**STATE OF WISCONSIN**
**DEPARTMENT OF JUSTICE**

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February 6, 2013

Ms. Diane M. Fremgen
Clerk of Court of Appeals
110 E. Main Street, Ste 215
Madison, WI 53703

RECEIVED 2/8/13

Re: ***Madison Teachers, Inc., et al v. Walker, et al***
Court of Appeals No: 12AP2067

Dear Ms. Fremgen:

Enclosed please find for filing the original and four (4) copies of the Supplemental Reply Memorandum of Defendants-Appellants in the above-mentioned case. Copies are mailed on this date to all other counsels on record.

Sincerely,

Steven C. Kilpatrick
Assistant Attorney General

SCK:mb
Enclosures
c w/enc.: Attorney Lester A. Pines
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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2012AP2067

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 61, AFL-CIO, and JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R. SCOTT. JUDITH NEUMANN, and RODNEY G. PASCH,

Defendants-Appellants.

# SUPPLEMENTAL REPLY MEMORANDUM OF DEFENDANTS-APPELLANTS

## ARGUMENT

### (1) THE CIRCUIT COURT NEVER INDICATED THAT IT WAS ENJOINING THE WERC IN ANY RESPECT.

Plaintiffs concede that the circuit court did not indicate, either orally or in writing, that it was enjoining the Wisconsin Employment Relations Commission (WERC) in any respect. Pls.' Supp. Mem., p. 1.

### (2) INJUNCTIVE RELIEF CANNOT BE DEEMED IMPLICIT IN THE CIRCUIT COURT'S ORDER.

Although claiming that an injunction was implicit, Plaintiffs do not direct this Court to any language of the circuit court, as required by this Court's December 28, 2012, Order. In fact, Plaintiffs correctly acknowledge that despite their request for declaratory *and* injunctive relief, the circuit court granted them only declaratory relief. Pls.' Supp. Mem., pp. 1-2.

Nonetheless, Plaintiffs argue that an injunction was implicit because a) Defendants did not specifically argue against injunctive relief; b) an injunction was unnecessary; c) a specific "injunction" is not a prerequisite for contempt sanctions; and d) Wis. Stat. § 806.04(8) provides that a circuit court "may" grant "further relief" based on a declaratory judgment. Plaintiffs' arguments are erroneous.

First, that Wis. Stat. § 806.04(8) permits a circuit court to grant "further relief" based on a declaratory judgment is irrelevant here because the circuit court did not issue any such further relief. Second, neither *McComb* nor *Carney* supports the proposition that a contempt sanction may be imposed simply for conduct inconsistent with a declaratory judgment where no injunction has been issued.

Third, Plaintiffs' assertion that an injunction is "redundant" or "unnecessary" is disingenuous. Plaintiffs themselves sought an injunction in their amended complaint and their briefs. Moreover, this argument is premised upon the proposition that when a circuit court declares a statute facially unconstitutional, the unconstitutional statute has no existence and it is as if it had never been enacted. That proposition, however, is legally flawed, as addressed in response to Questions 3 and 5.

Finally, Plaintiffs have not identified a single case that abrogates the general principle that injunctions must specifically identify the prohibited acts. *See Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 24, 312 Wis. 2d 435, 752 N.W.2d 359 ("Injunctions, of course, must be specific as to the prohibited acts and conduct in order for the person being enjoined to know what conduct must be avoided.") Indeed, as Justice Frankfurter noted in his

*McComb* concurrence, "courts should be explicit and precise in their commands and should only then be strict in exacting compliance." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949) (Frankfurter, J., concurring).

(3) IT IS NOT POSSIBLE TO CONCLUDE THAT THE CIRCUIT COURT'S RULING WOULD BE BINDING ON NON-PARTY UNIONS OR MUNICIPAL EMPLOYERS UNDER THE DOCTRINE OF ISSUE PRECLUSION.

Issue preclusion cannot operate to bar *any* subsequent litigation unless the circuit court decision below constitutes a final judgment for purposes of preclusion. *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Plaintiffs agree that whether the circuit court's decision here is such a "final" judgment is unsettled under Wisconsin law (Pls.' Supp. Mem., p. 20), but they gloss over the fundamental importance of this issue. The issue takes on heightened importance here because all courts must approach constitutional challenges to statutes by presuming the statute is constitutional and must preserve the statutes' constitutionality if possible. *State ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973); *Larson v. Burmaster*, 2006 WI App 142, ¶ 24, 295 Wis. 2d 333, 720 N.W.2d 134.

