STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NO. 2018-AP-1189

SANDRA J. WEIDNER,

Petitioner-Appellant,

v.

CITY OF RACINE,

Respondent-Respondent.

Appeal from a Final Judgment entered on May 16, 2018
in Racine County Circuit Court,
The Honorable Eugene A. Gasiorkiewcz Presiding
Circuit Court No. 17-CV-1644

BRIEF AND APPENDIX OF RESPONDENT-RESPONDENT CITY OF RACINE

Michael J. Cohen
(State Bar No. 1017787)
Garrett A. Soberalski
(State Bar No. 1088611)
MEISSNER TIERNEY FISHER & NICHOLS S.C.
111 East Kilbourn Avenue, 19th Floor
Milwaukee, Wisconsin 53202
(414) 273-1300

Attorneys for Respondent-Respondent
City of Racine

TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

STATEMENT OF THE ISSUES 1

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE 3

I. NATURE OF THE CASE 3

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY 5

A. Pre-Mandamus Action 5

1. City Decides to Seek Advisory Opinion 6

2. Weidner's Counsel Makes Requests 7

B. The Mandamus Action 9

1. The Petition 9

2. Weidner Receives Documents Requested in Petition and the City is Served 9

3. The City Files a Motion to Quash, the Circuit Court Refuses to Accept Weidner's Amended Petition, and the Circuit Court Seals the Entire Proceedings 10

4. Circuit Court Grants the City's Motion to Quash, Subject to Privilege Review 12

5. Circuit Court Reviews Documents *In Camera* and Issues Its Decision and Order....14

6. Weidner Files Notice of Appeal Appealing Final Order and the Circuit Court Unseals Much of the Record 15

ARGUMENT....17

I. WEIDNER FORFEITED HER RIGHT TO ARGUE THAT THE CIRCUIT COURT IMPROPERLY REFUSED HER AMENDED PETITION 17

II. THE CIRCUIT COURT CORRECTLY FOUND THAT THE CITY'S PRODUCTION OF THE CONFIDENTIAL ETHICS MEMORANDUM TO WIEDNER MOOTED THE DOCUMENT REQUEST 19

III. THE CIRCUIT COURT'S DETERMINATION THAT THE PETITION WAS NOT THE CATALYST OF THE CITY'S PRODUCTION OF THE CONFIDENTIAL ETHICS MEMORANDUM TO WIEDNER WAS NEITHER UNREASONABLE NOR CLEARLY ERRONEOUS 22

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT DOCUMENTS REQUESTED BY WEIDNER WERE PRIVILEGED AND THAT SHE WAS NOT THE PREVAILING PARTY UNDER WIS. STAT. §19.37(2)....27

A. General Attorney-Client Privilege Under Wisconsin Law....27

B. Alderpersons are Client Representatives when Requesting Information from the City Attorney's Office 29

C. Giving General Legal Advice 30

D. The Circuit Court Correctly Concluded that 13 of the 18 Communications were Privileged 31

1. Communication 1: E-mail from an alderperson to the City Attorney requesting the City Attorney's advice on the status of pending claim against the City.....31

2. Communication 2: E-mail from City Attorney to all Common Council members and other City employees providing advice regarding the process the City should take with respect to a Petition for Direct Legislation 32

3. Communication 3: E-mail from previous City Attorney to alderperson providing insights and responses to alderperson's inquiries regarding why the City retained outside counsel for a development project.....34

4. Communication 4: E-mails to and from City Attorney and an alderperson related to alderperson's request for legal advice and authority from the City Attorney regarding when the City Council or City board may go into closed session 35

5. Communication 5: E-mails to and from City Attorney and an alderperson related to alderperson's questions about the Redevelopment Authority.....37

6. Communication 6: E-mails between the City Attorney, an alderperson, and other City officials regarding the alderperson's request for information related to a City contract and the City Attorney's legal insights regarding the terms of that contract.....38

7. Communication 7: E-mail from Assistant City Attorney to an alderperson responding to alderperson's questions about a Racine ordinance and prospective ordinance.....38

8. Communication 8: E-mails from City Attorney to Common Council and other City employees providing legal advice on filling a mayoral vacancy 39

9. Communication 9: E-mails to and from the City Attorney and an alderperson providing the City Attorney's legal analysis as it relates to Common Council approval for contracts.....40

10. Communication 10: E-mail from City Attorney to Common Council and other City employees detailing a prospective settlement agreement.....41

11. Communication 11: Communication from outside attorney to City Attorney and alderperson that implicated a City employee's personal health information.....43

12. Communication 12: E-mails between the City Attorney, the Common Council, and other City employees discussing City Attorney's legal analysis of (i) agenda order and (ii) sharing privileged communications with outsiders.....44

13. Communication 13: E-mail from an alderperson to the City Attorney, copying individuals outside the City, but discussing legal information the alderperson previously received from the City Attorney related to the City's nuisance ordinance 45

V. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S ORAL SEAL RULING 47

A. This Court Lacks Jurisdiction to Review the Circuit Court's Oral Seal Ruling 47

B. The Circuit Court Correctly Concluded that the Entire Confidential Ethics Memorandum Should Be Sealed and that Parts of its Decision and Order Should Be Sealed and Redacted 48

1. The Confidential Ethics Memorandum is Confidential under City Ordinances and its Discussion of Attorney-Client Communications is Exempt from the Public Records Law 49

2. Parts of the Decision and Order Should Remain Redacted 52

CONCLUSION 53

FORM AND LENGTH CERTIFICATION 55

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) FOR ELECTRONIC BRIEF 56

CERTIFICATE OF SERVICE 57

CERTIFICATION OF APPENDIX 58

APPENDIX

TABLE OF AUTHORITIES

Cases **Page(s)**

Amcast Indus. Corp. v. Detrex Corp.,
1991 WL 441904 (N.D. Ind. July 26, 1991) 34

DeNava v. DNR,
140 Wis. 2d 213, 409 N.W.2d 151 (Ct. App. 1987) 25, 37, 39

Dyson v. Hempe,
140 Wis. 2d 792, 413 N.W.2d 379, 389 (Ct. App. 1987) 29

Evelyn C.R. v. Tykila S.,
2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768.....25

Glaxo, Inc. v. Novopharm Ltd.,
148 F.R.D. 535 (E.D.N.C. 1993).....31

Guidiville Rancheria of California v. United States,
2013 WL 5303748, (N.D. Cal. Sept. 20, 2013).....30

Helmrick v. Helmrick,
95 Wis. 2d 554, 291 N.W.2d 582 (Ct. App. 1980) 47

Jenkins v. Bartlett,
487 F.3d 482 (7th Cir. 2007).....46

Journal/Sentinel, Inc. v. Shorewood School Board,
186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994) 42

La Crosse Tr. Co. v. Bluske,
99 Wis. 2d 427, 299 N.W. 2d 302 (Ct. App. 1980) 48

Lane v. Sharp Packaging Sys., Inc.,
2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788.....*passim*

Oasis Int'l Waters, Inc. v. United States,
110 Fed. Cl. 87 (2013).....31

Racine Educ. Ass'n. v . Board of Educ.,
129 Wis. 2d 319, 385 N.W.2d 510 (Ct. App. 1986) 20, 22

Riley v. Lawson,
210 Wis. 2d 478, 565 N.W.2d 266 (Ct. App. 1997) 21

Sandra T.E. v. S. Berwyn Sch. Dist. 100,
600 F.3d 612, 618 (7th Cir. 2010).....29

Schonscheck v. Paccar, Inc.,
2003 WI App 79, ¶ 10, 261 Wis. 2d 769,
661 N.W.2d 476 17

State v. Ndina,
2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612.....17, 19

State v. Rogers,
196 Wis. 2d 817, 539 N.W.2d 897 (Ct. App. 1995) .....*passim*

State ex rel. Bilder, v. Township of Delevan,
112 Wis. 2d 539, 334 N.W.2d 252 (1983).....48, 49

State ex rel. Dudek Circuit Court for Milwaukee Cty.,
34 Wis. 2d 559, 150 N.W.2d 387 (1967).....29

State ex. rel. Three Unnamed Petitioners v. Peterson,
2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49.....48

State ex rel. Vaughan v. Faust,
143 Wis. 2d 868, 422 N.W.2d 898
(Ct. App. 1988)..... 23, 26, 27

Townsend v. Massey,
2011 WI App 160, 338 Wis. 2d 114, 808 N.W.2d 155.....18

Walder v. Allen,
31 Wis. 2d 70, 141 N.W.2d 867 (1966).....21

Wendt v. City of Denison,
2018 WL 1547119 (N.D. Iowa Mar. 29, 2018).....30

Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls,
199 Wis. 2d 768, 546 N.W.2d 143 (1996) 27, 28, 51

WTMJ, Inc. v. Sullivan,
204 Wis.2d 452, 555 N.W. 2d 140 (Ct. App. 1996) 23

Statutes

Wis. Stat. § 19.36 .....28, 44

Wis. Stat. § 19.36(3).....41

Wis. Stat. § 19.37(2).....*passim*

Wis. Stat. § 19.37(3).....10, 15

Wis. Stat § 19.63(3).....41

Wis. Stat. § 19.85(1)(h) 50, 51

Wis. Stat. § 62.09(12).....34, 52

Wis. Stat. § 103.13(5).....44

Wis. Stat. § 802.09(1).....*passim*

Wis. Stat. § 805.11(1).....19

Wis. Stat. § 805.18(2).....25

Wis. Stat. § 808.075 (6).....16

Wis. Stat. § 808.075(8).....47, 48

Wis. Stat. § 905.03 ..... 29, 35, 51

Wis. Stat. § 905.03(2).....*passim*

Wis. Stat. § 905.03(3).....29

Other Source

Health Insurance Portability and Accountability Act
of 1996 ("HIPPA"), Pub. L. 104-191 .....43, 44

Racine Ordinance § 2-578 .....*passim*

Racine Ordinance § 2-585 .....*passim*

Racine Ordinance § 2-585(b) 50

STATEMENT OF THE ISSUES

1. Did Sandra Weidner properly file her Amended Petition for Writ of Mandamus and Other Relief?

Circuit Court answered: No.

