STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1133

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

Plaintiffs-Respondents,

v.

THE WISCONSIN DEPARTMENT OF REVENUE and RICHARD CHANDLER, SECRETARY,

Defendants-Appellants.

INTERLOCUTORY APPEAL FROM A NON-FINAL ORDER ENTERED BY THE ASHLAND COUNTY CIRCUIT COURT, THE HONORABLE JOHN M. YACKEL, PRESIDING

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs' brief still does not identify any express sovereign immunity waiver that allows their damages or attorneys' fees claims against the Wisconsin Department of Revenue (DOR). Asserting constitutional claims does not relieve Plaintiffs of this obligation, despite their conclusory arguments otherwise. The only statute they identify—Wis. Stat. § 783.04—does not mention damages or fees against the State, and the supreme court has held that it does not create a damages cause of action.

Plaintiffs also still identify only the prosecutorial and investigative powers DOR has over local tax officials; mandamus cannot compel the exercise of discretionary powers like these. Moreover, Plaintiffs' mandamus claim is largely moot because it mostly relates to actions that DOR purportedly should have taken years ago. Without a current duty to act, mandamus is unavailable.

ARGUMENT[1]

I. Plaintiffs still identify no sovereign immunity waiver.

A. The Uniformity Clause does not waive sovereign immunity.

Plaintiffs fail to show that *Zinn v. State*, 112 Wis. 2d 417, 334 N.W.2d 67 (1983), a case about the Takings Clause, applies to their Uniformity Clause claim. (Pls.' Br. 9–14.) *Zinn*

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[1] DOR disputes many of the supposed "findings of fact" in Plaintiffs' brief. (Pls.' Br. 2–8.) If this purely-legal interlocutory appeal is not dispositive, DOR has reserved an appeal regarding material factual disputes. Moreover, courts do not find facts at summary judgment. *Camacho v. Trimble Irrevocable Tr.*, 2008 WI App 112, ¶ 11, 313 Wis. 2d 272, 756 N.W.2d 596.

held only that Takings Clause claims against the State do not require a legislative sovereign immunity waiver because the constitutional text itself waives immunity through its "just compensation" requirement. 112 Wis. 2d at 435–37; Wis. Const. art. I, § 13.

This result is unique to the Takings Clause, given *Zinn*'s reliance on earlier supreme court cases, out-of-state cases, and Second Restatement of Torts authority all specific to constitutional takings provisions. *Zinn,* 112 Wis. 2d at 435–37. The Takings Clause is therefore a "self-executing ... consent to suit," *id.* at 435, only because of its unique text and purpose—to ensure that Wisconsin citizens obtain "just compensation" when their property is taken for public use. No other constitutional provision, including the Uniformity Clause, shares that special feature.

That is why Plaintiffs do not—and cannot—identify any Uniformity Clause text like the Takings Clause's remedial provision for "just compensation." They highlight only that "[t]he rule of taxation shall be uniform." Wis. Const. art VIII, § 1. But that text creates the substantive rule of uniform taxation, not a remedy for violations of that rule—let alone an express *monetary* remedy.

Plaintiffs ignore this textual difference, arguing that the "just compensation" phrase was irrelevant to *Zinn*'s holding. (Pls.' Br. 12–13.) But that cannot be squared with *Zinn*'s explanation that "*just compensation* following a taking 'is a constitutional necessity rather than a legislative dole.'" *Id.* at 436 (emphasis added) (citation omitted). Takings claims do not require a legislative waiver because the constitutional text itself requires "just compensation."

Nor do Plaintiffs have a meaningful response to *Grall v. Bugher*, 181 Wis. 2d 163, 172, 511 N.W.2d 336 (Ct. App. 1993), which explains why the Uniformity Clause does not waive sovereign immunity. Plaintiffs only note that *Grall* was

reversed on other grounds, quote dissenting language, and speculate why the supreme court granted review. None of those arguments confront *Grall*'s persuasive reasoning.

As for *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 529 N.W.2d 245 (Ct. App. 1995), Plaintiffs say that it did not address a damages claim. (Pls.' Br. 14–15.) True, but the court explained that any such claim would have been barred: "[S]overeign immunity does not bar a suit against DOR ... *because damages are not being sought from the state.*" *Town of Eagle*, 191 Wis. 2d at 320 (emphasis added). Plaintiffs ignore that rule.

