STATE OF WISCONSIN
WISCONSIN COURT OF APPEALS
DISTRICT II

AMERICAN OVERSIGHT,

Petitioner-Respondent,

v.

Appeal No. 22AP1532
Circuit Court No. 21CV2440

ROBIN VOS, EDWARD BLAZEL and
WISCONSIN STATE ASSEMBLY,

Respondents-Appellants.

RESPONDENTS-APPELLANTS' BRIEF

**APPEAL FROM A FINAL ORDER
ENTERED ON AUGUST 2, 2022
IN THE CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE VALERIE L. BAILEY-RIHN PRESIDING**

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ISSUES PRESENTED FOR REVIEW

1. Whether the Circuit Court erred in finding that pursuant to Wis. Stat. § 19.36(3) Vos and Blazel were responsible for producing records from contractors who were parties to contracts with the Assembly.

   Circuit Court's Decision: In its Mandamus Order, the Circuit Court found that Vos and Blazel were responsible for producing contractors' records under Wis. Stat. § 19.36(3) as to the contractors that had entered into contracts with the Assembly.

2. Whether the Circuit Court abused its discretion in finding Respondents in contempt of the Mandamus Order.

   Circuit Court's Decision: The Circuit Court found that Respondents failed to produce responsive documents and were therefore in contempt of its Mandamus Order, even though it never found that the Respondents had custody of any record that they intentionally failed to produce.

3. Whether AO was entitled to attorneys' fees for the litigation of its unsuccessful contempt motion.

   Circuit Court's Decision: The Circuit Court found that while the contempt proceedings did not lead to the production of any

additional responsive documents, the contempt motion was successful as the contempt proceedings uncovered that a third-party possessed responsive documents, even though there was nothing to show that Respondents possessed the documents after AO's request and before August 31, 2021.

4. Whether under Wisconsin's Public Records Law, a non-profit advocacy organization may recover attorneys' fees for work performed on its behalf by its in-house counsel.

   Circuit Court's Decision: The Circuit Court found that AO is entitled to attorneys' fees for its in-house counsel. The Circuit Court reasoned that without an award of attorneys' fees, there would be "little incentive" for a similarly situated entity to bring a public records action.

5. Whether the Circuit Court erred by awarding AO attorneys' fees as damages under Wis. Stat. § 785.04(1)(a) for work performed by AO's in-house counsel on its own behalf.

   Circuit Court's Decision: In its Order on AO's contempt motion, the Circuit Court ordered Vos and the Assembly to pay AO's costs and fees incurred in bringing the contempt motion.

6. In the event this Court finds AO is entitled to attorneys' fees under the PRL or Wis. Stat. § 785.04(1)(a), did the Court abuse its discretion in awarding $98,073.27 in attorneys' fees?

   Circuit Court's Decision: Without any substantive analysis or explanation, the Circuit Court simply awarded AO all of the attorneys' fees it sought, totaling $98,073.27.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Respondents, Robin Vos, Edward Blazel, and Wisconsin State Assembly, believe that oral argument and publication are necessary. The issues raised in this action under Wisconsin's Public Records Law, Wis. Stat. § 19.31, et. seq., ("PRL"), are issues of first impression that warrant further oral argument and publication. Similarly, the recovery of attorney fees for a non-profit's in-house counsel under the PRL or Wis. Stat. § 785.04(1)(a) is also an issue of first impression.

STATEMENT OF THE CASE AND THE FACTS

A. Summary of Case and Issues Presented

Petitioner, American Oversight ("AO"), brought this mandamus action against the Wisconsin State Assembly (the "Assembly"), Edward Blazel ("Blazel") as custodian for the Assembly, and Robin Vos ("Vos") (collectively, "Respondents")

demanding production of certain documents pursuant to various public records requests. (*See* R.4.) On November 22, 2021, the Circuit Court signed an order for mandamus relief ("Mandamus Order"). (R.65.) The Mandamus Order directed Respondents to "produce contractors' records that existed through August 30, 2021, and that are responsive to the requests cited in the Petition, to the Petitioner within 10 business days from the date of the hearing, or by Friday, November 19, 2021." *Id.*

The Mandamus Order was fundamentally flawed as to Vos and Blazel as they did not have contracts with any contractors and therefore, they could not be responsible for the contractors' records under Wis. Stat. § 19.36(3). (*See* R.71.) Despite its flawed nature, Respondents complied with the Mandamus Order and produced all responsive records in their possession on November 19, 2021. *See* (R.69-73.) Respondents specifically identified that the production included "the remainder of the records that are responsive to the public records request that your client served on the respondents" and that "no documents are being withheld." (R.70.)

Despite AO receiving all the responsive documents in Respondents' possession, AO filed a contempt motion alleging that Respondents were not in compliance with the Mandamus Order. (R.67.) AO's motion was based entirely on its speculative assertion that there must be more documents than those produced by Respondents. (*Id.*, pp.6-10.) AO did not identify any document that was being withheld, nor did it show that Respondents did not produce responsive contractors' records that existed through August 30, 2021. (*Id.*) *AO's* motion was far from sufficient to establish a prima facie case of contempt.

Notwithstanding glaring deficiencies in AO's contempt motion, the Circuit Court found that AO established a prima facie case that Respondents were in violation of the Mandamus Order and then found Respondents in contempt. (R.107, pp. 11-15; R.99, 8:16-21.) The Circuit Court also entered purge conditions that required Respondents to show that they "complied with their duties under the public records law to search for responsive records created by their contractors." (R.107, pp.2, 14-15.)

After Respondents submitted written documentation and evidentiary support to address the Circuit Court's purge conditions, the Circuit Court found that Respondents purged their

alleged contempt. (R.183; R.187.) No additional documents were by produced Respondents in the contempt proceedings. (*Id.*; R.108-114.)

