that case involved certiorari review pursuant to a statute that conflicted directly with Section 893.80. 226 Wis. 2d 320, 327, 595 N.W.2d 42, 46 (Ct. App. 1999) (holding that 30-day time limit for certiorari review under Wis. Stat. § 59.694(10) took precedence over 120-day disallowance period under Section 893.80(1g)). Thus, *Kapischke* stands for the proposition that a specific statute supplants a more general one, *see, e.g., In re Lindsey A.F.,* 2002 WI App 223, ¶ 21, 257 Wis. 2d 650, 663, 653 N.W.2d 116, 121, *aff'd,* 2003 WI 63, 363 Wis. 2d 200, 663 N.W.2d 757, which is not at issue here. Voters' claim is for **common law** certiorari review, and there is no more specific statute that might supplant Section 893.80.

Thus, under Section 893.80(1d)(a), before a party (like Voters) can sue a municipal entity (like Eau Claire), it must give the entity written notice of the events giving rise to the claim within 120 days of their occurrence. If the party does not meet that deadline, it loses the right to sue (unless it can establish that the municipality had actual notice and was not prejudiced by the lack of written notice). *See Weiss v. Milwaukee*, 79 Wis. 2d 213, 227, 25 N.W.2d 496 (1977); *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 597, 530 N.W.2d 16 (Ct. App. 1995). There is no dispute that Voters complied with Subsection (1d)(a).[6]

After providing notice under Section 893.80(1d), Voters still had to wait for Eau Claire to respond before they could proceed to file this action. *See Gillen v. City of Neenah*, 219 Wis. 2d 806, 818, 580 N.W.2d 628 (1998); *City of Racine,* 216 Wis. 2d at 620; *Colby v. Columbia County*, 202 Wis. 2d 342, 362, 550 N.W.2d 124 (1996). Once provided with notice, a municipal entity has 120 days to either resolve the claim or disallow it. Wis. Stat. § 893.80(1g). The municipality can disallow the claim by serving formal,

[6] In addition, Subsection (1d)(b) requires that a claimant give notice of its address and the (itemized) relief sought, but it does not set a time limit for doing so. Like the notice under Subsection (1d)(a), notice under Subsection (1d)(b) is a prerequisite to filing an action. *See Vanstone*, 191 Wis. 2d at 593. In any event, there is no dispute that Voters complied with Subsection (1d)(b). (*See* R.1, at 8, ¶ 39.)

written notice, or by taking no action and simply allowing the four-month period to expire. *Id.* Here, Eau Claire chose the latter approach, and it was only afterwards that Voters filed this action.[7]

Significantly, by disallowing Voters' claim through inaction, Eau Claire elected not to take advantage of the six-month statute of limitations created by Section 893.80(1g). Under Section 893.80(1g), if a municipality delivers a formal disallowance via certified or registered mail, the claimant must then file a lawsuit within six months of that disallowance or lose the right to sue. *See* Wis. Stat. § 893.80(1g). The disallowance must inform the party of the time limitation. *Id.* Alternatively, if like here, the municipality does not send formal written notice informing the claimant of Subsection (1g)'s six-month limitation period, the period does not apply. *See Cary v. City of Madison*, 203 Wis. 2d 261, 264, 551 N.W.2d 596 (Ct. App. 1996); *Linstrom v. Christianson*, 161 Wis. 2d 635, 639, 469 N.W.2d 189 (Ct. App. 1991).

Thus, the legislature has created a condition precedent to the six-month limitation period in Subsection (1g) and, further, that statutory six-

[7] Similarly, Eau Claire never responded to the notice of claim that Voters served on it under Section 893.80 before filing *Voters I*. Also, Eau Claire never asserted in *Voters I* that such notice was unnecessary, or otherwise commented on the applicability of Section 893.80.

month period is exclusive, *see* Wis. Stat. § 893.80(5). After failing to comply with that condition precedent to the statutory six-month limitation, Eau Claire should not still be able to invoke the six-month "rule" from *Mentkowski, et al. See Pool v. City of Sheboygan,* 2006 WI App 122, ¶ 13, 293 Wis. 2d 725, 719 N.W.2d 792 ("Because legitimate claims can be thrown aside without redress when a claimant fails to follow the statutory requirements, strict compliance is required in how the government provides the notice of disallowance" before the six-month period in Subsection (1g) is triggered.) (citing *Driver v. Housing Auth. Of Racine County*, 2006 WI App 42, ¶ 23, 289 Wis. 2d 727, 713 N.W.2d 670), *aff'd,* 2007 WI 38, 300 Wis. 2d 74, 729 N.W.2d 415.

