STATE OF WISCONSIN CIRCUIT COURT BRANCH 4 WAUKESHA COUNTY

WISCONSIN MANUFACTURERS AND COMMERCE, et al.,
Plaintiffs,

vs.

Case No. 20-cv-1389
Hon. Lloyd V. Carter

TONY EVERS, et al.,
Defendants,

and

MILWAUKEE JOURNAL SENTINEL,
Intervenor-Defendant.

PLAINTIFFS' COMBINED BRIEF IN OPPOSITION TO DISMISSAL AND REPLY BRIEF IN SUPPORT OF TEMPORARY INJUNCTION

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INTRODUCTION

The issue presented at this stage of the case is straightforward: Should this Court convert its temporary restraining order—which it has already extended once—into a temporary injunction, maintaining the status quo and preventing (or at least delaying) the release of *thousands* of extremely confidential medical records that bear patient-identifiable information? Or should the Court instead lift its injunction, so that the State can quickly moot this case (which it admits is its goal[1]) by publicizing its COVID-19 employer blacklist and thereby thwarting this Court's ability to issue a decision on the merits? The question is not close. The State should not be allowed to wreak widespread, irreversible harm on Wisconsin, its businesses, and their employees before this Court has had a chance to determine whether doing so would be lawful. There would be no un-ringing that bell, as this Court has noted.

Almost entirely ignoring Plaintiffs' merits arguments, the State and the Milwaukee Journal Sentinel kick up dust by contending that Plaintiffs lack standing. Their argument fails in numerous respects. The State's planned release threatens Plaintiffs and their members with injuries to their legally protectable interests, including pecuniary harm to them as taxpayers, damage to their reputations, and injury to their interests under Wisconsin's medical-privacy statutes. And while Defendants assert that the Plaintiffs cannot bring this suit under the Uniform

[1] In an email sent on October 7, 2020, the State wrote that it "plan[s] to ask the court to deny issuance of the [temporary injunction], which would moot the case because the records would be released." Third Affidavit of Ryan Walsh, Ex. 1.

Declaratory Judgments Act, they overlook that Section 19.356 explicitly allows Plaintiffs to raise claims "*as otherwise provided by statute*."

On the merits, the State briefly argues that it may release the list because it will not permit identification of any patient. Not so. It is obvious that releasing this information, which includes medical diagnoses, employer names, and number of positive tests within a discrete date range, will surely at least "*permit*"—*i.e.*, make possible, even if difficult or unlikely in some cases—identification of COVID-positive workers. Hence state and federal law both categorically protect an employer's name as patient-identifiable information

Anyway, the sole provision on which the State relies to justify its planned release *never* applies where the State is *re*disclosing medical records received from health-care providers, as it would be doing here. The State may redisclose *only* for "the purpose for which" the records were "initially received": here, the surveillance of communicable disease. Wis. Stat. § 146.82(5)(c). Responding to open-records requests requesting information about inactive infections is obviously not surveillance of communicable disease. Finally, and if that were not enough, *DHS's own regulations* prohibit release of a patient's employer's name.

This Court was therefore correct to conclude—twice—that Plaintiffs are likely to succeed on the merits, they will suffer irreparable harm absent an injunction, an injunction is necessary to preserve the status quo, and the public interest favors an injunction. It should so conclude again, converting its current TRO into a temporary injunction.

STATEMENT OF FACTS

On July 1, 2020, the media reported that Governor Evers and Secretary-Designee Palm planned to "publish" "the names of all Wisconsin businesses that have recorded at least two COVID-19 cases." M.D. Kittle, *Breaking*: *Evers' DHS outing businesses with COVID cases* (July 1, 2020).[2] According to the media reports, the State also stated that it was processing "'hundreds' of public records requests for information about COVID-19." Mitchell Schmidt, *Wisconsin business groups raise concerns about what info state might release about COVID cases* (July 3, 2020).[3]

In response, Plaintiff WMC sent a letter to the State, explaining that the planned release would raise legal concerns and "further damage Wisconsin's business community," while "not help[ing] local public health authorities control the spread of COVID-19," because there would be no way for the public to know whether the positive cases were at all connected with the business. *Id.*

After WMC and others raised concerns, the State informed reporters that it had "decided not to post information online about active investigations." Molly Beck, *Wisconsin's health agency shelves plans to name businesses tied to coronavirus cases after pushback from industry lobbyists, GOP*, Milwaukee Journal Sentinel (July 7, 2020).[4] But the State warned that "requests for public records could push [it] to release the details anyway." *Id.*

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[2] https://empowerwisconsin.org/breaking-evers-dhs-outing-businesses-with-covid-cases/.
[3] https://madison.com/wsj/business/wisconsin-business-groups-raise-concerns-about-what-info-state-might-release-about-covid-cases/article_514f3a69-0009-5f63-b249-39277b99565a.html.
[4] Dkt. 8, Walsh Aff., Ex. 1.

Plaintiff WMC and other businesses then sent another letter to the State, explaining in detail that releasing this information, even in a response to public-records requests, would violate several statutory and constitutional provisions designed to protect the privacy of the medical records from which the State obtained the information. Dkt. 8, Walsh Aff. Ex. 2; *see also* WMC, *DHS Release of Businesses with COVID-19 Positives Would Violate Several State & Federal Laws* (July 15, 2020).[5] Also, the State's COVID blacklist would inflict massive harm on businesses. Dkt. 8, Walsh Aff. Ex. 2. The letter added: "We respectfully request a reply to this letter at your earliest convenience, which reply would indicate whether you agree or disagree with our conclusions. We look forward to engaging in a constructive dialogue on these critical issues." *Id.*

No response came, but the State did not release the information, and, on September 9, Governor Evers reaffirmed in a press conference that the State would not be releasing this information. *See* Molly Beck, *Tony Evers says he would take a coronavirus vaccine and blames Trump for sowing distrust in the process*, Milwaukee Journal Sentinel (Sept. 9, 2020).[6] He admitted that the information was "not public" and that posting it would raise "privacy" issues. WMC celebrated this decision.

Despite this seemingly firm decision, the State reversed itself yet again. On September 30, 2020, Secretary Brennan informed Plaintiff WMC that the State, in response to public-records requests, planned to release on October 2 the names of

[5] https://www.wmc.org/news/dhs-release-of-businesses-with-covid-19-positives-would-violate-several-state-federal-laws/.
[6] https://www.jsonline.com/story/news/politics/2020/09/09/tony-evers-blames-trump-for-sowing-distrust-in-covid-vaccine-process/5760488002/.

over 1,000 businesses with more than 25 employees that had two or more employees test positive for COVID-19 or close case contacts that were investigated by contact tracers. Dkt. 7, Bauer Aff. ¶¶ 3–6. The next day, Plaintiffs filed this suit, alleging that the planned release was unlawful under Wisconsin's medical-privacy laws, Wis. Stat. §§ 146.82 & .84, and seeking declaratory and injunctive relief. Dkt. 4. Along with a Complaint, Plaintiffs filed a Motion for Ex Parte Temporary Restraining Order and Temporary Injunction, seeking an immediate injunction to prevent the State's impending records release. Dkt. 5; 6. That afternoon, this Court granted the temporary restraining order ex parte. Dkt. 14. The next day, the planned day of release, the Sentinel filed a motion to intervene in the case. Dkt. 16. This Court set a hearing on that motion, along with Plaintiffs' motion for temporary restraining order and temporary injunction, for October 7. Dkt. 21.

On October 7, the State filed a brief in opposition to Plaintiffs' motion, asking this Court both to deny the motion and to dismiss Plaintiffs' complaint. Dkt. 22. At the hearing held that day, this Court granted the Sentinel's motion to intervene, extended the temporary restraining order, and set a briefing schedule and hearing for November 30. On October 9, the Sentinel filed a motion to dismiss Plaintiffs' Complaint and brief in support. Dkt. 32; 33. Plaintiffs have now filed a First Amended Complaint, containing additional allegations relating to Plaintiffs' standing and claim for relief. Plaintiffs also file this combined brief in opposition to the State's and the Sentinel's motions for dismissal and reply in support of Plaintiffs' motion for temporary injunction.

ARGUMENT

I. Plaintiffs Are Very Likely to Succeed on the Merits

A. Plaintiffs Plainly Have a Stake in the Outcome of This Controversy and, Therefore, Have Standing Under the Uniform Declaratory Judgments Act

1. To raise a justiciable claim, including under the Uniform Declaratory Judgments Act, a party must have standing. A claimant establishes standing by alleging "a personal stake in the outcome," such as having been "threatened with[ ] an injury to an interest that is legally protectable." *Munger v. Seehafer*, 2016 WI App 89, ¶¶ 48–49, 372 Wis. 2d 749, 890 N.W.2d 22. Or, put in terms of the Act's identical requirement, a "party seeking declaratory relief must have . . . a legally protectible interest." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211 (citation omitted). "[T]he concepts of standing and justiciability (a legally protectable interest) have been viewed as overlapping concepts in declaratory judgment cases." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.,* 2011 WI 36, ¶ 47, 333 Wis. 2d 402, 797 N.W.2d 789 (lead op.). So, if a party establishes standing, the party also satisfies the third factor for justiciability of a declaratory-judgment action, which is the only factor at issue here.[7] *See id.* ¶¶ 48–49.

Standing in Wisconsin is not a difficult hurdle to clear. "Unlike in federal courts, . . . standing in Wisconsin is not a matter of jurisdiction, but of sound judicial

[7] Courts apply a four-factor test to determine whether a controversy is "justiciable" for purposes of the Act: "(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it[;] (2) [t]he controversy must be between persons whose interests are adverse[;] (3) [t]he party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest[;] (4) [t]he issue involved in the controversy must be ripe for judicial determination." *Olson*, 309 Wis. 2d 365, ¶¶ 28–29.

policy." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855. The doctrine's purpose is solely to "ensur[e] that the issues and arguments presented will be carefully developed and zealously argued, as well as [to] inform[ ] the court of the consequences of its decision." *Id.* ¶ 16. Hence Wisconsin courts construe standing "liberally," requiring no more than "an injury to a trifling interest." *Id*. ¶ 15. Courts apply an identical standing principle under the Uniform Declaratory Judgments Act. Judges in Wisconsin must "construe standing in declaratory-judgment actions liberally, in favor of the complaining party, as it affords relief from an uncertain infringement of a party's rights." *State ex rel. Vill. of Newburg v. Town of Trenton,* 2009 WI App 139, ¶ 10, 321 Wis. 2d 424, 773 N.W.2d 500.

A plaintiff raising a claim under the Act can establish standing in at least two ways. First, a plaintiff can allege that it, as a taxpayer (or as a member of a class of taxpayers), "ha[s] sustained, or will sustain, some pecuniary loss." *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 16, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds* 2018 WI 63 (citation omitted). Under this principle of "taxpayer standing," "*[a]ny* illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Id.* (citation omitted, emphasis added). Such loss occurs whenever the government undertakes an unlawful course of action. *See Coyne v. Walker*, 2015 WI App 21, ¶¶ 12–13, 361 Wis. 2d 225, 862 N.W.2d 606, *aff'd* 2016 WI 38. "Even an 'infinitesimally small' pecuniary loss is sufficient to confer [taxpayer] standing." *Voters with Facts*, 376 Wis. 2d 479, ¶ 16 (citation omitted). This

doctrine turns only on "whether [the government's] actions were unlawful, thereby conferring taxpayer standing." *Id.* ¶ 18.

Second, and separately, a plaintiff establishes standing under the Act if its interest "is arguably within the zone of interests that [some other law] seeks to protect." *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 16, 275 Wis. 2d 533, 685 N.W.2d 573. When "[n]o statute or constitutional provision expressly relates to or protects the interest" courts examine "the interests involved, applicable statutes, constitutional provisions, rules, and relevant common law principles" to determine "whether the asserted interest . . . is to be recognized by the court." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶¶ 56–57 (lead op.). In other words, courts look to determine "whether judicial policy calls for protecting the interest of the party whose standing is challenged." *Id.* ¶ 40. "Whether interests deserve legal protection depend upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection." *Id.* ¶ 41 (citation omitted).

An organization asserting a claim on behalf of its members must meet additional standing requirements. It must allege "facts sufficient to show that a member of the organization would have had standing to bring the action in his own name." *Wis. Env'l Decade, Inc. v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 20, 230 N.W.2d 243 (1975); *see also* Wis. Stat. § 184.07(2). Organizations must also show that "the interests at stake in the litigation are germane to the organization's purpose . . . and . . . neither the claim asserted nor the relief requested requires an individual

member's participation in the lawsuit." *Munger v. Seehafer*, 2016 WI App 89, ¶ 54, 372 Wis. 2d 749, 890 N.W.2d 22 (citation omitted); *see also* Wis. Stat. § 184.07(2).