Plaintiffs correctly note that each circuit court is empowered to declare a duly enacted statute unconstitutional. But they fail to acknowledge that such a judicial declaration can only be final upon the issuance of a published appellate decision. *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 217, 466 N.W.2d 861 (1991) ("questions of constitutionality . . . cannot finally be laid to rest until decided by final appellate adjudication . . . either by the court of appeals by published opinion or by determination by the Wisconsin Supreme Court"). Plaintiffs assert that this feature of constitutional law, grounded in the separation of powers doctrine, should give way to a generalized proposition that finding the circuit court decision final for preclusive effects is the "better view." Pls.' Supp. Mem., pp. 20-21.

In effect, Plaintiffs ask this Court to conclude that while this appeal is pending another circuit court confronted with similar claims should abrogate the statute's presumption of constitutionality, ignore the fact that this Court will give no deference to the circuit court's constitutional interpretation, *Larson*, 2006 WI App 142, ¶ 24, and conclude that the question has "finally been laid to rest" by the circuit court below, prior to any "final appellate adjudication." This would be a significant and

impermissible departure from *Wroten*. *See Cook v. Cook*, 208 Wis.2d 166, 560 N.W.2d 246 (1997)("The supreme court is the only state court with the power to overrule … previous supreme court case.")[1]

Moreover, this Court is not presently faced with an actual issue preclusion case or controversy. This Court should avoid rendering an advisory opinion on this issue. *See Bd. of School Directors of Milwaukee v. WERC*, 42 Wis.2d 637, 656, 168 N.W.2d 92 (1969)(noting that "the court has always declined to decide speculative issues"). For present purposes, it is sufficient to note that another circuit court could very reasonably determine that the decision below is not final for purposes of issue preclusion. The few cases cited by Plaintiffs offer no compelling reason for this Court, or any circuit court, to determine otherwise.

Plaintiffs attempt to confuse the issue by citing to a few *claim* preclusion cases, *Dickie v. City of Tomah*, 999 F.2d 252 (7th Cir. 1993) and *Luebke v. Marine National Bank of Neenah*, 567 F.Supp. 1460 (E.D. Wis. 1983). These cases, however, offer no guidance as claim preclusion and

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[1] Indeed, considering the circuit court's decision holding parts of MERA unconstitutional final despite this appeal would also create significant practical problems for the courts and litigants in the event the Court of Appeals or Supreme Court overrules the circuit court. Such concern is not mere conjecture, as demonstrated by the Seventh Circuit's recent decision in a related case challenging certain aspects of Act 10. *Wisconsin Educ. Ass'n Council v. Walker*, ___ F.3d ___, WL203532 (7th Cir. 2013) (*Amici* App., Ex. 1).

issue preclusion deal with very different issues. Claim preclusion operates to prevent *the same parties* from re-litigating settled controversies whereas issue preclusion forecloses the rights of non-parties and therefore raises significant due process concerns. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 227, 594 N.W.2d 370 (1999).

Plaintiffs do note that the *Luebke* Court cited *Slabosheske v. Chikowske*, 273 Wis.144, 77 N.W.2d 497 (1956), for the proposition that "the fact that an appeal is pending in the first case does not deprive the judgment of its conclusive effect." Pls.' Supp. Mem., p. 20. But this observation does little to inform the present question. *Slabosheske* did not involve application of the doctrine of issue preclusion. The *Slabosheske* Court merely held that a judgment protects persons who act in good faith reliance on the judgment until the judgment is reversed on appeal. *See Slabosheske*, 273 Wis. at 150-152.

Finally, in discussing the issue of privity, Plaintiffs point to a Michigan appellate decision in which the state court applied federal *res judicata* doctrine to determine that a prior final declaratory judgment in an action brought against state actors barred a subsequent action brought by private citizens. Pls.' Supp. Mem., pp. 19-20, citing *Beyer v. Verizon*

*North, Inc.*, 715 N.W.2d 328 (Mich. Ct. App. 2006). The critical distinction is that *Beyer* involved an actual final judgment that was no longer subject to further appeal. Here, since the circuit court decision below has been appealed, it is unnecessary for this Court to consider a hypothetical circumstance involving a circuit court judgment declaring a statute unconstitutional that has not been appealed.

Because the issue of finality forecloses application of the issue preclusion doctrine in these circumstances, Plaintiffs' extensive discussion of privity and the role of the Attorney General simply confuses the issue. Nevertheless Defendants will address it.

