STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT FOUR

State of Wisconsin,

Plaintiffs-Respondent,

v.

Case No. 2014AP2433

Judith Ann Detert-Moriarty,

Defendant-Appellant.

On Appeal from the Circuit Court of
Dane County, the Hon. David T. Flanagan, Presiding

BRIEF OF DEFENDANT-APPELLANT JUDITH A. DETERT-MORIARTY

Pamela R. McGillivray
MCGILLIVRAY WESTERBERG & BENDER LLC
211 South Paterson Street
Suite 320
Madison, WI 53703
Tel. 608.310.3560
Fax. 608.310.3561

Counsel for Defendant-Appellant
Judith A. Detert-Moriarty

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STATEMENT OF THE ISSUES

I. IS THERE A "PROSECUTORIAL DISCRETION" EXCEPTION APPLICABLE TO THE WISCONSIN EQUAL ACCESS TO JUSTICE ACT?

Answered by the Circuit Court: Yes.
Defendant-Appellant answer: No.

II. WAS THIS FORFEITURE ACTION UNDER THE DEPARTMENT OF ADMINISTRATION'S RULES AN "AGENCY ACTION" FOR PURPOSES OF THE WISCONSIN EQUAL ACCESS TO JUSTICE ACT?

Briefed but not addressed by the Circuit Court.
Defendant-Appellant answer: Yes.

III. IS THE STANDARD FOR "SUSTANTIALLY JUSTIFIED" UNDER THE WISCONSIN EQUAL ACCESS TO JUSTICE ACT EQUIVALENT TO THE STANDARD FOR A FRIVOLOUS CLAIM UNDER WIS. STAT. § 814.025 (1979-80)?

Answered by the Circuit Court: Yes.
Defendant-Appellant answer: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellate Judith A. Detert-Moriarty believes oral argument is appropriate in the event the Court has any questions about the case.

This case is currently a one-judge appeal. Detert-Moriarty has moved to have this matter decided by a three-judge panel. That motion is pending. A published decision will provide needed guidance as there is little precedential case law interpreting the Wisconsin Equal Access to Justice Act and a published decision on this matter may have impact on other cases, in particular, other forfeiture action cases in which defendants sought fees are pending in the circuit court. Thus, this appeal is an issue of substantial and continuing public interest and publication is therefore warranted.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Nearly thirty years ago, the legislature passed the Wisconsin Equal Access to Justice Act ("WEAJA"), Wis. Stat. § 814.245, to protect citizens from having to bear heavy litigation costs to defend against unreasonable lawsuits filed by the state and to deter state agencies from engaging in protracted litigation of such baseless actions. The legislature extended the scope of that protection broadly to "any action" by a state agency, without exception. The circuit court below adopted an exception to WEAJA for all forfeiture actions by the state agencies, which was not provided by the legislature and which contradicts the legislative purpose. This appeal seeks to enforce the plain language of the statute and to reestablish its legislative purpose.

Defendant-Appellant Judith Detert-Moriarty seeks her fees and other costs under WEAJA, Wis. Stat. § 814.245, in a forfeiture action by the Department of Administration alleging a violation of that agency's administrative regulations. The circuit court found the administrative regulations at issue to be unconstitutional on their face and dismissed the action against Detert-Moriarty. Thus, Detert-Moriarty was the prevailing party and entitled to seek her fees and other costs under WEAJA. The circuit court ruled, however, that WEAJA did not apply to this type of action. In its ruling, the circuit court found, as a matter of first impression, a "prosecutorial discretion" exception to

WEAJA, and held that the fee-shifting statute does not apply as a matter of policy to forfeiture actions. That holding misreads the plain language of the statute, misapplies its legislative intent and relevant case law, and re-legislates the Act by court order. Detert-Moriarty appeals the circuit court's interpretation of the statute.

The circuit court passed on the legal question of whether this action was an "agency action" under the Act, but the issue had been fully briefed to the circuit court and this Court should find that it is an "agency action." Finally, the circuit court misinterpreted the standard an agency must prove to show that fees are not warranted under WEAJA. This Court should correct the standard of when an agency is "substantially justified" in its actions as a defense to fee-shifting.

II. STATEMENT OF FACTS

A. Background on the Protests at the State Capitol.

In February 2011, with the introduction of legislation intended to dismantle public employees' collective bargaining rights in this state, public protest erupted in the State Capitol. Protests continued daily inside and outside the Capitol into spring. Along with other speech activities, singing emerged as a popular form of protest. Some of the protest singing came to be known as the "Solidarity Sing Along." The daily Solidarity Sing Along continued after

the mass protests had subsided, throughout summer of 2013 (and continues today).[1]

Detert-Moriarty has from time to time visited the State Capitol rotunda at the noon hour to participate in the Solidarity Sing Along.

B. The Authority to Promulgate Department of Administration's Administrative Rules.

The Department of Administration brought this action against Detert-Moriarty for her participation in the Solidary Sing Along pursuant to rules the Department of Administration promulgated, purportedly by the authority conveyed by Wis. Stat. § 16.846.[2]

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[1] Because the merits of this case were dismissed on a facial challenge of the rule, the factual record is not well developed. The background facts rely on the facts stated by the circuit court in *State v. Crute*, Dane Co. Case No. 13FO2108 (2/5/14 Dec. and Order of Dismissal) (R.29 pp. 7-30) and by the federal district court in *Kissick v. Huebsch*, 956 F. Supp. 2d 981 (W.D. Wis. 2013) (R.32 pp. 34-52).

[2] The legislature delegated the Department of Administration the authority to promulgate "rules of conduct" at the state facilities pursuant to § 16.846. However, as the circuit court found, the rules the Department of Administration promulgated were unconstitutional on their face, and therefore, outside of the Department's statutory authority. (R.34; App. pp. 1-6 (relying on *Kissick v. Huebsch* and *State v. Crute* to find the regulation at issue is invalid time, place and manner restriction on free speech).). Thus, the rules were *ultra vires* and void. *State ex rel. Teunas v. County of Kenosha*, 142 Wis. 2d 498, 515 (1988) ("An unconstitutional law in legal

Under Wis. Stat. § 16.846,[3] the Department of Administration is authorized to promulgate rules of conduct for the state facilities, including the State Capitol, which are codified at Wis. Admin. Code ch. Adm 2. At issue in this case are now-expired "emergency" rules

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contemplation has no existence." (citations and internal quotations omitted)).