The Circuit Court awarded AO $16,836.32 in attorneys' fees and $300 in statutory damages pursuant to its mandamus action under Wis. Stat. § 19.37(2). (R.204.) The Circuit Court also awarded AO $81,236.55 in attorneys' fees pursuant to Wis. Stat. § 785.04(1)(a) as damages in the contempt proceedings. (*Id.*). The awards under § 19.37(2)(a) and § 785.04(1)(a) included work performed by AO's in-house counsel and its retained counsel. (R.214.)

On appeal, the Respondents seek review of the following:

1. Whether the Circuit Court erred in finding that pursuant to Wis. Stat. § 19.36(3) Vos and Blazel were responsible for producing contractors' records when it was undisputed that they were not parties to the contracts.
2. Whether the Circuit Court abused its discretion in finding Respondents in contempt of the Mandamus Order.
3. Whether AO was entitled to damages for the litigation of its unsuccessful contempt motion.

4. Whether the Circuit Court erred by finding that AO incurred damages in the form of attorneys' fees for work performed by its in-house counsel in the contempt motion.
5. Whether under Wisconsin's Public Records Law, AO was entitled to attorneys' fees for work performed by AO's in-house counsel in the PRL mandamus action.
6. In the event this Court finds AO is entitled to attorneys' fees incurred in its contempt motion and/or under the PRL, did the circuit court abuse its discretion in awarding fees without any explanation?

B. Factual Background

AO brought this mandamus action against the Respondents demanding production of documents pursuant to various public records requests. (R.4.) On November 22, 2021, the Circuit Court signed a Mandamus Order directing Respondents to "produce contractors' records that existed through August 30, 2021, and that are responsive to the requests cited in the Petition, to the Petitioner within 10 business days from the date of the hearing, or by Friday, November 19, 2021." (R.65.)

The Mandamus Order was fundamentally flawed as to Blazel and Vos as neither were parties to a contract with contractors and therefore, they could not be responsible for producing contractors' records under Wis. Stat. § 19.36(3). (R.71.) Although the Mandamus Order was inherently flawed, Respondents complied with it on November 19, 2021, by producing all responsive documents in their possession through August 30, 2021. (*See* R.69-73.) Respondents specifically identified that the document production included "the remainder of the records that are responsive to the public records request that your client served on the respondents" and that "no documents are being withheld." (R.70.).

Despite receiving all responsive documents in Respondents' possession, AO filed a contempt motion alleging that Respondents were not in compliance with the Mandamus Order. (R.67.) AO's motion was based entirely on the speculation that there must be more documents than those produced by Respondents. (R.68.) AO did not identify any document that was being withheld, nor did it show that Respondents did not produce responsive contractors' records that existed through August 30, 2021. (*Id.*)

Notwithstanding the glaring deficiencies of AO's contempt motion, at the beginning of an evidentiary hearing on January 24, 2022, the Circuit Court determined, that AO made a prima facie case that Respondents were in contempt of the Mandamus Order. (R.99, 8:16-21.) The Circuit Court did not provide any explanation for its finding. (*Id.*) On March 30, 2022, the Circuit Court entered an Order finding the Vos and the Assembly were in contempt of the Mandamus Order. (R.107.)

In the Order, the Circuit Court found that AO established a prima facie case for contempt in light of AO's submission of a document that allegedly should have been produced by Respondents but was not. (*Id.,* pp.9, 11.) The document was an email dated August 17, 2021, from Michael Gableman to Vos and another individual. (R.78.) AO did not submit any evidence Respondents had custody of this email at the time AO made its requests or that they possessed it as of August 30, 2021.[1] (R.73,; R.77.) In its Order, the Circuit Court entered purge conditions that required Respondents to show that they have "complied with their

[1] As the Court is aware, legislators are permitted to delete records any time before they have been requested under the PRL. Wis. Stat. § 16.61. Thus, the mere fact that an email was sent to Vos is not proof that he possessed it on the date that it was later requested by AO.

duties under the public records law to search for responsive records created by their contractors." (R.107, pp.2, 14-15.)

On April 13, 2022, Respondents submitted evidentiary support of their efforts to search for records and to address the purge conditions. (R.108-114.) A hearing on the purge conditions was held on May 4, 2022. (R.133.) At that time, the Circuit Court asked for additional information in the form of an affidavit from Mr. Gableman and set a continued hearing for June 23, 2022. (*Id.*)

At that June 23, 2022, hearing the Circuit Court received Mr. Gableman's affidavit and heard his live testimony. (R. 170; R. 183.) There was no showing that any of the Respondents failed, much less intentionally failed, to produce contractors' records that existed through August 30, 2021, and that were responsive to AO's requests. (*Id.*) The Circuit Court concluded that Respondents purged their contempt. (R.183; R.187.) No additional documents were produced as a result of the contempt proceedings. (*Id.*; R.108-114.)

On July 28, 2022, the Circuit Court held a hearing on AO's motion to determine costs, fees, and damages. (R.214.) AO moved for $16,836.32 in costs fees pursuant to Wis Stat. § 19.37 for the merits of the mandamus action and $76,274.12 in fees pursuant to

Wis. Stat. § 785.04(1)(a) for the contempt phase. (R.189, pp.5-6.) The Circuit Court awarded every penny of AO's claimed costs, fees, and damages. (R.214.)

On August 2, 2022, the Circuit Court entered an Order awarding AO $16,836.32 in attorneys' fees pursuant to Wis. Stat. § 19.37(2). (R.204; R.205.) The Circuit Court also awarded AO $81,236.55 in attorneys' fees pursuant to Wis. Stat. § 785.04(1)(a). (*Id.*) The Court's award under both statutes included work performed by AO's in-house counsel. (*See* R. 214.)

On September 8, 2022, Respondents filed a notice of appeal. (R.208.)

STANDARD OF REVIEW

A. Interpretation of Wisconsin Statutes.

The application of the Public Records Law to undisputed facts is a question of law that the Court of Appeals reviews *de novo*. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 21, 284 Wis. 2d 162, 177, 699 N.W.2d 551, 559. The interpretation of Wis. Stat. § 785.04 is a question of law and is reviewed without deference to the trial court's reasoning. *Seymour v. Eau Claire*, 112 Wis. 2d 313, 319, 332 N.W.2d 821, 823 (Ct. App. 1983).