As an initial matter, Plaintiffs presume that issue preclusion would only arise in the context of a municipal employer seeking to defend the validity of MERA. Pls.' Supp. Mem., p. 17 n.3. But there are many scenarios in which a municipal employer acting in accordance with the circuit court's decision below could be a defendant. For example, an employee member of a bargaining unit could challenge as *ultra vires* the employer's decision to enter into a collective bargaining agreement that addresses issues beyond total base wages. Or, an individual employee could bring a conversion or similar action against the employer for the

value of any fair share payments deducted from the employee's pay. Such actions would involve different interests than Defendants' interest in defending the validity of MERA. *See* Motion to File *Amici Curiae* Brief on Behalf of Grajkowski, et al., ¶¶ 3, 8-10.

Moreover, Plaintiffs' reference to decisions in which the courts have noted that the Attorney General represents the "people" for purposes of deciding whether to grant intervention is insufficient for an issue preclusion analysis. First, in this case, the Attorney General has not participated as a "party" as a matter of right per Wis. Stat. § 806.04(11)("Parties"), but rather has appeared as counsel for state officer defendants. Plaintiffs have not cited a single case stating that the appearance of the Wisconsin Attorney General, in his capacity as counsel for a named party, supported issue preclusion in a later case. Second, the analyses are different. Intervention addresses a situation where a third party seeks to invade someone else's case. Issue preclusion presents a different question altogether, which is whether a court is going to prevent a current litigant from pursuing a claim or argument on the basis of the actions undertaken in a previous case to which the litigant was not a party. That is why the

Wisconsin Supreme Court has cautioned that issue preclusion raises significant due process concerns. *Paige K.B.*, 226 Wis. 2d at 227.

> (4) IF ONLY THE PARTIES ARE BOUND BY THE ORDER ON APPEAL, AND IF A STAY IS NOT ISSUED, THE PARTICIPATION OF THE WERC COMMISSIONERS IN THIS LAWSUIT HAS NO EFFECT ON THE CHALLENGED ORDER'S IMPACT ON FUTURE POTENTIAL OR ACTUAL CONTRACT NEGOTIATIONS BETWEEN MUNICIPAL EMPLOYERS AND UNIONS WHO ARE NOT PARTIES TO THIS ACTION.

Plaintiffs fail to identify any case which holds that the WERC necessarily is bound to apply a non-precedential circuit court decision, declaring a state statute facially unconstitutional, to parties other than those involved in the case in which the decision arose, especially where the WERC is not enjoined from any particular conduct and where the WERC has both appealed from and sought a stay of the decision.

*Madison Teachers v. Madison Sch. Dist.*, 197 Wis. 2d 731, 541 N.W.2d 786 (Ct. App. 1995), cited by Plaintiffs, does not require a contrary result. In that case, the circuit court exercised primary jurisdiction to decide an issue of statutory interpretation where proceedings involving the union and the school district were pending both in the circuit court and before the WERC. The circuit court decided that a new statute limiting

interest arbitration did not apply to the union, and enjoined the school district from pursuing a unit clarification proceeding before the WERC (which could have modified the bargaining unit and made the statute applicable) until after the completion of negotiations or until after the interest arbitration. The court of appeals affirmed, but acknowledged that the decision of the circuit court did not bind the WERC or a future court as to whether a particular unit is an appropriate bargaining unit under MERA. *See id.* at 752.

Although the court of appeals also stated that the circuit court's interpretation of the statute binds the WERC in the sense that "[t]he decision supplies the meaning of the term which WERC must apply if WERC is called upon to determine an appropriate bargaining unit," *see id.* at 762, the court of appeals was likely referring to a determination of an appropriate bargaining unit involving the union and the school district *involved in that case* (after the completion of negotiations or interest arbitration). Since *Madison Teachers* predates the recent reiteration by the court of appeals in *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶ 8, 310 Wis. 2d 230, 750 N.W.2d 492 that circuit court decisions are **never**

binding precedent, the court of appeals could not have been referring to subsequent cases.

Finally, Defendants have never conceded that the WERC necessarily would be bound by the circuit court's decision when exercising its quasi-judicial function to decide cases involving parties other than the plaintiff unions, especially where they are not subject to any injunction, where they have appealed from the decision of the circuit court, and where they have sought a stay.[2]

(5) IT IS NOT POSSIBLE TO CONCLUDE, BASED ON THE RECORD, THAT THE CIRCUIT COURT'S RULING IN THIS CASE WOULD BE BINDING ON NON-PARTIES UNDER A THEORY OTHER THAN ISSUE PRECLUSION.