[3] Wis. Stat. § 16.486 provides:

> **(1) (a)** The department shall promulgate under ch. 227, and shall enforce or have enforced, rules of conduct for property leased or managed by the department. Unless the rule specifies a penalty as provided under par. (b), a person found guilty of violating a rule promulgated under this subsection shall be fined not more than $100 or imprisoned for not more than 30 days or both.
>
> **(b)** A rule promulgated under par. (a) may provide that a person who violates the rule is subject to one of the following:
>
> **1.** A lesser criminal penalty than the criminal penalty specified in par. (a).
>
> **2.** A forfeiture of not more than $500.
>
> **(2)** A forfeiture under sub. (1) (b) 2. may be sued for and collected in the name of the department before any court having jurisdiction of such action. An action for a forfeiture under sub. (1) (b) 2. may be brought by the department, by the department of justice at the request of the department, or by a district attorney.

Wis. Stat. § 16.846(1), (2).

promulgated by the Department of Administration to temporarily modify ch. Adm 2.[4] (*See* R.39 p. 10, Emergency Rules Now in Effect, Wis. Admin. Reg. No. 688.)

The "emergency" rules at issue were the Department of Administration's reaction to the protests ongoing in the State Capitol building since February 2011. (*See* R.39 p. 12, Scope Statements, Wis. Admin. Reg. No. 687.) The "emergency" rules went into effect on April 16, 2013, two years *after* the mass protests, and expired on September 12, 2013. *Id*. In support of its purported need for emergency rules, in April 2013 the Department of Administration asserted that, although "[t]he continuous occupation of the State Capitol was formally terminated in March of 2011 . . . [g]roups of persons continue to occupy rooms in the Wisconsin State Capitol building without permits, including the Capitol rotunda." *Id*.[5] Even though the mass protests were no longer occurring, as the scoping statement explains, the Department of Administration claimed that the "emergency" rules were required for it to gain

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[4] The term "emergency" is used because the rules were promulgated as EmR 1305 under Wis. Stat. § 227.24, the "emergency rules" section of the Wisconsin Administrative Procedures Act. Section 227.24 allows agencies to forego certain procedural requirements "if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with [those] procedures." Wis. Stat. § 227.24(1)(a).

[5] Detert-Moriarty asserted below that there was no "emergency" at the Capitol in April 2013; and, thus, the rules were improperly promulgated under § 227.24.

"compliance from user groups in order to protect the public safety and welfare." *Id.*

The Department of Administration's emergency rules amending Wis. Admin. Code § Adm 2.14(2), as pertinent to the action brought against Detert-Moriarty, are as follows:

> **SECTION 9:** Adm 2.14(2), 2(v), (2)(vm), (2)(vm)5, are amended to read:
>
> **Adm 2.14 Rules of conduct.**
>
> **(2)** In order to preserve the order which is necessary for the enjoyment of freedom by occupants of the buildings and facilities, and in order to prevent activities which physically obstruct access to department lands and buildings or prevent the state from carrying on its instructional, research, public service, or administrative functions, ~~P~~ and pursuant to s. 16.846, Stats., whoever does any of the following shall be subject to a forfeiture of not more than $500:
>
> > (v) Without approval of the department, conducts an event ~~picket, rally, parade or demonstration~~ in those buildings and facilities managed or leased by the department or on properties surrounding those buildings.

(*See* R.39 p. 10 (added text underlined; deleted text stricken).)

C. The Action Against Detert-Moriarty.

On July 25, 2013, Detert-Moriarty received a citation for her presence at the Capitol during the Solidarity Sing Along. The citation was issued by the Capitol Police under

the Department of Administration's regulations. (R.1, (listing "2.14(2)(v)" as the violation, with the description of "No Permit").) The Capitol Police is an arm of the Department of Administration. (R.45 p. 40.) By filing the citation with the court, the Department of Administration commenced a civil forfeiture action against Detert-Moriarty. That action was dismissed by the circuit court as unconstitutional on May 9, 2014. (R.34.) The Department of Administration did not appeal that decision.

III. DISPOSITION IN THE CIRCUIT COURT AND PROCEDURAL POSTURE.

The underlying forfeiture action against Detert-Moriarty was dismissed on the merits and with prejudice by the circuit court on May 9, 2014, because the Department's rules are unconstitutional time, place and manner restrictions on free speech. (R.34.)

On June 6, 2014, Detert-Moriarty filed a motion for fees under WEAJA. (R.35.) The circuit court denied those fees on October 7, 2014, as a matter of law, because it read WEAJA to contain an implicit exception precluding an award of fees against a state agency where there has been an exercise of "prosecutorial discretion." (R.46 p. 6; App. p. 6 (relying on *City of Janesville v. Wiskia*, 97 Wis. 2d 473 (1980), for its reasoning that a plaintiff may not seek fees for a frivolous forfeiture municipal ordinance action under Wis. Stat. § 814.025 (1980).) There is no such statutory exception to WEAJA.

Detert-Moriarty appeals.

STANDARD OF REVIEW AND LEGAL FRAMEWORK

I. STANDARD OF REVIEW.

This case was decided by the circuit court as a matter of law in construing Wis. Stat. § 814.245 to preclude actions by a state agency that involve "prosecutorial discretion." In so finding, the circuit court ignored the plain language and the legislative intent of the statute and, instead imported court-created reasoning looking at an entirely different statute. This Court reviews the construction of a statute without deference to the lower court's determination. *Sheely v. Wis. Dep't of Health & Social Services*, 150 Wis. 2d 320, 328-29 (1989).

The standard of review here is de novo.

II. THE WISCONSIN EQUAL ACCESS TO JUSTICE ACT BACKGROUND.

The Wisconsin Equal Access to Justice Act ("WEAJA"), Wis. Stat. § 814.245, "is to encourage challenges to agency action and to provide a disincentive to agencies to prolong the litigation process." *Stern by Morh v. Wis. Dep't of Health & Family Servs.*, 212 Wis. 2d 393, 404 (Ct. App. 1997) ("*Stern I*") (internal quotation omitted). It is also to compensate a party for the costs of defending against unreasonable government action. *Bracegirdle v. Dep't of Regulation and Licensing*, 159 Wis. 2d 402, 428 (Ct. App. 1990) (internal quotation omitted). The statute provides:

> Except as provided in s. 814.25, if an individual, a small nonprofit corporation or a small business is the prevailing party *in any action by a state agency* or in any proceeding for judicial review under s. 227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

Wis. Stat. § 814.245(3) (emphasis added).

Under Wis. Stat. § 814.245(3), the court must award the prevailing party costs unless the agency meets its burden to establish that it was substantially justified in taking its position or that special circumstances would make the award unjust.[6] *Bracegirdle*, 159 Wis. 2d at 425. "To satisfy its burden the government must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *Sheely v. Dep't of Health & Social Servs.*, 150 Wis. 2d 320, 337 (1989).