2. Did Sandra Weidner's receipt of the City of Racine's confidential submission to the Ethics Board for a confidential advisory opinion before the City was served with the Summons and Petition for Writ of Mandamus render the part of her Petition seeking production of those same materials moot?

Circuit Court answered: Yes.

3. Was it unreasonable for the circuit court to determine that Sandra Weidner's filing of her Petition for Writ of Mandamus was not the catalyst of the City of Racine's production to Sandra Weidner of its confidential submission to the Ethics Board?

Circuit Court answered: No.

4. Were documents that Sandra Weidner's counsel demanded the City of Racine produce protected by attorney-client privilege, work product doctrine, or other evidentiary or statutory privilege or protection?

Circuit Court answered: Yes. The circuit court found that thirteen of the eighteen items requested were privileged.

5. Should the City's 17-page confidential Memorandum to the Ethics Board regarding the City's confidential request for an advisory opinion be sealed in its entirety and parts of the circuit court's April 23, 2018 Decision and Order be sealed and redacted?

Circuit Court answered: Yes.

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION

The City of Racine (the "City") does not believe publication or oral argument are warranted in this case. This appeal involves the straightforward application of well-settled Wisconsin law to facts that speak for themselves based on the pleadings and documents available to this Court in the record. However, if this Court exercises its discretion to hear oral argument on the issues presented in this case, the City welcomes the opportunity to participate.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is not a public records case. This is a case about an alderperson, Petitioner-Appellant Sandra Weidner ("Weidner"), who breached attorney-client privilege and then took multiple acts to undermine a confidential and anonymous ethics board process that would have only resulted in a confidential advisory opinion and no disciplinary action against her or any other alderperson.

This case began with the City's investigation into certain alderpersons' improper dissemination of confidential and privileged information to the public. Following a City of Racine Executive Committee ("Executive Committee") closed-session meeting, the City of Racine Common Council ("Common Council") approved the Executive Committee's recommendation to request a confidential and anonymous advisory opinion from the City of Racine Board of Ethics ("Ethics Board") on whether these disseminations violated the City's ethics laws (the City's December 4, 2017 request for an Ethics Board advisory opinion defined in this Brief as the "Confidential Ethics Memorandum").

Despite the anonymous and confidential nature of the advisory opinion process, Weidner improperly attempted to insert herself in the process and revealed herself as a person being evaluated in the advisory

opinion process. She first, through counsel, submitted letters to the City Attorney and Ethics Board demanding the right to "participate" in the advisory opinion process—a request that was unavailable as a matter of law. When these requests were appropriately denied by the City, Weidner filed her Petition for Writ of Mandamus ("Petition")—completely unsealed and again revealed herself as a person being evaluated in the advisory opinion process—asserting a baseless claim of a right to "participate" in the advisory opinion process. While the letters and Petition also sought copies of certain materials—the letters requested copies of everything presented during the closed-session Executive Committee meeting and the Petition requested the Confidential Ethics Memorandum, which was not even completed yet—they only did so in the context of Weidner's misplaced belief that she had a right to participate in the advisory opinion process and could only meaningfully "participate" if she could review the materials beforehand.

Neither her counsel's letters nor her Petition (with the sole exception of one citation to a request for attorneys' fees in the *ad damnum* clause) mentioned anything about Wisconsin's public records law. Indeed, Weidner and her counsel never mentioned Wisconsin's public records law until February 28, 2018—nearly six months after Weidner's counsel's first letter—through arguments presented in

Weidner's Brief in Opposition to the City's Motion to Quash the Petition and Affidavit of Sandra J. Weidner ("Brief in Opposition").

Thus, while Weidner attempts to repackage this case as a public records case with important consequences for the public's access to governmental information, it is not. This appeal is a continuation of Weidner's baseless attempts to overcome the City's legitimate investigation into her rogue acts and to undermine its decision to seek confidential guidance from the Ethics Board on those acts. As a result, the City is now before this Court rehashing issues already correctly decided by the circuit court and responding to meritless arguments that Weidner raises for the first time on appeal.

The City opposes the entirety of Weidner's appeal, and asks that this Court affirm the May 16, 2018 Order for Judgment in the City of Racine's Favor Dismissing the Case in its Entirety With Prejudice ("Final Order") and remand this case to the circuit court to resolve any outstanding issues that remain in this case.[1]

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Pre-Mandamus Action.

[1] On October 15, 2018, the circuit court granted the City's motion for sanctions and found Weidner in contempt of court. (R 99.) The circuit court has not yet determined the sanctions amount, and has stayed Weidner's obligations to pay any sanctions until all appeals are resolved. (*Id.*)

1. City Decides to Seek Advisory Opinion.

On August 22, 2017, the Executive Committee was called into a closed session meeting by the Mayor to

> [C]onsider whether to request confidential written advice from the [Ethics Board] regarding the applicability of Racine Ordinance Section 2-581(a) to the disclosure of certain confidential information and privileged information, by certain officials, which information was gained in the course of, or by reason of, the officials' official position or official activities,

("Closed Session Meeting"). (R 36: 22, Ex. B.) The Executive Committee voted to recommend that the Common Council have the Executive Committee "request from the [Ethics Board] an advisory opinion regarding the propriety of sharing of attorney-client confidential communications by certain alderpersons of the [City]" ("Executive Committee Recommendation"). (*Id.* at 23, Ex. C.) Under this process, the individuals that were the subject of the advisory opinion process, including Weidner, would not be identified by name to the Ethics Board, and could not be disciplined or reprimanded. (R 7: 3-4, ¶¶ 6 & 8.)

On September 20, 2017, the Common Council approved the Executive Committee Recommendation. *See* City of Racine Legistar, Meeting Details for September 20, 2017 Common Council Meeting, Action Details for Matter 810-17, *available at* https: //cityofracine.legistar.com/MeetingDetail.aspx?ID=503742&GUID=B251BB

B9-35B1-4844-888A-EA9560442C86&Options=&Search=(last visited June 15, 2019); (*see also* R 36: 29–30, Ex. E.) Weidner did not abstain and voted not to approve the Executive Committee Recommendation. *Id.*

2. Weidner's Counsel Makes Requests.

After the Executive Committee Recommendation, Weidner retained personal counsel, who sent multiple letters to the City Attorney, Common Council, and Ethics Board regarding the advisory opinion process, destroying the process's anonymity.[2] (*See* R 2 :8–12, 15–16 & 19–21; Exs. A, C & E.) In his first letter, dated September 5, 2017, Weidner's counsel asked the City Attorney to provide copies of the materials presented at the Closed-Session Meeting so that Weidner could "defend herself"—albeit in the misplaced context of an Ethics Board Advisory Opinion request and "so that she may participate in the process." (*Id.* at 12, Ex. A.)

On September 6, 2017, the City Attorney responded to the September 5 letter, stating that he could not comment on the substance of the Closed-Session Meeting because he was bound by "attorney-client confidentiality" and could not reveal matters discussed in closed session. (*Id.* at 13, Ex. B.)

[2] Weidner's counsel's September 5, October 3, and October 6 letters were each sent to the City Attorney, Common Council, and Ethics Board. (R 2:12, 16 & 21.)

In his second letter, dated October 3, 2017, Weidner's counsel asked the City Attorney to provide all materials presented at the Closed-Session Meeting, so that Weidner could "meaningfully participate in the [Ethics Board] process." (*Id.* at 16, Ex. C.) Weidner's counsel further stated that:

> [A]s the primary target of [the] ethics inquiry, [Weidner] has the right to participate in this process. It is her desire and intention to do so, with me as her legal counsel. The only meaningful way for her to participate is to have a full and accurate identification of all items that are the subject of [the] inquiry.

(*Id.*)

On October 3, 2017, the City Attorney responded to the October 3 letter, stating that he could not comment on anything contained in the October 3 letter because he was bound by attorney-client confidence and confidentiality of the Closed-Session Meeting. (*Id.* at 17 Ex. D.)

