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Clerk of Circuit Court
Waukesha County
2022CV000515

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

WISCONSIN MANUFACTURERS
AND COMMERCE, INC.,

Plaintiff,

v.

Case No. 22-CV-515

VILLAGE OF PEWAUKEE,

Defendant.

**BRIEF IN SUPPORT OF MOTION FOR SANCTIONS
FOR CONTEMPT OF COURT**

INTRODUCTION

On March 13, 2024, the Wisconsin Court of Appeals concluded that the Village of Pewaukee's transportation user fee or TUF "is an impermissible tax." (R. 74:2.)¹ Yet Pewaukee continued to impose its TUF on its utility customers for several more months, and it has not reimbursed them for those payments.

Pewaukee has thus committed contempt of the court of appeals, making a remedial sanction appropriate here. As a remedial sanction, this Court should order Pewaukee to reimburse its taxpayers for those ill-gotten payments.

The contempt here is especially egregious because it was committed by the government. "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Elkins v. United States*, 364 U.S. 206, 223 (1960). If Pewaukee village officials do not need to comply

¹ *Wisconsin Manufacturers & Com., Inc. v. Vill. of Pewaukee*, 2024 WI App 23, ¶3, 411 Wis. 2d 622, 5 N.W.3d 949.

with the court of appeals' decision, then why should Pewaukee residents need to comply with the Pewaukee village code? Respect for the rule of law compels this Court to find Pewaukee in contempt and impose a remedial sanction.

BACKGROUND

The court of appeals issued an unpublished, summary disposition in February 2024, holding that Pewaukee's so-called transportation user fee or TUF is an "impermissible tax." (R. 71:2.) At the request of Plaintiff Wisconsin Manufacturers and Commerce Inc. (WMC), the court of appeals withdrew that decision. (R. 73.) The court of appeals subsequently issued an authored decision in March 2024, once again concluding that the TUF is an "impermissible tax." (R. 74:2.)

Pewaukee has imposed its TUF on its utility customers for several months after the court of appeals struck it down in March 2024. Pewaukee has not yet reimbursed its utility customers for all those payments.

"A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related." Wis. Stat. § 785.03(1)(a). So, "a contempt proceeding is derivative of and attached to the principal action in which it arises." *Evans v. Luebke*, 2003 WI App 207, ¶15, 267 Wis. 2d 596, 671 N.W.2d 304 (citation omitted). An aggrieved person must be "someone other than the trial court." *Id.* ¶23.

Here, the movants and aggrieved persons are WMC and Hawthorne Place LLC.² WMC brings this contempt motion on behalf of its members who have paid the unlawful TUF since the court of appeals' March decision. As a utility customer and owner of property in Pewaukee, Hawthorne Place LLC brings this motion on its own behalf and on behalf of all taxpayers who have paid the unlawful TUF since the court of appeals' March decision. *See City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988) (recognizing a taxpayer's right to sue "in his individual capacity and as representative of similarly situated taxpayers").

ARGUMENT

I. This Court should hold a hearing on this contempt motion unless the parties stipulate the relevant facts.

Wisconsin Stat. § 785.03(1)(a) requires, "at a minimum, notice that sanctions for contempt are being sought, and in the absence of stipulated facts, an evidentiary hearing sufficient to permit the court to make specific findings regarding whether the alleged contemnor intentionally disobeyed its orders." *Evans*, 2003 WI App 207, ¶25.

Unless the parties here stipulate the relevant facts, this Court must hold a hearing to determine the facts.³

² Hawthorne Place LLC owns the Hawthorne Place apartments in the Village of Pewaukee. Hawthorne Place LLC has a business address of 1105 Hawthorne Place, Village of Pewaukee, Wisconsin 53072.

³ This Court should allow additional briefing after it holds a hearing on this contempt motion or after the parties stipulate the relevant facts.

II. Pewaukee committed contempt by intentionally resisting the court of appeals' authority.

A. Pewaukee continued to impose its TUF after the court of appeals struck it down, and Pewaukee has continued this contempt by not reimbursing its utility customers for those payments.

