

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 1

OZAUKEE COUNTY

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PRN ASSOCIATES LLC  
and PGN ASSOCIATES  
LLC,

Plaintiff - Petitioner,

v.

Case No. 05 CV 312

STATE OF WISCONSIN  
DEPARTMENT OF  
ADMINISTRATION,

Defendant-Respondent.

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**RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

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**I. This case is moot and must be dismissed.**

Once a public contract has been let, a party may not challenge the award or the award process. The matter is moot and any challenge proceeding must be dismissed. That has been the law in Wisconsin for over 130 years. Defendant (the State), in its Initial Brief, cited three Wisconsin Supreme Court cases, *Aqua-Tech*, *Hron Bros.* and *Phelan*, that are directly on point. (Initial Brief at 6). This Court found a fourth case, *D.M.K. v. Town of Pittsfield*, 2006 WI APP. 40, 711 N.W. 2d 672 (Ct. App. 2006) that reached the same conclusion. Plaintiff (Prism) offers no authority which contradicts the four decisions. The four decisions are controlling and require dismissal of this case.

## **II. Prism cannot distinguish the four cases that are controlling.**

Because it has no authority to contradict the four cases, Prism tries to distinguish them. It cannot do so. Prism did not seek injunctive relief. The subject contract has been let. That is all the four cases require to support the finding that this case is moot and must be dismissed. The State, nevertheless, will respond briefly to the arguments made by Prism.

### **A. The applicability of the Wisconsin Administrative Code Adm. ch. 10 would not change the outcome dictated by the four cases.**

Prism first tries to distinguish the four cases by contending that had Wis. Admin. Code § Adm. ch. 10 (Adm. 10) applied in any of the four cases, the outcome would have been different. (Brief at 4) The State does not agree that Adm. 10 applies to the second procurement at issue in this proceeding, but even if it did, Prism's logic is flawed.

Prism states the Administrative Code "*requires*" the procuring agency to "settle and resolve" any protests, *even* if the contract at issue has been let, obviously referring to Adm. 10.15(2). *Id.* Prism thus intimates the Administrative Code provision **requires** the agency to settle a protest with some sort of economic award, whether or not the contract has been awarded. It clearly does not.

Adm. 10.15 is quoted in full on page 5 of Prism's brief. Subparagraph 2 gives the head of the procuring agency, or designee, the **authority** to settle protests, undoubtedly to include monetary settlements, if appropriate, but it does not **require** such settlements, as Prism argues. All Adm. 10.15(2) **requires** is that the protest be resolved. Prism's protest was resolved, twice! It was rejected both times. No provision of the Administrative Code **requires** that protests be resolved with a monetary award. Applicability of the Administrative Code would not have changed the holdings in the four controlling cases.

**B. The case is moot, regardless of the type of relief sought.**

Prism next tries to distinguish the three Supreme Court cases because it contends they all involved a request for a writ of mandamus – to require the contract be awarded to the petitioner – and the issue of damages was not before any of the courts.<sup>1</sup> Procedurally, that is not correct. *Aqua-Tech* and *Phelan* both involved mandamus, but the petitioner in *Hron Bros.*, was seeking a writ of certiorari to obtain judicial review of the procurement decision, much the same as Prism’s efforts in this ch. 227 case. *Hron*, 265 Wis. at 507. The Court still held the case was moot.

The State understands, however, that the sense of Prism’s argument is that none of the three cases addressed the question of whether or not damages are an available remedy for a protester, so they are distinguishable from our case. Prism is wrong. It is obvious from reading the three Supreme Court cases that the rationale for each was the same. Each based the outcome on the principle that public bidding statutes are intended for the benefit and protection of the general public and the lowest bidder therefore has no fixed, absolute right to the contract. *Aqua-Tech*, 71 Wis. 2d at 550; *Hron Bros.*, 265 Wis. at 509; *Phelan*, 24 Wis. at 684-685. That rationale clearly precludes a claim for damages. Once the contract has been let, the public interest has been served. The protester has no right or claim to sue on. Further, allowing a claim for damages would not be in the public’s best interests. The public would have litigation expenses to pay, no matter the outcome, and could end up having to pay twice for the goods and/or services, at least to the extent of the protester’s lost profit claim.

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<sup>1</sup> Prism has obviously abandoned its effort to have the contract awarded and is now focusing solely on its claim for damages.