B. Finding of Contempt.

A circuit court's use of its contempt power is a discretionary act, which requires this Court "to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." *In re Marriage of Gomez v. Leszczynski*, 2016 WI App 80, 372 Wis. 2d 185, 888 N.W.2d 23.

C. Award of Attorneys' Fees.

"[T]he proper standard upon review of attorney fees is that the trial court's determination of the value of these fees will be sustained unless there is an abuse of discretion." *Standard Theatres v. Dep't of Transp., Div. of Highways*, 118 Wis. 2d 730, 747, 349 N.W.2d 661, 671 (1984).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ISSUING THE WRIT OF MANDAMUS AGAINST VOS AND BLAZEL AS THEY WERE NOT A PARTY TO ANY CONTRACT WITH THE CONTRACTORS.

This mandamus action has always focused on AO's requests for contractors' records related to Wisconsin's investigation of the 2020 election. This was clear from the Complaint:

> 47. In total, in July and August, American Oversight submitted to Speaker Vos seven requests and received responses to five of them. In no case has Speaker Vos provided any records that appear to have been maintained by any contractors. See Table 1. 48. American Oversight submitted to Clerk Blazel the same seven Requests. While American Oversight has received responses to all of them, in no case has Clerk Blazel provided **any records that appear to have been maintained by any contractors**.
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> ***
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> 49. Respondents have improperly withheld and delayed **access to the Assembly's contractors' records**, despite their clear obligation to provide such records "to the same extent as if the record[s] were maintained" by the Respondents. Wis. Stat. § 19.36(3).
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> ***
>
> 57. Respondents are "authorities" and "custodians" for the **records of the Assembly's contractors** as those terms are used in Wis. Stat. §§ 19.32(1) and 19.33, and are the proper recipients of requests for the records of their contractors, *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, ¶ 74, 310 Wis. 2d 397, 751 N.W.2d 736.

(R.4, ¶¶ 47, 49, 57 (emphasis added).) AO's application for an alternative writ of mandamus was similarly focused:

> 7. The proper recipient of a **request for contractors' records** is the authority. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, ¶ 74, 310 Wis. 2d 397, 751 N.W.2d 736.
>
> 8. The Wisconsin Assembly hired **contractors** in June 2021 to investigate the November 2020 election; the contractors included former Wisconsin Supreme Court justice Michael Gableman, retained as a supervising attorney, and Mike Sandvick and Steven Page, retained as "Integrity Investigators." (Colombo Aff., ¶¶ 3, 6, 12 & Ex. H, A-000006– A-000015.)
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> ***
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> 12. Nothing in the records the Petitioner has received to date indicates that Respondents have provided **records of their contractors** that were produced or collected under their contracts with the Wisconsin Assembly. Moreover, nothing indicates that the Respondents-Appellants even requested the **records of their contractors** or made any attempt to obtain the **requested contractor records**.

> ***
>
> 17. Respondents indicated that their responses are final, but Petitioner has not received **the requested contractor records**, and Respondent has not provided a timeline for a response to Petitioner's outstanding requests. (Colombo Aff., ¶¶ 6-7 & Exhs. H-S.)

(R.6, ¶¶ 7, 8, 12, 17 (emphasis added).) Vos and Blazel have consistently asserted that they are not responsible for these contractors' records. In their Answer, Vos and Blazel asserted:

> 9. Robin Vos is an adult resident of the State of Wisconsin and an elected member of the Wisconsin State Assembly (the "Assembly"), representing the 63rd Assembly District. Vos is an "authority" as that term is defined in Wis. Stat. § 19.32(1). He is not, however, an authority in regard to records related to Justice Gabelman's investigation.
>
> 10. The Chief Clerk is an "office" under Wis. Stat. §§ 19.32(1) and 19.42(13)(e), and Assembly Chief Clerk Blazel is an "authority" as that term is defined in Wis. Stat. § 19.325(1). He is not, however, an authority in regard to records related to Justice Gableman's investigation.

(R.56, ¶¶ 9, 10 (emphasis added); *see also* R. 108

The Mandamus Order singularly focused upon contractors' records:

> Respondents shall produce contractors' records that existed through August 30, 2021, and that are responsive to the requests cited in the Petition, to the Petitioner within 10 business days from the date of the hearing, or by Friday, November 19, 2021.

(R.65.) Thus, the Complaint, Writ, Answer, and the Mandamus Order all focused upon, and were limited to, the production of contractors' records related to Wisconsin's investigation of the 2020 election.

Neither Vos nor Blazel had a contract with anyone regarding the investigation of the 2020 election. (R.71.) The only party to the contracts with the election investigators was the Assembly. (*Id.*, pp.1-3.) This was recognized by Judge Remington in a separate action and is irrefutable on the record in this matter as well. *See American Oversight v. Assembly Office of Special Counsel*, 2021-cv-3007, Decision and Order, Doc. 165, p. 34 ("[T]he contractors whose records American Oversight seeks do not have contracts with each of the three of the legislative Respondents– only the assembly (sic).").[2] Because neither Vos nor Blazel had a contract with any election investigator, they cannot be responsible for producing contractors' records under Wis. Stat. § 19.36(3). *See WIREdata, Inc. v. Vill. of Sussex,* 2008 WI 69, ¶ 84, 310 Wis. 2d 397, 751 N.W.2d 736 (holding the authority who is party to the

[2] The Court can take judicial notice of facts and documents outside of the record when: 1) the fact for which judicial notice is requested is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; and 2) a party asks the court to take judicial notice and gives the court the necessary information. Wis. Stat. § 902.01(2)(b), (4). *See Perkins v. State*, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973) recognizing that the supreme court has taken judicial notice of state records that are available at the seat of government in Madison that are easily accessible. Judge Remington's decision is available at the Dane County Courthouse and is contained in the record before this Court in 22AP636 and 22AP1516.

contract is solely responsible for providing access to contractor's records.).