As another example of the incompatibility between Section 893.80 and the *Mentkowski*, *et al.* "rule," because a party cannot sue before a claim is disallowed by the government – either formally or, as here, by inaction -- Section 893.80(1d) and (1g) together create a waiting period that can last as long as eight months after the events giving rise to the action. The courts in *Mentkowski*, *et al.* all held that the six months begins to run on the date of the decision that is to be reviewed. *See, e.g., Mentkowski,* 76 Wis. 2d at 574-75, 252 N.W.2d at 32. Thus, application of the "rule" from those cases would

undermine Section 893.80 by effectively reducing the period within which a notice of claim must be filed under Subsection (1d)(a) from 120 days to less than two months. Even where a municipality complied with the written notice of disallowance requirement to trigger Section 893.80(1g)'s six-month bar, the judicially-created six-month period (which runs from the date of the challenged decision) would always expire before the statutory period (which runs from the date that a written disallowance of claim has been delivered by certified or registered mail). There is, quite simply, no way in which the two can be reconciled.

This is shown from the facts in the instant case. TID #12 was approved by the JRB on September 15, 2017. (R.1, at 10, ¶ 27.) Voters filed a timely notice under Subsection (1d) on January 12, 2018 (*id.*, ¶ 39), and then had to wait until after Eau Claire disallowed the claim under Subsection (1g) before it could file this action. Eau Claire disallowed the claim by inaction as of May 13, 2018 (*id.*, ¶ 39) -- more than six months after creation of TID #12. Thus, despite satisfying Sections 893.80(1d) and (1g), Voters could not have satisfied the deadline set by the "rule." If Eau Claire's argument is accepted, parties fully in compliance with the notice of claim statute could still lose their right to seek common law certiorari review.

Contrary to the Circuit Court's conclusion, Paragraph 70 of *Voters I* offers no guidance, as it stands for a proposition that is not at issue here. In Paragraph 70, the Supreme Court stated,

> No statutory appeal process has been created to review the formation of a TID; therefore, certiorari review of the decision of both the City Common Council and the JRB is appropriate. *See* Wis. Stat. § 66.1105; *Olson*, 252 Wis. 2d 628, ¶32 (Roggensack J., dissenting); *see also Ottman v. Town of Primrose*, 2011 WI ¶ 34, 332 Wis. 2d 3, 796 N.W.2d 411 ('Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality.').

2018 WI 63, ¶ 70, 382 Wis. 2d 1, 913 N.W.2d 131. Although the six months "rule" from *Mentkowski, et al.* is the crux of this appeal, nowhere in *Voters I* was the "rule" ever mentioned, nor was it at issue in any way in *Olson* (or *Ottman*). Rather, the issue in the cited passages from those cases was the proper procedure for reviewing a decision to create a TID under Section 66.1105. By contrast, there is no dispute here that common law certiorari is the appropriate means for judicial review of the creation of TID #12. Further, neither the merits of Eau Claire's decision to create TID #12, nor any other aspect of Section 66.1105, is even before the Court at this stage in the litigation.

Other than the 6-month deadline after formal notice of disallowance under Section 893.80(1g), no statute of limitations governs common law

certiorari review and Section 893.80(5) expressly that states there is no other. Thus, once Eau Claire chose to forego the benefit of the Subsection (1g) statute of limitations, the only limitation on the time by which Voters had to file this suit was laches. *See Schwittay v. Sheboygan Falls Mut. Ins. Co.,* 2001 WI App 140, ¶ 11, 246 Wis. 2d 385, 630 N.W.2d 772 ("In the absence of a controlling statute, the only time limitation is the equitable doctrine of laches.") (quoting *Crosby v. Mills,* 413 F.2d 1273, 1276 (10th Cir. 1969)); *see also Walker v. Tobin,* 209 Wis.2d 72, 80, 568 N.W.2d 303 (Ct. App. 1997) (same); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S. Ct. 954, 961 (2017) ("Laches is a gap-filling doctrine" for situations in which there is no statute of limitations.) (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 134 S. Ct. 1962, 1974-75 (2014)); *United States v. Administrative Enterprises, Inc.,* 46 F.3d 670, 672 (7th Cir. 1995) ("Where there is no statute of limitations in the picture, the law . . . relies upon the doctrine of laches to protect [a defendant] from unreasonable delay in enforcement."). However, as explained in Section III below, the Circuit Court proceeded to dismiss Voters' claim on the mistaken assumption that it could do so without any laches analysis.

II. The Circuit Court Erred By Extending the Holdings in *Mentkowski, et al.* to the Instant Facts.

Even apart from the fact that Section 893.80 governed the timing of Voters' challenge to TID #12, *Mentkowski, et al.* are distinguishable on other grounds. No court has ever held that the six-month limitations period from those cases applies to challenging the creation of a TID, and the "rule" should not be extended to cover the instant facts.