They also wrongly argue that *Town of Eagle* suggests that state agencies do not enjoy sovereign immunity from damages. (Pls.' Br. 15–16.) That badly misreads the case, which held that agencies can only be subject to prospective declaratory relief, not damages. *Town of Eagle*, 191 Wis. 2d at 320–21 (citing *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶¶ 53–57, 317 Wis. 2d 656, 766 N.W.2d 559). Even that narrow exception for declaratory judgment actions disappears when the "declaration ... seeks to fix the state's responsibility to respond to a monetary claim." *PRN Assocs. LLC*, 317 Wis. 2d 656, ¶¶ 57 (citation omitted).

And although *Manitowoc Co. v. City of Sturgeon Bay*, 122 Wis. 2d 406, 362 N.W.2d 432 (Ct. App. 1984), did not involve a constitutional claim, it explains that "[t]he state is the real party in interest and is entitled to invoke its sovereign immunity ... when an action is in essence for the recovery of money from the state." *Id.* at 412. That rule does not except constitutional claims.

Lastly, Plaintiffs' recitation of the circuit court's purported "factual findings" are irrelevant. (Pls.' Br. 11–12, 16.) "Whether a claim is barred by sovereign immunity is a question of law." *Canadian Nat. R.R. v. Noel*, 2007 WI App 179, ¶ 5, 304 Wis. 2d 218, 736 N.W.2d 900.

B. Plaintiffs identify no immunity waiver for due process or equal protection claims.

Plaintiffs' also identify no sovereign immunity waiver in the due process and equal protection provisions they cite. (Pls.' Br. 16–21.)

Rather than identify a waiver in the constitutional text, they cite *Old Tuckaway Associates. v. City of Greenfield*, 180 Wis. 2d 254, 284, n.4, 509 N.W.2d 323 (Ct. App. 1993). But that case did not address sovereign immunity because it involved claims against municipal defendants, not the State. *Id.* at 267–68. "Unlike the State, municipal bodies are not protected by sovereign immunity." *Umansky v. ABC Ins. Co.*, 2008 WI App 101, ¶ 38, 313 Wis. 2d 445, 756 N.W.2d 601. *Old Tuckaway* held only that a damages cause of action may arise under the constitution—not that the State is subject to such claims. Moreover, the federal case on which *Old Tuckaway* relied only permits "action[s] for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). DOR is an agency, not an individual officer.

As for *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971), it did not involve a damages claim and thus is irrelevant. Plaintiffs quote portions of the case supporting the court's injunctive remedy (Pls.' Br. 19–20)—but the issue here is damages, not prospective equitable relief.[2]

C. *McKesson* does not permit damages claims.

Plaintiffs misread *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), arguing that it permitted monetary damages against a state. (Pls.' Br. 21.) It did not. Rather, it held that "[Florida's] obligation

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[2] Plaintiffs concede that sovereign immunity bars their federal 42 U.S.C. § 1983 claims. (Pls.' Br. 20–21.)

under the Due Process Clause to provide a refund ... extends only to refunding the excess taxes collected" and noted that the plaintiff "ha[d] not sought ... to recover any actual damages it may have suffered." *McKesson*, 496 U.S. at 49 n.33. *McKesson*'s due process theory thus guarantees taxpayers only a refund remedy (and only against the tax-collecting authority), not damages. *Id.* at 22.

Plaintiffs also contend that they did not have the "clear and certain" refund remedy that *McKesson* requires. (Pls.' Br. 22–24.) But even if true, DOR would be the wrong defendant. *McKesson* only guarantees taxpayers a refund remedy, and such actions can only proceed against the taxing entity, as occurred in *McKesson*. It is undisputed that DOR did not collect the taxes that Plaintiffs challenge.

In any event, Plaintiffs had—and pursued—refund claims under Wis. Stat. §§ 74.35 and 74.37. Plaintiffs say that these statutes do not allow for damages, but due process under *McKesson* only requires taxpayers to have a refund remedy. The lack of a damages remedy under these statutes is irrelevant. Next, Plaintiffs argue that Sanborn officials refused to consider their claims. But nothing in the record supports their argument.[3] In any event, the existence of a "clear and certain" remedy is a question of law that does not turn on local officials' actions. Nothing in Wis. Stat. §§ 74.35 or 74.37 prevented local officials from ruling on Plaintiffs' claims.

D. Wisconsin Stat. § 783.04 does not save Plaintiffs' damages claims.

Plaintiffs also seek attorneys' fees and damages under Wis. Stat. § 783.04, which provides that, in mandamus cases, "[i]f judgment be for the plaintiff, the plaintiff shall recover

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[3] This Court denied Plaintiffs' motion to supplement the record with evidence that purported to support this point.

damages and costs." (Pls.' Br. 40–44.) But they still identify no language expressly allowing damages against the State. To the extent the statute allows damages and costs, those may only be sought against municipalities, which have no sovereign immunity.

