

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH V

BROWN COUNTY

GREEN BAY PROFESSIONAL
POLICE ASSOCIATION, et. al,

Plaintiff,

Case No. 11-CV-2195

MOTION HEARING

-vs-

December 20, 2012

CITY OF GREEN BAY, et. al,

Defendant.

THE HONORABLE
MARC A. HAMMER
PRESIDING

APPEARANCES:

JONATHAN CERMELE, Attorney at Law, 6310 West Bluemond Road, #200, Milwaukee, Wisconsin 53213, appearing on behalf of the Plaintiffs.

JULIANA RUENZEL, Corporation Counsel for Brown County, 305 East Walnut Street, Suite 680, Green Bay, Wisconsin 54301, appearing on behalf of Brown County.

GEOFFREY LACY, Attorney at Law, 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, appearing on behalf of the City of Green Bay.

Sheri L. Piontek
Official Reporter

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(Proceedings began at 12:02 p.m.)

THE COURT: I'll call Green Bay Professional Association et. al, versus the City of Green Bay, et. al. This is 11-CV-2195. The Association appears by and through its attorney, Mr. Cermele. The City of Green Bay appears by Mr. Lacy?

MR. LACY: Correct, Your Honor.

THE COURT: And who do you have with you?

MS. RUENZEL: Attorney Juliana Ruenzel, the Corporation Counsel for Brown County, appearing for Brown County.

THE COURT: This is on the Court's calendar for hearing on motion for mandamus and/or in the alternative, motion for injunctive relief based upon the decision -- based in part on the decision that I had entered involving the interpretation of Act 32.

I reviewed the written materials. I'm not clear as to which argument you're advancing. Mr. Lacy, in his brief, anticipates some arguments, but I don't want to anticipate the arguments. I want to know what the thrust of your argument is.

MR. CERMELE: Sure. Let me first explain what we've not asking for.

THE COURT: Sure.

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MR. CERMELE: We're not asking at this point in time that you reconsider your decision on 111.70(4)(mc)6. We're not relitigating that regardless of the assertions of counsels for the defendants. We understand your decision. Your decision is fairly clear. The municipalities under that subdivision get to design and select their health care plan. We can't bargain that decision, nor can we bargain the impact of that decision. We get that.

However, that decision has now created a need for clarification given what the parties had done in 2010 and 2012. Essentially what the parties did was to adopt by means of resolution specific terms, at least with the County, very specific terms that are contained in the resolution, identifying the precise deductibles, co pays, et cetera, that would apply to deputy sheriffs. The City on the other hand resolved to adopt the terms and conditions of the contract.

Now, essentially both municipalities adopted the specific terms and conditions of the contract and that's important because there's a provision in each contract that has not been identified by any party. And I'd like to bring that to the Court's attention at this point in time.

In my moving papers, there was an affidavit that I

1 had filed, Exhibit 2 of that affidavit, at page 30,
2 Exhibit 2 is the labor agreement between the deputies
3 and the County. Page 30 contains Article 48 and it
4 reads Amendment Provisions, quote: "This agreement is
5 subject to amendment, alteration, or addition only by a
6 subsequent written agreement between and executed by
7 the County and the bargaining unit where mutually
8 agreeable."

9 That same language is contained in the labor
10 agreement between the City of Green Bay and the
11 Green Bay Professional Police Association. And I
12 provided counsel earlier with a copy of an affidavit
13 that contains the entire labor agreement. Neither --
14 none of the parties provided that, and I'd like to
15 provide that to the Court at this time.

16 Counsel, do you have a copy?

17 MS. RUENZEL: No.

18 MR. LACY: No.

19 THE CLERK: Did you want me to mark it?

20 MR. CERMELE: You don't need to mark it as
21 an exhibit as long as it's filed with the court, that's
22 fine.

23 THE CLERK: Okay.

24 MR. CERMELE: I would then direct counsel
25 and the Court to page 41 of that agreement. Article

1 34, which creates -- which -- excuse me -- identifies
2 almost identical language to what we see in the
3 agreement of the County. And it states Amendment
4 Procedure. Quote: "This agreement is subject to
5 amendment, comma, alteration, or addition only by a
6 subsequent written agreement between and executed by
7 the City and the bargaining unit where mutually
8 agreeable."

9 That language is important. It's not just the
10 language in the County resolution where they
11 specifically identify deductibles, co pays, the costs
12 that the deputies are going to pay. It's the fact that
13 the County in resolving to approve that labor agreement
14 not only adopted those specific itemized costs. They
15 adopted all terms of this, and by doing so, they agreed
16 to be bound by each provision, including the provisions
17 we've just identified.

18 What the County and the City by adopting a
19 resolution containing the same language essentially it
20 was to codify concepts we in the labor law community
21 refer to as the status quo, all right. So my position
22 is that the 2010 resolutions be it by the County or by
23 the City not only codified the terms and conditions of
24 these agreements but made clear that the County would
25 and the City would continue to honor the terms and the

1 condition of the agreement until they have a new
2 agreement, a new contract.

3 Now, why is that important? Well, it's important
4 because we have this intervening event that was created
5 by Act 32 that says the design and election of health
6 care plans and its impact on wages, hours, and
7 conditions is no longer something that may be
8 bargained. It is, in fact, a prohibited subject of
9 bargaining.

10 Now, what does that mean? Very clearly, by its
11 terms, and you have identified this, we cannot bargain
12 those things. The legislature never said that those
13 terms are illegal. The legislature never said that you
14 can't put specific planned design items and costs in a
15 labor agreement, and the legislature certainly never
16 said that once they're in an agreement, they
17 automatically evaporate simply because you can no
18 longer bargain these things.

19 A good example would be 111.70(4)(mc)6 does not
20 provide a municipality from providing public safety
21 employees free health care. They could do that. They
22 could say we're going to provide free health care and
23 we're going to put it in your contract. They can do
24 that. We can't bargain for those things, but they can
25 do that.

1 So what we have is we have an issue which is a
2 first impression, namely, whether or not the
3 discretionary authority that the municipalities have by
4 means of designing and selecting health care plans
5 trumps a mandatory ministerial duty that the employers
6 have, County and City, in complying with the terms of
7 the contracts which they adopted by means of
8 resolution.

9 My position is simple. That discretionary
10 authority to design and select doesn't allow them to
11 simply say the language that we agreed to and we
12 resolved to be bound by and we resolve to provide
13 enough money and funds to take care of suddenly
14 evaporates. It stays there because of the specific
15 provisions I have identified.

16 What does that mean? It doesn't stay there
17 *ad infinitum*. It don't stay there until I'm in the
18 grave. It stays there until the parties enter into a
19 subsequent agreement. That's what Article 34 in the
20 Green Bay's agreement says and that's what Article 48
21 in the County, Brown County's agreement says.

22 So my position is that we do meet the standard of
23 mandamus. The contracts and the resolutions that
24 adopted the specific terms of those contracts create a
25 clear, specific right. It's free from substantial

1 debt. That right is not impinged or trumped by the
2 municipality's ability to design and select health care
3 coverage without the ability to bargain. The duty
4 sought to be enforced is also positive and plain. They
5 past a resolution. They resolved to be bound by
6 something.

7 Now, I read Ms. Ruenzel's brief only this morning.
8 I got it when I was en route from Milwaukee to
9 Green Bay yesterday afternoon. And as I read it, and I
10 may be mistaken, as I read it, the County asserts that,
11 you know, a resolution is just an opinion. It's not
12 something that municipality is bound by like an
13 ordinance. There's no legal authority that's cited for
14 that, and, frankly, I think that's -- that it's
15 unsupportable.

16 In fact, this is a case that I found from the
17 supreme court. It's very old. I'll be happy to give
18 counsel and the Court a copy of it, but it's deals with
19 the City of Green Bay, which in 1880 apparently didn't
20 follow specific protocol when it resolved to bind
21 itself to do certain things and so somebody sued
22 saying, hey, City, you didn't pass a written
23 resolution. You didn't sign it by all the people that
24 were on there. You didn't do all these procedural
25 things. And supreme court said that's silly. There

1 was a clear motion to adopt a resolution and it was
2 voted on. The City of Green Bay is bound. That case
3 is **Green Bay versus Branus**, B-r-a-n-u-s, and it is
4 cited at 50 Wis.2d 204, and I'll be happy to give
5 counsel and the Court a copy of that.

