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OF WISCONSIN

Case No. 2018AP1133

State of Wisconsin

In Court of Appeals – District III

DARRELL KLEIN,
RICHARD MITCHELL,
LINDA MITCHELL, and
SCOTT BRETTING,

Plaintiffs-Respondents,

v.

THE WISCONSIN
DEPARTMENT OF
REVENUE AND RICHARD
CHANDLER, SECRETARY,

Defendants-Appellants.

An appeal from an order dated June 1, 2018
and judgment entered June 5, 2018
in Ashland County Case No. 16CV83
Honorable John M. Yackel

BRIEF OF PLAINTIFFS-RESPONDENTS

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III. STATEMENT ON THE ISSUES

The Appellants misstate the issues and presume facts and legal conclusions that simply do not exist in this case. A more accurate description of the issues presented in this case follows:

1. Is the Wisconsin Department of Revenue ("DOR") immune from both claims for monetary relief and attorney fees even though it was found to have caused non-uniform taxation that resutled in the depravation of the rights guaranteed to the Plaintiffs pursuant to due process and the Uniformity Clauses of the Wisconsin Constitution?

The trial court answered no.

2. Did DOR fail to perform any non-discretionary duties thereby entitling Plaintiffs to assert a mandamus action against DOR?

The trial court answered yes.

3. Are the Plaintiffs entitled to attorney fees from DOR pursuant to the *Weinhagen* rule and the private attorney general doctrine?

The trial court answered yes.

IV. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are necessary because the legal authority that governs the resolution of the issues presented is well-established and can adequately be presented by written briefs.

V. STATEMENT OF FACTS

Although the facts presented by DOR are generally accurate, they are incomplete when it comes to DOR's conduct, which resulted in the trial court's decision. The facts are, therefore, supplemented below directly from the trial court's Findings of Fact.

On July 23, 2007, the Town of Sanborn ("Town"), in Ashland County, enacted a resolution declaring "any land allotted in fee simple pursuant to the 1854 treaty owned by the [Bad River Band of Lake Superior] Tribe … or any Tribe member" shall be "non-taxable." (R-121, ¶ 8.)

The Wisconsin property assessment manual that was in place during the passage of the Town's resolution 2007 provided the following directive: "[i]n the situation where a Native American owns real property on a reservation in fee simple it is subject to the property tax on the presumption that the Congressional act authorizing fee simple ownership provides for taxation of the land." (R-121, ¶ 9.)

DOR has confirmed that the land allotted after 1887 and all land … that ever fell out of Native American ownership is taxable. (R-121, ¶ 10.)

In March 2008, DOR first became aware of the property tax scheme created by the resolution … in which property in the same taxable classification was being treated differently depending upon whether the property owner was Native American of [sic] a non-Native American. (R-121, ¶ 11.)

Between 2008 and 2017, DOR was made aware that the taxation scheme in the Town was illegal and non-uniform and that there was purposeful treatment of hundreds of parcels of taxable land as non-taxable. (R-121, ¶ 12.)

The record is replete with information indicating the Town of was not following the law. (R-121, ¶ 13.)

The assessors for the Town operated in direct contravention of the Wisconsin property assessment manual's guidance and directives. (R-121, ¶ 14.)

Individuals that work for DOR recognized that as early as 2008 the Town's assessor was "doing whatever he wants with little, if any, regard for the law." (R-121, ¶ 15.)

The Town eventually went so far as to acknowledge in writing that the July 23, 2007 resolution contradicts DOR guidelines. (R-121, ¶ 16.)

Despite acknowledging that the resolution contradicted DOR guidelines, the Town refused to rescind the resolution. (R-121, ¶ 17.)

The DOR, knowing that the Town refused to rescind its resolution that contradicted DOR guidelines, did not initiate an action or proceeding against the Town Board, Board of Review Members or the Town Assessor to force the Town to comply with DOR guidelines. (R-121, ¶ 18.)

The DOR was made aware of the assessor's failure to comply. (R-121, ¶ 19.)

The DOR did nothing about the Assessor or the Town's blatant defiance. (R-121, ¶ 20.)

The DOR failed to ensure that real property in the Town of Sanborn was valued in the manner specified in the Wisconsin Property Assessment Manual. (R-121, ¶ 21.)

The DOR failed to take any corrective action to bring the Town into compliance with and follow the unambiguous mandates of the Uniformity Clause of the Wisconsin Constitution and Wisconsin Statutes Chapter 73. (R-121, ¶ 22.)

The supervisor of equalization for DOR failed to notify the Assessor for the Town of Sanborn that property liable to taxation had been omitted from assessment in the Town of Sanborn between 2008 and 2017. (R-121, ¶ 23.)

The supervisor of equalization for DOR, when the assessor neglected or refused to correct assessment by taxing properties that had been omitted, failed to notify the board of review that property liable to taxation had been omitted in the Town of Sanborn between 2008 and 2017 as required by Wis. Stat. § 73.06(3). (R-121, ¶ 24.)

The DOR took absolutely no action which resulted in or even required the property in the Town in Ashland County be taxed in a uniform manner. (R-121, ¶ 25.)

A system was created whereby each municipality that included property owned by Native Americans decided for itself what property to tax and not tax within that municipality. (R-121, ¶ 26.)

The DOR did not exercise general supervision over the administration of the tax laws of the State. (R-121, ¶ 27.)

The DOR did not direct proceedings, actions, and prosecutions to be instituted to enforce the laws relating to the penalties, liabilities, and

punishment of the public officers, persons, and officers or agents of corporations for failure or neglect to comply with the provisions of the statutes governing the return, assessment, and taxation of the property. (R-121, ¶ 28.)

The DOR did not cause complaints to be made against assessors, members of boards of review, assessors of incomes, and members of county boards, or other assessing or taxing officers to the proper circuit judge for their removal from office for official misconduct or neglect of duty. (R-121, ¶ 29.)

There is nothing in the record to show that DOR did any of the things required of them or which they are empowered to do under Wisconsin Statute Sec. 73.03 or Sec. 73.06 when made aware of the illegal and non-uniform tax scheme in the Town of Sanborn. (R-121, ¶ 30.)

The DOR acted in a way that permitted the Town to wrongfully exempt the properties within the Town for a period of approximately nine years with what appears to be complete impunity. (R-121, ¶ 31.)

The DOR assisted the Town in keeping in place its illegal and non-uniform properly tax scheme for a long period of time, approximately a decade. (R-121, ¶ 32.)

The DOR knew of and allowed nearly a decade-long violation of the Uniformity Clause of the Wisconsin Constitution. (R-121, ¶ 33.)

The DOR, as well as the Town Defendants, caused all of the similarly situated property to be taxed in a non-uniform manner. (R-121, ¶ 34.)

The DOR's lack of action resulted in the illegal and non-uniform tax scheme being allowed to continue. (R-121, ¶ 35.)

The DOR's conduct resulted in the deprivation of the rights guaranteed Plaintiffs pursuant to the Uniformity Clause of the Wisconsin Constitution. (R-121, ¶ 36.)

If DOR had acted and followed its duties, Plaintiffs would not have been forced to engage in litigation in the previous case (Ashland County Case No. 16CV30) as well as this case. (R-121, ¶ 37.)

If DOR had acted when the Town was not following the guidelines and not following the law as far as assessing these properties, Plaintiffs in this case would not have had to expend their energies or their monies in order to correct the violations of the law under those tax assessments. (R-121, ¶ 38.)

Plaintiffs have been forced to bear financial and emotional burdens on behalf of all Town and county taxpayers asserting their constitutionally and

statutorily guaranteed right to uniform taxation and to return the properties wrongly deemed nontaxable back to the tax rolls. (R-121, ¶ 39.)