This result does not amount to DOR "pick[ing] and choos[ing]" the parts of Wis. Stat. ch. 783 "it wants to be subject to." (Pls.' Br. 40.) Mandamus can compel any government official to act, whether state or local. But sovereign immunity shields state entities from damages claims, absent an express waiver—and Wis. Stat. § 783.04 simply does not contain one. DOR can be subject to a mandamus claim without losing its sovereign immunity against damages, just like a state agency can be subject to prospective equitable relief yet retain immunity against damages. *See PRN*, 317 Wis. 2d 656, ¶¶ 53–57.

In any event, the mandamus statute creates no substantive right to damages. *Corrao v. Mortier*, 7 Wis. 2d 494, 496–97, 96 N.W.2d 851 (1959), explains that

> this statute is procedural and not substantive in character.... The statute does not create a right to damages which were not recoverable by separate action prior to the enactment of the statute.

The statute therefore "[does] not create an absolute liability for damages ... in a mandamus proceeding [if] the plaintiff prevail[s]." *Id.* at 497. Plaintiffs' failure to identify any other statutory basis for damages against the State thus means that Wis. Stat. § 783.04 does not entitle them to damages or fees.

E. Common law doctrines cannot authorize attorneys' fees against the State.

Sovereign immunity defeats Plaintiffs' fee request, too. Their primary response is that DOR cited no cases rejecting requests like theirs (Pls.' Br. 45–46), but that ignores the rule

that "attorney's fees ... may not be taxed against the state without express statutory authorization." *Wis. DOT v. Wis. Pers. Comm'n*, 176 Wis. 2d 731, 736, 500 N.W.2d 664 (1993). Plaintiffs fail to identify any statute saving their fee request from this general rule.

Instead, Plaintiffs cite *Weinhagen v. Hayes*, 179 Wis. 62, 190 N.W. 1002 (1922), which did not mention sovereign immunity or even involve a state party. (Pls.' Br. 44–46.) Plaintiffs also ignore that the case embodies a common law doctrine, not a statute authorizing fees. The same is true for the "private attorney general" concept, another common law doctrine. (Pls.' Br. 46–49.) The out-of-state cases they cite here are irrelevant given Wisconsin's rule that fees against the State require statutory authorization.

Plaintiffs also again cite Wis. Stat. § 783.04 (Pls.' Br. 46, 49), but that statute mentions neither fees nor the State. And no authority supports Plaintiffs' conclusory assertion that these common law doctrines somehow transform attorneys' fees into damages under section 783.04.[4]

II. Plaintiffs still identify no private cause of action for damages.

Plaintiffs' damages claims fail for an independent reason: they identify no private cause of action for damages against DOR under any state statute. DOR is thus entitled to summary judgment on Plaintiffs' state statutory damages claims.

Plaintiffs instead vaguely reference the "constitutional claims stated previously" (Pls.' Br. 24), but no damages claim

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[4] Plaintiffs also reference a brief DOR filed in another case (Pls.' Br. 43 n.18), but that brief did not concede that fees could ever be available against DOR under this statute.

against DOR arises under the state constitution. In any event, that is irrelevant to their *statutory* damages claims.

And even if DOR could be compelled through mandamus to comply with the state statutes on which Plaintiffs rely—Wis. Stat. §§ 70.32(1), 73.03, and 73.06—that would not also entitle Plaintiffs to a private damages action. (Pls.' Br. 24–25.) Mandamus and damages are separate remedies. While mandamus requires a non-discretionary duty, "[f]or a rule or statute to form a basis for civil liability, expression of legislative intent is necessary." *Fortier v. Flambeau Plastics Co.,* 164 Wis. 2d 639, 658, 476 N.W.2d 593 (Ct. App. 1991). Because Plaintiffs identify no provision for civil liability in these state statutes, no statutory damages claims against DOR exists.

Plaintiffs also mention their common law attorneys' fees theories (Pls.' Br. 25), but they do not explain how a common law fee doctrine could supply a statutory cause of action for damages.

III. Plaintiffs still identify no mandatory duty subject to mandamus.

A. Part of Plaintiffs' mandamus claim is moot.

Plaintiffs do not dispute that their mandamus request to place tribal-owned property back on Sanborn's tax rolls is moot (Pls.' Br. 26), because the circuit court already ordered that relief elsewhere. (R. 90:23 (Order ¶ 5).)

