

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP675

Cir. Ct. No. 2005CV2662

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**AMERICAN FEDERATION OF STATE, MUNICIPAL AND COUNTY
EMPLOYEES, AFL-CIO, INTERNATIONAL UNION, WISCONSIN STATE
EMPLOYEES UNION, COUNCIL 24 AND STEPHAN FANTAUZZO,**

PLAINTIFFS-APPELLANTS,

STATE, MUNICIPAL AND COUNTY EMPLOYEES, LOCAL UNION 55,

PLAINTIFF,

v.

**WISCONSIN LAW ENFORCEMENT ASSOCIATION, GLEN JONES,
DIANE M. ANGER, TRACY A. FULLER, JOHN A. HEFFERNAN,
MARK E. LEWIS, DAVID L. LUTZE, ANNE M. MAXSON, KRISTIN M. KEMPEN,
TERESA A. BURCHARD, LEWIS M. JUDGE, JEAN A. MOODY AND
GWEN P. SCHNEIDER,**

DEFENDANTS-RESPONDENTS,

WISCONSIN LAW ENFORCEMENT ASSOCIATION AND GLEN JONES,

THIRD-PARTY PLAINTIFFS,

v.

AMERICAN FEDERATION OF STATE, MUNICIPAL AND COUNTY
EMPLOYEES, AFL-CIO, INTERNATIONAL UNION, WISCONSIN STATE
EMPLOYEES UNION, COUNCIL 24, CHERYL A. PARKER, DALE LAWTON,
KRIS N. STOLPA AND PEGGY A. VAN GRINSVEN,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County:
MORIA KRUEGER, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 BRIDGE, J. The American Federation of State, Municipal and County Employees (AFSCME) appeals from a summary judgment in favor of the Wisconsin Law Enforcement Association (WLEA). The central issue is whether AFSCME was entitled to a Local's treasury when it disaffiliated from an intermediate body of AFSCME and affiliated with the WLEA. AFSCME argues that: (1) the transfer of the Local's treasury to the WLEA was a breach of contract; (2) Local 55's refusal to turn over the treasury violated the AFSCME Constitution; (3) the transfer constituted a conversion of Local 55's funds; and (4) the Local's officers breached their fiduciary duty by diverting the treasury. We conclude that the present case is factually and legally indistinguishable from *Wells v. Waukesha County Marine Bank*, 135 Wis. 2d 519, 401 N.W.2d 18 (Ct. App. 1986), and that *Wells* controls the outcome. We affirm.

BACKGROUND

¶2 This case involves a dispute over which entity has control of union funds following a disaffiliation vote. For purposes of this appeal, the following facts are undisputed. AFSCME is an international union. Prior to 2005, state law

enforcement unit members were represented by the Wisconsin State Employees Union (WSEU), which is an intermediate body of AFSCME. The unit was divided into locals, including Locals 55 and 1195.

¶3 The WLEA, a newly created and unaffiliated union, filed a petition for election seeking to represent the bargaining unit in lieu of the WSEU. Prior to the election, the executive board of Local 55 voted to transfer Local 55's assets to an escrow account if the WLEA prevailed. Learning of this, the AFSCME International President advised Local 55 of its intent to place it under administrative control. The reason given was that the AFSCME International President believed that Local 55 was going to dissipate its assets in violation of a provision in the AFSCME International Constitution which requires a subordinate body to forfeit its assets to AFSCME upon disaffiliation. Thereafter, Local 55 placed its funds, totaling approximately \$60,000, in a trust account and declined to release them to AFSCME.

¶4 On February 24, 2005, the members of the law enforcement unit represented by WSEU voted to be represented by WLEA. Following the disaffiliation vote, Local 1195 voluntarily turned over its assets, totaling approximately \$6,000, to AFSCME when requested to do so. However Local 55's funds remained in a trust account.

¶5 A suit and counterclaim for Local 55's treasury followed. Both parties filed motions for summary judgment. The circuit court denied AFSCME's

motion and granted Local 55's motion.¹ AFSCME appeals. We reference additional facts as needed in the discussion below.