6 Now, I think, in terms of damage, we're not
7 talking about money here. What we're talking about is
8 whether or not these labor associations, which
9 regardless of 111.70(4)(mc)6, still have full,
10 collective bargaining rights, can rely upon an
11 agreement that is bargained with the municipality and
12 then is codified essentially by means of a resolution.
13 If the City and the County are allowed to disregard the
14 terms of the contract that they have approved and the
15 terms of the resolution that they adopted, that sends a
16 chilling notice to my clients as to whether they will
17 be able to rely on anything that is placed in a
18 collective bargaining agreement in the event the
19 municipality says unilaterally we don't think we have
20 to bargain that anymore.

21 It's our position that we don't have to bargain
22 that anymore. That's a problem. That sends the wrong
23 message to our client, my clients. It sends the wrong
24 message to anybody else who is contracting with either
25 of these municipalities. The resolution is the

1 resolution. It is the municipality that resolves to be
2 bound by a certain contract. And if other people,
3 other entities that are contracting with either
4 municipality become aware that the resolutions of the
5 City or Brown County don't mean the paper that they're
6 written on, that's a problem. That's substantial
7 damage.

8 In terms of no other adequate remedy at law,
9 there, presumably, there would be remedies at law. We
10 could file additional actions, but I don't think
11 they're adequate, and the **MPA versus Milwaukee** case,
12 which is a Court of Appeals case from 2008, says
13 specifically this. When you have a nondiscretionary
14 ministerial duty that is due to be performed, mandamus
15 is the perfect vehicle to enforce that duty. I think
16 the duty is nondiscretionary and ministerial.

17 Now, there are two different sets of resolutions
18 here. The ones I've been talking about are from 2010
19 where either or both municipalities resolve to adopt
20 the terms of the agreements of the contracts. Both
21 municipalities then sometime in 2012 and counsel for
22 defendant also have probably identify specific dates.
23 They have those in their affidavits passed a resolution
24 to adopt a new plan design. Noticeably in that
25 resolution they did not resolve to repeal the prior

1 resolution which adopt our agreement. They didn't
2 resolve to repeal the prior resolution that set forth
3 specific deductibles. They just say we're going to
4 resolve to adopt a new plan. That's fine.

5 So the question then is there a conflict between
6 those resolutions? I don't think, as far as the City
7 is concerned, I don't think there is a conflict and let
8 me explain why. When that 2012 resolution was adopted,
9 the City was bound by means of an order of this court
10 signed by Judge Warpinski to maintain the status quo.
11 Arguably that would have prevented passing -- passage
12 of that resolution if it was present to apply to my
13 client, City of Green Bay Police Officers. That would
14 have violated the status quo.

15 I'm willing to presume that the City didn't want
16 to violate the status quo. In fact, I know they didn't
17 want to do so. They indicated that to me on several
18 occasions. This was a concern of mine. So I think
19 it's reasonable to presume that with respect to the
20 City what was passed in 2012 was not present to negate
21 the prior resolution of 2010. If it was, they would be
22 in contempt. If it was, that new resolution would be
23 *ultra vires*. It would be illegal because they were
24 under a status quo order.

25 As to the County's resolution in 2012, I also

1 don't think it's in conflict and I'll explain why.
2 Remember, Article 48 of the County's labor agreement
3 says you can't amend or alter or change any term of
4 this agreement until there's a subsequent agreement
5 that's reached by the parties. The County is obviously
6 aware of that, acutely aware of that. They simply
7 can't unilaterally pass a new plan to apply to these
8 deputies that is at odds with the term of this
9 agreement until they enter into a new agreement. So I
10 don't think the subsequent 2012 resolution of the
11 County was at odds with the 2010. I don't think so.

12 I think both when you break it down both
13 municipalities wanted to design and select a new plan.
14 They believed they would eventually have the authority
15 to do so. They did so. The question is whether they
16 actually present it to apply to deputies and police
17 officers when each of the municipalities knew they
18 couldn't force it on the officers because of the terms
19 of their agreement. They can do that, and we can't
20 bargain their choice of design and selection, but they
21 can only do it when we have a new agreement. That's
22 the way I read the contract. And the contract is in
23 both cases a piece of essentially legislation by means
24 of the resolution of municipalities.

25 Now, I coupled this mandamus motion -- let me go

1 back. I brought the mandamus motion because the
2 Court's decision now requires us to address another
3 matter that's related to this. I don't know whether
4 the Court feels it has sufficient input, whether it
5 needs additional briefs, whether it needs time to
6 consider mandamus over and above what's been submitted
7 by the parties and that was the basis for the motion
8 for injunctive relief.

9 In the event the Court believes that it's able to
10 rule on mandamus before 1/1/13, perfect. If the Court
11 believes it needs additional time, then what we're
12 asking is that you simply maintain the status quo as
13 stated in the contracts by means of temporary
14 injunctive relief until the Court can address the
15 motion for mandamus. And, if you like, I will address
16 the bases and the elements of injunctive relief. I'm
17 happy to do so.

18 There's one other thing I wanted to address before
19 I give it to counsel for the defendants. There is --
20 there's a difference between something in a contract
21 becoming, quote, unquote, "illegal" and something in
22 the contract which is now a prohibited subject of
23 bargaining.

24 Let me give you an example. If a contract said
25 that the police officers and deputies didn't get

1 worker's compensation rights, weren't entitled to
2 overtime, that would clearly be an illegal provision
3 because that is directly at odds with a statute, state
4 or federal. Here we have language in both of these
5 agreements which is not illegal. We simply can no
6 longer bargain that language. It doesn't mean it goes
7 poof and evaporates as would an illegal thing.

8 The question -- and the case that the Court may
9 want to look at is **Janesville versus WERC**, W-E-R-C,
10 193 Wis.2d 492. What that says is that if a contract
11 provision runs counter to an express statutory command,
12 that provision is void and unenforceable. So a
13 contract provision that says you don't get overtime or
14 workers comp is void and unenforceable. A contract
15 provision which identifies specific health care
16 benefits is not void and unenforceable because that
17 doesn't run directly counter to the statutory command
18 of 111.70(4)(mc)6, which simply says we can't bargain
19 these things anymore, so when we're at the table with
20 either the County or the City, I can't bargain it. I
21 can't talk to them about it. They're going to --
22 they're going to enforce their choice as long as your
23 decision remains the law of the land. I can't get
24 around that, but it doesn't mean it goes poof. It does
25 not mean it evaporates. It doesn't mean it does not

1 remain in effect until the parties get to a new
2 contract. I believe that's what the provisions of the
3 contract state. Thank you.

4 THE COURT: Let me ask you a question.

5 MR. CERMELE: Yes, sir.

6 THE COURT: What I'm understanding you're
7 saying is we hit December 31, 2012, and there's no new
8 agreement. You start then January of 2013 with the
9 agreements that were entered under these resolutions
10 between 2009 and 2011 because your argument is this
11 agreement, meaning the agreement 2009 to 2011, is
12 subject to amendment, alteration, or addition only by a
13 subsequent written agreement.

14 MR. CERMELE: Correct. And just in terms
15 of full disclosure, both of my clients have been in
16 negotiations with both municipalities for some time to
17 get to a new agreement. So it's not that we will be
18 starting fresh. We are in that process to one extent
19 or another. We are almost at impasse, and with another
20 entity, we're just rekindling things given some
21 changing and turnover in county personnel. But,
22 correct, come 1/1/13, my position are the terms and
23 conditions of the labor agreements that you have in
24 front of you remain status quo. We can't bargain the
25 City or the County's choice of design and selection.

1 Can't do that. But the language in those agreements
2 doesn't simply evaporate.

3 When we get to a new agreement if on 1/10 of 2013
4 the City and the police who are scheduled for an
5 impasse resolution session comes to an agreement, it's
6 done, all right, but not until then. And the reason is
7 simple. Both parties, all four parties in two
8 different contracts agreed that's what the terms --
9 that's the way they were going to proceed. And that's
10 identified in Article 34, the deputies' agreement or,
11 excuse me, the City's agreement and Article 48 of the
12 deputies' agreement.