2. Threatened with far worse than "an injury to a trifling interest," Plaintiffs here clearly have standing in at least three independent respects: (a) the State's illegal release of confidential employee records will harm WMC, its members, and members of the other Plaintiff chambers, as taxpayers; (b) Plaintiffs and their members fall within the "zone of interests" that the medical-privacy statutes protect; and (c) even if they did not meet any other standing test, Plaintiffs satisfy the purposes of standing, which is all that our supreme court requires.

a. Plaintiff WMC has taxpayer standing to bring this declaratory-judgment action. WMC is a Wisconsin taxpayer, FAC ¶¶ 5, 37, and has alleged that the State has spent, and will continue to spend, taxpayer money paying employees to collect, review, organize, and prepare the confidential medical information for release, which would violate Wisconsin law and would expose the State to liability for damages under Section 146.84, to be paid out of the public fisc. *See id.* ¶¶ 29–35, 40, 42; *see Serv. Employees Int'l Union v. Vos*, 2020 WI 67, ¶ 69, 393 Wis. 2d 38, 946 N.W.2d 35. Thus, the State's unlawful course of action will cause Plaintiff WMC directly to incur a pecuniary loss. FAC ¶¶ 5, 41.[8]

Also, Plaintiffs all have standing to bring claims on behalf of their members who are taxpayers. All three have members who are Wisconsin taxpayers, FAC ¶¶ 5, 8, 11, 37–39, and these members have standing to assert claims in their own right for

[8] So long as "one party has standing to maintain [an] action," courts will address the merits. *See City of Madison v. Town of Fitchburg,* 112 Wis. 2d 224, 232, 332 N.W.2d 782 (1983).

the reasons set out above with respect to WMC. Second, the interests that Plaintiffs are seeking to protect in this lawsuit are germane to their purposes. The purpose of all three Plaintiff organizations is to represent the interests of their member businesses and (by extension) their employees, to support area businesses generally, and to create a community and environment hospitable to businesses. FAC ¶¶ 6, 9, 12. Preventing pecuniary losses to their members from the unlawful expenditure of public funds, protecting their members from unwarranted, unlawful reputational harm, and protecting the interests of their members' employees, who are the lifeblood of business, are central to these purposes. *Finally*, neither the claim asserted nor the relief requested requires the participation of any of Plaintiffs' members. Plaintiffs' claim turns on whether the State's planned records release would be illegal, which will not require any evidence or testimony from any of Plaintiffs' members. Nor does the relief requested—a declaration that the State's proposed actions violate the law and an injunction preventing the violation—require participation of any member.

b. Plaintiffs and their members also fall within the "zone of interests" that the medical-privacy laws are meant to protect. Section 146.84 provides that "*[a]ny person*, including the state or any political subdivision of the state, who violates s. 146.82 or 146.83 . . . shall be liable to *any person injured as a result of the violation*." Wis. Stat. § 146.84(1)(b), (bm) (emphases added). This provision protects Plaintiffs and their members by imposing liability on actors whose violation of the medical-privacy laws causes harm to Plaintiffs or their members. This is because Plaintiffs and their members are "person[s]" under Section 146.84. That term necessarily describes not

only human beings but also non-individual entities. "[T]he state or any political subdivision" are enumerated categories of "person[s]," *id.* and Section 146.84 uses the term "individual" in another subsection, indicating that "person" bears a different meaning than "individual." *See Pawlowski v. Am. Fam. Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67; *see also Smith v. RecordQuest, LLC,* 380 F. Supp. 3d 838, 842 & n.1 (E.D. Wis. 2019) (noting that an LLC could be considered a "person" under Section 146.84).[9] Moreover, some of Plaintiffs' members are individuals, who may be the subjects of medical records, and healthcare providers, who generate and maintain medical records. Second Bauer Aff. ¶ 7; Holpfer Aff. ¶ 7; Durnford Aff. ¶ 6.

c. Finally, Plaintiffs also have standing because "the unique circumstances of this case render the merits of [their] claim fit for adjudication." *McConkey*, 326 Wis. 2d 1, ¶ 17. Where plaintiffs easily satisfy the judicial-policy purposes of standing, a court should adjudicate the merits, as the supreme court has clearly held. *See id.*, ¶¶ 17–18. Here, no one contends that Plaintiffs have failed to "competently frame[ ] the issues and zealously argue[ ] [t]his case," which judicial standing policy seeks to ensure. *Id.* ¶ 18. And "a different plaintiff would not enhance [the court's] understanding of the issues in this case." *Id.* Finally, judicial economy favors adjudicating the merits here, as "it is likely that if [this case] were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit." *Id.*

3. None of the State's and the Sentinel's counterarguments succeeds.

[9] For the same reasons, the Legislature did not intend to restrict relief to "patients." *See Cook v. Public Storage, Inc.*, 2008 WI App 155, ¶ 32, 314 Wis. 2d 426, 761 N.W.2d 645.

The State and the Sentinel argue that Plaintiffs lack standing to assert the privacy interests of their employees. Dkt. 22:7–8; Dkt. 32:13–14. But courts have allowed employers to challenge public-records releases of their employees' information. *See Atlas Transit, Inc. v. Korte,* 249 Wis. 2d 242,638 N.W.2d 625 (Ct. App. 2001); *Kraemer Bros. v. Dane Cty*., 229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999). In any event, Plaintiffs, either directly or under associational standing, have taxpayer standing and fall within the medical-privacy statutes' zone of interests.[10]

The State and the Sentinel next counter that the reputations of Plaintiffs' members are not legally protected interests. Dkt. 22:7–8; Dkt. 32:15. But in fact reputational interests are shielded by law, and a party may be held liable for the damage caused by publication of unlawfully obtained information even if truthful. *See Cohen v. Cowles Media Co.,* 501 U.S. 663, 671 (1991). Regardless, Plaintiffs *do* have legally protected interests as taxpayers and come within the medical-privacy statutes' zone of interests.

The Sentinel next argues that Plaintiffs' alleged reputational harms are too speculative to confer standing. Dkt. 32:14–18. This argument has no effect on Plaintiffs' taxpayer standing and, regardless, the argument misunderstands the standing inquiry under the Uniform Declaratory Judgments Act. Courts construe standing under the Uniform Declaratory Judgments Act *liberally* because the very

[10] The Sentinel's reliance on *Milwaukee Deputy Sheriff's Association v. City of Wauwatosa*, 2010 WI App 95, 327 Wis. 2d 206, 787 N.W.2d 438, is therefore misplaced. Dkt. 32:14. There, the court addressed neither associational nor taxpayer standing, and the appellant made no argument that Association could have sought damages under Section 51.30. *Mil. Deputy Sheriff's Ass'n*, 327 Wis. 2d 206, ¶ 30.

nature of a declaratory-judgment action means that the harms *by definition* are speculative, in the sense that they have not yet occurred. *See Olson*, 309 Wis. 2d 365, ¶¶ 28–29; *Vill. of Newburg,* 321 Wis. 2d 424, ¶ 10. So long as "the facts [are] sufficiently developed"—or, here, alleged—"to avoid courts entangling themselves in abstract disagreements," it is proper for a court to issue a declaratory judgment. *Olson*, 309 Wis. 2d 365, ¶ 43 (citation omitted). Here, the facts are sufficiently alleged and developed for this court to determine the merits of a concrete disagreement.[11]

Finally, the State and the Sentinel argue that Wis. Stat. § 19.356 effected an implied, partial repeal of the Uniform Declaratory Judgments Act by forbidding any declaratory-judgment action in any circumstance not expressly permitted by Section 19.356. Dkt. 22:9–14; Dkt. 32:4–13. On this theory, *no one* may bring a declaratory-judgment action relating to the release of public records, including highly sensitive medical information, unless they are records subjects and the records fall within one that provision's three extremely narrow categories: records of employee discipline, records obtained by subpoena or search warrant, and records prepared by an employer other than an authority.

That cannot be the law. The State's and the Sentinel's argument fails for myriad reasons.

Section 19.356 provides that "[e]xcept as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior

[11] The Sentinel's discussion of various cases weighing the public-interest balancing test is irrelevant to the question of standing. Dkt. 32:16–17. Whether Plaintiffs' interest is sufficient to overcome the general public-interest in disclosure of records is an entirely separate question from whether the Plaintiffs have standing.

to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356(1). Section 19.356 then provides notice and judicial review for three limited categories: employee-discipline records, records obtained by subpoena or search warrant, or records prepared by an employer other than "an authority." Wis. Stat. § 19.356(2)(a).

The purpose of Section 19.356 was to limit the common-law cause of action created by the Wisconsin Supreme Court's decisions in *Woznicki v. Erickson,* 202 Wis. 2d 178, 549 N.W.2d 699 (1996), and *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999). *See* 2003 Wis. Act 47, Joint Legislative Council Prefatory Note. In those cases, the Court provided that "an individual whose privacy or reputational interests are implicated by [a records custodian's] potential release of his or her records has a right to have the circuit court review the [custodian's] decision to release the records." *Woznicki*, 202 Wis. 2d at 193; *Milwaukee Teachers*, 227 Wis. 2d at 790–92. Under this new cause of action, records subjects could ask the courts to reweigh the public-interest balancing test conducted by the records custodian. *See Woznicki*, 202 Wis. 2d at 193–95; *Milwaukee Teachers*, 227 Wis. 2d at 797–98. Section 19.356 limited this de novo review to three categories of records.

While Section 19.356 limits the common-law cause of action created by *Woznicki* and *Milwaukee Teachers*, the statute does not impliedly repeal the Uniform Declaratory Judgments Act. Quite the opposite: Section 19.356 explicitly *allows* for a

person to obtain judicial review of a public-records release if such review is "otherwise provided by statute." Wis. Stat. § 19.356(1); *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is given its common, ordinary, and accepted meaning."). The Uniform Declaratory Judgments Act is such a statute. Indeed, the Act "is singularly suited to test the validity of [governmental] action, prior to enforcement." *Weber v. Town of Lincoln*, 159 Wis. 2d 144, 148, 463 N.W.2d 869 (Ct. App. 1990). The State's and the Sentinel's argument would read the language "or as otherwise provided by statute" entirely out of the Section 19.356. *See Kalal*, 271 Wis. 2d 633, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word.").

Aside from ignoring clear text, the State's and the Sentinel's reading of Section 19.356 would lead to absurd results—leaving the State with virtually unbridled discretion to violate laws while leaving those harmed with no means of stopping it. *See id.* ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results."). Suppose that the Department of Transportation announced its decision to release, in response to a public-records request, the names, dates of birth, addresses, social security numbers, and bank account numbers of all of its employees. Or suppose that a records custodian intended to discriminate on the basis of sex or race by releasing the records of only its female employees or only its Black employees. Under the State's and the Sentinel's reading, those wronged workers could do nothing to protect their rights because their records do not fall within Section 19.356's narrow categories. Thankfully, a plain-language reading of Section 19.356—

which allows those parties, like the Plaintiffs here, to seek relief under the Uniform Declaratory Judgments Act—avoids these outlandish results.[12]

Contrary to the State's and the Sentinel's claims, Dkt. 22:12; Dkt. 32:12–13, Plaintiffs' reading does not render Section 19.356 superfluous. Section 19.356 still does work: it limits the common-law cause of action created by *Woznicki* and *Milwaukee Teachers*. To bring a declaratory-judgment action, a plaintiff must still have an underlying legally protectable interest, created by some statute, constitutional provision, or common law. *See Foley-Ciccantelli.*, 333 Wis. 2d 402, ¶¶ 56–57 (lead op.). Even when a plaintiff brings a declaratory-judgment action based on taxpayer standing, the challenged government action must be unlawful for the plaintiff to suffer a pecuniary loss, *see Voters with Facts*, 376 Wis. 2d 479, ¶ 1, meaning that some law, the violation of which renders the State's actions unlawful, must provide the basis for the plaintiff's claim. Thus, Section 19.356 still operates to limit the broad cause of action created by *Woznicki* and *Milwaukee Teachers*, which allowed plaintiffs to challenge a records release regardless of whether an underlying legal provision provided a basis for their claim. *See Woznicki*, 202 Wis. 2d at 184–94; *Milwaukee Teachers*, 227 Wis. 2d at 785–98.

[12] Seeming to recognize that its interpretation leads to absurd results, the State claims that "an aggrieved individual whose medical records were to be released" "could bring a private right of action under Wis. Stat. § 995.50(2)(c) 'for giving publicity to a private matter.'" Dkt. 22:14. But this directly conflicts with the State's earlier argument that "[w]hen, as here, the records sought to be enjoined fall outside . . . Section 19.356(2)(a)1-3, the authority's decision to release records that are the subject of a public records request may not be challenged." Dkt. 22:10–11. The State does not, and could not, explain how Section 19.356 impliedly repealed the Uniform Declaratory Judgments Act but *not* Section 995.50.