Prism then separately attacks each of the three Supreme Court decisions. It dismisses *Hron Bros.*, simply because it relied upon the earlier decision in *Phelan*, which Prism says did not address the issue of whether damages were available (correct), and “if anything, was based on the argument of the procuring agency there that the wronged contractor had an adequate remedy at law.” (not correct) (Brief at 8). Prism, no doubt, would like us to believe the adequate remedy it refers to is a claim for damages. But, Prism is wrong, again.

The decision in *Phelan* was not based in any way, shape or form on the contention that the petitioner had an adequate remedy at law. That was one of three arguments made by the respondent, but the Court never reached the argument, holding instead that the matter was moot because the contract had already been awarded. *Phelan* at 684-685. Nowhere does the *Phelan* court even hint that the petitioner could maintain an action for damages.

Prism’s attempt to distinguish *Aqua-Tech* is even more bizarre. First, Prism argues the Supreme Court in *Aqua-Tech* was not confronted with the question of whether damages would have been available to Aqua-Tech had it sought them. (Brief at 7). In the very next sentence, Prism claims that *Aqua-Tech* actually confirms that damages are available, because the court held that Aqua-Tech could recover its bid preparation and bonding costs. *Id.* That, in fact, is not what the Court held and Prism’s statements are misleading, to say the least. The actual quote from the decision on this point is:

**“If Aqua-Tech prevails in its action for a permanent injunction, it should be permitted to recover as damages its reasonable and necessary expenditures in preparing its bid, plus the costs of obtaining the bonds required by the specifications, but not its loss of profit.”** (Emphasis added).

*Aqua-Tech*, 71 Wis. 2d 541 at 553-554. Prism conveniently left out the fact that Aqua-Tech first had to obtain a permanent injunction, in order to even be in position to claim its bid preparation and bonding costs. The omission is likely because Prism did not seek injunctive relief and thus cannot satisfy the condition precedent imposed by *Aqua-Tech*.

Prism also conveniently left out the part about lost profits not being available, even if it had sought and obtained an injunction. *Aqua-Tech* therefore completely refutes Prism's argument that it can pursue a claim for damages, in any form or amount.

If there was any question about Prism's ability to pursue a claim for damages after the contract has been let, *D.M.K.* puts the last nail in the coffin. The plaintiff in *D.M.K.*, like Prism, **was** pursuing a claim for damages. It argued the language in *Aqua-Tech*, quoted above, which precludes a claim for lost profits in a procurement case, and conditions the right to obtain bid preparation and bonding costs upon first obtaining injunctive relief, was dicta and should not be followed. The court of appeals rejected the argument. *D.M.K.*, 2006 WI APP ¶ 25. In doing so, the court adopted the reasoning expressed by language from *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W. 2d 85 (1981):

--- when the supreme court intentionally takes up, addresses, and decides an issue germane to, though not necessarily dispositive of, the controversy before it, such a decision is not dicta but is a judicial act that will thereafter be recognized as **binding precedent**. We likewise conclude that the *Aqua-Tech* court's decision regarding a disappointed bidder's available remedies is not dicta. [Emphasis added.]

*Id.* The authority is crystal clear. Having failed to seek or obtain injunctive relief, Prism may not pursue a claim for damages of any type whatsoever.

C. **A ch. 227 court cannot, in any event, award damages.**

Prism contends this court, effectively sitting as an appellate court, has the authority to award damages. Prism says the State conceded that ch. 227 is a waiver of its immunity from suit. (Brief at 9). The State made no such concession. It did concede ch. 227 is a **limited** waiver of its immunity. (State's Initial Brief at 8, citing *Turkow v. DNR*, 216 Wis. 2d 273, 281, 576 N.W. 2d 288 (1998)). The State used the word **limited** advisedly, noting that the waiver only extends as far as the authority expressly provided in ch. 227. (Initial Brief at 8).

Prism next argues that consent to suit (apparently even a limited consent as provided in ch. 227) is different than consenting to a remedy. Once sovereign immunity is waived, Prism contends any and all remedies come into play and it can both seek and recover damages in this ch. 227 proceeding. (Brief at 9). Prism cites three cases, *State v. P.G. Miron Construction*, *Townsend v. Wisconsin Desert Horse Association* and *Forseth v. Sweet*, which it claims supports that argument. None of the cases actually do; more importantly, none are not ch. 227 cases and do not address the authority this court has based upon the **limited** waiver of immunity provided by ch. 227. Ch. 227 restricts the scope of a court's review and the remedies it can impose. See: Wis. Stat. § 227.57. That is Prism's problem in this case. Ch. 227 simply does not authorize this court, sitting in its review capacity, to award damages against the State.

