STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2433

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUDITH ANN DETERT MORIARTY,

Defendant-Appellant.

ON APPEAL FROM THE DECISION BY THE
CIRCUIT COURT OF DANE COUNTY,
THE HONORABLE DAVID T. FLANAGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Wisconsin Stat. § 814.245 (the Wisconsin Equal Access to Justice Act, or "WEAJA") applies when a "state agency" brings an action that is not substantially justified. This forfeiture action was brought, as required under statute, by the State of Wisconsin. Is WEAJA inapplicable when the plaintiff is the State of Wisconsin?

The circuit court did not answer this question.

2. In *City of Janesville v. Wiskia*, 97 Wis. 2d 473, 483, 293 N.W.2d 522 (1980), the Wisconsin Supreme Court held that the fee shifting provision in Wis. Stat. § 814.025, which applies to any action that lacks merit, did not apply to ordinance violation matters involving an exercise of prosecutorial discretion. Does that reasoning apply with equal force to WEAJA?

The circuit court answered yes.

3. In the underlying forfeiture case in this matter, the State of Wisconsin issued a citation when defendant-appellant refused to leave an event at the State Capitol that had been declared unlawful by the State Capitol Police. Was the State's position substantially justified?

The circuit court did not reach this issue because it concluded that WEAJA did not apply.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this case because plaintiff-respondent believes that the briefs will adequately address the issues before the Court. Publication of this Court's opinion may be appropriate because this case will clarify issues of Wisconsin law.

Plaintiff-respondent did not oppose the motion for a three-judge panel.

SUPPLEMENTAL STATEMENT OF THE CASE

This is an appeal of an order denying an award of $23,997.42 in attorneys' fees and costs[1] for an ordinance forfeiture citation in the amount of $200.50. Judith Ann Detert-Moriarty's recitation of the procedural history of the case is generally accurate, with an important general correction.

Detert-Moriarty repeatedly describes the plaintiff below as the "Department of Administration," but that is incorrect: the plaintiff was and is the State of Wisconsin. A forfeiture case under Wis. Stat. ch. 778 must be brought by the State of Wisconsin, not by a state agency. Detert-Moriarty's earlier pleadings recognized this fact, stating repeatedly that the "Defendant is being sued by the State of Wisconsin."[2]

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[1]R. 35:2.

[2]R. 14:9.

The citation at issue was filed directly by the State Capitol Police with the Dane County Circuit Court; it was assigned Dane County Case No. 13-FO-2109. Pursuant to the express language in Wis. Stat. § 778.02, the Dane County Circuit Court properly listed the "State of Wisconsin" as the party plaintiff in this forfeiture action. Any amount of money collected as a result of this and other such forfeiture actions is to be deposited with the county treasurer, not with any individual state agency. Wis. Stat. § 16.846(3).

The Department of Justice prosecuted the case on behalf of the State of Wisconsin according to its prosecutorial discretion. Detert-Moriarty moved to dismiss the action, and the circuit court issued a decision and order of dismissal of the underlying citation/forfeiture action on May 9, 2014.[3] That decision was not appealed by the State of Wisconsin, and is not at issue in this appeal.

After Detert-Moriarty's case was dismissed, she sought $23,997.42[4] in attorneys' fees under Wis. Stat. § 814.245. Following briefing, the circuit court held that the statute was inapplicable to a forfeiture action under Wis. Stat. ch. 778.[5]

This appeal followed.[6]

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[3]R. 34.

[4]R. 35.

[5]R. 46; Appellant's App. 1-6.

[6]R. 47.

STANDARD OF REVIEW

The appeal seeks review of a legal question, and, as such, it is within the province of the appellate courts and is reviewable *ab initio*. *Bd. of Regents v. Pers. Comm'n*, 103 Wis. 2d 545, 551, 309 N.W.2d 366 (Ct. App. 1981). In particular, review of the construction of statutes is a question of law. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615. While an appellate court considers the decision of the circuit court as well as its reasoning, the appellate court is not bound by, nor need it defer to, the lower court's conclusions of law. *Omerick v. Lepak (In re of Estate of Omerick)*, 112 Wis. 2d 285, 290, 332 N.W.2d 307 (1983).

Moreover, this Court is not bound to rely only upon the grounds set forth by the circuit court if it decides there was a correct decision but disagrees with the basis for that decision. "An appellate court is concerned with whether the decision . . . is correct, not whether it or the circuit court's reasoning is." *Liberty Trucking Co. v. Dep't of Indus., Labor & Human Relations*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). "If the holding is correct, it should be sustained and this court may do so on a theory or on reasoning not presented to the lower court." *Id.* *See also State ex rel. Harris v. Milwaukee City Fire & Police Comm'n*, 2012 WI App 23, ¶ 9, 339 Wis. 2d 434, 810 N.W.2d 488 ("'An appellate court may sustain a lower court's holding on a

theory or on reasoning not presented to the lower court.'") (quoting *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by* Wis. Stat. § 940.225(7), *as recognized in State v. Grunke*, 2007 WI App 198, 305 Wis. 2d 312, 738 N.W.2d 137)); *State v. Trecroci*, 2001 WI App 126, ¶ 45, 246 Wis. 2d 261, 630 N.W.2d 555; *State v. Fosnow*, 2001 WI App 2, ¶ 11, 240 Wis. 2d 699, 624 N.W.2d 883.