The only party in this case that could be subject to a writ of mandamus directed to the production of contractors' records related to the election investigation was the Assembly, not Vos or Blazel. The Circuit Court erred in ordering Vos and Blazel to produce contractors' records pursuant to its Mandamus Order.

II. THE CIRCUIT COURT ERRED IN FINDING THAT AO ESTABLISHED A PRIMA FACIE SHOWING THAT THE COURT'S LAWFUL ORDER HAD BEEN DISOBEYED.

a. Vos and Blazel Could Not Be Held in Contempt of the Unlawful Mandamus Order.

To find a party in contempt, it must be shown that the party violated a lawful order of the court. *In re Paternity of D.A.A.P.*, 117 Wis. 2d 120, 126, 344 N.W.2d 200, 203 (Ct. App. 1983) (citing *In re Honorable Charles E. Kading*, 70 Wis. 2d 508, 543b, 235 N.W.2d 409 (1975), *reh'g denied*, 70 Wis. 2d 543b, 238 N.W.2d 63, 63-64 (1976)). It is the "[i]ntentional disobedience of a lawful court order [that]constitutes contempt of court. *Id.*

The Circuit Court's finding of contempt against Vos and Blazel cannot stand. As explained above, because neither Vos nor Blazel had a contract with any election investigator, they cannot be responsible for the production of contractors' records pursuant to Wis. Stat. § 19.36(3). The Mandamus Order requiring Vos and Blazel to produce those records was therefore unlawful. As such, Vos and Blazel cannot be held in contempt for failing to comply with the invalid Mandamus Order.

b. AO Failed to Establish a Prima Facie Case That Any Party Was in Contempt.

The Circuit Court also abused its discretion by failing to logically interpret the facts, failing to apply a proper legal standard, and failing to use a rational process to reach a conclusion that a reasonable judge could reach when it found Respondents in contempt. To support a motion for contempt based upon a violation of a court order, a complainant must make a prima facie showing that the order has been violated. *See In re Marriage of Noack*, 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989). Only if a prima facie showing is made, does the burden then shift to the alleged contemnor to show that its conduct was not contemptuous. *Id.* Despite this clear standard, the Circuit Court allowed AO to move

forward with its contempt motion without showing any factual basis for its claim that Respondents were in contempt.

AO's contempt motion set forth a "factual background" that was heavy on self-serving conclusions and hyperbole, not facts. The first three pages of its motion contained "facts" that were nothing but a recitation of the case's procedural background. (R. 68, pp.2-4.) Finally, on page four, AO recited the Mandamus Order and then simply concluded that Respondents had not complied with the Order. (*Id.*, p.4.) AO's "facts" consisted of claims that:

- The cover letter accompanying the November 19, 2021, production made no mention of contractors' records.
- At most, 27 pages of the 148 produced pages may have been contractors' records, based on a title page that said "Open Records produced by WI Special Counsel 11/19/21."
- The 27 pages contain records which were either already produced or appear to be from Respondents and not created by the Assembly's contractors, such as a copy of the Assembly Committee on Assembly Organization's mail ballot motions relating to the special counsel and memoranda from the Wisconsin Legislative Reference Bureau.

(*Id.*, p.5.)

AO failed to set forth any other evidentiary facts to support a claim that Respondents possessed or intentionally failed to produce responsive contractors' records that existed through August 30, 2021. (*See id.*) AO's contempt motion was grounded entirely on AO's mere suspicion that there "must be" more documents. (*Id.*).

AO relied upon unsupported assumptions that it was "very likely" that more responsive documents existed. (R.189, p.3.). For instance, AO stated that "none of the work product described in the Gableman's, Sandvick's, or Page's contracts has been produced" and no "no contractor communications" were produced. (R.68, p.8.) However, AO did not provide any evidentiary support to show that any such work product or communications was ever created. (*Id.*) AO simply concluded that there must be more records and therefore the "failure" to produce those records must be contempt. (*Id.*)

Despite the glaring deficiencies in AO's contempt motion, the Circuit Court found that AO made a prima facie case of contempt. (R.107, pp.11-15; R.99, 8:16-21.) The Circuit Court justified its conclusion by citing to a single document that AO claimed was not produced by Respondents. (R.107, pp.9, 11.) That document was an

email from Mr. Gabelman to Vos and another dated August 17, 2021. The email was produced to AO by a different governmental body pursuant to an unrelated public records request. (R.78.) AO never submitted any evidence to the Circuit Court that this single document was possessed by Respondents when its request was made, or that it existed as of August 30, 2021. (*See* R.73; R.77.) Without such evidence, the Circuit Court could not reasonably conclude that Respondents intentionally failed to produce this single document. The Circuit Court abused its discretion in finding that AO established a prima facie case of contempt.

III. AO CANNOT RECOVER DAMAGES FOR ITS UNSUCCESFUL CONTEMPT PROCEEDING.

a. AO Did Not Receive Any Relief from the Contempt Proceedings and Therefore It Is Not Entitled to Damages.

To be entitled to recover damages, a plaintiff must be successful in prosecuting its claim. E.g., *Harmann v. French*, 74 Wis. 2d 668, 673, 247 N.W.2d 707, 710 (1976); *Chris Hinrichs & Autovation Ltd. v. Dow Chem. Co.*, 2020 WI 2, ¶80, 389 Wis. 2d 669, 937 N.W.2d 37 (noting that only a successful plaintiff is entitled to recover damages).

If a contempt proceeding is successful, the moving party is entitled to recover "a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court" (Wis Stat. § 785.04(1)(a)) and those damages include attorney's fees. *Seymour*, 112 Wis. 2d at 320.

