STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH 5

WISCONSIN STATE SENATE,
SENATOR ANDRÉ JACQUE,
ANTHONY THEISEN and
JANE DOE,

Plaintiffs,

Case No. 23-CV-250

v.

THE CITY OF GREEN BAY and
ERIC GENRICH,

Defendants.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

This is an odd "emergency" request for a temporary restraining order. It has been filed by four plaintiffs, none of whom asserts that the City of Green Bay (the "City") has actually invaded their privacy by recording their conversations in City Hall or threatens to do so anytime soon. At least some of the plaintiffs seem to have been aware of the City's recording program for months but puzzlingly waited until now to declare an "emergency" that requires immediate, emergency relief from the Court. And, counterintuitively, the plaintiffs rest their claims on the supposed right to privacy in a quintessential public place: open hallways in Green Bay's City Hall. After clearing away the exaggerated, inflammatory rhetoric about "bugging" and "eavesdropping," all that remains is a policy

disagreement over an unexceptional surveillance program designed to ensure public safety in a few sensitive locations in a single government building.

Among the numerous fatal defects to their motion are the fact that the plaintiffs lack standing, have not shown an imminent and irreparable harm, fail to show a reasonable chance of success on the merits, and seek to completely upend rather than preserve the status quo, accordingly, their motion for a temporary restraining order must be denied.

STATEMENT OF FACTS

The City has installed three visible audio recording devices in City Hall in response to several safety incidents that have occurred over the past year-and-a-half. (Affidavit of Joseph Faulds ("Faulds Aff.") ¶7).

In June 2021, the City's then-Human Resources Director received a report from a staff member in the City Attorney's office that three members of the public verbally assaulted her in City Council chambers following the conclusion of a public meeting. (Faulds Aff. ¶3). The staff member said that she felt threatened to the point that her personal safety was at risk and asked for something to be done to protect her and other staff. (Faulds Aff. ¶3) To provide more security, the City's IT Director asked for the installation of recording devices on the second floor of City Hall near the Council chambers and Mayor's office. (Affidavit of Jason Bamman ("Bammon Aff." ¶4).

In November 2021, a second significant incident occurred in the same area on the second floor, as the City was informed that a member of the press working for the Green Bay Press Gazette was isolated, threatened, and verbally assaulted by members of the public in the hallway of the second floor of City Hall after a City Council meeting. (Faulds

Aff. ¶4). She said that these persons stood over her, insulted her, claimed that she should not be in the City, questioned her education and made other degrading remarks. (Faulds Aff. ¶4). Following the incident, The Gazette no longer had the reporter cover City Hall. (Faulds Aff. ¶4). As noted in an email dated December 9, 2021 that was sent to all City staff (over 800 employees), the second floor audio (and video) recording devices had been installed (and no one was instructed that their existence should not be disclosed to public). (Faulds Aff. ¶8; Bamman Aff. ¶5).

In April 2022, another incident occurred in a different location, this time immediately outside the Clerk's office on the first floor of City Hall. (Faulds Aff. ¶5). During the incident, an elderly member of the public attempted to deliver an absentee ballot to the City Clerk's office. (Faulds Aff. ¶5). A member of the public entered the office and verbally assaulted staff about the absentee ballot in the presence of the voter. (Faulds Aff. ¶5). The assault caused the voter to cry and visibly shake to the point that staff needed to escort her to her vehicle. (Faulds Aff. ¶5). In response, the City again installed one video and one audio recording device in visible locations outside the Clerk's office on the first floor. (Bamman Aff. ¶¶6–7).

In sum, there are three total audio recording devices. Two on the second floor, one near the entrance to council chambers and mayor's office in the main hallway, and one audio recording device on the first floor, near the entrance to the clerk's office. All three audio recording devices have inconsistent capabilities. Because of the hard surfaces in the hallways, the acoustics are poor. (Bamman Aff. ¶10). Therefore, the audio recording has an inconsistent ability to record voices speaking in a normal tone so that conversations can

be understood. (Bamman Aff. ¶10). Recording of the audio or video only occurs when there is physical motion—the device quickly activates when motion starts or stops, and so there is no continuous recording. (Bamman Aff. ¶11). No one in the Police Department or City Hall is assigned the task of monitoring the audio recordings on an ongoing basis, nor does anyone at City Hall and/or the Police Department regularly monitor the audio recordings. (Bamman Aff. ¶13; Faulds Aff. ¶10).

In addition to the visibility of the audio recording devices (Faulds Aff. ¶9), the City recently posted notices at City Hall alerting visitors that video and audio recordings are taking place within City Hall. (Faulds Aff. ¶9, Ex. E).

ARGUMENT

I. As a threshold matter, Plaintiffs offer no evidence that the City's audio devices have recorded them and they therefore lack standing to bring this case.

Plaintiffs' first hurdle to obtaining a temporary restraining order is standing. This case is about purportedly unlawful audio recording devices, but none of the named plaintiffs can even allege that they have, in fact, been recorded by the City's audio recording system. Absent an actual invasion of their privacy, none of the named plaintiffs have standing to advance their generalized grievances in this Court.[1]

Plaintiffs in Wisconsin must clear two hurdles to establish standing. The first step is to determine whether the alleged infraction "directly causes injury to the interest of the

[1] Plaintiffs' class action allegations cannot help them demonstrate standing at this stage of the case because a class has not yet been certified. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009) ("Before a class is certified … the named plaintiff must have standing, because at that stage no one else has a legally protected interest in maintaining the suit."). In other words, the named plaintiffs themselves must have standing to proceed; they cannot rely on the standing of putative class members.