ARGUMENT

Fees were properly denied in this case, for three independent reasons. First, the statute Detert-Moriarty relies on applies only to actions brought by a state agency, not by the State of Wisconsin. Second, as the circuit court correctly held, even if the statute might in theory apply to a case brought by the State of Wisconsin, it does not apply to a quasi-criminal forfeiture action under Chapter 778 that was brought in accord with prosecutorial discretion. Finally, even if attorneys' fees were potentially available for forfeiture actions under Wis. Stat. ch. 778, the State of Wisconsin was substantially justified in prosecuting the underlying citation given the facts and the state of the law as it existed in July 2013.

I. Wisconsin Stat. § 814.245 does not apply to an action brought by the State of Wisconsin rather than a state agency.

Under Wis. Stat. § 814.245(3), attorneys fees are available only regarding actions brought by a state agency. For the

type of forfeiture action at issue here, Wis. Stat. § 778.02 requires the action to be brought by the State of Wisconsin, not a state agency. Under its plain language, Wis. Stat. § 814.245 does not apply.

Wisconsin Stat. § 814.245(3) 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.**

Wisconsin Stat. § 778.02 does not allow an action to be brought by a state agency. Instead, it requires forfeiture actions brought under that chapter to be brought in the name of the State of Wisconsin, not in the name of a state agency.

Wisconsin Stat. § 778.02 provides:

> **Action in name of state; complaint; attachment**. Every such forfeiture action **shall be in the name of the state of Wisconsin**, and it is sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, according to the provisions of the statute that imposes it, specifying the statute, plus costs, fees, and surcharges imposed under ch. 814. If the statute imposes a forfeiture for several offenses or delinquencies, the complaint shall specify the particular offense or delinquency for which the action is brought, with a demand for judgment for the amount of the forfeiture, plus costs,

> fees, and surcharges imposed under ch. 814. If the defendant is a nonresident of the state, an attachment may issue.

In another circuit court forfeiture case before a Dane County Circuit Court Judge involving a motion for attorneys' fees,[7] the court explained this concept in detail:

> The proper plaintiff for a forfeiture action under Section 2.14(2)(v) is the state because Section 2.14 is subject to Chapter 772 [sic][8] of the Wisconsin Statutes. As previously mentioned, the authority to pursue a forfeiture under Section 2.14 is granted by Section 16.846. Section 778.25 Stats. establishes the citation procedures in an action to recover a forfeiture. According to Section 778.25(6), the citation procedures stated by Section 778.25 apply to a forfeiture action brought pursuant to, "An administrative rule promulgated by the Department of Administration under Section 16.846 brought against an adult in circuit court." Given that Chapter 772 [sic] governs forfeiture actions brought in circuit court, and the citation procedures established by Chapter 772 [sic] apply to forfeiture actions brought under Section 16.846, through which Section 2.14(2)(v) was crafted, this court can safely conclude that this case was

[7]Pursuant to Wis. Stat. § 902.01, the Court may take judicial notice of this decision.

[8]The circuit court mistakenly referred to chapter and statutory section 772 when she meant "778."

> properly brought in the name of the State of Wisconsin.

Decision, *State v. Huberty*, Dane County Case Nos. 12-FO-2437, 12-FO-2681, and 12-FO-2842 (Hon. Julie Genovese), dated January 17, 2013, at 17-18; R-Ap. 29-30.[9]

In the circuit court, Detert-Moriarty herself recognized this fact. On November 5, 2013,[10] Detert-Moriarty recognized several times that she was sued by the State of Wisconsin:

> The Defendant is being sued by the State of Wisconsin for a violation of a questionably legal administrative rule, one that she believes quells First Amendment speech. . . .
>
> . . . Here, the plaintiff is the State of Wisconsin . . . .

R. 14:9.[11] Only when the concept of attorneys' fees under Wis. Stat. § 814.245 arose did Detert-Moriarty make an

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[9]While the Honorable Julie Genovese's decision is not precedential nor binding upon this Court, the Court of Appeals has held that many circuit court decisions may be considered for the limited purpose of considering "any persuasiveness that might be found in their reasoning and logic." *Brandt v. Labor & Indus. Review Comm'n*, 160 Wis. 2d 353, 364, 466 N.W.2d 673 (Ct. App. 1991). Here, Judge Genovese considered this very same issue and her reasoning and logic are relevant to the discussion at hand.

[10]R. 14.

[11]R. 28:3; R-Ap. 3. *See also* R. 11:4 ¶ 1, 12:1, 4, 5, 7, 8, 9, 14:1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 15:1 ¶ 3, 2 ¶¶ 4-5, 6, 7 ¶ 1, 16:2 ¶¶ 4, 7.

about-face, newly asserting in her briefing that "this is an 'action by the agency.'"[12]

Detert-Moriarty may think the difference in party does not matter for purposes of Wis. Stat. § 814.245, but it does. The Legislature used different terms in Wis. Stat. §§ 778.02 and 814.245, choosing to require that the "State of Wisconsin" be the plaintiff in Wis. Stat. § 778.02 and limiting recovery under Wis. Stat. § 814.245 to actions brought by state *agencies*. "When the legislature chooses to use two different words, [the courts] generally consider each separately and presume that different words have different meanings." *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67. "[W]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings." *Graziano v. Town of Long Lake*, 191 Wis. 2d 812, 822, 530 N.W.2d 55 (Ct. App. 1995). Here, because the Legislature used the "State of Wisconsin" in one statute and "state agencies" in another, the canons of statutory construction lead to the inevitable conclusion that the Legislature intended a reference to different entities. Perhaps this was done because the WEAJA forfeiture actions are quasi-criminal

[12]R. 32:1 n.1. It is also in this pleading that the question of whether the emergency rules were actually based on an "emergency" is raised for the first time. R. 32:1 n.2.

and the funds collected for suits go—not to any individual agency—but to the county treasurers.