All the cases cited by Eau Claire involved relief sought by government employees or their families, which is unlike the circumstances before this Court. *See Mentkowski*, 76 Wis. 2d at 575-76 (six-month limitations period applied to certiorari review of dismissal of police officers); *Czapiewski,* 54 Wis. 2d at 538-39 (six-month limitations period applied to certiorari review of order by civil service commission suspending city employee); *Casper*, 30 Wis. 2d at 174-75 (six-month limitations period applied to certiorari review of denial of claim by heirs of deceased judge for benefits owed by state retirement fund). Eau Claire has not identified any application of the six-month limitations period beyond such a factual context and, again, no court has ever applied it to bar certiorari review of a TID.

This makes sense because *Mentkowski*, *et al.* involved individual challenges to a discrete governmental action that had been fully completed,

as opposed to allegations of ongoing, improper use of tax dollars with a potentially long-term, adverse impact on many taxpayers (that is, potential plaintiffs) spread across a wide geographic area. Evaluating the impact of such a broad abuse of the public fisc, and whether it warrants litigation, takes time. It would be an extraordinary matter if taxpayers were forever barred from addressing such abuse by a short-lived limitations period. As discussed in Section III below, this is especially true where the limitations period was created by the courts, not the legislature. Thus, assuming, *arguendo*, that the holdings created a "rule," the Circuit Court should not have extended it to the instant circumstances.

III. Courts Lack Authority Under Equity Or Otherwise To Fix A Certain Time Period By Which A Claim Must Be Filed Or Be Permanently Barred Without Regard To Any Fault By The Claimant, Prejudice To The Defendant, Or Other Relevant Factual Circumstances.

Apart from Section 893.80, no statute of limitations governed Voters' claim for common law certiorari review and, obviously, a court cannot "enact" a statutory limitations period. Thus, regardless of whether Section 893.80 controls, the holdings in *Mentkowski, et al.* cannot be understood as having resulted in a hard-and-fast limitations period that fixed the time by

which all claims for common law certiorari review must be filed or lost forever, regardless of the specific facts relating to any individual claim.

Presumably because no statutory limitations period existed at the time, *Mentkowski, et al.* all cited the equitable doctrine of laches as the basis for applying a six-month time bar on actions for certiorari review. *See Mentkowski,* 76 Wis. 2d at 575-76 ("parties who fail to [commence certiorari proceedings within six months] are guilty of laches"); *Czapiewski,* 54 Wis. 2d at 539 ("the six months' rule . . . is consistent with the settled proposition that one seeking a common-law writ of certiorari may lose his right to such review if he is guilty of laches"); *Casper,* 30 Wis. 2d at 174-75 (six months limitations period "is akin to the action of courts of equity in holding that the period of the statute of limitations applicable to a legal right is to be considered laches applicable to the equitable right"). However, besides these passing references to laches, none of the three cases reflect any analysis of whether the defendants had carried their burden of establishing the elements of the affirmative defense. Rather, the opinions simply state without explanation that because the statutory time period for filing an appeal from circuit court to the Supreme Court was, at that time, six months, it was

“reasonable” to require that an action for certiorari review be commenced within the same time frame.

However, fixing the period of time by which an entire class of claims must be brought is a **legislative function, not a judicial one**:

> The bar created by operation of a statute of limitations is established independently of any adjudicatory process. It is a legislative expression of policy that prohibits litigants from raising claims whether or not they are meritorious after the expiration of a given period of time. Under Wisconsin law the expiration of the limitations period extinguishes the cause of action of the potential plaintiff and it also creates a right enjoyed by the would-be defendant to insist on that statutory bar. The passage of time itself destroys the right and remedy of the injured party.

Matter of Fessler’s Estate, 100 Wis. 2d 437, 447, 302 N.W.2d 414 (1981)(citations omitted)(emphasis added), *abrogated on other grounds by Estate of Barthel*, 161 Wis. 2d 587, 468 N.W.2d 689 (1991). “A statute of limitations bars good causes as well as bad ones and its application . . . has nothing to do with the equities of the suit. A statute of limitations is the expression of legislative policy that claims and controversies, whatever their merit, if not litigated promptly, be laid to rest forever.” *Schafer v. Wegner*, 78 Wis. 2d 127, 134, 354 N.W.2d 193 (1977) (citation omitted); *see also Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 346, 565 N.W.2d 94 (1997) (“The legislature determines when the opportunity to file a claim for an

accrued cause of action expires."); *SCA Hygiene Products*, 137 S. Ct. at 960 ("The enactment of a statute of limitations necessarily reflects a [legislative] decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted."); *Nature Conservancy v. Wilder Corp.,* 656 F.3d 646, 650 (7th Cir. 2011) ("[S]tatutes of limitations necessarily reflect[] the legislature's balancing of competing interests[;]" namely, the "recognition that predictability and finality are desirable, indeed indispensable, elements of the orderly administration of justice that must be balanced against the right of every citizen to seek redress for a legally recognized wrong.'") (citation omitted); *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997) (While laches arises out of inherent judicial authority to do equity, "[m]odern statutes of limitations . . . embody the notion that fixing the periods for bringing damages actions is a legislative function that imposes certainty and predictability upon how long a defendant should be subject to suit.").