The circuit court did not reach the question of whether the Department of Administration met its burden to prove it was "substantially justified" in taking its action. Instead, it denied Detert-Moriarty's request because it found that WEAJA could not apply to this type of case.

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[6] The state did not raise an issue of "special circumstance" in the circuit court proceedings, nor could it meet its burden to show there are any special circumstances here.

ARGUMENT

The circuit court's decision was in error because the Department of Administration's civil forfeiture action is unquestionably an action brought by an agency, and therefore subject to WEAJA. The circuit court erroneously read an exception into the statute that does not comport with the plain language of the statute or the intent of the legislature. To reach its conclusion, the circuit court applied the reasoning from irrelevant case law interpreting different legislation unrelated to WEAJA. The circuit court must be reversed.

I. THERE IS NO "PROSECUTORIAL DISCRETION" EXCEPTION UNDER THE PLAIN LANGUAGE, LEGISLATIVE INTENT OR CASE LAW INTERPRETING THE WISCONSIN EQUAL ACCESS TO JUSTICE ACT.

The circuit court's decision ignored the plain language of, and legislative intent behind, the WEAJA statute. "The primary goal of statutory construction is to determine and give effect to the legislature's intent." *Crawford v. City of Ashland*, 134 Wis. 2d 369, 372 (Ct. App. 1986). Although fee-shifting provisions are in derogation of the common law rule that parties bear their own costs of litigation, which would generally require strict-construction, the rule of strict construction "must yield to clear evidence of an intention on the part of the legislature." *Sheely*, 150 Wis. 2d at 329. Here, the plain language,

legislative history, purpose of the statute, and relevant case law all support covering this forfeiture action under WEAJA. The circuit court's decision creating an extra-statutory exception should therefore be reversed.

A. The Plain Language Of The Act Allows Recovery Under WEAJA For "Any Action" Brought By A State Agency, Without Exception.

The plain language of WEAJA directs that fees are available to prevailing parties in "any action" brought by a state agency, such as the Department of Administration. Wis. Stat. § 814.245(3) ("if an individual . . . is the prevailing party in any action by a state agency . . ., the court shall award costs to the prevailing party . . . "). The court first looks to the language of the statute and, "[i]f the language is unambiguous, no judicial rule of construction is permitted, and a court must give effect to the statute's plain meaning." *Crawford,* 134 Wis. 2d at 372-73. The circuit court erred by looking beyond the clear meaning of the broad language of the statute.

"Any action" includes a civil forfeiture action. *Id*. ("the broad scope of the phrase 'any action or special proceeding' would include forfeiture actions.") *See also United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." (internal quotation and citation omitted)); *Norfolk S. Rwy. Co. v. Kirby*, 543 U.S. 14, 31-32, (2004) (finding the use of the word "any" gives to the word it modifies an "expansive meaning" when there is "no

reason to contravene the clause's obvious meaning."). In short, the term "any" means *any*.

The legislature chose broad coverage under WEAJA by using the term "any" to modify "action" and, thus, under the plain language of the statute this forfeiture action is subject to fee-shifting under WEAJA. The circuit court's decision to graft a non-statutory exception conflicts with the legislature's decision to cover "any" action and should be reversed.

B. The Legislative Intent Of WEAJA Is Not Met By The Circuit Court's Exclusion By "Prosecutorial Discretion."

The circuit court's non-statutory exception also conflicts with the legislative intent of WEAJA. "The cardinal rule in all statutory interpretation . . . is to discern the intent of the legislature." *Employers Ins. of Wausau v. Smith*, 154 Wis. 2d 199, 226 (1990). "The court ascertains the legislative intent by examining the language of the statute and the scope, history, context, subject matter and purpose of the statute." *Id.*

The legislative history from 1985 Special Session Senate Bill 10, which created WEAJA, supports inclusion of forfeiture actions within the definition of "any action." The Legislative Reference Bureau summarized the legislation as follows:

> This bill provides procedures for awarding a more complete recovery of actual costs for individuals and small businesses if they prevail in an administrative

> contested case proceeding or judicial review of a contested case proceeding**,** regardless of who initiates the proceeding or review*, or in a court action brought by a state agency.*"

(App. p. 7, Legis. Ref. Bureau Analysis of 1985 Special Session Senate Bill 10 (creating Wis. Stat. § 814.245) (emphasis added).) That is, the legislature intended WEAJA to apply to court actions brought by state agencies. Many, if not most, of those actions could be characterized as involving "prosecutorial discretion," and thereby exempted by the circuit court's non-statutory rule. Thus, the circuit court's exemption rewrites the statute to exclude actions brought by an agency against a defending individual, small business or nonprofit. This defeats the legislature's purpose by drastically limiting the scope of the legislation. *Bracegirdle*, 159 Wis. 2d at 428 (finding the legislature intended to compensate a party for the costs of *defending* against unreasonable government action).

In practice, the circuit court's revision of the statute would exempt forfeiture actions by every state agency with forfeiture authority—for example, the Department of Natural Resources (e.g., Wis. Stat. §§ 23.50, 280.98, 281.36, 281.99, 283.89, 285.59, 287.95, 299.64), the Board of Regents (e.g., Wis. Stat. § 36.11), the Technical College System Board (e.g., Wis. Stat. § 38.50), the Public Service Commission (e.g., Wis. Stat. § 196.66), the Department of Health Services (e.g., Wis. Stat. §§ 50.03, 50.035, 50.04, 50.377, 254.45, 254.73), the Department of Tourism (e.g., Wis. Stat. § 41.11), the Department of Safety and Professional Services (e.g., Wis. Stat. §§ 101.599, 440.11, 440.64, 440.978, 440.98, 440.9975), the Department of Administration (e.g., Wis. Stat. § 562.02),

the Department of Licensing and Regulation (e.g., Wis. Stat. § 444.14, 451.14, 454.29), the Department of Revenue (e.g., Wis. Stat. § 995.12), the Department of Agriculture, Trade and Consumer Protection (e.g., Wis. Stat. § 707.57), among many other state agency forfeiture provisions. Like this case, these actions would be forfeiture "action[s] by a state agency" and the legislature intended WEAJA to apply, or the legislature would have explicitly excluded them from the Act. Instead, the legislature used the broad "any action" to cover all such matters to protect against unreasonable agency actions seeking forfeitures against individuals, small nonprofits, and small businesses. To uphold the circuit court's exception would deprive WEAJA of the one of the legislation's central purpose.

C. Contemporaneous Agency Drafting Records Made Available to the Legislature When WEAJA Was Introduced Confirms That The Legislature Intended To Cover Enforcement Actions.