Given that relief, Plaintiffs' mandamus requests on pages 29 through 38, which all concern DOR's supposed past duties, are also moot. Mandamus can only compel the exercise of duties "presently due to be performed." *Pasko v. City of Milwaukee*, 2002 WI 33, ¶¶ 24, 252 Wis. 2d 1, 643 N.W.2d 72 (citation omitted). DOR's purported duties to report omitted property to Sanborn's Board of Review (under Wis. Stat. § 73.06(3)), examine complaints of improperly assessed

properties (under Wis. Stat. § 73.03(3)), or ensure compliance with its Property Assessment Manual (under Wis. Stat. § 70.32(1)), relate to actions that Plaintiffs say DOR should have taken long ago. But there is nothing more to do today in this regard, because the properties about which Plaintiffs complain are back on Sanborn's tax roll.

B. Plaintiffs state no mandamus claim because they point only to discretionary duties.

Both the moot claims and the non-moot claims also fail because Plaintiffs still identify no clear non-discretionary duty, as is required to state a mandamus claim.

First, the moot claims rest on discretionary duties not subject to mandamus.[5] As for Wis. Stat. § 73.06(3) (Pls.' Br. 31–32), any obligation to report omitted property is preceded by DOR's duty to "examine and test the work of assessors" to discover omitted property. Wis. Stat. § 73.06(3). That is a discretionary investigative duty under *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969) and *Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714 (1988).

Similarly, DOR's duties under Wis. Stat. § 73.03(3)–(4), (9)–(12) (Pls.' Br. 32–35) are investigative and prosecutorial. Plaintiffs focus on Wis. Stat. § 73.03(12)'s direction that DOR "carefully examine" complaints of misconduct, but DOR's investigative decisions were necessarily discretionary. As for a hearing before DOR's Secretary, Plaintiffs identify no statute requiring one.

Plaintiffs identify no non-discretionary duty in Wis. Stat. § 70.32(1), either. (Pls.' Br. 35–38.) That provision is directed at local assessors, not DOR. Plaintiffs say DOR had

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[5] DOR reserves the argument that it complied with these statutes. The only issue here is whether these statutes can support a mandamus claim as a matter of law.

to "guarantee that assessors compl[ied]" with the statute, but they identify no such statutory requirement. (Pls.' Br. 36.)

Plaintiffs' only response to the discretionary nature of DOR's investigative and prosecutorial duties is to argue that mandamus can compel the exercise of discretion. (Pls.' Br. 38–40.) True, but it cannot compel a particular *outcome*, which is what Plaintiffs really seem to want. And a past failure to exercise discretion would be moot, anyway, because the contested properties are back on Sanborn's tax roll.

The use of the word "shall" in these provisions changes nothing. (Pls.' Br. 37–38.) Appellate courts have twice rejected arguments that the word "shall" alone indicates a non-discretionary duty. *Vretenar*, 144 Wis. 2d at 665 ("This court has not interpreted this language [i.e. the word "shall"] to limit in any way the prosecuting attorney's discretion ...."); *Pasko*, 252 Wis. 2d 1, ¶¶ 25–26 (holding that the word "shall" reflected a "grant of power, rather than a mandate"). The word "shall" alone cannot alter the discretionary nature of DOR's investigative and disciplinary actions.

Second, Plaintiffs' non-moot mandamus claims on pages 26 and 27 also fail. Some are untethered from any statutory duty. Plaintiffs want DOR to supervise Sanborn's assessor to "ensure that [he] complies with the trial court's ... Order" (Pls.' Br. 26), but they identify no statute requiring DOR to monitor local assessors for contempt. Nor does any statute require DOR to "[s]upervise and ensure that all taxes 'owed for previous years on the wrongfully exempted parcels' are collected in a timely manner." (Pls.' Br. 27.) Wisconsin Stat. § 73.06(1) provides that DOR "shall have complete supervision and direction of the work of the local assessors," but that language is too vague to compel such specific actions.

Two other requests rely on Wis. Stat. § 70.75, which allows DOR to order municipal-wide reassessments. But that statute expressly gives DOR discretion:

> ***[I]f*** the department finds that the assessment of property in the taxation district is not in substantial compliance with the law and that the interest of the public will be promoted by a reassessment, the department ***may*** order a reassessment....

Wis. Stat. § 70.75(1)(a)1. Mandamus cannot be used to second-guess DOR's decision about whether a reassessment would serve the public interest.

Plaintiffs' last request—that DOR "investigate and, if necessary, discipline" local officials under Wis. Stat. § 73.03 (Pls.' Br. 27)—concerns prosecutorial functions. Again, that power cannot be subjected to mandamus.

CONCLUSION

The circuit court's decision should be reversed and summary judgment entered in DOR's favor.

Dated this 20th day of June, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,994 words.

Dated this 20th day of June, 2019.

COLIN T. ROTH
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of June, 2019.

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