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

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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ARGUMENT

I. ERRORS IN FRIENDS' STATEMENT OF THE CASE

Friends devotes more than half of its Response Brief to its Statement of the Case. That Statement contains much that is not relevant, but is in error in certain respects which are significant.

Friends claims that there was no discussion of the draft contracts at the Common Council meeting on December 19, 2017, and no action taken by it regarding negotiations with Big Top Baseball (See, for example, Response Brief pps. 4-5). It refers to the minutes of that meeting in support of this claim. (P-A App. 30, p.6). It considers this significant with respect to the City's reliance on Wis. Stat. § 19.85(1)(c) in withholding copies of these documents. As stated by Friends: "The City points to this meeting as somehow removing its need to withhold the records. Yet nothing in the public record shows that any action was taken regarding the plan to convert Frame Park and to allow Big Top's plan to go forward. That plan was not rescinded or cancelled at the December 19, 2017 meeting, just the opposite." (Response Brief p. 5).

A review of the minutes establishes they state very little or nothing regarding any of the items addressed or actions taken

by the Council. Its consideration of the draft contracts as described in the minutes differs in no significant respect from the description of the Council's consideration of the other agenda items.

The requirements of the law regarding minutes of meetings of governmental bodies are very few. The Open Meetings Law provides only that motions and roll call votes must be recorded and preserved. The record of a meeting must show all motions made, who initiated them and who seconded them, and how each member voted. Wis. Stat. § 19.88(3). Wis. Stat. § 62.11(4)(a) states that proceedings when published shall include the substance of every official act taken. Nothing more is required.

Therefore, Friends cannot rely on the fact that the minutes fail to describe discussion or action to support its claim no discussion took place. Also, as the minutes need only record motions and votes taken on them, it is unsurprising that no motion or voting is described, as it is undisputed no action was taken on the contracts. There is no requirement that minutes confirm no action was taken.

There was nothing for the Council to rescind or cancel at that meeting, as it had never adopted the draft contracts. Friends does not cite any authority providing that a governing body must take some official action *not to accept or not to take any action on a contract*. It is not necessary that there be an official action that no official action will be taken. (See Robert's Rules of Order Newly Revised, 12th Edition, p. 96: "A motion whose only effect is to propose that the assembly refrain from doing something should not be offered if the same result can be accomplished by adopting no motion at all.")

The draft contracts were obviously not accepted or approved by the Council. The fact there was no further formal action taken or direction made, makes the City Attorney's statement that there was no longer a need to protect the City's negotiation and bargaining position perfectly appropriate. P. App. 40.

On page 10 and elsewhere in its brief, Friends makes much of the fact that the City was engaged in negotiations with Big Top Waukesha only. It apparently feels that the City Attorney's statement in his letter of October 23, 2017 that "there is at least one other entity that *may be competing* with the City of

Waukesha" (Emphasis Added) is dishonest or disingenuous in some sense. P-App. 170. But the statement that an entity "may be competing" simply means another entity may be competing at some future time. It is possible that Friends may think that the exception to the Open Meetings Law in Wis. Stat. § 19.85(1)(c) applies only where a municipality is engaged in "competition" with more than one other entity. However, it cites no authority in support of this contention.

II. FRIENDS FAILS TO REBUT THE CITY'S CLAIM THAT THE COURT OF APPEALS CHANGED THE TEST FOR WHEN AN AWARD OF ATTORNEY'S FEES IS AVAILABLE

Friends' argument that the Court of Appeals has not modified the test to be used in determining the availability of attorney's fees fails to dispute the fact that all prior case law holds that there must be a causal connection between the commencement of an action and the disclosure of the records in question. *See, e.g.*, ***State ex rel. Eau Claire Leader-Telegram v. Barrett***, 148 Wis.2d 769, 773, 436 N.W.2d 885, 887 (Ct. App. 1989); ***Racine Educ. Ass'n v. Board of Educ.***, 145 Wis.2d 518, 522-23, 427 N.W.2d 414, 416 (Ct. App. 1988); ***State ex rel. Vaughan v. Faust***, 143 Wis. 2d 868, 871,

422 N.W.2d 898, 899 (Ct. App. 1988); ***WTMJ, Inc. v. Sullivan***, 204 Wis.2d 452, 454, 555 N.W.2d 140 (Ct. App. 1996).

The Court of Appeals itself has acknowledged this fact. According to the Court of Appeals: "throughout the years we have continuously focused on causation, or what the federal circuits term 'the catalyst theory." ***Friends of Frame Park U.A. v. City of Waukesha***, 2020 WI App 61, ¶ 25, 394 Wis.2d 387, 950 N.W.2d 831; P-App 114.