Prism's argument that consent to suit is separate from consent to remedy is also contrary to established precedent interpreting ch. 227. Where a specified method of review is prescribed by the legislature, that method is exclusive. *Kosmatka v. DNR*, 77

Wis. 2d 558, 567, 253 N.W. 2d 887 (1976); *Graney v. Board of Regents*, 92 Wis. 2d 745, 755, 286 N.W. 2d 138 (Ct. App. 1979). See also: *Clafin v. Department of Natural Resources*, 58 Wis. 2d 182, 187, 206 N.W. 2d 392 (1973) (strict compliance with review statute is required). The end result is that if ch. 227 does not expressly allow a claim for damages, this court, respectfully, does not have authority to entertain such a claim.

Prism argues § 227.57(9) provides such authority, with language that the court shall provide “whatever relief is appropriate ---.” Prism cites no authority that expressly provides such language authorizes a claim for damages. The State cited two cases, at page 9 of its original brief, *Kegonsa* and *Keip*, which unequivocally hold the subject language does **not** provide such authority.

The State has located a third case, which also demonstrates nothing in ch. 227 authorizes a claim for damages. In *Butzlaff v. State DHFS*, 223 Wis. 2d 673, 590 N.W. 2d 9 (Ct. App. 1998), plaintiff was suing because he was fired, allegedly in violation of Wis. Stat. § 103.10, the State’s Family or Medical Leave Act. The procedure for challenging termination is set forth in Wis. Stat. § 103.10(12). The employee must first file a complaint with the Department of Workforce Development (DWD). If DWD finds probable cause that a violation occurs, it conducts a ch. 227 hearing. Wis. Stat. § 103.10(13) allows the employee to bring a civil action to recover damages, **after** completion of the hearing and ch. 227 judicial review of DWD’s decision.

Butzlaff did not prevail at the administrative level, or in the ch. 227 judicial review proceeding. He nevertheless brought a civil action to recover damages. In deciding whether or not Butzlaff could bring suit when he did not prevail at the administrative level, the court notes that the only type of relief Butzlaff could get in the

civil action is an award of damages. The Court concludes that the purpose of the civil action is to allow a successful plaintiff to obtain relief **not available** in the administrative hearing or the ch. 227 judicial review portions of the claim process. *Butzlaff v. DHFS*, 223 Wis. at 684. If damages were available in a ch. 227 proceeding, as Prism contends, there would have been no need for the civil action in *Butzlaff*.

The State has thus cited three cases directly on point – damages are not available in a ch. 227 proceeding. Two of those cases, *Kegonsa* and *Keip*, hold they are not available under the “whatever relief is appropriate” language of Wis. Stat. § 227.57(9), the only provision in ch. 227 Prism contends authorizes a claim for damages.

Prism argues *Wagner v. State Medical Examining Bd.* (Brief at 10) shows a ch. 227 court can award damages under the “whatever relief is appropriate” language in § 227.57(9), because it holds a ch. 227 court has a number of remedies not expressly set forth in the statute. The court said that, but it did not find the provision in question authorized a claim for damages.

The trial court in *Wagner* entered a default judgment against the respondent state agency because it failed to file its response to the petition and the agency record in a timely fashion. *Wagner* 181 Wis. 2d at 635. The Supreme Court found entry of a default judgment was inconsistent with a ch. 227 court’s scope of review under § 227.57(2), stating:

The circuit court had within its discretion other remedies compatible with the ch. 227 scope of judicial review. For example, the circuit court, upon motion or petition, could have (a) issued a writ of mandamus, ordering compliance by the Board; (b) issued an order to show cause as to why the Board should not be held in contempt for noncompliance; (c) ordered production of the record; or (d) refused to consider the Board’s statement of position because it failed to timely file its notice of appearance. All of the aforementioned remedies would have

been consistent with the purpose of sec. 227.57, Stats., which requires a circuit court's independent review of the record.

*Wagner* at 644. Nowhere in its decision does the *Wagner* court even hint a ch. 227 court can award damages.

Even if a ch. 227 court had authority to award damages, that does not mean an award is automatic. Presumably, the court would still follow established precedent in making that determination. Prism's failure to obtain injunctive relief would still be fatal and the precedent established by the four cases cited at the beginning of this brief would still render this case moot and require dismissal.