The State cites many cases in response, but none applies. Dkt. 22:12–13. *Lister v. Board of Regents,* 72 Wis. 2d 282, 240 N.W.2d 610 (1976), and *Aesthetic & Cosmetic Plastic Surgery Ctr., LLC v. Wisconsin Department of Transp*ortation, 2014 WI App 88, 356 Wis. 2d 197, 853 N.W.2d 607, involved claims for "[a] declaration which seeks *to fix the state's responsibility to respond to a monetary claim*[, which] is not authorized by Wisconsin's Declaratory Judgments Act." *Aesthetic & Cosmetic Plastic Surgery Ctr.*, 356 Wis. 2d 197, ¶¶ 15, 20; *Lister*, 72 Wis. 2d at 307–08. Plaintiffs here are not seeking a declaration to fix the State's responsibility to respond to a claim for monetary damages, but are instead seeking a declaration that the State's planned course of action is unlawful and an injunction prohibiting that action—a claim for which the Uniform Declaratory Judgments Act is "singularly suited." *See Weber*, 159 Wis. 2d at 148. And *Sewerage Commission of City of Milwaukee v. Department of Natural Resources*, 102 Wis. 2d 613, 307 N.W.2d 189 (1981), involved a statute that provided the "exclusive means for judicial review of the validity of a rule." *Id.* at 628–29 (quoting Section 227.05, Stats.1973 and 1975). Here, by contrast, Section 19.356 states that other statutes may also provide for judicial review.

For its part, the Sentinel invokes the canon that "specific statutes take precedence over general statutes," *State v. Reyes Fuerte*, 2017 WI 104, ¶ 29, 378 Wis. 2d 504, 522, 904 N.W.2d 773, arguing that the more specific Section 19.356 applies here and so the more general Uniform Declaratory Judgments Act should be ignored. Dkt. 32:10. But that canon applies only "[w]here conflict between statutes is unavoidable." *Reyes Fuerte*, 378 Wis. 2d 504, ¶ 29; *see also* Scalia and Garner,

Reading Law, at 183. Here, there is no conflict at all. Section 19.356 explicitly allows that other statutes may provide a cause of action for judicial review of an authority's decision to release a record. The Uniform Declaratory Judgments Act is such a statute. By contrast, in *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukauna*, 2013 WI App 113, ¶ 11, 350 Wis. 2d 435, 443, 838 N.W.2d 103, cited by the Sentinel, Dkt. 32:10, the statute at issue stated, "No action on any grounds . . . to contest the validity of an annexation under sub. (2), may be brought by any town." *Darboy*, 350 Wis. 2d 435, ¶ 11 (citing Wis. Stat. § 66.0217(11)(c)). This law conflicted with the Uniform Declaratory Judgments Act, which would have allowed towns to bring such actions. *See id.* ¶ 17. No such conflict exists here.

Finally, the State and the Sentinel cite *Moustakis v. Wisconsin Department of Justice*, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142, for the proposition that Section 19.356 impliedly and partially repeals the Uniform Declaratory Judgments Act. Dkt. 22:10–13; Dkt. 32:6, 11–12. But *Moustakis* considered a different question and interpreted entirely different language in Section 19.356, and so is inapplicable here. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 44, 57, 324 Wis. 2d 325, 782 N.W.2d 682. In *Moustakis*, the plaintiff brought an action under Section 19.356(4) seeking pre-release judicial review of public records. 368 Wis. 2d 677, ¶ 2. The "single question" before the Court was whether "a district attorney [is] an 'employee' as that term is used in Wis. Stat. § 19.356(2)(a)1. . . . such that the district attorney may maintain an action for notice and pre-release judicial review of records under § 19.356(4)." *Id.* ¶ 3. The Court never addressed whether a plaintiff may maintain an

action under another statute to challenge the government's planned release of records or whether Section 19.356 impliedly repeals the Uniform Declaratory Judgments Act. *See generally*, *id.* Indeed, the Court's opinion never once mentions Section 19.356's language "or as otherwise provided by statute." *Id.* Therefore, the Court's opinion is "inapplicable as precedent for interpreting" the meaning of that phrase. *See Zarder*, 324 Wis. 2d 325, ¶¶ 44, 57.

B. Section 146.82 of Wisconsin's Medical-Privacy Laws Forbids Releasing the Names of Patients' Employers

Wisconsin law affords significant protection to the privacy of medical records, requiring all health-care records to be kept confidential, including the name of a patient's employer. Furthermore, DHS's own regulations require that a patient's employer's name be kept confidential whenever DHS releases healthcare data for public use. Thus, the State's planned release would be unlawful. This is true for several independent reasons:

1. A patient's employer's name must always remain confidential under Wis. Stat. § 146.82 because it is part of the "patient health care record" and "permit[s] identification of the patient" under Wis. Stat. § 146.82(2)(a)20.

In Wisconsin, the privacy of a person's medical information is sacrosanct. Section 146.82 provides that "[a]ll patient health care records shall remain confidential." Wis. Stat. § 146.82(1). "Patient health care records" are "all records related to the health of a patient prepared by or under the supervision of a health care provider." Wis. Stat. § 146.81(4). The term "health care provider," in turn, includes myriad medical professionals and organizations, including "physician[s],

physician assistant[s]," "nurse[s]," "inpatient health care facilit[ies]," and "corporation[s]," "limited liability compan[ies]," and "partnership[s]," of such providers. Wis. Stat. § 146.81(1). Likewise, *DHS also must "treat" all "record[s] of [ ] report[s]" of communicable diseases made by "local health officer[s]" "as patient health care records under" Section 146.82*. Wis. Stat. § 252.05(6) (emphasis added).

Embracing a "legislative policy" of "strict compliance with the statutory rules for medical records," *Szymczak v. Terrace at St. Francis*, 2006 WI App 3, ¶ 25, 289 Wis. 2d 110, 709 N.W.2d 103, the law harshly penalizes those who violate medical confidentiality. Section 146.84 provides that "[a]ny person, *including the state or any political subdivision of the state*, who violates s. 146.82 or 146.83 in a manner that is knowing and willful shall be liable to any person injured as a result of the violation for actual damages to that person, exemplary damages of not more than $25,000 and costs and reasonable actual attorney fees." Wis. Stat. § 146.84(1)(b) (emphasis added). If the violation is merely negligent, the exemplary damages cap is $1,000. *Id.* § 146.84(1)(bm). Only a records custodian who "acts in good faith" escapes this liability. Wis. Stat. § 146.84(1)(a). Additionally, those who violate the medical-privacy laws may be subject to criminal penalties. Wis. Stat. § 146.84(2).

Critically, but unsurprisingly, the statutes seal not only the records themselves but also the information that they contain. This includes the results of medical testing as well as all patient-identifiable information, such as name, address, date of birth, and the name or address of the employer. *See City of Muskego v. Godec*, 167 Wis. 2d 536, 544–46, 482 N.W.2d 79 (1992); *Johnson v. Rogers Mem'l Hosp., Inc.*, 2005 WI

114, ¶¶ 39–41, 283 Wis. 2d 384, 700 N.W.2d 27. Hence Section 146.84 penalizes the unlawful disclosure not merely of formal medical documents but of "confidential *information*" in general. Wis. Stat. § 146.84(2) (emphasis added).

Because this information is categorically confidential, it may not be disclosed even under the public records law. Section 146.84 could not be any clearer: *any person*, including "the state or any political subdivision," with information from a patient health-care record must keep it confidential. Hence, as the court of appeals has explained, Section 146.82 categorically exempts patient health-care records from the usual obligations of the open-records law. *George v. Knick*, 188 Wis. 2d 594, 598, 525 N.W.2d 143 (Ct. App. 1994). A public-records custodian could incur civil and even criminal liability for releasing such information. Wis. Stat. § 146.84.

The statutes allow release when "the patient health care records do not contain information and the circumstances of the release do not provide information that would permit the identification of the patient," but this exception simply does not apply to release of employer names linked to diagnostic tests. Wis. Stat. § 146.82(2)(a)20. That is because publicizing employer names associated with test results will always at least "*permit*" identifying employees by making it merely *possible* (even if, in some cases, very difficult).

This follows from a straightforward application of the ordinary meaning of "permit." *Kalal*, 271 Wis. 2d 633, ¶ 45. To "permit" is "to make possible." *Permit*, Merriam-Webster;[13] *Permit*, Lexico by Oxford;[14] *Kalal*, 271 Wis. 2d 633, ¶ 53 (the

[13] https://www.merriam-webster.com/dictionary/permit.
[14] https://www.lexico.com/en/definition/permit.

ordinary meaning of statutory terms is "ascertainable by reference to the dictionary definition"). And "possible," in turn, means "something that may or may not occur." *Possible*, Merriam-Webster;[15] *Possible*, Lexico by Oxford.[16] For smaller employers, it would not be difficult for co-workers or community members—once equipped with DHS's data, including diagnosis, employer name, and number of positive tests within a discrete date range—to discern the identity of the employees who have tested positive for COVID-19, making identification of the patient assuredly "possible." *See Gowan v. Mid Century Ins. Co.*, No. 5:14-CV-05025-LLP, 2015 WL 9592515, at *3 (D.S.D. Dec. 31, 2015) ("The name of the [very small] town and [very small] employer, as well as the date and nature of the work injury, are recounted in the [record]. . . . It would take very little sleuthing to figure out the identity of this patient."). Even with larger employers, while identifying the patient may be more difficult, it would nevertheless be "possible." *See In re Burns,* 484 So. 2d 658, 659 (La. 1986) ("disclosure of information, such as *place of employment*, [ ] would tend to identify [a confidential informant]") (emphasis added). The release of an individual's diagnosis and employer's information would therefore "permit identification of the patient" and is not permitted under Section 146.82(2)(a)20.

Looking to closely related statutes and federal law confirms that an employer's name permits identification of the patient and is not permitted under Section 146.82. *In re Jeremiah C.*, 2003 WI App 40, ¶ 17, 260 Wis. 2d 359, 659 N.W.2d 193 ("[t]he statutory construction doctrine of *in pari materia* requires a court to read, apply and

[15] https://www.merriam-webster.com/dictionary/possible.
[16] https://www.lexico.com/en/definition/possible.

construe statutes relating to the same subject matter together"); *Midwest Developers v. Goma Corp.*, 121 Wis. 2d 632, 651–52, 360 N.W.2d 554 (Ct. App. 1984) (courts can look to similar federal laws). Wisconsin Statutes Chapter 153 "relate[s] to the same subject matter" as Section 146.82—the release of patient medical information—and therefore the two must be read together. Under Chapter 153, DHS collects, analyzes, and disseminates "health care information." Wis. Stat. § 153.05(1)(a). When DHS releases health-care data for "public use" under Chapter 153, it must "*protect[ ] by all necessary means*" "[t]he identification of *patients*, *employers*, or health care providers." Wis. Stat. § 153.45(1)(b) (emphases added). Indeed, these statutes make clear that DHS may not release "patient-identifiable data," including a "[p]atient's employer's name," to any but a few enumerated entities. Wis. Stat. § 153.50(1)(b)(i), (4), (5). Likewise, federal law protects the confidentiality of patient health care information, *see* 45 C.F.R. § 160.103; 45 C.F.R. § 164.502, and treats the name of a patient's employer as "individually identifiable health information," which may not be disclosed. *See* 45 C.F.R. § 164.514(b)(2).

Finally, if a government agency obtains information contained medical records under one of the exemptions in Section 146.82, the statute restricts *redisclosure* of that information even more severely. In fact, the government may redisclose medical records only in three circumstance: (1) "[t]he patient or a person authorized by the patient provides informed consent for the redisclosure," (2) "[a] court of record orders the redisclosure," or (3) "[t]he redisclosure is limited to the purpose for which the patient health care record was initially received." Wis. Stat. § 146.82(5)(c). In other

words, if a health-care provider discloses to the government the results of a test, for example "[i]n response to a written request by [the] governmental agency to perform a legally authorized function," Wis. Stat. § 146.82(2)(a)5., the government may redisclose those test results only with the informed consent of the patient, a court order, or for the purposes of performing its legally authorized function, Wis. Stat. § 146.82(5)(c). The exemption for disclosure that does not permit identification of the patient does not apply to a redisclosure. *See id.*

It follows that the State may not release to the public the results of diagnostic testing for COVID-19 that the State has obtained pursuant to its "legally authorized function" of communicable-disease surveillance. The State is prohibited from redisclosing that information for any purpose other than communicable disease surveillance. Wis. Stat. § 146.82(5)(c). Redisclosing this information in response to public-records requests is *not* for the purpose of the State's communicable disease surveillance, as the State concedes—it is instead for the alleged purpose of complying with the open-records law—and is therefore prohibited by Section 146.82(5)(c).[17]

The State argues that the release of the names of patients' employers will not permit identification of the patients, Dkt. 22:14–16, but the State is wrong for multiple reasons. First, the State argues that Plaintiffs' argument is too speculative, that it is not certain that patients will be identified by the State's release. Dkt. 22:14–15. But, as explained above, Section 146.82 prohibits the release of medical records if

[17] Even if the State's planned release were an initial disclosure of medical records, it would nevertheless be prohibited under Section 146.82. As explained above, the release of a patient's employer's name permits identification of the patient and is therefore not exempted from the rule that health-care records must remain confidential.

it is *possible* that the patient would be identified, even if the patient is not ultimately identified. Second, the State argues that Chapter 153 has no application here because DHS did not collect these records under Chapter 153. Dkt. 22:16. But, as explained above, Section 146.82 and Chapter 153 "relat[e] to the same subject" and therefore must be read together. *In re Jeremiah C.*, 260 Wis. 2d 359, ¶ 17. Given that Chapter 153 defines a patient's employer's name as "patient-identifiable data," a patient's employer's name "would permit identification of the patient" under Section 146.82.[18]

2. Even if a patient's employer's name were not categorically protected by statute, the name is always confidential *under DHS's own rules*.