DISCUSSION

¶6 Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).² When we review a circuit court's grant or denial of summary judgment, we use the same methodology as the circuit court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶7 Article IX, Section 35 of the AFSCME Constitution (the forfeiture clause) provides in part that if a subordinate body disaffiliates from AFSCME, it must forfeit its assets to AFSCME. It provides further that if the subordinate body returns to AFSCME within two years, the International Union will return the assets to it. The provision reads:

The funds or property of a subordinate body, whether chartered or not, shall not be divided among the members, but shall remain intact for the use of such subordinate body for its legitimate purposes while such subordinate body exists. When any such subordinate body secedes or discontinues its affiliation, all monies, books, collective bargaining agreements and any other memoranda of understanding or other agreements concerning wages, hours, or terms and conditions of employment of members of such subordinate body and other properties shall be transmitted to the International Secretary-Treasurer and

¹ Unless the context requires otherwise, we will refer to Local 55/WLEA as Local 55, and will refer to AFSCME/WSEU as AFSCME.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

assigned to the International Union. If such subordinate body is reorganized within a period of two years following transmission of its assets to the International Secretary-Treasurer, then an amount of funds equal to the value of such assets shall be provided to such reorganized body by the International Union....

¶8 Article IX, Sections 36 and 37 of the AFSCME Constitution provide that the AFSCME International President may place a subordinate body under administrative control if the President believes that it has engaged in improper conduct. Under Article IX, Section 44, an administrator appointed for this purpose “shall have the right, upon demand, to take possession of all the funds, properties, books and other assets” of the subordinate body.

¶9 In *Wells*, 135 Wis. 2d at 532, we determined that a nearly identical forfeiture clause in AFSCME’s Constitution³ was void on public policy grounds. The application of *Wells* to the present case is a significant focus of the parties’ arguments. It is therefore useful to briefly describe the facts and our holding in that case.

¶10 In *Wells*, members of AFSCME Local 2491, who were municipal employees of Waukesha County Technical Institute, became dissatisfied with the quality of representation they were receiving from AFSCME and District Council 40, an intermediate level organization within the AFSCME governing structure. *Id.* at 523. Following a meeting with Local 2491 executive board members, a representative of a competing union, the Wisconsin Education Association Council (WEAC) left authorization cards to be circulated among the employees to

³ AFSCME does not argue that the forfeiture clause in *Wells v. Waukesha County Marine Bank*, 135 Wis. 2d 519, 532, 401 N.W.2d 18 (Ct. App. 1986), is distinguishable from the forfeiture clause at issue here.

determine whether there was sufficient interest to hold a representative election pursuant to WIS. STAT. § 111.70.

¶11 Robert Lyons, the Executive Director of District Council 40 discovered that the authorization cards were being circulated and wrote a letter to the Local's membership urging them not to sign the cards. *Wells*, 135 Wis. 2d at 523. He also called a meeting with Local 2491's executive board. *Id.* At the meeting, Lyons was severely critical of the actions of Local 2491's officers and threatened to confiscate the Local's treasury if the authorization cards were not retrieved. *Id.* He shouted, pounded on the table and pointed his finger. *Id.* He also threatened that any attempt to divide the treasury among the members or to transfer it would result in embezzlement charges. *Id.*

¶12 In subsequent communications from Lyons and from AFSCME's International Union Director and from its President, Local 2491 was warned that it would be placed under administrative control if it did not cease its efforts to have a competing union represent it. *Id.* at 523-24. The Local's officers were also told that the terms of the International Constitution required a forfeiture of the Local's treasury if AFSCME were defeated in the election. *Id.* at 524.

