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SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2019AP000096

FRIENDS OF FRAME PARK U.A.

Plaintiff-Appellant,

v.

CITY OF WAUKESHA

Defendant-Respondent-Petitioner.

Appeal from the Waukesha County Circuit Court, Case No. 17-CV-2197
Michael O. Bohren, Presiding Judge
Reversed by the Court of Appeals

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

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INTRODUCTION

In its decision in this matter, ***Friends of Frame Park U.A. v. City of Waukesha***, 2020 WI App 61, 394 Wis.2d 387, 950 N.W.2d 831 (P-App 101), the Court of Appeals determined that attorney's fees may be awarded to a prevailing party under Wis. Stat. § 19.37(2)(a) even where the commencement of an action was not a cause of the disclosure of public records. As the Court of Appeals acknowledged, the test which has been applied to determine whether attorney's fees may be awarded under that statute is whether the commencement of an action was a cause of the disclosure of the records. However, it held that a different test was to be applied in this case.

Claiming to clarify prior decisions, it held the question to be addressed is whether the exception from the law initially relied on by the Defendant-Respondent-Petitioner City of Waukesha ("the City") to temporarily withhold disclosure actually applied. ***Id.*** ¶ 4; P-App 104. Therefore, according to the Court of Appeals, the Plaintiff-Appellant Friends of Frame Park U.A. ("Friends") was entitled to fees, regardless of whether its action was a cause of the release of records in question, if the disclosure of the records had been delayed by

the City of Waukesha's improper reliance on an exception to the Public Records Law. ***Id***. ¶ 5; P-App 104-105.

As will be shown below, the Court of Appeals decision, though it is confusing in some respects, has changed the test which has been continuously applied to determine whether a prevailing party is entitled to attorney's fees under Wis. Stat. § 19.37(2)(a). By virtue of its decision, attorney's fees may be awarded even when records are released for reasons unrelated to the commencement of an action, i.e. when records are released voluntarily and without inducement.

The Court of Appeals also held that proposed contracts between municipalities and third parties must be disclosed under the Public Records Law before they are presented to and reviewed by a municipal governing body. It held that such disclosure must be made even where a governing body may properly meet in closed session to review the proposed contracts under Wis. Stat. § 19.85(1)(e). Thus, according to the Court of Appeals, such contracts must be disclosed on request even when competitive or bargaining reasons exist which would justify review of the contracts in a properly closed meeting under the Open Meetings Law.

STATEMENT OF ISSUES

1. May a litigant be entitled to attorney's fees under Wis. Stat. § 19.37(2)(a) of the Public Records Law regardless of whether commencement of an action was a cause of the release of records?

The Court of Appeals held that it is not necessary that commencement of an action be a cause of release of records in order for a litigant to be awarded attorney's fees under the statute.

2. May a draft contract which is the subject of negotiation between a municipality and a private entity be withheld from disclosure under the Public Records Law pursuant to Wis. Stat. §§ 19.35(1)(a) and 19.85(1)(e) where the contract has not yet been presented to the municipality's governing body for review, and where it could legally meet in closed session to do so?

The Court of Appeals held that such a draft contract must be disclosed prior to review and consideration by the governing body, even if the governing body could properly convene in closed session to review and consider it pursuant to Wis. Stats. § 19.85(1)(e).

STATEMENT OF THE CASE

This is an appeal of an order granting a summary judgment motion to dismiss a mandamus action brought against the City under the Public Records Law by Friends of Frame Park, U.A. (R. 49). Friends initially claimed in its Complaint that the City had improperly failed to disclose certain records in response to a request made in writing on October 9, 2017. (R. 2 Ex. A; P-App. 168-169). Some records were disclosed in response to that request; some were not. The City Attorney wrote a letter to the requester dated October 23, 2017, explaining why particular records, draft contracts between the City and a private entity, were being withheld. (R. 3 Ex. B; P-App. 170-171). Wis. Stat. § 19.85(1)(e) was relied on in withholding the documents, pursuant to Wis. Stat. § 19.35(1)(a).

This action was commenced on December 18, 2017. (R. 1). The records that had been withheld – the draft contracts – were disclosed one day after the City's Common Council had met to consider those documents, and two days after commencement of the action. After the Common Council had met, the City Attorney wrote a letter to the requestor explaining

that they were being disclosed because the reasons for withholding them no longer applied. (R. 14, 8 ¶ 24).

Although the records regarding which Friends commenced this action had been disclosed, Friends amended its complaint, claiming that additional record requests were made subsequent to the commencement of the action, and it believed those requests had not been responded to appropriately. (R. 14). Thereafter, the City filed a motion for summary judgment. (R. 26). A hearing was held on the motion. The Circuit Court rendered its decision granting the motion from the bench. (R. 69; P-App. 136-167). A written order granting the motion was entered on November 26, 2018. (R. 49; P-App. 134-135). This appeal ensued.

In the Court of Appeals, Friends did not claim that the City had improperly failed to withhold any records outside of the draft contracts which were disclosed two days after commencement of its action. It effectively abandoned such claims, by virtue of which it had continued the action in Circuit Court, on appeal. It maintained on appeal only that the draft contracts disclosed immediately after its action was

commenced had not been disclosed as required by the Public Records Law.

The Circuit Court determined that the City appropriately withheld the draft contracts and other documents. It determined that disclosure of the draft contracts had not been caused by commencement of Friend's action, but was the result of the fact that the City's Common Council was not interested in pursuing negotiations relevant to the draft contracts. (R. 69; P-App. 160).

The Court of Appeals reversed the Circuit Court. ***Friends***, 2020 WI App 61; P-App. 101-134. First, the Court of Appeals addressed the appropriate test to be used in determining when a party prevails in an action under Wis. Stat. § 19.37(2)(a). While acknowledging that, according to prior case law, the test for determining whether an award of fees is appropriate is whether the commencement of an action was a cause of the disclosure of records, it held that the test to be imposed was one not previously employed by the courts. Instead, it held the question to be addressed is whether the exception from the Public Records Law relied on by the City

applied. ***Id***. ¶ 4; P-App. 104. Therefore, according to the Court of Appeals, Friends was entitled to fees regardless of whether its action was a cause of the release of the records, if its disclosure of the records had been delayed by the City's improper reliance on an exception to the Public Records Law. (***Id.*** ¶ 5; P-App. 104-105).