DHS has established rules to determine whether and when it may release health care information, which rules prohibit the release of a patient's employer's name. *See* Wis. Admin. Code Ch. DHS 120. When releasing data for public use, the department must "protect identification of patients, *employers*, and health care providers by all necessary means." Wis. Admin. Code § DHS 120.29(1), (3) (emphasis added). DHS is also prohibited from "releas[ing] or provid[ing] access to patient-identifiable data." Wis. Admin. Code § DHS 120.30(1). *The rules provide that a "[p]atient's employer's name" is patient-identifiable data.* Wis. Admin. Code § DHS

[18] The State's argument regarding district-attorney prosecution for violations of Section 252.05, Dkt. 22:16, is beside the point. Because DHS's records under Section 252.05 are "patient healthcare records" under Section 146.82, and therefore release of those records is a violation of Section 146.82, for which persons may seek redress under Section 146.84.

120.30(4) (emphasis added).[19] Thus, under its own rules, DHS may not release the name of a patient's employer, rendering this planned release unlawful.[20]

II. An Injunction is Necessary to Preserve the Status Quo and Disclosure Would Cause Plaintiffs, Their Members, and Their Employees Irreparable Harm

"Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile." *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Here, the State has indicated that it plans to release the disputed records as soon as possible—indeed, just as soon as this Court lifts its injunction. And Plaintiffs sought an ex parte temporary restraining order just hours before the State's planned release. *See* Dkt. 7, Bauer Aff. ¶ 10. Without a temporary injunction to preserve the status quo, the State will immediately release the disputed records, causing the very injury this lawsuit seeks to prevent and rendering meaningless any future equitable relief. This is more than sufficient to show irreparable harm. *Werner*, 80 Wis. 2d at 520.

Additionally, it is well established that "the injury that flows from an illegal expenditure of public funds is inherently irreparable." *Rath v. City of Sutton*, 673

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[19] While DHS's rules relating to the release of patient data were promulgated under its authority under Wis. Stat. § 153.75 and to implement ch. 153, Wis. Admin. Code § DHS 120.01, these rules "appl[y] to the department . . . and persons requesting data from the department," Wis. Admin. Code § DHS 120.02, and are not by their terms limited to data collected under Chapter 153.

[20] Finally, for the reasons stated in Plaintiffs' Brief in Support of the Motion for Temporary Injunction, the public-interest balancing test (if it applied here, which it does not) would also favor non-disclosure. Dkt. 6:11–14.

N.W.2d 869, 884 (Neb. 2004). The public funds cannot be recovered without either increasing the tax burdens on the taxpayers or reducing legitimate government spending. *See S.D. Realty*, 15 Wis. 2d at 22.

Finally, businesses suffer irreparable harm from reputational damage or a loss of goodwill. *See Meridian Mut. Ins. Co. v. Meridian Ins. Grp., Inc.*, 128 F.3d 1111, 1120 (7th Cir. 1997) (injury to goodwill "can constitute irreparable harm for which a plaintiff has no adequate remedy at law."). Here, the State's planned records release would irreparably harm Plaintiffs' members by permanently harming their reputations. First, while the State's list has not yet been released, given that Plaintiffs represent *thousands* of Wisconsin businesses, and that the State plans to release the names of over one thousand businesses, some of Plaintiffs members will invariably appear on the State's list. Second, consumers are already highly concerned about visiting various establishments for fear of catching COVID-19, and this concern is causing a decrease in patronization of those establishments. McKinsey & Company, *Survey: US consumer sentiment during the coronavirus crisis* (Oct. 20, 2020);[21] Cennox Consumer Research Report (July 2020);[22] Steve Maas, *Consumers' Fear of Virus Outweighs Lockdowns' Impact on Business*, The Digest, National Bureau of Economic Research (August 2020);[23] Akrur Barua and Monali Samaddar, *A recovery*

[21] https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/survey-us-consumer-sentiment-during-the-coronavirus-crisis.
[22] https://www.cennox.com/sites/default/files/Market_Research_Report_July2020_Final_online.pdf.
[23] https://www.nber.org/digest/aug20/consumers-fear-virus-outweighs-lockdowns-impact-business.

in retail sales is underway amid COVID-19, but there are challenges ahead, Deloitte Insights (Sept. 25, 2020).[24] The listing of businesses in the State's planned release will imply that the businesses are somehow at fault for COVID-19 infections, exacerbating already heightened fear and concern and further causing consumers to avoid those businesses. Worse, the State plans to release information dating as far back as May, meaning that members of the public will likely suspect that businesses who were never exposed to COVID-19, or who may have been exposed many months ago, must be avoided. The reputational damage to Plaintiffs' members would be immense and irreversible. *See Meridian Mut. Ins. Co.*, 128 F.3d at 1120.

III. An Injunction Is in the Public Interest

Basic principles of public policy also militate in favor of an injunction. *See Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Publication of private health information may undermine trust in the medical system and thereby damage DHS's efforts to contain the virus. Patients may be less likely to cooperate with their physicians' requests for information if they suspect that their private health information will be publicly disclosed. The resulting dearth of reliable data would have the effect of both making treatment less effective on the individual level and making the public-health response more difficult to implement statewide.

CONCLUSION

This Court should deny the State's and the Sentinel's motions to dismiss and should grant Plaintiffs' motion for a temporary injunction.

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[24] https://www2.deloitte.com/us/en/insights/economy/spotlight/economics-insights-analysis.html.

Dated: October 23, 2020

Respectfully submitted,

Electronically Signed
/s/ Ryan J. Walsh

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Non-Wisconsin Authorities Cited in the Brief

(Civil Local Rule 3.3)

2015 WL 9592515
Only the Westlaw citation is currently available.
United States District Court,
D. South Dakota, Western Division.

Stephen M. Gowan, Plaintiff,
v.
Mid Century Insurance Company, a Division of Farmers Insurance Group; Defendant.

5:14-CV-05025-LLP
|
Signed December 31, 2015

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ORDER ON PLAINTIFF'S MOTION TO CHALLENGE CONFIDENTIALITY DESIGNATION

DOCKET NO. 67

VERONICA L. DUFFY, United States Magistrate Judge

INTRODUCTION

***1** This diversity matter is pending before the court on plaintiff Stephen M. Gowan's amended complaint alleging defendant Mid Century Insurance Company denied his worker's compensation claim in bad faith. See Docket No. 49. The parties previously requested the district court to enter a protective order, which the district court granted. See Docket Nos. 14, 14-2 & 16 (requests), and Docket No. 25 (order). Pursuant to that protective order, Mid Century produced certain documents and designated those documents as "confidential." Mr. Gowan now files this present motion to challenge that confidential designation. See Docket No. 67. This matter was referred to this magistrate judge for decision pursuant to 28 U.S.C. § 636(b)(1)(A). See Docket No. 71.

FACTS

A. Background Facts

These background facts are drawn from the parties' briefs and Mr. Gowan's amended complaint. The court's recitation of the facts thus gleaned does not represent any imprimatur of the court as to their veracity.

Stephen Gowan injured his knee at work; his employer had a worker's compensation insurance policy with Mid Century. Mr. Gowan and Mid Century settled Mr. Gowan's worker's compensation claim under terms that did not impact Mr. Gowan's right to future medical treatment for his injury. Mid Century continued to provide medical treatment for Mr. Gowan until his treating physician recommended he undergo knee replacement surgery. At this time, Mid Century denied coverage for the surgery as well as for pain control injections to Mr. Gowan's knee that he had previously been receiving.

Mid Century hired Richard Farnham, M.D. to conduct an independent medical exam (IME) on Mr. Gowan. From 2000 to 2001, Mid Century had hired Dr. Farnham on 11 occasions to provide it with IMEs on claimants. Mr. Gowan alleges that Dr. Farnham is biased in favor of insurance companies and that Mid Century expected Dr. Farnham to render an opinion favorable to Mid Century.

Dr. Farnham issued an opinion that Mr. Gowan did need a total knee replacement and that the surgery was related to Mr. Gowan's 2000 work-related injury. However, he opined only 25% of the surgery was occasioned by the work injury, while 75% was non-work related. Accordingly, Mid Century agreed only to pay only 25% of the cost of the anticipated surgery. Mr. Gowan's doctor then refused to perform the surgery. Mid Century discontinued payments for Mr. Gowan's knee injections, a matter not touched upon by Dr. Farnham.

After filing a successful motion to compel, Mr. Gowan received from Mid Century 11 prior IME reports authored by Dr. Farnham for Mid Century. Pursuant to this court's order granting the motion to compel, Mid Century redacted all personal identifiers of the patients who were the subjects of Dr. Farnham's IMEs. In addition, Mid Century designated these IME reports "confidential" pursuant to the district court's protective order.

The protective order came into being because *both* parties suggested such an order be entered, although each party

suggested an order with differing terms from the other's proposed order. See Docket Nos. 14, 14-2, & 16.

***2** Under the terms of the protective order entered by the district court, a party producing sensitive documents is allowed to designate them as "confidential." See Docket No. 25. The order contemplates "non-public" documents as among those documents the parties may appropriately designate as "confidential." Id. Once a document is produced in discovery and is designated as "confidential," several prophylactic measures apply. "Confidential" documents may only be filed with the court under seal. Id. Portions of deposition transcripts may be themselves designated "confidential" if "confidential" documents are discussed therein. Id. Third parties to whom "confidential" documents must be disclosed during the course of litigation must be told of the terms of the protective order and they must agree to the terms of the protective order. Id. Following the conclusion of this litigation, all originals and copies of "confidential" documents must be destroyed or returned to the party that produced the documents. Id.

Mr. Gowan now seeks to challenge Mid Century's designation of these 11 IME reports from Dr. Farnham as "confidential." Mr. Gowan asserts that there is a public interest in exposing Dr. Farnham's bias in favor of Mid Century in workers compensation cases. Mid Century resists Mr. Gowan's motion, arguing that a key rationale relied upon by this court in granting the motion to compel discovery of the IME reports in the first place was the belief that the documents would be protected by the district court's protective order.

DISCUSSION

Under the Federal Rules of Civil Procedure, protective orders may be granted upon a showing of "good cause" to protect a party or a person from annoyance, embarrassment, oppression, or undue burden or expense. See FED. R. CIV. P. 26(c)(1). A protective order can take many forms, including "specifying terms, including time and place, for the disclosure or discovery." Id. at R. 26(c)(1)(B).

The "good cause" proffered by both parties in support of their respective requests for a protective order was to facilitate discovery where the discovery sought sensitive or confidential information. Compare Docket No. 14 with Docket No. 16. Having, in essence, stipulated to the entry of a protective order in this case, Mr. Gowan now seeks to circumvent it for the purpose of making Dr. Farnham's 11 IME reports on patients other than himself public. Mr. Gowan is asking the court to modify the protective order entered in this case so that it no longer encompasses the clearly confidential documents at issue.

In considering whether to modify a protective order, a balancing test is usually applied. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 790 (3d Cir. 1994). Under that balancing test, a number of factors are to be weighed by the court: (1) whether a party benefiting from the protective order is a public entity or official, (2) whether the information covered by the protective order would otherwise be available under a freedom of information statute, (3) the reliance by the original parties on the existence of the protective order in providing the discovery, (4) whether the entry of the protective order encouraged settlement, and (5) whether the case involves issues important to the public. Id. at 788-90. Also, the party seeking to modify the protective order must show some reason justifying its modification. Id.

Here, Mr. Gowan argues that the public has an interest in learning of the alleged bias Dr. Farnham has in favor of Mid Century. In addition, he argues that, once personal identifiers of the persons who were the subjects of the IMEs were redacted, there is no longer a privacy interest on the part of those persons in keeping their IMEs confidential.