The legislative intent that WEAJA apply to civil forfeiture actions is also supported by other drafting records that comprise the Act's legislative history. In particular, the fiscal estimates for the draft legislation prepared by affected state agencies demonstrate that forfeiture actions were understood at the time to be covered by WEAJA. Courts "frequently look[] to fiscal estimates submitted to the legislature during consideration of a bill for indication of legislative intent." *Employers Ins. of Wausau v. Smith*, 154 Wis. 2d 199, 226 & n. 24 (1990) (listing cases).

The fiscal estimates that accompanied Senate Bill 10, introduced on October 1, 1985, support the inclusion of forfeiture actions under WEAJA. For example, the Department of Natural Resources ("DNR") included in its estimate the cost of citations (i.e., forfeiture actions), "including hunting, fishing and parks violations" that are "prosecuted by the District Attorney" because, as the DNR noted, "[u]nder the bill, the DNR would be liable for costs in this category as well as for hearings and actions handled by the Attorney General." (App. p. 12, Legis. Ref. Bureau Drafting File, 1985 Special Session SB-10, DNR Fiscal Estimate.) The DNR continued, "[c]osts for this type of action depend on the nature of the decision; agency losses include dismissal of cases and judgments of not guilty." *Id*. Thus, at the time of consideration of the bill, the DNR clearly anticipated WEAJA would cover its forfeiture actions. This directly contradicts the circuit court's decision to exclude such actions from the scope of WEAJA.

Similarly, preparing its fiscal estimate for the bill, the Department of Agriculture, Trade and Consumer Protection ("DATCP") included "court cases filed by or at the request of the department, *including both civil and criminal actions*." (App p. 17, *Id*., DATCP Fiscal Estimate (emphasis added).) DATCP made no distinction between its civil and criminal enforcement actions in estimating the impact of WEAJA on the agency. Here too, the circuit court's decision conflicts with this legislative history.

Further still, unlike the position it took at the lower court, the Department of Justice acknowledged when WEAJA was in the process of being adopted that its cases

would be subject to WEAJA, without attempting to claim any "prosecutorial discretion" exception. In the Department of Justice's fiscal estimate of the bill, after first agreeing that its actions would be covered, it went on to project a limited fiscal impact because "the Department is selective in its lawsuits filed against individuals and business entities." (App. p. 20, *Id*., DOJ Fiscal Estimate.) Thus, rather than assuming it would be exempted entirely from WEAJA because it was exercising "prosecutorial discretion," the Department of Justice asserted that its "careful selection of lawsuits"(*id*.) would be used to reduce WEAJA's financial impact. The Department of Justice's focus on bringing only meritorious actions, instead of a blanket exemption, comports with the legislative intent of WEAJA to discourage baseless government lawsuits, and its acknowledgement in 1985 of the bill's scope to include its enforcement actions is contrary to the Department of Justice's current argument, and the circuit court's holding, in this case.

The legislature was informed by the agencies of their fiscal concerns from the broad reach of the bill, including in civil and criminal enforcement actions. Yet, the legislature did not amend the WEAJA bill to exempt such actions or otherwise limit the scope of WEAJA when it was enacted as 1985 Act 52. Instead, the broad language covering "any action" was adopted without limitation as initially proposed.

The legislative history of the Act therefore supports the applicability of WEAJA to this, and other, forfeiture actions. *See Sheely,* 150 Wis. 2d at 336 (noting that legislative

analysis that is present when the legislature voted on it is significant in determining legislative intent). The circuit court's decision, in contrast, grafts an exception onto the statute that the legislature could have—but did not—enact in response to agency concerns that WEAJA would apply to its enforcement actions. The circuit court's decision should be reversed to reestablish the legislative purpose of WEAJA.

D. *Following Federal Case Law, WEAJA Is Intended To Cover Cases In Which the Attorneys Exercise Prosecutorial Discretion.*

The legislature's intent to apply WEAJA to forfeiture actions is also apparent by federal case law interpreting the federal Equal Access to Justice Act ("EAJA"),[7] which the

[7] As its state counterpart, the federal EAJA comprises two statutory provisions, 5 U.S.C. § 504, which addresses cases brought before administrative agencies, and the equivalent to the provision at issue here, 28 U.S.C. § 2412, which addresses civil actions in court. The state equivalent of 5 U.S.C. § 504 is Wis. Stat. § 227.845, which allows fees to prevailing parties in contested cases before administrative agencies. At issue here is an agency action in court, thus, 28 U.S.C. § 2412 is more pertinent. It provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

state legislature specifically directed courts interpreting WEAJA to rely upon. Wis. Stat. § 814.245(1); *Sheely*, 150 Wis. 2d at 328.

Federal cases do not make a distinction between cases brought by the government for penalties, administrative sanctions, fines or other types of enforcement actions. They are all covered under EAJA. *See e.g., Scafar Contr., Inc., v. Sec'y of Labor*, 325 F.3d 422, 432 (3d Cir. 2003) (discussing "the intent of EAJA to provide fees and expenses to people who are forced to face potential fines and sanctions by unjustified government action."); *Gold Kist, Inc. v. U.S. Dep't of Agriculture*, 741 F.2d 344, 348 (11th Cir. 1984) (finding EAJA applicable in a case where the government sought fines that amount to penalties, not merely administrative sanctions, against the company).

If there were any doubt about the legislature's intent, it is resolved by the explicit directive to follow federal case law, which applies the federal EAJA to enforcement actions for administrative sanctions, fines and penalties. As directed by the legislature, the circuit court should have adhered to the scope of actions covered under EAJA, and included forfeiture actions by the state agencies under WEAJA. The circuit court should be reversed.

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28 U.S.C. § 2412(d)(1)(A).

II. THE CIRCUIT COURT APPLIED THE WRONG WISCONSIN CASE LAW BECAUSE *SHEELY V. DEPARTMENT OF HEALTH & SOCIAL SERVICES,* NOT *CITY OF JANESVILLE V. WISKIA,* CONTROLS THIS CASE.

The circuit court based its decision to create a non-statutory exemption to WEAJA for cases involving "prosecutorial discretion" on the court's interpretation of Wisconsin case law. However, the circuit court looked to the wrong case as controlling. Instead of relying on the Wisconsin Supreme Court's application of WEAJA, the circuit court erred in applying an earlier Wisconsin Supreme Court decision discussing the now-repealed, wholly separate standard for frivolous actions under Wis. Stat. § 814.025 (repealed by Wis. S. Ct. No. 03-06, 2005 WI 38). Specifically, the circuit court ignored the Court's holding in *Sheely v. Department of Health & Social Services*, and instead erroneously relied on *City of Janesville v. Wiskia*, 97 Wis. 2d 473 (1980).