In his third letter, dated October 9, 2017, Weidner's counsel wrote directly to the Ethics Board. (*Id.* at 20–21; Ex. E.) In this letter, Weidner's counsel stated that:

> [I]t is fair and just to allow [Weidner] to participate, with counsel, in any proceedings before your Board on the City's submission and to submit materials to your Board in presentation of her position and to rebut the position of the City, with which she disagrees. . . . Toward this end, we would request that the Board: (1) Authorize disclosure to Ms. Weidner and myself, as her counsel, of all materials submitted to the Board for consideration and advice; and (2) Allow Ms. Weidner to submit to the Board her position, both in writing and via participation in any hearings or meetings convened

> by the Board and, toward this end, specify a procedure and deadline for any submissions.

(*Id.*)

B. The Mandamus Action.

1. The Petition.

On November 29, 2017, Weidner filed the Petition, which sought two forms of relief: (1) a writ requiring "that the City provide her with any and all documentation (information) it alleges or submits to the Ethics Board in support of its request of the Board for an advisory opinion" ("Document Request") and (2) a writ allowing her an "appropriate opportunity to submit to the Board her position before it on such documentation and her actions relative thereto" ("Participation Request"). (*See* R 2: 6–7.)

2. Weidner Receives Documents Requested in Petition and the City is Served.

The Confidential Ethics Memorandum, a 68-page document, was hand-delivered to the Ethics Board on December 4, 2017. (R 7: 5 ¶ 16; *see also* R 23: 1; *see generally* R 23 & 24 (totaling 68 pages)). On December 5, 2017, at 8:08 a.m., the City Attorney e-mailed all members of the Common Council, including Weidner, and advised them that the City had submitted the Confidential Ethics Memorandum to the Ethics Board and that copies of the Memorandum were placed in their

mailboxes. (R 7: 6 ¶ 17.) The City was not served with the Petition until the afternoon of December 5, 2017. (*Id.* ¶ 19.) There is no evidence that the City knew of the filing of the Petition at the time the City Attorney provided Weidner and all of the alderpersons with a copy of the Memorandum. (*See generally* Record.)

3. The City Files A Motion to Quash, the Circuit Court Refuses to Accept Weidner's Amended Petition, and the Circuit Court Seals the Entire Proceedings.

On December 22, 2017, the City filed a Notice of Motion and Motion to Quash the Petition ("Motion to Quash"). (*See generally* R 5, 7, 9, 12, 14, 15, 17, 18, 20 & 23–27.) In the Motion to Quash, the City sought dismissal of the Petition on the following bases: (i) the Document Request was moot because Weidner had already received the documents requested in the Petition; and (ii) Weidner could not state a claim for relief as a matter of law as it related to the Participation Request because there is no right to participate in an ethics board advisory opinion. (R 9: 3–4.) The City also sought dismissal of relief Weidner sought in the Petition under Wis. Stat. §§ 895.46(1)(a), 19.37(2), and 19.37(3). (*See id.* at 4.)

On that same date, the City filed a Notice of Motion and Motion to file the Motion to Quash Under Seal ("Motion to Seal"). (*See generally*

R 11.) The circuit court set a hearing for February 5, 2018 on the Motion to Quash and Motion to Seal ("February 5 Hearing"). (*See* R 5.)

On February 5, 2018, approximately three hours before the hearing, (*see* R 111: 8), Weidner filed an Amended Petition for Writ of Mandamus and Other Relief ("Amended Petition"), (*see generally* R 29 & R 111: 8). Weidner's counsel also filed a letter with the Court stating he could not view the Motion to Quash or Motion to Seal on Wisconsin's e-filing system before the February 5 Hearing. (*See* R 30.)

At the February 5 Hearing, hearing no objection from Weidner, (*see* R 31: 1; *see also* R 30: 1), and acknowledging the confidential and sensitive nature of the information addressed in the Petition, the Court granted the Motion to Seal, ordering that (i) the Motion to Quash would remain sealed; (ii) Weidner's counsel would be granted access to all documents; (iii) the parties could not share any documents filed under seal with the public; and (iv) the parties could not disclose the contents of any hearings that were closed to the public, (s*ee id.* at 2, ¶¶ 1–4; *see also* R 111: 1–7).

The Court also addressed the Amended Petition, refusing to accept its filing. (R 111: 7–8.) Weidner did not object to the circuit court's refusal to accept the Amended Petition or state any reason why such refusal may be improper. (*See generally* R 111.) Weidner did not

file a motion to reconsider that ruling. (*See generally* Record.) Until the arguments presented in this appeal, Weidner never argued that the circuit court's refusal to accept the Amended Petition was improper under Wis. Stat. § 802.09(1). (*See id.*)

Because Weidner's counsel had not received a copy of the Motion to Quash, the Court adjourned the February 5 Hearing until March 13, 2018 ("March 13 Hearing"). (R 111: 8–13.) On February 13, 2018, the circuit court held a teleconference with both parties, and entered an order sealing the case in its entirety. (*See* R 32.)

4. Circuit Court Grants the City's Motion to Quash, Subject to Privilege Review.

On February 28, 2018, Weidner filed her Brief in Opposition. (*See generally* R 34 & 36.) For the first time, Weidner argued that her counsel's 2017 letters were public records requests rather than requests to participate in and defend Weidner during the advisory opinion process, and she abandoned her Participation Request. (*See generally* R 34.)

At the March 13 Hearing on the Motion to Quash, the circuit court held (i) the Document Request should be dismissed because it was moot; (ii) the Participation Request should be dismissed because Weidner had no right to participate in the advisory opinion process; and (iii) the Court

would not accept the Amended Petition. (R 78: 19, 20–23; R 112: 12:4–11 & 13: 13–16: 22; *see also* R 41: ¶¶ 1–3; R-App. 1-2.) Weidner made no argument at the March 13 hearing that the circuit court's refusal of the Amended Petition was improper under Wis. Stat. § 802.09(1). (R 78: 20–23, 13: 13–16: 22; *see also* R 41: 2, ¶ 3; R-App. 2.)

Because of Weidner's newly-raised public-records-request argument and her request for attorneys' fees under Wis. Stat. § 19.37(2), the Court concluded that it should review the documents in the Confidential Ethics Memorandum *in camera* to determine whether they were covered by attorney-client privilege. (R 112: 11–12.) The circuit court ordered the City to file a privilege log, explaining why each communication in the Confidential Ethics Memorandum was protected by attorney-client privilege, and provided Weidner an opportunity to file a response. (R 41: 2, ¶¶ 4–5; R-App. 2.) Thus, the circuit court granted the City's Motion to Quash, subject to a privilege review. (*See generally* R 42.)

The circuit court's March 13, 2018 oral ruling was reduced to writing and entered in a March 14, 2018 Order ("March 14 Order").

5. Circuit Court Reviews Documents *In Camera* and Issues Its Decision And Order.

On April 23, 2018, the Court entered its Decision and Order ("Decision and Order") and ruled that 13 of the 18 communications in the Confidential Ethics Memorandum were privileged and appropriately withheld under Wisconsin's public records law: the Court found 10 were protected by attorney-client privilege, 2 were protected by work product protection, and 1 contained federally-protected health information. (*See* R 62: 8–10; R-App. 10-12.) For the remaining 5 items, the circuit court concluded that the Petition did not in whole or substantial part secure production of those items "as they had already been provided or were fully accessible on the City website." (R 62: 12; R-App. 14.) Thus, the Court found that Weidner had not prevailed under Wisconsin's public records law, and denied Weidner's request for attorneys' fees, damages, and costs under § 19.37(2). (*See id.*)

The Court ordered that the Decision and Order remain sealed, and the parties then had a dispute whether the Decision and Order should remain sealed. (*See generally* R 64 & 66.) On May 8, 2018, the court held a hearing on this issue and the case's status following the Decision and Order. The Court concluded that due to the March 14 Order and Decision and Order, Weidner's remaining requests for attorneys' fees under Wis. Stat. § 895.46(1)(a) and (2) and punitive damages under Wis. Stat. § 19.37(3) were moot and were therefore denied. (*See* R 68; R-App.

15-16.) It also concluded the Decision and Order would remain sealed. (*See id.*)

The circuit court's May 8, 2018 ruling was reduced to writing and entered in the Final Order. (*See id.*) The Final Order specified it was a final order for appeal, incorporated the Decision and Order and March 14 Order, ordered that the Decision and Order remain sealed, retained jurisdiction to review the circuit court's decision to seal the Decision and Order only if a public ethics complaint was filed, and entered judgment in the City's favor dismissing the case in its entirety with prejudice. (*See id.*)

6. Weidner Files Notice of Appeal Appealing Final Order and the Circuit Court Unseals Much of the Record.

On June 20, 2018, Weidner timely filed a Notice of Appeal of the Final Order. (*See* R 69.) On June 29, 2018, Weidner filed a motion with this Court to seal all pleadings from the circuit court and seal the parties' submissions to this Court ("Appellate Motion to Seal"). (*See generally* R 70.) The City joined in this motion, (*see generally* R 71), and this Court granted the Appellate Motion to Seal, sealing this Court's entire case file, but noting any decision from this Court would not be sealed. (*See generally* R 72.)