Plaintiffs acted to enforce the public's rights. (R-121, ¶ 40.)

To fully enforce those guaranteed rights, assistance of counsel is fundamental. Plaintiffs acted not only for themselves but for other individuals similarly situated. (R-121, ¶ 41.)

VI. STANDARD OF REVIEW

Courts of appeal will "reverse a decision granting summary judgment if either (1) the trial court incorrectly decided legal issues, or (2) material facts are in dispute." *Official Comm. of Unsecured Creditors of Great Lakes Quick Lube LP v. Theisen*, 2018 WI App 70, ¶ 25, 384 Wis. 2d 580, 920 N.W.2d 356. Here, DOR has admitted there are no material facts in dispute. (DOR's Opening Brief, p 2.) Thus, the circuit court's findings of fact are binding on review.

When reviewing a trial court's legal conclusions on cross-motions for summary judgment, courts of appeal "review the disposition of such motions de novo, applying the same methodology the circuit courts apply." *Am Family Mut. Ins. Co. v. Cintas Corp. No. 2,* 2018 WI 81, ¶ 9, 383 Wis. 2d 63, 914 N.W.2d 76.

VII. ARGUMENT

A. DOR is not Immune from a Claim for Damages Stemming from Its Violations of the Wisconsin Constitution.

Sovereign immunity for the state and its agencies is not all encompassing as DOR suggests. There is no sovereign immunity for monetary claims based upon a state denying individuals their constitutionally guaranteed rights.

1. The trial court correctly recognized Plaintiffs are entitled to pursue a monetary claim against DOR based upon the fact DOR was found to have violated the Uniformity Clause of the Wisconsin Constitution.

In *Zinn*, the Wisconsin Supreme Court reviewed the state's sovereign immunity relative to claims alleging constitutional violations. In that case, the plaintiff commenced an action against the state of Wisconsin alleging an unconstitutional taking of property without just compensation in violation of Wis. Const. art. I, § 13. *Id.* at 421-22. That provision states that "[t]he property of no person shall be taken for public use without just compensation therefor." *Id.* at 424. The state moved to dismiss on the doctrine of sovereign immunity as provided for in Wis. Const. art. IV, § 27.[1] More specifically and

[1] Wis. Const. art. IV, § 27 reads as follows: "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state."

exactly as DOR is doing in this case, the state argued nothing in the Constitution nor in any state statute waived its immunity from a monetary claim. *Id.* at 432. While the Supreme Court agreed that there was no express authorization, it nonetheless held the plaintiffs could assert a monetary claim:

> We conclude that the doctrine of sovereign immunity has only limited applicability to actions against the state which allege a constitutional taking of private property without just compensation. It is a well-established principle, although apparently never expressly recognized by this court, that the doctrine of sovereign immunity cannot bar an action for just compensation based on the taking of private property for public use, even though the legislature has failed to establish specific provisions for the recovery of just compensation.

Id. at 435.

The court explained its decision as follows:

> In many States the rule that the State cannot be sued without its consent is written into the constitution. Some state constitutions prohibit the giving of consent. On the other hand, consent to suit, in some respects at least, may be implied from constitutional provisions.

Id. at 435 citing Comment a. to sec. 895B of Restatement, 2 Torts (Second) at 400.

The Supreme Court then concluded that the Constitution "is self-executing and needs no express statutory provision for its enforcement. This is because just compensation following a taking is a constitutional necessity rather than a legislative dole…." *Id.* The court concluded:

> The above analysis leads to the conclusion that the two provisions of the Wisconsin Constitution involved here, the doctrine of

> sovereign immunity and the just compensation clause, must be read together. Under the just compensation clause a property owner has a constitutionally mandated right to be compensated for property taken by the state and the absence of any statute providing for such a remedy does not bar the action.

Id. at 437.

Similarly, the two constitutional provisions involved in this case, sovereign immunity and the Uniformity Clause, "must be read together." The Uniformity Clause states, "[t]he rule of taxation *shall* be uniform…." Wis. Const. art. VIII, § 1 (emphasis added). Uniform taxation is therefore also a "constitutional necessity." Just as a property owner has a "constitutionally mandated right" to be compensated for damages suffered from a violation of the taking clause, a citizen of this state has a "constitutionally mandated right" to be compensated for a violation of the Uniformity Clause.[2]

This is especially true given the factual findings of the trial court relative to DOR's egregious conduct in this case.

> Department of Revenue's conduct resulted in the deprivation of the rights guaranteed them pursuant to the Uniformity Clause of the Wisconsin Constitution.

Transcript of Proceedings, Oral Ruling, May 2, 2018, p. 8; R-129.

[2] Further evidence of the paramount importance of a citizen's right to be taxed only in a uniform fashion can be found in the fact the United States Constitution also contains a uniformity clause. Congress is given the power to tax, "but all duties, imports and excises shall be uniform throughout the United States…." U.S. Const. art. I, § 8, cl. 1.

> [T]he State Department of Revenue … caused all of the similarly situated property to be taxed in a non-uniform manner.

Transcript of Proceedings, Oral Ruling, May 2, 2018, p. 9; R-129.

> The Department of Revenue consented to the Town's decision to treat similar classified parcels in a non-uniform manner. It is convincing to this Court that within the past decade it would seem that they would have taken appropriate remedial action to assure compliance with the Uniformity Clause, with its own manual, and with its Town specific guidance, and with the United States Supreme Court precedent.
>
> Instead, for whatever reason, it appears that they assisted the Town in keeping in place its illegal and non-uniform property tax scheme for a long period of time, approximately a decade.
>
> ***
>
> The Department of Revenue took absolutely no action which resulted in or even required the property in the Town of Ashland County to be taxed in a uniform manner.
>
> The Department of Revenue appeared to have ignored the pleas of Ashland County for the State to correct the problem so that everyone can be treated equally. And in other words, the State Defendants conceded they knew of and allowed nearly a decade-long violation of the Uniformity Clause of the Wisconsin Constitution….
>
> Department of Revenue violated the Uniformity Clause of the Wisconsin Constitution and are liable for damages, if there are any.

Transcript of Proceedings, Oral Ruling, May 2, 2018, pp. 10-11; R-129.

DOR attempts to distinguish the holding in *Zinn* by claiming the phrase "without just compensation" as found within the taking clause is an express waiver of the state's sovereign immunity. That argument fails because it is contrary to what the *Zinn* court held. In *Zinn*, the court did not

find an express waiver of sovereign immunity. Rather, the court allowed the monetary claim to proceed "even though the legislature has failed to establish specific provisions for the recovery of just compensation," and holding "consent to suit, in some respects at least, may be implied from the constitutional provisions." *Id.* Ultimately, the court found that the Wisconsin Constitution is "self-executing and needs no express statutory provision for its enforcement." *Id.* The same logic applies to granting each citizen of this state a remedy against a state agency that has been found to have knowingly and willingly violated the Uniformity Clause.

DOR also cites *Grall v. Bugher*, 181 Wis. 2d 163, 172, 511 N.W.2d 336 (Ct. App. 1993), *rev'd on other grounds*, 193 Wis. 2d 65, 532 N.W.2d 122 (1995), to claim the Uniformity Clause of the Constitution does not waive DOR's immunity from suit. That case has no precedential value because it was overruled on other grounds, after a change in legislation. Additionally, in Judge Sundby's dissent in *Grall*, he stated:

> It is fundamental that sovereign immunity is not a defense to a claim based on an alleged violation of the plaintiff's constitutional rights by a state agency or officer. 1 SHEPARDS, CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 1.20, at 70 (2d ed. 1992). "Constitutional claims that are not barred by sovereign immunity may include those based on both the federal and state constitutions, such as violations of the constitutional rights to … due process and equal protection of the laws." *Id.* at 70-71.