Having determined that Friends' action need not have been a cause of the disclosure of the records two days after commencement of the action for it to be eligible for an award of attorney's fees, the Court of Appeals turned to the reasons on which the City relied in temporarily withholding those records. While Wis. Stat. § 19.85(1)(e) was relied on in temporarily withholding the documents, the Court of Appeals made no determination it would not have been appropriate for the Common Council to meet in closed session to review and consider the draft contracts pursuant to that statute. It assumed that meeting in closed session on that basis would have been proper under the Open Meetings Law. ***Id.*** ¶ 49; P-App. 129. It nonetheless held that the draft contracts which would have been the subject of the closed session under that statute were

withheld in violation of the Public Records Law. It found, in other words, that the draft contracts should have been disclosed to Friends before they were reviewed by the Common Council. Therefore, according to the Court of Appeals, Friends is entitled to an award of attorney's fees. ***Id***. ¶ 51; P-App. 130-131.

The Court of Appeals remanded the case to the Circuit Court for a determination of attorney's fees to be awarded, with directions. ***Id***. ¶ 55; P-App. 133.

ARGUMENT

I. THE TEST APPLIED TO DETERMINE WHETHER ATTORNEY'S FEES MAY BE AWARDED UNDER THE PUBLIC RECORDS LAW BEFORE THE COURT OF APPEALS' DECISION

Case law prior to the Court of Appeals' decision in this case clearly sets forth the test to be applied in determining whether attorney's fees are available under Wis. Stat. § 19.37. As the court noted in ***State ex rel. Vaughan v. Faust***, 143 Wis. 2d 868, 871, 422 N.W.2d 898 (Ct. App. 1988),

> "[I]n ***Racine Ed. Ass'n v. Racine Bd. Of Ed.***, 129 Wis. 2d 319, 327-28, 385 N.W.2d 510, 513 (Ct. App. 1986), we adopted the reasoning of ***Cox v. United States Dept. of Justice***, 601 F.2d 1, 6 (D.C. Cir. 1979), and held that a party seeking fees under sec. 19.37(2), Stats., 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. This is largely a question of causation and is a factual determination to be made on a case-by-case basis. ***Racine Ed. Ass'n***, *supra."*

According to ***WTMJ, Inc. v. Sullivan***, 204 Wis.2d 452, 456, 555 N.W.2d 140 (Ct. App. 1996),

> "[a] party seeking attorney fees under § 19.37(2), Stats., 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. ***State ex rel. Vaughan v. Faust***, 143 Wis. 2d 868, 871, 422 N.W.2d 898, 899 (Ct. App. 1988). In Wisconsin, the test of cause is whether the actor's action was a substantial factor in contributing to the result." (citation omitted)

"The test to determine whether a party has prevailed under sec. 19.37(2) is whether there is a causal connection between the litigant's mandamus action and that agent's compliance with disclosure." ***State ex rel. Eau Claire Leader-Telegram v. Barrett***, 148 Wis.2d 769, 773, 436 N.W.2d 885, 887 (Ct. App. 1989).

The mere fact that the disclosure occurred after initiation of the mandamus action is insufficient to establish the required causal connection. ***Racine Educ. Ass'n v. Board of Educ.***, 145 Wis.2d 518, 522-23, 427 N.W.2d 414, 416 (Ct. App. 1988).

In the past, the Court of Appeals relied on Federal case law to support this test. In ***Racine Education Assoc. v. Board***

of Education, 129 Wis.2d 319, 327, 385 N.W.2d 510 (Ct. App. 1986) for example, the Court of Appeals stated as follows:

> "To determine the meaning of 'prevails in whole or in substantial part,' we adopted the analysis of ***Cox v. United States Department of Justice***, 601 F.2d 1 (D.C. Cir. 1979), which held:
>
> [T]he party seeking such fees in the absence of a court order [compelling disclosure] 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. Whether a party has made such a showing in a particular case is a factual determination that is within the province of the district court to resolve. In making this determination, it is appropriate for the district court to consider, *inter alia*, whether the agency, upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be disclosed….If rather than the threat of an adverse court order either a lack of actual notice of request or an unavoidable delay accompanied by due diligence in the administrative processes was the actual reason for the agency's failure to respond to a request, then it cannot be said that the complainant substantially prevailed in his suit."

II. THE TEST APPLIED BY THE COURT OF APPEALS IN THIS CASE

The Court of Appeals in its decision in this case acknowledges that the test "most often invoked" to determine the prevailing party in public records cases is whether the lawsuit is the cause or at least a cause of the release of the records. ***Friends***, 2020 WI App 61 ¶ 3; P-App. 103-104. However, it found that the test was not applicable. Instead, according to the Court of Appeals, in determining whether a party prevails in a public records case it is not necessary that a

lawsuit be a cause of the release of records: "We hold that where litigation is pending and an authority releases a public record because a public records exception is no longer applicable, *causation is not the appropriate inquiry* for determining whether the requesting party 'substantially prevailed.' Rather, the key consideration is *whether the authority properly invoked the exception in its initial decision to withhold release."* ***Id.*** ¶ 4 P-App. 104. (Emphasis added).

The Court of Appeals' statement of its holding in this regard is difficult to understand taken in the context of this case. As stated, it seems to describe a situation where an exception under the law is properly invoked but later becomes inapplicable. If an authority releases a public record "because a public records exception is *no longer* applicable" as stated by the Court of Appeals above, the exception necessarily must have applied at some point. If not, the exception could never be "no longer" applicable. Thus, it would make no sense to ascertain whether an authority properly invoked the exception initially, as it perforce was properly invoked before it could become "no longer applicable."

If an exception was properly invoked, however, there would be no obligation to disclose the record requested under

the law at the time of its invocation. It is conceivable that in that situation the exception would not apply at some subsequent time, at which time the record would have to be disclosed under the law. Possibly, the Court of Appeals is holding that attorney's fees may be awarded in that case if, for example, the records were not released soon enough. In such a case, it could be argued that while the litigation was not a cause of the release and the exception was properly invoked, there was too long of a delay in disclosing the records after the exception no longer applied for some reason warranting an award of attorney's fees. If that is what the Court of Appeals is holding, however, it is a holding which does not apply to its decision in this action.