“A party may be found in contempt for, among other things, ‘intentional ... [d]isobedience, resistance or obstruction of the authority, process or order of a court.’” *State ex rel. Zignego v. Wisconsin Elections Comm’n*, 2021 WI 32, ¶40, 396 Wis. 2d 391, 957 N.W.2d 208 (alterations in original) (quoting Wis. Stat. § 785.01(1)(b)). “The ‘purpose of contempt is to uphold the authority and dignity of the court.’” *Id.* (citation omitted).

Here, the Wisconsin Court of Appeals concluded that Pewaukee’s TUF “is an impermissible tax.” (R. 74:2.) Despite that clear statement of the TUF’s illegality, Pewaukee has continued to impose this unlawful tax. Pewaukee has billed its utility customers with its illegal TUF twice since the court of appeals decided this case: once on April 10 and again on July 10. (Ex. A–E.)⁴ By continuing to enforce this TUF after the court of appeals struck it down, Pewaukee has intentionally committed “[d]isobedience, resistance or obstruction of the authority, process or order of a court.” Wis. Stat. § 785.01(1)(b).

It is immaterial that the court of appeals’ decision does not expressly enjoin Pewaukee from imposing its TUF. A court’s order is enforceable by contempt even if

⁴ Exhibits A–D are copies of the Village of Pewaukee utility bills for the Hawthorne Place apartments, with billing dates of January 10, 2024; April 10, 2024; July 10, 2024; and October 10, 2024. The TUF does not appear on the October 10 bill. Exhibit E is a copy of the Village of Pewaukee utility bills for another utility customer, with billing dates of April 10, 2024, and July 10, 2024.

it does not contain an injunction. *Carney v. CNH Health & Welfare Plan*, 2007 WI App 205, ¶¶16–17, 305 Wis. 2d 443, 740 N.W.2d 625. Indeed, when a court declares a government policy invalid, the declaration “necessarily operates to enjoin further enforcement.” *Midwest Renewable Energy Ass’n v. Pub. Serv. Comm’n*, 2024 WI App 34, ¶79, 412 Wis. 2d 698, 8 N.W.3d 848.

B. The petition for review did not give Pewaukee a license to resist the court of appeals’ authority and decision striking down the TUF tax.

Pewaukee might argue that it was not required to comply with the court of appeals’ March decision while its petition for review was pending, but that argument would have no merit. “Merely taking an appeal does not stay the execution or enforcement of a judgment.” *Herkert v. Stauber*, 127 Wis. 2d 87, 89, 378 N.W.2d 704 (Ct. App. 1985) (citing Wis. Stat. § 808.07(1)). Instead, under Wis. Stat. § 808.07(1), “the general rule is that the enforcement of a judgment is not stayed pending appeal.” *Chase Lumber & Fuel Co. v. Chase*, 228 Wis. 2d 179, 203, 596 N.W.2d 840 (Ct. App. 1999).

This general rule applies to court of appeals decisions by virtue of Wis. Stat. § (Rule) 809.84. “Under Wis. Stat. § (Rule) 809.84, appeals are governed by the rules of civil procedure unless the appellate rules or the circumstances of the appeal require a different result.” *Jadair Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 200, 562 N.W.2d 401 (1997) (footnote omitted). Pursuant to Rule 809.84, the general rule in § 808.07(1) renders a court of appeals decision enforceable while the appeal continues. Neither exception to this general rule applies here.

Turning to the first exception under Rule 809.84, the rules of appellate procedure do not require a different result. The rules of appellate procedure merely state that “[e]xcept as provided in [Wis. Stat. §] 809.24, the filing of [a] petition [for review] stays *further proceedings* in the court of appeals.” Wis. Stat. § (Rule) 809.62(5) (emphasis added). A stay of proceedings is not the same as a stay of a judgment. Circuit court *proceedings* are generally stayed pending an appeal. *State ex rel. Unnamed Person No. 1 v. State*, 2003 WI 30, ¶58 n.16, 260 Wis. 2d 653, 660 N.W.2d 260 (citing Wis. Stat. § 808.075). Nevertheless, a circuit court’s *judgment* is generally enforceable pending an appeal. *Chase Lumber*, 228 Wis. 2d at 203.

The same distinction is true of the court of appeals. Rule 809.62(5) deprives the court of appeals of jurisdiction to act while a petition for review is pending, like how § 808.075 generally deprives a circuit court of jurisdiction while an appeal is pending. Nevertheless, a court of appeals decision remains enforceable absent a stay, even if a petition for review is pending—just like how a circuit court’s judgment remains enforceable during an appeal absent a stay. *See* Wis. Stat. § 808.07(1); *see also* Wis. Stat. § (Rule) 809.84.