Id. at 172.

Also, the fact the Supreme Court initially agreed to hear the case is telling in terms of whether it agreed with the lower court's ruling the Uniformity Clause did not allow a claim for monetary damages. In any event, there is no binding precedent that supports DOR's position.

DOR also cites *Manitowoc Co., Inc. v. City of Sturgeon Bay*, 122 Wis. 2d 406, 362 N.W.2d 432 (Ct. App. 1984), for the proposition that monetary claims cannot be asserted against the state. First, the plaintiff in *Manitowoc Co.* never sought monetary relief from DOR. Second, that case had to do with whether equipment was used in the manufacturing process were exempt from taxation. *Id.* at 408. It had nothing to do with a state agency violating a citizen's constitutionally guaranteed rights.

DOR also reads too much into the holding of *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 529 N.W.2d 245 (Ct. App. 1995) to obtain support for its contention that a state agency cannot be sued for monetary damages. That, however, was not the question before that court. As the *Town of Eagle* court noted "[t]his case involves a claim for declaratory relief…." *Id.* at 307. Given that only declaratory relief was sought, the court never had to and, therefore, never did address the issue of monetary claims. DOR jumps

to the unfounded conclusion that if the court in *Town of Eagle* actually did address if a monetary claim can be asserted, based on constitutional violations, the answer would have been no. *Town of Eagle*, just like *Manitowoc Co.*, cannot be read to be dispositive of issues never directly considered.

Additionally, the *Town of Eagle* decision was not based on the fact the plaintiffs were not seeking damages but on the fact "damages are not being sought *from the state*." *Id.* at 320. In the immediately preceding discussion, the court noted the general applicability of state sovereign immunity but then confirmed, "[n]onetheless, suit will lie against state officials and agencies alleged to be acting unconstitutionally or in excess of jurisdictional authority." *Id.* at 319. "As a result, it has been necessary to engage in a fiction that *allows such actions to be brought against the … agency charged with administering the statute* on the theory that a suit against a … agency is not a suit against the state when it is based on the premise that the … agency is acting outside the bounds of … its constitutional or jurisdictional authority." *Id.* at 320 (emphasis in original).

In other words, *Town of Eagle* does not stand for the proposition that sovereign immunity always applies if damages are being sought, but instead,

clarifies the use of the legal fiction that a state agency is not "the state" in the context of seeking relief for a confirmed constitutional violation.

DOR also notes that in addition to suing DOR, local officials could have been and, in fact, were sued in this case. DOR, however, cannot be excused from knowingly and repeatedly trampling on a citizen's constitutionally protected rights simply because there may be another bad actor who may also be susceptible to liability. DOR's constitutional and statutory obligations are independent of the duties another defendant may have. Nothing in the Constitution says otherwise.

An inability to sue DOR despite the trial court's factual findings it "violated the Uniformity Clause," "caused" non-uniform taxation, "assisted the Town in keeping in place its illegal and non-uniform property tax scheme," "ignored the pleas of Ashland County," "knew of and allowed nearly a decade long violation of the Uniformity Clause," and its conduct "resulted in the deprivation of the rights guaranteed … pursuant to the Uniformity Clause," clearly is not what the drafters of the constitution had in mind.

2. Plaintiffs have a direct damage action based upon DOR's denial of their constitutionally protected due process and equal protection rights.

Immunity does not apply as a bar to Plaintiffs' damage claims because DOR violated both the United States and Wisconsin Constitutions. That determination is in accord with both federal and Wisconsin precedent.

> The Wisconsin Constitution begins with a Declaration of Rights, echoing language from our nation's Declaration of Independence, recognizing that the proper role of government—the very reason governments are instituted—is to secure our inherent rights, including liberty:
>
> > All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.
>
> (Wis. Const. art. I, § 1).
>
> ***
>
> An inherent right to liberty means all people are born with it; the government does not bestow it upon us and it may not infringe it.
>
> ***
>
> [T]he constitution compels the judiciary to protect the liberty of the individual from intrusion by the majority.

Porter v. State, 2018 WI 79, ¶¶ 52-53, 382 Wis. 2d 697, 913 N.W.2d 842 (Bradley, R., dissenting).

Consistent with those fundamental rights, the Wisconsin Court of Appeals held as follows in case where a landowner challenged a denial of his request to amend a planned unit development:

> While our supreme court has yet to recognize such a tort, we conclude that the trial court did not err in ***allowing plaintiffs to***

> ***pursue a direct damage action based on an intentional denial of due process under the state constitution***. Allowing this type of damage action is a logical extension of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), wherein the Court observed that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." In *Bivens*, the Supreme Court held … that ***individuals whose constitutional rights have been so violated may recover damages directly under the constitution***…. *Id.* at 395, 91 S.Ct. at 2004. Subsequent to *Bivens*, the Court has held that violations of the Fifth and Eighth Amendments also give rise to an individual damage action ***directly under the United States Constitution***. (Internal citations omitted.) We also note that a number of other states recognize a ***common law action for damages pursuant to a violation of state constitutional rights***. *See, e.g., Moresi v. State*, 567 So.2d 1081 (La. 1990); *Widgeon v. Eastern Shore Hosp. Ctr*., 300 Md. 520, 479 A.2d 921 (1984); *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992).

Old Tuckaway Assocs. v. City of Greenfield, 180 Wis. 2d 254, 284, n.4, 509 N.W.2d 323 (Ct. App. 1993) (emphasis added).

Citizens of this state are not only guaranteed the absolute right to be free from non-uniform taxation, they are also guaranteed the rights of due process and equal protection. Wis. Const. art. I, § 1. "Article I, Section 1 of the Wisconsin Constitution includes economic liberty within its general guarantee of liberty as an inherent and fundamental right…." *Porter v. State*, 2018 WI 79, ¶ 74, 382 Wis. 2d 697, 913 N.W.2d 842 (emphasis in original). "Too much dignity cannot well be given to that declaration." *State v. Redmon*, 134 Wis. 89, 101, 114 N.W. 137 (1907). "The constitution is the mandate of a sovereign people to its servants and representatives, and no one

of them has a right to ignore or disregard its plain commands." *John F. Jelke Co. v. Emery*, 193 Wis. 311, 321, 214 N.W. 369 (1927).

When those constitutional rights have been violated, a citizen may recover damages "directly *under the constitution*." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). The "constitution compels the judiciary to protect" individuals from the harm they suffer as a result of the loss of those liberties.[3] No separate statutory authorization is necessary.

In *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971), a group of plaintiffs alleged that the local taxable values of, and assessment rates on, real property in Alabama varied significantly between counties, resulting in non-uniform taxation. *Id*. at 618. They, therefore, claimed that the secretary's failure to perform his duties in accordance with state law, and the resultant disparity and inequality in the assessment and taxation of real property in the state, deprived them of property, in the form of ad valorem taxes, without due process of law…. *Id*. at 619.

In *Weissinger*, the federal district court summarized due process jurisprudence relating to property taxation as follows:

3

> The Constitution and laws of the State of Alabama provide, for tax purposes, for but one class of property. This means that all property within the state must be assessed and taxed at uniform ratios.… The evidence further reflects that this lack of uniformity has resulted not from mere mistake or error in judgment, but from the intentional and systematic refusal of defendant and his predecessors in office to perform their duties in accordance with state law.[4] Such inequality of treatment, besides violating . . . the Alabama Constitution, denies these plaintiffs their constitutional rights under the Fourteenth Amendment to the United States Constitution.

Id. at 621–22 (internal citations omitted); (footnote added).