In this case the Court of Appeals determined that the City *did not properly* invoke an exception initially. The Court of Appeals held that the exception relied on by the City in initially withholding the records in question did not apply. Therefore, there would seem to be no reason it would hold that the test to be applied is one applicable where an exception is properly invoked initially, and records released subsequently when the exception no longer applied.

It is most probable that in this case the Court of Appeals intended to hold that where an exception was improperly invoked initially, attorney's fees would be available regardless of whether the litigation was a cause of the release of the records, even if the records were voluntarily released subsequently. It is not likely that the Court of Appeals intended to hold that the test it imposes in its decision in this case would apply when an exception was properly invoked initially, although it is possible the Court of Appeals may hold that it does in some future case given the rationale behind its holding in this matter. If a delay in disclosing records where an exception has been improperly invoked initially makes an award of fees available regardless of whether litigation is the cause of disclosure, and the delay in voluntary disclosure is caused by the authority possessing the records. If there is an unreasonable delay of voluntary disclosure although an exception was properly invoked initially, the delay would likewise be caused by the authority in question.

If it was the intent of the Court of Appeals that the test it imposes applies where an exception to the law did not apply

initially, however, that situation is not significantly different from other situations in which the test which was applied was whether litigation was a cause of the release of records. As that is the case, the new test imposed by the Court of Appeals is unnecessary.

What the Court of Appeals refers to as the "key consideration" to be determined in deciding whether attorney's fees should be awarded in its decision in this case (***Id.*** ¶ 4: P-App 104) is in fact the key consideration in most actions brought under the Public Records Law. As noted above, the Court of Appeals claims the key consideration here is "whether the authority properly invoked the exception in its initial decision to withhold release." ***Id.*** Obviously, the question whether an authority properly invoked an exception in its decision to withhold release of records will be a common question in an action to enforce the Public Records Law. Just as obviously, the question whether attorney's fees should be awarded will commonly arise where an exception to disclosure was improperly invoked by an authority. In that case, the person successfully maintaining an exception did not apply and seeking to enforce the law would be a prevailing party.

Accordingly, if the Court of Appeals appropriately decided the exception to the law invoked by the City was invoked improperly, there is nothing to distinguish this case from any other case under the Public Records Law. In each such case, if an exception to the law had been invoked by an authority, a determination would have to be made whether the exception was properly invoked. If it was not properly invoked, the plaintiff would prevail. There is nothing special or distinctive about the circumstances of this case which requires a different test be applied to determine whether attorney's fees should be awarded.

If the City understands the Court of Appeals' opinion correctly, it is the fact that records previously withheld were released within two days of commencement of the action which the Court of Appeals believes renders it necessary that an award of fees be available "even if the lawsuit was not an actual cause" of the release of the records in question. ***Id.*** ¶ 5; P. App. 104. According to the Court of Appeals, if there had been no voluntary release of the records, then apparently Friends would have been required to establish its litigation was a cause of the

release of the records. Because there was a voluntary release, it need not do so.

The Court of Appeals acknowledges that it must reconcile its holding with what it asserts "at least superficially" appears to be inconsistent language in prior decisions. ***Id.*** ¶ 4; P-App. 104. It is questionable whether the language of its prior decisions is only "superficially" inconsistent with its decision in this case, though, as it admits that "throughout the years we have *continuously* focused on causation, or what the federal circuits term 'the catalyst theory." ***Id.*** ¶ 25; P-App 115. (Emphasis added). The Court of Appeals contends, however, that this continual focus on causation is irrelevant, because "several cases focus on whether an unreasonable delay was caused by the authority's improper reliance on an exception under the public records law, regardless of the subsequent voluntary disclosure." ***Id.***, ¶ 26; P-App. 116. Notably, the Court of Appeals in ¶ 26 of its opinion refers to an authority's improper reliance on an exception, while in ¶ 4 of its opinion it apparently addresses a situation where an authority properly relies on an exception which came to be "no longer applicable" as noted above.

As an example it refers to the case of ***Portage Daily Register v. Columbia County Sheriff's Department***, 2008 WI App 30, ¶ 8, 308 Wis.2d 357, 746 N.W.2d 525, noting that in that case the Court of Appeals stated that the matter was not moot as it was necessary to determine whether the plaintiff was entitled to damages and fees due to the failure to disclose the records in question. ***Id.*** ¶ 26; P-App. 116. However, this does not support its decision to depart from the long-established test requiring that an action be at least a cause of the release of records. Certainly, a matter is not moot in all cases where an action has been commenced and records were voluntarily released thereafter, and fees may be awarded in those circumstances. It does not follow from this that in that case attorney's fees may be awarded regardless of whether the action was a cause of the release of the records, however. ***Portage Daily Register*** does not depart from the well-established case law holding that litigation must be a cause of disclosure of records for attorney's fees to be awardable, as it did not address whether fees should be awarded and instead

merely held that eligibility for an award of fees remained to be determined.

The Court of Appeals claims that in ***Racine Educ. Ass'n v. Board of Education for Racine Unified School District,*** 145 Wis.2d 518, 427 N.W.2d 414 (Ct. App. 1988), it "decided that the requesting party was not entitled to fees because the lawsuit was not a cause of the release; rather, there was 'an unavoidable delay accompanied by due diligence in the administrative processes.'" ***Friends,*** 2020 WI App 61 ¶ 23; P-App 114. Indeed, it expressly stated in that case that "[a]fter examining the record, including the voluminous contents of the exhibits, and considering the arguments of the parties, *we conclude that REA has not shown a sufficient causal nexus between the prosecution of the mandamus action and the board's release of the records.*" ***Racine Educ. Ass'n***, 145 Wis.2d at 523. (Emphasis added).