Applying the Pansy factors, the court notes that neither party in this case nor the persons who were the subject of the IMEs are public entities or public officials. That weighs in favor of keeping the documents confidential. Second, the IMEs are not subject to disclosure under any freedom of information act. Quite the contrary, the confidentiality of such records would typically be protected by laws such as the Health Insurance Portability and Accountability Act. This also weighs in favor of maintaining the confidentiality of the documents.

***3** Mid Century clearly relied upon the entry of the protective order in providing the discovery, as did this court. The protective order, separate and apart from the redaction of personal identifiers, was and is a second layer of confidentiality serving to protect these medical records. Furthermore, many of the reports contain sufficient additional detail to enable persons to identify the patients who were subject to IMEs by Dr. Farnham, even with the personal identifiers redacted. This is the most serious and weighty issue to the court. For example, in one report, the subject of the IME is an employee of a very small employer in a very small

town. The name of the town and employer, as well as the date and nature of the work injury, are recounted in the IME. In addition, the gender of the patient is revealed through the use of pronouns. It would take very little sleuthing to figure out the identity of this patient were the redacted IME stripped of its confidentiality.

The entry of the protective order did not necessarily encourage settlement, although full disclosure of facts always helps, rather than hinders, settlement. But the order certainly streamlined discovery, which otherwise could have been a longer and bumpier road.

Finally, the court considers the public interest in the documents. This is the issue pressed most by Mr. Gowan. While the public certainly has an interest in learning that an expert ostensibly holding himself out as unbiased is in fact biased, this interest is ameliorated by the availability of other information in the public sphere. For example, even before Mr. Gowan obtained the IMEs in question, he was able to put together substantial information about the connection between Mid Century and Dr. Farnham strictly from perusing public records. Mr. Gowan was able to learn that Dr. Farnham had appeared as Mid Century's expert in 11 workers compensation cases. He was able to find that Dr. Farnham's credentials as an expert had been called into question by an adjudicator in a workers compensation proceeding. Thus, the public interest in knowing the relationship between Mid Century and Dr. Farnham is already met by publicly-available information. The IMEs themselves lend little additional information. The IMEs bear some general similarity to each other, but there is not the type of rote language which would suggest Dr. Farnham completely abandoned his role as a doctor in order to serve Mid Century's interests.

Based on a weighing of all the above factors, including and most especially the facts that Mr. Gowan sought the protective order he now seeks to avoid and the identity of the IME subjects is not completely shielded by redaction, the court concludes that Mr. Gowan's motion should be denied. The IME reports provided by Mid Century to Mr. Gowan should continue to be treated as confidential under the district court's protective order.

CONCLUSION

Based on the foregoing, Mr. Gowan's motion challenging the confidentiality of the IMEs of Dr. Farnham [Docket No. 67] is denied.

All Citations

Not Reported in F.Supp.3d, 2015 WL 9592515

484 So.2d 658
Supreme Court of Louisiana.

In re Michael BURNS.

No. 86–KK–0368.
|
March 14, 1986.
|
Reconsideration Denied
|
May 12, 1986.

Synopsis

Reporter was held in contempt in prison for refusal to answer questions about source of his information for article which related to existence and details of confession by murder defendant. Reporter invoked hearing for purpose of revoking reporter's privilege. The trial judge determined the reporter's privilege was inapplicable. Appeal was taken. The Court of Appeal denied writs and reporter applied for writ of certiorari. The Supreme Court held that reporter's privilege included within its protective scope, place of employment of informant, and trial court should thus have followed its statutory guidelines for revocation of reporter's privilege.

Judgment of trial court vacated and conviction and sentence of reporter reversed.

Opinion

***658** PER CURIAM.

Michael Burns is a reporter for the Alexandria Daily Town Talk who was held in contempt of court and imprisoned for refusal to answer questions about the source of his information for an article which related the existence and details of a confession by a murder defendant.

The defendant invoked a hearing under R.S. 45:1453 for the purpose of revoking the reporter's privilege against compulsory identification of "any informant or any source of information obtained by him from another person while acting as a reporter" contained in R.S. 45:1452. [1]

1 R.S. 45:1452 provides:

> "Except as hereinafter provided, no reporter shall be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter."

R.S. 45:1453 provides:

> "In any case where the reporter claims the privilege conferred by this Part, the persons or parties seeking the information may apply to the district court of the parish in which the reporter resides for an order to revoke the privilege. In the event the reporter does not reside within the state, the application shall be made to the district court of the parish where the hearing, action or proceeding in which the information is sought is pending. The application for such an order shall set forth in writing the reason why the disclosure is essential to the protection of the public interest and service of such application shall be made upon the reporter. The order shall be granted only when the court, after hearing the parties, shall find that the disclosure is essential to the public interest. Any such order shall be appealable under Article 2083 of the Louisiana Code of Civil

> Procedure. In case of any such appeal, the privilege set forth in R.S. 45:1452 shall remain in full force and effect during pendency of such appeal."

***659** Upon motion of counsel for the murder defendant, over objection of counsel for Burns, the trial judge ordered the revocation hearing closed to the press and public, and ordered the record sealed. According to Burns, the judge would not permit argument or presentation of evidence on the validity of the closure of the hearing, nor did the judge articulate reasons on the record for the closure order. Since the record has been sealed, and the closure order remains in effect, there is no transcript of the hearing before this court. Accordingly, the following version of the hearing was gleaned from Burns' brief and the per curiam opinion of the trial judge.

At the hearing Burns refused to answer when counsel for the defendant questioned defendant whether his source for the story, listed in the article as "a courthouse source," was an individual employed by the clerk of court, asserting the reporter's privilege. The trial judge ruled that the privilege was inapplicable because the question did not call for Burns to reveal the identity of the source, but only information on the source's employment. On Burns' continued refusal to answer the question, the trial judge found him in contempt of court and ordered him imprisoned.

Because the trial judge determined that the reporter's privilege was inapplicable, he did not follow the procedures outlined in R.S. 45:1453 for revocation of the privilege. R.S. 45:1453 provides that an order for disclosure of a source should be made only after a determination that the revelation of the information is essential to the public interest, whereupon the reporter has the right to an appeal of the disclosure order without penalty of contempt and imprisonment.

The court of appeal, after an initial stay of Burns' contempt citation and sentence, denied writs, holding that the trial court was correct in ordering Burns to answer the question, and reinstated the trial court judgment.

The trial court erred in holding the reporter's privilege inapplicable and in failing to follow the statutory procedure for revocation of the privilege. R.S. 45:1452 includes within its protective scope not only the actual name of a confidential source of information, but any disclosure of information, such as place of employment, that would tend to identify him. Otherwise, through a series of indirect questions, the identity of the informant could be obtained without the need to ask for the informant's name directly, resulting in subversion of the reporter's privilege.

In order to revoke the privilege, a court must determine that disclosure of the information is essential to the public interest as a precondition to an order to the reporter to reveal his source. This order of revocation is appealable, and during the pendency of the appeal the privilege remains in effect. R.S. 45:1453. This statute gives reporters the right to appeal the ruling of the trial court without fear of a contempt conviction or imprisonment.

The trial court erred in failing to follow these statutory guidelines.

Although a remand to determine whether disclosure of a reporter's source is essential to the public interest might be required in some cases, the informant in this case voluntarily identified himself when he learned of the contempt proceedings. The judgment of the trial court is therefore vacated, and the conviction and sentence of Michael Burns are reversed.

WATSON, J., concurs since the informant has identified himself and the matter is therefore moot.

All Citations

484 So.2d 658

267 Neb. 265
Supreme Court of Nebraska.

Marlowe RATH, a resident taxpayer of Sutton, Clay County, Nebraska, appellant
v.
CITY OF SUTTON, a city of the second class, et al., appellees.

No. S–02–1174.
|
Jan. 23, 2004.

Synopsis
Background: City solicited bids for improvements to its wastewater treatment facility and awarded contract to local bidder, even though its bid was $16,000 higher than lowest bid. Taxpayer sponsored by lowest bidder filed petition seeking to temporarily and permanently enjoin city from awarding project to local contractor and from spending any public funds on project until it was awarded to lowest responsible bidder, and seeking a declaration that contract between city and local contractor was null and void. The District Court, Clay County, Stephen Illingworth, J., determined that evidence failed to show that taxpayer would suffer irreparable injury and denied injunctive and declaratory relief on that basis. Taxpayer appealed, and, because there was no court order prohibiting local contractor from proceeding with project, it completed project and was paid by city during pendency of appeal. Subsequently, city moved to dismiss appeal as moot.

Holdings: The Supreme Court, Gerrard, J., held that:

completion of improvement project by local contractor rendered taxpayer's appeal moot as it rendered moot predicate claims for injunctive and declaratory relief; but

issues raised by taxpayer on appeal, namely, what a party alleging illegal expenditures of public funds needs to show to establish irreparable harm and what is the appropriate interpretation of often-used phrase in competitive bidding statutes, "lowest responsible bidder," merited review under public interest exception to mootness doctrine;

taxpayer seeking to enjoin an alleged illegal expenditure of public funds needs to prove only that the funds are being spent contrary to law in order to establish an irreparable injury; and

a public body has no discretion to award a bid to any entity other than the lowest bidder when two or more responsible bidders submit identical bids except for price.

Appeal dismissed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

****874** *Syllabus by the Court*

***265** 1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.

3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.

4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

5. **Injunction.** Injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.

6. **Injunction.** Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction.

7. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.

8. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.

9. **Moot Question: Damages.** A suit that seeks damages for harm caused by past practices is not rendered moot by the cessation of the challenged conduct.

***266** 10. **Declaratory Judgments.** Declaratory relief cannot be used to obtain a judgment which is merely advisory.

11. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.

12. **Moot Question: Appeal and Error.** The public interest exception to the mootness doctrine requires the consideration of (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for guidance of public officials, and (3) the likelihood of recurrence of the same or a similar problem.

13. **Injunction.** As an injunction is an extraordinary remedy, it ordinarily should not be granted except in a clear ****875** case where there is actual and substantial injury. Stated otherwise, injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.

14. **Injunction.** As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury.

15. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.

16. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.

17. **Injunction: Damages: Words and Phrases.** An injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard.

18. **Actions: Municipal Corporations: Contracts: Liability.** Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was unenforceable because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received.

19. **Actions: Taxation: Damages: Proof.** A taxpayer seeking to enjoin an alleged illegal expenditure of public funds needs to prove only that the funds are being spent contrarily to law in order to establish an irreparable injury.

20. **Political Subdivisions: Contracts: Statutes: Words and Phrases.** Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money. Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price. Such statutes are enacted for the benefit of taxpayers.

21. **Political Subdivisions: Contracts.** Determining the lowest responsible bidder is a two-step process. The first step is for the public body to determine which bidders are responsible to perform the contract. The second step focuses on which of the responsible bidders has submitted the lowest bid.

22. **Political Subdivisions: Contracts: Words and Phrases.** In the context of competitive bidding, the term "responsibility" pertains to a bidder's pecuniary ability, as well as the bidder's ability and capacity to carry on the work, the bidder's equipment and facilities, the bidder's promptness and the quality of his or her previous work, the bidder's suitability to the particular task, and such other qualities as are found necessary ***267** to consider in order to determine whether or not, if awarded the contract, the bidder could perform it strictly in accordance with its terms.

23. **Public Officers and Employees: Contracts.** Public officials do not act ministerially only, but exercise an official discretion when passing upon the question of the responsibility of bidders.

24. **Public Officers and Employees: Contracts.** Public bodies retain an official ****876** discretion to determine which bid offers the best value to their constituents.

25. **Municipal Corporations: Fraud: Courts.** Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.

26. **Political Subdivisions: Contracts.** When the only difference in bids is price, no discretion exists on the part of a public body in awarding the contract; the responsible bidder with the lowest bid must be awarded the contract.

27. **Public Officers and Employees: Contracts: Fraud: Courts.** Determining the responsibility of bidders is a job for elected officials, and a court's only role is to review those decisions to make sure the public officials did not act arbitrarily, or from favoritism, ill will, or fraud.

28. **Contracts: Parties.** A party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids.

Attorneys and Law Firms

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David A. Hecker, Lincoln, and Richard P. Jeffries, of Kutak Rock, L.L.P., Omaha, for appellee Van Kirk Sand & Gravel, Inc.

CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER–LERMAN, JJ.

Opinion

GERRARD, J.

The City of Sutton, Nebraska (City), sought to make improvements to its wastewater treatment facility. The City received bids from a number of construction companies, including JJ Westhoff Construction Company, Inc. (Westhoff), and Van Kirk Sand & ***268** Gravel, Inc. (Van Kirk). The Sutton City Council (City Council) awarded the contract for the project to Van Kirk, a local contractor, despite the fact that Westhoff's bid was $16,000 lower. The question presented on appeal is whether the City impermissibly awarded the contract to someone other than the lowest responsible bidder in contravention of Neb.Rev.Stat. §§ 17–918 and 18–507 (Reissue 1997).