Friends merely restates what the Court of Appeals identified as the reasons for its change to the law. Thus Friends quotes from the decision of the Court of Appeals in which it interprets the opinion in the case of ***Racine Education Assoc. v. Board of Education***, 129 Wis.2d 319, 327-328, 385 N.W.2d 510 (Ct. App. 1986). However, that case and the other cases interpreted by the Court of Appeals held that an action under the Public Records Law must be a cause of release of records in order for attorney's fees to be available. In addition, the Court of Appeals states that "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." ***Friends***,

2020 WI App 61 at ¶ 27; P-App. 117. This is contrary to prior decisions which provide that the fact disclosure occurred after initiation of an action is insufficient to establish the required causal connection, and a prevailing party must "assert something more than *post hoc ergo propter hoc*." ***Racine Educ. Assoc.***, 129 Wis. 2d at 326.

Because the Court of Appeals departed from well-established case law, it has exceeded its powers as a unitary court. As noted by this Court in ***Cook v. Cook***, 208 Wis.2d 166, 188-190, 560 N.W.2d 246 (1997):

> If the court of appeals is to be a unitary court, it must speak with a unified voice. If the constitution and statutes were interpreted to allow it to overrule, modify or withdraw language from its prior published decisions, its unified voice would become fractured, threatening the principles of predictability, certainty and finality relied upon by litigants, counsel and the circuit courts. Further, with the ability to rely on the rules set out in precedent thus undermined, aggrieved parties would be encouraged to litigate issues multiple times in the four districts.
>
> Four principles are clear: The court of appeals is a unitary court; published opinions of the court of appeals are precedential; litigants, lawyers and circuit courts should be able to rely on precedent; and law development and law defining rest primarily with the supreme court. Adhering to these principles we conclude that the constitution and statutes must be read to provide that only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals. In that way one court, not several, is the unifying law defining and law development court.

The options available to the Court of Appeals if it disagrees with or wishes to depart from its prior decision are

these: "It may signal its disfavor to litigants, lawyers and this court by certifying the appeal to this court, explaining that it believes a prior case was wrongly decided. Alternatively, the court of appeals may decide the appeal, adhering to a prior case but stating its belief that the prior case was wrongly decided." ***Id.*** 190.

Friends' response to the City's argument that the Court of Appeals misconstrues the Federal case law is that "when a requester prevails in showing that the governmental body acted out of compliance with what the law requires, the catalyst/causation doctrine strongly supports an award of attorney's fees." (Response brief p. 28). The gist of Friends' response is that once it has been shown that records were wrongly withheld, attorney's fees are available. If that was the case, however, there would be no need for the test which has been applied continually requiring that it be shown that the action was at least a cause of disclosure, and placing the burden on the party making a claim for fees to show that is true.

By eliminating the causation requirement, the Court of Appeals has held that commencement of an action alone is all that is required for a plaintiff to obtain an award of attorney's fees, unless it is found that an exemption applied. But without

a causation requirement an award of fees may be available if an authority properly fails to disclose records initially but discloses them after commencement of litigation. Then the authority would have the burden to establish that *it did not disclose* the records in question because an action was commenced.

III. FRIENDS' INTERPRETATION OF WIS. STAT. § 19.85(1)(E) IGNORES THE LAW OF THE AUTHORITY OF MUNICIPAL GOVERNING BODIES

Friends does not dispute the City's claim that only its Common Council had the authority to accept and approve any contract with Big Top or the law cited in support of that claim. The claim may therefore be considered admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App. 1994).

Wis. Stat. § 19.35(1)(a) states that "[t]he exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 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." If an exemption under s. 19.85 is relied on in withholding a

record, it would seem appropriate to consider whether a governmental body did or would appropriately hold a closed session under that exemption. The Court of Appeals stated that "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." ***Friends***, 2020 WI App 61 at ¶ 48; P-App. 127-128.

In determining whether an exemption applied, it must be presumed that a closed session would be or was held. There is no requirement that a governmental body go into closed session whenever notice of a closed session is given. The law requires a body to vote on whether to enter closed session. Wis. Stat. Wis. Stat. § 19.85(1). Because whether or not a closed session was held is not pertinent, the City will not address Friends' claim that the City has made misstatements in this respect.

Friends believes that in order for the exception to the Open Meeting Law set forth in Wis. Stat. § 19.85(1)(e) to apply, the City would have to be engaged in a "competition" of some sort. On page 19 of its brief, therefore, it claims that "there was no way that disclosure of those documents could impact the

City's ability *to compete with another entity* for something they had already disclosed to Big Top." (Emphasis Added). On page 20 it states that "the reality appears to be that it was really Big Top *that was competing for* the baseball franchise or rights, not the City. The City's use of the competitive/bargaining exception to withhold records from the public (but not from Big Top) ends up using the exception to the benefit of a private party." (Emphasis Added).

