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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' REPLY 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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INTRODUCTION

Petitioner American Oversight's ("Petitioner") Response Brief is filled with irrelevant facts and litany of superficial comments about the form of Respondents' Brief. (*See, e.g.,* Pet.'s Br., p. 1.) This Court should resist Petitioner's distractions from the merits of the issues. The merits establish that the Circuit Court erred in its various orders.

ARGUMENT

I. THE MANDAMUS ORDER WAS INVALID AS VOS AND BLAZEL WERE NOT PARTIES TO THE CONTRACT.

Petitioner does not dispute that this case was limited to its requests for contractors' records under Wis. Stat. § 19.36(3). (Pet.'s Br., p. 4.) With respect to contractors' records, Wisconsin's Public Records Law directs:

> Contractors' records. Each authority shall make available for inspection and copying under s. 19.35 (1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority.

Wis. Stat. § 19.36(3) (emphasis added).

The only "authority" that entered into a contract with the election investigators was the Assembly. (R.71.) It is undisputed that there was no "contract entered into" by Vos and Blazel. (*Id.* at

pp. 1-3.) Accordingly, only the Assembly could be the "authority" required to produce the investigator's records. *See WIREdata, Inc. v. Vill. of Sussex,* 2008 WI 69, ¶ 84, 310 Wis. 2d 397, 751 N.W.2d 736.

A. Vos and Blazel Argued Below That They Were Not the Authority for the Contractors' Records.

To avoid the inescapable conclusion that Vos and Blazel were not responsible for producing contractors' records, Petitioner speciously claims that Respondents "did not raise the question" at the Circuit Court level. (Pet.'s Br., p. 19.) Petitioner ignores that Respondents argued that Vos and Blazel were not the authority for these contractors' records on numerous occasions – including in their Answer at the outset of this litigation. (R.56, ¶¶ 9-10; R. 64, affirm. defenses 3, 7; R. 75, p. 6.) Accordingly, the Circuit Court would not be "blindsided" by a finding that it erred in concluding that Vos and Blazel were obligated to produce the Assembly's contractors' records.

B. The Plain Language of Wis. Stat. § 19.36(3) Only Applies to an Authority Who Is a Party to a Contract.

Petitioner claims that requiring one to be party to a contract creates a "vague standard" under § 19.36(3). (Pet.'s Br., 21.) This alleged "vague standard," however, is precisely what the plain meaning of the statute requires.

The plain meaning of the statute is controlling. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 271 Wis. 2d 633, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.") (internal citations omitted). Since Vos and Blazel did not "enter into" a contract, they could not be the "authority" responsible for producing contractors' records under § 19.36(3).

C. A Harmonious Construction of Wis. Stat. § 19.37(1)(a) Requires a Mandamus Order Be Directed Against the Authority, Not Those Who Sign or Oversee the Contract.

Petitioner's claim that Wis. Stat. § 19.37(1)(a) allows a mandamus action against anyone connected to the "authority" is a ridiculous construction of the statute.[1] Section 19.37 must be read

[1] Petitioner continues to assert that Vos entered into a contract because he signed the contract on behalf of the Assembly and had responsibilities for certain aspects of the contract. (Pet.'s Br., p. 24.) Petitioner's claim is contrary to law. *See Midwest Neurosciences Assocs., LLC v. Great Lakes Neurosurgical*

as a whole: Section (1) identifies a circumstance relevant to the statute – "[i]f an authority" denies or withholds a request. Then, subsections (a) and (b) harmoniously identify that the remedy is against that authority. *See Milwaukee Cty. v. Dep't of Indus., Labor & Human Relations Com.*, 80 Wis. 2d 445, 454 n.14, 259 N.W.2d 118, 123 (1977) ("A general rule of statutory construction is that each part of a statute should be construed in connection with every other part so as to produce a harmonious whole."). Vos and Blazel were not subject to a writ of mandamus for the Assembly's denial or withholding.