FACTUAL AND PROCEDURAL BACKGROUND

In September 2001, the City advertised an invitation for bids for the construction of certain improvements to its wastewater treatment facility. The City's invitation for bids stated that the City would receive bids until October 3, 2001, at 1:30 p.m., at which time all bids would be publicly opened and read aloud. The invitation stated that each prospective bidder would be required to certify, by submitting "EPA Form 5700–49," that it was not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency. Additionally, the bidders were notified they would have to comply with certain rules regarding nondiscrimination in employment and the U.S. Environmental Protection Agency's ****877** Disadvantaged Business Enterprise (DBE) requirements.

The invitation for bids also stated that the City reserved "the right to reject any and all bids and to waive informalities in bids submitted and to accept whichever bid that is in the best interest of the City, at its sole discretion." Likewise, article 19 of the "Instructions to Bidders" purported to give the City, as the "Owner," nearly unbounded discretion in the bidding process.

> OWNER reserves the right to reject any or all Bids, including without limitation, nonconforming, nonresponsive, unbalanced, or

> conditional Bids. OWNER further reserves the right to reject the Bid of any Bidder whom it finds, after reasonable inquiry and evaluation, to be non-responsible. OWNER may also reject the Bid of any Bidder if OWNER believes that it would not be in the best interest of the Project to make an award to that Bidder. OWNER also reserves the right to waive all informalities not involving price, time, or changes in the Work and to negotiate contract terms with the Successful Bidder.

***269** Van Kirk, a contractor located in Sutton, and Westhoff, a contractor located in Lincoln, Nebraska, submitted bids on the project. On October 3, 2001, the bids were opened and Westhoff's bid ($1,274,000) was lower than Van Kirk's bid ($1,290,000) by $16,000. Per the bid specifications, both Westhoff and Van Kirk listed August 15, 2002, as the substantial completion date and September 15 for the project's final completion date. Van Kirk's bid did not include the DBE requirements or form 5700–49. A public meeting to award the project was scheduled for October 9, 2001.

After the bids were unsealed, but before the October 9, 2001, meeting of the City Council, the president of Van Kirk sent a letter to the City urging the City Council to award the project to Van Kirk. The letter noted the amount of personal property taxes Van Kirk had paid in 2000 and the amount Van Kirk estimated it would pay in 2001. In addition, the letter stated the amount of money Van Kirk spent annually within the City and estimated the amount Van Kirk contributed to the City's economy each year. Van Kirk recognized that it was not the low bidder, but argued that the $16,000 difference in bids would be more than made up in overall economic benefits to the City if the project were awarded to a local contractor.

During the public meeting on October 9, 2001, the City Council noted the $16,000 difference in bids. The minutes of the meeting show that one council member stated that the difference in bids was not substantial and that by choosing Van Kirk, the wages would stay in the City. All four members of the City Council voted in favor of awarding the contract to Van Kirk, and the motion carried.

Westhoff protested this decision through a letter to the clerk of the City. In the letter, dated October 11, 2001, Westhoff argued that it was the lowest responsible bidder and threatened to pursue legal action if it were not awarded the contract. On October 23, Marlowe Rath, a taxpayer and resident of the City, instituted this action, at the request and with the funding of Westhoff, against the City, the City Council, the mayor, and Van Kirk (collectively the appellees). Essentially, Rath's petition claimed that the City failed to award the contract to the lowest responsible bidder.

***270** After the lawsuit was filed, the City Council called a "special meeting" for October 31, 2001, to reconsider their decision. At the beginning of the special meeting, the mayor of the City, Virgil Ulmer, disclosed that he was a salaried employee of Van Kirk. He also stated that in the event the vote on awarding the contract resulted ****878** in a tie, he would not vote to break the tie. The record shows that Ulmer worked sporadically for Van Kirk between 1991 and 1996, when he became a permanent employee of Van Kirk. He was elected as the City's mayor in 1998. We note that Ulmer did not vote at the prior meeting, held on October 9, nor did he disclose his potential conflict of interest.

Westhoff presented no supporting evidence at the special meeting. Rather, it merely reminded the City Council that a lawsuit had been filed over the matter and restated its position that the award to Van Kirk was inappropriate and contrary to law. In response, the president of Van Kirk reiterated Van Kirk's status as a local contractor and argued that by selecting Van Kirk, the City would reap a variety of savings and economic benefits. Additionally, various persons presented oral testimony in favor of awarding the bid to Van Kirk, specifically emphasizing the positive economic impact its selection would have on the community.

The City Council then voted in favor of reconsidering the original award of the contract. During the subsequent discussion, each of the three present members of the City Council stated their support for awarding the contract to a local business. Generally speaking, they argued that awarding the contract to a local business would offset the $16,000 difference in bids and contribute positive economic benefits to the community. The City Council then voted 3 to 0 to award the contract to Van Kirk.

Rath's operative amended petition, filed December 3, 2001, sought to temporarily and permanently enjoin the City from (1) awarding the project to Van Kirk and (2) spending any

public funds on the project until it was awarded to the lowest responsible bidder. In addition, the amended petition sought an order declaring the contract between Van Kirk and the City null and void.

On February 7, 2002, the district court issued an order on Rath's motion for a temporary injunction. The court found, inter ***271** alia, that (1) both Westhoff and Van Kirk were deemed to be responsible bidders by the City, (2) Westhoff was the low bidder by $16,000, and (3) the only reason Westhoff did not receive the contract was that the City thought it would be best to award the project to a local bidder. Nonetheless, the court denied Rath's motion because it determined that Rath failed to show he would suffer irreparable injury if the injunction were not granted.

The parties submitted the case on a stipulated record. The court issued its order on October 2, 2002, and made findings nearly identical to those in its order of February 7. Specifically, the court determined that the evidence failed to show Rath would suffer irreparable injury if injunctive relief were not granted. The court denied Rath's request for permanent injunctive and declaratory relief on this basis.

Rath filed a timely notice of appeal, but did not request a stay or supersedeas bond. Therefore, because there was no court order prohibiting Van Kirk from proceeding with construction, Van Kirk began the work and, on September 30, 2003, completed the improvements to the wastewater treatment facility. The City remitted final payment to Van Kirk on July 23. On October 6, 1 day prior to oral argument in this court, the appellees, by way of separate motions, moved to dismiss Rath's appeal as moot. Rath opposed these motions, and we granted the parties additional time to brief the issue of mootness.

ASSIGNMENTS OF ERROR

Rath claims, renumbered and restated, that the district court erred in (1) finding ****879** that a resident taxpayer claiming the illegal expenditure of public funds is required to prove more than the illegality of the expenditure in order to show irreparable harm; (2) construing the bidding statutes, §§ 17–918 and 18–507, to allow a city of the second class to have discretion in awarding a contract for the construction of a wastewater treatment facility or the improvement thereof; and (3) finding that Van Kirk's initial bid, which did not include the DBE requirements or form 5700–49, was responsive.

STANDARD OF REVIEW

A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, ***272** which requires the appellate court to reach a conclusion independent of the lower court's decision. *Stoetzel & Sons v. City of Hastings,* 265 Neb. 637, 658 N.W.2d 636 (2003).

An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Whipps Land & Cattle Co. v. Level 3 Communications,* 265 Neb. 472, 658 N.W.2d 258 (2003). See *State ex rel. City of Alma v. Furnas Cty. Farms,* 266 Neb. 558, 667 N.W.2d 512 (2003).

ANALYSIS

MOOTNESS

Essentially, the appellees argue that because construction of the wastewater treatment facility has been completed and Van Kirk has been paid in full, there is nothing left for this court to enjoin. Thus, according to the appellees, there is no live case or controversy, and an opinion passing on the propriety of the award to Van Kirk would be advisory. On the other hand, Rath argues that because he is seeking a declaration that the contract is null and void and because taxpayers have a right to recover all funds paid under an illegal contract, he is still entitled to a remedy, and that his appeal is not moot.

The contours of the doctrine of mootness are well established. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Stoetzel & Sons, supra; Putnam v. Fortenberry,* 256 Neb. 266, 589 N.W.2d 838 (1999). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Stoetzel & Sons, supra.*

Recently, we have addressed similar situations where the action a party was seeking to enjoin had been completed prior to our review of the lower court's decision. See,

generally, *Stoetzel & Sons, supra; Prucha v. Kahlandt,* 260 Neb. 366, 618 N.W.2d 399 (2000); *Putnam, supra; Koenig v. Southeast Community College,* 231 Neb. 923, 438 N.W.2d 791 (1989). In these cases, we have emphasized the nature of injunctive relief, stating that "injunctive relief is preventative, prohibitory, or protective, and ***273** equity usually will not issue an injunction when the act complained of has been committed and the injury has been done." See *Putnam,* 256 Neb. at 270, 589 N.W.2d at 842–43. Moreover,

> " '[s]ince the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already ****880** perpetrated cannot be corrected by injunction.' "

Id. at 271, 589 N.W.2d at 843, quoting *Conrad v. Kaup,* 137 Neb. 900, 291 N.W. 687 (1940).

Much like the aforementioned cases, the actions that Rath is seeking to enjoin—the execution of the contract with Van Kirk and the expenditure of public funds for the project—have been completed. Thus, any opinion on the court's denial of injunctive relief would be "worthless." See *Stoetzel & Sons v. City of Hastings,* 265 Neb. 637, 646, 658 N.W.2d 636, 643 (2003). Simply put, we lack the power, "once a bell has been rung, to unring it." See *CMM Cable Rep. v. Ocean Coast Properties, Inc.,* 48 F.3d 618, 621 (1st Cir.1995). See, also, *Stoetzel & Sons, supra.* Rath's request for injunctive relief is moot.

We must, however, determine whether the declaratory judgment prayer has also been rendered moot, as the inability of the court to grant the injunction does not, by itself, render the declaratory action moot as well. See *Koenig, supra.*

> A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.... At the time that the declaration is sought, there must be an actual justiciable issue.... A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.

(Citations omitted.) *Putnam,* 256 Neb. at 272–73, 589 N.W.2d at 844. See, also, *Greater Omaha Realty Co. v. City of Omaha,* 258 Neb. 714, 605 N.W.2d 472 (2000); *Koenig, supra.*

The actions Rath is seeking to enjoin are predicated on an alleged illegal expenditure of public funds. Rath argues that ***274** notwithstanding completion of the project and payment of all funds, relief is still available because a taxpayer has a right to recover the funds expended under an illegal contract. See *Cathers v. Moores,* 78 Neb. 17, 113 N.W. 119 (1907). According to Rath, a declaration of the contract's illegality maintains the action because he can then seek to recover the illegally expended funds. In other words, Rath is arguing that the City could not divest this court of jurisdiction by paying out the money on an illegal contract. See, *Faden, Aplnt. v. Phila. Housing Auth.,* 424 Pa. 273, 227 A.2d 619 (1967); *Egidi v. Town of Libertyville,* 218 Ill.App.3d 596, 578 N.E.2d 1300, 161 Ill.Dec. 654 (1991).

To a certain extent, Rath is correct. Obviously, petitions that seek restitution damages, refund damages, lost profits, or other types of monetary relief do not become moot upon completion of the project. As noted elsewhere, a "suit that seeks damages for harm caused by past practices is not rendered moot by the cessation of the challenged conduct." *CMM Cable Rep.,* 48 F.3d at 621. See, also, *Curtis Indus., Inc. v. Livingston,* 30 F.3d 96 (8th Cir.1994).

Here, however, Rath did not seek to recover the funds that may have been illegally expended under the City's contract with Van Kirk. His petition sought only injunctive and declaratory relief, plus such other relief that the court deemed proper. In order to be entitled to recoup the illegally expended funds, Rath was required to specifically request such relief in his petition. See, *Alexander v. School Dist. No. 17,* 197 Neb. 251, 248 N.W.2d 335 (1976); *National Fire Ins. Co. v. Evertson,* 153 Neb. 854, 46 N.W.2d 489 (1951). Therefore, a declaration by this ****881** court on the legality of the contract between Van Kirk and the City would be advisory because it would have no effect on the parties *in this case.* And, as

we have said before, " 'declaratory relief cannot be used to obtain a judgment which is merely advisory.' " See *Putnam v. Fortenberry,* 256 Neb. 266, 273, 589 N.W.2d 838, 844 (1999), quoting *Galyen v. Balka,* 253 Neb. 270, 570 N.W.2d 519 (1997). Rath's request for declaratory relief is also moot.