A. *The Wisconsin Supreme Court Broadly Interpreted WEAJA in* Sheely v. Department of Health & Social Services.

Rather than relying on law interpreting the now-revoked frivolous standard at issue in *Wiskia*, the circuit court should have looked to case law interpreting WEAJA. Specific to WEAJA, the Wisconsin Supreme Court has rebuked the notion that the fee-shifting statute is modified depending on the characterization of the agency action. In

Sheely v. Dep't of Health and Social Services, the Court plainly held "the statute makes no distinction between the different 'functions' of a state agency" and declined to adopt an exception to application of WEAJA where the agency acted in an adjudicative function. 150 Wis. 2d at 324.

The Court found the actions of the agency's hearing examiner in failing to apply the correct legal standard to the facts of the case in its "final administrative decision" warranted an award under WEAJA. *See Sheely,* 150 Wis. 2d at 326-27. The "function" of the agency in *Sheely* was quasi-judicial. A prosecutor's discretion has been characterized by the state supreme court as similarly "quasijudicial." *Wiskia*, 97 Wis.2d at 481 ("We have characterized the prosecutor's charging discretion as 'quasijudicial' in the sense that it is his duty to administer justice rather than obtain convictions."). Certainly, if reaching a final agency decision is an included quasijudicial activity, exercising prosecutorial discretion is included under WEAJA as well. WEAJA does not differentiate based on a characterization of the type of agency action.

Moreover, in *Sheely*, the Court found Judge Sundby's dissent at the Court of Appeals persuasive. 150 Wis. 2d at 328. In his dissent, Judge Sundby noted that to allow the function of the agency to determine applicability of WEAJA would "seriously compromise the legislative purpose in enacting the Act." *Sheely v. Dep't of Health & Social Services*, 145 Wis. 2d 328, 342 (Ct. App. 1988) (J. Sundby, dissenting). Judge Sundby explained that Wis. Stat. § 814.245 covers not only agency cases that are subject first to a contested case hearing, but also to state actions brought by the state "for

example, *forfeiture actions*, which are not preceded by a contested case hearing. . . ." 145 Wis. 2d at 336 (J. Sundby, dissenting) (emphasis added). As Judge Sundby recognized, forfeiture actions are among those types of state actions that the legislature intended to be subject to WEAJA.

The circuit court erred by not applying *Sheely* as controlling precedent to this case and should be reversed.

B. City of Janesville v. Wiskia, *Interpreting A Now-Repealed Frivolous Statute, Is Easily Distinguishable From This Case Brought Under WEAJA.*

In adopting the reasoning from *Wiskia* that "the dispositive question is whether the case was brought within a prosecutor's discretion" (R.46 p. 5; App. p. 5), the circuit court presumed the legislative history behind the frivolous statute interpreted there and WEAJA to be the same. They are not, as their respective legislative purposes and sequence of enactment of the statutes demonstrate.

Former Wis. Stat. § 814.025 was introduced as 1977 Assembly Act 237. The frivolous statute was to apply widely to plaintiffs the legislature perceived as having engaged in "the practice of naming defendants in lawsuits, where there is no legal basis in fact for such a claim and the purpose thereof is to obtain unwarranted contribution toward settlement." (App. p. 26, Legislative History, 1977 Assembly Bill 237, Assembly Substitute Amendment 1 (enacted at 1977 c. 209).) The legislature intended § 814.025, to protect individuals and businesses from what it deemed

unscrupulous litigation because it "demeans the legal process and imposes a needless expense upon the individual sued[.]" *Id*.

The purpose of discouraging private plaintiffs from engaging in unmeritorious lawsuits for the purpose of extracting a monetary settlement was not the purpose of WEAJA. As discussed above, WEAJA is to discourage *state agencies* from unreasonably litigating against individuals and small businesses. *See Stern I,* 212 Wis. 2d at 404. It is also to compensate a party for the costs of defending against unreasonable *state agency* action. *Bracegirdle*, 159 Wis. 2d at 428.

In 1980, the state Supreme Court decided in *Wiskia* that a defendant was not entitled to recover fees under Wis. Stat. § 814.025 in a municipal ordinance forfeiture action because allowing such recovering would interfere with the exercise of prosecutorial discretion. *Wiskia*, 97 Wis. 2d at 527. While it may have made sense in *Wiskia* to find no legislative intent to include prosecutorial action under the sweeping application of the frivolous statute aimed at private plaintiffs, WEAJA is directed specifically to litigation brought by state agencies to keep the government in check.

The Wisconsin Supreme Court decided *Wiskia* five years before WEAJA was enacted. At the time the WEAJA bill was introduced, the legislature would have been aware of the state Supreme Court's limitation under *Wiskia* to not allow awards of fees for frivolous forfeiture actions. *State v. Grady*, 2006 WI App 188 ¶ 6 ("We presume that the

legislature acts with full knowledge of existing case law when it enacts a statute.") Yet, faced with the Court's reasoning in *Wiskia*, the legislature adopted WEAJA without limiting it to "non-prosecutorial" actions. Rather, it is clear from WEAJA's legislative history that forfeiture actions, including those litigated on an agency's behalf by the Department of Justice, were intended to be and are covered under WEAJA.

Indeed, if the old frivolous standard and WEAJA served the same purpose, there would have been no need for the legislature to adopt WEAJA because *non*-prosecutorial actions (if any) by the state agencies could be covered by the frivolous statute. Such a construction would inappropriately render WEAJA's "any action by a state agency" language superfluous. *Wis. Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27 ¶ 45 ("We avoid construction of a statute that results in words being superfluous").

It is also telling that in the state Supreme Court's first review of WEAJA—*Sheely* in 1989—does not cite *Wiskia* or § 814.025 at all. 150 Wis. 2d at 328. Certainly, the Court was aware of its decision issued nine years earlier, but found it inapposite.

The frivolous statute and WEAJA serve distinct and unrelated purposes. The court erred by assuming the legislative purposes were the same and simply adopting the reasoning in *Wiskia* for this case.

C. Unlike The Statute At Issue In Wiskia*, Under WEAJA, The Legislature Directed The Courts To Award Fees Against The State Agencies.*

The legislature authorized fees to be assessed against the state under WEAJA, but not under the frivolous statute. WEAJA is specific to state agency action, but the statute at issue in *Wiskia* allowed for fees to be assessed against any "party" bringing or sustaining a frivolous action, 97 Wis. 2d at 476, and did not provide express statutory authorization for costs against the state. *Compare* Wis. Stat. § 814.245(3), (9); and § 814.025 (1979-80). *See also Martineau v. State Conservation Comm.*, 54 Wis. 2d 76, 79 (1972) (holding that costs may not be assessed against the state or an administrative agency without express authorization by statute). Thus, whereas the legislature intended WEAJA to be assessed for any action by the state agency, the legislature did not provide coverage to agency actions under the general frivolous statute.