The court further explained:

> But when a state, such as Alabama, has decided, through its duly elected officials, that all property in the state shall be assessed and taxed at a uniform ratio, and has enacted laws and formulated procedures to ensure this end, any substantial disparity or differences in taxation resulting from the failure of state officers to properly administer the state's tax laws will offend the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Wells Fargo & Co. v. Johnson*, 214 F. 180 (8th Cir. 1914); *aff'd* 239 U.S. 234, 36 S.Ct. 62, 60 L.Ed. 243 (1915); *Central R. Co. of N. J. v. Martin*, 65 F.2d 613 (3rd Cir. 1933); *Mobile & O. R. Co. v. Schnipper*, 31 F.2d 587 (E.D.Ill. 1929); *Wyandotte Chem. Corp. v. City of Wyandotte*, 199 F.Supp. 582 (E.D.Mich 1961), *rev'd on other grounds*, 321 F.2d 927 (6th Cir. 1963).

Weissinger v. Boswell, 330 F. Supp. 615, 622, n.29 (M.D. Ala. 1971).

DOR attempts to argue Plaintiffs' federal due process and equal protection claims fail because 42 U.S.C. § 1983 does not abrogate the state's sovereign immunity for those claims. (DOR Brief, p. 12.) That defense, even

[4] This is exactly what DOR has done in this case, a "systematic refusal" for nearly a decade to perform their duties.

if it had merit, is not applicable to claims based upon the Wisconsin Constitution. Consequently, the Plaintiffs may assert their damage claims directly under the Wisconsin Constitution and no separate legislative authorizing those claims is necessary.

3. United States Supreme Court precedent provides Plaintiffs with an avenue for seeking damages.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the United States Supreme Court allowed a plaintiff to seek monetary damages from the state of Florida for its unconstitutional tax scheme. The monetary claim was allowed to proceed despite Florida's claim it was immune from such a monetary claim.

DOR attempts to distinguish *McKesson* by claiming it was a refund case and, therefore, applies only when the governmental entity being sued for damages actually "collected the challenged tax." (DOR Brief, p. 17.) That reasoning misses the point of *McKesson*, which stands for the much broader proposition that if a state is involved in a taxing scheme that violates rights guaranteed under the constitution, there must be a mechanism to seek damages stemming from the state's violation. In this case, it is DOR's direct involvement in and the trial court's factual finding it "caused" the constitutional violation that is the salient point. That is what makes DOR

liable for damages. The fact those damages may not be in the form of a refund is irrelevant. *McKesson* does not state that a monetary remedy, caused by purposeful illegal taxation, can only be brought against the entity that actually collected the tax. That is especially true here, where the Plaintiffs are claiming damages in addition to the illegal taxes.

DOR also claims that in this case, unlike in *McKesson*, Plaintiffs have an alternative remedy under Wis. Stats. §§ 74.35 and 74.37 dealing with the "recovery of unlawful taxes" and "claims on excessive assessment." (DOR Brief, p. 17.) This is not a simple challenge, however, of a property tax assessment governed by Wisconsin Statutes Chapter 74. This is a case in which DOR itself knowingly caused non-uniform taxation in violation of the Constitution. Also, Plaintiffs are not seeking only a refund of the illegal taxes or questioning the assessed value of this real estate. They are making a claim for the loss of past and future property values, as well as other damages and attorney fees.

Furthermore, DOR is incorrect when it claims Chapter 74 provides the "clear and certain" refund mechanism missing in *McKesson*. At the December 17, 2015 hearing, BOR refused to even consider the Chapter 74 claims. Plaintiffs were expressly informed that "the issues of taxability or

assessment of Indian land is not in the jurisdiction of the Board of Review. The Board of Review's jurisdiction covers valuation and classification issues only." (Transcript, December 17, 2015 BOR Hearing, p. 2:9–15 (to be added to the Record via Motion to Supplement).) Consequently, BOR refused to even consider the claims. *Id.* Thus, according to BOR, Chapter 74 provides no relief whatsoever, let alone a "clear and certain" refund mechanism. Additionally, even if BOR would have considered the claims, Chapter 74 deals only with the improper tax and provides no mechanics for the recovery of other damages. That is one of the reasons why Plaintiffs were forced to seek relief directly from DOR, who has now been found to have caused the non-uniform taxation and to have assisted the Town in keeping the illegal tax scheme in place for nearly a decade.

DOR's position, that it can take an active role in depriving someone of their constitutional rights, while simultaneously cowering behind their purported immunity, flies in the face of *McKesson*. As the trial court noted in denying DOR's motion to dismiss:

> The United States Supreme Court has indicated that the exaction of a tax constitutes a deprivation of property and due process guaranteed by the United States Constitution requires that a state provide taxpayers with not only a fair opportunity to challenge the tax, but also a clear and certain remedy for any erroneous tax collection.

Court Decision and Order dated March 3, 2017, p. 3 *citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36, 110 S. Ct. 2238 (1990).

4. The trial court correctly concluded that state law creates a private right of action against DOR.

DOR further contends the trial court erred by finding that state law creates a private right of action against DOR. (DOR's Opening Brief, pp. 23–24). This argument is nothing more than a re-stating of DOR's sovereign immunity argument. It fails for the same reasons, most notably the constitutional claims stated previously.

Additionally, DOR has admitted that plaintiffs can compel state agencies to perform non-discretionary functions. (DOR's Opening Brief, pp. 24–28) As the trial court correctly concluded, DOR's duties under Wis. Stats. §§ 73.03, 73.06, and 70.32 are non-discretionary. A private right of action also exists to compel the exercise of discretionary duties, as explained *infra*. Furthermore, Wis. Stat. § 783.04 expressly entitles a successful mandamus plaintiff to recover "damages and costs." Thus, Wisconsin's mandamus statute does expressly create a private right of action entitling a successful plaintiff to monetary relief. For this reason alone, the Court must reject this argument.

Second, it is important to note that DOR has also admitted that Wis. Stats. §§ 73.03, 73.06, and 70.32 all "impose certain duties on" DOR. (DOR's Opening Brief, p. 24) Despite this key admission, DOR claims that its knowing violation of these duties does not create any private right of action. Thus, at least according to DOR, a plaintiff who is injured by a state agency's failure to fulfill its mandatory, non-discretionary duties, or its failure to do anything whatsoever relative to discretionary duties, is never entitled to monetary relief from that agency. This is nonsensical. The admitted statutory duties are meaningless if a plaintiff has no right whatsoever to enforce those duties in court, and to seek monetary redress for this violation.

Third, the Wisconsin Constitution and the Supreme Court rule in McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla., 496 U.S. 18, (1990) create private rights of action against DOR, as explained earlier. Last, the Private Attorney General and Weinhagen doctrines also serve as exceptions to the general rule of sovereign immunity and create private causes of action against DOR, also explained elsewhere in this Brief.

B. The Trial Court Was Correct in Allowing Plaintiffs' Mandamus Claims to Proceed Against DOR because It Failed to Perform Non-Discretionary Duties.

DOR next contends that the trial court erred by allowing Plaintiffs' mandamus claims to proceed. It bases this contention on two arguments: (1) Plaintiffs' mandamus claims are moot, and (2) DOR cannot be compelled to perform discretionary functions. As will be shown below, and as the trial court concluded both arguments fail.