A statute's plain language is not to be taken lightly, but rather should be followed by the courts. *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 365, 597 N.W.2d 687 (1999). In this case, the plain language of the statute expressly indicates that the action must be brought *by a state agency* for it to fall within its bounds. Wis. Stat. § 814.245(3).

There is no legal basis for the recovery of attorneys fees and costs under Wis. Stat. § 814.245. This Court may affirm on this basis regardless of how the circuit court reached its conclusion. *Harris*, 339 Wis.2d 434, ¶ 9.

II. In the alternative, the circuit court properly held that *Wiskia* excludes quasi-criminal forfeiture actions under Wis. Stat. ch. 778 from the reach of Wis. Stat. § 814.245.

Even if Wis. Stat. § 814.245 could potentially apply to some actions brought by the State of Wisconsin, it would not apply to forfeiture actions under Chapter 778 because they are quasi-criminal and involve an exercise of prosecutorial discretion. The circuit court correctly held that the supreme court's ruling in *Wiskia* was on point and foreclosed a fee request under Wis. Stat. § 814.245.

A. The circuit court correctly held that, under *Wiskia,* fees do not apply in forfeiture cases.

This is a forfeiture action. Its procedural make-up and party designations are dictated by Wis. Stat. § 778.02. It is

akin to an ordinance violation. It is a hybrid proceeding, and, as such, it has the characteristics of both a criminal and civil action. Therefore, it must be considered quasi-criminal. *Wiskia*, 97 Wis. 2d at 483 (citing *City of Milwaukee v. Cohen*, 57 Wis. 2d 38, 203 N.W.2d 633 (1973)).

In *Wiskia*, a case in which a bartender was charged with violating a city ordinance prohibiting the sale of intoxicating liquor to a person under the influence of liquor, the Wisconsin Supreme Court held that Wis. Stat. § 814.025,[13] which permits courts to award costs and attorney fees against a party pursuing frivolous claims, does not apply to quasi-criminal actions like municipal ordinance violations where the decision to proceed is based on prosecutorial discretion. *Wiskia*, 97 Wis. 2d at 481-82. The court reasoned:

> We believe that the application of sec. 814.025, Stats., allowing defendants to recover costs for frivolous claims in quasi-criminal ordinance violations would be inconsistent with our reasoning in prior case law allowing a prosecutor to exercise his independent judgment and discretion. If we were to allow the recovery of monetary sanctions in an action subsequently found to be frivolous, we would adversely inhibit the prosecutor's free exercise of discretion and interfere with responsible and

[13] *Wiskia* dealt with a different statute regarding the awarding of fees and costs, it is relevant here because these two statutes, while slightly different, were both intended to deal with similar issues and they should be interpreted in a similar manner. Both of these statutes under Wis. Stat. ch. 814 concern the pursuit of frivolous claims or claims which are not substantially justified. Accordingly, the holding in *Wiskia is* relevant to the case at hand.

> effective enforcement of the laws. Therefore, we hold that sec. 814.025, Stats., as enacted, is not applicable in quasi-criminal actions (ordinance violations) where the decision to proceed with the action is based on prosecutorial discretion.

Id. at 482; *see also Sommer v. Carr*, 99 Wis. 2d 789, 796, 299 N.W.2d 856 (1981) ("Th[e] court has already ruled that sec. 814.025, Stats., does not apply to city attorneys prosecuting ordinance violations . . .").

That is precisely the case at hand. The Department of Justice, operating at the request of the Department of Administration ("DOA"), exercised its prosecutorial discretion in determining whether to prosecute these ordinance violations.

In a civil forfeiture case, the clerk of court assigns a case number and the matter is then—and only then—sent to the prosecuting agency, be it the district attorney's office, or as in this case, to the Department of Justice. At that point, the district attorney or the Department of Justice reviews the case and makes the prosecutorial decision as to whether the matter should be prosecuted or whether it should be dismissed. An immediate dismissal does not indicate that the case was not meritorious, but could be based upon any number of other factors which are weighed as part of that prosecutorial discretion, including, but not limited to, whether witnesses are available, whether there are sufficient office resources or other policy issues.

Prosecutorial discretion is then used throughout the prosecution of the case. The prosecuting agency must determine whether facts have changed, whether witnesses are no longer available, whether the law has changed, and make other determinations as the case progresses.

The State was acting (through its counsel) with prosecutorial discretion and exercising its independent judgment throughout the prosecution of this case.

As in *Wiskia,* to apply a fee shifting statute would adversely inhibit the prosecutor's free exercise of discretion and interfere with responsible and effective enforcement of the laws. The Wisconsin Supreme Court has repeatedly noted that prosecutors—those involved in criminal and quasi-criminal matters—are afforded great discretion in determining whether to initiate prosecutions. *State v. Annala*, 168 Wis. 2d 453, 472, 484 N.W.2d 138 (1992); *State v. Karpinski*, 92 Wis. 2d 599, 607-10, 285 N.W.2d 729 (1979). "[I]n general the prosecuting attorney is answerable to the people of the state and not to the courts or the legislature as to the way in which he exercises power to prosecute complaints." *Id.* at 608.

Finally, the Legislature has long known about the court's ruling in *Wiskia* and has not changed the law. As the supreme court stated in *Zimmerman v. Wisconsin Electric Power Company*, 38 Wis. 2d 626, 634, 157 N.W.2d 648 (1968), "when the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation

of legislative intent is correct." The Legislature itself is cognizant of the holding in *Wiskia* and the effect it has on municipalities, counties, and state agencies as well as possible defendants, and has not seen fit to revise the law or to provide other, appropriate statutory relief.