[plaintiff]." *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983). Moreover, "[a]bstract injury is not enough"; rather, "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 525 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). "The second step is to determine whether the interest asserted is recognized by law." *Id.* at 524.

Plaintiffs' entire lawsuit—and, in turn, their motion for a temporary restraining order—cannot get past step one, because no Plaintiff has shown an actual injury. First and foremost, no Plaintiff offers any evidence that they have, in fact, been recorded by the audio devices at issue. Instead, they simply speculate that they may have been recorded, and even the basis for that speculation is flimsy at best.

As for Senator Jacque and Jane Doe, neither asserts that they have actually had a private conversation in City Hall since the challenged audio recording system was installed in June 2021 and June 2022. Both say that they have visited City Hall "over the past three years" (that is, since February 2020)—Senator Jacque "on at least one occasion" (Dkt. 9, ¶3) and Jane Doe "on several occasions" (Dkt. 10, ¶3). Their testimony allows that this handful of visits could have occurred before any audio recording devices were installed. Moreover, neither Senator Jacque nor Jane Doe specifies where in City Hall they had purportedly private conversations, let alone attests that those conversations occurred outside the Council chambers, Mayor's office, or Clerk's office, the only places audio devices have been installed. And although Mr. Theisen claims more specifically that he

participated in a purportedly private conversation at City Hall in September 2022 (Dkt. 8, ¶¶11–16), he also does not allege where in the building that conversation transpired, nor does he even state a belief that his conversation was recorded.

None of this constitutes proof of "direct injury." *Fox*, 112 Wis. 2d at 525. No Plaintiff has offered any evidence that they were recorded, much less that that the content of their conversation is audible on a recording that currently exists. Without such evidence, their claimed injuries are "conjectural" at best. *Id.*

And the asserted injury of the remaining Plaintiff—the Wisconsin State Senate (Dkt. 3, ¶6)—is entirely "[a]bstract," and therefore as a matter of law "not enough" for standing. *Id.* "Although the magnitude of the injury is not determinative of standing, the fact of injury is." *Id.* (citing *State ex rel. 1st Nat'l Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 308–09, 290 N.W.2d 321 (1980)). The City obviously has not—and cannot—record from City Hall the State Senate's conversations, and so it cannot show any concrete harm caused by the City's audio recording devices. And as for the allegation that the City has violated a state statute (Dkt. 3, ¶6), that alone cannot grant standing to the State Senate as it would allow a legislative branch to sue municipalities whenever it thinks a statutory violation has occurred. Plaintiffs provide no authority to support such an absurd result.

To be sure, the individual Plaintiffs all also assert that they are "reluctant" to return to City Hall for fear that they will be recorded. (Dkt. 8, ¶19; Dkt. 9, ¶8; Dkt. 10, ¶11). But a supposed "chilled speech" injury could conceivably provide standing only for Plaintiffs' free speech claim; that injury could not also provide standing for their various privacy claims, which must necessarily rest on alleged privacy violations, not chilled speech. *Cf.*

Pagoudis v. Keidl, 2021 WI App 56, ¶ 13, 399 Wis. 2d 75, 963 N.W.2d 803 (analyzing the plaintiffs' standing as to "each type of claim" they asserted). In any event, Plaintiffs' purported fear is completely implausible—the City Hall building is six stories, and visible audio recording devices have only been installed in parts of two floors. (Faulds Aff. ¶3). There are plainly other places in City Hall that Plaintiffs could go to converse without any fear of being recorded.

II. Plaintiffs cannot satisfy the stringent requirements for a temporary restraining order.

Even if Plaintiffs could clear the standing hurdle, they still would not be entitled to a temporary restraining order. "Injunctions are not to be issued lightly." *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶60, 403 Wis. 2d 539, 977 N.W.2d 756 (quoting *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974)). A court may issue a temporary injunction only when the moving party "is likely to suffer irreparable harm if a temporary injunction is not issued," "has no other adequate remedy at law," "has a reasonable probability of success on the merits," and where an injunction is "necessary to preserve the status quo." *Milw. Deputy Sheriffs' Ass'n v. Milw. Cnty.*, 2016 WI App 56 ¶20, 370 Wis. 2d 644, 883 N.W.2d 154 (citation omitted). A failure to prove any element requires denying the motion. *Id.* Here, plaintiffs falter on every element.

A. Plaintiffs fail to show that they will suffer imminent irreparable harm absent a temporary restraining order.

For largely the same reasons that Plaintiffs have not shown an injury sufficient to support standing, they also have not demonstrated that they are likely to suffer irreparable

harm absent a temporary injunction. Again, none of the Plaintiffs offers any evidence that their supposedly private conversations actually have been recorded by the City's audio devices. So, there is no basis to conclude that, as Plaintiffs assert, there is any imminent, meaningful risk that their "attorney/client communications," "sensitive medical matters," or "conversations about sensitive political matters" will be recorded and potentially disclosed to the public. (Pl. Br. 28).