13 THE COURT: What about the argument though
14 that the amendment provisions would apply only between
15 timeframe 2009 to 2011?

16 MR. CERMELE: Okay. That's fair. The law
17 as to, to, I believe, Mr. Lacy and the City has
18 identified is very clear that with regard to mandatory
19 subjects of bargaining, and this is no longer a
20 mandatory subject of bargaining, but with regard to
21 mandatory subjects of bargaining, they must maintain
22 the status quo. They cannot change it after the term
23 of the contract expires, all right.

24 We have, as I understand it, I have not found any
25 cases that ever addressed this where you have a subject

1 that is unquestionably a mandatory subject of
2 bargaining, when it's bargained, when it's put in the
3 contract, when it's codified by means of resolution of
4 the subsequent that it becomes prohibited. What
5 happens? No court has ever ruled on that so that's
6 another first for you.

7 My position is that because it was mandatory at
8 the time it was bargained, it doesn't simply evaporate.
9 It's not illegal. It's now prohibited, but it's not
10 illegal.

11 THE COURT: Let me ask you this question.
12 If I agreed with you, why would the County and City
13 unions ever want to go back and renegotiate anything?

14 MR. CERMELE: We very well might read the
15 writing on the wall and know that you're likely not
16 going to give, you as say in your decision, and that we
17 want to resolve this, and maybe it's time to come to an
18 agreement on a labor agreement.

19 Plus, let me say one thing. It is not feasible.
20 I assume in theory it's possible, but it's not feasible
21 simply to refuse to go back to the table with either
22 municipality. We have an obligation to bargain. If we
23 just sit on our heels or our hands and say we're not
24 going to talk to you about this for the next
25 three years, they're going to file an action with the

1 WERC, we're forced to do that. And, in fact, with the
2 City, we are close to impasse, and we're meeting with
3 their legal counsel on the 10th of January to see if
4 the parties can finally craft an agreement. Maybe they
5 can. If they can't, they go to arbitration and then
6 the arbitrator is going to decide what the law is going
7 to be.

8 THE COURT: Thank you. Mr. Lacy?

9 MR. LACY: Thank you, Your Honor. At the
10 risk of jumping in too many straw men and red herrings,
11 let me point out a couple of things that I wanted to
12 make clear to the Court.

13 First of all, I agree with Mr. Cermele we continue
14 for a duty to bargain regardless of what is mandatory,
15 what is prohibited, and what is permissive, but the
16 duty to bargain is a much broader scope of a duty than
17 Mr. Cermele would have this court believe.

18 First of all, it isn't just a matter of sitting
19 down at the bargaining table and deciding what terms
20 are going to go into successor contract. The duty to
21 bargain includes the obligation to abide by a
22 collective bargaining agreement throughout the course
23 that that agreement is valid and also includes the
24 obligation to maintain the status quo during a contract
25 hiatus.

1 In the case of a now prohibited by and thus
2 illegal subject of bargaining, that duty to bargain
3 within that collective bargaining agreement with
4 respect to that issue no longer an enforceable
5 provision of the contract.

6 THE COURT: Wait. Let me stop you because
7 you just lost me.

8 MR. LACY: Sure.

9 THE COURT: I understand that the unions
10 can't bargain now on the issues that I previously
11 decided.

12 MR. LACY: Sure. And the City.

13 THE COURT: Cermele has been straight
14 forward in saying, Judge, we can't. We're done. We
15 can't do that unless we appeal your decision, and the
16 court of appeals or supreme court says, no, Judge, you
17 got it wrong.

18 What he's saying is we're looking just at the
19 contract. We want you, Judge, to enter an order,
20 whether you call it an order of mandamus or an
21 injunction pending further review, we want you to enter
22 an order that enforces this contract provision. So I,
23 to some extent, I've left the analysis of union
24 bargaining because apparently if you don't reach an
25 agreement, from what Cermele says, an arbitrator is

1 ultimately going to tell you how these benefits are
2 going to work.

3 MR. LACY: That's true. So a year and a
4 half or so down the road that is, in fact, the case.

5 THE COURT: But can't reach agreement,
6 someone is going to do it for you.

7 MR. LACY: Sure.

8 THE COURT: My job isn't to have you reach
9 agreement.

10 MR. LACY: Right.

11 THE COURT: My job is to enter a court
12 order. And I appreciate you trying to help me. I've
13 read your brief. It was an outstanding brief. But
14 this issue is a new issue. It's a new argument. He
15 didn't advance this in the briefing. And so I'm
16 interested in it, because I haven't had time to think
17 about it.

18 So let me turn you back, and I know you want to
19 argue other things, and I'll let you.

20 MR. LACY: Sure.

21 THE COURT: This is in my mind right now
22 and I have to understand this argument because it's new
23 and I think it's something he hadn't advanced in the
24 past. He's saying, look, Judge, a deal is a deal.
25 They drafted it. They made it a resolution. It's

1 contract. You have to enforce the terms of the
2 contract, Judge. What about that?

3 MR. LACY: And I apologize for getting off
4 the beaten path. The reason I started with discussion
5 of the status quo is because I think no matter how it's
6 stated to the Court, that's what the argument is,
7 because on a pure contract basis, Mr. Cermele is
8 correct, a deal is a deal, and the City Council in 2010
9 voted to approve that contract, but the entire
10 contract, which includes the provision which was
11 provided to you, which you referenced and asked
12 Mr. Cermele about, which states that the terms of the
13 contract are January 1, 2009, to December 31, 2011, the
14 contract provision, none of the contract provisions
15 survive beyond the end of the contract except by
16 operation of collective bargaining law, which requires
17 us to maintain status quo during hiatus.

18 THE COURT: Let me stop you.

19 MR. LACY: And that's --

20 THE COURT: Let me stop you only because I
21 want to understand what you're saying.

22 MR. LACY: Sure.

23 THE COURT: Not because I disagree with
24 you. Let's assume that what you just said is correct.

25 MR. LACY: Um-hum.

1 THE COURT: December 31st comes and goes.
2 There is no agreement.

3 MR. LACY: Right.

4 THE COURT: There is no advancement on the
5 remaining issues. You have to be left with something.

6 MR. LACY: Sure, absolutely. Absolutely,
7 Your Honor. That's why I'm saying -- if you and I
8 enter into a contract where I'm going to plow your
9 driveway any time it snows before 6 o'clock in the
10 morning, and we have an agreement that says we're going
11 to -- I'm going to do that from January 1st of '09
12 until December 31st of '11, and we also have a
13 provision that says nothing in this contract can be
14 changed unless we mutually agree to the change, a
15 fairly common contract provision, on January 1, 2012, I
16 don't automatically continue to have that obligation
17 and you don't have the automatic obligation to
18 presumably pay me for that service unless we've agreed
19 to extend it.

20 THE COURT: That's because I can get
21 services other places or I can do it myself. But this
22 is different. You can't get services in other places.
23 You've got to have police and fire working for the
24 City. It's not a matter of choice, so to speak.
25 You're not going to go out and hire a new police force

1 and a new fire force. You got to work with these
2 people. In your example, I can do it myself. I can't
3 put a fire out by myself. You can't either.

4 MR. LACY: Sure.

5 THE COURT: So I understand the argument.
6 It's a good argument. But I think it's different
7 because in the snow plowing example, I got all kinds of
8 options, other service providers. It may be great for
9 me to get out of that contract, but in this example, I
10 don't have any other service providers, and I've got to
11 have a relationship with these providers. The question
12 is what are the terms and condition of the
13 relationship? What terms govern now? And so I think
14 it's a different situation.

15 MR. LACY: Well, and I understand what
16 you're saying but that -- what governs the relationship
17 between employer and employee doesn't have to be in a
18 collective bargaining agreement.

19 THE COURT: No. In this case, it's by
20 resolution. It's within the contract.

21 MR. LACY: Well, the contract which adopts
22 an agreement, a contract which by its terms expires on
23 a date certain.

24 THE COURT: Show me in the language
25 because the language that I'm reading says this

1 agreement is subject to alteration or addition only by
2 a subsequent written agreement between and executed by
3 the City and the bargaining unit where mutually
4 agreeable.

