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**No. 2022-AP-001953**

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STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

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STATE OF WISCONSIN, EX REL. LEANNE WIED,

Plaintiff-Appellant,

v.

SCOTT WHEELER,

and

JEAN LAMBERT,

Defendant-Respondents.

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Appeal from the Circuit Court of Waukesha County

Circuit Court Case No. 2020CV-1745

The Honorable Judge Brad D. Schimel

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**BRIEF IN CHIEF OF**  
**PLAINTIFF-APPELLANT**

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STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

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STATE OF WISCONSIN, EX REL.  
LEANNE WIED,

Plaintiff-Appellant,

v.

Appeal Case No. 2022AP001953

SCOTT WHEELER,

Circuit Court Case No: 2020-CV-1745

and

JEAN LAMBERT,

Defendant-Respondents.

**BRIEF IN CHIEF OF PLAINTIFF-APPELLANT**

**INTRODUCTION**

This appeal effectively presents three questions that impact fundamental legal rights to government transparency under the Wisconsin Public Meetings Law: First, can a citizen of Wisconsin be denied their statutory right to maintain a public meetings law enforcement action because they previously sent a tort claim notice that references similar or overlapping facts? Second, can public officials change the set of individuals under consideration at a public meeting for an interim appointment without public notice? Third, can later inclusion of secret

ballots in public records releases retroactively render a closed vote compliant with the public meetings act? Despite little to no authority in Wisconsin law to support any of these propositions, the Circuit Court answered all these questions in the affirmative. Both precedent and public policy dictate that these two erroneous rulings be reversed.

### **STATEMENT OF ISSUES PRESENTED AND DECIDED BY THE CIRCUIT COURT**

1. Issue: Can a citizen of Wisconsin be denied their statutory right to maintain a public meetings law enforcement action because they previously sent a tort claim notice that references similar or overlapping facts?

Circuit Court Decision: Judge Carter (originally on the Circuit Court case prior to substitution by Judge Schimel) concluded the original Relator in this action was barred from serving due to conflict of interest and removed her because she had filed a Government Tort Claims Notice against the Elmbrook School District that related to the claims in this case, but did not rely on them, or vice versa.

2. Issue: Second, can public officials change the set of individuals under consideration at a public meeting for an interim appointment without public notice?

Circuit Court Decision: Judge Schimel determined that adding a forth candidate for consideration without notice was not sufficiently material of a change to trigger a Public Meetings Law violation.

3. Issue: Can later inclusion of secret ballots in public records releases retroactively render a closed vote compliant with the public meetings act?

Circuit Court Decision: While acknowledging that the Respondents established and used a practice in which Board members' preferences or votes were discreetly communicated via email during an otherwise open session (essentially a digital ballot), Judge Schimel found that subsequent release of the emails under Wisconsin's Public Records Law rendered them no longer secret or closed and thus purged a violation of the Public Meetings Act.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Appellant does not request oral argument at this time, since this appeal deals with a legal question that appears to be sufficiently presentable in written briefs. As such, the Court of Appeals appears unlikely to benefit substantially from the parties' presentation of oral argument. However, Appellant has no objection

to oral argument if either of the Appellee-Respondents or the Court believes that there is necessity or benefit to it.

Appellant does request and recommend publication of the resulting opinion in this appeal. This Court's decision is likely to meet the following two recognized criteria for publication:

First, it will necessarily modify or clarify an existing rule of law. Wis. Stat. §809.23(1)(a)(1). This appeal directly presents the question of who may bring a civil action to enforce the provisions of the Wisconsin Public Meetings Law. It also determines whether compliance with the Public Records Law can render otherwise non-compliant use of secret ballots allowable under the Public Meetings Law.

Second, this Court is deciding a case of "substantial and continuing public interest." Wis. Stat. §809.23(1)(a)(5). The questions presented have the potential to change the balance of the roles of private citizen and government on the issue of government transparency. Whether otherwise statutorily-entitled persons can be barred from bringing enforcement actions because they complied with Wisconsin's Government Tort Claims Act is a question that directly determines an

issue of substantive legal rights and the scope of an important set of protections on the people's right to government transparency.

### STATEMENT OF THE CASE

This appeal arises from the Waukesha County Circuit Court's grant of summary judgment in favor of Respondents. Plaintiff-Appellant had moved for summary judgment and Defendant-Appellees responded by requesting the Circuit Court render it in their favor rather than Plaintiff-Appellant's. *See* R.44-50; R 55. The Circuit Court did so following oral argument, the transcript of which has been filed in the Circuit Court record as R. 78.