Instead, it seems that Plaintiffs are relying primarily on speculative injuries that may occur to "other members of the public" who might be part of the proposed class. (Pl. Br. 29–30). But they have offered no admissible evidence whatsoever about harms that may be suffered by absent class members.[2] And even if they had, courts recognize that they "cannot rely on evidence showing a likelihood that the putative class members will suffer interim harm and grant a preliminary injunction on behalf of a class not yet certified," for largely the same reasons that absent members of a putative class cannot supply standing. *See, e.g.*, *Barker v. Int'l Union of Operating Engineers, Loc. 150, AFL-CIO*, 641 F. Supp. 2d 698, 704 (N.D. Ill. 2009).

Two other facts demonstrate the lack of imminent, irreparable harm here. ***First***, Plaintiffs may have known about these recording devices for months (e.g., Wisconsin

[2] The only backup Plaintiffs provide for their claim that such sensitive information has been recorded is a news story on a local television station. (Dkt. 16 at 2 nn.1–2). But news stories are hearsay when offered, as here, for the truth of the matter reported. *See* Wis. Stat. §§ 908.01(3), 908.02; *see also, e.g.*, *In re oracle Corp. Sec. Litig.*, No. C01-00988SI, 2009 WL 1709050, at *15 n.16 (N.D. Cal. June 19, 2009), *aff'd sub nom. In re Oracle Corp. Sec. Litig.*, 627 F.3d 376 (9th Cir. 2010) ("repetition of [ ] out of court statements in the news reports is inadmissible hearsay"). Plaintiffs cannot rely on such a source; as the Wisconsin Supreme Court has noted, the "absence of [admissible] proof would alone be sufficient to justify the trial court in refusing to grant the temporary injunction requested." *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 508, 66 N.W.2d 157 (1954).

Legislative Council Memo to Senator Jacque was dated October 25, 2022)[3] raising the question on why plaintiffs' concerns were not raised with the City and/or this case was not filed until the midst of Wisconsin's spring election.[4] To the extent the plaintiffs may have sat on their rights for this long would once again indicate that there is no emergency here justifying immediate injunctive relief. Second, Plaintiffs seek money damages (*see* Dkt. 3, ¶¶68–73), which indicates that their supposed injuries are not irreparable and that Plaintiffs have an adequate remedy at law (an independent requirement for a temporary injunction that Plaintiffs fail to meet). Indeed, the Legislature considered the kinds of injuries alleged here and expressly provided for damages. (Dkt. 3, ¶72 (citing Wis. Stat. § 968.31(2m)). The existence of such remedies—which would address the identical harms on which Plaintiffs base their injunction request—precludes temporary injunctive relief.

Balanced against the lack of imminent, irreparable harm to Plaintiffs is the risk to public safety posed by enjoining the City's audio surveillance program. As City employees attest, the audio devices were installed in response to multiple verbal assaults on City staff and at least one Green Bay Press Gazette reporter. (Faulds Aff. ¶¶3–5). This recording system serves both to deter future such assaults and ensure the City can effectively pursue

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[3] The Court can take judicial notice of these materials, which are also admissible pursuant to Wis. Stat. § 908.03(3) and Wis. Stat. § 909.02(4). *See also State v. Fohey,* 91 Wis. 2d 848, 284 N.W.2d 120 (Ct. App. 1979); *Lievrouw v. Roth*, 157 Wis. 2d 332, 354, 459 N.W.2d 850 (Ct. App. 1990).

[4] Plaintiffs' briefing repeatedly cites to concern of public disclosure of the audio recordings and the reporting of Fox 11 news. (Plaintiffs' Brief, p. 8). The plaintiffs' brief notes that Fox 11 obtained the 90-minute City Hall recording from "an anonymous source that had requested the recording in a public records request." *Id.* The only time the City has produced the 90-minute audio and video recording (and/or any City Hall recording) was on December 16, 2022 in response to a request from Janet Angus. (Cochart Aff. ¶6). The Defendants object to Jane Doe's Motion to Proceed Using a Pseudoynm, and her identify has not been disclosed to defense counsel despite a request and the motion papers indicating a willingness to do so. (Dkt. #5, p. 1).

anyone who may nevertheless someday choose to assault City staff. And that risk is heightened given the imminent election, given that recent elections have proven especially tense around City Hall. It is therefore an especially inopportune time to remove an important tool the City implements to protect its staff and others in City Hall.

B. Plaintiffs have little chance of succeeding on the merits because they have no reasonable expectation of privacy in the open hallways of City Hall.

Leaving aside the lack of standing and irreparable harm, a temporary injunction should be denied because Plaintiffs have little chance of succeeding on the merits. As an initial matter, there is a procedural and factual question whether any of the plaintiffs have complied with Wisconsin notice of claim procedures. Wis. Stat. § 893.80(1d)(a). The parties dispute whether the plaintiffs have actually been harmed; however, to the extent plaintiffs allege they have been harmed, they would have 120 days to service a notice of circumstances of their claim with the City. The Complaint does not allege compliance with Wis. Stat. § 893.80, nor do the plaintiffs' identify when or how they learned of the audio recording devices. By way of reference, the City notified over 800 employees of the audio recording in December 2021. (Faulds Aff. ¶8). The City also responded to Attorney Schuchart's open records request on September 12, 2022 regarding audio recording devices – meaning 120 days later was January 10, 2022. (Affidavit of Lacey Cochart, ¶¶ 3-5). The Wisconsin Legislative Council Memo released by Senator Jacque is dated October 25, 2022 (only to be revised and then released February 7, 2023).[5]

[5] *See* supra note 3 regarding judicial notice, and the hearsay exception for governmental records. Wis. Stat. § 908.03(3) and Wis. Stat. § 909.02(4).