1. The trial court correctly held that Plaintiffs' mandamus claims are not moot, as DOR has expressly admitted.

DOR argues the mandamus claims are moot because the wrongly-exempted properties have been returned to the Town's tax rolls. This argument ignores the fact Plaintiffs continue to actively seek an order requiring DOR to perform specific tasks to ensure uniform taxation moving forward, including an order to:

- Supervise the Town's new assessor, Scott Zillmer, to ensure that he complies with the trial court's January 2017 Order placing the exempted properties back on the Town's tax rolls (Plaintiffs' Brief in Response to DOR's Motion for Summary Judgment, p. 21; R-98);

- Supervise a complete reassessment of all properties in the Town and Ashland County to ensure that such reassessment is done in a proper, uniform, and timely manner (Plaintiffs' Brief in Response to DOR's Motion for Summary Judgment, p. 21; R-98);

- Supervise and ensure that all taxes "owed for previous years on the wrongfully exempted parcels" are collected in a timely manner (Complaint, Prayer for Relief, ¶ 2; R-7);

- Perform a "complete reassessment of the Town of Sanborn tax district" pursuant to Wis. Stat. § 70.75 in a timely manner (Complaint, Prayer for Relief, ¶ 3; R-7); and

- Actually investigate and, if necessary, discipline the parties responsible for implementing and maintaining an illegal tax scheme pursuant to Wis. Stat. § 73.03 (Plaintiffs' Brief in Response to DOR's Motion for Summary Judgment, p. 24; R-98).

Most significantly, DOR admitted to the trial court that, "Plaintiffs' mandamus claims resting on [the above] statutory provisions are *not moot*." (DOR Reply Brief in Support of its Motion for Partial Summary Judgment, p. 21; R-110; emphasis added.) *See also* DOR's Opening Brief, p. 25 (again admitting that Plaintiffs' statutory mandamus claims are still alive, but arguing that they fail because they seek to compel DOR to perform discretionary duties). Likewise, DOR further admits that Wis. Stats. §§ 73.03, 73.06, and 70.32 all "impose certain duties on" DOR. (DOR's Opening Brief, p. 24.) Based on these admissions alone, this Court must uphold the trial court's common-sense decision that Plaintiffs' mandamus claims are not moot.

Even setting aside DOR's fatal admission, however, it is clear that Plaintiffs' mandamus claims are not moot. Each of these claims demands that DOR take specific actions in the future, and each survived summary judgment. The trial court acknowledged the prospective nature of these outstanding claims in its June 5, 2018 Order which serves as the basis of this appeal, and which directs that "[t]his matter shall be set for further trial court proceedings." (Order, Judgment, ¶ 5; R-121.) Because of the non-final nature of this Order, and the interlocutory nature of this appeal, Plaintiffs' outstanding mandamus claims (including any related damages) will be addressed at these further circuit court proceedings.

It is also important to note that even if this Court somehow were to decide that Plaintiffs' outstanding mandamus claims are moot, Plaintiffs are still entitled to recover the damages they incurred up to the point these claims became moot. Inherent to DOR's mootness argument is the tacit admission that, had this matter been on appeal prior to the wrongly-exempted properties being placed back on the tax rolls, then DOR would have been subject to a writ of mandamus. Given that apparent admission, and the egregious nature of DOR's complete abrogation of its constitutional and statutory duties to ensure uniform taxation over the course of almost a decade, Plaintiffs are

entitled to recover any damages incurred before their mandamus claims became moot.

2. The trial court correctly held that Plaintiffs' mandamus claims seek the enforcement of non-discretionary DOR obligations.

DOR further responds that the trial court erred when it permitted Plaintiffs' mandamus claims to proceed because "all the duties Plaintiffs have identified are discretionary." (DOR's Opening Brief, p. 25.)[5] This argument also fails.

a. DOR's constitutional and statutory duties are not discretionary.

In the Order that is the subject of this appeal, the trial court held that Wis. Stats. §§ 73.06, 73.03, and 70.32 all create binding, non-discretionary obligations which DOR failed to satisfy. (June 5, 2018 Order from Summary Judgment; R-121.) A few specific examples confirm the trial court was correct.

i. DOR's Wis. Stat. § 73.06(3) duties relating to omitted properties are not discretionary.

[5] DOR incorrectly, and for the first time, claims Plaintiffs have never said what exactly they want DOR to do; their Complaint simply requests a "writ of mandamus…." (DOR Brief, p. 24.) That is a gross mischaracterization of the Complaint, which references numerous statutory obligations DOR ignored. (*See* Complaint, pp. 95-99; R-7, R-19; specifically citing among other things Wis. Stats. §§ 73.03, 76.03, and Chapter 74.

As an initial matter, Wis. Stat. § 73.06(1) directs that DOR, through its supervisors of equalization, "shall have complete supervision and direction of the work of the local assessors[.]" In other words, the buck stops with DOR. The statute goes on to state that in carrying out this duty, DOR "shall investigate all … matters and subjects relative to the assessment and taxation of general property." Wis. Stat. § 73.06(2). As part of this investigation, DOR "shall":

> [T]est the work of assessors during the progress of their assessments and ascertain whether any of them is assessing property at other than full value or is omitting property subject to taxation from the roll. The department and such supervisors shall have the rights and powers of a local assessor for the examination of persons and property and for the discovery of property subject to taxation. *If any property has been omitted or not assessed according to law, they* [DOR] *shall bring the same to the attention of the local assessor of the proper district and if such local assessor shall neglect or refuse to* correct *the assessment they shall report the fact to the board of review*.

Wis. Stat. § 73.06(3) (emphasis added).

Here, DOR does not even try to argue that it complied with the mandatory provisions of Wis. Stat. § 73.06(3). The reason is obvious. The record confirms that DOR did not report that property was wrongfully omitted to the BOR despite being informed of that fact at least ten times over the course of nine years.[6] Incredibly, DOR even went so far in internal emails

[6] DOR learned of omitted property: (1) after DOR's tax specialist, Tom Ourada's April 16, 2008 meeting with State Representative Gary Sherman; (2) after DOR's employee, Jennifer Miller's June 10, 2008 email to Mr. Romportl; (3) after Ashland

as to refer to the evidence of omitted properties as a "smoking gun"[7] and yet it never referred this matter to the BOR.

In light of this sheer mountain of evidence of DOR's knowing failure to even attempt to satisfy its binding, mandatory duty to refer the issue of omitted properties to BOR, the trial court made the following findings of fact which are now binding:

> The supervisor of equalization for DOR failed to notify the Assessor for the Town of Sanborn that Property liable to taxation had been omitted from assessment in the Town of Sanborn between 2008 and 2017.
>
> The supervisor of equalization for the DOR, when the assessor neglected or refused to correct assessment by taxing properties that had been omitted, failed to notify the board of review that property liable to taxation had been omitted in the Town of Sanborn between 2008 and 2017 as required by Wis. Stat. § 73.06(3).

(June 5, 2018 Order, Findings of Fact at ¶¶ 23–24; R-121.)

County Administrator Jeffrey Beirl's formal complaint to DOR in October 2008; (4) after Mr. Romportl's December 16, 2008 email to DOR; (5) after the presentation of evidence of improperly exempted parcels in Plaintiffs' petition for reassessment in August 2015; (6) after the Town admitted its resolution was contrary to DOR's guidance in December 2015 and DOR acknowledged same; (7) after Plaintiffs were denied their right to a hearing on their objections to assessment; (8) after dozens of emails and telephone calls from Plaintiffs' counsel providing DOR with hundreds of land patents issued after 1887 and deeds which clearly and unequivocally evidenced the transfer of property out of Native American ownership; (9) after DOR was provided with a Notice of Claim on June 29, 2016; and (10) after this lawsuit was filed on July 8, 2016.

[7] Exhibit 26, December 7, 2015 email from Defendant Zillmer to Romportl; Affidavit of Frank W. Kowalkowski in Support of in Support of Plaintiffs' Motion for Partial Summary Judgment; R-78; R-81.

Once DOR learns of omitted property, it "shall report the fact to the board of review." No discretion is involved.

ii. DOR's Wis. Stat. § 73.03(3) duties, triggered by an assessor's and BOR's failure to comply with the law are not discretionary.