On October 29, 2018, multiple news-media-parties filed a Motion to Intervene in this appeal for the purpose of unsealing the court record ("Motion to Intervene"). (*See generally* Mot. To Intervene, Milwaukee Journal Sentinel, et al. October 29, 2018.) On December 5, 2018, this Court entered an order granting the Motion to Intervene and remanded this appeal to the circuit court pursuant to Wis. Stat. § 808.075(6) "with directions to determine which specific documents in the circuit court record should be sealed from public view, if any, and whether the circuit court docket should remain sealed." (R 102: 2.)

The circuit court complied with this Court's order. On January 9, 2019, it held a hearing to determine which documents would remain sealed. By oral ruling only, the circuit court unsealed much of the record in its entirety, and unsealed approximately 25 documents, with redactions ("Oral Seal Ruling"). (*See generally* R 118.) The Confidential Ethics Memorandum remained sealed in its entirety, except for those parts that were attachments of the five communications the circuit court determined were neither privileged nor protected in the Decision and Order. (*See id.*) Much of the Decision and Order was unsealed, but certain portions remain sealed with redactions. (*See id.*)

Following remand and the Oral Seal Ruling, the record was returned to the clerk of the appellate court on March 5, 2019. (*See* Notice of Filing of Circuit Court Record.)

ARGUMENT

I. WEIDNER FORFEITED HER RIGHT TO ARGUE THAT THE CIRCUIT COURT IMPROPERLY REFUSED HER AMENDED PETITION UNDER WIS. STAT. § 802.09(1).

Generally, appellate courts do not consider legal issues and arguments that are raised for the first time on appeal, *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶ 10, 261 Wis. 2d 769, 661 N.W.2d 476, because appellate courts "will not . . . blindside trial courts with reversals based on theories which did not originate in their forum[,]" *id*. (citation omitted.) This rule is based on judicial efficiency. *State v. Rogers,* 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Without it, parties and the circuit court would lack notice and a fair opportunity to address arguments at the trial-court level, and attorneys could "sandbag" opposing counsel by failing to object to an error for strategic reasons and later claim that the error is grounds for reversal. *State v. Ndina,* 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. Furthermore, without this rule, trial courts would be left "to discern and resolve every 'argument' that could have been but was not raised in resolving an issue[,]" a result that is "unfair and certainly illogical." *Schonscheck,*

2003 WI App 79, ¶ 10. Thus, in order to preserve the right to appeal a specific issue or argument, the appellant must articulate each of its theories to the trial court. *Rogers,* 196 Wis. 2d at 827. The forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the trial court. *See, e.g.*, *Townsend v. Massey,* 2011 WI App 160, ¶ 26, 338 Wis. 2d 114, 808 N.W.2d 155.[3]

Weidner has not preserved the argument that she had a right to amend her Petition under Wis. Stat. § 802.09(1). The circuit court rejected her Amended Petition at the February 5 Hearing and at the March 13 Hearing, (R 111: 8; R 41: 2, ¶ 3; R-App. 2), and Weidner did not raise the argument that she had a right to amend the Petition once within six months under § 802.09(1) at either of these hearings, (R 111; 112.) (*Id.*) Moreover, Weidner never raised this argument or mentioned § 802.09(1) at any time before the entry of the March 14 Order or Final Order, providing an independent basis to conclude she forfeited her new

[3] *State v. Holland Plastics, Co.* , 111 Wis. 2d 497, 505, 331 N.W.2d 320 (1983), does not save Weidner's § 802.09(1) argument. As *Townsend* noted, "countless [opinions] after *Holland Plastics* have reaffirmed that the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." *Townsend*, 2011 WI App 160, ¶ 25. And rightfully so: if appellate courts were required to address the merits of new legal arguments so long as the arguments related to an issue raised before the circuit court, then this "would seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so the that judicial resources are used efficiently and the process is fair to the opposing party." *Id.* ¶ 26.

§802.09(1) argument on appeal. (*See generally* Record); *see also* Wis. Stat. § 805.11(1) (any party who has fair opportunity to object before an order is made must do so in order to avoid waiving error).

This appeal is the first time Weidner has asserted that she had a right to file her Amended Petition under § 802.09(1). Accordingly, Weidner has forfeited the right to raise her new argument that she had a right to amend the Petition once within six months under § 802.09(1). Allowing Weidner to make this argument now would contravene the Wisconsin Supreme Court's directive that parties should not now be allowed to "blindside" the circuit court and "sandbag" opposing counsel by failing to object to an error for strategic reasons and now claim that the error is grounds for reversal. *Ndina,* 2009 WI 21, ¶ 30. Thus, this Court should not consider that argument as a possible basis to reverse the circuit court. *Rogers,* 196 Wis. 2d at 827.

II. THE CIRCUIT COURT CORRECTLY FOUND THAT THE CITY'S PRODUCTION OF THE CONFIDENTIAL ETHICS MEMORANDUM TO WEIDNER MOOTED THE DOCUMENT REQUEST.

Weidner contends that her receipt of the documents she requested in her Document Request did not render her Document Request moot because: (1) she received the Confidential Ethics Memorandum in her capacity as a sitting alderperson (along with all other alderpersons) and

not in response to her public records request; and (2) the documents were produced to her (and all the other alderpersons) as confidential and privileged as part of the advisory opinion process and thus, were not "free from the constraints of any legal privilege." (App. Br. at 23.) Weidner's arguments are meritless.

It matters not whether Weidner received the Confidential Ethics Memorandum as a "sitting Alderperson," or with or without the "specter of privilege." (App. Br. at 21-22.) As Weidner concedes, "the voluntary release or production of previously-denied records following the institution of a mandamus action renders such an action moot." *Racine Educ. Ass'n. v . Board of Educ.*, 129 Wis. 2d 319, 323-24, 385 N.W.2d 510 (Ct. App. 1986). (*see* App. Br. at 21.)

Neither her pre-suit requests nor her Petition requested that she receive the documents outside of her role as an alderperson or "free from privilege assertion," as she now contends, again for the first time on appeal. The *ad damnum* clause of the Petition clearly states what she requested:

> WHEREFORE, Petitioner, Sandra J. Weidner, requests:
>
> (A) A writ of mandamus requiring that the City provide her with any and all

> documentation (information) it alleges or submits to the Ethics Board in support of its request of the Board for an advisory opinion as to her actions involving such documentation:
>
> * * * *

(R 2: 4-5.)

Weidner received the exact documents she requested in her Document Request on December 5, 2017, before the City was served with her Petition. (App. Br. at 7; R 6: 6 ¶ 19; 7: 6 ¶ 17.) No documents within the Confidential Ethics Memorandum were withheld from her on the basis of privilege and the only redactions in the copy of the document she received were to protect the identification of the alderpersons involved, including ironically, herself. (*Id.*) Thus, Weidner obtained the exact relief she requested in her Document Request. Accordingly, as the circuit court correctly held, her Document Request is moot. *See Riley v. Lawson*, 210 Wis. 2d 478, 490, 565 N.W.2d 266 (Ct. App. 1997); *Walder v. Allen*, 31 Wis. 2d 70, 72, 141 N.W.2d 867 (1966).

Weidner's argument that the circuit court "unmooted" the case by considering the City's assertions of privilege as to the subject documents, (App. Br. at 23-24.), is specious. The circuit court analyzed the City's claims of privilege in conjunction with Weidner's request for attorneys'

fees pursuant to § 19.37(2). (R 61: 11-12.) As Weidner concedes, (App. Br. at 24), one whose mandamus action is rendered moot by a voluntary release can still be entitled to attorneys' fees and costs under the public records law. *Racine Educ. Ass'n.,* 129 Wis. 2d at 325. That is the exact issue the circuit court considered when it reviewed privilege in this case. Thus, the circuit court's consideration of the privilege issue was not "incongruous" to its determination that Weidner's Document Request was moot, (App. Br. at 23.), it was necessary to resolve part of Weidner's requested relief that was not mooted by her receipt of the Confidential Ethics Memorandum. (R 111: 9-13; 61:11-12.) Thus, the circuit court's ruling that Weidner's Document Request was mooted when she received the Confidential Ethics Memorandum should be affirmed.

III. THE CIRCUIT COURT'S DETERMINATION THAT THE PETITION WAS NOT THE CATALYST OF THE CITY'S PRODUCTION OF THE CONFIDENTIAL ETHICS MEMORANDUM TO WEIDNER WAS NEITHER UNREASONABLE NOR CLEARLY ERRONEOUS.

Weidner asks the Court to substitute its judgment for the circuit court's and determine that it was not "reasonable" for the circuit court to reach the factual determination that Weidner's Petition was not the catalyst for the City's production of the Confidential Ethics Memorandum to Weidner. Respectfully, this Court should decline.