The plaintiffs have the burden of proof in serving timely notice, or actual notice of the claim within 120 days and the lack of prejudice for failure to comply with Wis. Stat. § 893.80. *See e.g., Moran v. Milwaukee Cnty.*, 2005 WI App 30, ¶3, 278 Wis. 2d 747, 693 N.W.2d 121 (affirming dismissal of complaint for plaintiff's failure to meet burden of showing compliance with § 893.80 despite plaintiff filing out incident report submitted to County in timely manner). Although actual notice may be a substitute for written notice if there is no prejudice to the defendant, the actual notice must be received within the same 120 days as the written notice. *Medley v. City of Milwaukee*, 969 F.2d 312, 320, 1992 WL 165401 (7th Cir. 1992). Constructive notice is not a substitute for actual notice. *Elkhorn Area School Dist. v. East Troy Community School Dist.,* 110 Wis.2d 1, 6, 327 N.W.2d 206 (Wis.Ct.App.1982). In other words, a governmental entity's awareness of a party's apparent concerns is not the equivalent of the governmental entity's awareness that a party intends to pursue a legal claim. *G&D Properties, LLC v. Milwaukee Metro. Sewerage Dist.*, No. 2015AP1906, ¶ 19, unpublished slip op. (Wis. Ct. App. Nov. 1, 2016).[6]

Setting aside the questions whether plaintiffs can satisfy their burden on Wis. Stat. § 893.80, their privacy claims all rest on the faulty premise that they have an objectively reasonable expectation of privacy in conversations they choose to have in a quintessential public location—the open hallways of Green Bay's seat of local government, City Hall. Whatever these particular Plaintiffs may have thought about the privacy of these public conversations, it is simply not reasonable to expect conversations in open hallways in City

[6] This case is cited pursuant to Wis. Stat. § 809.23 for its persuasive value and a copy of the opinion is attached.

Hall to remain private. Because Plaintiffs have no reasonable expectation of privacy—and they have cited no on-point cases from anywhere in the country finding such an expectation to be reasonable—Plaintiffs have virtually no chance of succeeding on the merits and thus are not entitled to preliminary relief.

As explained below, the respective legal standards for Plaintiffs' privacy claims all rest on them having a reasonable expectation of privacy in their City Hall conversations.

First, Plaintiffs assert a claim under Wisconsin's Electronic Surveillance Control Law ("WESCL"), which can be triggered by the interception of "oral communication[s]." Wis. Stat. § 968.31(1)(a). An "oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation." The statute is therefore "restricted to [oral statements] made in certain circumstances"—namely, those in which the speaker has a "reasonable expectation of privacy." *State v. Duchow*, 2008 WI 57, ¶19, 310 Wis. 2d 1, 749 N.W.2d 913. Such an expectation is reasonable when an individual has "both (1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that is one that society is willing to recognize as reasonable." *Id.*, ¶20.

Second, Plaintiffs argue that the recordings violate Article I, Section 11 of the Wisconsin Constitution, which guards against "unreasonable searches and seizures." Just like the WESCL, a "search" occurs that triggers Article I, Section 11 (Wisconsin's analogue to the federal constitution's Fourth Amendment) only when the action invades an individual's "reasonable expectation of privacy." *State v. Bruski*, 2007 WI 25, ¶22, 299 Wis. 2d 177, 727 N.W.2d 503.

Third, Plaintiffs assert an intrusion upon their privacy under Wisconsin's right-to-privacy statute, Wis. Stat. § 995.50(2)(am)(1). Such claims can succeed only if the invasion occurred "in a place that a reasonable person would consider private" and in a way that was "highly offensive to a reasonable person." *Id.* This entails the same "reasonable expectation of privacy" analysis as required for Plaintiffs' WESCL and constitutional claims. *See Bogie v. Rosenberg*, 705 F.3d 603, 610 (7th Cir. 2013) (applying Wis. Stat. § 995.20(2)). Notably, the Wisconsin Court of Appeal has reversed and remanded a jury verdict in favor of plaintiffs to enter judgment in favor of defendants because, as a matter of law, defendant neighbors' recording of sounds that emanated from neighboring property taken from defendants' window, did not constitute an invasion of privacy pursuant to Wis. Stat. § 995.50. *Poston v. Burns*, 2010 WI App 73, 325 Wis. 2d 404, 784 N.W.2d 717.

Plaintiffs' privacy claims therefore all turn on one core question: do Plaintiffs have a reasonable expectation of privacy in conversations they have in open hallways in City Hall? The answer is plainly no.

