

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 18, 2010

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. 2009AP1699-FT

Cir. Ct. No. 2007CV111

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

GERVASE C. THOMPSON,

PLAINTIFF-APPELLANT,

V.

**TOWN OF GERMANTOWN, ROBERT MILLER, ROSETTA BOYLE,
DAVID BRENDLE, DAVID SPECHT AND WILMER CASS,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Juneau County:
PATRICK TAGGART, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront, and Lundsten, JJ.

¶1 PER CURIAM. Gervase C. Thompson appeals¹ from the judgment of the circuit court that granted summary judgment to the Town of Germantown

¹ This appeal is expedited under WIS. STAT. RULE 809.17 (2007-08).

and members of the town board. Thompson argues that the trial court erred when it granted a summary judgment because the respondents violated the Open Meetings Law, WIS. STAT. § 19.86 (2005-06),² when the town board voted in a closed session not to renew Thompson's employment contract. Thompson further argues that, as a result, his employment contract should be considered to have been automatically renewed, and he is entitled to receive his salary from the date the town board voted not to renew his contract. Because Thompson's claim is based on a violation of the Open Meetings Law, and because he did not follow the proper procedure for pursuing such a claim under the statute, we conclude that the circuit court properly granted summary judgment to the Town of Germantown. We affirm.

¶2 The undisputed facts in this case are that Thompson and the Town entered into an employment agreement for Thompson to act as the Town's Zoning Administrator. The agreement was for one year, and provided that the contract would automatically renew for a period of one year, unless notice of "non-renewal" was given at least thirty days prior to the expiration of the agreement. The agreement terminated on February 12, 2006. On December 13, 2005, the town board convened in a closed session to discuss the renewal of Thompson's employment agreement. Thompson briefly spoke at this meeting, and then left. The town board then took an informal vote in closed session not to renew Thompson's contract, and did not ever vote on this issue in open session, on the record.

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

¶3 On December 27, 2005, Thompson received a letter from the board saying that his contract was not being renewed. Thompson then brought this action alleging that the board did not act in accord with the Open Meetings Law, and, therefore, the decision to not renew his contract was void, the contract remained in effect, and he is entitled to receive his salary as damages. Both parties ultimately moved for summary judgment. The court granted judgment to the Town, determining that the board did not violate the terms of the employment agreement, and that while the board technically violated the Open Meetings Law, WIS. STAT. § 19.86, Thompson had not followed the proper procedure for pursuing a claim under that statute.

¶4 Thompson argues that this is not an action under the Open Meetings Law, but rather an action “in contract,” and that “the violation of that law rendered the vote of non-renewal invalid.” Thompson also argues, however, that this is not a claim for breach of contract because “the Agreement is still in full force and effect because the board failed to properly vote to non-renew the contract.” In other words, Thompson asserts that he has a contract remedy because the town board violated the Open Meetings Law. Thompson, however, has not cited any authority to support his argument that he has a contract remedy for an Open Meetings Law violation.

¶5 We conclude that Thompson was required to follow the enforcement procedures established in the Open Meetings Law when he brought this action. *See* WIS. STAT. § 19.97. No matter how Thompson attempts to phrase the issue, the success of his action—that the Town owes him his salary, that the reason it owes him his salary is because the decision not to renew his contract is void, and because the decision is void the contract is still in effect—is dependent on a determination that the Town violated the Open Meetings Law. The Open

Meetings Law statute provides a specific procedure for enforcement, including that the actions must be brought by or on behalf of the State. WIS. STAT. § 19.97(1) and (4). The failure to bring an action on behalf of the State under § 19.97 is fatal, and deprives the court of competency to proceed. *Fabyan v. Achtenhagen*, 2002 WI App 214, ¶13, 257 Wis. 2d 310, 652 N.W.2d 649.

¶6 Further, the cases on which Thompson relies to support his argument that the decision to not renew his contract should be void, were brought on behalf of the State, and therefore properly pled under WIS. STAT. § 19.97. *See State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 508 N.W.2d 603 (1993); *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d 271 (Ct. App. 1985). Thompson again has not cited any authority to suggest that we could void the Town's decision not to renew his contract in an action that does not conform with § 19.97.

¶7 Since Thompson's claim is dependent on his allegation that the Town violated WIS. STAT. § 19.86, and since Thompson did not bring the action in accord with WIS. STAT. § 19.97, there is no valid determination as to whether or not the Town violated Wisconsin's Open Meetings Law. We therefore affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