Here, AO was not successful in the contempt proceeding. The entire contempt proceeding, from motion through purge, failed to show that Respondents possessed and failed to produce any responsive document between the date of the request and August 30, 2021. (R.108-114.) Despite this indisputable fact, the Circuit Court ruled that AO's contempt motion was successful. (R 214, 20:14-24:14). The Circuit Court reasoned that the contempt motion was successful as the contempt proceedings uncovered that a third-party, Mr. Gableman, may have had responsive documents, but he deleted them. (*Id.*)

The fact that Mr. Gableman may have deleted potentially relevant documents does not constitute contempt by Respondents. AO failed to show that any responsive records were deleted when its requests were pending.[3] AO also failed to show that the

[3] Regardless of the propriety of the destruction of records, one cannot seek relief under the Public Records Law for an alleged violation of the records retention laws "because, pursuant to *Zinngrabe*, an agency's alleged failure to keep

Respondents had possession of these deleted documents after AO's request or as of August 30, 2021. Further, if any records were deleted by Mr. Gableman, it would have been impossible for Respondents to produce them originally or in response to the Mandamus Order. "A person cannot be punished for contempt for failing to comply with an impossible order." *Seymour*, at 318.

Accordingly, the only thing AO achieved in the contempt proceedings was an understanding as to why there were so few records responsive to its requests. But the purpose of a Wis. Stat. § 19.37 mandamus action is not to educate a curious litigant: "A writ of mandamus under Wis. Stat. § 19.37(1) has a singular purpose: 'to compel performance of a particular act by . . . a governmental officer, usu. to correct a prior action or failure to act." *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶43 (Grassl Bradley, J., concurring). Satisfying AO's curiosity is not substantial success. Accordingly, AO did not achieve succeed in the contempt proceedings. Without success AO should not have been awarded any damages for litigating its contempt motion.

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sought-after records may not be attacked under the public records law." *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, 742 N.W.2d 530 (citing *State ex rel. Zinngrabe v. School Dist. of Sevastopol*, 146 Wis. 2d 629, 634, 431 N.W.2d 734 (Ct. App. 1988)).

b. Damages in a Contempt Proceeding May Include Attorneys' Fees Actually Incurred, But Not For Reasonable Fees Attributable To In-House Attorneys.

Section 785.04, Stats., authorizes the recovery of damages if one is successful in bringing a motion for contempt:

> Sanctions authorized.
>
> (1) Remedial sanction. A court may impose one or more of the following remedial sanctions:
>
> (a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

Wis. Stat. § 785.04(1)(a). Thus, a contempt proceeding only permits the recovery of damages "for a loss or injury suffered by the party as the result of a contempt."

As the Court explained in *Seymour*, Chapter 785 is not a prevailing party statute in which the prevailing party is entitled to an award of attorney's fees. Rather, the Court found that historically, the rationale for allowing an award of attorneys' fees in a contempt proceeding was to indemnify a party for the actual loss and damage incurred in hiring an attorney to pursue the contempt action, and thus attorneys' fees can be awarded as an award of damages under Wis. Stat. § 785.04(1)(a). *Seymour,* 112 Wis. 2d at 319 (citing *Stollenwerk v. Klevenow*, 151 Wis. 355, 364, 139 N.W. 203, 206 (1912)).

In both *Seymour* and *Stollenwerk*, the attorneys' fees awarded indemnified the parties for actual losses they incurred as a result of the contemptuous conduct. The *Seymour* Court made clear that an award of attorneys' fees under Wis. Stat. § 785.04 awards damages, not reasonable attorneys' fees. *Seymour*, 112 Wis. 2d at 320. Accordingly, unlike a proceeding involving a prevailing party fee requirement, in a contempt proceeding attorneys' fees can only be awarded as damages to make a party whole for expenses it actually incurred.

AO did not claim that it actually incurred an expense of its in-house attorneys' fees in pursuing this contempt motion. Rather, it claimed that its in-house staff spent a certain number of hours on this matter, and then multiplied those hours by a fictious hourly "market rate" to reach a number that reflects what it might have been charged by private attorneys – a claimed total amount of $51,196. (R.192.)

This calculation impermissibly melds the concepts of a prevailing party fee award and damages. The calculation of a reasonable number of hours multiplied by a reasonable market rate is a lodestar calculation, not an "expense actually incurred." See, *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶29, 275

Wis. 2d 1, 683 N.W.2d 58. The Circuit Court erred in awarding reasonable attorneys' fees to AO for work performed by its in-house counsel in the litigation of the contempt motion because those fees were never actually incurred by AO. The Circuit Court's award of fees impermissibly changed Wis. Stat. § 785.04 to a prevailing party statute.

IV. THE CIRCUIT COURT ERRED IN AWARDING AO ATTORNEYS' FEES UNDER WISCONSIN'S PUBLIC RECORDS LAW FOR WORK PERFORMED BY ITS IN-HOUSE COUNSEL.

AO requested the Circuit Court to award its attorneys' fees pursuant to Wis. Stat. § 19.37. The Circuit Court awarded the requested fees over Respondents' objection that under Wisconsin's Public Records Law attorneys' fees for work performed by AO's in-house counsel is not recoverable. (R.193, pp.16-22; R.214, 28:8-12.) Relying on *Shands v. Castrovinci*, 115 Wis. 2d 352, and *Richland School District v. Department of Industry, Labor & Human Relations Board*, 174 Wis. 2d 878, the Circuit Court was persuaded that recovery of in-house attorney's fees was permissible.

The Circuit Court erred in its analysis as neither *Richland* nor *Shands* supports that a non-profit advocacy organization may recover attorneys' fees for work performed by its in-house counsel on its own behalf as a PRL litigant. In *Shands*, the plaintiff was represented by a non-profit legal service organization that provided *pro bono* legal services to indigent clients – Legal Action of Wisconsin, Inc. ("LAW"). *Id.* at 355, 360. The small claims court found for the plaintiff and awarded the plaintiff attorneys' fees pursuant to Wis. Stat. § 100.20(5). *Id.* at 354. The landlord appealed the award.