The Court of Appeals does not seem to claim that in ***Racine Educ. Ass'n*** it decided causation need not be established for attorney's fees to be available. Nor can it do so given its statement in that case that "[i]f the failure to timely respond to a request was caused by an unavoidable delay accompanied by due diligence in the administrative processes, *rather than being caused by the mandamus action,* the plaintiff has not substantially prevailed." ***Id.*** at

524. (Emphasis added). In addition, it specifically held that attorney's fees were not available because no cause had been shown. According to the Court of Appeals: "We therefore conclude from our *de novo* review that REA did not meet its burden of proving that the prosecution of the mandamus action was reasonably necessary to obtain the release of the records. As causation has not been adequately shown, it cannot be said that REA "prevail[ed] in whole or in substantial part." Sec. 19.37(2), Stats. "We therefore reverse the trial court's judgment which awarded attorney's fees to REA." ***Id.*** at 525.

Nonetheless, the Court of Appeals in its decision in this action goes on to say: "In the ***Racine Education Association*** decisions, our stated focus on the lawsuit as a cause-in-fact clearly dovetailed with our consideration of whether there was an unreasonable (as opposed to an unavoidable) delay in release. If we had determined that there was an unreasonable delay in that case, the outcome undoubtedly would have been different. Thus the ***Racine Education Association*** decisions adopted causation as the test for prevailing-party status, but the application of that test was intertwined with the court's finding that there was no violation of the statute: the 'cause' of the release was not the commencement of a lawsuit but the authority's prompt action once the records became available." ***Friends***, 2020 WI App 61 at ¶ 24; P-App 114-115.

Undoubtedly, therefore, the Court of Appeals in the ***Racine Education Association*** decisions adhered to causation as the test for prevailing-party status. The Court of Appeals feels, however, that the requester in those decisions was unable to establish cause because there was no unreasonable delay in releasing the records once the records became available. Thus, the Court of Appeals states that if there had been an unreasonable delay, the outcome of the case would have been different.

It is unclear whether this means that an unreasonable delay would have rendered the lawsuit a cause of the release of records, or whether the Court of Appeals is saying that an unreasonable delay would have required a different outcome regardless of whether there was a causal nexus between the litigation and the release. Regardless, however, these decisions do not stand for or create a new test of eligibility for fees under the Public Records Law. There is nothing in the case law which indicates litigation need not be a cause of disclosure for an award of attorney's fees to be available.

The Court of Appeals, in what may be an effort in minimize the significance of its departure from the case law, states that "[a]fter all, when an authority inexcusably delays in releasing records to the point that prompts litigation, *it can typically be inferred that the lawsuit was at least 'a' cause of the release.*" (Emphasis added) ***Friends***, 2020 WI App 61 at ¶ 27; P-App. 117. However, it is clear under the law that the fact that disclosure occurred after initiation of a mandamus action is insufficient to establish the required causal connection. ***Racine Educ. Assoc.*** 145 Wis.2d at 522-23, 427 N.W.2d at 416. To be entitled to fees, the prevailing party in a Public Records Law action "must assert something more than *post hoc, ergo propter hoc.*" ***Racine Educ. Assoc.***, 129 Wis. 2d at 326.

Here, the Court of Appeals asserts that the disclosure of records after the commencement of an action is, in itself, *usually sufficient* to establish a causal connection between the action and the disclosure. In other words, the Court of Appeals is saying that *post hoc ergo propter hoc* applies in most instances, contrary to prior cases.

The Court of Appeals by its own admission, therefore, has at least modified the test it adopted and applied in the past

according to the case law. However, only the Supreme Court has the authority to overturn, modify or withdraw language from a previously published decision of the Court of Appeals. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246 (1997). The Court of Appeals exceeded its authority by departing from its prior published decisions, something it cannot do.

III. THE COURT OF APPEALS' RELIANCE ON FEDERAL CASE LAW IS UNFOUNDED

The Court of Appeals relies on the case of ***Church of Scientology v. United States Postal Service***, 400 F.2d 486 (9th Cir. 1983) as persuasive authority in support of its reinterpretation of the case law. It notes that in that case the 9th Circuit instructed the district court on remand to consider the following factors in determining whether the Church had substantially prevailed under FOIA (as quoted in the Court of Appeals decision): "(1) when the documents were released; and (2) what actually triggered the release to the Church; and (3) *whether the Church was entitled to the documents at an earlier time in view of the fact the exemption [upon which the Postal Service initially relied] was*

eliminated." 700 F.2d at 492. (Emphasis in Court of Appeals' Decision ¶ 31; P-App. 119-120).

The Court of Appeals infers from the third factor identified by the 9th Circuit for the district court's consideration, as referred to in a footnote to the 9th Circuit's decision, that the ***Church of Scientology*** case "arguably refines" the ***Cox*** test "previously adopted by this court." According to the Court of Appeals, "[t]he three factor test set forth in ***Church of Scientology*** allows for a more flexible inquiry, one that permits consideration of factors other than causation." ***Friends***, 2020 WI App 61 at ¶ 32; P-App. 120.

Therefore, the Court of Appeals concludes that "[t]he third factor--whether a requester was entitled to the record at an earlier time--should control where the delay in a voluntary release can be attributed to the authority's reliance on a public records exception. Where that is the case, the trial court must scrutinize the claimed exception, rather than whether the lawsuit caused the release, to determine whether a requesting party has prevailed in whole or in substantial part." ***Id.*** ¶ 33; P-App. 120-121. The Court of Appeals has misconstrued the ***Church of Scientology*** case.

The Court of Appeals evidently construes what it calls the "three factor test" in ***Church of Scientology*** as if each factor may be considered separately in determining eligibility for attorney's fees. Thus, it asserts "[i]f a lawsuit becomes necessary to, and does, trigger compliance, that fact alone should usually be sufficient to permit a fees award." ***Friends***, 2020 WI App 61 at ¶ 33; P-App. 120-121. Therefore, the Court of Appeals maintains that the second factor referred to by the court in ***Church of Scientology*** is "usually" sufficient in itself to permit an award of fees.

According to the Court of Appeals, however, the third factor is also sufficient in itself to permit an award of fees. It states that "[t]he third factor--whether the requester was entitled to the record at an earlier time--should control where a delay in a voluntary release can be attributed to the authority's reliance on a public records exception." ***Id.***

The 9th Circuit's use of the word "and", a conjunction, in referring to the three factors indicates that those factors are not to be considered by the district separately, or that each them is sufficient to determine whether fees may be awarded. In any case, it can hardly be said on the basis of the single sentence in

which the three factors are described that the 9th Circuit intended to hold that cause is not a factor in determining eligibility for attorney's fees, especially given that one of the factors to be considered is "what actually triggered the documents release."

