
No. 2023AP690

In the Wisconsin Court of Appeals

DISTRICT II

WISCONSIN MANUFACTURERS AND COMMERCE, INC.,
Plaintiff–Appellant,

v.

VILLAGE OF PEWAUKEE,
Defendant–Respondent.

On Appeal from a Judgment Entered in
the Waukesha County Circuit Court, the
Honorable Michael J. Aprahamian,
Presiding

**APPELLANT’S MOTION AND SUPPORTING
MEMORANDUM FOR THE COURT OF APPEALS TO
WITHDRAW AND AUTHOR ITS OPINION**

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

*Attorney for Plaintiff–Appellant
Wisconsin Manufacturers and Commerce, Inc.*

INTRODUCTION

Pursuant to Wis. Stat. §§ (Rules) 809.14 and 809.23(4)(c), Plaintiff–Appellant Wisconsin Manufacturers and Commerce, Inc. (“WMC”) hereby moves the Court of Appeals to withdraw its summary disposition in this case and issue an authored opinion recommended for publication. WMC is not requesting that this Court make any substantive changes to its opinion.

As explained more fully below, the Court’s opinion in this case should be authored and recommended for publication because this case is of substantial and continuing public interest. In this case, the Court of Appeals held that the Village of Pewaukee’s “transportation user fee” or TUF “is an impermissible tax under our supreme court’s decision in *Wisconsin Property Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, 408 Wis. 2d 287, 992 N.W.2d 100.” *WMC, Inc. v. Vill. of Pewaukee*, No. 2023AP690, 2024 WL 462594, at *1 (Wis. Ct. App. Feb. 7, 2024) (summary disposition). The Court explained that its “analysis is straightforward in light of *Town of Buchanan*, 408 Wis. 2d 287, which our supreme court issued on June 29, 2023, just a few weeks after WMC filed its opening appellate brief.” *Id.* at *2.¹

WMC agrees that the unlawfulness of Pewaukee’s TUF is straightforward, but a published opinion in this case is warranted because municipalities have been flouting the unanimous decision in *Town of Buchanan*. A published opinion in this case could help reduce or eliminate the need to separately litigate the validity of the TUFs in those other municipalities. Oddly enough, the *circuit court’s* decision in this case—which was summarily reversed—is citable for persuasive value. But this Court’s opinion in this case will be uncitable if it remains a summary disposition. To remedy that citation disparity and provide much-needed guidance to the public, this Court should withdraw its summary disposition and issue an authored opinion recommended for publication.

¹ To clarify, the supreme court decided *Town of Buchanan* two days (not a few weeks) after WMC filed its opening appellate brief.

Our supreme court has urged this Court to publish its opinions more often. “The Wisconsin appellate court system functions fairly and efficiently only if the court of appeals fulfills its responsibility to publish opinions according to Wis. Stat. § (Rule) 809.23(1).” *Deutsche Bank Nat’l Tr. Co. v. Wuensch*, 2018 WI 35, ¶ 26 n.13, 380 Wis. 2d 727, 911 N.W.2d 1. When an opinion “satisfies the criteria for publication” but goes unpublished, “[t]his not only deprives the bench and bar of important guidance on legal issues of substantial and continuing public interest, it risks inconsistent disposition of cases across Wisconsin.” *Id.*

APPLICABLE LEGAL STANDARDS

“A person may request that a per curiam opinion that does not address issues of appellate jurisdiction or procedure be withdrawn, authored and recommended for publication.” Wis. Stat. § (Rule) 809.23(4)(c).² One criterion for publishing an opinion by this Court is whether the opinion “[d]ecides a case of substantial and continuing public interest.” Wis. Stat. § (Rule) 809.23(1)(a)5.

ARGUMENT

This Court should withdraw its summary disposition and issue an authored opinion recommended for publication.

A published opinion in this case would have three benefits. It would provide guidance to municipalities that are continuing to enforce their TUFs even after *Town of Buchanan*. It would minimize the need for lawsuits over other TUFs. And it would ensure that this Court’s opinion has more statewide effect than the circuit court’s decision that was summarily reversed.

² A summary disposition is a per curiam opinion for purposes of Rule 809.23(4)(c). The Court’s summary disposition here refers to itself as an “opinion and order.” A per curiam opinion is “attributed to the entire panel of judges who have heard the appeal and not signed by any particular judge on the panel.” Per Curiam, Black’s Law Dictionary (11th ed. 2019). The summary disposition in this case is thus a per curiam opinion that may be withdrawn, authored, and then recommended for publication.