One of the issues on appeal was whether the plaintiff could be awarded attorneys' fees despite being provided free representation by LAW. *Id.* at 359-60. The *Shands* Court held that the award of attorneys' fees was proper. The *Shands* Court held the public policy factors underlying § 100.20(5) supports the award of attorneys' fees when a plaintiff is being provided *pro bono* legal services:

> By bringing actions on behalf of indigent clients, LAW advances the objectives of the statute by litigating individual claims, by enforcing the more general public policy objective of protecting tenants' rights, and by encouraging landlords to comply with their statutory duties. In advancing these objectives, LAW is no different from the private attorney litigating like claims. Similarly, LAW has finite financial resources and, like the

> private bar, cannot absorb the costs of litigation itself without limiting the number of cases it can pursue.

Shands, at 360-61 (quoting *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092 (7th Cir. 1975).)

AO does not provide free legal services to indigent clients, or any clients for that matter. AO represents itself by using "public records requests backed by litigation" to further its mission.[4] AO decides what issues are important to its mission and then uses its in-house lawyers to pursue claims on its own behalf. This is a far cry from the services LAW provides to indigent clients. In 2018, AO took in $3,831,195 in donations and its entire expense for salaries was $1,760,061.[5] Unlike a non-profit firm that represents indigent clients, AO is quite able to cover the costs of litigating the issues that it chooses to pursue.

The Court's holding in *Richland* also does not support a claim that AO should be able to recover fees under the PRL. *Richland* involved the Wisconsin Family and Medical Leave Act. *Richland*, at 886. The School District was ordered to pay the

[4] See American Oversight, *About* https://www.americanoversight.org/about (last visited Nov. 9, 2022.)

[5] ProPublica, *American Oversight Inc. Full text of Form 990 for Fiscal Year Ending Dec. 2018* https://projects.propublica.org/nonprofits/organizations/815294830/201921359349310152/IRS990 (last visited Nov. 9, 2022).

employee's attorneys' fees after he prevailed in his FMLA action. *Id.* at 887.

Like in *Shands*, an issue on appeal was whether the plaintiff could be awarded attorneys' fee for the *pro bono* legal services provided to him. *Id.* at 911. The Court phrased the issue as: whether "the statutory language 'reasonable actual attorney fees' precludes awards of attorney fees to a prevailing party who is represented without charge." *Richland*, at 911.

The *Richland* Court upheld the award of attorneys' fees and mimicked *Shands'* reasoning:

> Public interest law firms and nonprofit legal organizations, like the private bar, have limited resources. Public interest and nonprofit groups, like private attorneys who provide pro bono services, depend on awards of attorney fees to defray the costs of providing representation free of charge.

Id. As pointed out above, AO does not provide *pro bono* services to clients, and it does not litigate claims on behalf of those who cannot afford counsel. Rather, it serves itself.

Shands and *Richland* confirm that Wisconsin's fee-shifting statutes generally allow for the recovery of attorneys' fees when *pro bono* representation is provided to a plaintiff by a legal advocacy group. However, this public policy is inapplicable to the instant case. AO is not a non-profit legal advocacy group that

provides legal services to indigent clients. AO also did not provide *pro bono* legal services to a plaintiff – AO is ***the*** plaintiff. Thus, whereas *Shands* and *Richland Center* allowed awards of attorneys' fees to non-profit entities who provided *pro bono* legal services to a plaintiff, AO asks this Court to go a step further and award attorneys' fees for work AO's own in-house counsel performed on its own lawsuit to advance its own interests. The policy considerations from *Shands* and *Richland Center* are not present here.

AO's request is more like the request that was specifically rejected by the Wisconsin Supreme Court in *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 295, 477 N.W.2d 340, 348 (Ct. App. 1991). In *State ex re. Young*, the Wisconsin Supreme Court held that an attorney who represents himself is not entitled to attorneys' fees under § 19.37's fee shifting provisions:

> The attorney who represents himself
>
> is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom.

Id. at 295, (quoting *Kay v. Ehrler*, 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991)). If an attorney who is a party to a § 19.37

mandamus cannot recover for his time in prosecuting that action, it logically follows that a plaintiff who is a non-profit, cannot recover its in-house attorneys' fees under § 19.37.

There is vast body of federal authority under federal fee shifting statutes and the Freedom of Information Act that have allowed a for-profit corporation to recover attorney's fees for in-house counsel. *See Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312, 322 (2006). The language of the federal FOIA and the Wisconsin Public Records Law are not, however, identical. *See Friends of Frame Park,* at 57. Additionally, this case law largely relies upon *dicta* from *Kay*. Other state's appellate courts have recognized that this *dicta* under the federal FOIA does not support allowing non-profit organizations to recover attorney's fees for its in-house counsel in state public records actions. Two states' appellate courts have addressed the issue and both states held that such in-house "fees" are not recoverable.

Illinois has rejected the idea that a non-profit corporation that is a party to a public records action may recover attorney's fees for work done by its in-house counsel. Illinois refers to its public records law as the Freedom of Information Act. *See* 5 Ill. Comp. Stat. Ann. 140/1.1 *et. seq*. The policies behind the Illinois

Freedom of Information Act align with the polices behind the Wisconsin Public Records Law. *See FOP, Chi. Lodge No. 7 v. City Chi.*, 2016 IL App (1st) 143884, ¶¶ 33-34, 405 Ill. Dec. 803, 811-12, 59 N.E.3d 96, 104-05. Like Wisconsin, the Illinois statutory scheme also provides for the award of reasonable attorney's fees and costs for a requester that prevails in an action to obtain records. *See* 5 Ill. Comp. Stat. Ann. 140/11.

The award of fees under the Illinois statute is more liberal than in Wisconsin. The Illinois law was amended to change the requirements that to recover fees a party needed to "substantially prevail" to only require that the party "prevail[]" – the amendment that was adopted to "ensure that successful plaintiffs could obtain attorney fees regardless of the extent to which they had prevailed, no matter how slight." *Uptown People's Law Ctr. v. Dep't of Corr.*, 2014 IL App (1st) 130161, ¶ 20, 379 Ill. Dec. 676, 682, 7 N.E.3d 102, 108. For comparison, Wisconsin's Public Records Law is less liberal, requiring one to prevail "in whole or in substantial part" to receive fees. Wis. Stat. § 19.37(2)(a); *Friends of Frame Park*, at ¶ 4.