¶13 The AFSCME International President subsequently placed Local 2491 under administrative control and ordered it to turn over the Local's assets. *Id.* When the Local refused, AFSCME commenced an action seeking a turnover order. The circuit court upheld the application of the forfeiture provision. *Id.*

¶14 We reversed. In doing so, we rejected AFSCME's argument that the enforceability of the forfeiture provision was a straightforward matter of contract between AFSCME and the Local. *Id.* at 530-31. Instead, we determined that the only purpose of the forfeiture clause was to discourage and punish disaffiliation

from AFSCME. *Id.* We observed that no claim to the Local treasury existed apart from the forfeiture clause, and concluded that the forfeiture clause violated the Local members' statutory right to choose a new bargaining representative pursuant to WIS. STAT. § 111.70(2).⁴ *Wells*, 135 Wis. 2d at 531-32. We concluded further that this purpose and application of the forfeiture clause violated Wisconsin public policy as expressed in WIS. STAT. § 111.70(2) and (3).⁵ *Wells*, 135 Wis. 2d at

⁴ In *Wells*, the statutory right to choose a new bargaining representative arose under the Municipal Employment Relations Act, WIS. STAT. § 111.70, whereas in the present case, the statutory right to choose a new bargaining representative arises under the State Employment Labor Relations Act, WIS. STAT. § 111.82. The rights guaranteed to employees under these acts are the same. *Department of Employment Relations v. WERC*, 122 Wis. 2d 132, 143, 361 N.W.2d 660 (1985). AFSCME does not argue otherwise.

⁵ WISCONSIN STAT. §111.70(2) provides:

RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities

WISCONSIN STAT. § 111.70(3)(a) provides:

It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

WISCONSIN STAT. § 111.70(3)(b) provides:

It is a prohibited practice for a municipal employee, individually or in concert with others:

1. To coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2).

WISCONSIN STAT. § 111.70(3)(c) provides:

(continued)

530-31. We stated that “the public policy of Wisconsin does not allow the enforcement of this contract provision, as applied to require the forfeiture of a local union’s property to the international union, *which has no other claim to that property*, upon the local members’ exercise of their statutory right to discontinue affiliation with the international.” *Id.* at 532.

¶15 Relying on our use of the phrase “as applied” in *Wells*, AFSCME argues that *Wells* is factually distinguishable from the present case because the *Wells* decision was driven by the coercive use of the forfeiture provision rather than any inherent defect in the forfeiture clause itself. AFSCME points to the aggressive behavior exhibited by Lyons in threatening Local 2491 with the forfeiture provision and the loss of the Local’s treasury in the course of his efforts to avoid disaffiliation. It asserts that, in contrast, there is no evidence of record in the present case that any WSEU representative referred to the forfeiture clause in the course of the WLEA’s campaign, and asserts that the forfeiture clause was a “non-issue” in the WLEA election campaign.⁶ In sum, AFSCME contends that whether a forfeiture clause is enforceable is dependent upon the pre-vote actions of those seeking its benefits. We disagree.

It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

⁶ Local 55 disagrees with AFSCME’s characterization of the instant facts, and contends that AFSCME made it clear to the union members that the new union would have no funds with which to operate if AFSCME/WSEU lost the election. It asserts that the lack of financial resources was “one of the primary arguments” used by AFSCME/WSEU in urging a vote against the WLEA.

¶16 Contrary to AFSCME's argument, it was not Lyons' behavior that formed the basis of our conclusion in *Wells*. Instead, our conclusion was based on the fact that the forfeiture clause itself violated Wisconsin public policy, apart from whether it was affirmatively used as a threat. We emphasized that it was undisputed that absent an attempt at disaffiliation by the Local, neither AFSCME nor District Council 40 had any claim whatsoever to the Local's property. *Id.* at 531. The "as applied" phrase reflected our emphasis on the fact that because AFSCME had no other claim to the Local's funds, its sole purpose was to threaten and intimidate. Moreover, we noted that if the mere tendency or purpose of a contract works against public policy, it is illegal, even though no actual damage results. *Id.* at 534 (citing *Associated Wis. Contractors v. Lathers*, 235 Wis. 14, 17, 291 N.W. 770 (1940)). We stated that the fact that Local 2491 disaffiliated despite the threat of forfeiture did not save the forfeiture provision. *Id.* In other words, regardless of whether the Local was successful in disaffiliating, it was the existence of the forfeiture clause, coupled with the absence of any other claim on the Local's treasury, that violated public policy.

¶17 AFSCME also asserts that the present case is factually distinguishable from *Wells* because here, it possesses other claims to Local 55's funds apart from the forfeiture clause. It argues that it was the primary representational body and bore the costs of that representation, entitling it to Local 55's funds. Local 55 contends that this argument is contrary to the reality of the WSEU's organizational structure.