II. THE CIRCUIT COURT ERRED IN HOLDING VOS IN CONTEMPT OF THE INVALID MANDAMUS ORDER.

Petitioner argues that even if an order is invalid, a party must "abide by the terms of [the] court order unless and until it has been set aside." (Pet.'s Br., p. 28.) Petitioner's draconian argument ignores the well-established legal precept that the invalidity of an underlying court order is a defense to civil contempt. *Glasser v. Blixseth (In re Yellowstone Mt. Club, LLC)*, 585 F. App'x 393, 394 (9th Cir. 2014) ("It is true that the invalidity

Assocs., LLC, 2018 WI 112, ¶ 55, 384 Wis. 2d 669, 920 N.W.2d 767 (finding that a signature on a contract obligates the party, not the signor).

of an underlying injunctive order may be raised as a defense in civil contempt proceedings."); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 726 F.2d 1150, 1157-58 (7th Cir. 1984) (*en banc*) (Posner, J.), *rev'd on other grounds*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985). Thus, since the Mandamus Order was invalid as to Vos, the Circuit Court's finding of contempt must be reserved.

The cases cited by Petitioner do not support a finding that an invalid order leads to contempt. *State v. Campbell*, 2006 WI 99, ¶ 49, 294 Wis. 2d 100, 718 N.W.2d 649 held that a family court's order could not be collaterally attacked in a separate criminal proceeding. *Getka v. Lader*, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976) addressed whether one must abide by an injunction that was within the contemnor's power. Here, because Vos was not a party to the contract with the investigators, he had no power to compel them to do anything. Unlike *Getka*, when the invalidity of the court's order implicates one's lack of power to comply, the invalidity of the order can be a defense to the contempt action. This is not altered by the holding in *State v. Orethun*, 84 Wis. 2d 487, 490, 267 N.W.2d 318 (1978) where there was a collateral attack on a conviction.

III. SPECULATION DOES NOT ESTABLISH A PRIMA FACIE CASE OF CONTEMPT.

Petitioner does not dispute that to support a contempt motion, a complainant must "make a prima facie showing that the order has been violated." *Krause v. Krause*, 2018 WI App 54, 383 Wis. 2d 785, 918 N.W.2d 644; (Pet.'s Br., p. 29.) Petitioner insists that it met this burden by identifying one email that it alleges was not produced by Respondents. (Pet.'s Br., pp. 29-30.) The email was from Michael Gableman to Vos and others dated August 17, 2021. (Resp.'s Br., pp. 19-20.) Petitioner did not submit evidence to the Circuit Court that this email was possessed by Respondents or by Gableman[2] after the Order was issued.[3] *See* (R.73; R.77.) Respondents' lack of possession of the email is consistent with Petitioner's claim that Gableman admitted that "he did little work in July and August 2021, and that he deleted many records from this period." (R.189, p. 5 (citing R183, p, 72:19-73:18).)

The issue is not as simple as whether the record existed in the hands of a third-party. Without any evidence that Respondents

[2] Petitioner claims that Gableman "indisputably" possessed this email after the Order was issued. Pet. Br., p. 31. Petitioner does not cite to the record for this claim because there is no evidence to support a finding that Gableman possessed the record after the Order was issued.

[3] The mere fact that a third party had a copy of this email does not show that Respondents or Gableman possessed the email.

or Gableman possessed this email after the Order was issued, the Circuit Court could not have reasonably concluded that Petitioner established a prima facia case of contempt.[4]

Petitioner also grounded its contempt motion on its suspicions that there "must be" more records that were not produced. (R.68, pp. 6-10; Pet.'s Br., p. 31.) Petitioner's belief that other records "should exist," is a mere suspicion that is insufficient to establish a prima facie case for contempt.

IV. PETITIONER WAS NOT ENTITLED TO DAMAGES UNDER § 785.04 AS IT FAILED TO OBTAIN ANY SUCCESS.

Section 785.04 permits a court to direct a party in contempt to pay the moving party "for a loss or injury suffered…as a result of the contempt of course." Wis. Stat. § 785.04(1) (a). However, to be entitled to damages in an action, a plaintiff must achieve substantial success. *Ventresca v. Town Manager*, 68 Mass. App. Ct. 62, 65, 859 N.E.2d 897, 900 (2007) ("As matter of law, the awarding of attorney's fees and costs is an appropriate element of

[4] The Circuit Court acknowledged that it was impossible to say that records were not produced. "…the reality is, whatever records they were, they were either -- they were destroyed…the problem here is we don't know. We don't have the timing of when these records were destroyed, especially with Attorney Gableman." (R.214, p. 24:11:13, 25:3-5.)

a successful civil contempt proceeding"); *see also Rand v. Rand*, 2010 WI App 98, ¶7, 327 Wis. 2d 778, 785.