In fact, the Court of Appeals fails to establish that the 9th Circuit abandoned the causation test in ***Church of Scientology***. There is nothing which indicates that the 9th Circuit held that the third factor it instructed the district court to consider in itself determines eligibility for fees in FOIA cases, regardless of whether an action was a cause of the release of records. If the 9th Circuit had intended to so hold, it is very unlikely that the 9th Circuit would relegate such a holding to a footnote to its decision.

Moreover, the ***Church of Scientology*** case expressly states and even reiterates the ***Cox*** test previously relied on by the Court of Appeals, and confirms its applicability. Thus, the 9th Circuit states: "To be eligible for an award of attorney's fees in a FOIA suit, the plaintiff must present evidence that two threshold conditions have been satisfied. The plaintiff must show that: (1) the filing of the action could reasonably have been regarded as necessary to obtain

the information; and (2) the filing of the action had a substantial causative effect on the delivery of the information." ***Id.*** 700 F.2d at 489. Also: "On remand, in determining whether the Church is eligible for attorney's fees--that is, whether it has substantially prevailed--the district court should determine: (1) whether the Church's suit was reasonably necessary to obtain the information; and (2) whether the suit had a substantial causative effect on the release of the documents in question." ***Id.*** 700 F.2d at 490.

It is clear the 9th Circuit itself rejects any claim that it held in ***Church of Scientology*** that attorney's fees may be awarded in a FOIA action in certain cases regardless of whether release of records was caused by commencement of an action. According to the lead opinion in ***First Amendment Coalition v. United States Dept. of Justice***, 878 F.3d 1119 (9th Cir. 2017), ***Church of Scientology*** was representative of the "catalyst theory of recovery" as set forth in ***Cox***. ***First Amendment Coalition***, 878 F.3d at 1127. Two of the Judges joining in the lead opinion determined that "there still must be a causal nexus between the litigation and the voluntary disclosure or change in position by the government." ***Id.***, 878 F.3d at 1128. At most, ***Church of Scientology*** stands for the proposition that

"multiple factors may be at play" in determining whether a plaintiff has substantially prevailed. ***Id.***, 878 F.3d at 1130.

In summary, the Court of Appeals' revision of the test to be applied to determine whether a plaintiff in an action under the Public Records Law prevails and is entitled to attorney's fees has no basis in the case law, state or federal, and is contrary to it. The Court of Appeals exceeded its authority.

IV. THE COURT OF APPEALS' DECISION SHIFTS THE BURDEN FROM PLAINTIFF TO DEFENDANT ON THE QUESTION WHETHER ATTORNEY'S FEES ARE AVAILABLE

The decision of the Court of Appeals revises the case law in another significant respect. By holding that attorney's fees are to be awarded where records are not disclosed initially due to improper reliance on an exception to the Public Records Law, it shifts the burden of proof as to eligibility for an award of attorney's fees from the plaintiff to the defendant in actions under that law.

As was noted above, where the determination to be made is whether the action commenced was a substantial cause of the release of records, the plaintiff pursuing the action is required to show that this is the case. "A party seeking attorney's

fees under Section 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." ***State ex rel. Vaughan v. Faust,*** 143 Wis.2d at 871.

According to the Court of Appeals in this case, however, there is no need for a party to do so. Instead, the defendant is required to establish it properly relied on an exception to the law in cases where it temporarily withholds documents but voluntarily releases them subsequently. If it cannot do so, the plaintiff is entitled to an award of attorney's fees, regardless of whether there is a causal nexus between the litigation and disclosure. In other words, according to the Court of Appeals, the defendant has the burden to prove that the plaintiff *is not entitled* to an award of attorney's fees in those cases.

The effect of this shift of burden is dramatic. The result is that whenever an authority voluntarily decides to disclose records previously withheld, it will be liable for attorney's fees in each case in which it improperly relied on what it believed to be an exception to the Public Records Law. The issue whether litigation was a cause of such disclosure will not arise.

As a practical matter, this means that an authority will always be liable for attorney's fees if the authority was wrong in relying on an exception to the law.

V. WITHHOLDING THE DRAFT CONTRACTS UNTIL THEIR REVIEW BY THE COMMON COUNCIL WAS PROPER

Wis. Stat. § 19.35(1)(a) states that exemptions to the requirement that a public body meet in open session under § 19.85 are indicative of public policy, but may be used as grounds for denying access to a record only if the legal custodian "makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made." The Court of Appeals determined there was no such specific demonstration in this case.

Case law addressing what is needed to make the specific demonstration required has focused on the nature of the explanation to be made. The "specific demonstration" required need not be detailed. "[W]hen denying inspection, the custodian is not required to provide a detailed analysis of the records and why public policy directs it must be withheld." ***Journal/Sentinel, Inc. v. Aagerup***, 145 Wis.2d 818, 823, 429 N.W.2d 772 (Ct. App. 1988).

The case of ***Law Offices of Williams Pangman & Associates, S.C. v. Zellmer*****,** 163 Wis. 2d 1070, 473 N.W. 2d 538 (1991) explains what is required to make a specific demonstration under Wis. Stat. § 19.35(1). The court in ***Pangman*** held that the mere citation of the Open Meetings Law exemption statute, § 19.85, is insufficient, in itself, to provide a specific demonstration. "Mere recitation of the exemption statute is insufficient without providing an added public policy reason for dismissal." ***Id.*** at 1084.

The records custodian must explain why the exemption statue is applicable. So, the refusal of disclosure pursuant to §19.85(1)(b), (c) and (f) allowing closed sessions in connection with the consideration of discipline, performance and promotion and evaluations of employees and officials was sufficient where it was noted that refusal was made on the basis disclosure would seriously hamper "the Milwaukee Police Department's ability to conduct thorough, confidential and internal personnel investigations, including the gathering of statements from members of the department as a condition of their employment." ***Id.*** at 1081.