5 MR. LACY: Sure. If you look at, and I
6 provided this as what was Exhibit 1 to Ms. Boland's
7 affidavit, but if you have -- it's page 42 of the
8 contract. I'm not sure if Mr. Cermele gave you the
9 full contract.

10 THE COURT: Of the City or County?

11 MR. LACY: The City contract 2009-11,
12 page 42.

13 THE COURT: Hold on for a second.

14 MR. CERMELE: That's the one I filed
15 today.

16 THE COURT: Okay. I got page 42.

17 MR. LACY: Article 39, Term of Agreement.

18 THE COURT: Yes.

19 MR. LACY: And that says this contract
20 shall be binding on both parties and effective from the
21 first day of January 2009 to and including the 31st day
22 of December, 2011. There's nothing in that provision
23 regarding modification except by mutual agreement that
24 automatically survives the expiration of this contract.
25 And, again, that -- I think your point is well taken

1 that this is a different concept than my snow shoveling
2 example. But there's certain presumptions that exist
3 within a collective bargaining agreement that the
4 provisions continue thereafter until there's a
5 successor agreement because of the continuing duty to
6 bargain. That is how the obligation on the part of the
7 City extends beyond what is otherwise a finite term of
8 this contract.

9 THE COURT: Would you agree with the
10 argument that the status quo has to prevail until the
11 new agreement is reached?

12 MR. LACY: As to mandatory subjects of
13 bargaining, absolutely. That is, like I said, black
14 letter law.

15 THE COURT: In labor negotiations. But
16 not discretionary.

17 MR. LACY: But not to things that are --
18 well, without getting confused by permissive subjects
19 focussing just on mandatory and prohibited subjects of
20 bargaining, we do not continue prohibited subjects of
21 bargaining during the contract hiatus. There's no
22 obligation to do that. And the law changed subsequent
23 to the City Council's adoption of this agreement, and
24 during the term of this agreement no changes were made
25 during the term of this agreement. No resolutions were

1 passed changing any of the terms of this agreement
2 during the term of the agreement.

3 The resolution that Mr. Cermele refers to in
4 September of 2012, which I reference as well, occurs
5 after the expiration of this agreement and after the
6 law changed with respect to what are those subjects
7 that are appropriate for a collective bargaining
8 agreement.

9 THE COURT: You would agree though that
10 these provisions have not prohibited --

11 MR. LACY: Which provisions?

12 THE COURT: The provisions that
13 interpreted as in my decision in which I indicated that
14 the union doesn't have the ability to bargain on
15 certain benefits. There's nothing that prohibits the
16 City from bargaining on those benefits?

17 MR. LACY: Yes. If it's a prohibited
18 subject of bargaining, neither party is permitted to
19 deal with that during negotiations or to have it in
20 their labor agreement.

21 THE COURT: Well, I -- if it's prohibited,
22 my question is if the matters that I had decided are
23 you suggesting that they are prohibited from being
24 bargained on?

25 MR. LACY: Yes.

1 THE COURT: And you disagree with that?

2 MR. CERMELE: I, with all due respect,
3 your Honor, I disagree with your conclusions in your
4 decision. However, I think it is correct Mr. Lacy is
5 correct, given your decision, that anything that deals
6 with design and selection of health care or its impact
7 on our wages, hours, or conditions can no longer be
8 bargained by other municipality or the labor
9 associations. I agree with that. That's, in essence,
10 what your decision said.

11 But it does not address what -- how to deal with
12 provisions that were mandatory when they were bargained
13 and when they became the law by means of a resolution
14 and whether or not they simply evaporate because we can
15 no longer bargain them. That's, that's the issue.
16 That's the nub. And the question is whether or not --
17 excuse me -- the City has a ministerial duty to comply
18 with those or not.

19 THE COURT: Thank you. I'm sorry. I
20 interrupted you and the time is yours. Go ahead.

21 MR. LACY: No, I'm glad you did because
22 that makes sure that we're clear on that issue that
23 what, what deductibles and coinsurance and all the
24 components of the health insurance plan that the City
25 provides to his bargaining unit member, police officers

1 cannot be bargained at the table or be a part of
2 collective bargaining agreement, part of a continuing
3 obligation with respect to the duty to bargain. And by
4 law, that means that the City could say, you know,
5 we're not providing any health insurance to their
6 police officers. Stupid decision, I would suggest, but
7 they could do that.

8 But what we're talking about here and what
9 Mr. Cermele is attempting to do is conflate two totally
10 separate issues, which is, number one, an action by the
11 City Council routine action to adopt a labor agreement
12 which was tentatively agreed to by the bargaining
13 committees, which by its terms expires on a date
14 certain.

15 And the second issue being what happens when that
16 date certain arrives and you have not reached a
17 successor agreement, and by law, you still have a duty
18 to bargain? And that body of law is really what
19 Mr. Cermele is arguing to this court that that requires
20 us to maintain these provisions. There's nothing in
21 the contract that automatically takes any of the
22 provisions of the contract beyond the very clearly
23 stated term of agreement in Article 39.

24 THE COURT: And if he's right, and the
25 court were to enter an order essentially maintaining

1 the status quo, and the union's refused to bargain, you
2 could then file a separate action with an
3 administrative agency and force binding arbitration on
4 that issue. Is that a correct process?

5 MR. LACY: No, I could not file anything
6 with the Wisconsin Employment Relations Commission
7 suggesting and demanding that they bargain as to health
8 plan, design, and those components of the agreement
9 because this court decided that those are prohibited
10 subjects so I can't compel bargaining on that issue.
11 It's all the other components of the contract that
12 remain subject to bargaining and as a matter of fact
13 remain provisions that the City is bound by during the
14 period between the agreement expiring as it currently
15 is and when there's a successor agreement.

16 THE COURT: Sure.

17 MR. LACY: All other provisions of that
18 contract have to be complied with.

19 THE COURT: So you would be able to
20 bargain on all other provisions. I'm sorry. You would
21 be able to force arbitration on all other provisions.

22 MR. LACY: Correct.

23 THE COURT: And once you did that, and the
24 arbitrator made a decision, you would then go ahead and
25 adopt or create an agreement, I'm assuming,

1 incorporating the arbitrator's decision.

2 MR. LACY: We would be forced -- we would
3 be required to, sure.

4 THE COURT: Right. And then you would
5 have a new agreement for whatever term.

6 MR. LACY: Correct.

7 THE COURT: Is either afforded by the
8 arbitrator or you and the union negotiate.

9 MR. LACY: Correct.

10 THE COURT: So you can -- you would
11 ultimately secure an agreement through arbitration that
12 would accomplish really your objective. Your objective
13 is to in no way allow the union to negotiate or bargain
14 on the rights that I've indicated they don't have the
15 right to bargain in my written decision.

16 MR. LACY: Well, no, I -- I agree with you
17 in part and I dissent in part.

18 THE COURT: Tell me what's wrong with that
19 argument.

20 MR. LACY: What we are not able to do,
21 which is something the City clearly intends to do and
22 desires to do, is make changes to the health plan
23 design now because the state legislature has said that
24 is a discretionary act on part of the municipal
25 employer regardless of whether there is a collective

1 bargaining agreement -- or unit that's been certified
2 such as the case here. Our statutory right as a
3 municipal employer is to set the health insurance plan
4 and there are very significant reasons why not being
5 able to do that January 1 as the state law says we
6 should -- that we're allowed to do so as this court
7 acknowledged is something that is outside of the
8 context of collective bargaining by law. Not being
9 able to make those changes on January 1st is a
10 significant issue. So if we get an arbitrator's award,
11 you know, it don't matter any time after January 1st,
12 which I think we can all agree is clearly going to be
13 the case, that sets all other terms of the contract, we
14 have not accomplished what the City desires to
15 accomplish for making modifications to the plan design
16 as the law says it can.

17 THE COURT: Sure you're not able to do
18 that. Sometimes people are unable to agree. And an
19 arbitrator makes the final decision for you.

20 MR. LACY: But in here we're not -- we
21 can't agree on what the plan design looks like. We
22 can't by law have that agreement. The arbitrator can't
23 by law tell us what it's going to look like.

24 THE COURT: You're right but -- it
25 operates on an entire agreement. I don't think anyone

1 is debating, if my decision is upheld by the court of
2 appeals or supreme court, that the union can't bargain
3 that anymore, but the union can bargain other
4 provisions.