The circuit court outlined the procedure and the decision-making by the Capitol Police and the Department of Justice and explained why prosecutorial discretion in this context was consistent with *Wiskia*:

> Finally, Defendant claims that this case was not brought by "prosecutors" because it was brought by DOJ on the request of the Capitol Police Chief and not by DOJ of its own accord. Defendant asserts that this is significant in that the "prosecutorial discretion" rationale of *Wiskia* would not apply. But the same argument could be made of all prosecutions under any criminal statute or ordinance. In the course of a good deal of prosecutions, the police recommend charges. The prosecuting attorney then, in his or her discretion, decides whether or not to file charges. The same thing happened here. Charges were referred by the citation written by the Capitol Police, and DOJ prosecutors, in their discretion, decided to prosecute the citation. This decisionmaking is reflected in the deposition of Capitol Police Chief David Erwin from another of the Capitol Singers cases, provided in Defendant's filings, in which Chief Erwin states with regard to the decision to prosecute: "I mean the prosecuting attorneys and the courts would make that decision. I mean we put the evidence forward. If they don't feel like it's adequate, you know, if [the prosecutor] doesn't feel like it's adequate or he doesn't want to pursue it, I'm assuming at some point they'll make a plea agreement or bargain or the court will dismiss it, and due process has been, has worked." While the Capitol Police can recommend charges, the ultimate

> decision of whether to prosecute or not is up to the DOJ prosecutors.
>
> The public policy expressed in *Wiskia* indicates that a defendant in a quasi-criminal proceeding such as this cannot collect fees and costs when the decision to prosecute is a matter of prosecutorial discretion. None of Defendant's arguments provide a significant distinction from *Wiskia* to depart from its results.

R. 46:5-6; Appellant's App. 5-6 (citations omitted). This ruling was correct and should be affirmed.

B. Detert-Moriarty's efforts to distinguish *Wiskia* are without merit.

Detert-Moriarty attempts to distinguish *Wiskia* or argue that other case law would reach a different result, but her efforts are without merit.

Detert-Moriarty points out that *Wiskia* was interpreting whether attorneys' fees under Wis. Stat. § 814.025 apply to forfeiture actions, not Wis. Stat. § 814.245. That is certainly true, but *Wiskia's* reasoning remains on point. The same need for prosecutors to freely exercise their discretion applies under either statute. She also points out that Wis. Stat. § 814.245 uses the phrase "any action" (Appellant's Br. 11), but the statute at issue in *Wiskia* referred to "an action" or "the action," thus including any action. *Wiskia*, 97 Wis. 2d at 476.

Detert-Moriarty suggests that the Legislature's decision to create an appropriation to pay fees awarded under Wis. Stat. § 814.245 means that fees apply to more types of cases than

did the old statute (Appellant's Br. 12-13). But state prosecutors may be deterred from freely exercising their discretion where fee shifting is available, regardless of the pot from which the monies come, if taxpayer funds will be expended.

Detert-Moriarty also asserts that *Sheely v. Wisconsin Department of Health and Social Services*, 150 Wis. 2d 320, 326-27, 442 N.W.2d 1 (1989), compels a different result, but she is wrong. In that case, the State Bureau of Social Security Disability Insurance, a state agency, determined that Ms. Sheely was not "disabled" for purposes of medical benefits. Because the Supreme Court found that there was no substantial justification for the state agency's denial of Ms. Sheely's medical benefits, it awarded her costs and fees under that statute. *Id.* at 339. The case was not a forfeiture case and made no suggestion that fees would have been available if it had been.

Detert-Moriarty attempts to equate prosecutorial discretion with agency decision-making, and argues that, if one falls under WEAJA, so must both (Appellant's Br. 20-21). The analogy does not hold up. *Wiskia*, facing a statute that did not specify whether quasi-criminal actions were included, relied on the unique discretion granted to prosecutors; such discretion is unreviewable. An agency's decision such as the one at issue in *Sheely* is explicitly reviewable under Wis. Stat. § 227.52 and is explicitly subject to fees under Wis. Stat. § 814.245, which allows fees in "any

proceeding for judicial review." Wis. Stat. § 814.245(3). *Wiskia* is the appropriate legal authority. The circuit court did not create a statutory exception for "prosecutorial discretion;" rather, it examined the policy inherent in *Wiskia* and held that it was appropriately applied in instances of quasi-criminal forfeitures—such as the one issued to Detert-Moriarty.[14]

C. The forfeiture chapter provides specific language on the payment of costs when the defendant prevails, and that more specific statute controls.

Another statute gives context to this case and further supports the decision made by the circuit court. In Wis. Stat. § 778.20, the Legislature identified who is liable for certain costs, providing that, in non-municipal forfeiture actions, the costs of a prosecution are to be borne by the county:

> **Who liable for costs.** In all actions brought under s. 778.10 the town, city, village or corporation in whose name such action is brought shall be liable for the costs of prosecution; and, if judgment be for defendant, for all the costs of the action, and judgment shall be entered accordingly. **In all other actions brought under the provisions of this chapter**, except as provided in s. 778.04, **the county** in which the forfeiture was incurred **shall be liable for the costs of the prosecution**, and, if judgment be for defendant, **for all the costs of the action.**

This coincides with the statute which requires forfeitures to be paid to the county treasurer and not to an agency.

[14]R. 46:6; Appellant's App. 6.

Had the Legislature intended forfeitures to be brought by agencies and to permit the award of attorneys' fees and costs against those agencies, it would not be the county which would be both the beneficiary of the award of forfeitures and the payer of costs if the action was unsuccessful. As noted above, the Legislature is deemed to know the laws it places on the books. Accordingly, it necessarily follows that if the Legislature made arrangements for costs for forfeitures (both made to or paid by counties), if it had intended to cover attorneys' fees in forfeitures, it would have done so in Chapter 778. It did not do so. WEAJA cannot be said to override the forfeiture statutes.