In addition, the court held the specificity requirement was satisfied in the case of reliance on Wis. Stat. § 19.85(1)(b) to withhold records when a governmental body considers forms of discipline, and in the case of 19.85(1)(c) where a governmental body considers financial, medical or social history of an employee or official, because the records custodian gave "additional or complimentary" reasons for denying disclosure. ***Id.*** at 1086. Those reasons were that there was nothing in the records suggesting an interest to be served by disclosure; contrasting disclosure to nondisclosure in light of the necessity to maintain confidentiality for day-to-day operations; and the fact nondisclosure was warranted because disclosure is not an alternative to discovery statutes in criminal, municipal and traffic codes. ***Id.***

In ***Journal/Sentinel, Inc. v. Aagerup****, supra*, a coroner denied a request for a copy of an autopsy report. 145 Wis.2d at 821. In doing so, the coroner cited Wis. Stat. § 19.85(1)(d), which grants an exception to the requirements of the Open Meetings Law where a governmental unit considers probation and parole applications and strategy for crime prevention or

detection. The custodian stated that withholding the report was appropriate in the interest of crime detection. ***Id.*** 145 Wis.2d at 823. The Court of Appeals held that this statement satisfied the specificity requirement of Wis. Stat. § 19.35(1). ***Id.*** 145 Wis.2d at 824.

A review of the City Attorney's letter of October 23, 2017, establishes that the grounds for temporary nondisclosure of draft contracts pursuant to Wis. Stat. § 19.85(1)(e) met the specificity requirement according to prior case law as it relates to providing a description of the policy reasons supporting nondisclosure. (R. 3 Ex. B; P-App. 170-171). That statute provides exemption from open session for "deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require closed session." The City Attorney in that letter did far more than cite the statute in support of withholding the records. He noted that the contract is in draft form and the City was still in negotiation with Big Top Baseball, and that there was at least one other entity that may be competing with the City for a team. He noted that the draft contract is subject to review, revision and approval by the

City's Common Council before it can be finalized, and that the Council has not had an opportunity to review and address the draft contract. (R. 3 Ex B; P-App. 170-171).

He also explained that nondisclosure was required to protect the City's ability to negotiate the best deal for taxpayers, and that there was a current need to restrict public access to provide the Council with the opportunity to review the draft and determine whether it wants to adopt it or set different parameters for continued negotiations with interested parties. He noted further that if the contract terms were made public, it would diminish the City's ability to negotiate different terms that the Common Council may desire for the City's benefit. (R. 3 Ex B; P-App. 170-171).

The City Attorney's letter establishes, therefore, that the City did not merely cite to § 19.85(1)(e) in withholding disclosure. Applying the balancing test, it explained how the disclosure of a draft contract which had not even been presented to or reviewed by the Common Council did not serve the public interest.

The purpose of the specificity requirement of § 19.35 is twofold. First, it ensures that the custodian did not act arbitrarily, but rather balanced the general public interest in disclosure against a particular public interest in secrecy of certain matters as required. Second, the denial gives the requester notice sufficient to allow preparation of a challenge to the withholding. ***Journal/Sentinel, Inc. v. Aagerup****, supra,* 145 Wis. 2d at 774. The City Attorney's letter satisfied the purposes of the specificity requirement.

In its appeal, Friends asserted that the Open Meetings Law exemption appearing at Wis. Stat. § 19.85(1)(e) does not apply, relying on ***State ex rel. Citizens for Responsible Development v. City of Milton***, 2007 WI App. 114, 300 Wis. 2d 649, 731, 9 N.W. 2d 640. That case involves the application of the Open Meetings Law, not the Public Records Law. It held that exception to the Open Meetings Law did not apply to certain closed sessions but would apply to others. Friends' argued that based on that decision, the City's Common Council could not properly enter into closed session to review the draft

contracts and as a result that exemption could not be used in support of nondisclosure of the records in question.

However, as noted by the City in its Response Brief in the Court of Appeals, relief from a violation of the Open Meetings Law cannot be sought in a mandamus action under the Public Records Law. ***Journal Times v. Racine Board of Police and Fire Commissioners***, 2015 WI 56 ¶ 51, 362 Wis. 2d 577, 866 N.W.2d 563. The Court of Appeals, unlike Friends, does not claim that the City's Common Council would violate the Open Meetings Law by entering into closed session to review and consider the draft contracts, as noted above. According to the Court of Appeals, it does not decide whether or not there would be a violation of the Open Meetings Law.

However, the Court of Appeals also expressly states that Friends' entitlement to attorney's fees depends on whether the exception to the Open Meetings Law was applicable: "Friends' claim for attorney's fees must hinge on whether the City appropriately invoked Wis. Stat. § 19.85(1)(e) to withhold disclosure until after the December 19 common council meeting. We therefore turn to a discussion of that exception." ***Friends,*** 2020 WI App 61at ¶ 34; P-App. 121. In addition, in note 11 to paragraph 36 of its decision, the Court

of Appeals expressly states that "the issue here is not whether the City invoked Wis. Stat. § 19.85(1)(e) with sufficient specificity but whether the City met its burden of showing this exception applied." (***Id.*** ¶ 36; P-App. 122-123). The Court of Appeals therefore expressly states that Friends is entitled to attorney's fees if the City fails to meet its burden of showing this exception to the Open Meetings Law applied.

The Court of Appeals assumes without deciding that meeting in closed session would have been appropriate to prevent those with whom the City was negotiating to learning of what the City called in its Response Brief on the appeal "the Common Council's reactions to proposed terms, preferences, willingness to accept alternatives, and other matters which would put the City at a disadvantage in the bargaining process." ***Id.*** ¶ 49; P-App. 129. Thus, the Court of Appeals states "we assume without deciding that those portions of the December 19 meeting concerning the 'Common Council's reactions' were properly closed--the trial court's statement about not wanting to 'negotiate a contract in public' is well taken. It does not follow, however, that the City was justified in withholding all documents under discussion." ***Id.*** ¶ 50; P-App. 129.