¶18 In *Wells*, we noted that the treasury at issue was accumulated over the years from dues imposed by the Local upon its own members. The Local separately calculated and paid "per capita taxes" to both Council 40 and AFSCME International. *Wells*, 135 Wis. 2d at 531. At the time the administrative control

was imposed, the Local was current on those payments. *Id.* The balance of the treasury was a “purely Local matter,” intended for such purposes as to fund a bowling team, provide a “sunshine” fund for sick members and to cover the Local’s arbitration expenses. *Id.*

¶19 The same is true here. Local 55 collected dues from its members and forwarded approximately fifty percent to WSEU and thirty-three percent to AFSCME International. AFSCME does not argue that Local 55 was not current on those payments, nor does it claim that any debts were otherwise owed to it by Local 55. The balance of the treasury, as in *Wells*, was purely a Local matter, used for such things as expenses for negotiating Local agreements, conducting Local elections, publishing newsletters, officers’ salaries, fees for conferences, office supplies and mileage reimbursement for union business. We conclude that *Wells* is not factually distinguishable from the present case, and that AFSCME had no claim on Local 55’s treasury apart from the forfeiture clause.

¶20 AFSCME next argues that *Wells* was wrongly decided. It argues that our holding with respect to the forfeiture provision is not supported by precedent, is contrary to the weight of case law in other jurisdictions, and misconstrues state and federal labor law. However, this court is bound by its own prior precedent and is not allowed to overrule, modify or withdraw language from its prior published decisions. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). To the extent that AFSCME seeks to revisit the holding in *Wells*, it may ask the Supreme Court for review of that decision.

¶21 Next, AFSCME argues that Local 55’s refusal to turn over its treasury was a breach of contract in violation of the AFSCME Constitution. It contends that the actions by Local 55 violated not only the forfeiture clause, but

also the Local officers' oath under Appendix B of the AFSCME Constitution, which contains a pledge to "deliver to my successor in office all books, papers and other property of this union which are in my possession at the close of my official term."⁷

¶22 However, AFSCME has pointed to no provision in its Constitution other than the forfeiture clause which entitles it to Local 55's treasury. The oath requiring the Local officers to deliver "property of this union" refers to any property belonging to AFSCME. Because we have concluded that the forfeiture clause is void and that AFSCME had no other claim to Local 55's treasury apart from the forfeiture clause, there was no property owed to AFSCME. Thus, this argument is unavailing.

¶23 AFSCME contends that, even if its claim under the forfeiture clause fails, it nevertheless has a valid claim against Local 55 for conversion and conspiracy to convert. The elements of conversion are: (1) controlling or taking property belonging to another (2) without the owner's consent (3) in a manner that seriously interferes with the owner's rights to possess the property. *Bruner v. Heritage Companies*, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999).

⁷ Article IX, Section 51 provides as follows: "Each elected officer of each subordinate body shall, upon assuming office, subscribe to the Obligation of an Officer contained in Appendix B of this Constitution."

Appendix B, entitled "Obligation of an Officer," provides as follows: "I, _____, promise and pledge that I will perform faithfully and with honor the duties of the office which I now assume in the American Federation of State, County and Municipal Employees, and I will deliver to my successor in office all books, papers and other property of this union which are in my possession at the close of my official term."

¶24 Local 55 contends that AFSCME's conversion claim must fail because AFSCME cannot prove that the property in question belonged to it. It argues that, following our reasoning in *Wells*, the treasury of Local 55 belongs to the new union, the WLEA, rather than to AFSCME. We agree. Our direction on remand in *Wells* provided as follows:

The portion of the judgment requiring the Local funds, books and records to be surrendered to the administrators is reversed. The circuit court is directed to enter judgment in favor of the appellants, directing that the moneys in the Local's bank account and the moneys being held in escrow for the Local by [the Waukesha County Technical Institute] be transferred to the appellants as trustees for the benefit of the local bargaining unit.

Wells, 135 Wis. 2d at 535.