5 MR. LACY: Sure.

6 THE COURT: And you're not going to
7 arbitrate or negotiate, I'm assuming, individual items.
8 You're going to bargain everything that you can
9 bargain; right?

10 MR. LACY: Well, it varies. I mean,
11 sometimes you're focussed on one issue. Sometimes it's
12 just wages. Sometimes everything else in the contract
13 remains the same. I mean, it depends. It varies
14 significantly from negotiations to negotiations.

15 THE COURT: But the goal is to get an
16 agreement.

17 MR. LACY: As to all subjects that you
18 have to have an agreement to.

19 THE COURT: Right. And so ultimately
20 whether you negotiate on this issue or not, and I don't
21 think you can, that's what my decision said. You're
22 still going to have to negotiate on other matters to
23 reach an agreement.

24 MR. LACY: Correct. But what if the court
25 takes the action that it's being requested to do,

1 essentially what happens is we are prevented from
2 taking action that the state law clearly says we can do
3 outside -- without regard to collective bargaining
4 duties and obligations simply because we don't have
5 agreement with the union on all of the other myriad of
6 things in this, you know, lengthy contract that we both
7 agree we still have a duty to bargain over. Those are
8 two completely separate issues. One being, yeah, we
9 still have a duty to bargain. Nobody is disputing
10 that.

11 THE COURT: But you don't have agreement
12 yet on all those other issues.

13 MR. LACY: No, we don't have agreement on
14 all those other issues, and as Mr. Cermele indicated,
15 it's likely we're going to be proceeding to a third
16 party arbitrator for decision on that.

17 But what we don't -- what is outside of the
18 context of that negotiation, arbitration, mediation,
19 whatever process we go through to try to get an
20 agreement or have one imposed is not going to have
21 anything to do with and not going to involve health
22 insurance plan design and the costs associated with it
23 by law.

24 THE COURT: I appreciate you allowing me
25 to do this, by the way. You don't have agreement.

1 We're going to be on December 31st and you're still not
2 going to have an agreement presumably.

3 MR. LACY: Correct.

4 THE COURT: What is the operating
5 agreement, operating method January 1st? You're going
6 to be operating under something January 1st.

7 MR. LACY: Sure. And we still have all of
8 the provisions of this collective bargaining agreement
9 other than those that have been declared unlawful,
10 prohibited subject of bargaining, and we have the
11 decision by the City Council in September of this past
12 year to design the employees health plans. And
13 Mr. Cermele and the union were absolutely notified that
14 the intent was to roll this out to all employees,
15 including the police officers. They were notified of
16 that several times with the obvious caveat if we had a
17 court order in place prohibiting the City from doing
18 so, it would not violate a court order, but the intent
19 was to roll it city wide.

20 THE COURT: Let me stop you for a second.
21 You're going to take the position that come January 1,
22 2013, if you don't have an agreement, you're going to
23 go right back to the agreement that you had for 2009 to
24 2011 less the benefits that I indicated were
25 inconsistent with Act 32. Did I say that right?

1 MR. LACY: Correct. That's what the law
2 of -- under the Municipal Employment Relations Act
3 requires us to do. There is not a contract that exists
4 in a vacuum or that is applicable or I should say
5 subject to just regular contract law.

6 THE COURT: Let me stop you. Doesn't the
7 law require you to maintain the status quo if you don't
8 have an agreement?

9 MR. LACY: As to mandatory subjects of
10 bargaining, correct.

11 THE COURT: Okay.

12 MR. LACY: But a prohibited subject of
13 bargaining is a subject that can't be part of a labor
14 agreement and it can't be part of a labor agreement
15 which is more than to say you can't talk about it at
16 the bargaining table. The duty to bargain includes the
17 duty to comply with the provisions of the agreement, to
18 enforce the provisions of the agreement, to maintain
19 the status quo during the hiatus, and continue to
20 bargain over a successor. All of those things are part
21 of the duty to bargain.

22 Health insurance, plan design, and the costs
23 associated with it based on the state legislative
24 action, which this court interpreted is not part of
25 that process. It is prohibited. It can't be part of

1 that process.

2 Mr. Cermele is correct that the City absolutely
3 could unilaterally by resolution say thank you, Your
4 Honor, for interpreting the statute in the manner that
5 we've asked you, but we've decided we're going to keep
6 everything exactly the way it is moving forward.

7 That's what we're going to do. Absolutely they could
8 do that and certainly they're going to at least for the
9 foreseeable future continue to provide health insurance
10 to their employees including the police bargaining unit
11 and all other employees in the City unilaterally but
12 they cannot be bound by a collective bargaining
13 provision that necessitates that because it's a
14 prohibited subject.

15 THE COURT: Would you agree with me that
16 your interpretations would require a retroactive
17 application of my decision? You're going back and
18 looking at the 2009-20011 contract and say we don't
19 have to provide those benefits based on Hammer's
20 decision because the 2009-2011 contract as it's written
21 is the status quo. My decision after this agreement
22 was entered into, if used in the manner that you're
23 suggesting, basically retroactively modifies the 2009-
24 2011 contract moving forward as the status quo?

25 MR. LACY: No, I would respectfully

1 disagree with that because what modified the status
2 quo, and I think the status quo is more than just what
3 the -- when we use that term, incorporating a whole
4 body of labor law, and the status quo was modified by
5 Act 32 and the provisions that said health care plan,
6 design, and selection and the impact thereof are
7 prohibited subjects of collective bargaining.

8 At that point and the law also applied
9 prospectively upon expiration of the collective
10 bargaining agreements to the extent that they were
11 enforced, so we fall into that category in the City
12 where at the time that that law was passed there was a
13 collective bargaining agreement with the police union
14 that had insurance provisions in it.

15 As of January 1st of 2012, state law said, City,
16 you can do whatever you want with respect to health
17 plan design. And the union filed suit because we told
18 them that was the intent was to make changes. The only
19 reason changes weren't made is because in this case the
20 City agreed that we didn't want to have a battle about
21 what do we do during the time there's litigation, but
22 your decision is essentially -- not essentially, it is
23 the interpretation of the scope of a statute that has
24 been in effect since last June since it was passed by
25 the legislature. What it exactly meant has been the

1 subject of dispute, but once we have the meaning, that
2 meaning is retroactive, I suppose, but the application
3 of it in our instance has not been by agreement in the
4 first instance but also with respect to the provisions
5 of the contract everything else remains as it is.

6 THE COURT: Do you have a timetable for
7 when the City and the County will reach impasse on
8 current collective bargaining? Mr. Cermele suggests
9 that the City is almost there or is at impasse. Will
10 that impasse automatically happen December 31st?

11 MR. LACY: No, no, no, because the duty to
12 bargain is not dependent upon or limited or really, in
13 any way, typically affected by the expiration of the
14 contract. The duty to bargain arises out of the fact
15 that the members of the police department who can
16 organize have opted to have a union represent them so
17 that's the duty to bargain. That continues until that
18 representation is revoked. So in that sense we
19 continue to have that duty no matter what so
20 December 31st of 2012 is a date of no relevance with
21 respect to that duty.

22 We have -- I believe there's mediation scheduled
23 in January, and I would expect that in the absence of
24 any movement or any significant movement towards
25 agreement that we would be pretty close to impasse.

1 You know, at the risk of being later accused of not
2 bargaining in good faith, I wouldn't say right now that
3 I can say per se on that date that we would be at
4 impasse. It's a decision that has to be made by an
5 investigator for the Wisconsin Employment Relations
6 Commission to certify impasse. So there's a much more
7 procedure to that. It's going to take quite some time
8 most likely.

9 THE COURT: Sure.

10 MR. CERMELE: Just because I am bargaining
11 with the City on this issue, just to let the Court know
12 where we are, the City had requested to initiate
13 binding arbitration because the City believed that we
14 were at impasse. We have met once with the general
15 council for the WERC to mediate things. That was
16 unsuccessful. We have another hearing on the 10th of
17 January where he will decide whether we truly are at
18 impasse in which case he will require final offers and
19 then proceed to arbitration. That's where we are with
20 the City.