Plaintiffs discuss various factors drawn from *State v. Duchow* that can be considered when answering this question (Pl. Br. 13–14), but they conspicuously ignore *Duchow*'s facts which, in important ways, are strikingly similar to those here. There, a child used a tape recorder in his backpack to secretly record verbal statements made to him by the driver of his public school bus. 2008 WI 57, ¶¶6–8. The bus driver moved to suppress the statements under the WESCL, arguing—much like Plaintiffs here—that it was "uncommon" for these kinds of conversations to be recorded, that he and the student were

the only people present for the conversation, and that he made his statements at a relatively low volume. *Compare id.* ¶¶23–28, *with* Pl. Br. 12–15.

But our supreme court rejected the bus driver's position, in large part due to the "place where [he] spoke": a public school bus. *Duchow*, 2008 WI 57, ¶25. The Court explained that a person's "expectation of privacy is diminished in places that the individual shares with others, as compared with places retained for his or her exclusive use," especially on "public property, being operated for a public purpose." *Id.*, ¶¶25, 37. This principle applies with equal force to open hallways in City Hall as it does to public school buses. And even though no one else was aboard the bus with the student and his driver—just as Plaintiffs assert no one else was present in the hallways during their conversations—"[t]here is nothing private about communications [that] take place in [ ] a [public] setting." *Id.*, ¶38. Courts across the country routinely reach similar conclusions that people have no reasonable expectation of privacy in conversations they hold in public areas where they could easily be overheard.[7]

It is critical to keep in mind the location of the audio recording devices here—in open hallways and spaces outside the Mayor's and Clerk's offices. These are not hidden devices in closed rooms where one might perhaps reasonably expect some privacy; rather,

[7] *See, e.g.*, *State v. Garcia*, 252 So. 3d 783, 785 (Fla. Dist. Ct. App. 2018) (an "expectation [of privacy] is not reasonable where "[t]he intercepted communication was made in an open, public area rather than in an enclosed, private, or secluded area") (citation omitted); *State v. Peltz*, 391 P.3d 1215, 1222–23 (Ariz. Ct. App. 2017) ("Participants of a conversation that can be readily overheard by someone standing in a public place have a lesser expectation of privacy."); *United States v. Wells*, 739 F.3d 511, 518 (10th Cir. 2014) ("[N]either video nor audio surveillance automatically violates the Fourth Amendment; when such surveillance is conducted in a public place such as a bank, where no reasonable expectation of privacy exists, the surveillance is not subject to suppression.").

they are openly displayed devices in common areas outside some of the busiest parts of City Hall. (Bamman Aff. ¶8). Moreover, the technology used is not tailored to constantly monitor quiet conversations; rather, it is activated by motion in the vicinity. (Bamman Aff. ¶¶ 10–11). Notably, Plaintiffs do not even assert that their private conversations have been recorded by the City's surveillance system—just that they *may* have been.

Plaintiffs' main argument rips from context the observation in *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018), that "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." (Pl. Br. 14) That is true, but *Carpenter* involved the "novel circumstances" of police obtaining an "all-encompassing record of [a cellphone] holder's whereabouts," an investigative tactic that "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.* Sporadic audio recordings of conversations by visible equipment in public hallways of City Hall and triggered by motion differ in kind from the pervasive and covert "perfect surveillance" at issue in *Carpenter*. *Id.* at 2218. And Plaintiffs' analogy to the "FBI interview room" at issue in *United States v. Llufrio*, 237 F. Supp. 3d 735, 742, 745–46 (N.D. Ill. 2017) (cited at Pl. Br. 14), falls flat, as "a locked room with no law enforcement officers and with no visible working audio-recording device," *id.* at 745, obviously differs from an open hallway in City Hall with multiple visible audio and video recording devices.

Beyond that, any marginal expectation of privacy Plaintiffs might have is eliminated by the signage the City has posted that alerts the public to the audio recording devices. (Faulds Aff. ¶9, Ex. E). Courts frequently conclude that a notice of surveillance in public

places or private businesses diminishes any reasonable expectation of privacy in those places.[8]

Plaintiffs contend that the posted notices do not mean City Hall visitors have "consented" to the recording of their conversations (Pl. Br. 15–16), but consent is not the relevant issue here. Rather, the question is whether City Hall visitors—who are present in a public building and have been informed that they are subject to video and audio recording—nevertheless retain a reasonable expectation of privacy in their conversations in open hallways. Government buildings are perhaps the most-surveilled places in our country, given the "particularly acute" need to preserve public safety at these civic locations. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 33 (2000). Society has therefore come to expect as "routine" searches "at entrances to courts and other official buildings," *Chandler v. Miller*, 520 U.S. 305, 323 (1997), and also a "significant level of video surveillance" in "government buildings." *United States v. Mazzara*, No. 16-cr-576, 2017 WL 4862793, at *11 (S.D.N.Y. Oct. 27, 2017). Particularly when combined with notice of the audio recordings, Plaintiffs here cannot reasonably expect privacy in open hallways in City Hall.