PUBLIC INTEREST EXCEPTION

As a general rule, a moot case is subject to summary dismissal. ***275** *Stoetzel & Sons v. City of Hastings,* 265 Neb. 637, 658 N.W.2d 636 (2003). Nebraska, however, recognizes a public interest exception to the mootness doctrine, and we must consider whether it is applicable in this case. The exception requires the consideration of (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for guidance of public officials, and (3) the likelihood of recurrence of the same or a similar problem. *Id.* Two questions presented in Rath's appeal meet the aforementioned test and merit review.

First, Rath's appeal raises the issue of what a party alleging the illegal expenditure of public funds needs to show in order to establish irreparable harm. Obviously, the proof required to enjoin an illegal expenditure of public funds is of paramount importance to the taxpayers in this state. Moreover, this issue, if adjudicated, will provide needed guidance because it is an issue of first impression in this state. Furthermore, the issue is likely to recur because taxpayer suits seeking to enjoin alleged illegal expenditures of public funds are frequently filed. The public interest exception is applicable.

Second, Rath's appeal also raises the issue of the appropriate interpretation of an oft-used phrase in our statutes, "lowest responsible bidder," and its proper application within the context of Nebraska's competitive bidding statutes. Again, the public nature of this question is not in doubt. We have repeatedly held that competitive bidding statutes exist solely for the protection of the public, see *Anderson v. Peterson,* 221 Neb. 149, 375 N.W.2d 901 (1985), and Rath, as a taxpayer, instituted this action on the public's behalf.

In addition, an authoritative decision on this issue will provide guidance to every municipality and state official entrusted with procuring products and services. The term "lowest responsible bidder" is found in numerous statutory provisions, and to the extent we can bring clarity to its proper scope, interpretation, and interplay within the competitive bidding framework, tax-paying citizens of this state will benefit. See, e.g., Neb.Rev.Stat. §§ 13–1414, 14–361, 14–363, 14–365.08, 14–3,111, 14–1710, 14–2121, 15–228, 15–734, 15–753, 16–249, 16–649, 16–672.05, 17–533, 17–918, 18–507, 23–342, 23–366, 23–3615 (Reissue 1997); Neb.Rev.Stat. §§ 31–118, 31–120, 31–355, 31–512, ***276** 31–748, 31–912, 39–810, 39–1407, 39–1620, 46–145 (Reissue 1998); Neb.Rev.Stat. §§ 31–741, 39–1349, and 81–161 (Cum.Supp.2002); Neb.Rev.Stat. §§ 72–803, 73–101.01, 73–103 (Reissue 1996); Neb.Rev.Stat. §§ 81–1108.55, 81–1201.13, 83–134, 83–916 (Reissue 1999).

Lastly, this issue is likely to recur because of the frequency of public contracting and the corresponding disputes over the fairness of those contracts. A short review of our case law shows that we have been faced with a number of cases challenging awards to the lowest responsible bidder. See, generally, *Day v. City of Beatrice,* 169 Neb. 858, 101 N.W.2d 481 (1960); *Philson v. City of Omaha,* 167 Neb. 360, 93 N.W.2d 13 (1958); ****882** *Niklaus v. Miller,* 159 Neb. 301, 66 N.W.2d 824 (1954); *Best v. City of Omaha,* 138 Neb. 325, 293 N.W. 116 (1940). However, we have not had the opportunity to properly determine the procedural framework of competitive bidding.

The appellees suggest that our analysis of the public interest exception should be controlled by *Stoetzel & Sons v. City of Hastings,* 265 Neb. 637, 658 N.W.2d 636 (2003); *Greater Omaha Realty Co. v. City of Omaha,* 258 Neb. 714, 605 N.W.2d 472 (2000); and *Putnam v. Fortenberry,* 256 Neb. 266, 589 N.W.2d 838 (1999), where we concluded that the public interest exception was inapplicable. By and large, the appellees are correct in asserting that, much like the aforementioned cases, the current posture of Rath's appeal is due to the relief sought and the procedural and strategic choices made along the way. However, this is not enough, by itself, to preclude review. For if, as the appellees suggest, Rath forfeited any chance of review under the public interest exception because of past strategic or procedural choices, a party advancing mootness would need only to point a court's attention to the mistake that caused the appeal to be moot and review would be precluded. Such a rule would nearly eviscerate the public interest exception.

Additionally, unlike the cases cited by the appellees, the issue facing this court is not unique to the factual situation of the parties. Instead of an inquiry into specific bidding proposals, contracts, or bequests, the overarching issues in this case are generic and statutorily based. In sum, this issue is susceptible to and proper for review under the public interest exception.

***277** The final issue on appeal, whether Van Kirk's bid was responsive, does not meet the public interest exception. Much like *Stoetzel & Sons, supra; Greater Omaha Realty Co., supra;* and *Putnam, supra,* it entails a detailed examination into the specific factual circumstances of the case. Specifically, we would be required to examine the bid requirements, the authority retained by the City to waive informalities in the bidding process, and the specific bid submissions of the parties. Furthermore, paramount concern over this issue resides wholly with the parties, and no guidance is needed on an issue that, due to its unique facts, is unlikely to recur.

Thus, prior case law, including *Stoetzel & Sons, supra; Greater Omaha Realty Co., supra; Putnam, supra;* and *Koenig v. Southeast Community College,* 231 Neb. 923, 438 N.W.2d 791 (1989), compels a finding that Rath's appeal is moot. However, two of the aforementioned issues presented by Rath's appeal meet the public interest exception to the mootness doctrine and, although moot, merit review to provide guidance to public officials and future litigants in the competitive bidding arena.

IRREPARABLE HARM

Rath's amended petition requested temporary and permanent injunctive relief to prevent the City from (1) awarding the project to Van Kirk and (2) spending any public funds on the project until it was awarded to the lowest responsible bidder. In its order, the district court quoted *Central Neb. Broadcasting v. Heartland Radio,* 251 Neb. 929, 931, 560 N.W.2d 770, 771–72 (1997), for the standard for granting an injunction.

> As an injunction is an extraordinary remedy, it ordinarily should not be granted except in a clear case where there is actual and substantial injury.... Stated otherwise, injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.... As an injunction is an extraordinary remedy, it ****883** is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury.

(Citations omitted.) Initially, the court determined that Rath "failed to produce any evidence of substantial or irreparable ***278** injury" and denied his request for a temporary injunction. Nearly 8 months later, the court made the same determination and denied Rath's request for permanent injunctive relief. The court explained:

> The evidence to date is that money to pay off the debt on this project will come from rate payers. There was no additional evidence presented at final hearing as to whether the rates would increase or if so how much, by a $16,000.00 difference in bid price. The evidence could conceivably be that it will not increase rates due to certain economies of having a local contractor. There was no showing of irreparable injury to rate pay[e]rs or Mr. Rath as a taxpayer. The request for permanent injunction and other relief should therefore be denied.

On appeal, Rath argues the district court erred in holding that a taxpayer has to prove more than an illegal expenditure of public funds in order to establish irreparable injury. According to Rath, taxpayers have the right to enjoin the government's illegal expenditure of funds without any showing of individual financial loss. Rath relies exclusively on the following oft-cited rules of standing:

> " ' "[A] person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public *unless it involves an illegal expenditure of public funds* or an increase in the burden of taxation." ' " ...
>
> ... A resident taxpayer, *without showing any interest or injury peculiar to itself,* may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.

(Emphasis supplied.) *Chambers v. Lautenbaugh,* 263 Neb. 920, 928, 644 N.W.2d 540, 547–48 (2002). See, also, *Wasikowski v. Nebraska Quality Jobs Bd.,* 264 Neb. 403, 648 N.W.2d 756 (2002); *State ex rel. Steinke v. Lautenbaugh,* 263 Neb. 652, 642 N.W.2d 132 (2002); *Hagan v. Upper Republican NRD,* 261 Neb. 312, 622 N.W.2d 627 (2001); *Ritchhart v. Daub,* 256 Neb. 801, 594 N.W.2d 288 (1999); *Fitzke v. City of Hastings,* 255 Neb. 46, 582 N.W.2d 301 (1998); *Professional Firefighters of Omaha v. City of Omaha,* 243 Neb. 166, 498 N.W.2d 325 (1993); ***279** *Rexroad, Inc. v. S.I.D. No. 66,* 222 Neb. 618, 386 N.W.2d 433 (1986); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.,* 220 Neb. 504, 371 N.W.2d 258 (1985); *Haschke v. School Dist. of Humphrey,* 184 Neb. 298, 167 N.W.2d 79 (1969); *Martin v. City of Lincoln,* 155 Neb. 845, 53 N.W.2d 923 (1952). Essentially, Rath argues that his right to injunctive relief is established by proof that (1) he is a resident taxpayer and (2) taxpayer funds are being expended contrary to law.

The appellees agree that the rule quoted in *Chambers, supra,* gives Rath standing. However, the appellees argue that the district court's ruling was based on Rath's failure to meet the standard for granting a permanent injunction in *Central Neb. Broadcasting v. Heartland Radio,* 251 Neb. 929, 560 N.W.2d 770 (1997), and that Rath's *standing is not relevant to this determination.* According to the appellees, the aforementioned cases are confined to the issue of standing and are irrelevant to the propriety of granting an injunction. The appellees argue that in addition to satisfying the standing requirement, ****884** Rath had to make a separate showing of irreparable harm. On that account, the appellees argue that the court correctly found that Rath offered no evidence of irreparable harm and that therefore, Rath's petition was properly dismissed.

It is clear, and no one argues otherwise, that Rath has standing to maintain the action. See, *Wasikowski, supra; Chambers, supra.* Likewise, it is clear that taxpayers have an equitable interest in public funds and their proper application. See, *Niklaus v. Miller,* 159 Neb. 301, 303, 66 N.W.2d 824, 826 (1954) ("each taxpayer has such an individual and common interest in public funds as to entitle him to maintain an action to prevent their unauthorized appropriation"); *Rein v. Johnson,* 149 Neb. 67, 70, 30 N.W.2d 548, 552 (1947) ("resident taxpayers of the state have an equitable interest in the public funds of the state and in their proper application"). In fact, the public's interest in the proper appropriation of public funds is the main impetus behind the relaxation of standing requirements in this area. See, *Niklaus, supra; Rein, supra; Woodruff v. Welton,* 70 Neb. 665, 97 N.W. 1037 (1904). It is not clear, however, what a resident taxpayer alleging the illegal expenditure of public funds needs to show in order to establish irreparable harm.

***280** We conclude that the injury that flows from an illegal expenditure of public funds is inherently irreparable. An injury is irreparable "when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." *Central Neb. Broadcasting,* 251 Neb. at 933, 560 N.W.2d at 772, citing *Eidemiller Ice Co. v. Guthrie,* 42 Neb. 238, 60 N.W. 717 (1894). See, also, *World Realty Co. v. City of Omaha,* 113 Neb. 396, 404, 203 N.W. 574, 577 (1925) (" '[i]rreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great ...' ").

Obviously, plaintiff taxpayers have no problem determining the amount of money that was illegally expended. However, an eventual declaration of illegality does not void the obligations a municipal corporation has incurred for services expended on its behalf under the illegal contract. Thus, the taxpayer will not be made whole, i.e., the public coffer will not return to its original level. "Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was unenforceable because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received." *Gee v. City of Sutton,* 149 Neb. 603, 609, 31 N.W.2d 747, 751 (1948). In other words, if an action is "void not because of a lack of power but because of a failure to properly exercise existing power[,] the organization is bound to the extent that it has received the benefits of the action." *Fulk v. School District,* 155 Neb. 630, 643, 53 N.W.2d 56, 63 (1952). See, also, *Lanphier v. OPPD,* 227 Neb. 241, 417 N.W.2d 17 (1987).

For example, if a city acts within its power to enter into a contract for a construction project, as soon as a contractor expends efforts on behalf of the city, the contractor becomes entitled to compensation for those efforts, even if the contract is eventually declared null and void for failure to follow the applicable bidding statutes. This leaves the taxpayer with unavoidable and unrecoverable obligations and establishes the existence of irreparable harm.

***281** Moreover, the district court's ruling suggests that before taxpayers are able to ****885** obtain an injunction to prevent an illegal expenditure of public funds, they have to quantify the amount the expenditure will increase their rates or taxes. Yet, even if we assume a taxpayer action gives rise to a private claim for damages, it would be nearly impossible for an aggrieved taxpayer to quantify his or her pro rata share of damages. For example, an illegal expenditure of $500 would have almost no budgetary or tax consequences for a city with a multimillion-dollar budget. In fact, while it may be easy to determine the amount of the illegal expenditure, the true fiscal impact of the expenditure will often be indeterminable because of the myriad of fiscal and political choices that follow an expenditure of public funds.

Finally, if an absence of irreparable harm (beyond the illegality of the expenditure itself) prevents a court from deciding if an illegal expenditure of public funds has occurred, following the law becomes irrelevant to those entrusted to uphold it. This cannot be the case. If the inscription on the State Capitol Building is true and "[t]he salvation of the state is watchfulness in the citizen" (inscribed by Hartley Burr Alexander), legitimate taxpayer suits should not be unduly hindered and empty formalism should not prevent a determination on the merits.