The circuit court's determination is supported by the undisputed facts and inferences drawn from the documentary evidence and was neither unreasonable nor clearly erroneous. The standard of review for this issue is clear:

> A party seeking attorney fees under § 19.37(2), . . . , must show that prosecution of the action could reasonably be regarded as necessary to obtain the information and that a "causal nexus" exists between that action and the agency's surrender of the information. . . . [T]he test of cause is whether the actor's action was a substantial factor in contributing to the result. The action may be one of several causes; it need not be the *sole* cause. Causation is a question of fact, and we will not overturn a trial court's findings as to causation unless they are clearly erroneous. However, in an open records case, causation is often an inference drawn from documentary or undisputed facts. In that situation, as here, we will affirm the trial court's findings as to causation if they are reasonable.

WTMJ, Inc. v. Sullivan, 204 Wis. 2d 452, 458–59, 555 N.W. 2d 140 (Ct. App. 1996) (internal citations omitted). This Court must affirm the circuit court's finding unless it finds that the inferences drawn by the circuit court may not reasonably be inferred from the established evidence. *State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 871, 422 N.W.2d 898 (Ct. App. 1988). Weidner cannot meet this burden.

Weidner erroneously contends that the circuit court's determination was not reasonable because there was "no evidence in the record to support the circuit court's finding that preparation of the [Confidential Ethics Memorandum] was a 'substantial investment' and

'in process long before the present action was filed.'" (App. Br. at 28.) To make this argument, Weidner paraphrases the circuit court's determination (which is redacted in the public record) and gives the circuit court's analysis short shrift.

The circuit court's finding that preparing the Confidential Ethics Memorandum was a "substantial investment" and "in process long before the present action was filed" was based upon the court's review of the 68-page document. (R 21 & 22; *see also* R 111: 7-8.) This document included a 17-page detailed confidential memorandum that (i) thoroughly explained the City's advisory opinion request and factual background of the request; (ii) outlined the relevant City ordinances and Wisconsin Supreme Court Rules; (iii) explained the relevant law on privilege; (iv) contained a description of the 18 communications that the City contended were confidential and protected by attorney-client privilege; (v) included redactions to protect the anonymity of the alderpersons involved as required by Racine Ordinance 2-585; and (vi) provided an explanation of the City's position on the privileged nature of each communication. (R 7: 5-6, ¶ 16, Ex. G.) Even a cursory review of this document evidences that the inferences drawn by the circuit court about the time and effort involved in preparing the Confidential Ethics Memorandum are reasonable. Moreover, the City Attorney's affidavit

expressly stated that the time delay in submitting the Confidential Ethics Memorandum to the Ethics Board was due, in part, to "the time it took to prepare the Ethics Request." (R 7; 6: ¶ 18.)

Weidner also contends the circuit court applied the wrong standard when it concluded the Petition was not "the" catalyst of Weidner's receipt of the Confidential Ethics Memorandum rather than concluding whether the Petition was "a" cause. However, even if true,[4] this would not justify reversal of the circuit court because it is only harmless error. For an error to "affect the substantial rights" of a party under Wis. Stat. § 805.18(2), there must be a "reasonable possibility" that the error contributed to the outcome of the action or proceeding. *Evelyn C.R. v. Tykila S.,* 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768; *see also DeNava v. DNR,* 140 Wis. 2d 213, 220, 409 N.W.2d 151 (Ct. App. 1987) (an appellate court will affirm a circuit court that reaches the right result for the wrong reasons.) Harmless errors do not justify reversal of the circuit court. *See id.*

Here, it is undisputed that Weidner provided no evidence to suggest that the City, who had not been served with the Petition at the

[4] Weidner's argument that the Petition was "a" catalyst of the Confidential Ethics Memorandum production is entirely inconsistent with her argument that she received the Confidential Ethics Memorandum "'because she is a sitting Alderperson' [ ]—and not in response to her records request ***or the lawsuit***." (App. Br. at 20-21.) (emphasis added.)

time Weidner received the Confidential Ethics Memorandum, even knew the Petition had been filed at the time the City provided copies of the Confidential Ethics Memorandum to all alderpersons, including Weidner. Without evidence that the City was actually aware of Weidner's Petition, *a fortiori*, the Petition could not have even possibly been "a" cause of the production of the Confidential Ethics Memorandum to Weidner.[5]

Weidner also argues by negative inference that the City Attorney did not deny having knowledge that the Petition had been filed before the City had been served. (App. Br. at 30.) However, this negative inference does not justify reversal of the circuit court because Weidner had the burden of presenting evidence that the Petition was a substantial factor in contributing to her receiving the Confidential Ethics Memorandum. *State ex rel. Vaughan*, 143 Wis. 2d at 871. As correctly determined by the circuit court, she failed to meet that burden. Thus, regardless of whether the circuit court applied the correct standard, there is no evidence to suggest that the filing of the Petition was even "a" cause of Weidner's receipt of the Confidential Ethics Memorandum, and

[5] The other "undisputed facts" Weidner contends support an inference that the Petition was a catalyst in her receipt of the Confidential Ethics Memorandum, (App. Br. at 29-30), are immaterial without a showing that the City knew of the Petition at the time the City provided her and all other alderpersons with the Confidential Ethics Memorandum.

any potential error in the legal standard applied by the circuit court was harmless.[6]

Because the inferences drawn by the circuit court in determining that the Petition was not "the" catalyst for her receipt of the Confidential Ethics Memorandum were reasonable and there are no facts of record to suggest that the Petition was even "a" cause for her receipt of the Confidential Ethics Memorandum, this Court must affirm the circuit court's determination. *State ex rel. Vaughan*, 143 Wis. 2d at 871.

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT DOCUMENTS REQUESTED BY WEIDNER WERE PRIVILEGED AND THAT SHE WAS NOT THE PREVAILING PARTY UNDER WIS. STAT. § 19.37(2).

A. General Attorney-Client Privilege under Wisconsin Law.

Communications protected by attorney-client privilege or subject to federal and state non-disclosure statutes are exempt from public records disclosure. *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 783, 546 N.W.2d 143 (1996); *see*

[6] Weidner contends, for the first time, she should be allowed to explore the factual issue of causation by discovery or an evidentiary hearing. (App. Br. at 31-32.) Weidner, who carried the burden to prove causation to be entitled to attorneys' fees, neither initiated any discovery on the issue nor requested that the circuit court allow her an opportunity to do so at any time before entry of the Final Order. (*See generally* Record.) Nor did Weidner ever request an evidentiary hearing or request to present evidence at any scheduled hearing, including the March 13 Hearing when the circuit court addressed the issue of causation. (R 111: 7-8.) Thus, she has forfeited that argument. *Rogers,* 196 Wis. 2d at 827.

also Wis. Stat. § 19.36. A client "has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services." Wis. Stat. § 905.03(2)

A communication is privileged if it takes place between the client *or a client's representative* and the client's attorney. *Id.* Applied in this case, the City is the client and the City Attorney's Office is the client's attorney. Accordingly, communications between an individual alderperson and the City Attorney's Office regarding something that would "facilitat[e] the rendition" of legal advice, are privileged communications because alderpersons are the City's client-representatives.

In this regard, the privilege belongs to the City as embodied through the Common Council, and although communications with the client-representative alderpersons are privileged, only the City—the client—has the authority to waive the privilege. *Id.*; *see also Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 33, 251 Wis. 2d 68, 640 N.W.2d 788 (only the corporation client, and not one of its former officers, can waive the privilege). Both the client and its legal counsel have the authority to assert the privilege. *Lane*, 2002 WI 28, ¶ 21; *see*

also Wis. Stat. § 905.03(3); *see also Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2010).

The purpose of attorney-client privilege is to promote a client's full disclosure of information to its attorneys. *See State ex rel. Dudek Circuit Court for Milwaukee Cty.*, 34 Wis. 2d 559, 581, 150 N.W.2d 387 (1967), *Lane*, 2002 WI 28, ¶ 21. Thus, attorney-client privilege is absolute (unless an exception found in § 905.03 applies), *Dudek*, 34 Wis. 2d at 581, and the scope of the privilege is broad, *Lane*, 2002 WI 28 ¶ 40. The privilege protects communications that would *directly or indirectly* reveal the substance of confidential communications between the client and lawyer, *id.,* and a document is privileged if it would threaten to reveal the substance of a lawyer-client communication, *Dyson v. Hempe*, 140 Wis. 2d 792, 815, 413 N.W.2d 379 (Ct. App. 1987).