Petitioner's contempt motion was grounded on the mere suspicion that Respondents possessed responsive records and did not produce them.[5] *See* (R.68; Pet.'s Br., p. 31.) Petitioner's claim of success – obtaining an "understanding [of] Respondents' efforts … to comply with the … Order and determining whether any additional responsive records still existed" is not success on the contempt motion: it is fishing for whether there was contempt. (Pet.'s Br., p. 35) The entire contempt proceeding failed to validate Petitioner's suspicion. The undisputed record confirms Petitioner failed to establish that Respondents possessed and failed to produce responsive records after the Order was issued. (R.108-114).

Petitioner inaccurately argues that it was "successful on nearly every aspect of its contempt motion." (Pet.'s Br., p. 35.) By "successful", Petitioner means that its motion was granted.

[5] Petitioner actually admits that its contempt motion was about mere suspicions: "AO's contempt motion was directed towards understanding Respondents' efforts (or lack thereof) to comply with the Mandamus Order and determining whether any additional responsive records still existed and could be produced." (Pet.'s Br., p. 35.) A contempt motion is required to relate to non-compliance with an order, not to placate one's suspicion about "whether" there had been compliance.

Success is not measured by whether a motion is granted; rather, success turns on whether there was some degree of success on the merits. Here, it was never shown that any responsive record was possessed and not produced as ordered. Petitioner never received any actual relief.[6] Petitioner was not entitled to damages under § 785.04 as its contempt motion was unsuccessful and no disobedience of the Order caused any harm to Petitioner.

V. REMEDIAL SANCTIONS MAY INCLUDE DAMAGES FOR A LOSS ACTUALLY INCURRED, NOT "REASONABLE" ATTORNEYS' FEES.

Petitioner fundamentally misunderstands the sanctions authorized under Wis. Stat. § 785.04. (Pet.'s Br., p. 33.) The statute does not authorize "payment for attorney's fees" as a remedial sanction. Rather, it allows for an award "for a loss or injury suffered by the party as the result of a contempt of court." § 785.04(1)(a).

A party who pays an attorney to successfully prove contempt incurs an actual loss represented by what was paid to the attorney for the services. *See Seymour v. Eau Claire*, 112 Wis. 2d 313, 320, 332 N.W.2d 821, 824 (Ct. App. 1983). This recovery of damages is

[6] *See Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2152-53 (2010) (applying the "some degree of success" standard to guide courts in applying a fee-shifting statute that did not condition a fee award to the "prevailing party").

distinct from statutes that allow reasonable attorneys' fees to a "prevailing party."

Setting aside whether Petitioner was successful, it failed to present any evidence of the actual cost of work performed by its in-house counsel. Simply requesting "attorneys' fees" does not represent evidence of an actual loss. The lack of an actual loss is reflected in Petitioner's reliance on the lodestar method. A lodestar calculation is a calculation of a" reasonable" fee by using a fictious hourly rate – not an actual expense.

In an unconvincing attempt to rebut Respondents' argument, Petitioner cites to a litany of extra-jurisdictional caselaw addressing irrelevant statutes. (Pet.'s Br., p. 38 (citing *SEIU Local 32BJ v. Preeminent Protective Servs.*, 415 F. Supp. 3d 29, 34 (D.D.C. 2019) (awarding attorneys' fees under court's inherent authority); *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272, 278 (3d Cir. 1985) (addressing a prevailing party provision under the Clean Air Act); *Textor v. Bd. of Regents*, 711 F.2d 1387, 1396 (7th Cir. 1983) (awarding attorneys' fees for frivolousness); *Holland v. Jachmann*, 85 Mass. App. Ct. 292, 298, 9 N.E.3d 340, 345 (2014) (addressing a prevailing party statute).)

Wisconsin caselaw interpreting § 785.04(1)(a), holds that a party may only be awarded for a loss actually incurred. Petitioner did not submit any evidence to the Circuit Court that it sustained a loss from having its staff counsel litigate this matter.

VI. PUBLIC POLICY DICTATES THAT WORK PERFORMED BY IN-HOUSE COUNSEL IS NOT COMPENSABLE UNDER WISCONSIN'S PUBLIC RECORDS LAW.