¶25 AFSCME argues that, even in the absence of the forfeiture clause, an issue remains as to whether Local 55's treasury belonged to the union entity or to the members after disaffiliation. It argues that Local 55 was an entity apart from its members, and the members relinquished title to the funds to Local 55 when they paid their dues.⁸ It contends that the disaffiliation effectively ended the terms of Local 55's officers, and that, as discussed above, the officers were required to deliver all books, papers and "property of this union" at the close of their terms. Because they did not do so, AFSCME argues, the officers converted funds belonging to it.

⁸ AFSCME contends that Local 55 continued to exist even after the disaffiliation vote because it still had approximately fifty members working in bargaining units other than the disaffiliated Law Enforcement Unit. Local 55 disagrees, pointing to a February 28, 2005 letter from WSEU Executive Director Martin Beil to Wisconsin Office of State Employment Relations Director Karen Timberlake in which he stated that Locals 55 and 1195 were being dissolved.

¶26 AFSCME has provided no authority for the proposition that Local 55's treasury became AFSCME's property upon disaffiliation. Moreover, we determined above that the dues that remained in Local 55's treasury after disbursing fifty percent to WSEU and thirty-three percent to AFSCME International were a "Local matter," and were rightly used for various purposes benefiting local members. We are not persuaded that AFSCME has any claim on Local 55's treasury independent of the forfeiture clause, which we have concluded is invalid.

¶27 AFSCME next argues that there was an "independent property right" created by AFSCME's administrative control, and that its ability to impose the administratorship "had nothing whatsoever to do with the forfeiture clause." However, this argument overlooks the fact that the reason given by the AFSCME International President for assuming administrative control was that Local 55 was going to dissipate its assets in violation of the forfeiture clause. The administrative control was inextricably linked to AFSCME's invocation of the forfeiture clause. Once the forfeiture clause was held to be invalid, any claim AFSCME had to Local 55's treasury was extinguished. We conclude that because AFSCME has not proven that it has a right to Local 55's treasury apart from the forfeiture clause, it cannot sustain a claim for conversion.

¶28 We also reject AFSCME's claim that Local 55's officers' actions constituted a breach of their fiduciary responsibility to "see that the union's assets are managed prudently, ensuring that any and all expenditures are for the exclusive benefit of the affiliate and its members" pursuant to Article V of the AFSCME Financial Standards Code. For the reasons discussed above, the officers' fiduciary duty with respect to the treasury ran to the former Local 55 Law Enforcement membership, not to the international union or WSEU. We conclude

that the officers of Local 55 did not violate their duty to see that all expenditures were for the benefit of the affiliate and its members, consistent with Wisconsin law.

¶29 The final issue involves AFSCME's right to retain the funds which were voluntarily surrendered to it by Local 1195. An unjust enrichment claim is granted when (1) a benefit was conferred; (2) there was knowledge of the benefit by the recipient; and (3) retention of the benefit would be inequitable. *Puttkammer v. Minth*, 83 Wis. 2d 686, 689, 266 N.W.2d 361 (1978).

¶30 The decision to grant relief for a claim of unjust enrichment involves the exercise of the court's discretion insofar as the court must decide what is equitable. *Tri-State Mechanical, Inc. v. Northland College*, 2004 WI App 100, ¶13, 273 Wis. 2d 471, 681 N.W.2d 302. However, whether the court correctly applied the facts to the legal standard is a question of law which we review de novo. *Id.*

¶31 For the reasons discussed above, just as AFSCME has no claim on Local 55's treasury independent of the forfeiture clause, it likewise has no claim on Local 1195's treasury independent of the forfeiture clause. By transferring its treasury to AFSCME, Local 1195 conferred a benefit on AFSCME, and AFSCME had knowledge of the benefit. We conclude that the circuit court did not err when it determined that the retention of Local 1195's funds was inequitable.⁹

⁹ WLEA also argues that AFSCME/WSEU breached its fiduciary duty by refusing to surrender Local 1195's treasury to the new law enforcement unit representative as required by public policy as expressed in *Wells*. However, we need not reach this issue. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (If a decision on one point disposes of the appeal, we will not decide the other issues raised.).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.