B. Alderpersons are client representatives when requesting information from the City Attorney's Office.

Weidner argues, in part, that some of the communications are not privileged because the alderperson was not making the inquiry in confidence, was acting as a conduit of information to third parties, and was acting as an "ombudsman" for constituents. (App. Br. at 35.) However, when an alderperson contacts the City Attorney's Office and receives feedback in the form of legal advice, that person is at the very

least indirectly revealing the substance of the City's lawyer-client communications, and that alderperson does not hold the ability to waive the City's privilege or determine on the City's behalf whether any particular communication was intended to be confidential. *See, e.g., Wendt v. City of Denison*, 2018 WL 1547119, at *3 (N.D. Iowa Mar. 29, 2018); *Guidiville Rancheria of California v. United States*, 2013 WL 5303748, at *4 (N.D. Cal. Sept. 20, 2013). Instead, the City makes those determinations and its decisions can only be made by full vote of the Common Council. There is good reason for this rule, without it, any alderperson could obtain sensitive information from the City Attorney's Office and use that information in a manner adverse to the City without the City having the protection of the privilege.

C. Giving general legal advice.

Weidner also argues that some communications are not privileged because they involve the City Attorney's Office responding to questions about publicly-available statutes, ordinances, or resolutions. She argues that if the underlying topic is public, the communication cannot be privileged. This clearly cannot be correct, especially since almost all sources of law are now publicly available on the internet. The law is clear: one circumstance where attorney-client privilege applies occurs when a client asks an attorney about the law and the attorney analyzes

the inquiry, conducts research, finds the applicable law, and responds by providing the law, even if the underlying material being analyzed may be in the public domain. *See, e.g.*, *Oasis Int'l Waters, Inc. v. United States*, 110 Fed. Cl. 87, 104 (2013); *Glaxo, Inc. v. Novopharm Ltd.*, 148 F.R.D. 535, 540 (E.D.N.C. 1993).

D. The Circuit Court Correctly Concluded that 13 of the 18 Communications Were Privileged.[7]

1. Communication 1: E-mail from an alderperson to the City Attorney requesting the City Attorney's advice on the status of pending claim against the City.[8]

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent references internal processing of a pending claim." (R 62: 8; R-App. 10.) This communication involves an alderperson seeking advice from the City Attorney regarding a pending claim against the City, and thus is covered by attorney-client privilege. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33 (privilege "readily protects statements from the client to the lawyer.")

[7] The City agrees this issue is reviewed de novo.
[8] (R 21: 20.)

Contrary to Weidner's arguments, there is nothing in the body of this communication that suggests the alderperson was acting as a mere conduit of information for a third party—the body of the communication includes requests for information that would not, at least in part, ever be passed along to a third party. Moreover, even if the alderperson was attempting to act as a mere conduit, it would be immaterial because the alderperson does not have the authority to unilaterally waive any privilege that may exist with respect to this communication with the City Attorney. Finally, Weidner incorrectly states what happened after the alderperson's e-mail. The alderperson, not the City Attorney, forwarded the e-mail to the City paralegal, who in any event is an extension of the City Attorney and working under its direction. Thus, Weidner's argument that there was a tacit recognition that legal advice was not being sought is premised on false facts. (*See* App. Br. at 43; *see also* R 21: 20.)

2. Communication 2: E-mail from City Attorney to all Common Council members and other City employees providing advice regarding the process the City should take with respect to a Petition for Direct Legislation.[9]

[9] (R 21: 21–22.)

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent references legal advice regarding changes to a City ordinance." (R 62: 8; R-App. 10.) This communication is covered by attorney-client privilege because it involves the City Attorney's confidential legal advice regarding the best way to handle a petition to change certain ordinances. *See* Wis. Stat. § 905.03(2) (protecting confidential communications between the client's lawyer and client when the communication is made to render legal advice); *see also Lane*, 2002 WI 28, ¶ 33 ("readily protects statements from the client to the lawyer" and those that would indirectly reveal the substance of the client's communications).

Weidner's characterization of this communication as "merely a preliminary notice, and basic summary of, the Petition and process, without analysis" is simply inaccurate. (App. Br. at 44.) The body of this communication clearly includes the City Attorney's legal analysis. (*See generally* R 21: 21–22.) Whether that legal analysis is preliminary or final is of no moment. Moreover, Weidner's contention that the communication is not privileged because it does not reveal the substance of the client's communication to the lawyer ignores the City Attorney's Office's role and inaccurately reflects the scope of attorney-client privilege. The City Attorney's Office's only client is the City. Per statute,

the City Attorney's Office is responsible for "conduct[ing] all the law business in which the city is interested." Wis. Stat. § 62.09(12). As such, the Common Council and Mayor look to the City Attorney's Office to be proactive and provide them with advice on legal matters when presented in due course to the City. In similar contexts, courts have found that the privilege applies to an attorney's proactive legal communications to a client when the client is a perpetual client, as is the case here. *See, e.g., Amcast Indus. Corp. v. Detrex Corp.*, 1991 WL 441904, at *2 (N.D. Ind. July 26, 1991) ("self-initiated attorney communications intended to keep the client posted on legal developments and implications may also be protected."). Finally, Weidner misrepresents the City's position; the City does not take the position that this communication was privileged simply because it was marked as privileged. (*See* App. Br. at 44.)

3. Communication 3: E-mail from previous City Attorney to alderperson providing insights and responses to alderperson's inquiries regarding why the City retained outside counsel for a development project.[10]

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent references confidential thought process regarding retention of outside counsel." (R

[10] (R 21: 23–24.)

62: 8; R-App. 10.) This communication is covered by attorney-client privilege because it involves the City Attorney's confidential legal advice to an alderperson regarding a legal conflict of interest analysis related to the City's outside counsel. *See generally* Wis. Stat. § 905.03.

The fact that the alderperson's initial inquiry was made to Administrator Friedel does not give rise to an inference that this communication does not involve legal advice. In fact, Administrator Friedel forwarding the initial inquiry to the City Attorney only furthers the conclusion that this communication involves legal advice: another City employee believed that the subject matter of the communication required the City Attorney's legal analysis, otherwise he would have answered the question himself. Weidner provides no explanation or citation to support her bald conclusion that the alderperson was "in essence" acting as an ombudsman. Finally, her assertion that the City Attorney was not providing legal advice is simply inaccurate.

4. Communication 4: E-mails to and from City Attorney and an alderperson related to alderperson's request for legal advice and authority from the City Attorney regarding when the City Council or City board may go into closed session.[11]

[11] (R 21: 25.)

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent references legal opinions of City Attorney regarding closed sessions." (R 62: 9; R-App. 11.) This communication is covered by attorney-client privilege because it involves the City Attorney's confidential legal insights to an alderperson asking about the process for closed-session meetings. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33 ("readily protects statements from the client to the lawyer" and those that would indirectly reveal the substance of the client's communications).

Contrary to Weidner's erroneous argument, the body of this communication shows that the City Attorney not only passed along copies of statutes, he also provided his legal insight into the function of a statute's certain parts. (*See* R 21: 25.) Thus, this communication is readily distinguishable from those that the circuit court concluded were not privileged because they only passed along a copy of an otherwise publicly-available-document, and the City Attorney was clearly doing more in this communication than acting as a mere conduit of information.

5. Communication 5: E-mails to and from City Attorney and an alderperson related to alderperson's questions about the Redevelopment Authority.[12]

While the circuit court incorrectly concluded that this e-mail was protected by attorney work product, (R 62: 9; R-App. 11.), this Court should still uphold the circuit court's conclusion that this communication is privileged because it is protected by attorney-client privilege. Therefore, the circuit court's reliance on the work product protection is harmless error. *See DeNava,* 140 Wis. 2d at 220. (An appellate court will affirm a trial court that reaches the right result for the wrong reasons).

This communication is clearly covered by attorney-client privilege: an alderperson requested the City Attorney's advice on a topic of authority, the City Attorney considered the inquiry, analyzed it, formulated an opinion regarding the topic of authority, and responded. The communication reveals the City Attorney's confidential legal thought processes in response to a client's inquiry, and is therefore protected by attorney-client privilege. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33.

[12] (R 21: 27.)

6. Communication 6: E-mails between the City Attorney, an alderperson, and other City officials regarding the alderperson's request for information related to a City contract and the City Attorney's legal insights regarding the terms of that contract.[13]

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "content sought insight to the City Attorney's legal reasoning regarding the contract." (R 62: 9; R-App. 11.) This communication is covered by attorney-client privilege because it involves an alderperson asking about a contract and the City Attorney's legal insights regarding the contract's terms. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33.

Contrary to Weidner's assertions, this e-mail sought much more than just public information; it required the City Attorney's analysis of the contract. The City Attorney reviewed the request, and then provided a response revealing his legal analysis. Thus, the City Attorney was not simply acting as a conduit of information that was otherwise public.

7. Communication 7: E-mail from Assistant City Attorney to an alderperson responding to alderperson's questions about a Racine ordinance and prospective ordinance.[14]

---

[13] (R 21: 28–29.)
[14] (R 21: 30.)

While the circuit court incorrectly concluded that this e-mail was protected by attorney work product, (R 62: 9; R-App. 11), this Court should still uphold the circuit court's conclusion that this communication is privileged because it is protected by attorney-client privilege. Therefore, the circuit court's reliance on the work product protection is harmless error—the circuit court reached the right result for the wrong reasons. *See DeNava,* 140 Wis. 2d at 220.