D. Detert-Moriarty's reliance on legislative history is improper and unpersuasive.

Detert-Moriarty relies heavily upon legislative history, resorting to non-legislative records from the drafting records to interpret a statute she asserts is plain on its face. Resort to legislative history is inappropriate where the statute is unambiguous. Even if the statute were ambiguous, the history she cites does not do the work she asks of it.

"Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "[I]n construing or 'interpreting' a statute the court is not at liberty to disregard the plain, clear words

of the statute." *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967).

Here, the plain words of WEAJA state that only actions by agencies fall within its parameters. Further, the Legislature's limitation of the actions covered to those brought by "state agencies" showed that it does not apply to forfeiture matters under Chapter 778, because those agencies are not the plaintiffs in those matters.

Thus, there is no basis to consider extrinsic evidence such as the legislative history or, even more far-removed evidence such as fiscal estimates that were not drafted by the Legislature and can hardly be said to evidence its legislative intent. In fact, such intent is almost impossible[15] to discern in the ordinary case, which is why the statute's text and not the legislative history is considered the "authoritative statement." *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1980 (2011); *Sherfel v. Newson*, 768 F.3d 561, 569 (6th Cir. 2014). Detert-Moriarty agrees with this legal concept; she complains that the "circuit court erred by looking beyond the clear meaning of the broad language of the statute" (Appellant's Br. 11). In the very

[15]*See also Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (J. Scalia, dissenting) ("discerning the subjective motivation of those enacting statutes is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite. . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist.").

next two sections, however, she asks this Court to do precisely that—to consider 1985 Special Session Senate Bill 10 and the fiscal estimates that accompanied it.

Detert-Moriarty's efforts are improper under the rules of statutory construction and without merit in any event. Examination of these two types of extrinsic evidence does nothing to bolster Detert-Moriarty's arguments in this case.

Legislative history from 1985 Special Session Senate Bill 10 shows that the Legislature was contemplating several categories of actions: "administrative contested case proceedings or judicial review of a contested case proceeding, regardless of who initiates the proceeding or review" and "a court action brought by a state agency" (Appellant's App. 7). Detert-Moriarty asserts that this language shows the scope of the statute (Appellant's Br. 12-13), but all it does is repeat the statutory language. Nothing in the drafting records indicates whether forfeiture actions were intended to be included, or not.

Detert-Moriarty asserts that the circuit court's decision "would exempt forfeiture actions by every state agency with forfeiture authority" and then proceeds to list several agencies and several statutes (Appellant's Br. 13-14). This has nothing to do with legislative intent; it is simply a public policy argument. Detert-Moriarty's brief includes a cursory tour through any mention in the statutes of the term forfeiture, but it fails to consider whether these actions would be brought in the State's name, under the procedures

of Wis. Stat. ch. 778, or have their own costs and fees provisions in separate, specific statutory schemes.[16] Accordingly, Detert-Moriarty's list is of no use in interpreting the application of WEAJA to the specific forfeiture provisions at issue here.

Detert-Moriarty also cites fiscal estimates as a way to guess the scope of the statute. Such an effort has been approved by courts only as a way to measure whether an ambiguous statute would have retroactive, or prospective, effect. *Employers Ins. of Wausau v. Smith*, 154 Wis. 2d 199, 229, 453 N.W.2d 856 (1990); *Chappy v. Labor & Indus. Review Comm'n*, 136 Wis. 2d 172, 183, 401 N.W.2d 568 (1987) (the conclusion that the law "is to be applied retroactively is further supported by the fiscal estimates"). The question of retroactivity can be easily measured through a fiscal estimate, but the amount of money estimated by individual agencies is not a reliable indicator of what the statute might and might not cover.

It is for good reason that the type of "legislative" history cited by Detert-Moriarty has not been relied on by courts. What she relies on are guesses by state agencies that were

[16]Although beyond the scope of this case, fees and costs may be treated differently even where a single agency is involved. For example, the Department of Natural Resources ("DNR") may seek forfeitures pursuant to Wis. Stat. § 23.50(2) as "civil actions in the name of the state of Wisconsin." DNR actions under Wis. Stat. § 281.36(g), in contrast, are considered contested cases under Chapter 227.

asked to make fiscal estimates to a legislative service agency. Regarding WEAJA, one agency candidly remarked that no accurate estimate was possible because of its uncertainty about the bill (Appellant's App. 19); another, the Department of Justice, simply remarked that it was unlikely to be assessed for fees because it was careful in its litigation (*Id.* at 20). Neither involved any analysis—much less *legislative* analysis—that forfeitures under Chapter 778 would be subject to the bill.

Detert-Moriarty suggests that WEAJA must exist to cover forfeiture actions, or else Wis. Stat. § 814.025 would have sufficed (Appellant's Br. 22-23). That is not the case.

First, the state at least arguably had sovereign immunity under Wis. Stat. § 814.025. The state enjoys sovereign immunity unless the Legislature has clearly waived it by statute. *Aesthetic & Cosmetic Plastic Surgery Ctr., LLC v. Wis. Dep't of Transp.*, 2014 WI App 88, ¶ 13, 356 Wis. 2d 197, 853 N.W.2d 607. Wisconsin Stat. § 814.025 did not mention the state. Second, Wis. Stat. § 814.245 applies different standards for awarding fees and caps the fees at an hourly level. The old statute did not include those features.