It is true that the fact documents were compiled in conjunction with properly held closed sessions does not in itself

render them exempt from disclosure under Wis. Stat. § 19.35(1). ***Wisconsin State Journal v. University of Wisconsin-Platteville*****,** 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990); ***Zellner v. Cedarburg School District*****,** 2007 WI 53, ¶ 48, 300 Wis. 2d 290, 731 N.W.2d 240. In this case, however, the documents in question would themselves be the subjects of the closed session. There were no other documents to be considered. Thus, if review and consideration of those documents would be appropriate in closed session under the Open Meetings Law pursuant to § 19.85(1)(c), it is difficult to understand why the documents themselves should have been disclosed before a meeting took place. The Court of Appeals apparently acknowledges that the City's Common Council should not be required to negotiate a contract in public but believes that the contract being negotiated should be public before the Common Council sees what is being negotiated.

The Court of Appeals' conclusion that the City failed to meet its burden of showing Wis. Stat. § 19.85(1)(e) to be applicable, at least where disclosure of the draft contracts is concerned, is based on its interpretation of ***State ex rel. Citizens***

for Responsible Dev. v. City of Milton, supra. It notes that the ***City of Milton*** case holds that this exception to the Open Meetings Law cannot be invoked because a private entity desires confidentiality. ***Id.*** ¶ 41; P-App. 125-126. It notes that it also indicates that there are public policy reasons why that exception should not apply to prevent competition among governmental entities. (***Id.***; P-App. 125-126).

A review of the letter of the City Attorney explaining why disclosure was being temporarily withheld establishes that these were not significant reasons for non-disclosure, however. (R. 3 Ex. B; P-App. 170-171). No desire for confidentiality on the part of a private entity is even mentioned. That there is at least one other entity that may be competing with the City with respect to a baseball team is mentioned, but in connection with the fact that the contract between the City and Big Top Baseball is still in negotiation.

It is clear from the letter that the primary concern is that the Common Council had not had the opportunity to review and discuss the draft contracts between the City and Big Top: "There currently is a need to restrict public access for competitive and bargaining reasons until the Council has an opportunity to review the draft and

determine whether it wants to adopt it or set different parameters for continued negotiations with the interested parties. If the contract's terms were made public, it would substantially diminish the City's ability to negotiate different terms the Council may desire for the benefit of the City." (R. 3 Ex. B; P-App 170-171). Thus, it was explained that the exception was invoked in connection with negotiations between the City and Big Top, not to protect confidentiality or strengthen the City's bargaining position over that of another public entity. The reasons invoked by the authority in support of the exception relied on in the ***City of Milton*** case are not being invoked in the case at hand. Therefore, the court's decision in that case is not controlling.

VI. THE COURT OF APPEALS FAILS TO RECOGNIZE THE ROLE AND AUTHORITY OF THE CITY'S COMMON COUNCIL

The Court of Appeals' apparent acceptance of a distinction between negotiating a contract and the contract under negotiation may arise from its assumption that the draft contract was "was marked up and exchanged among City and Big Top representatives in a succession of back-and-forth edits. To state the obvious, then, any harm from disclosing this document could not relate to the City's negotiating strategy with respect to Big Top." ***Id.*** ¶ 43; P-

App. 126. According to the Court of Appeals, "the City undoubtedly could have relied on Wis. Stat. § 19.85(1)(e) had it been able to show that disclosure prior to common council review would have impeded its negotiation strategy. The City, however, did not and probably could not meet this burden. Again, this is because this particular draft contract *was created by the City and Big Top together.*" ***Id.*** ¶ 48; P-App. 128. (Emphasis in original).

The Court of Appeals' decision that Wis. Stat. § 19.85(1)(e) does not apply is therefore based on an unfounded assumption--that the draft contract being reviewed by the Common Council was the product of the City in negotiation with Big Top, *before it was submitted to the Common Council.* Negotiations regarding the contract and its terms had therefore already taken place as far as the Court of Appeals is concerned. However, this simply was not the case. The Court of Appeals' decision is fundamentally misguided due to a misunderstanding of municipal law.

Where contracts are concerned, all decisions on their terms, and their approval by a city, is within the authority and discretion of the Common Council acting as a body, not that of any public officer or official. Only a city's governing body has

the authority to approve, and authorize entry into, a contract on behalf of a city. Accordingly, negotiations in this case involving a contract between the City and Big Top, and bargaining, would continue until such time as the Common Council approved of the contract and authorized its execution by the appropriate city officers by vote duly noticed and taken. Alternatively, negotiations could be discontinued--as in this case--if the Common Council did not approve the contract and authorize its execution. Those who negotiate a contract with a municipality are, practically and legally speaking, negotiating with the municipality's governing body, not its officers or employees.

This is clear from the case of ***Town of Brockway v. City of Black River Falls***, 2005 WI App 174, 285 Wis.2d 703, 702 N.W.2d 418. In that case, it was claimed that city officials who negotiated a contract bound the city to the contract before it was considered and approved by the common council. ***Id.*** at ¶ 22. It was maintained that it was a "foregone conclusion" that the common council would approve the agreement because it had been negotiated by city officials. ***Id.*** at 1123

The Court of Appeals in ***Town of Brockway*** rejected these claims and held that the city was not bound by the contract before the common council voted to authorize its execution by the mayor and the clerk. It noted the "general rule of municipal law" that a valid contract with a municipality cannot be created except by its governing body or a duly authorized officer. ***Id.*** at 1124. The common council has a broad grant of authority under Wis. Stat. § 62.12 and § 62.11(5) for the management and control of city property and finances, while mayors, clerks and attorneys have no such power. ***Id.***

According to the court in ***Town of Brockway***:

> "The general rule of municipal law is that only a duly authorized officer, governing body, or board can act on behalf of a city, and a valid contract with the municipality cannot be created otherwise. 10 McQUILLAN, MUNICIPAL CORPORATIONS § 29.15 at 307 (3d ed. 1999). The powers and duties of city mayors, clerks, and attorneys are prescribed by statute and do not include this authority. See Wis. Stat. § 62.09(8), (11), and (12). On the other hand, the common council has a broad grant of authority for the management and control of the city property, finances, highways, navigable waters, and the public service, and ... power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out is powers by license, regulation ... and other necessary or convenient means." ***Id.*** 2005 WI App 174 at ¶ 24.