21 THE COURT: Is that arbitration binding?

22 MR. CERMELE: Absolutely.

23 THE COURT: Who does the arbitration?

24 MR. CERMELE: It would be a panel -- we
25 would pick and choose amongst a panel of arbitrators

1 that were provided by WERC. I would strike one. The
2 City would strike one. I would strike one. The City
3 would strike one. We finally get to somebody. We
4 would whittle them away.

5 There are a couple -- before the County starts, I
6 just like to point out a few things in response to what
7 Jeff said. He indicated that a prohibited subject
8 cannot be part of a labor agreement. That's wrong. He
9 cited the **City of Menasha** case, 335 Wis.2d 250 at
10 paragraph two for that proposition. I have paragraph
11 two. I have it highlighted. It doesn't say that.
12 What a prohibited subject -- and here's why that makes
13 no sense because we can't bargain over something like
14 the design selection of health care. It doesn't mean
15 the City can't give us what -- something that they want
16 to give us. It doesn't mean the City can't say here's
17 our plan that we've decided to design and select and
18 you can't say anything about it, but we're going to put
19 it in your contract. What we're prohibited from doing
20 is bargaining over these things. That's it. So I take
21 issue with the assertion that simply because design and
22 selection is prohibited that it can't be in the
23 contract anymore. It is there.

24 The other thing is that the City asserts that
25 because of your ruling, not only can a design and

1 select health care coverage without our ability to
2 bargain, the City asserts that this law allows them to
3 implement it immediately after your decision. The law
4 doesn't say anything about that, okay? The law says we
5 can't bargain according to your ruling. The question
6 is when can it be implemented given the contractual
7 terms that the parties are bound by? Thank you.

8 THE COURT: I agreed that's -- I agree
9 that's, in my mind, an important issue. Before I turn
10 to Ms. Ruenzel, let me ask you, sir. Are you also
11 counsel for the County union?

12 MR. CERMELE: Deputy Sheriff's union.

13 THE COURT: Yes.

14 MR. CERMELE: Yes, sir.

15 THE COURT: What's their status regarding
16 bargaining? After you told me where the City is at,
17 where is the County?

18 MR. CERMELE: We started bargaining in, I
19 believe it was, 2011 with the County. They -- the
20 County had different personnel that were involved in
21 the bargaining. At that point it was Fred Mohr who was
22 across the table. This action was then instituted.
23 The deputies were brought into it, and the County and
24 the Association agree to simply let things be until
25 there was a decision from this court because we wanted

1 to know what the playing field was with regard to
2 health care. So Mr. Mohr is no longer with the County.
3 We have a new director of administration, correct,
4 Mr. Miller. Mr. Miller and other members of the
5 County, including Ms. Ruenzel, have met with myself and
6 the association once or twice. I believe just once.

7 MS. RUENZEL: Twice.

8 MR. CERMELE: Once or twice. And we're no
9 where near impasse yet.

10 THE COURT: Thank you. Okay. Ms.
11 Ruenzel, I'm sorry I didn't recognize you earlier.
12 It's been a long time.

13 MS. RUENZEL: It's been over 20 years.

14 THE COURT: It is nice to see you again.
15 I didn't mean to fail to acknowledge you. I apologize.
16 How can you help me? What can you tell me?

17 MS. RUENZEL: Well, I can, first off, I
18 want to point out, you know, Mr. Cermele turns to the
19 County agreement and references Article 48. That says
20 that the agreement cannot be appended or altered
21 without a writing.

22 But he fails to tell you at Article 53 states that
23 this contract basically does not continue once a person
24 -- once a party in writing states their desire, their
25 desire to alter, amend the contract. It don't say that

1 it has to be in writing already amended. It says that
2 the agreement shall become effective January 1st and
3 shall remain in full force and effect until and
4 including December 31st and shall renew itself for
5 additional year periods unless either party has
6 notified the other party in writing that it desires to
7 alter or amend this agreement at the end of the
8 contract period. That has happened, Your Honor. That
9 has happened at the end of the contract period under
10 Mr. Fred Mohr and it has also happened twice when we
11 did meet with Mr. Cermele when we told him we want to
12 alter and amend this agreement.

13 So as far as I'm concerned, the agreement is null
14 and void at this point in time. Now, do we just throw
15 the contract out? We don't. We continue with that
16 contract, but, but, again, I agree with many of
17 Mr. Lacy's arguments here. We cannot -- let me
18 backtrack.

19 It doesn't make sense, Your Honor. It doesn't
20 make sense to issue a writ of mandamus here for the
21 plaintiffs. It doesn't make sense because what you're
22 literally doing is stalling a decision to go into a
23 different health plan for the union. That's all you're
24 doing, and it doesn't -- it doesn't make any sense.

25 If the Court here decides that the resolution has

1 the effect of law and has the effect of a contract,
2 then I'm going back to my county board and saying we
3 need a new resolution that says we're going to abide by
4 the terms of Act 32, specifically Section 111.70(4)(mc)
5 6, and we are going to put in place our health plan.
6 That's what we're going to do. That's what we're going
7 to do.

8 Because the whole premise here -- the plaintiff's
9 whole premise this resolution has the effect of law.
10 This has the effect of a contract. We don't believe
11 that. A resolution and the resolution that we are
12 referencing it didn't say that this was a contract. It
13 said that it gave basically the County the authority to
14 execute the contract. Nothing more.

15 THE COURT: Let me stop you. Can't you
16 read Article 53 in conjunction with Article 48? In
17 other words, I understand what you are saying. Article
18 53 says that the agreement shall remain in full force
19 and effect and shall renew itself unless a party has
20 notified the party in writing that it desires to alter
21 or amend.

22 So the way that I read that is this thing is going
23 to remain until one party says I don't like this deal
24 anymore and they notify the other party I don't like
25 this deal anymore. Okay. What do we do about that?

1 Well, then turn to Article 48, which outlines the
2 amendment provisions. Tell me if I'm wrong, Julie,
3 because if I'm wrong, I want to know.

4 Article 48 says this is how you amend. It's
5 subject to amendment. And it appears as if the way to
6 amend it is by subsequent written agreement between and
7 executed by the County and the bargaining unit. And,
8 again, I think, I think, I'm not a union lawyer, but --
9 or labor lawyer is a better word -- but I think the
10 whole reason why it's set that way is because you
11 always have to have some type of operating agreement.
12 You have to.

13 And Lacy gives me a good example. He's right. It
14 is the paradigm. What's the difference between this
15 and a contract to shovel my driveway? You have to have
16 this service. You have to have some form of agreement.

17 So I don't disagree. The County absolutely has
18 the right to say I don't want to do this anymore for
19 whatever reason as apparently does the union, but I
20 don't think because you have that right there's no
21 deal. So help me to understand.

22 MS. RUENZEL: I'm not saying there's no
23 deal. Your example of plowing my driveway, the
24 difference being is you're not tied to this person
25 that's plowing your driveway. The only tie is that

1 contract; correct? And once that contract expires,
2 there is no tie, but the employees are a little
3 different. They do have a tie to the County. And it's
4 not that the County isn't offering them another plan.
5 They are being offered a plan. It's not like they
6 don't have anything.

7 And, Your Honor, this just really -- I really
8 don't understand the logic here, because under the new
9 plan, under the new plan when you really look at it,
10 the employees are better off.

11 THE COURT: They don't see it that way.

12 MS. RUENZEL: I understand that. But
13 really when you look at what they're getting, they are
14 better off. The County is actually giving them money
15 in a LRA. They're supplementing that deductible, and
16 in the long run, they're better off.

17 Now, I understand their argument. Their argument
18 that's fine for now. That's fine for now but what
19 happens in the future?

20 THE COURT: You're arguing there's no
21 harm. You are --

22 MS. RUENZEL: Exactly, there's no harm.
23 It's just like the rest of the 1,500, approximately
24 1,500 other employees. Why is it we're down to 94
25 employees and not all of them take the health

1 insurance? Why is these 94 are being held to a
2 different standard?