Even if it were appropriate to consider, Detert-Moriarty's legislative history does not demonstrate that the Legislature intended to cover forfeiture actions under Chapter 778 under WEAJA. Thus, it does not advance her arguments here.

E. The federal cases cited by Detert-Moriarty do not support her interpretation of the state statute.

Federal case law also does not support defendant-appellant's arguments. The cases she cites are not on point.

Detert-Moriarty asserts that federal case law shows WEAJA covers cases in which attorneys exercise prosecutorial discretion. None of these cases involves the United States rather than a federal agency; there is no federal case law like *Wiskia*; and the cases mention no other fee statute that would apply instead of the federal Equal Access to Justice Act such as the forfeiture costs statute here. Indeed, these issues were not even raised by the cases Detert-Moriarty cites. *See Scafar Contracting, Inc. v. Sec'y of Labor,* 325 F.3d 422 (3d Cir. 2003) (involving the timing of when an application for fees must be made); *Gold Kist, Inc. v. U.S. Dep't of Agric.*, 741 F.2d 344, 345 (11th Cir. 1984) (also a case concerning the timeliness of an application for fees).[17]

[17]Detert-Moriarty also fails to note that *Gold Kist* is questionable authority. It was amended by *Gold Kist, Inc. v. U.S. Dep't of Agric.*, 751 F.2d 1155 (11th Cir. 1985), was not followed in *Keasler v. United States*, 766 F.2d 1227 (8th Cir. 1985), distinguished by three other cases and superseded by statute as stated in *Myers v. Sullivan*, 916 F.2d 659 (11th Cir. 1990).

III. Assuming, *arguendo*, both that forfeitures under Chapter 778 fall under Wis. Stat. § 814.245 *and* that fees can be recovered from the State of Wisconsin, the State was substantially justified in filing this citation.

Assuming for the sake of argument that the Court determines *both* that the forfeiture citation is covered by Wis. Stat. § 814.245 and that, contrary to the language of Wis. Stat. § 778.02, the State is *not* the proper party plaintiff, Detert-Moriarty was still not entitled to prevail on her motion. According to Wis. Stat. § 814.245(3), the Court shall award costs to a defendant *unless* the court finds that the plaintiff (state agency) was "substantially justified" in taking its position or that special circumstances exist that would make the award unjust. The State's position here was substantially justified.

Wisconsin Stat. § 814.245(2)(e) defines "substantially justified" as "having a reasonable basis in law and fact." According to *Stern by Mohr v. Department of Health and Family Services*, 212 Wis. 2d 393, 398, 569 N.W.2d 79 (Ct. App. 1997) (quoting *Sheely*), state agencies are substantially justified in taking a position if they have (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. "Losing a case does not raise the presumption that the agency was not substantially

justified." *Sheely*, 150 Wis. 2d at 337. In fact, that court further held that:

> Nor is advancing a 'novel but credible extension or interpretation of the law' grounds for finding a position lacking substantial justification. We also note that when a state agency makes an administrative decision and the agency's expertise is significant in rendering that decision, this court will defer to the agency's conclusions if they are reasonable; even if we would not have reached the same conclusions.

Id. at 338 (internal citations and footnote omitted).

The Capitol Police had a reasonable basis in both law and fact to issue the citation against Detert-Moriarty, and, more importantly, the State had a reasonable basis to prosecute this case. Furthermore, the State has an expertise in making prosecutorial decisions.

Application of the substantial justification standard requires the Court to examine both the agency's litigation position and the conduct that led to the litigation. After doing so, the Court then must reach a judgment independent from that of the merits phase and determine only whether the agency's actions had a reasonable basis in law and in fact. *See Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1087-91 (D.C. Cir. 1986).

The facts and circumstances surrounding the issuance of the forfeiture citation, its opening as a civil action and the decision to prosecute the case are commonplace. The first and last step with respect to *this* citation require a government official to perform a discretionary function, *i.e.*,

the Capitol Police officer must determine whether to issue a citation and for what violation, and the Department of Justice has to determine whether to opt to prosecute the civil action which arises from the citation.

A. The Capitol Police were substantially justified when they issued the citation to defendant-appellant.

The Capitol Police were acting pursuant to the administrative code and DOA's promulgated policies when they issued Detert-Moriarty's citation. They were also acting pursuant to the decision in *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 1007 (W.D. Wis. 2013), which allowed DOA to enforce the existing code for unpermitted groups of more than twenty. The Capitol Police had no reason to believe that the underlying conduct that served as the basis for the citation was not prohibited by the rules; therefore, they were justified in issuing the citation.[18] In other words, the Capitol Police believed the law was clearly established and that it supported their interpretation of the administrative code and that they were acting within their authority and pursuant to the Constitution when they issued the citation.

[18]As each decision—by state or federal courts—was issued with respect to various aspects of the relevant administrative code, the Capitol Police reviewed these rulings and adjusted their practices accordingly. R. 45:66-68, 73-74 (Dep. 21-22, 27-28, 31-33, 51-52, 56).

As the U.S. Supreme Court recently held in *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (citations omitted), the question of whether a right is "clearly established"—albeit in the context of qualified immunity—is illustrative here:

> To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'" In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." This "clearly established" standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can "'reasonably . . . anticipate when their conduct may give rise to liability for damages.'"

The Capitol Police had a reasonable basis in truth for issuing the citation: they reasonably believed that Detert-Moriarty's actions were a violation of the administrative code. In determining whether the Capitol Police's conduct was substantially justified, it must be examined based upon the information available to them at the time the citations were issued. It is very simple to use hindsight and try to argue what the Capitol Police should have known with respect to how the circuit courts[19] would view the administrative code after the fact. The question is, however, how the courts viewed it at the time, and the

[19]The decisions by Dane County circuit courts regarding the constitutionality of the relevant sections of the administrative code are currently under appeal.

determining factor is whether the Capitol Police followed the laws as they were contemporaneously pronounced by various courts and as the policy and administrative code was amended.