The legislature's intent to broadly cover agency actions under WEAJA is apparent from its special appropriation to cover WEAJA judgments. WEAJA authorizes and directs the courts to order the state to pay fees and costs of the prevailing party and provides appropriations for that expenditure. *See* Wis. Stat. § 814.245(6) ("If a state agency is ordered to pay costs under this section, the costs shall be paid from the applicable appropriations under 20.865(1)(a), (g) or (q)."). The appropriation, as it still exists, was included in the original Act. (*See* App. pp. 22-23, 1985 Act 52; App. p. 7, LRB Analysis, 1985 Special Session Senate Bill 10 ("[I]f any

agency is ordered to pay these costs, the payment is made from program supplemental funds.").) There was no such appropriation for state actors under Wis. Stat. § 814.025, the statute at issue in *Wiskia*.

As for the circuit court's policy concern about covering actions involving "prosecutorial discretion," because "a prosecutor should be free to exercise his or her discretion without the specter of a judgment for fees and costs in the back of his or her mind,"(R.46 p. 4; App. p. 4), the stated concern does not bear out here where there is no financial risk to prosecutors who bring and litigate forfeiture actions because there is an appropriation to cover the costs assessed under WEAJA. This is distinct from the frivolous statute discussed in *Wiskia* where the attorney (not just the plaintiff) could be assessed litigation costs and there was no special appropriation. *See* Wis. Stat. § 814.025 (2) (1979-80). Thus, the policy concern about the financial risk to prosecutors is not relevant to WEAJA.

Moreover, the circuit court's policy consideration mistakenly protects the "over-zealous prosecutor" rather than "the ordinary citizen." *See Silverman v. Ehrlich Beer Corp.*, 687 F. Supp. 67, 70 (S.D.N.Y. 1987) (interpreting the federal EAJA). In the *Ehrlich Beer* case, the federal court explained why the balance of the policy considerations should protect the citizen rather than the prosecutor:

> First, an attorney in the employ of the government is not on the same footing as a private attorney. He or she has the august majesty of the sovereign behind his or her every utterance; the economic power in the hands of some individual government lawyers can wreak total devastation on the average citizen. As a

> result, the attorney representing the government must be held to a higher standard than that of the ordinary lawyer. This rule is particularly appropriate when the government attorney is bringing charges, even quasi-criminal in nature, against the ordinary citizen.

Id. at 69-70. The federal court found that allowing fee-shifting under EAJA was a safeguard against unreasonable prosecutorial action and awarded fees to the defendant. *Id*. at 70-71.

The legislative directive to allow fee-shifting against the state in this type of forfeiture action is clear under WEAJA, unlike under the frivolous claim provision in *Wiskia*. The circuit court erred in failing to distinguish *Wiskia*'s reasoning from the facts of this case and should be reversed.

D. The "Quasi-Criminal" Moniker Discussed In Wiskia *Does Not Create An Exception To WEAJA.*

The Department of Justice argued to the circuit court that because a forfeiture action is "quasi-criminal," the prohibition of awarding fees in an ordinance forfeiture action under *Wiskia* should apply here. (*See* R. 40 pp. 2-3.)[8] The Department of Justice seems to suggest that because the proceeding is criminal in nature, fee-shifting statutes should not apply. The circuit court found that this was an incorrect reading of *Wiskia* because the dispositive question

[8] In its brief to the circuit court, the Department of Justice asserts, "[this case] is an ordinance violation." (R. 40 p. 2.) As explained above, this case is not based on an ordinance violation, but a violation of a state agency rule.

in *Wiskia* was whether there was an exercise of "prosecutorial discretion," not whether the "quasi-criminal" characterization is applicable. (*See* R.46 p. 5; App. p. 5.) Actually, the "quasi-criminal" label is inapposite under WEAJA given the legislative directive that WEAJA applies to all agency actions, but, in any event, this case is more civil in nature than criminal. So, the Department of Justice's characterization is inapt here.

On balance, the forfeiture action at issue here is closer to a traditional civil action than a criminal action. *Menomonee Falls v. Kunz*, 126 Wis. 2d 143, 144 (1985) ("Although forfeiture proceedings have certain aspects of criminal proceedings, . . . forfeiture actions nonetheless remain essentially civil in nature." (internal citations omitted)). The proceedings in this case, too, were essentially civil in nature.

First, the administrative rule under which Detert-Moriarty was ticketed (for being at an event at the State Capitol without a permit) was not derived from a criminal statute. *Cf. Wiskia*, 97 Wis. 2d at 483 (discussing the fact that the municipal ordinance at issue was derived from a state criminal statute as a basis of characterizing the case "quasi-criminal"). Detert-Moriarty was not issued a citation for any criminal conduct, or a municipal ordinance or administrative regulation that adopts a criminal statute.

Moreover, although the case was commenced by the Department of Administration's officer issuing a ticket to Detert-Moriarty and to which she pled "not guilty" (*see Milwaukee v. Cohen*, 57 Wis. 2d 38, 46 (1973)), the case has followed civil rules of procedure. For example, the

Department of Justice filed a motion to amend the pleadings on the grounds that it is allowed to do so by Wis. Stat. § 802.09, the rule of civil procedure for amending pleadings. (R.6 (motion was pending when the case on the merits was dismissed).) Also, the Department of Justice's motion in limine, seeking to prohibit Detert-Moriarty from challenging the action as unconstitutional without providing proper notice, was based on Wis. Stat. § 806.04(11), the civil procedure for a declaratory judgment action. (R.9 p. 1 (motion was pending when the case was dismissed).)

Additionally, Detert-Moriarty served civil discovery requests and a notice of deposition on the Department of Administration and its officer. (R.15 pp 4-9.) The Department of Justice sought to prohibit that discovery. (R.5.) The discovery motion was pending when this Court decided *State v. Bausch*, 2014 WI App 12, which allowed parties to conduct civil discovery under chapter 804 in this exact type of forfeiture proceeding, and was not decided by the circuit court before the case was dismissed on constitutional grounds.