Separate from their privacy claims, Plaintiffs also assert an odd free-speech claim that is even less likely to succeed. They argue that the audio recordings improperly

[8] *See, e.g.*, *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 180 (1st Cir. 1997) (employees had no reasonable expectation of privacy where they were "notified ... in advance that video cameras would be installed"); *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 655 (Cal. 1994) ("[A]dvance notice of an impending action may serve to 'limit [an] intrusion upon personal dignity and security' that would otherwise be regarded as serious.") (citation omitted); *People v. Rincon*, 581 N.Y.S.2d 293, 294–95 (N.Y. App. Div. 1992) ("[W]hen a person with notice of [a] impending search seeks entry into such a restricted area [e.g. government buildings], he or she relinquishes any reasonable expectation of privacy … .").

"regulate[ ] speech by subjecting anyone who speaks in the hallways [ ] to audio recording." (Pl. Br. 22). But Plaintiffs cite zero authority for the novel proposition that audio recordings in a public place somehow "regulate speech" in a way that triggers constitutional free speech protection. Simply put, visitors to City Hall remain free to assemble there and say whatever they want. To the extent Plaintiffs seek preliminary relief on this basis, it should be denied for the sole reason that they fail to offer any explanation for how a speech regulation has occurred here, let alone provide legal authority to support such an unusual argument.

C. Plaintiffs seek to undo the status quo.

Finally, Plaintiffs' request seeks not to preserve the status quo but to reverse it. That alone requires denying their motion. "[T]he purpose of a temporary injunction or restraining order is to maintain the status quo and not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought." *Gahl*, 2022 WI App 29, ¶60; *Sch. Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 373, 563 N.W.2d 585 (Ct. App. 1997) (quoting *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964)). What Plaintiffs seek here is nothing less than most of the ultimate relief they request—shutting down the City's audio recording devices and destroying all existing recordings they have generated. Granting such a "temporary" injunction would completely upend the status quo, not preserve it.

CONCLUSION

The Court should deny Plaintiffs' motion for a temporary restraining order.

Dated: March 1, 2023.

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372 Wis.2d 833
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Court of Appeals of Wisconsin.

G & D PROPERTIES, LLC, Kardon, Inc., Systems Engineering Company, Inc., Cecil Edirisinghe, Velicon, Ltd., Kenneth Dragotta, David Garms and Systems Engineering & Automation Corp., Plaintiffs–Appellants,
v.
MILWAUKEE METROPOLITAN SEWERAGE DISTRICT and City of Milwaukee, Defendants–Respondents.

No. 2015AP1906.
Nov. 1, 2016.

Appeal from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before CURLEY, P.J., KESSLER and BRASH, JJ.

Opinion

¶ 1 KESSLER, J.

***1** G & D Properties, LLC, Systems Engineering Company, Inc., Cecil Edirisinghe, Velicon, Ltd., Kenneth Dragotta, David Garms, and Systems Engineering & Automation Corp. (collectively, "G & D") appeal a judgment of the circuit court granting summary judgment to the Milwaukee Metropolitan Sewerage District (MMSD) and the City of Milwaukee (the City). G & D contends that it filed proper notice of flood damage with MMSD and the City, that the governmental entities had actual knowledge of the circumstances giving rise to G & D's claim, and that the entities were not prejudiced by any lack of notice. We affirm the circuit court.

BACKGROUND

¶ 2 The material facts underlying this appeal are not in dispute. On July 22, 2010, the City of Milwaukee experienced substantial rainfall. The property located at 4044 North 31st Street, owned by G & D, experienced excessive flooding. On September 30, 2010, Kenneth Dragotta, one of the members of G & D, met with MMSD representatives to discuss the flooding and the damages to each business operating at the property. It is undisputed that between September 30, 2010, and the end of October 2010, Dragotta, MMSD representatives, and City representatives met multiple times to discuss the cause of the flooding, the resulting damage, and strategies for mitigating future flood damage. Also in October 2010, an MMSD representative informed Dragotta that MMSD planned to conduct a flow study to determine whether system design and operation contributed to the flooding in the vicinity of the property at issue. Within 120 days of the flooding, eighty-two claimants affected by the flooding filed Notices of Claim with MMSD, in accordance with WIS. STAT. § 893.80(1d) (2013–14),[1] for flood-related damages. G & D was not among those claimants.

¶ 3 MMSD completed and released the flow study on or about December 2, 2011. G & D determined, based on the report, that MMSD was responsible for the flooding. On March 30, 2012, 119 days after MMSD issued its report, G & D filed a "Demand for Indemnity Pursuant to Recorded Easement, and Notice of Claim." (Some capitalization omitted.) The notice, as relevant to this appeal, stated:

> This claim relates to damages caused to the Claimants by you in the area of North 31st Street and Capitol Drive. The circumstances of the claim are generally described in the attached HNTB Technical Memorandum, dated as of December 1, 2011.
>
> ....
>
> The Milwaukee Metropolitan Sewerage District, and the City of Milwaukee, owe Claimants $2,333,438.84.
>
> ....
>
> Claimants reserve the right to supplement and amend

> this Notice of Circumstances of Claim and itemization of Relief Sought. Furthermore, as the Milwaukee Metropolitan Sewerage District and the City of Milwaukee had actual notice of the circumstances surrounding this claim, this Notice of Circumstances of Claim and Claim is unnecessary....

MMSD denied the claim, prompting G & D to file the lawsuit underlying this appeal.