Wisconsin Statute § 73.03 directs that it "*shall be the duty*" of DOR to carry out more than 72 enumerated actions, including:

> (3) To direct proceedings, actions and prosecutions to be instituted to enforce the laws relating to the penalties, liabilities and punishment of public officers, persons, and officers … for failure or neglect to comply with the provisions of the statutes governing … taxation of property; and to cause complaints to be made against assessors, members of boards of review, … to the proper circuit judge for their removal from office for official misconduct or neglect of duty.

As early as 2008, DOR knew the Town's assessor was "doing whatever he wants with little if any regard for the law." (June 5, 2018 Order from Summary Judgment, ¶ 15; R-121.) DOR did absolutely nothing about Meyer's blatant defiance, let alone actually "direct proceedings against him" or "to cause complaints to be made" against him to the proper circuit judge for his removal. The Town eventually went so far as to acknowledge in writing that "[t]he Town of Sanborn is aware that its July 23, 2007 Resolution contradicts the December 2012 Department of Revenue

guidelines,"[8] and despite this fact "[t]he Town of Sanborn is not willing to rescind its July 23, 2007 Resolution." *Id.* DOR was made aware of this communication, and still, "did nothing about the Assessor or the Town's blatant defiance."[9] (June 5, 2018 Order from Summary Judgment, ¶ 20; R-121.)

[8] Complaint, p. 57; R-7; R-19: R-121, ¶ 16.

[9] The statute gets even more detailed in terms of what DOR must do when an assessor or a board of review continues to defy the law.

> (4) To *require* district attorneys to assist in the commencement and prosecution of actions and proceedings for penalties, forfeitures, removals and punishment for violations of the laws of the state in respect to the assessment and taxation of property, in their respective counties.
>
> * * *
>
> (9) To summon witnesses to appear and give testimony, and to produce records, books, papers and documents relating to any matter which the department shall have authority to investigate or determine.
>
> (10) To cause the deposition of witnesses … to be taken, … in any matter which the department shall have authority to investigate or determine.
>
> (11) To visit the counties in the state … for the investigation of the work and the methods adopted by local assessors, county assessors, boards of review, supervisors of equalization and county boards, in the assessment, equalization and taxation of property….

Wis. Stats. §§ 73.03(4), (9), (10), and (11).

Additional obligations are also triggered when a violation of the law is complained of or discovered. In either of those events, it is the obligation of DOR:

> To carefully examine into all cases where evasion or violation of the laws for assessment and taxation of property is alleged, *complained* of *or discovered*, and to ascertain wherein existing laws are defective or are improperly or negligently administered.

Wis. Stat. § 73.03(12) (emphasis added).

Ashland County Administrator Jeffrey Beirl filed a Wis. Stat. § 73.03(12) formal complaint with DOR in which he detailed town assessor Martin Meyer's complete refusal to correct the properties that had been purposely misclassified as non-taxable in Ashland County.[10]

Following the receipt of the complaint, DOR became statutorily required to investigate and "carefully examine" into the case to determine if the tax laws were being "improperly or negligently administered." As a DOR official conceded during his deposition, a valid complaint "requires" a hearing in front of the Secretary of Revenue.[11] In other words, there is no discretion to be exercised in whether or not to respond to a formal complaint.

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[10] Exhibit 11, October 28, 2008 Formal Complaint. *See also* Exhibit 12, September 22, 2017 email from attorney Colin Roth identifying this October 28, 2008 letter as a "formal complaint." Affidavit of Frank W. Kowalkowski in Support of in Support of Plaintiffs' Motion for Partial Summary Judgment; R-78; R-81.

[11] Dep. of Romportl, pp. 72:11–73:12; Affidavit of Frank W. Kowalkowski in Support of in Support of Plaintiffs' Motion for Partial Summary Judgment; R-78; R-81.

Commencement of an investigation after receiving what it conceded was a formal complaint, was a non-discretionary duty. This is true even if the outcome of the investigation is not certain. Despite that fact, DOR did nothing in response to the formal complaint as the trial court confirmed.

The trial court said it best when it concluded "[t]here has to be some guidance agency or guidance force to these local municipalities and tax assessments. To me that is the Wisconsin Department of Revenue's job to do that." (Oral Ruling, p. 18:11–20; R-129.) As the trial court further noted, "the record is replete with information indicating that" DOR abrogated its binding, non-discretionary duties to ensure uniform taxation. (Oral Ruling, p. 10:21–23; R-129.)

iii. DOR's Wis. Stats. §§ 70.32, 73.03, and 73.06 duties, to ensure compliance with its assessment manual and to supervise and test the work of assessors are not discretionary.

The trial court also correctly held that DOR violated the binding, non-discretionary duties established by Wis. Stat. § 70.32, which states "real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual[.]" Wis. Stat. § 70.32(1). It is

undisputed that the WPAM in place during the passage of the Town's 2007 Resolution required the taxes illegally exempted to be taxed.[12]

As also shown above, however, Martin Meyer and Scott Zillmer, as the assessors for the Town, knowingly operated in direct contravention of and in actual written defiance of the WPAM. One of the obligations of DOR is to guarantee that assessors comply with Wis. Stat. § 70.32(1) and adhere to the WPAM. DOR did not require compliance and left that duty to be fulfilled by Plaintiffs, after nearly a decade of DOR "assisted" defiance of the rules.

In support of its argument that the Wisconsin Statutes create merely discretionary duties, DOR cites *State ex rel. North v. Goetz*, 116 Wis. 2d 239, 342 N.W.2d 747 (Ct. App. 1983). That case actually supports Plaintiffs' arguments in this case. At issue in that case was Wis. Stat. § 9.20(3), which contained the following directive: "[w]hen the … petition is found to be sufficient and the … ordinance or resolution is in proper form, the clerk shall … forward it to the common council or the village board immediately."

[12] Exhibit 39, WPAM 2013, pp. 22-25 – 22-26 (emphasis in original). The 2013 WPAM further directed that "[a]ssessors should review tax roll information at the Municipality and County along with ownership information at the Register of Deeds office." *Id*. Affidavit of Frank W. Kowalkowski in Support of in Support of Plaintiffs' Motion for Partial Summary Judgment; R-78; R-81

(Emphasis added.) Despite this language, a city clerk refused to forward to the common council a proposed ordinance, after concluding that Wis. Stat. § 9.20(3) created merely discretionary duties. The Wisconsin Court of Appeals disagreed, and instead granted a mandamus petition after holding that the statute imposed a "*mandatory*, *ministerial*, *nondiscretionary*" duty to send the petition to the common council. *North*, 116 Wis. 2d at 244 (emphasis added).

Much like the statute at issue in *North*, Wis. Stat. § 73.03 directs that it "*shall be the duty*" of DOR to carry out specific, enumerated actions. Although the record is replete with such failures, the examples referenced above are perhaps the most glaring. In particular, DOR "shall" bring to the attention of a local assessor and "shall" report to the board of review any property that has been wrongly omitted from property tax rolls pursuant to Wis. Stat. § 73.06(3). There is no discretion involved. Similarly, DOR "shall" and is "required" to investigate any formal complaints it receives, including forwarding that complaint to the BOR, pursuant to Wis. Stats. §§ 73.03 and 73.06, and the deposition testimony of DOR's own employee. There is no discretion involved. DOR "shall" also "exercise general supervision," "test the work of assessors," "carefully examine into cases,"

where improper taxes are discovered or complained of, ensure compliance with the WPAM, and report omitted property to the BOR. The plain language of these statutes gives DOR clear direction in the form of "when this condition is met, you must take this specific action." As a result, the trial court was correct in holding that DOR's constitutional and statutory duties are not discretionary under Wis. Stats. §§ 73.03 and 73.06.[13]

3. Even if DOR is correct, which it is not, that "all" of DOR's duties are discretionary, the trial court still correctly granted Plaintiffs' writ of mandamus.