3 THE COURT: I didn't pass this.

4 MS. RUENZEL: Yeah.

5 THE COURT: Only the legislature can tell
6 you that. I can't tell you why they did.

7 MS. RUENZEL: Correct.

8 MR. LACY: Your Honor, if I -- I'm sorry.

9 MS. RUENZEL: No, go ahead.

10 MR. LACY: If I could? I just want -- the
11 reason I jump in, and I apologize, but you just said
12 something that I think is incredibly important. The
13 legislature made these rules, and while you're right
14 the City needs a police force and the County presumably
15 needs a sheriff department and so forth, the manner in
16 which that employment relationship exists doesn't by
17 necessity have to be through a contract, through a
18 collective bargaining agreement, through anything other
19 than just typical at will employment. That would be --
20 and without getting led astray in terms of police
21 because there are separate provisions dealing with
22 police, they're statutory, but in terms of collective
23 bargaining rules, there's nothing that says that has to
24 be governed by a contract per se simply because we need
25 the services. What does that is the Municipal

1 Employment Relations Act which says police officers
2 have the right to organize in this case. Obviously,
3 they have done so. And once organized, they have a
4 right to collectively bargain the terms and conditions
5 of their employment with their employer and here's all
6 the things they can do. And by the way, here are the
7 things that they cannot require the City in this case
8 to agree with them in terms of the scope or the
9 provisions that govern that employment relationship.
10 One of those being the plan, design, and selection and
11 the impact of health insurance or health care coverage.
12 And it, yes, it has a necessary implementation just
13 like any other carved out within the scope of
14 collective bargaining that which is not mandatory from
15 a bargaining standpoint is presumed to be the
16 discretion of the employer. And they set policy, they
17 have handbooks, all sorts of other things that govern
18 the employment relationship, and if they are not
19 mandatory subjects, they aren't in an agreement, a
20 collective bargaining agreement unless the City in this
21 case has agreed to bargain permissive and put them in
22 the contract and then they're binding or -- and if
23 they're prohibited, they don't belong in this agreement
24 at all. They are set by the City. They apply to the
25 employees and it has no effect on the collective

1 bargaining relationship with respect to those two
2 parties. That's what's happened here. That's the
3 legislature has done exactly like you said. They have
4 defined the scope of our bargaining relationship.

5 THE COURT: They have. Anything else,
6 Ms. Ruenzel?

7 MS. RUENZEL: Well, only that you know
8 issuing the writ here, Your Honor, is just throwing a
9 roadblock in the path of the government entities when
10 they have the right to do this. They have the right by
11 the state law to enter this health care. The parties
12 are not harmed. In fact, they are benefited. I know
13 they don't think that.

14 I don't know what the future holds. I don't know
15 how this is going to play out for them or for any
16 County employee or City employee for that matter. But
17 by maintaining the status quo here, it does nothing but
18 put a roadblock in our way. We can't bargain. So when
19 do we get the chance to implement the new plan? If we
20 go to arbitration, they won't touch it. It's
21 prohibited subject bargaining so they won't touch it so
22 where do we go from here? Where do we go from here?
23 How do we implement a new plan without bargaining,
24 whether it's bargaining directly or through the courts,
25 because what I see is the plaintiffs are trying to

1 bargain their position through the courts with the
2 County and the City. That's what I'm seeing.

3 THE COURT: Okay. Well, I have listened
4 very carefully to excellent argument in this case.
5 I've had the opportunity to review Mr. Lacy's brief. I
6 didn't get a chance to review Ms. Ruenzel's brief and I
7 apologize. I didn't see it. Didn't cross my desk.

8 In addition to Mr. Lacy's brief, I had the
9 opportunity to review his supporting materials. I had
10 a chance to review Mr. Cermele's notice of motion,
11 motion, his affidavit, his brief, although it was a
12 very, quite frankly, it was a very short brief, and I
13 didn't, I didn't, to be frank, garner a lot of
14 argument. Really what I garnered was the issue and
15 what issue you are asking me to decide.

16 I've had the chance to review the affidavits and
17 particularly the plans that were provided in advance
18 and as of today's -- as of today's oral argument.

19 And I incorporate the oral argument, the briefing,
20 and the plans that were submitted to me today as part
21 of this decision that I'm asked to render today.

22 This is a very complicated area of the law, I
23 think. It took me a long time. As counsel knows, they
24 were waiting patiently for me to issue a decision on
25 the matter before me regarding the interpretation of

1 Act 32. As a result of my decision, I'm satisfied that
2 the issue, quite frankly, is more muddled as posed to
3 less with courts across our state interpreting the
4 language and the application of the language and the
5 construction of the language differently. And I was
6 cognizant of that when I wrote the decision and I'm
7 acutely aware of it today.

8 The decision that I make today on the motions
9 before me in no way impact or modify my decision.
10 Regardless of anyone's personal thought, that's what I
11 think the law requires, and to the extent that the
12 union elects to take an appeal, they were the losing
13 party, they have every right to do that, but I want to
14 make clear I'm not changing my decision.

15 I think Mr. Cermele, I think, phrased the narrow
16 issue, what I perceive to be the issue, is not a
17 question of reconsidering my decision or interpreting
18 my decision because I think that the union understands
19 what they can and cannot bargain as a result of my
20 decision. They have said over and over again in their
21 oral argument we get it, Judge. We can't do that by
22 your decision.

23 The question is one of implementation. When is
24 the impact of the decision? When does that go into
25 effect? That's not something I addressed in my

1 decision because I wasn't asked to address it in my
2 decision, and maybe the response is, well, it was
3 obvious to what we thought the implication date would
4 be.

5 But this isn't an obvious area of the law and this
6 isn't simple contract law. This is complex labor law.
7 And unlike when I contract with my kids to shovel snow,
8 these services provided by these entities have to go
9 on. It isn't optional. There is no other snow
10 shoveler out there that I can contact and say protect
11 me or put out the fire in my house. That's why this
12 area is so complex and that's why there is so many
13 different rules that govern the contract of employment,
14 the contract of benefits that are different than a
15 simple contract.

16 What is clear, unlike other areas of contract law,
17 is that in the event the parties cannot agree as to the
18 scope and extent of benefits, there's a mechanism in
19 place to ensure that services are provided to the
20 County and the City, and the City provides benefits to
21 those who provide those services. And that, that
22 avenue clearly is the concept of maintaining the status
23 quo. That's the law in this area.

24 And Mr. Lacy points out that's true, Judge, but
25 there's a difference between maintaining the status quo

1 upon discretionary matters versus nondiscretionary
2 matters, prohibited matters versus non-prohibited
3 matters. My own thought is that the City is not
4 prohibited from discussing these benefits. Agree with
5 Mr. Cermele. Agree with Mr. Lacy that the City is not
6 obligated to provide any specific benefits and
7 certainly not obligated to provide benefits that Act 32
8 indicates they are no longer to bargain with relative
9 to the union.

10 But the bottom line is this. The City and the
11 County do not have contracts with these unions and will
12 not have contracts with these unions as of December 31,
13 2013 (sic). Some arrangements need to be continued in
14 full force and effect until a new agreement is
15 bargained with whatever terms that agreement contains.
16 I'm assuming they would only contain terms that the
17 union would be allowed to bargain on. Maybe the City
18 gives additional benefit, I don't know. That's up to
19 them. The union doesn't have the ability to demand
20 them. The City though does have the ability to provide
21 them. But they haven't reached that level yet.

22 And as such, the status quo, I think, must be
23 maintained. I'm not going to pick which benefits
24 remain and which benefits do not remain if I'm going to
25 enter an order that the status quo remains in full

1 force and effect. And I'm satisfied that both the City
2 and the County have the ability to address any
3 prejudice that may result by continuing aggressive
4 negotiation or alternative dispute resolution, which is
5 provided for in labor law and which, quite frankly, the
6 court has no impact of whatsoever.

7 It sounds as if these matters will proceed to
8 optional mediation -- Strike that. It sounds as if
9 these matters will proceed to mediation to the extent
10 that either party feels aggrieved and they don't want
11 to negotiate on their own, they then proceed to
12 arbitration. The arbitrator will make a binding
13 decision. The parties know exactly what benefits are
14 or are not provided and their costs and then an
15 agreement would be reached because the ability to agree
16 is eliminated when parties refuse to come to agreement
17 on the negotiating table or bargaining table and the
18 arbitrator makes a decision. That's, in fact,
19 de facto, the parties agree.