The original action was filed by Relator Leanne Wied, alleging that Defendant-Appellees violated Wis. Stat. §19.81 et seq. by (1) changing the people under consideration for an appointment without changing the public notice, and (2) using emails as a coordinated form of secret ballot to vote or express preferences to each other discreetly in an otherwise open session.

Prior to completing discovery and the hearing on summary judgment, the Circuit Court granted a motion from the Defendant-Appellees to disqualify Leanne Wied as a Relator because she was one of the candidates for appointment

and had filed a GTCA claim against the Elmbrook School District for negligence due to Scott Wheeler falsely informing Board members that a majority of them had voted (by discreet email) for a competing candidate when that was not the case, effectively ending Wied's chances of appointment. Neil Bubke was substituted as the Relator and continues to serve as such.

The pertinent factual background of the underlying allegations is as follows, taken from the same materials considered by the Circuit Court:

At all times pertinent to this case, Appellee-Respondents Scott Wheeler and Jean Lambert were members of the Elmbrook School District Board of Education, and have been since 2015 and 2009, respectively.<sup>1</sup> Wheeler is the presiding officer of the Board, and Lambert the vice-presiding officer.<sup>2</sup> On May 8, 2020, a public notice was posted for a special meeting of the School Board with a single substantive agenda item—the choosing of a candidate to fill a vacancy appointment for an open seat on the Board of Education.<sup>3</sup> The agenda approved and communicated to the public indicated that at the upcoming May 12, 2020 meeting, three candidates would be interviewed and then “the Board President

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<sup>1</sup> <https://www.elmbrookschoools.org/board/board-members>.

<sup>2</sup> Id.

<sup>3</sup> <http://go.boarddocs.com/wi/elmbrook/Board.nsf/goto?open&id=BPARZM702AFA>.

will ask Board members to identify their preferred candidate for appointment. Please note that secret ballot is not permitted; voting must occur in an open session.”<sup>4</sup>

On May 11, 2020, Jean Lambert and Scott Wheeler decided on a pertinent change to the approved and posted agenda, by which four candidates would now be interviewed. R.45 – Email from Scott Wheeler to Board on 5-11-20 at 7:20pm; R.46 – Text message chain timestamped 5-11-20 at 5:53pm. At least two Board members, Jian Sun and Glen Allgaier, noted to Wheeler and Lambert that this did not follow the public notice that had already been posted, and they requested that the notice be followed. R.47 – Email from Glen Allgaier to Wheeler and Lambert on 5-12-2020 at 6:07am.

At the Special Meeting of the Board of Education held on the evening of May 12, 2020, via livestreamed videoconference, Wheeler went ahead with interviewing four candidates despite a voice vote unanimously approving the agenda that only indicated three.<sup>5</sup> All Board members, including Lambert, continued to attend and participated in the interviews.<sup>6</sup>

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<sup>4</sup> Id.

<sup>5</sup> <https://www.youtube.com/watch?v=xfTJQWc6XAk>, at 1:37; 2:20.

<sup>6</sup> Id, at 3:48 – 1:35:40.

After the four interviews and a brief recess, Board Member Jian Sun asked, “what is the voting process?” Defendant Wheeler responded by stating the following:

The first thing we will do is send an email to Christy [Westfall] and myself. Christy will be tabulating the votes, we’ll have two people verifying they come in. You will select your first choice and second choice and put that in the email. We’ll tabulate that and just see where we’re at. And then we can have discussion from there. But I want to make sure everyone has had enough time with their notes and does not feel rushed.<sup>7</sup>

From about 5:44-5:46pm, the Board members voted by submitting emails to Wheeler and the Board’s clerk, Christy Westfall. During the sending of the first email votes, the Board members are silent, with no member of the Board identifying via sight or sound what they communicated in their email.<sup>8</sup>

After this, Wheeler states, “OK, I think all the emails are received and Christy is tabulating that now.”<sup>9</sup> As the tabulation was presumably being done, Wheeler then stated, “I would remind the Board and the public watching we are looking for consensus here; four or more votes.”<sup>10</sup> Westfall’s voice can be heard a few moments later verifying that, “we have all the votes.”<sup>11</sup> Wheeler did not

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<sup>7</sup> <https://www.youtube.com/watch?v=xfTJQWc6XAk>, at 1:38:54.

<sup>8</sup> Id, at 1:40:00-1:41:59

<sup>9</sup> Id, at 1:42:17.