Despite Illinois' liberal fee provision, its supreme court rejected the idea that a non-profit corporation that is a party to an action may recover "attorneys' fees" for work done by its in-house counsel. The Illinois Supreme Court specifically rejected the *dicta* in *Kay*, stating:

> We note, however, that the discussion of organizational plaintiffs in *Kay* was *dicta*, and the lower federal courts following that *dicta* have all involved federal statutes. Applying Illinois law, our appellate court has reached a contrary conclusion, holding that under the reasoning of *Hamer, Tantiwongse*, and related cases, an organizational plaintiff that sued to obtain access to public records using the services of its in-house counsel was not entitled to recover statutory fees. *Uptown People's Law Center*, 2014 IL App (1st) 130161, ¶ 25.

State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc., 2018 IL 122487, ¶ 30, 426 Ill. Dec. 1, 9, 115 N.E.3d 923, 931.

In *Uptown People's Law Ctr.*, the Illinois Court of Appeals explained the reasoning for why a non-profit party cannot be awarded fees for in-house counsel's service:

> Here, Uptown, an artificial entity, was represented by attorneys Alan Mills and Nicole Schult. *Downtown Disposal Services, Inc. v. City of Chicago* ('a corporation is an artificial entity that must always act through agents'). Accordingly, Uptown did not represent itself and was not *pro se*. With that said, the purpose of the attorney fee provision would not by furthered by awarding attorney fees in this instance. While Mills and Schult were salaried employees, Uptown was not required to spend additional funds specifically for the purpose of pursuing FOIA requests. See *In re Marriage of Tantiwongse* (attorneys in a law firm representing themselves in a collection action against a client incurred no legal fees on their own behalf and thus, were not entitled to attorney fees for their collection action). Thus, legal fees were never a burden that Uptown was required to

> overcome in order to pursue its FOIA requests. In addition, Mills and Schult had no expectation of receiving additional fees from Uptown for performing this work. *See Label Printers* ('Because defendant's representation was provided as a gratuity, he cannot recover the fees as damages.'). As a result, providing Uptown with legal fees for pursuing FOIA requests would not compensate Uptown. On the contrary, an award of fees would reward Uptown. Moreover, it would encourage salaried employees working for a not-for-profit organization to engage in fee generation on the organization's behalf. Accordingly, we hold that the reasoning of *Hamer* prohibits a not-for-profit legal organization from being awarded legal fees that were not actually incurred in pursuing a FOIA request on the organization's behalf. Uptown is not entitled to fees under these circumstances.

2014 IL App (1st) 130161, ¶ 25 (string citations omitted).

These same factors should preclude AO from recovering its fees. AO's in-house counsel are salaried employees. Because it employs staff attorneys, AO was not required to spend additional funds to hire attorneys for the purpose of pursuing this case. Thus, AO was not required to overcome any legal fees to pursue its Public Records Law requests. In addition, there is nothing to show that AO's in-house attorneys had an expectation of receiving additional fees from AO for performing this work. As a result, providing AO with legal fees for pursuing Public Records Law requests would not compensate AO. On the contrary, an award of fees ***would reward AO***. Moreover, awarding in-house fees to AO would encourage salaried employees working for a non-profit organization to engage in fee generation on the organization's behalf. All these factors

should prohibit AO from being awarded attorney's fees that were not actually incurred.

Ohio appellate courts have also held that a party (even a for-profit party) is not entitled to an award of attorney's fees for work performed by in-house counsel. *See State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 2004-Ohio-6557, ¶ 62, 104 Ohio St. 3d 399, 411, 819 N.E.2d 1087, 1098; *State ex rel. Hous. Advocates, Inc. v. City of Cleveland*, 2012-Ohio-1187, ¶ 6 (Ct. App.)

Ohio's public records law is also similar to Wisconsin's. *See* Ohio Rev. Code Ann. § 149.43. The Ohio Statute includes, like Wisconsin, a strong public policy in favor of providing the public with the ability to scrutinize all public records. *See Cleveland Ass'n of Rescu Emples./ILA Local 1975 v. City of Cleveland*, 2018-Ohio-4602, ¶ 6, 123 N.E.3d 374, 377 (Ct. App.) And, again like Wisconsin, Ohio provides that one who prevails in an action to obtain the release of records may be awarded reasonable attorney's fees. Ohio Rev. Code Ann. § 149.43(C)(3)(b).

In *Hous. Advocates, Inc.,* the Ohio court of appeals explained:

> . . . the Supreme Court of Ohio has repeatedly held that in public records cases attorney fees are available only to the extent that the relator actually paid an attorney to win the public records action. In-house counsel or pro se representation precludes an

> award. In *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, the court ruled that because there was 'no evidence or suggestion that the Beacon Journal either paid or was obligated to pay its in-house counsel attorney fees in addition to her regular salary and benefits for the work she did, * * * 'fees' are not recoverable in a mandamus action under R.C. 149.43.' Similarly, in *State ex rel. O'Shea & Assocs. Co. L.P.A. v. Cuyahoga Metro. Hous. Auth.*, , the relator, a law firm, was represented by its principal partner. The supreme court reversed an award of attorney fees, because there was no evidence that the relator either paid or was obligated to pay its own counsel attorney fees. *Accord State ex rel. Lucas Cty. Bd. Of Commrs. v. Ohio Environmental Protection Agency*); and *State ex rel. Besser v. Ohio State Univ.*

2012-Ohio-1187, ¶ 6 (string citations omitted).

Here too, because there is no evidence that AO paid or was obligated to pay its in-house counsel "attorney fees" in addition to their regular salary and benefits for the work they did, AO's in-house counsel "attorneys' fees" are not recoverable in this mandamus action. Such an award improperly rewards AO.