This communication is covered by attorney-client privilege: an alderperson requested the Assistant City Attorney's advice on a topic of replicating another municipal ordinance, the Assistant City Attorney then considered the inquiry, analyzed it, formulated an opinion regarding the topic of authority, and responded. The communication reveals the Assistant City Attorney's confidential legal thought processes in response to a client's inquiry, and is therefore protected by attorney-client privilege. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33.

8. Communication 8: E-mails from City Attorney to Common Council and other City employees providing legal advice on filling a mayoral vacancy.[15]

[15] (R 21: 32–34; R 22: 35–38.)

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent reflects legal analysis and opinion." (R 62: 9; R-App. 11.) This communication is covered by attorney-client privilege because it involves the City Attorney's confidential legal analyses and advice related to laws about filling a mayoral vacancy. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33.

This document clearly shows that Weidner's assertion that "[t]he City Attorney provides no legal insight or legal advice and renders no opinions" is simply inaccurate. (App. Br. at 51.) Furthermore, looking at the context of this document reveals that the City Attorney is responding to an issue the Common Council sought advice on, undermining any contention that this communication does not, at least, indirectly reveal the client's confidential communications to the lawyer. Finally, the City does not take the position that this communication was privileged simply because it was marked as privileged, as Weidner incorrectly asserts. (App. Br. at 52.)

9. Communication 9: E-mails to and from the City Attorney and an alderperson providing the City Attorney's legal analysis as it relates to Common Council approval for contracts.[16]

[16] (R 22: 39–41.)

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent reflects legal analysis of contract." (R 62: 9; R-App. 11.) This communication is covered by attorney-client privilege because it involves the City Attorney's confidential legal analyses and advice related to analysis of laws related to Common Council contract approval. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33.

Weidner's contentions to the contrary are misplaced. It is clear from the document that the alderperson was seeking legal advice, and the City Attorney provided it to that alderperson. The fact that the alderperson shared the information has no relevance to whether or not the alderperson was seeking legal advice or whether the communication is otherwise protected by attorney-client privilege. Finally, this communication clearly does not fall within the gambit of Wis. Stat. § 19.36(3) as it involves the City Attorney's analysis of (1) terms of a contract and (2) when certain approvals are required of the Common Council for contracts. This communication is not a "record produced or collected under a contract" as contemplated by § 19.63(3).

10. Communication 10: E-mail from City Attorney to Common Council and other City

employees detailing a prospective settlement agreement.[17]

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent discusses City resolution of ongoing litigation." (R 62: 9; R-App. 11.) This communication is covered by attorney-client privilege because it involves the City Attorney's confidential legal analyses and advice regarding a potential settlement. *See* Wis. Stat. § 905.03(2) (protecting confidential communications between the client's lawyer and client for purposes of facilitating the rendition of legal advice).

Weidner's reliance on *Journal/Sentinel* is misplaced. (App. Br. at 53–54.) That case involved the analysis of whether a communication discussing the terms of a settlement that was already agreed to by the parties in a memorandum of understanding was subject to attorney-client privilege. *See Journal/Sentinel, Inc. v. Shorewood School Board,* 186 Wis. 2d 443, 447 & 460, 521 N.W.2d 165 (Ct. App. 1994). Unlike *Journal/Sentinel*, this communication is conveying proposed settlement terms that were not formally agreed to and were being presented to the client for it to consider whether they may be acceptable. (R 22: 45–46.) Allowing disclosure of communications like this would allow adverse

[17] (R 22: 45–46.)

parties to obtain attorneys' thoughts on prospective settlements before they are finalized. Moreover, attorney-client communications are often "wrought from interaction between attorneys," (App. Br. at 54), which does not change the confidential nature of the City Attorney's communication to his client about the potential settlement.

11. Communication 11: Communication from outside attorney to City Attorney and alderperson that implicated a City employee's personal health information.[18]

The circuit court correctly concluded that this e-mail was protected by medical privilege because the "[c]ontent contains federally protected Health Information (HIPPA) and a confidential communication possibly leading to legal exposure to the City." (R 62: 10; R-App. 12.)

Despite Weidner's contentions, (App. Br. at 55), this document contains a City employee's confidential health information. The letter lists the name of a City employee that an alderperson had made contemporaneously public (although anonymous) statements about in regards to the City employee's medical information.[19] Thus, if the letter

[18] (R 22: 60–62.)

[19] http://journaltimes.com/news/local/alleged-failed-drug-test-draws-concerns/article_fdc102f3-0967-5298-924a-b7841adf95fd.html (Racine Journal Times article from October 13, 2015) and http://journaltimes.com/news/local/no-news-following-closed-door-talk-on-employee-drug-test/article_cabb4f83-e6f6-

was public, it would be easy to connect the two (the named employee and the medical information contained in the newspaper articles). In essence, it would reveal employee information that is protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"), *see* Pub. L. 104-191, and Wis. Stat. § 103.13(5); *see also* Wis. Stat. § 19.36 (recognizing exemptions for disclosure to comply with federal and state law).

12. Communication 12: E-mails between the City Attorney, the Common Council, and other City employees discussing City Attorney's legal analysis of (i) agenda order and (ii) sharing privileged communications with outsiders.[20]

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent . . . reflects thoughts and processes regarding various ongoing legal matters involving the City or Racine." (R 62: 10; R-App. 12.) This communication is covered by attorney-client privilege because it involves the City Attorney's confidential legal analyses and advice related to the analysis of laws related to Common Council scheduling

51e6-8472-a50d2c0dfeb9.html (Racine Journal Times article from October 29, 2015) (last visited June 19, 2019.)

[20] (R21:63–66.)

and Common Council members' dissemination of confidential information. *See* Wis. Stat. § 905.03(2); *see also Lane*, 2002 WI 28, ¶ 33.

Once again, the fact that an alderperson shared the e-mail with a third party is not dispositive to the application of attorney-client privilege or whether legal advice was originally sought. It is clear from the document that advice was being sought. (R 22: 65.) Furthermore, Weidner's contentions that this communication contains no legal advice and does not directly or indirectly reveal any confidential client communication is simply inaccurate.

13. Communication 13: E-mail from an alderperson to the City Attorney, copying individuals outside the City, but discussing legal information the alderperson previously received from the City Attorney related to the City's nuisance ordinance.[21]

The circuit court correctly concluded that this e-mail was protected by attorney-client privilege because the "[c]ontent asks for legal opinion and analysis from the City Attorney." (R 62: 10; R-App. 12.) This communication is covered by attorney-client privilege because it reveals the City Attorney's confidential legal analyses and advice

[21] (R 21: 67–68.)

previously provided to an alderperson. *See* Wis. Stat. § 905.03(2). The fact that the alderperson copied third parties to the email does not destroy the privilege because that alderperson does not control the City's attorney-client privilege.

Jenkins provides no help to Weidner. (*See* App. Br. at 56–57.) That case did not involve a situation such as here where an organization held attorney-client privilege and one member of that organization (here an alderperson) shared confidential attorney-client information with the public. *See generally Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007). Again, here, the client is the entire City and one alderperson cannot waive the privilege on the City's behalf. Furthermore, the attorney-client privilege applied in *Jenkins* even though a third party was present when the individual client spoke with his attorney. *See id.* at 490–91. Thus, *Jenkins*—a case involving the attorney-client privilege's application to individuals, not organizations, *see id.*,—does not overcome attorney-client privilege that applies to this communication.

Accordingly, for the reasons expressed above, the circuit court's conclusion that these 13 communications are privileged communications that are not subject to disclosure under Wisconsin's public records law and the circuit court's determination based on that

conclusion that Weidner was not the prevailing party under § 19.37(2) should both be affirmed.

V. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S ORAL SEAL RULING.

A. This Court Lacks Jurisdiction to Review the Circuit Court's Oral Seal Ruling.

Weidner challenges the Oral Seal Ruling as to two documents: (1) the Confidential Ethics Memorandum, which the circuit court left entirely sealed; and (2) the Decision and Order, which the circuit court unsealed with limited redactions. (App. Br. at 60.)

This Court lacks jurisdiction to review the Oral Seal Ruling for several reasons. First, there was no written order entered by the circuit court following the Oral Seal Ruling. An oral ruling must be reduced to writing and entered before an appeal can be taken from it. *Helmrick v. Helmrick*, 95 Wis. 2d 554, 556, 291 N.W.2d 582 (Ct. App. 1980). Thus, the Court does not have jurisdiction over the Oral Seal Ruling. *Id.*

Second, Wis. Stat. § 808.075(8) sets forth a specific procedure for the court's review of an order that the circuit court enters following remand. It requires a party aggrieved by the circuit court's order to file in the appellate court a written statement of objections to the order within 14 days after the record is returned to the appellate court clerk. *Id.*

Notwithstanding the lack of a written order, the appellate record was returned to the clerk of the appellate court following remand on March 5, 2019. (Notice of Filing of Circuit Court Record.) Thus, pursuant to the requirements of § 808.075(8), Weidner had 14 days—until March 19, 2019—to file a statement of objection to the Oral Seal Ruling and failed to do so. Nor did she file an additional notice of appeal. Having failed to do either, this Court lacks jurisdiction to address her arguments on the Oral Seal Ruling. *See, e.g., La Crosse Tr. Co. v. Bluske*, 99 Wis. 2d 427, 428, 299 N.W. 2d 302 (Ct. App. 1980).