### **III. Prism cannot prevail on its other arguments.**

The remainder of Prism's brief takes a shotgun approach and urges different legal theories it contends support a claim for damages. As already noted, that is not the issue before the court, even if the case were not moot. The secondary issue here is whether or not this court has authority to award damages, no matter what legal theory is asserted. The State has provided uncontroverted authority that it does not have such authority. A discussion about what legal theories Prism argues might support its claim for damages is not relevant, because this court has no authority to award damages, no matter what legal theory is asserted. The State will, however, comment briefly on Prism's remaining arguments.

#### **A. The state is not estopped from asserting its defenses in this action.**

Prism asserts the State's conduct, as alleged in the petition, estops it from arguing it cannot obtain damages in this matter. Prism asserts *R.W. Docks & Slips v. Department of Natural Resources*, cited on page 12 of its brief, as authority. The State is not exactly sure what Prism's argument is here. The State is not claiming Prism does not have an an

avenue through which it can seek relief; its argument is that it cannot obtain relief in this ch. 227 proceeding.<sup>2</sup>

Further, *R.W. Docks & Slips v. Department of Natural Resources* does not hold the State is subject to an estoppel argument. In that case, the circuit court found the agency record was inadequate to decide the issues before it and ordered the case remanded so the record could be supplemented. *R.W. Docks*, 145 Wis. 2d at 856. The petitioner had argued the DNR was estopped to deny the relief it had requested, based upon disclosures allegedly made some 14 years earlier. The circuit court did not reach the merits of the estoppel argument, but ordered the agency to include facts in the supplemental record on that issue. *R.W. Docks*, at 863. The court of appeals, similarly, did not address the estoppel issue on the merits. It simply held the trial court had the authority to order that the record be supplemented. *Id.* In point of fact, the law in Wisconsin is that the state cannot be estopped from asserting its immunity from suit. *Kegonsa Jt. Sanitary Dist. v. City of Stoughton*, 87 Wis. 2d 131, 144, 274 N.W. 2d 598 (1979), citing: *Lister v. Board of Regents*, 72 Wis. 2d 282, 294, 240 N.W. 2d 610 (1976).

**B. Prism has no takings claim.**

Even if a takings claim could be heard in a ch. 227 proceeding, Prism could not prevail. First, it has no contract upon which to base such a claim. Cases cited in the State's Initial Brief (at 12) hold neither party to contract negotiations is bound until a contract is actually signed and, until it is, either party is free to walk away, without liability. Further, as noted in the three Supreme Court Cases cited at the beginning of this brief, public bidding statutes are for the benefit and protection of the general public; the

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<sup>2</sup> The state does not concede that Prism is entitled to relief, only that there **may** be another avenue available to seek relief.

low bidder has no fixed, absolute right to the contract. See also: *Forseth v. Sweet*, 38 Wis. 2d 676, 686-690, 158 N.W.2d 370 (1968) (There is no Constitutional right, under either the Due Process or Takings clauses, to sue the State). There is no basis for a takings claim.

**C. This court has limited authority to fashion a remedy.**

The State does not wish to belabor the point. Again, this is an argument that perhaps is appropriate were this court sitting in its traditional role. It, however, is not sitting in that capacity. As already argued, this court only has the authority expressly provided in ch. 227, and it does not include the power to fashion a remedy that would include damages against the State.

**D. Timeliness.**

The state's timeliness argument is only to bar claims based upon the first procurement effort (Initial Brief at 10). It concedes this proceeding was timely commenced as to claims based upon the second procurement; such claims still should be dismissed as being moot.

**E. Remainder of Prism's arguments.**

The state addressed Prism's contract claims in its original brief and will stand on those arguments. Prism introduces a new theory, that of promissory estoppel (Brief at 19). Once again, that is a theory of recovery that **perhaps** can be asserted in a plenary action, but the secondary issue in this proceeding concerns what authority this court has sitting in its review capacity. Since it does not have authority to award damages, and since the case is moot (the primary issue), the promissory estoppel theory cannot be asserted here.

## CONCLUSION

Prism did not seek injunctive relief. The contract has been let. Four cases directly on point say the case is moot and must be dismissed. Even if the case was not moot because public bidding statutes are only for the benefit and protection of the public, as the four cases hold, it would be moot because this court has no authority under ch. 227 to award damages, the only relief now sought by Prism. Prism's other arguments are simply different legal theories it contends support its right to recover damages. They may be relevant in a separate, plenary action, but not in a proceeding in which damages cannot be awarded. This case must therefore be dismissed.

Dated this 29th day of August, 2006.

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