To the extent that the courts in *Mentkowski, et al.* sought to create a hard-and-fast, per se rule, equity did not empower them to do so. "A court of equity applies the rules of laches according to its own ideas of right and

justice, **and the courts have never prescribed any specific period applicable to every case, like the statute of limitations**; and **as to what constitutes a reasonable time within which the suit must be brought depends upon the facts and circumstances of each particular case**." *Saric v. Brlos,* 247 Wis. 400, 408, 19 N.W.2d 903 (1945) (emphasis added) (quoting *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N.W. 757, 762 (1894)); *see also Bur v. Bong*, 159 Wis. 498, 150 N.W. 431, 433 (1915). In the application of laches, "'[t]here is no fixed rule as to the lapse of time necessary to bar a suitor in a court of equity. Each case must stand on its own particular facts.'" *In re Estate of Flejter*, 2001 WI App 26, ¶ 41, 240 Wis. 401 (quoting *Likens v. Likens*, 136 Wis. 321, 327, 117 N.W. 799 (1908)).

"Laches is an equitable defense to an action based on the plaintiff's unreasonable delay in bringing suit under circumstances in which such delay is prejudicial to the defendant." *State ex rel. Lopez-Quintero v. Dittman*, 2019 WI 58, ¶ 16, 387 Wis. 2d. 50, 928 N.W.2d. 480 (citing *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999)). As with any affirmative defense, the defendant carries the burden of proving laches. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 38, 290 Wis. 2d 352, 714

N.W.2d 900. Thus, a finding of laches cannot be made based solely on a review of the complaint, as the Circuit Court did here. Rather, Eau Claire had to show that 1) Voters unreasonably delayed in filing this action; 2) Eau Claire lacked knowledge that Voters would bring an action challenging TID #12; and 3) Eau Claire was somehow prejudiced by any such delay by Voters. *See Lopez-Quintero*, 2019 WI 58, ¶ 16 (citing *Coleman*, 2006 WI 49, ¶¶ 28-29.).

Eau Claire did not even try to carry its burden. In moving to dismiss, it presented no facts or argument indicating that any of the three elements were met and, even on the slim record before the Circuit Court, it is highly doubtful that Eau Claire could do so. Eau Claire knew that Voters intended to bring an action challenging TID #12 because Voters filed their Section 893.80(1d) notice with the City on January 12, 2018. (R.1, at 8, ¶ 39.) Further, the "delay" here was not unreasonable, and Eau Claire has never offered any reason to believe that it was prejudiced. The Circuit Court itself expressed "concern[] about the equity" of applying laches "in this particular situation." Thus, to the extent that the Circuit Court purported to be acting within the scope of its equitable authority in dismissing Voters' claim based on laches, its decision must be reversed. *See Coleman*, 2006 WI ¶ 37

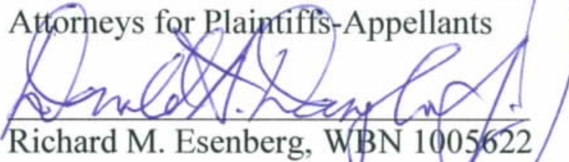
(reversible error to assume defendant prejudiced by long delay, and court must require defendant "to prove a factual basis for prejudice").

CONCLUSION

Voters asks this Court to reverse the lower court, and direct it to proceed with their claim for certiorari review of Eau Claire's decision to create TID #12.

Dated this 6th day of December, 2019.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Appellants



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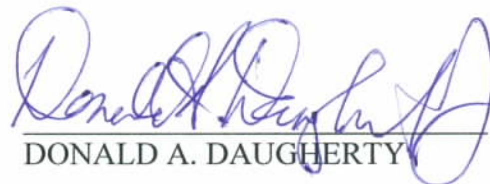
FORM AND LENGTH CERTIFICATION

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 6,414 words, calculated using Microsoft Word 2013.

Dated: December 6, 2019



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CERTIFICATION 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 Wis. Stat. § (Rule) 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.

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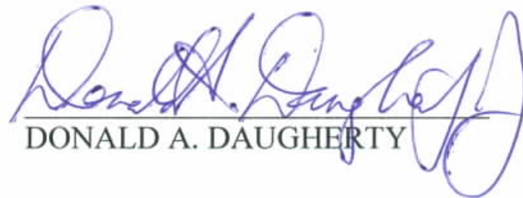

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