B. The Circuit Court Correctly Concluded that the Entire Confidential Ethics Memorandum Should Be Sealed and That Parts of Its Decision and Order Should Be Sealed and Redacted.

Even assuming *arguendo* this Court has jurisdiction to hear Weidner's arguments regarding the Oral Seal Ruling, the Oral Seal Ruling was correct.

The City acknowledges that court filings are presumptively open for public inspection and sealing is the exception to the rule. *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, ¶ 89, 365 Wis. 2d 351, 875 N.W.2d 49. However, a circuit court may "limit public access to judicial records when the administration of justice requires it." *State ex rel. Bilder, v. Township of Delevan*, 112 Wis. 2d 539, 556, 334 N.W.2d

252 (1983).[22] As the circuit court correctly recognized upon remand, the administration of justice requires the entire Confidential Ethics Memorandum[23] be sealed and parts of the Decision and Order be sealed and redacted.

1. The Confidential Ethics Memorandum is Confidential under City Ordinances and its Discussion of Attorney-Client Communications is Exempt from the Public Records Law.

The Confidential Ethics Memorandum is confidential pursuant to Racine Ordinances 2-578 and 2-585 and its discussion of the subject attorney-client communications is exempt from the Public Records Law. Thus, it should remain completely sealed.

Racine Ordinance § 2-578 defines "Confidential information" as "written material or oral information related to city government, not otherwise subject to the public records law and expressly designated or marked as confidential." Racine Ordinance § 2-585 allows the Board of Ethics to issue ethics advisory opinions, and the process is cloaked with confidentiality. As Weidner concedes, "consideration of requests for confidential written advice" from a municipal ethics board are exempt from the Open Meetings Law. Wis. Stat. § 19.85(1)(h). In addition,

[22] The City agrees this issue is reviewed de novo.
[23] For purposes of this argument, the Confidential Ethics Memorandum refers only to the 17-page memorandum prepared by the City Attorney.

Racine Ordinance § 2-585(b) provides that "[a]dvisory opinions and requests shall be in writing. Any individual requesting an advisory opinion or any individuals or organizations mentioned in the opinion shall not be made public . . ."

Here, the City submitted to the Board of Ethics a 17-page detailed memorandum, which was clearly marked on its face as a "CONFIDENTIAL MEMORANDUM" and laid out in detail the subject matter already described above. (Resp. Br. § III, *supra*; *see also* R : 5-6, ¶ 16, Ex. G.) At the time the City submitted the Confidential Ethics Memorandum to the Ethics Board, it intended that document to be confidential and thought the Ethics Board's advisory opinion would also be confidential. (*Id.*).

Contrary to Weidner's misplaced arguments, the Confidential Ethics Memorandum qualifies as "Confidential Information" under Racine Ordinance section 2-578. The City's written request for a confidential advisory opinion from the Ethics Board is unquestionably "written material related to city government." Because the confidential advisory opinion request at issue in this case describes in detail attorney-client privileged communications and was submitted by the City to the Ethics Board in confidence for the very purpose of reviewing those privileged communications, it is also "not subject to the public records

law" (or the Open Meetings Law[24]). *See* §§ 905.03 & § 19.85(1)(h). As noted above, communications protected by attorney-client privilege are exempt from public-records disclosure. *Newspress*, 199 Wis. 2d at 783. The Confidential Ethics Memorandum is privileged and confidential because its release to the public would reveal information protected by the attorney-client privilege. *Id*. at 782–83 (portion of a letter from school district attorney to the school district regarding disciplinary sanctions to be imposed on school district administrator subject to attorney-client privilege and excepted from the Public Records Law). Finally, the Confidential Ethics Memorandum was "expressly designated or marked as confidential." (R 21 & 22.) Thus, the Confidential Ethics

[24] Weidner contends, without support, that only written advice from the Ethics Board is exempt from the Open Meetings Law and not the request itself (other than identities). (App. Br. at 63.) Accepting that argument would render the protections afforded by the exemption meaningless; confidential information contained in the request would become public information and thus, there would be no further need to protect that same information in the Ethics' Board written advice. This concern is particularly acute here, where the request includes a detailed description of privileged attorney-client communications. Nondisclosure is still appropriate for those parts of the Confidential Ethics Memorandum that discuss the communications the circuit court concluded were not privileged. Absent any express exception, nondisclosure of materials under Wisconsin's public records law is also appropriate when there is an overriding public interest in keeping the document confidential. (App. Br. at 33.) The entirety of the Confidential Ethics Memorandum falls within this category, regardless of any findings of privilege or other express exception. Allowing public disclosure of the Confidential Ethics Memorandum and documents similar to it would undermine the overriding public interest of maintaining the ethics advisory opinion process as a confidential and anonymous one, including but not limited to the overarching confidentiality concerns related to that process that are already discussed in this Brief. (*See* Section V, *supra*.)

Memorandum meets all the requirements of the definition of "Confidential Information" under Racine Ordinance § 2-585.[25]

For these reasons, the Confidential Ethics Memorandum should remain sealed in its entirety to protect its confidential and privileged nature under (i) Racine Ordinances 2-578 and 2-585 and (ii) the attorney-client privilege.

2. Parts of the Decision and Order Should Remain Redacted.

Weidner contends that the circuit court erred with respect to certain specific line item redactions made to its Decision and Order. Some of these redactions, (R 62: 7 ¶ 3, 8 ¶¶ 1–2; R-App. 9-10), relate to the confidentiality of information submitted to the Ethics Board as part of the City's confidential request for a written opinion under Racine Ordinance § 2-585. For the reasons stated in Section V.B.1., *supra*, the information is confidential and should remain sealed. The remaining redactions (*Id*. at 9 (item 8 of 48); (item 11-12 of 48); (item 20-22 of 48);

[25] The Ethics Board Memorandum also qualifies as "Privileged information" under Racine Ordinance section 2-578. "Privileged information" is defined as "information obtained under government authority which has not become a part of the body of public information." (*Id.*) The Confidential Ethics Memorandum describes attorney-client privileged communications and was confidentially submitted by the City to the Ethics Board for the very purpose of reviewing those privileged communications in the context of a request for confidential written advice. The information was obtained and provided by the City Attorney's Office to the Ethics Board pursuant to its authority under Wis. Stat. § 62.09(12) and has not become public.

& (item 26-28)), are dependent upon the Court ruling in Weidner's favor on the communications not being privileged. With respect to those redactions, the City refers the Court to its arguments in support of privilege as to those items. *See* Section IV, *supra*.

For the above reasons, the Oral Seal Ruling, even if reviewable, was not erroneous and should be affirmed.

CONCLUSION

For all the foregoing reasons, the City asks that this Court deny Weidner's appeal in its entirety, affirm the Final Order, and remand this case to the circuit court to resolve any outstanding issues that remain in this case.

Dated this 20th day of June 2019.

MEISSNER TIERNEY FISHER & NICHOLS S.C.

By: *Electronically signed by Michael J. Cohen*

Michael J. Cohen
State Bar No. 1017787
Email: mjc@mtfn.com
Garrett A. Soberalski
State Bar No. 1088611
Email: gas@mtfn.com
111 East Kilbourn Avenue, 19th Floor
Milwaukee, WI 53202
Tel: 414-273-1300
Fax: 414-273-5840

Attorneys for Respondent-Respondent,
City of Racine

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,990 words.

Dated this 20th day of June 2019.

Electronically signed by Michael J. Cohen
Michael J. Cohen
State Bar No. 1017787

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) FOR ELECTRONIC BRIEF

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief and appendix are identical in content and format to the printed form of the brief and appendix 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 20th day of June 2019.

Electronically signed by Michael J. Cohen
Michael J. Cohen
State Bar No. 1017787

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Respondent-Appellee City of Racine's Brief and Appendix were hand-delivered to below counsel on June 20, 2019:

Mark R. Hinkston, Esq.
KNUTESON, HINKSTON & QUINN, S.C.
500 College Avenue
Racine, Wisconsin 53403

I further hereby certify that the requisite number of copies of Respondent-Appellee City of Racine's Brief and Appendix were hand delivered to the Wisconsin Court of Appeals on June 20, 2019 at the following address:

Sheila Reiff
Clerk of the Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53701-1688

Dated this 20th day of June 2019.

Electronically signed by Michael J. Cohen
Michael J. Cohen
State Bar No. 1017787

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13) FOR ELECTRONIC APPENDIX

I hereby certify that:

I have submitted an electronic copy of the appendix, which complies with the requirements of s. 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 20th day of June 2019.

Electronically signed by Michael J. Cohen
Michael J. Cohen
State Bar No. 1017787