Moving on to the second exception under Rule 809.84, the circumstances of this case do not require a different result, either. Arguably, Pewaukee did not need to comply with the court of appeals’ February decision after it was withdrawn. But Pewaukee *was* required to comply with the court of appeals’ March decision. Indeed, that decision was ordered published on April 24, 2024. (Ex. F.)⁵ “Published court of

⁵ Exhibit F is the court of appeals’ publication order dated April 24, 2024.

appeals decisions have ‘statewide precedential effect’ until overruled by [the Wisconsin Supreme Court].” *Skindzelewski v. Smith*, 2020 WI 57, ¶11 n.5, 392 Wis. 2d 117, 944 N.W.2d 575 (quoting *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997)). Because the court of appeals’ March decision was binding precedent *statewide* after it was published, it certainly is and was binding on Pewaukee after it was issued.

Even if the petition for review stripped the court of appeals’ March decision of effect (it didn’t), Pewaukee still committed contempt of court. Pewaukee imposed its TUF on taxpayers on April 10, 2024. (*See, e.g.*, Ex. B; Ex. E.) Pewaukee filed its petition for review two days later, on April 12. (*See* R. 75.) The court of appeals’ decision was surely in effect on April 10.

And for the reasons just stated, the court of appeals’ March decision was also in effect when Pewaukee imposed its TUF in July 2024. By continuing to impose the TUF after the court of appeals struck it down, Pewaukee acted as if the court of appeals’ decision was stayed, but it wasn’t. By flouting the court of appeals’ decision, Pewaukee committed contempt of court.

III. To protect the court of appeals’ authority and dignity, this Court should impose remedial sanctions against Pewaukee.

“If a court finds contempt under Wis. Stat. § 785.01(1)(b) has occurred, then the court must consider Wis. Stat. § 785.04(1), which provides for remedial sanctions.” *Carney*, 2007 WI App 205, ¶24. As relevant here, remedial sanctions may include “[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.” *Frisch v. Henrichs*, 2007

WI 102, ¶35, 304 Wis. 2d 1, 736 N.W.2d 85 (alteration in original) (quoting Wis. Stat. § 785.04(1)(a)). A remedial sanction is “imposed for the purpose of terminating a *continuing* contempt of court.” *Id.* (emphasis in original) (quoting Wis. Stat. § 785.01(3)).

Evans is instructive here on the nature of a continuing contempt involving money. In *Evans*, the alleged contempt was an attorney’s alleged failure to deposit certain settlement funds into restricted accounts as ordered by a court. *Evans*, 2003 WI App 207, ¶22. The court of appeals held that the alleged contempt was continuing “[s]o long as no properly restricted accounts containing the settlement proceeds existed.” *Id.*

Here, Pewaukee’s contempt is continuing because it has not reimbursed all taxpayers for the TUF money that it unlawfully collected from them after the court of appeals’ March decision. Pewaukee committed contempt by collecting payments for its TUF after the court of appeals struck down the TUF in March. This contempt is continuing so long as Pewaukee does not put that money where it rightly belongs: back in the pockets of the persons who were unlawfully forced to pay it.

The most appropriate remedial sanction here is “[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.” Wis. Stat. § 785.04(1)(a). By keeping the TUF on utility bills after the court of appeals struck it down, Pewaukee financially harmed its utility customers. Ordering Pewaukee to refund those unlawfully obtained payments would compensate the utility customers for this loss.

IV. This Court should award attorney fees to the movants.

Wisconsin Stat. § 785.04(1)(a) “authorizes the trial court to award attorney’s fees and other litigation costs” to the parties that filed a contempt motion. *Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 320, 332 N.W.2d 821 (Ct. App. 1983).

Here, the Movants might file a separate motion for costs and attorney fees under Wis. Stat. § 785.04(1)(a). If they do, the Court should grant that motion.

CONCLUSION

This Court should grant the relief requested in the motion for contempt.

Dated this 12th day of November 2024.

Respectfully submitted,

Electronically signed by
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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 12th day of November 2024.

Electronically signed by

Scott E. Rosenow

Scott E. Rosenow