In addition, there were significant warnings provided to each individual, including Detert-Moriarty, before they received a citation. There was a sandwich board sign posted in the center of the Capitol Rotunda which outlined the rules to be followed, and, following the *Kissick* decision, would be changed when the group was more than 20 individuals to indicate that the event was no longer a lawful event.[20] After the *Kissick* decision was issued, there was at least a week of announcements of how the rules would be enforced before *any* of the citations were issued.[21] And, as always, before any individual received a citation they were also given at least one in-person warning and an opportunity to cease their actions.[22] Detert-Moriarty refused to follow any of the warnings.

Therefore, in this case, the Capitol Police reasonably exercised their discretion when issuing the citation which, in turn, led to the clerk of court's initiation of the underlying action and identifying the State as the proper party plaintiff pursuant to Wis. Stat. § 778.02. Accordingly, for purposes of

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[20]R. 45:66-67 (Dep. 24-25).

[21]R. 45:91 (Dep. 122-24).

[22]R. 45:66-67 (Dep. 22-23, 28).

Wis. Stat. § 814.245, the Capitol Police were substantially justified.

B. The State was substantially justified in prosecuting this case.

The State was substantially justified in this case—given the state of the law in July 2013—when it began prosecution of Detert-Moriarty's citation. For almost three decades prior, the permit system for activities and events in the State Capitol stood uncontested. It was even ratified in *Gaylor v. Thompson*, 939 F. Supp. 1363, 1370 (W.D. Wis. 1996), where the court noted that the State made the "decision" to open the capitol building as a designated public forum, subject to restrictions.[23] More recently, even though the permit system has been the center of focus of

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[23]In doing so, the *Gaylor* court specifically noted the limitations on free speech found in Wis. Admin. Code ch. Adm 2 in making its ruling. 939 F. Supp. at 1372. While exploring interests that legitimately over-rode plaintiff's contention that her free speech rights were violated, the *Gaylor* court noted that:

> There is little question that the state of Wisconsin has a significant governmental interest in keeping the capitol rotunda free from visual clutter. The building is an important monument and source of historic pride for the citizens of this state. The state is and should be concerned with maintaining the capitol's appearance.

Id. at 1370. The court went on to note the specific limitations on speech set forth in Wis. Admin. Code ch. Adm 2, including the limitation that speech not interfere with the prime uses of the building. *Id.* at 1372.

several courts, it has been upheld in most part—and where there were issues, the State has amended the rules.

Ever since 1979, there has been a permit system in place for use of the Wisconsin State Capitol, as well as other buildings and facilities managed by DOA. The permit system was codified in Wis. Admin. Code ch. Adm 2, which was approved and adopted by DOA on February 6, 1998.[24]

On April 11, 2013, Governor Scott Walker approved amendments to the old Wis. Admin. Code ch. Adm 2[25] which had been issued as emergency rules by DOA, effective upon the date of approval. The plain language analysis of the Emergency Rules at 2 states:

> The objective of the rule is to obtain greater compliance from user groups regarding facility use. This objective will be achieved by codifying historical Department practices and more clearly detailing certain provisions of the administrative code as informed by judicial interpretations.

R. 41:37; R-Ap. 15.

In March 2011, *Wisconsin State Employees Union v. State of Wisconsin*, Dane County Case No. 11-CV-0990 ("*WSEU v. Wisconsin*"), a case involving a group of protestors who stayed inside the State Capitol after closing, was filed. The circuit court heard testimony and, upon ordering that the

[24]R. 41:6-28.

[25]R. 41:1 ¶ 4.

protestors had to vacate the State Capitol, advised DOA as follows:

- DOA had "inherent authority pursuant to Admin. Chapter 2" to enforce a permit system within the Capitol.[26]
- "[U]nder Adm 2, the Secretary [of DOA] can grant permits as to time, place, and manner."[27]
- "[T]he permitting process must allow free speech in the Rotunda, and I am not sure yet on the floor above that. Evidently, that's the first floor."[28] The Court felt it had to "leave a fair amount of *discretion in the hands of the Department of Administration*" because "[f]rankly, they have shown that they are sensitive to protesters' needs and understand the absolute right of free speech, freedom of association."[29]

Moreover, the Stipulation and Order for Dismissal in the *WSEU v. Wisconsin* case is also instructive and shows that the Capitol Police and the State were operating in good faith compliance with the laws as they existed when the citation

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[26]R. 41:71.

[27]R.41:58.

[28]R. 41:59.

[29]R. 41:59 (emphasis added). It is noteworthy that the circuit court in *WSEU v. Wisconsin* considered this a discretionary act.

was issued to Detert-Moriarty. The Stipulation and Order provides:

> (4) DOA has the authority to manage and operate the Capitol Building as managing authority under Wis. Admin. Code Adm ch. 2. Plaintiffs recognize such authority but reserve the right to challenge any such provision as written and or as applied in a separate lawsuit.
>
> (5) The Capitol Building's ground and first floor Rotunda will be open for public access *subject to Wis. Admin. Code Adm ch. 2, and to DOA's permitting authority under that Code.*"[30]

The Court in *WSEU v. Wisconsin* expressly inquired as to whether plaintiffs were challenging the constitutionality of Wis. Admin. Code ch. Adm 2; they were not.[31]

Until *Kissick v. Huebsch*, no plaintiffs raised or litigated the constitutional claims at issue here. In *Kissick*, on July 8, 2013, Judge William Conley issued a preliminary injunction decision upholding as constitutional the time, place, and manner restrictions of the permitting process but granting a preliminary injunction, enjoining the enforcement of the permitting requirement, in relevant part, as applied to events in the Capitol that are anticipated to attract 20 or fewer persons. 956 F. Supp. 2d at 1007. Judge Conley expressly noted that he was not "making any final determinations as to severance," and that this was only a

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[30]R. 41:74 ¶¶ 4-5 (emphasis added).