In contrast to a criminal matter, this civil forfeiture action does not attach many of the rights afforded defendants in criminal actions. For example, although Detert-Moriarty secured counsel, she had no right to such representation. *State v. Novak*, 107 Wis. 2d 31, 40 (1982) (finding that where the violation is "only of a civil forfeiture, the accused violator is not constitutionally entitled to counsel."). Because the penalty for her violation was limited to a forfeiture and she was not at risk for losing

her liberty, a *Miranda* warning was not required when she was arrested. *Kunz*, 126 Wis. 2d at 148 ("[U]nder Wisconsin law, a forfeiture is civil in nature, the *Miranda* requirements do not apply."). *See also* Wis. Stat. § 939.12 ("Conduct punishable only by a forfeiture is not a crime."). Thus, the "quasi-criminal" distinction is not appropriate.

This is, in essence, a civil action, with civil discovery rights and multiple civil procedural motions. As this Court noted in *Bausch*, forfeiture actions have been sometimes characterized as "quasi-criminal" by the courts, but "such judicial pronouncements are not legislative directives." 2014 WI App 12 ¶ 13. This action leans toward a traditional civil action, but in either case, the legislature's decision to cover "any action by a state agency" cannot be overridden by a court-made label of "quasi-criminal" or court-made exemption of "prosecutorial discretion."

III. THIS CASE IS AN AGENCY ACTION BY THE DEPARTMENT OF ADMINISTRATION TO ENFORCE ITS RULES.

Finding that this case is precluded under the "prosecutorial discretion" theory, the circuit court did not directly reach the legal question of whether this was an agency action. Rather, it presumed, because the Department of Justice litigated the case, WEAJA does not apply. However, the question of whether this is an "agency action" has been fully briefed below and is properly before this Court to decide. *See State v. Caban*, 210 Wis. 2d 597, 604 (1997); *Ruenger v. Soodsma*, 2005 WI App 79 ¶ 55. (noting that although the issue was raised to the circuit court, "the

circuit court did not decide it because that was unnecessary given the ruling the court did make[,]" and explaining "[i]n any event, we have the authority to decide questions of law even if they were not raised or not decided in the circuit court.").

This is a state agency action because the Department of Administration commenced the action by issuing the citation and requested the representation of the Department of Justice—all under the umbrella of the enforcement policies of the Chief of the Capitol Police, who had been delegated the authority to set such policy for the Department of Administration.

A. The Only Authority For This Forfeiture Action Is The Department of Administration's Enforcement Of Its Administrative Rules.

The case is a forfeiture action by the Department of Administration, brought on its behalf by the Department of Justice. This relationship is spelled out in correspondence from the Department of Administration requesting representation from the Department of Justice:

> Pursuant to s. 16.846(2), Wis. Stats., we [Department of Administration] respectfully request the Department of Justice, in the name of the Department of Administration, sue for and collect forfeitures for violations of s. Adm 2.14(2) of the Wisconsin Administrative Code. Such violations shall be evidenced by citations issued by the Department of Administration's Division of Capitol Police.

(R. 45 p. 30, 8/20/12 Ltr. from G. Murray, Department of Administration Chief Legal Counsel, to K. Potter, Department of Justice Administrator of Legal Services.) The letter quoted above is *the* authority for Department of Justice to bring this forfeiture action, as well as the other Solidarity Sing Along forfeiture actions, in the circuit court. (R. 45 pp. 16, 28 & 30.)

The only basis for the Department of Justice to have prosecuted the forfeiture actions is because the Department of Administration requested the Department of Justice's representation under Wis. Stat. § 16.846(2) and prosecution of the citations issued under Adm 2.14(2) by the Capitol Police. The only statutory authority under which this case was brought is Wis. Stat. § 16.846(2) which allows the Department of Administration to bring a forfeiture action under Wis. Admin. Code § Adm 2.14(2) by the Department of Justice at the request of the Department of Administration. Neither the Department of Justice, nor the local District Attorney, could have enforced Adm. 2.14(2), except on behalf of the Department of Administration.

B. The Department Of Justice Acts As Counsel To The Department Of Administration In This Case, Not As The Party Itself.

Not only did the Department of Administration formally request representation from the Department of Justice in writing, the attorney-client relationship between the Department of Administration and Department of Justice is reinforced by the verbal agreement of the Department of Justice and the Chief of the Capitol Police

that the Department of Justice would represent the Capitol Police in the forfeiture actions under ch. Adm 2.

The Capitol Police is a division of the Department of Administration (R.45 p. 40); the Chief of the Capitol Police reports directly to the Secretary and the Deputy Secretary of Administration (*id*.). The Chief of the Capitol Police has the duty and discretion to enforce rules of conduct for the State's building facilities under ch. Adm 2 of the Wisconsin Administrative Code. (R.45 pp. 69 & 71 (7/22/14 Dep. Tr. of David Erwin, pp. 33, 43).) The Chief sets the enforcement policy for the Capitol Police. (R. 45 p. 63 (*Id*. Dep. Tr. p. 9).) The Chief of the Capitol Police from July 23, 2012, through the present has been David Erwin. (R. 45 p. 63 (*Id*. Dep. Tr. p. 10).)

The formal letter request by the Department of Administration's counsel follows a meeting held by the Chief of the Capitol Police with the Department of Justice in which the Chief specifically requested the Department of Justice's representation in the Sing-Along forfeiture actions. A forfeiture action under ch. Adm 2 is commenced by the Capitol Police officers filing a citation with the Court. (R.45 p. 52.) Immediately after Chief Erwin became Chief of Police, he noticed that many of the citations issued to the Solidarity Singers were being dismissed. (R.45 pp. 69 & 72 (7/22/14 Dep. Tr. of David Erwin, pp. 33-36, 45-46).) According to Chief Erwin, in August of 2012, he convened a meeting with the Dane County District Attorney and the Department of Justice. (R.45 p. 72 (*Id*. Dep. Tr. pp. 45-48).) At that meeting, at the request of the Chief Erwin, it was agreed that "on behalf of the Capitol Police, the Department

of Justice would prosecute the forfeiture actions under Adm 2[.]" (R.45 p. 72 (*Id*. Dep. Tr. p. 48).) The District Attorney agreed to continue prosecuting the statutory criminal charges, but the Department of Justice would prosecute the forfeiture actions on behalf of the Capitol Police. (R.45 p. 72 (*Id*. Dep. Tr. p. 47).) That arrangement is still in place. (R. 45 p. 73 (*Id*. Dep. Tr. p. 49).) In other words, the Department of Administration went out in search for, and found, its preferred attorney representation for this forfeiture action.

The Department of Justice is acting in the role of counsel for the Department of Administration in this civil matter. This arrangement is much akin to the Department of Justice representation of the DNR on its civil enforcement matters—for example, an action for penalties under Wis. Stat. §§ 283.89(1) and 283.91 (Wisconsin Pollutant Discharge Elimination System enforcement provisions)—where the Department of Justice may be in charge of the litigation, but the "client" is the DNR. The representation by the state's attorneys does not exempt the action from WEAJA simply because the Department of Justice appears for the DNR in the court action.