***2** ¶ 4 MMSD and the City then filed motions for summary judgment, arguing that G & D failed to follow the notice requirements described in WIS. STAT. § 893.80(1d), which provides:

> **(1d)** Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any ... political corporation, governmental subdivision or agency thereof ... for acts done in their official capacity or in the course of their agency ... upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the ... political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the ... corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant ... corporation, subdivision or agency or to the defendant officer, official, agent or employee; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant ... corporation, subdivision or agency and the claim is disallowed.

¶ 5 MMSD and the City argued that G & D's claim contained "no date of injury; no date of loss; no date of harm; [and] no description of the events giving rise to the claim." They argued that G & D failed to provide any details which could have allowed them to ascertain the nature and date of G & D's losses and that G & D's reference to MMSD's flow study did not provide MMSD or the City with actual notice of G & D's injuries because the report "does not refer to ... any of the ... named plaintiffs; does not provide the relevant address [es], does not describe any loss suffered, and does not supply any specific date of loss." MMSD and the City also argued that G & D's failure to comply with the statutory requirements was prejudicial to MMSD's abilities to evaluate G & D's claims.

¶ 6 The circuit court found that G & D's notice did not comport with the requirements of WIS. STAT. § 893.80(1d) but did not dismiss G & D's claim. Rather, the court allowed the parties to conduct discovery on the issues of whether MMSD and the City had actual notice of G & D's claim and whether MMSD was prejudiced by G & D's failure to comply with the statute.

¶ 7 Following discovery, the parties filed competing summary judgment motions on the issues of whether MMSD and the City had actual notice of G & D's claim and whether the governmental entities were prejudiced by G & D's delay in seeking relief.

¶ 8 Ultimately, the circuit court granted MMSD's motion and denied G & D's motion. The court found that G & D did not meet its burden of proving that MMSD and the City had actual notice of its claim. The court found that even though G & D contacted MMSD following the flooding to inquire about responsibility and to discuss the prevention of future flooding, the inquiry did "not rise to the level necessary to create actual knowledge that G & D intended to pursue a legal claim against the defendants." The court stated that the statutory language required G & D to provide "notice of the legal variety, and notice of damage or injury." The court also found that G & D's lack of formal notice was prejudicial to MMSD because MMSD lost the ability to properly budget for G & D's claims.

***3** ¶ 9 This appeal follows. Additional facts are included as necessary to the discussion.

DISCUSSION

¶ 10 On appeal, G & D contends that its claim against MMSD and the City accrued on December 1, 2011, the date of the flow study report, making its notice of claim timely. G & D also contends that MMSD and the City had actual notice of its claim and that neither has shown prejudice by any delay or failure of G & D to provide earlier written notice of its claim.

Standard of Review.

¶ 11 This court reviews summary judgment decisions *de novo,* applying the same methodology and legal standard the circuit court employs. *See Green Spring Farms v. Kersten,* 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶ 12 This case also involves the interpretation of the notice of claim statute, found in WIS. STAT. § 893.80(1d). The interpretation of a statute is a question of law that we review *de novo. See Hocking v. City of Dodgeville,* 2010 WI 59, ¶ 17, 326 Wis.2d 155, 785 N.W.2d 398.

G & D failed to comply with WIS. STAT. § 893.80.

¶ 13 Under WIS. STAT. § 893.80(1d), no action may be brought against a governmental subdivision unless paragraphs (a) and (b) are satisfied:

> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the ... political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the ... corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant ... corporation, subdivision or agency or to the defendant officer, official, agent or employee; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant ... corporation, subdivision or agency and the claim is disallowed.

***4** ¶ 14 In short, WIS. STAT. § 893.80(1d)(a) is the notice of injury provision. *See Thorp v. Town of Lebanon,* 2000 WI 60, ¶ 23, 235 Wis.2d 610, 612 N.W.2d 59. "The notice of injury provision allows governmental entities to 'investigate and evaluate' potential claims." *Id.* (citations omitted). "It states that an action cannot be brought against a governmental entity unless a signed 'written notice of the circumstances of the claim' is served on the governmental entity within 120 days of the initial event." *Id.* (citation omitted). "Even if a claimant fails to comply with the 120–day deadline, however, the claimant may still comply with [the statute] by showing that the governmental entity had actual notice of the claim and was not prejudiced by the claimant's failure to give the requisite notice." *Id.*

¶ 15 It is undisputed that G & D discovered the loss on July 22, 2010—the date of the flood—and did not file a notice of injury within 120 days of the flooding; however, G & D asserts that even if it did not provide the requisite notice, its action is not barred because MMSD and the City had actual notice such that neither was prejudiced by the lack of formal notice. We disagree.

¶ 16 Whether a governmental entity had actual notice of a plaintiff's claim presents a mixed question of fact and law. *Olsen v. Township of Spooner,* 133 Wis.2d 371, 377, 395 N.W.2d 808 (Ct.App.1986). What the governmental entity knew about the plaintiff's claim is a factual finding and may not be overturned unless clearly erroneous. *Id.* Whether the governmental entity's knowledge constituted actual notice under the law is a legal conclusion we review *de novo. See id.* The plaintiff bears the burden of proving actual notice. *Weiss v. City of Milwaukee,* 79 Wis.2d 213, 227, 255 N.W.2d 496 (1977). It is the plaintiff's burden to prove actual notice or that the governmental entity was not prejudiced by the failure to comply with the formal notice requirements of WIS. STAT. § 893.80(1d). *E–Z Roll Off, LLC v. County of Oneida,* 2011 WI 71, ¶¶ 17–18, 335 Wis.2d 720, 800 N.W.2d 421. Whether he or she has done so is a question of law. *Olsen,* 133 Wis.2d at 379, 395 N.W.2d 808.