DOR contends its duties are all discretionary and that it was not required to correct the non-uniform taxation because it enjoys a form of "prosecutorial discretion." In support, DOR cites *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 166 N.W.2d 255 (1969). However, the Wisconsin Supreme Court acknowledged in *Kurkierewicz* that a "writ of mandamus will lie to compel public officers to perform their prescribed statutory duties." *Id*. at 376. This is because the position of a prosecutor, "though constitutional, [is] not one of inherent powers, but [is] answerable to specific directions of the legislature." *Id*. at 380. As a result, "[d]iscretion

[13] By contrast, Wis. Stat. § 73.03(6) actually starts out with the phrase "[i]n its discretion…." The statutory provisions DOR violated in this case do not have that prefatory language but instead include words like "shall," "duty," "direct," "cause," and "require."

of a *limited nature* is conferred upon him … and there *must be* evidence that discretion was in fact exercised." *Id.* at 384 (emphasis added).

If there is no evidence the prosecutor actually exercised discretion, it is well-established that "mandamus is appropriate to compel the exercise of discretion." *State ex rel. Althouse v. City of Madison*, 79 Wis. 2d 97, 106, 255 N.W.2d 449, 453 (1977). *See also State ex rel. Thomas v. State*, 55 Wis. 2d 343, 350–51, 198 N.W.2d 675, 679 (1972) (where the record does not show that a governmental unit has taken any affirmative steps to exercise discretion, mandamus will lie to compel exercise of that discretion even if mandamus will not lie to compel a specific result).

Returning to the present situation, even if this Court were to determine that the above-cited Wisconsin Statutes create only discretionary duties, DOR would still have needed to present evidence to the trial court that it took some affirmative steps in exercising its discretion before allowing non-uniform taxation to remain for almost a decade. It presented no such evidence. This led the trial court to make the following finding of fact: "[t]here is nothing in the record to show that the DOR did any of the things required of them … under Wisconsin Statute Sec. 73.03 or Sec. 73.06 when made aware of the illegal and non-uniform tax scheme in the Town of

Sanborn." (Order, Findings of Fact, ¶ 30; R-121.) And that DOR "took absolutely no action which resulted in or even required the property in the Town of Ashland County be taxed in a uniform manner" despite "the pleas of Ashland County for the State to correct the problem so that everyone can be treated equally." (Oral Ruling, pp. 13:3–4; 10:24–11:5; R-128.)

Because DOR did virtually nothing, it remains susceptible to a writ of mandamus even if its duties are all discretionary. Blatant inaction does not satisfy even discretionary obligations.

4. The trial court correctly held that plaintiffs are entitled to recover damages and costs under Wisconsin's mandamus statute, including attorney fees.

In attempting to avoid the consequences of Wis. Stat. § 783.04, DOR asserts a single defense. "Because that language does not expressly mention attorney fees or the State, it does not provide the express authorization required for fees against DOR. (DOR Brief, p. 22.) That position is completely irreconcilable. DOR admits it is subject to Chapter 783 relative to a mandamus action. That means all of Chapter 783. DOR cannot pick and choose which subsection of an admittedly applicable law it wants to be subject to. DOR's argument also contradicts the language of Wis. Stat.

§ 783.04, which entitles a successful plaintiff seeking a writ of mandamus to "recover damages and costs."

Here, Plaintiffs, individually and as residents of the Town, have suffered numerous, significant damages as a result of DOR's failure to satisfy its non-discretionary duties and its decision to ignore even what it claims are discretionary duties. The Town's total assessed value decreased by nearly $15 million, resulting in approximately $2.5 million in lost revenue from 2006 through 2016.[14] Over this same time, the Town's mill rate also increased by approximately 1.5%, which further resulted in Plaintiffs paying over $25,000 in increased property taxes for tax years 2015 and 2016 alone.[15]

Additionally, Plaintiffs, Richard and Linda Mitchell, had been attempting to sell a portion of their property that had been assigned a 2016 assessed value of $148,473.[16] However, when they finally received an offer in May 2017, it was for $66,000—an $82,743, or 55.5%, diminution in the property's assessed value.[17] The diminution in value claim of Plaintiffs' other properties totals hundreds of thousands of dollars when the same 55.5% loss

[14] *See* Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, pp. 12–13; R-77. *See also* Affidavit of Scott Bretting, ¶¶ 2–8 (filed by Attorney Coleman on November 15, 2017); R-75.
[15] Affidavit of Scott Bretting ¶ 11; R-75.
[16] *Id*. at ¶ 9; R-75.
[17] *Id*. at ¶ 10; R-75.

is applied. Pursuant to Wis. Stat. § 783.04, these are damages the Wisconsin legislature has clearly and unequivocally indicated Plaintiffs are entitled to seek from DOR. DOR acknowledges a claim for monetary relief can be brought against a state agency if the legislature so directs. (DOR's Opening Brief, p. 11.) This is exactly what the legislature did when it created Wis. Stat. § 783.04.

Notably, Wis. Stat. § 783.04 also entitles Plaintiffs to recover their attorney fees as both damages and costs. *See* discussion of *Weinhagen v. Hayes*, 179 Wis. 62, 190 N.W. 1002 (1922) *infra*. As discussed in that section of the Brief, attorney fees are included as a form of damages when a plaintiff is required to litigate with a third party to protect the plaintiff's rights or interests. That is precisely the situation here, where Plaintiffs were forced to litigate with the Town only because DOR failed to fulfill any of its duties over a period of almost ten years.

Even if the Court determines attorney fees are not damages under *Weinhagen*, however, Plaintiffs are entitled to attorney fees as costs under Wis. Stat. § 783.04. As noted above, this statute allows for the recovery of not only "damages," but also "costs." The Wisconsin Supreme Court has explained that attorney fees are included within the meaning of "costs."

Estate of Miller v. Storey, 2017 WI 99, ¶ 49, 903 N.W.2d 759, 771. A successful plaintiff is entitled to such relief because "[a] mandamus proceeding is regarded as an action respecting the right to costs…." *Wunderlich v. Kalkofen*, 134 Wis. 74, 113 N.W. 1091, 1093 (1907); *State ex rel. Ryan v. Pietrzykowski*, 42 Wis. 2d 457, 463, 167 N.W.2d 242, 246 (1969). Furthermore, these costs are to be imposed on the party committing the wrong. *State ex rel. Sch. Dist. No. 2 of Town & Vill. of W. Bend v. Wolfrom*, 25 Wis. 468 (1870). In a brief it filed in an unrelated lawsuit, even DOR has admitted that a party represented by an attorney can recover attorney fees against DOR upon successfully obtaining a writ of mandamus against it.[18]

For all these reasons, the trial court was correct in holding that Plaintiffs are entitled to an award of damages and costs, including attorney

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[18] *See* Brief on Behalf of Richard G. Chandler filed in *Nazir AL-MUJAAHID, Plaintiff-Appellant, v. Richard G. CHANDLER, Secretary, Wisconsin Department of Revenue, Defendant-Respondent*, 2014 WL 476449 (Wis. App. I Dist.) stating:

> In the trial court, taxpayer requested an award of attorneys fees. That claim has not specifically been renewed on appeal. Even if taxpayer had been entitled to a writ, Wis. Stat. § 814.04(1)(c) provides: "No attorneys fees may be taxed on behalf of any party *unless* the party appears by an attorney other than himself or herself." Taxpayer cannot recover attorneys fees because no attorney has ever entered an appearance in this action.

(Emphasis added.)

fees, under Wis. Stat. § 783.04 as a result of their mandamus claims against DOR.