Petitioner insists that Wisconsin's Public Records Law does not require a litigant to "actually pay their attorneys to recover attorneys' fees." (Pet.'s Br., p. 42.) Petitioner relies on *Shands v. Castrovinci*, 115 Wis. 2d 352, 354, 359-62, 340 N.W.2d 506 (1983) and *Richland School Dist. v. Dep't of Industry, Labor, & Human Relations,* 174 Wis. 2d 878, 911-15, 498 N.W.2d 826 (1993). Those cases identified that Wisconsin has a public policy that generally allows for the recovery of attorneys' fees when an indigent plaintiff is represented *pro bono* by a legal advocacy group. This public policy consideration is not at issue here.

The public policy behind the Public Records Law's fee-shifting provision is to provide access to those who could not afford legal costs:

> Legal fees can create significant hurdles for two common public record requesters: concerned citizens … and local news media ….Often, these two groups simply cannot afford the required

> legal costs of a mandamus action… without mandamus actions, government violations of public records laws would go largely unchecked…

Friends of Frame Park, U.A. v. City of Waukesha, 2022 WI 57, ¶108, 403 Wis. 2d 1, 69, 976 N.W.2d 263, 297 (Karofsky, J. dissenting).

Allowing Petitioner, a well-funded,[7] nation-wide, non-profit advocacy group, to recover attorneys' fees under the Public Records Law would not advance this public policy. Petitioner's legal fees were never a burden that Petitioner was required to overcome in order to pursue its requests. *See Uptown People's Law Ctr. v. Dep't of Corr.*, 2014 IL App (1st) 130161, ¶ 25, 379 Ill. Dec. 676, 7 N.E.3d 102. Effectively, an award of attorneys' fees for work performed by Petitioner's in-house counsel would impermissibly reward Petitioner and would encourage employees working for a not-for-profit organization to engage in litigation tactics that generate fees at public expense. Thus, the public policy considerations behind the Public Records Law's fee-shifting provision does not support awarding Petitioner attorneys' fees.

[7] In 2020 Petitioner received $6,391,293 in grants and contributions and ended the year with net assets of $3,959,390. *See* https://apps.irs.gov/pub/epostcard/cor/815294830_202012_990_20210521181633379.pdf (last accessed January 4, 2023). The Court may take judicial notice of these facts. Wis. Stat. § 902.01(2)(b).

VII. THE CIRCUIT COURT FAILED TO EXERCISE ANY DISCRETION IN DETERMINING ATTORNEYS' FEES.

Respondents do not ask this court to substitute its judgment on whether fees were reasonable. (Pet.'s Br., pp. 49-52.) The issue, which is fully developed in Respondents' Brief, is whether the Circuit Court "employed a logical rationale based on the appropriate legal principles and facts of record" in its attorneys' fee award. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 22, 275 Wis. 2d 1, 15, 683 N.W.2d 58, 65. It did not.

The Circuit Court's justification for awarding every penny requested by Petitioner was that the underlying litigation "took a very long time and had numerous hearing and depositions" and that "the evidence submitted by the petitioners is sufficient to justify the fee request." (R.214, p. 28:13-20.) These statements do not reflect a "clear explanation of…reasons for the fee award." (Pet.'s Br., p. 50.) Wisconsin law requires circuit courts to explain on the record the reasons for discretionary decisions. *See State v. Scott*, 2018 WI 74, ¶ 38, 382 Wis. 2d 476, 492, 914 N.W.2d 141, 149 ("When a circuit court exercises its discretion, it must explain on the record its reasons for its discretionary decision to ensure the soundness of its own decision making and to facilitate judicial

review."). The Circuit Court's superficial acceptance of the Petitioner's fee petition without an analysis is insufficient. (R.214, p. 28:13-20). Petitioner submitted materials in support of the motion and Respondents submitted materials in opposition. Nevertheless, one cannot discern the Circuit Court's reasons for its discretionary decision.

CONCLUSION

For the reasons set forth in Respondent's principal brief and this reply brief, the Circuit Court's Orders in this matter should be reversed.

Dated this 6th day of January 2023.

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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 is 2,847 words.

Dated this 6th day of January, 2023.

Electronically signed by Ronald S. Stadler
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