If otherwise, WEAJA would have no application when the state agency brings the action but is represented by the state's attorneys. That would deprive individuals, small businesses and non-profits from one of the central purposes of WEAJA: to rectify the lose/lose option when facing unjustified lawsuits by state agencies of capitulating to unjust government actions, or incurring high litigation costs to defend, and beat, the agency's baseless lawsuit. The

Court should find this was an agency action for purposes of WEAJA.

C. *The Fact That This Matter Is Captioned In The Name Of The State Does Not Change The Fact That This Is A Department Of Administration Action.*

The plain language of WEAJA provides that fees are available to prevailing parties in "any action" brought "by" a state agency, such as the Department of Administration. Wis. Stat. § 814.245(3) ("if an individual . . . is the prevailing party in any action by a state agency . . ., the court shall award costs to the prevailing party . . . ."). In its argument to the circuit court, the Department of Justice claimed that this case is captioned "State v. Detert-Moriarty" not "Department of Administration v. Detert-Moriarty" and, therefore, not a state agency action. (R.40 p. 4.) There is nothing determinative about a caption under WEAJA.

This is a state agency action because the Department of Administration commenced the action by issuing the citation under the Department of Administration's rules and requested the representation of Department of Justice—all under the direction of the Chief of the Capitol Police, who had been delegated the authority to set such policy for the Department of Administration. (R.43 pp. 2-4.) To allow the agency to avoid WEAJA by simply captioning a case as "State v." would circumvent the legislative purposes of the statute to encourage challenges to agency action, to provide a disincentive to agencies from prolonging litigation, and to compensate individuals, small businesses and non-profits for costs in defending

unreasonable agency action. *See Bracegirdle,* 159 Wis. 2d at 428 (Ct. App. 1990) (finding that one primary purpose of WEAJA was to compensate a party for the costs of defending against unreasonable state agency action); *Stern I,* 212 Wis. 2d at 404 (finding that WEAJA is to provide state agencies with a disincentive to prolonging the litigation process).

While the circuit court did not reach this issue directly, this Court should find that this was an agency action regardless of how the action was captioned.

IV. THE COURT SHOULD CORRECT THE CIRCUIT COURT'S USE OF THE FRIVOULOUSNESS STANDARD FOR REMAND.

The circuit court discussed the standard for "substantial justification" under WEAJA, erroneously equating it with one of frivolousness, (R.46:4, 10/23/14 Dec.), but passed on the question of whether the Department of Administration was substantially justified in its litigation position because it found, as a matter of law, WEAJA fees are not available in this type of action. (R.46 p.6; App. p. 6.) For the reasons above, this determination was in error and the Court should correct the standard for "substantial justification" to be less stringent than "frivolous" for remand.

In attempting to show that the reasoning applied in *Wiskia* should be applied to his case, the circuit court erroneously equated the standard for frivolousness with

"substantial justification" under WEAJA. (R.46 p. 4; App. p. 4 (citing *Howell v. Denomie*, 2005 WI 81 ¶ 13).) Although the frivolous statute and WEAJA used *a few* similar words, they do not employ the same standards. *Compare Howell*, 2005 WI 81 ¶ 13 (interpreting Wis. Stat. § 814.025 to apply when "a claim is frivolous if the party or attorney knew or should have known that the claim was without a reasonable basis in law or equity. . . .) *with* Wis. Stat. § 814.245(2)(e) (defining substantially justified to mean "having a reasonable basis in law and fact.").

Even though both employ an objective "reasonableness" standard, the circuit court missed the clear distinction in whether the fee-seeking party or the fee-defending party has the benefit of the presumption: for a frivolous claim, there is a presumption of non-frivolousness (i.e., in favor of the fee-defending party); whereas, under WEAJA, the agency is presumed *not* to have been substantially justified in its actions (i.e., in favor of the fee-seeking party). *Compare Stern v. Thompson & Coates, Ltd*, 185 Wis. 2d 220, (1994) ("all doubts are resolved in favor of find the claim nonfrivolous."); *Dailey v. Kelly*, 192 Wis. 2d 633, 654 (Ct. App. 1995) (finding a "presumption of 'nonfrivolousness' to claims made under Wis. Stat. § 814.025) *to Sheely*, 150 Wis. 2d at 337 (explaining that the government has the burden to demonstrate its actions were substantially justified under WEAJA); *Bracegirdle,* 159 Wis. 2d at 425 (Ct. App. 1990) (under WEAJA, "[the agency] had the burden of establishing that it was substantially justified in taking its position.").

The standards are not equivalent and the legislature intended the benefit of doubt to go to the individuals, small businesses and non-profits seeking fees (not the state agency defending against paying them) under WEAJA, but to the party against whom fees are sought (and not the movant) under Wis. Stat. § 814.025. *See also Zimmerman v. Schweiker*, 575 F. Supp. 1436, 1441 (E.D.N.Y. 1983) (awarding plaintiff EAJA fees against government but noting that the government's pleadings "just barely" met Fed. R. Civ. Proc. 11 frivolousness standard).

The circuit court should be corrected that the standards are not equivalent because, given the allocation of the burden, WEAJA fees are available where frivolous sanctions may not be.

CONCLUSION

For the reasons stated above, Detert-Moriarty respectfully requests that this Court reverse the decision of the circuit court and remand for a decision on Detert-Moriarty's motion for fees and other costs under WEAJA.

Respectfully submitted this 16th day of December, 2014.

Counsel for Defendant-Appellant Judith A. Detert-Moriarty

MCGILLIVRAY WESTERBERG & BENDER LLC

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Pamela R. McGillivray
SBN 1034194
211 South Paterson Street, Suite 320
Madison, WI 53703
Tel. 608.310.3560
Fax. 608.310.3561
mcgillivray@mwbattorneys.com

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §§ 809.19 (8) (b) and (c) for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 8,952 words.

I hereby certify that this electronic brief is identical in form and content to the printed version of this brief, filed December 16, 2014, pursuant to Wis. Stat. § 809.19(12).

Dated this 16th day of December, 2014.

Counsel for Defendant-Appellant Judith A. Detert-Moriarty
MCGILLIVRAY WESTERBERG & BENDER LLC

_____

Pamela R. McGillivray
SBN 1034194
211 South Paterson Street, Suite 320
Madison, WI 53703
Tel. 608.310.3560
Fax. 608.310.3561
mcgillivray@mwbattorneys.com