C. The Trial Court Correctly Held Plaintiffs are Entitled to Recover Their Attorney Fees Under *Weinhagen*.

The *Weinhagen* doctrine allows for an innocent party to seek, as damages, attorney fees incurred in a litigation from a third party whose actions necessitated that litigation. *Weinhagen v. Hayes*, 179 Wis. 62, 190 N.W. 1002 (1922). In discussing the *Weinhagen* claim, the trial court held:

> If the Department had acted and followed its duty the Plaintiffs would not have been forced to incur litigation in the previous case as well as this case. And I think that enough has been shown that they are entitled to their attorneys' fees.

Transcript of Proceedings, Oral Ruling, May 2, 2018, p. 19; R-129.

In the trial court's subsequent written judgment, the court made this finding:

> The plaintiffs are entitled to a judgment against the DOR for their attorney fees pursuant to the "*Weinhagen*" rule for all attorney fees incurred in both this case and Ashland County Case No. 16CV30.

Order from Summary Judgment, p. 8; R-121.

The trial court found DOR assisted in violating the Constitution, and knowingly "caused" non-uniform taxation. It also knowingly ignored its non-discretionary statutory obligations for nearly a decade. It also ignored its discretionary obligations. All of this left Plaintiffs with the extremely

difficult decision of doing nothing, thereby having their property taxes continue to rise to unbearable levels, watch their property become virtually worthless, watch their Town go broke, watch their county and school district lose significant revenue, or file suits to accomplish what DOR should have done years earlier; guarantee uniform taxation in compliance with the Wisconsin Constitution and exercise its non-discretionary and discretionary statutory obligations. They were forced to do the latter and cannot be left without a remedy.

All of these concepts are fundamental to our very system of government. *See, e.g., Williams v. Weaver*, No. CIV. A. 99-0809AHC, 2000 WL 1844684, at *3 (S.D. Ala. Nov. 7, 2000) (stating "the right to due process is fundamental in our legal system"); *see also McCurdy v. Dodd*, 352 F.3d 820, 825 (3d Cir. 2003) (noting that due process is meant to protect "fundamental rights and liberty interests."). It is difficult to imagine more numerous and egregious "wrongful acts," by a governmental entity which would entitle a plaintiff to attorney fees.

DOR argues that the *Weinhagen* rule has never been applied against the state. The contrary is also true. DOR has failed to cite any precedent which would suggest that rule would not be applicable to the state especially

in a case such as this where the facts are so incriminating against DOR. Moreover, Plaintiffs' successful mandamus action also entitles them to attorney fees under Wis. Stat. § 783.04. That statute is an express authorization to sue the state for damages which, pursuant to the *Weinhagen* rule, include attorney fees incurred by Plaintiffs in their litigation against the Town. Attorney fees which the trial court found would never had been incurred if DOR would have just done its job. DOR cannot avoid this conclusion even if the *Weinhagen* rule standing alone does not authorize the attorney fee claim.

D. The Trial Court Correctly Held Plaintiffs are also Entitled to Recover Their Attorney Fees under the Private Attorney General Doctrine.

As the trial court found, Plaintiffs are further entitled to recover their attorney fees under the private attorney general doctrine, which allows a party to recover attorney fees when that party vindicates a right that benefits a large number of people, requires private enforcement, and is of societal importance. *Hartman v. Winnebago Cty*., 216 Wis. 2d 419, 433, 574 N.W.2d 222, 229 (1998). Although DOR was unable to cite a single case actually rejecting the use of the private attorney general theory against the state, it

continues to claim it is not applicable. The trial court properly rejected contention.

Numerous courts have awarded a litigant his attorney fees under the private attorney general doctrine following a successful action brought against a state or a state agency. For example, in *Valentine v. City of Oakland,* 148 Cal. App. 3d 139, 196 Cal. Rptr. 59 (Ct. App. 1983), a group of taxpayers filed suit against the city of Oakland and various city and county officials alleging the unconstitutionality of a property tax. The trial court agreed and rendered judgment declaring that the property tax was void and unconstitutional and awarding attorney fees to the taxpayers. This decision was subsequently affirmed on appeal, again with an award of "reasonable attorney fees" to the successful plaintiffs. *Id.* at 155.

Similarly, in *Stewart v. Utah Pub. Serv. Comm'n,* 885 P.2d 759 (Utah 1994), plaintiffs petitioned for judicial review of a Public Service Commission rate order which increased a multistate telephone company's authorized rate of return on equity. In reviewing the plaintiffs' claims, the Utah Supreme Court held that an award of attorney fees was appropriate under the private attorney general doctrine because the plaintiffs were

successful in showing that the proposed rate increase was unconstitutional. *Id.* at 781.

Furthermore, in *Miller v. EchoHawk*, 126 Idaho 47, 878 P.2d 746 (1994), a plaintiff brought an action against the state attorney general to challenge the state's plan to reapportion legislative districts following a census. The trial court subsequently granted partial summary judgment in favor of the plaintiff and awarded him his attorney's fees. On appeal, the Idaho Supreme Court affirmed the trial court's decision, concluding that the lawsuit was of great societal importance, imposed a great burden on the plaintiff, and benefitted a large number of people. *Id.* at 748.

As the trial court found, that is precisely the situation here. Plaintiffs have spent considerable time and money acting as private attorneys general for the benefit of all taxpayers in the Town and Ashland County. As a result, many taxpayers have already benefitted from the placement of previously exempt properties back on the tax roll. Ashland County and the Town are now collecting significantly more desperately needed tax revenue. There can be no dispute that this lawsuit is of great societal importance, has imposed a great burden on Plaintiffs, and has (and will) benefit a large number of people and governmental units. As the trial court found, someone had to do DOR's

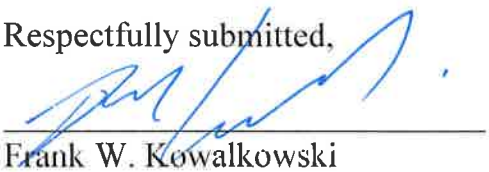
job. Since DOR refused, that burden fell on the shoulders of Plaintiffs. The private attorney general theory is an exception to any claimed prohibition of claiming attorney fees from the state. Additionally, to the extent statutory authority is also necessary to apply the private attorney general, it is found at Wis. Stat. § 783.04. That statute allows for attorney fees as damages and costs when, as here, a successful mandamus claim has been asserted against any governmental entity or agency.

VIII. CONCLUSION

For the foregoing reasons, the trial court's decision that Plaintiffs are entitled to pursue monetary relief against DOR for its failure to satisfy any of its mandatory, non-discretionary duties under the United States Constitution, the Wisconsin Constitution, or the Wisconsin Statutes should be affirmed.

Dated this 17th day of May 2019.

Respectfully submitted,



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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b) and (c), for a brief and appendix produced with a proportional serif font. The length of this Brief is 10,984 words.

Dated May 17, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2019, I personally caused copies of Brief of Plaintiffs-Respondents and Appendix to be delivered/mailed to:

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

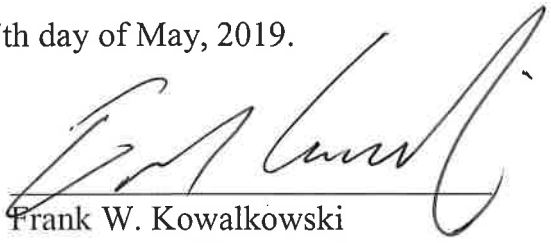
I have submitted an electronic copy of this Brief, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic Brief is identical in content to the printed form of the Brief filed as of this date.

A copy of this certificate has been served via facsimile at the request of the Court of Appeals of this Brief filed with the court and served on all opposing parties.

Dated this 17th day of May, 2019.



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