The exemption specifically states that a closed session may be held when "competitive or bargaining reasons" require such a session. The City and Big Top were engaged in negotiations over the terms of a contract. Parties negotiating a contract do not "compete." They bargain in the course of negotiations. Such negotiations may be grounds for a closed session under this exemption, according to the case on which Friends and the Court of Appeals primarily rely, ***State ex rel. Citizens for Responsible Development v. City of Milton***, 2007 WI App. 114, 300 Wis. 2d 649, 9 N.W. 2d 640. There, the court noted that developing a negotiating strategy or, e.g., deciding on a price to offer to purchase land are examples of circumstances in which competitive or bargaining reasons may support a closed session. ***Id.***

The Court of Appeals did not maintain that negotiations over a contract could never justify a closed session under the exemption or that it is necessary that a governmental body be engaged in some sort of competition. The Court of Appeals stated that the Circuit Court's concern regarding "negotiating a contract in public" was well founded. ***Friends***, 2020 WI App 61 at ¶ 50; P-App. 128. The Court of Appeals found that Wis. Stat. § 19.85(1)(e) did not apply for other reasons.

According to the Court of Appeals, it did not apply because the City did not establish, specifically, that withholding draft contracts was appropriate as part of negotiations with Big Top. According to the Court of Appeals: "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. 127-128. (Emphasis in original).

This is why an understanding of the authority of the Common Council is required to understand the applicability of this exemption. The Court of Appeals believed the contract between the City and Big Top had already been negotiated before it was seen and reviewed by the Common Council. That

cannot be the case because as was held in ***Town of Brockway v. City of Black River Falls***, 2005 WI App 174, 285 Wis.2d 703, 702 N.W.2d 418, a Common Council is not bound by negotiations involving city officials, and the authority to create a contract is exclusively that of the Common Council unless expressly delegated. ***Id.*** at ¶ 24.

Because the draft contracts were not finished documents, and could be approved, disapproved, disregarded or modified, negotiations were not at an end, and the contracts remained at issue. The City Attorney stated the significance of this in his letter explaining why those documents were being withheld: "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 171-172.

The discussions of the Common Council would not take place in a vacuum, but would arise from the draft contracts as it was viewing them for the first time. Discussion about the

drafts could impact future negotiations between the parties. The Court of Appeals assumed that the draft contracts were set in stone and improperly held the public discussion of their terms would not significantly impact any negotiations.

The Common Council may have found that the draft contract was fundamentally objectionable. It may have decided that an entirely different approach should be taken; it may have set "different parameters" for negotiations, it may have adopted different goals. A review of the terms of the draft contract and discussion of them would be required for this to take place. The drafts themselves may have prompted discussion and direction from the Council and the manner of its reaction to them could reveal future negotiation strategy. That discussion could provide information or directions which would impair the City's ability to negotiate in the future if held in public and available for review by Big Top.

The Common Council determined not to accept or approve the draft contracts and took no action related to them. However, that does not mean that the City did not appropriately invoke the exemption in reasonable anticipation that disclosure

before the Common Council had seen them would have negative consequences.

CONCLUSION

The Court of Appeals' has modified the well-established test used to determine whether a plaintiff in an action under the Public Records Law is entitled to an award of attorney's fees. Its decision has the effect that an authority will always be subject to such an award whenever it improperly relies on an exemption to the disclosure requirements or fails to properly employ the balancing test used in deciding whether or not records may be withheld. The Court of Appeals change to the law also shifts the burden of proof on when attorney's fees may be awarded from the plaintiff to the defendant in a Public Records Law action.

The Court of Appeals decision that the draft contracts were improperly withheld until the day after their review by the Common Council is based on a misunderstanding of how municipal contracts are negotiated and approved, and ignores the authority of municipal governing bodies.

The City respectfully requests that this Court reverse the decision of the Court of Appeals.

Dated at Two Rivers, Wisconsin this 27 day of April, 2021.

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Certification as to Form and Length Requirements

I hereby certify that this reply brief meets the requirements set forth in Wis. Stat. § 809.62(4)(a) for a brief produced with a proportional serif font. This brief contains 2,974 words.

John M. Bruce

Subscribed and sworn to before me
this 27th day of April, 2021.

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

EMILY A. WALKER NOTARY PUBLIC STATE OF WISCONSIN

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 27th day of April, 2021.

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

EMILY A. WALKER NOTARY PUBLIC STATE OF WISCONSIN