In sum, we hold that a taxpayer seeking to enjoin an alleged illegal expenditure of public funds needs to prove only that the funds are being spent contrarily to law in order to establish an irreparable injury. Stated otherwise, irreparable harm should be assumed whenever a plaintiff proves an expenditure of public funds is contrary to law. See, *White v. Davis,* 30 Cal.4th 528, 556, 68 P.3d 74, 93, 133 Cal.Rptr.2d 648, 671 (2003) ("a taxpayer's general interest in not having public funds spent unlawfully" is "sufficient to afford standing to bring a taxpayer's action ... and to obtain a permanent injunction after a full adjudication on the merits"); *Kendall Appraisal Dist. v. Cordillera Ranch, Ltd.,* No. 04–03–00150–CV, 2003 WL 21696901 at *2 n. 2 (Tex.App. July 23, 2003) (standing is "conferred on the taxpayer, despite the absence of a distinct injury, precisely because imminent and irreparable harm will likely befall the taxpayer in the absence of equitable intervention").

***282** LOWEST RESPONSIBLE BIDDER

Rath's second assignment of error asserts that the City was required to award the contract to Westhoff because it was the lowest responsible bidder. Even though this assignment is moot with respect to the present parties, we review this issue under the public interest exception for guidance to public officials and future litigants. Section 18–507 governs contracting for the construction of improvements to the wastewater treatment facilities for all cities and villages in Nebraska. Among other things, § 18–507 requires that the "lowest responsible bidder" be awarded the contract.

> Upon approval of such plans, the governing body shall thereupon advertise for sealed bids for the construction of said improvements once a week for three weeks in a legal paper published in or of general circulation within said municipality, and the contract *shall be awarded to the lowest responsible bidder.*

(Emphasis supplied.) *Id.* Cities of the second class, such as Sutton, are also required to follow Neb.Rev.Stat. § 17–913 et seq. (Reissue 1997) when contracting for the construction of sewerage systems, including wastewater treatment facilities. These provisions also require that the contract be granted to the "lowest responsible bidder." See § 17–918.

****886** On a number of occasions, we have discussed the policy behind competitive bidding. We have said:

> [C]ompetitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money.... Competitive bid statutes exist to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price. Such statutes are enacted for the benefit of taxpayers.

(Citation omitted.) *Anderson v. Peterson,* 221 Neb. 149, 153, 375 N.W.2d 901, 904 (1985). By mandating that contracts be awarded to the lowest responsible bidder, the Nebraska

Legislature is seeking to protect taxpayers, prevent favoritism and fraud, and increase competition in bidding by placing bidders on equal footing. See, generally, *Philson v. City of Omaha,* 167 Neb. 360, 93 N.W.2d 13 (1958); *Fairbanks, Morse & Co. v. City of North Bend,* 68 Neb. 560, 94 N.W. 537 (1903); ***283** *State, ex rel. Whedon, v. York County,* 13 Neb. 57, 12 N.W. 816 (1882); *Merrick County v. Batty,* 10 Neb. 176, 4 N.W. 959 (1880).

At its heart, this dispute is about the role public officials should play in the awarding of contracts. A review of our cases makes it clear that public officials are granted discretion under the competitive bidding statutes. The real question, however, is determining when, if at all, their freedom of action is curtailed. As noted elsewhere, it is a delicate balancing act:

> These provisions should not be so strictly construed as to reduce the authorities to mere ministerial agents, since this would often defeat the purpose for which they are designed, by allowing unscrupulous contractors to defraud the city. On the other hand, if the authorities are vested with too broad discretionary powers, the way for fraudulent practices is again left open.

10 Eugene McQuillin, The Law of Municipal Corporations § 29.72 at 482 (3d ed.1999).

Determining the lowest responsible bidder is a two-step process. The first step is for the public body to determine which bidders are responsible to perform the contract. Responsibility, however, is not merely a synonym for a bidder's pecuniary ability. Rather, responsibility also pertains to a bidder's

> ability and capacity to carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to the particular task, and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, he could perform it strictly in accordance with its terms.

State, ex rel. Nebraska B. & I. Co., v. Board of Commissioners, 105 Neb. 570, 572–73, 181 N.W. 530, 532 (1921). See, also, *Day v. City of Beatrice,* 169 Neb. 858, 101 N.W.2d 481 (1960); *Best v. City of Omaha,* 138 Neb. 325, 293 N.W. 116 (1940).

Because many of the aforementioned qualities and characteristics are subjective in nature, we have recognized that public officials "do not act ministerially only, but exercise an official discretion" when "passing upon the question of the responsibility of bidders." See *State, ex rel. Nebraska B. & I. Co.,* 105 Neb. at 573, 181 N.W. at 532. See, also, *Best, supra;* 64 Am.Jur.2d *Public Works and Contracts* § 69 at 704 (2001) ("public bodies ***284** have discretion to determine that bidders are responsible"). Only bidders that are deemed responsible are proper for further consideration and ultimate approval.

****887** The second step in determining the lowest responsible bidder focuses on which of the responsible bidders has submitted the lowest bid. The lowest total price is not always dispositive of this question because public bodies retain an official discretion to determine which bid offers the best value to their constituents. See *Best,* 138 Neb. at 328, 293 N.W. at 118 ("[p]ublic administrative bodies possess a discretionary power in awarding contracts ... and in determining questions of public advantage and welfare"). Stated otherwise, the public body has discretion to award the contract to one other than the lowest of the responsible bidders whenever a submitted bid contains a relevant advantage. See, *Day, supra; Niklaus v. Miller,* 159 Neb. 301, 66 N.W.2d 824 (1954); *Best, supra.* For example, a bid that promises an early completion date or construction with higher quality materials could justify a public body's award of a construction contract to one other than the lowest of the responsible bidders. See, *Niklaus, supra* (earlier completion date justified city council's decision to award construction contract to higher cost bidder); *Best, supra* (noting importance of completion dates); *Worth James Const. v. Jacksonville Water Com'n,* 267 Ark. 214, 590 S.W.2d 256 (1979) (better quality pipe justified award of construction contract to higher cost bidder). Cf., *State v. City of Lincoln,* 68 Neb. 597, 94 N.W. 719 (1903) (difference in quality of coal justified award of contract to one other than lowest bidder); *Austin v. Housing Authority,* 143 Conn.

338, 122 A.2d 399 (1956) (difference in bids for insurance coverage justified award of contract to higher cost bidder).

Recognizing that public bodies exercise an official discretion when awarding bids, we have stated that courts will show deference when reviewing challenges to a public body's responsibility determinations and award decisions.

> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to ***285** interfere and substitute its judgment for that of the administrative body.

Best v. City of Omaha, 138 Neb. 325, 328, 293 N.W. 116, 118 (1940). In other words, whenever a public body has discretion to make a decision during the bidding process, a court is essentially limited to reviewing that decision for bad faith. See, *Day v. City of Beatrice,* 169 Neb. 858, 101 N.W.2d 481 (1960); *Best, supra; State, ex rel. Nebraska B. & I. Co., v. Board of Commissioners,* 105 Neb. 570, 181 N.W. 530 (1921).

The appellees argue that this case falls under the analysis of *Best, supra,* and *Day, supra,* and that the City Council's decision should be reviewed deferentially. Rath, on the other hand, argues that public bodies have no discretion when two responsible bidders submit identical bids except for price. In such cases, Rath argues, the public body can only award the project to the lowest of the responsible bidders.

Rath is correct. In *Day, supra,* we reaffirmed the validity of *State v. Cornell,* 52 Neb. 25, 71 N.W. 961 (1897), where we held that when the only difference in bids is price, no discretion exists on the part of a public body in awarding the contract; the responsible bidder with the lowest bid must be awarded the contract. In essence, if the bids for the improvements to the wastewater treatment facility are identical, they become bids to sell the ****888** same commodity. Thus, the actual value/cost of the bids can be objectively compared, and the public body has no discretion to award the bid to anyone other than the lowest of the responsible bidders. Cf., *Austin, supra; Otter Tail Power Co. v. Village of Elbow Lake,* 234 Minn. 419, 49 N.W.2d 197 (1951).

The policy behind this rule is simple: If responsible bidders submit identical bids—except on price—the public body is without a valid reason to award the project to anyone other than the lowest of the responsible bidders. Stated otherwise, if all factors are equal except price, only price should be considered. While courts should normally ignore mere assertions of favoritism and waste, absent evidence to the contrary, questions abound when public officials choose the costlier of two identical bids from responsible contractors. This is aptly demonstrated in the instant case when concerns were expressed that Van Kirk was awarded the bid only because it may have been a local, favored business.

***286** With reference to the facts in the present appeal, the district court, in its order, stated that both Westhoff and Van Kirk were deemed responsible bidders by the City Council. However, our review of the record shows that the City Council failed to make this determination. This failure would usually be fatal to the award, as a court cannot make an independent determination of responsibility. See *State, ex rel. Nebraska B. & I. Co., v. Board of Commissioners,* 105 Neb. 570, 181 N.W. 530 (1921). Determining the responsibility of bidders is a job for elected officials, and a court's only role is to review those decisions to make sure the public officials "did not act arbitrarily, or from favoritism, ill will, or fraud." *Id.* at 573, 181 N.W. at 532.

However, because review under the public interest exception to the doctrine of mootness is designed to provide guidance to public officials and future litigants, we must assume that Westhoff and Van Kirk were deemed responsible bidders. The next determination to be properly made is whether the City Council had discretion to award the bid to someone other than the lowest of the responsible bidders, i.e., it must be determined if the bids contained relevant differences. The appellees argue that the City Council highlighted the relevant differences in the bids. Specifically, they argue that Van Kirk's bid was superior because (1) Van Kirk is a local contractor and, therefore, familiar with the varied soil types in the area; (2) Van Kirk is a local contractor that would be immediately available for future repairs and maintenance; and (3) Van Kirk has past experience working with the project engineer.

Initially, even if we were to assume that some of these alleged advantages would favor one contractor over another in either of the bidding stages, there was no evidence before the City Council to support the first two claims. Moreover, all of the alleged advantages rest on factors outside of the bid and the bidding specifications. Therefore, while some of these factors might have been relevant to determine the bidders' responsibility, they are irrelevant when determining the similarity of the bids. If the City were truly concerned about a contractor's familiarity with the soil types in the geographical area, it could have included appropriate requirements in the invitation to bid or the bidding instructions. Furthermore, future maintenance or ***287** repairs to the treatment facility is wholly separate from the proposed improvements, and the record contains no contractual provision preventing the City from using any contractor, including local contractors, for future repairs. Lastly, to the extent experience with the project engineer is relevant, the evidence illustrates ****889** that Westhoff had worked with the project engineer at least 11 times previously.

Our review of the bids shows that they were identical in every respect but price. The bids, per the project engineer's instructions, contain the exact same specifications and dates of completion. Because the bids were identical except for price, the City Council would have had no discretion to award the contract to anyone other than Westhoff, the lowest of the responsible bidders.

Lastly, Van Kirk argues the City retained the discretion to award the bid to one other than the lowest responsible bidder because the invitation to bid purported to give the City the right to accept whatever bid was in the best interests of the City in its sole discretion. This argument is without merit. A party cannot, by contractual agreement with another party, obtain the power to do something that state law forbids. See *Moore v. Eggers Consulting Co.,* 252 Neb. 396, 406, 562 N.W.2d 534, 542 (1997) ("[i]f an act is prohibited by statute, an agreement in violation of the statute is void").

In sum, a public body has broad discretion in the awarding of public contracts. Initially, that discretion allows a public body to determine whether a bidder is responsible. It also allows a public body to look beyond a bid's stated price to determine the true value of the bid. Stated otherwise, a public body has the authority to determine which of the responsible bidders has submitted the bid that offers the best value to its constituents. However, when responsible bidders submit identical bids, the public body's freedom of action is curtailed and it must award the contract to the lowest of the responsible bidders. Contracts let in contravention of this rule, i.e., in contravention of §§ 17–918 and 18–507, are illegal and can be enjoined.

CONCLUSION

For the foregoing reasons, we conclude that a resident taxpayer seeking to enjoin an illegal expenditure of public funds ***288** establishes the requisite irreparable harm by proving that the funds are being spent contrary to law. In addition, we determine that a public body has no discretion to award a bid to any entity other than the lowest bidder when two or more responsible bidders *submit identical bids* except for price. However, because we have concluded that the instant appeal is moot and that the above-stated determinations are made based on the public interest exception to the mootness doctrine, we dismiss the present appeal.

APPEAL DISMISSED.

HENDRY, C.J., and WRIGHT, J., not participating.

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