A. Municipalities have been flouting *Town of Buchanan* and will likely continue to do so if this Court does not publish its opinion in this case.

Before *Town of Buchanan* was decided in June 2023, more than a dozen municipalities in Wisconsin had adopted or were considering adopting a TUF.³

Town of Buchanan should have put an end to TUFs in Wisconsin. In *Town of Buchanan*, our supreme court unanimously agreed with the argument that “Wisconsin Statutes do not authorize municipalities to impose a TUF on property owners based on estimated use of the municipality’s roads.” *Town of Buchanan*, 2023 WI 58, ¶ 2. The court held that, despite being labeled a fee, the town’s TUF was a property tax. *Id.* ¶¶ 10, 18. As a property tax, the town’s TUF was unlawful for several reasons: it was not calculated based on property value, it applied to tax-exempt property, and it was subject to and exceeded the levy limit in Wis. Stat. § 66.0602. *Id.* ¶¶ 18–19, 22–31.

Shockingly, even after *Town of Buchanan*, several municipalities in Wisconsin still have TUFs, and “several more communities are in various stages of consideration.”⁴

The City of Neenah, for example, announced plans last fall “to sharply increase” its TUF (which Neenah calls a “Transportation Assessment Replace Fee”).⁵ Neenah’s “City Attorney David Rashid said he is comfortable with the

³ See, e.g., Rich Kremer, *Wisconsin Public Radio*, “Wisconsin Supreme Court to rule on whether Transportation Utility Fees are legal to fund roads” (March 15, 2023), <https://www.wpr.org/justice/wisconsin-supreme-court-rule-transportation-utility-fees-tufs-legal-way-fund-roads-repair>.

⁴ Jeff Bollier, *Green Bay Press-Gazette*, “Green Bay to study replacing wheel tax with a quarterly utility fee for road work” (Dec. 19, 2023), <https://www.greenbaypressgazette.com/story/news/local/2023/12/19/green-bay-largest-wisconsin-city-to-consider-utility-to-fund-road-work/71973824007/>.

⁵ Duke Behnke, *Appleton Post-Crescent*, “Neenah plans to increase transportation fee to cover street reconstruction projects” (Sep. 28, 2023), <https://www.postcrescent.com/story/news/local/2023/09/28/neenah-plans-to-double-its-transportation-fee-to-cover-rising-costs/70979122007/>.

legality of Neenah's fee."⁶ According to Attorney Rashid, Neenah's transportation charge "never was deemed to be a tax. It's a fee. It also was a replacement for assessments. Those are the two principal distinctions between what [Neenah is] doing and what (Buchanan) did."⁷

Attorney Rashid's two grounds for distinguishing Neenah's transportation tax from the Town of Buchanan's are unfounded. Like Neenah, the Town of Buchanan labeled its transportation tax a "fee." *Town of Buchanan*, 2023 WI 58, ¶ 10. Also like Neenah, Buchanan adopted that tax as an alternative to special assessments. *Id.* ¶ 3. Neenah thus has no legal basis for enforcing (let alone doubling) its transportation tax, in plain violation of *Town of Buchanan*. Because Neenah is in District II of the Court of Appeals, any future litigation challenging Neenah's transportation tax may come before this Court.

Also after the *Town of Buchanan* decision, the City of Green Bay last December "has become the largest Wisconsin city to consider whether to create a transportation utility to pay for road construction costs."⁸ Contrary to the Court of Appeals' decision in the present case, the *Green Bay Press-Gazette* asserted that "towns do not have the capability [to impose transportation utility charges], but villages and cities do."⁹ Despite acknowledging the supreme court's *Town of Buchanan* decision, the *Green Bay Press-Gazette* cited the circuit court's decision in the present case for the notions that "the village of Pewaukee has the authority under 'home rule' law to create a transportation utility and charge a fee, that the charge is a fee not a tax, and that the utility does not run afoul of any existing state law."¹⁰

⁶ *Id.*

⁷ *Id.* (second alteration in original).

⁸ Bollier, *supra* note 4.