[31]R. 41:79.

preliminarily ruling in the matter because defendants had "established that some threshold is appropriate." *Id.*

In reaching its conclusions, the district court addressed and rejected several constitutional challenges to the Capitol Access Policy ("Access Policy"),[32] which guides implementation of Wis. Admin. Code ch. Adm 2, governing conduct on state property.

The *Kissick* court rejected the argument that the permitting process constitutes an invalid prior restraint on speech. 956 F. Supp. 2d at 995-96. It reached this conclusion because the Access Policy "is plainly directed at mediating competing uses on state property, not imposing censorship on content or viewpoint." *Id.* at 995. The court also found that the Access Policy was neither unconstitutionally overbroad nor vague. *Id.* at 996-97. The time, place, and manner restrictions are not overly broad. Further, the Access Policy's permitting scheme is not vague because it does not reach a substantial amount of constitutionally protected conduct. *Id.* at 997.

Finally, the *Kissick* Court generally upheld the Access Policy's time, place, and manner restrictions. It recognized that the permit process serves important purposes: "(1) ensur[ing] the presence of adequate police resources at the Capitol and (2) manag[ing] competing demands for public space in the Capitol." *Id.* at 1000-01.

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[32]R. 23:52-75.

However, the Court raised questions regarding the Access Policy's requirement that groups of four or more must apply for permits for events. As such, the District Court set the minimum permit participant number at 20 pending its final decision following the trial. *Id.* at 1007. The District Court, however, held that this was merely a "preliminary number" until there is a final hearing in that case. *Id.*

This Court has inquired as to the effect of the recent decision of *Smith v. Exec. Dir. of the Indiana War Mem'ls Comm'n*, 742 F.3d 282 (7th Cir. 2014), on Wisconsin's administrative code, but that case is not applicable, much less dispositive, here. Unlike the inside of the Capitol Rotunda—a designated public forum—*Smith* involved an outdoor area of several blocks in which there are monuments, a public park and war memorials—clearly a traditional public forum. *Id.* at 284-85. Further, there was a content-based, unwritten policy in *Smith* that allowed 25 or more to gather for lunch, but required 14 or more to get a permit to have a demonstration. Finally, the commission had unbridled discretion not to offer applications to individual demonstrators, and, in fact, declined to offer one to Smith. None of those facts would apply here.

"[L]ocal governments can exercise their substantial interest in regulating competing uses of traditional public fora by imposing permitting requirements for certain uses." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1038 (9th Cir. 2006).

Given all of these facts—facts surrounding not only the issuance of Detert-Moriarty's citation, but the State's prosecutorial decisions—the State asserts that its decisions were substantially justified.

C. The circuit court correctly set forth the appropriate "substantially justified" standard.

Plaintiff-respondent agrees that there are different standards for reasonableness under WEAJA and for non-frivolousness under Wis. Stat. § 814.025. Plaintiff-respondent has never asserted anything to the contrary.

D. Plaintiff-respondent reserves its right to challenge the reasonableness of fees sought.

Assuming, *arguendo* that fees may be awarded, plaintiff-respondent preserves its right to challenge the reasonableness of those proposed.

Detert-Moriarty seeks the recovery of $23,597.22 in fees and costs in defending against one civil forfeiture action punishable by a maximum penalty of $500. That amount is unreasonable on its face, particularly when compared to the amount of the potential forfeiture. Based upon the rate of $192.63, Detert-Moriarty is asking this Court to accept that over 122 hours were expended on this citation. That is an unreasonable amount of time. In addition, the rate that defendant-appellant is seeking to receive is in excess of

the allowable state rate of $150/hour. *See* Wis. Stat. § 814.245(5)(a)2.

Accordingly, should this Court rule that Wis. Stat. § 814.245 applies to actions by the State of Wisconsin, that it applies to forfeiture actions prosecuted under Wis. Stat. ch. 778, and that the State of Wisconsin's actions were not substantially justified, plaintiff-respondent would ask the case to be remanded for the circuit court to hold a hearing on the reasonableness of the fees sought by Detert-Moriarty.

IV. Any challenge to the rules based on the existence of an emergency is not properly before this Court.

Detert-Moriarty did not raise a challenge to the validity of the emergency rules below. It thus cannot form the basis of any argument as to whether the State of Wisconsin's position was justified in this action.

"Generally, issues not raised or considered by the trial court will not be considered for the first time on appeal." *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983). Thus, this "lack of emergency" argument is not properly before this Court.

* * * * *

Fees under WEAJA were unavailable in this action for three separate reasons: the action was brought by the State of Wisconsin; it was a forfeiture matter brought under Wis. Stat. ch. 778, and the position of the State was

substantially justified. The State asks that the decision below be affirmed.

CONCLUSION

The State of Wisconsin asks that the circuit court's decision be affirmed.

Dated this _____ day of January, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,414 words.

Dated this _____ day of January, 2015.

_____
MARIA S. LAZAR
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of January, 2015.

_____
MARIA S. LAZAR
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of January, 2015.

_____
MARIA S. LAZAR
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
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I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this _____ day of January, 2015.

_____
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