V. THE ABSENCE OF ANY EVIDENCE TO SHOW THAT IT ACTUALLY EXERCISED ITS DISCRETION IN DETERMINING THE AMOUNT OF ITS ATTORNEYS' FEES AWARD DEMONSTRATES THAT THE CIRCUIT COURT ABUSED ITS DISCRETION.

"[T]the proper standard upon review of attorney fees is that the trial court's determination of the value of these fees will be sustained unless there is an abuse of discretion." *Standard Theatres v. Dep't of Transp., Div. of Highways*, 118 Wis. 2d 730, 747, 349 N.W.2d 661, 671 (1984). The court of appeals will not

simply substitute its judgment on whether fees were reasonable, "but instead [it will] probe the court's explanation to determine if the court 'employed a logical rationale based on the appropriate legal principles and facts of record.'" *Kolupar,* 2004 WI 112, ¶22, quoting *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 987, 542 N.W.2d 148 (1996).

Although a trial court's award of attorneys' fees is vested in its discretion, the discretionary power must, in fact, be exercised. *Stathus v. Horst*, 2003 WI App 28, ¶¶12-14, 260 Wis. 2d 166, 659 N.W.2d 165. Where there is no evidence to show that discretion was actually exercised, there is an abuse of discretion. *Id.*

Here, the record is devoid of any evidence that the Circuit Court exercised any discretion in its determination of what fees were reasonable. The Circuit Court's analysis was limited to a single paragraph:

> The lodestar factors, I'm satisfied, are in favor of the fees requested because this took a very long time and had numerous hearings and depositions just to get to the bottom of the fact that records were destroyed. And I believe that the evidence submitted by the petitioners is sufficient to justify the fee request.

(R.214, 28:13-20.)

There is nothing in the record that could even begin to show that the Circuit Court "employed a logical rationale based on the appropriate legal principles and facts of record." *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 987, 542 N.W.2d 148 (1996). At best, the record reflects the Circuit Court's will and not its judgment.

A circuit court has the discretion to adjust a fee request for a variety of reasons when a fee request is not reasonable. *See Kolupar*, 2004 WI ¶ 29. Despite this, the Circuit Court offered absolutely no reasons as to why it awarded all of AO's requested attorneys' fees for work performed by its in-house counsel and its retained counsel. The Circuit Court simply awarded every single penny of the requested fees for a total of $98,073.27, all without analysis.

Respondents objected in detail to the fee request on numerous grounds, demonstrating their particular contentions as to each fee request that was not reasonable. Respondents objected that that many of Pines Bach's billing entries were excessive, duplicative, needless, or unreasonable, and they should be downwardly adjusted. (R.193 at pp. 5-12.) Respondents specifically detailed that many of Pines Bach's billing entries were vague or

block billed. *Id.* They also pointed out that many of Pines Bach's fee requests included duplicative and excessive billing entries that should be disregarded or reduced. *Id.* These detailed arguments addressed each individual billing entry.

Respondents pointed out the same and similar deficiencies in the fees that AO sought. (*Id.* at pp. 12-16.) The Respondents explained, again in great detail, that AO's bills contained entries that were excessive, duplicative, needless, or unreasonable, and they should be downwardly adjusted or disregarded. *Id.* Respondents argued that AO's vague and block billed entries should be disregarded or downwardly adjusted, again calling out each offending billing entry. *Id.* Respondents objected to and explained each instance where AO engaged in duplicative and excessive billing. *Id.* For instance, Respondents argued that AO was not entitled to recover fees for the time its in-house counsel spent watching hearings via Zoom where its local counsel handled the hearings and AO's in-house counsel did nothing. *Id.*

Despite these detailed objections, the Circuit Court, without explanation, concluded that AO was entitled to all the fees they requested. The Circuit Court wholly failed to offer any explanation as to how it arrived at its conclusion that it was appropriate to

award AO every penny it requested. The complete absence of any explanation for the Circuit Court's conclusion is the epitome of a failure to exercise discretion. This fee award cannot withstand challenge.

CONCLUSION

For the reasons set forth above, the County Respondents respectfully request this Court:

1. Find that the Circuit Court erred in subjecting Robin Vos and Edward Blazel to its Mandamus Order as neither were responsible for producing the contractors' records contemplated by AO's public records requests.
2. Find that the Circuit Court erred in awarding damages, fees, and costs against Robin Vos as he was never responsible for records contemplated by AO's public records requests;
3. Find that the Circuit Court erred in awarding attorneys' fees for AO's unsuccessful contempt motion;
4. Find that the Circuit Court erred in awarding AO damages for its attorneys' fees for work performed by its in-house counsel in the litigation of the contempt motion

as time spent by in-house counsel is not a damage that was actually incurred;

5. Find that the Circuit Court erred in awarding AO attorneys' fees for work performed by its in-house counsel under Wisconsin Public Records Law; and,
6. Find that the Circuit Court failed to exercise its discretion in determining reasonable attorneys' fees and remand this matter back to the court for a proper determination.

Dated this 14th day of November, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE § 809.19(8)(b) and (c)

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, minimum resolution of 200 dots per inch, 13 point body text, maximum of 60 characters per fill line of body text. The length of this brief, from Statement as to Oral Argument and Publication through Conclusion, is 8285 words.

Dated this 14th day of November, 2022.

Electronically signed by Ronald S. Stadler
Ronald S. Stadler

CERTIFICATE OF SERVICE AND COMPLIANCE WITH § 809.80(3)(b)

I hereby certify that the brief was delivered to a 3rd-party commercial carrier for delivery to the clerk of the Wisconsin Court of Appeals, for delivery within 3 calendar days, in compliance with § 809.80(3)(b). Further, I certify that the brief was sent to all other counsel by US-mail this same date.

Dated this 14th day of November, 2022.

Electronically signed by Ronald S. Stadler
Ronald S. Stadler

CERTIFICATE OF E-FILE COMPLIANCE

I hereby certify that a true and accurate copy of this brief has been contemporaneously e-filed with the Court of Appeals.

Dated this 14th day of November, 2022.

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