The City's Common Council as a body was therefore not bound by the draft contract in any respect. It did not participate in the creation of the draft contract, its drafting, or

attendant negotiations between city representatives and those of Big Top Baseball. It was not involved in prior discussions or negotiations with Big Top. It could only act as a body. Its review and consideration was essential to whether the contract would be entered into, rejected, altered, or subject to further negotiation. Accordingly, the Court of Appeals' reference to the deposition of the City Administrator as indicating a lack of evidence of continuing negotiations and supporting a conclusion that bargaining had already taken place before the Common Council met to review and consider the draft contract is not pertinent, as the City Administrator cannot be equated with the Common Council, the actual decision-maker in every respect.

Developing a negotiation strategy or deciding on a price to offer for a piece of land is an example of what is contemplated by "whenever competitive or bargaining reasons require a closed session." See Wis. Stat. § 19.85(1)(e). ***City of Milton,*** 2007 WI App 114, ¶ 19. The Court of Appeals appears to believe that the Common Council's review and discussion of the draft contract was of a contract already negotiated by the

City, and therefore § 19.85(1)(e) does not apply. There is no basis for this belief. There is nothing in the record even suggesting that the City's officers and employees had been authorized to accept the contract or any of its terms by the Common Council. The contract was not being presented to the Common Council as a *fait accompli* to be either accepted or rejected.

The Common Council's review would be essential in determining what terms the Council would or would not approve in acting on behalf of the City and its citizens. It would establish what it felt to be appropriate and desirable provisions of a contract and the reasons why certain terms were acceptable and others were not. It would determine what was acceptable to the Council and what was not, what could or should be done if other terms were offered or particular terms rejected, and whether the draft contract was appropriate for use in negotiations or should be modified or rewritten prior to submission to the party with which negotiations were being held.

Disclosure before the Common Council had an opportunity to review and discuss the documents and receive information from City staff regarding them, and make such decisions as it deemed appropriate would have resulted in confusion of members of the Council and the public regarding what was and was not the will and the opinions of the Council acting a body. Members of the public may have believed as the Court of Appeals apparently did that the contract had already been negotiated and would be adopted by the Council. Disclosure of the documents before Common Council review may have unduly prejudiced members of the Council for or against any agreement, or raised issues which could have been addressed, and their significance determined in closed session before disclosure. In addition, the public may have been needlessly disturbed or concerned by matters which the Common Council as a body would not countenance upon consideration in closed session.

The Court of Appeals distinguishes the propriety of disclosing the draft contracts from the propriety of a governing body meeting in closed session to review those documents.

Therefore, it discounts the fact that the meeting was appropriate for competitive or bargaining reasons. According to the Court of Appeals: "The problem with this argument is that Friends was not seeking access to a *meeting*--it was simply seeking disclosure of a *document* that might be discussed at that meeting. By itself, the document could itself reveal nothing about internal reactions or negotiating strategies." (***Friends,*** 2020 WI App 61 at ¶ 49; P-App. 129).

The Court of Appeals' assertion that the draft contracts "might be discussed" at the meeting is not accurate. Clearly, they were to be discussed and were discussed. Its rationale for distinguishing the draft contracts from the meeting is more significant: "The need to negotiate, and to form a strategy for negotiating, a contract in private is one thing; withholding all documents relating to those negotiations, so as to deprive the public of the ability to provide any input whatsoever, is quite another." ***Id.*** ¶ 50; P-App. 129-130.

First, as noted above, the City clearly did not withhold "all documents." The only documents at issue are the draft contracts. Second, the draft contracts themselves are the subject of the negotiations. They indicate what Big Top and City staff discussed, what Big Top was or was not willing to accept or

consider, what City staff thought of importance, and what City staff felt should be included in a contract. All of that was subject to review, comment, questioning, modification, renegotiation and revision by the Common Council acting as a body. The documents in this case were what was being negotiated. There would be no point in the Common Council meeting without them.

Finally, though public input in Common Council decisions is to be encouraged, and there is no desire to diminish its importance, it should be noted that this is not a case where a public hearing was required, at which members of the public would have the right to speak before the Common Council at the meeting regarding the draft contracts, nor does the public have any right to provide input at any other meeting of a governing body under the Open Meetings Law. The statutes only authorize governing bodies to allow public input at their discretion. *See* Wis. Stat. §§ 19.83(2) and 19.84(2). Withholding the documents in question in this case did not negatively impact any legal right of the public to provide input

regarding the contract during any meeting of the Common Council.

CONCLUSION

The decision of the Court of Appeals in this case changes the test to be applied in determining whether a litigant in an action under the Public Records Law is entitled to attorney's fees, so that a plaintiff is no longer required to show the action was a substantial cause of the release of a record in certain circumstances. It shifts the burden of proof as to entitlement to attorney's fees to the defendant. Such modification of the law is beyond the authority of the Court of Appeals.

The Court of Appeals has misinterpreted the law in determining that draft contracts which were the subject of negotiation should be disclosed prior to review and consideration by the governing body of a municipality. It assumed negotiations would not be taking place as a result of its assumption negotiations had ended. Such an assumption was unwarranted, but is the basis for the Court of Appeals decision that Wis. Stats. § 19.35(1)(a) and § 19.85(1)(e) do not

serve to justify the temporary withholding of the records in this case.

The City respectfully requests that the Supreme Court overrule the decision of the Court of Appeals in this matter.

Dated at Two Rivers, Wisconsin this 23 day of March, 2021.

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Certification as to Form and Length Requirements

I hereby certify that this petition and appendix meets the requirements set forth in Wis. Stat. § 809.62(4)(a) for a petition produced with a proportional serif font. This petition contains 9,897 words.

John M. Bruce

Subscribed and sworn to before me
this 15th day of March, 2021.

Notary Public, State of Wisconsin
My commission expires February 6, 2025

Certification as to E-Filing Requirements

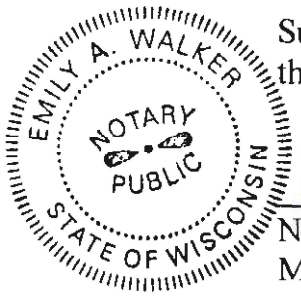
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.62(4)(b). I further certify that:

The 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.

John M. Bruce



Subscribed and sworn to before me
this 23rd day of March, 2021.

Notary Public, State of Wisconsin
My commission expires February 6, 2025.