¶ 17 WISCONSIN STAT. § 893.80(1d) is designed to ensure that the governmental entity will have enough information about the plaintiff's injury, either formally by a notice within 120 days or by actual notice sufficient to avoid prejudice from the lack of formal notice, so as to be able to fully investigate "the circumstances giving rise to a claim." *Elkhorn Area Sch. Dist. v. East Troy Cmty. Sch. Dist.,* 110 Wis.2d 1, 5, 327 N.W.2d 206 (Ct.App.1982). "An irreducible minimum of this enough-information requirement is that the governmental entity know the 'type of damage alleged to have been suffered by a potential claimant.' " *Moran v. Milwaukee Cty.,* 2005 WI App 30, ¶ 7, 278 Wis.2d 747, 693 N.W.2d 121 (citation omitted).

¶ 18 The heart of G & D's argument is that because the flood was obvious, G & D communicated its concerns to

MMSD shortly after the flooding, and G & D had multiple subsequent meetings with MMSD and City representatives to discuss the flooding, MMSD and the City had actual knowledge of G & D's losses. John Jankowski, an employee of MMSD, and multiple City employees all stated in deposition testimony that they met with Dragotta multiple times, but that their meetings consisted of discussions primarily about the cause of the flooding and ways to prevent future flooding. The testimony indicates that while both entities were aware that G & D suffered flood damage, they were not aware that G & D intended to file a claim alleging that MMSD and the City were the parties responsible for the damage. Accordingly, MMSD and the City had no way of knowing whether they faced a claim based in tort, contract, negligence, or a statutory violation. Indeed the circuit court noted that:

> ***5** [e]ven Mr. Dragotta did not expressly discuss liability or a lawsuit. For example, while waiting for the results of the flow study, ... Dragotta ... told Mr. Jankowski that the floods were nearly fatal to his business and that it's imperative that we know how the storm/sanitary sewer infrastructure is operating with the multiple cross connections in our area during heavy periods of rain. But this does not indicate that a lawsuit was forthcoming or that G & D believed the defendants were liable; rather, it appeared that Mr. Dragotta was concerned with correcting the problem before the flooding happened again.

¶ 19 We have previously held that a governmental entity's awareness of a party's concerns is not the equivalent of the governmental entity's awareness that a party intends to pursue a claim. *See Urban Planning and Dev., LLC v. Village of Grafton,* No.2012AP20, unpublished slip op. ¶ 9 (WI App Mar. 13, 2013). Accordingly, we conclude that G & D did not meet its burden of proving that MMSD and the City had actual notice of its losses.

¶ 20 We also conclude that G & D failed to meet its burden of showing that MMSD was not prejudiced by the delay in filing its notice. "Prejudice" is the inability to adequately defend a claim. *Olsen,* 133 Wis.2d at 379–80, 395 N.W.2d 808. One purpose of WIS. STAT. § 893.80 is to ensure that the governmental unit has sufficient opportunity to escape prejudice by promptly investigating claims. *Olsen,* 133 Wis.2d at 380, 395 N.W.2d 808. Another is to afford the governmental body the opportunity to compromise and to budget for potential settlement or litigation. *E–Z Roll Off, LLC,* 335 Wis.2d 720, ¶ 46, 800 N.W.2d 421. Whether a governmental entity suffered prejudice is also a mixed question of fact and law. *Olsen,* 133 Wis.2d at 378, 395 N.W.2d 808. We uphold the circuit court's factual findings unless clearly erroneous. *See id.* at 378–79, 395 N.W.2d 808. How these facts fit the statutory concept of prejudice is a question of law we review *de novo. See id.* at 379, 395 N.W.2d 808. The plaintiff bears the burden of proving lack of prejudice. *Weiss,* 79 Wis.2d at 227, 255 N.W.2d 496.

¶ 21 The circuit court recognized that MMSD budgets for its annual operations and management costs, including expenses related to personal injuries or property damage, on a yearly basis. Budget surpluses are returned within two years of collection so as to minimize user costs. Thus, any budget surplus from 2010—the year G & D sustained flood damage—was returned in 2012—the year G & D filed its notice. Accordingly, MMSD did not have the opportunity to budget for G & D's multi-million dollar claim. It is undisputed that eighty-two other claimants filed notices with MMSD in the 120 days following the flood. MMSD evaluated and denied all of those claims. Had G & D acted more promptly, MMSD may have been able to work out a settlement or properly budget for a damage claim. G & D has not proved that its failure to timely provide formal notice was not prejudicial to MMSD.

***6** ¶ 22 For the foregoing reasons, we affirm the circuit court.

Judgment affirmed.

Not recommended for publication in the official reports.

All Citations

372 Wis.2d 833, 890 N.W.2d 48 (Table), 2016 WL 6461300, 2017 WI App 1

Footnotes

[1] All references to the Wisconsin Statutes are to the 2013–14 version unless otherwise noted.

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