⁹ *Id.*

¹⁰ *Id.*

If the Court of Appeals' opinion in this case remains a summary disposition, municipalities will likely continue to effectively ignore *Town of Buchanan*. Indeed, shortly after the supreme court decided *Town of Buchanan*, the League of Wisconsin Municipalities wrote an article arguing that *Town of Buchanan* was a "limited" decision that did not apply to the Village of Pewaukee.¹¹ At least one municipality—the Town of Gibraltar—cited that League article as a reason for denying a challenge to its TUF.¹² Apparently, Gibraltar does not share the *Green Bay Press-Gazette's* view that the *Town of Buchanan* decision forbids towns from imposing TUFs. Instead, Gibraltar seems to think that the *Town of Buchanan* decision is limited to the Town of Buchanan.

Because the supreme court's unanimous decision striking down the Town of Buchanan's TUF did not convince municipalities to repeal their unlawful TUFs, then this Court's summary disposition in this case certainly will not. But if this Court withdraws its summary disposition and issues an authored opinion that ultimately gets published, then municipalities should begin to realize that the supreme court's decision in *Town of Buchanan* applies outside the Town of Buchanan.

Quite clearly, this case has "substantial and continuing public interest." Wis. Stat. § (Rule) 809.23(1)(a)5.

B. A published opinion in this case should reduce or eliminate the need for future litigation over TUFs, thus preserving judicial resources.

Bringing a separate lawsuit against every Wisconsin municipality with a TUF would be a time-consuming and onerous process, not only for the lawyers involved but also for the courts. Some lawsuits against TUFs may be financially unviable, given the high price that private attorneys charge compared to the few-hundred to few-thousand dollars per year that the typical

¹¹ The League's article is included with this motion as Exhibit 1.

¹² A letter challenging the Town of Gibraltar's TUF and the Town of Gibraltar's response are included with this motion as Exhibits 2 and 3, respectively. These two documents' exhibits are omitted.

TUF imposes on most property owners. Pro bono attorneys who work at non-profit law firms brought the present case against Pewaukee and the *Town of Buchanan* case. But non-profit law firms in Wisconsin likely do not have the resources to sue every municipality that has a TUF.

The unfortunate reality is that if this Court does not issue a published opinion in this case, some clearly unlawful TUFs will continue to be enforced (and increased) around Wisconsin. And some municipalities may adopt new TUFs.

Some of those municipalities may eventually be sued over their TUFs. But if this Court publishes its opinion in this case, those municipalities may voluntarily repeal their TUFs, possibly rendering those future lawsuits unnecessary. And even if those potential lawsuits come to fruition, they would be resolved more quickly and easily if the Court's opinion in this case were published.

Again, this case is “of substantial and continuing public interest.” Wis. Stat. § (Rule) 809.23(1)(a)5.

C. A published opinion in this case would preserve the hierarchy of Wisconsin's courts.

Wisconsin Stat. § (Rule) 809.23 allows citations to circuit court decisions for their persuasive value. *Predick v. O'Connor*, 2003 WI App 46, ¶ 12 n.7, 260 Wis. 2d 323, 660 N.W.2d 1. By contrast, the Court of Appeals' summary dispositions are not citable in Wisconsin courts as precedent or even for persuasive value. *State ex rel. Kurtzweil v. Sawyer Cnty. Zoning Bd. of Appeals*, 2023 WI App 43, ¶ 19 n.4, 409 Wis. 2d 77, 995 N.W.2d 286. An attorney may be sanctioned for citing an uncitable Court of Appeals opinion. *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 12 n.3, 305 Wis. 2d 658, 741 N.W.2d 256.

That disparity is on full display here. In any possible future lawsuit challenging a TUF, the circuit court's decision in the present case might be citable for persuasive value—but this Court's summary disposition would not be. If a municipality were to cite the circuit court's decision for persuasive value, the opposing counsel may be reluctant to note that the circuit court's

decision got reversed, lest the attorney be sanctioned for referring to an uncitable Court of Appeals opinion.

This citation disparity is yet another reason to issue an authored opinion that is recommended for publication in this case.

* * *

At bottom, municipalities are undermining our supreme court's authority by continuing to enforce (and perhaps increasing) their TUFs, despite the clear ruling in *Town of Buchanan* that TUFs are illegal for several reasons. Nothing short of a published Court of Appeals opinion in this case is likely to convince municipalities to comply with the supreme court's decision in *Town of Buchanan*.

CONCLUSION

This Court should withdraw its summary disposition in this case and issue an authored opinion that is recommended for publication.

Dated this 26th day of February 2024.

Electronically signed by

Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

*Attorney for Plaintiff–Appellant
Wisconsin Manufacturers and Commerce, Inc.*