20 So I'm going to enter an order today that the
21 County and the City must maintain the status quo. That
22 status quo is defined under the previous bargaining
23 agreements that they enter for the Green Bay, City of
24 Green Bay, the Green Bay Professional Police
25 Association agreement of 2009 to 2011, for the County,

1 the County bargaining agreement, the agreement between
2 Brown County and the Brown County Sheriff's Department
3 non-supervisory employees 2010-2011.

4 The question really now becomes am I granting that
5 under mandamus or am I granting that under a form of
6 injunctive -- a temporary injunctive relief? I'm
7 concerned about proceeding on a temporary injunction.
8 I think Mr. Lacy is right. I don't think the law
9 allows me to enter a temporary injunction. There's no
10 separate action filed. You're asking me really to look
11 back within the context of this case, and your question
12 is, Judge, we're not challenging -- Strike that. We're
13 not asking for reconsideration of your decision. We're
14 asking for a date of implication, and until that date
15 of implementation is clarified, we want the current
16 benefits. That to me sounds like an action in mandamus
17 and not an action for temporary injunction.

18 So I'm going to issue an order in mandamus. I'll
19 take the request for injunction under advisement. And
20 I'm further, essentially, reserving the right to allow
21 reconsideration of my mandamus motion subsequent to
22 completion of the collective bargaining process through
23 mediation and arbitration. In other words, what I do
24 not want, and what I think would be grossly unfair, is
25 for the unions to say, well, now we got what we want,

1 and we're not going to do anything, and we're going to
2 liberally stall out arbitration and mediation to the
3 extent the union act is inequitable. That's when she
4 makes -- but one of the arguments she makes in part is,
5 Judge, once you enter that, then we'll never get an
6 agreement and that's completely inconsistent with your
7 decision and completely inconsistent with the law. And
8 to the extent the union inequitably fails to bargain or
9 bargains in bad faith with an attempt to delay the
10 implication of a new agreement, I'm reserving the right
11 to review this and lift my order of mandamus.

12 You may draft an order to that effect.

13 MR. CERMELE: I will, Your Honor. One
14 question is, as I understand the Court then, the
15 mandamus would be in effect until the parties have a
16 new written agreement? Is that your understanding?

17 THE COURT: That's what my
18 understanding --

19 MR. CERMELE: Absent finding an allegation
20 and finding of the court of bad faith or refusal or
21 inequitable conduct on my client's behalf; correct?

22 THE COURT: That's what I'm ordering
23 today.

24 MR. LACY: Your Honor, can I ask a point
25 of clarification?

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THE COURT: Sure.

MR. LACY: I'm a little concerned how it works in operation. You accepted Attorney Cermele's argument because we have a provision in this agreement that says that no provisions in this agreement can be modified until there's a mutual agreement on a successor; correct? And as I understand the Court's decision, that that means we have to wait until we either have -- we agree or we have an arbitrator tell us what it is.

In neither of those context whether we agree or whether we have an arbitrator tell us what we agree to or what we are going to have is that going to cover health insurance, plan design or the cost of it. So we have a problem in the sense that the provision that you're relying on and that Mr. Cermele relied on to require maintenance of this contract until it's been modified by contract is now something that is illegal for us to bargain and therefore won't ever be modified by contract.

THE COURT: Why is it illegal for you to modify by contract?

MR. LACY: Because it's a prohibited subject of bargaining.

THE COURT: Mr. Lacy, you're right, so in

1 the new agreement, they can't bargain it. You're
2 absolutely right. But until you have a new agreement,
3 you got to have something. And this, the agreement you
4 have, but they can't bargain those benefits because I
5 entered an order saying Act 32 prohibits it. You're
6 right. You won the war.

7 MR. LACY: No, no. I've lost, I've lost
8 the major battle because, because you're maintaining
9 the contract provision that we can't bargain over.
10 There's no point to saying we can't bargain, that it's
11 prohibitive. It's not that we don't have to, okay.
12 And it's not that the union can't force us to. It's
13 that the law sayings neither of you are allowed,
14 permitted by law to bargain this.

15 THE COURT: You're right.

16 MR. LACY: It can't be in your collective
17 bargaining agreement.

18 THE COURT: In your prospective collective
19 bargaining agreement it can't be in there.

20 MR. LACY: Therefore, the modification of
21 the provisions that's in the '09-'11 contract which
22 have to be maintained can't be modified by mutual
23 agreement as that provision states. Therefore, we're
24 perpetually stuck with this because we can't agree to
25 changes and that's what the provision of the contract

1 says you have to agree to changes.

2 THE COURT: You don't have to agree. I
3 appreciate that. I ordered this agreement remains as
4 part of the status quo in full force and effect until
5 there is a new agreement. The new agreement will not
6 allow the union to collectively bargain on the issues I
7 addressed in my decision. So, no, the provisions that
8 I had entered an order on aren't going to be in the new
9 agreement because they can't be based on my decision.

10 MR. LACY: And, therefore, the provisions
11 in the current agreement have -- will not be modified
12 and that's -- the provision that we're looking at in
13 the contract says nothing in the contract can be
14 modified, altered, amended except by mutual agreement.

15 Your decision, as I understand it, interprets or
16 reasons that provision thus requires that contract to
17 remain in effect until such time as there are successor
18 agreement.

19 THE COURT: Correct.

20 MR. LACY: And it's specific to no
21 provisions may be amended, modified until there's
22 successor agreement.

23 THE COURT: Mr. Lacy, that would be
24 inconsistent with the law.

25 MR. LACY: I agree.

1 THE COURT: That would be inconsistent
2 with my decision, so I'm not saying that my decision
3 was meaningless. I'm being a bit sarcastic. I'm not
4 saying my decision was meaningless, and I'm not saying
5 Act 32 is meaningless. I'm saying until you have a new
6 agreement that does not include these benefits because
7 the law doesn't allow the benefits, the benefits
8 continue until you have a new agreement because you
9 can't agree to those benefits which I have earlier
10 decided the union is prohibited from bargaining on.
11 You can't. That agreement would be an illegal
12 agreement.

13 MR. LACY: And the reason I'm saying
14 you're two decisions are inconsistent, Your Honor, is
15 that you're saying we can't -- that planned design and
16 selection cannot be part of our bargaining
17 relationship. It's an employer imposed benefit. It
18 can't be part of the bargaining. But yet today you say
19 we have to maintain a collective bargaining agreement
20 that contains provisions that we can't bargain over.
21 That's why I'm saying there's a problem in terms -- let
22 me rephrase that. I don't understand how that works
23 pragmatically.

24 THE COURT: Sure.

25 MS. RUENZEL: How do you amend this

1 agreement by taking that out when you don't have
2 agreement to take it out?

3 THE COURT: You got to get a new agreement
4 just as you've noted.

5 MS. RUENZEL: Well --

6 THE COURT: Just as you noted, counsel, we
7 don't agree to this anymore. We are putting you on
8 notice. You done exactly what the contract requires.
9 And now you're going to negotiate a new agreement.
10 Sounds like you've been negotiating a new agreement for
11 quite some time, to be honest, and you're getting ready
12 for impasse.

13 MS. RUENZEL: Isn't that in essence
14 negotiating as health care because we're negotiating
15 that out of the contract?

16 THE COURT: You're negotiating towards
17 getting a new collective bargaining agreement. When
18 you get that new collective bargaining agreement, the
19 union will not be collectively bargaining the benefits
20 that I have indicated in my previous decision. They
21 don't have the right to bargain. But until you have a
22 new agreement, you got to have something and that
23 something is the status quo. And I'm not going to
24 start pulling provisions out of the status quo, so
25 that's the agreement until you reach a new agreement.

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And it sounds like you can go as quickly or as slowly as you want in reaching a new agreement, but you got to have a new agreement before we start pulling -- before we start pulling terms out of the old agreement.

You can draft that order. I'll sign it upon receipt. Thank you very much for the information. It was extremely informative. Thank you.

MR. CERMELE: Thank you, Your Honor.

(End of proceedings at 1:22 p.m.)

STATE OF WISCONSIN)

)SS. CERTIFICATE

County OF BROWN)

I, SHERI L. PIONTEK, certify that I am an official reporter for said County; that the foregoing pages have been carefully compared against my stenographic notes; that the foregoing 62 pages is a true and accurate transcript of the proceedings taken on December 20, 2012.

Dated this 30th day of December, 2012.

Sheri L. Piontek, Official Reporter