Plaintiffs make the incredible assertion that the circuit court's decision and order means that the statutory provisions held unconstitutional "cannot be enforced against anyone." Pls.' Supp. Mem., p. 10. Not surprisingly, Plaintiffs have not identified a single case which holds that a **circuit court** decision, which declares that a state statute is facially

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[2] Under the primary jurisdiction doctrine, a circuit court properly decides constitutional and statutory issues rather than an agency. *See Madison Teachers*, 197 Wis. 2d at 746-746. Accordingly, a circuit court in any subsequent action involving a municipal employer and a representative of its general employees, concerning the constitutionality of certain MERA provisions, could exercise its primary jurisdiction to decide those issues over the WERC in a companion administrative proceeding.

unconstitutional, has binding effect on non-parties or, for that matter, on a party with respect to other controversies. Indeed, it is well-settled law that while circuit court decisions may be persuasive because of their reasoning, they are **never** binding precedent.[3] *See Raasch*, 2008 WI App 54, ¶ 8. Moreover, an unpublished decision of one branch of a circuit court, even one declaring a state statute facially unconstitutional, does not bind other branches of that circuit court or other circuit courts. *See id.*; *see also Milwaukee Police Ass'n v. City of Milwaukee*, 113 Wis. 2d 192, 193, 335 N.W.2d 417 (Ct. App. 1983)(Court of Appeals consolidated appeals where two different branches of the same circuit court decided the same statutory issue differently).

Also, Plaintiffs err in their assertion that "[t]he circuit court's jurisdiction is statewide." Pls.' Supp. Mem., p. 5. Instead, the Legislature established regional circuit courts, Wis. Stat. § 753.06and expressly described the reach of their authority: "The circuit courts have power to hear and determine, **within their respective circuits**, all civil and criminal

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[3] Amicus City of Milwaukee agrees. "[T]he City did not seek to intervene as a party in the Circuit Court proceedings, because a Circuit Court determination would not be binding or carry any precedential effect." Memorandum of Law in Support of City of Milwaukee's Petition to Intervene, p. 2, n.1.

actions and proceedings . . . ." Wis. Stat. § 753.03 ("Jurisdiction of circuit courts")(emphasis added). Thus, contrary to Plaintiffs' assertions, the Legislature did not grant each circuit court the authority to bind all other circuit courts with a declaratory judgment, nor did it prevent circuit court judges from issuing conflicting declaratory rulings on the facial constitutionality of a statute.

The fallacy of Plaintiffs' argument is evident in the limited value of unpublished court of appeals decisions. Even though the court of appeals is a unified court, only published decisions of the court of appeals are precedential and have binding effect on other panels of the court of appeals; an unpublished opinion of the court of appeals "is not precedent, [and] is not binding on any court of this state." *See* Wis. Stat. § 809.22(3)(b); *Cook*, 208 Wis. 2d at 185-186, 189-190.

Finally, neither *stare decisis* nor comity would compel another circuit court, in a subsequent action between a municipal employer and a representative of its general municipal employees concerning the same constitutional issues involved in this case, to reach the same decision as the unpublished decision of the circuit court in this case. Plaintiffs'

fundamental flaw is the assumption that a circuit court decision can be the basis for the principle of *stare decisis*.

(6) IF THE ORDER ON APPEAL HAS STATEWIDE EFFECT AND BINDS ALL CIRCUIT COURTS IN ACTIONS INVOLVING MUNICIPAL UNIONS AND EMPLOYERS, THE EMPLOYEES COULD RECEIVE ANY UNPAID WAGES AND BENEFITS WITH GREATER EASE AND CERTAINTY THAN THE MUNICIPAL EMPLOYERS COULD RECOVER ANY OVERPAYMENT OF WAGES AND BENEFITS.

The parties agree that if the circuit court's order has statewide effect and binds all circuit courts in actions involving municipal unions and employers, there is no legal reason why municipal employers and unions could not agree that general municipal employees could obtain unpaid wages and benefits retroactively if the order is stayed but ultimately affirmed, or that municipal employers could recover excess wages and benefits paid if the order is not stayed but ultimately reversed.

Plaintiffs argue, however, that weighing the potential harms to the municipal employers and employees, the denial of the continued infringement of the employees' constitutional rights requires that they receive the excess wages and benefits pending the decision on appeal. Pls.' Supp. Mem., pp. 24-25. To the contrary, the potential harms weigh in favor

of the municipal employers, because the employees could recover the wages and benefits with greater ease and certainty than the municipal employers who could face substantial difficulty attempting to recover the excess wages and benefits, especially from employees who leave their employment prior to the decision on appeal.

## CONCLUSION

Defendants-Appellants request that the Court grant its motion to stay the circuit court's order and conclude that it is not binding on any non-party unions or non-party municipal employers.

Dated this 6th day of February 2013.

Respectfully submitted,

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