<sup>10</sup> Id, at 1:42:26.

<sup>11</sup> Id, at 1:43:40.

announce any individual's vote or any tally, but instead two names were displayed to the public on a screen as being the top two who would remain in consideration for the vacancy appointment.<sup>12</sup>

At the conclusion of approximately 25 minutes of public discussion, a second vote was taken to decide between the remaining two candidates. Beforehand, Wheeler stated, "Any other conversation before we take a vote? And again this vote is part of our conversation; this is not a motion at this point. It's just to see where we are at in terms of consensus."<sup>13</sup> Hearing no further conversation, Wheeler continued, "OK, let's vote. So email to Christy and myself your preference if you had to select one, now, who that one would be."<sup>14</sup> Members again communicated their votes using solely the email process as before, and it produced a tie between Dr. Mushir Hassan and Leanne Wied, with three votes each.<sup>15</sup>

In a text message, the exact time of which is unknown, but was sent sometime during the meeting, after 5:45pm, Superintendent Hansen advised Wheeler: "Give it a few minutes and then call for another vote. If it is tied, we cross that bridge then." R.48 – text messages between Mark Hansen and Scott Wheeler

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<sup>12</sup> Id, at 1:46:00.

<sup>13</sup> Id, at 2:07:05.

<sup>14</sup> Id, at 2:07:19.

<sup>15</sup> Id, at 2:10:50.

on 5-12-2020. A third vote, which Wheeler referred to as “vote number three,” was held at about 6:35pm and was conducted in the same manner as the prior two.<sup>16</sup> At its conclusion, Wheeler announced that the tie had been broken and there were now four votes for Dr. Hassan.<sup>17</sup> Following this, Jean Lambert made a motion to appoint Dr. Hassan to the open seat.<sup>18</sup> The Board passed the motion with a roll call vote of five in favor and member Lina Boucher abstaining, officially appointing Dr. Hassan to the position.<sup>19</sup>

The actual emails by which members voted in all three rounds of voting were placed in the record as R.49. They show that on the third vote, Leanne Wied and Dr. Hassan actually remained tied at 3 to 3. R.49.

## ARGUMENT

There does not appear to be any substantive dispute that Defendant-Appellees are subject to Wis. Stat. §1981 et seq., or concerning the key facts presented by the parties. Instead, the disputes in this case concern chiefly the application of law in reaching summary judgment.

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<sup>16</sup> Id, at 2:31:20.

<sup>17</sup> Id, at 2:34:15.

<sup>18</sup> Id, at 2:35:05

<sup>19</sup> Id, at 2:36:15.

The standard of review for summary judgment is clear and well-established, representing a two-part test. A party is only entitled to summary judgment if the movant has shown “that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Wis. Stat. §802.08(2). This standard is nearly identical to the longstanding federal test codified in Fed. R. Civ. P. 56(a), which like its Wisconsin counterpart is employed with the proviso that the record is essentially to be read in the light most favorable to the non-moving party, so as to determine if a trier of fact could make reasonable inference(s) from the record sufficient to entitle the non-moving party to trial. *Trinity Evangelical v. Tower Ins. Co.*, 2003 WI 46, ¶ 32, 661 N.W.2d 789 (Wis. 2003); *Marine Bank v. Taz’s Trucking Inc.*, 281 Wis.2d 275, 2005 WI 65, 697 N.W.2d 90 (Wis. 2005); *St. Louis North Joint Venture v. P&L Enterprises, Inc.*, 116 F.3d 262 (7th Cir. 1997); *Testerman v. EDS Tactical Products Corp.*, 98 F.3d 297 (7th Cir. 1996).

In other words, in the present case, summary judgment can only be affirmed if this Court agrees with the Circuit Court that the Plaintiff-Appellant’s claim is not actionable as a matter of law under any reasonable interpretation of the facts and conclusions to be drawn from them.

**I. The Court misapplied the law in disqualifying Leanne Wied from continuing to serve as Relator.**

The Circuit Court erred by granting Defendant-Appellees' motion to disqualify Wied as Relator.

*a. Inadequate factual basis.*

The crux of the factual basis for the Motion to Disqualify is their twinned allegation that Leanne Wied was serving as Relator due to an alleged financial interest in the case and a "personal vendetta" against the Defendants. R.22 at 1. Neither of these twin allegations was established with any pertinent evidence or facts and neither is objectively true.

The financial interest allegation relies on pretending that a government tort claim served on the Elmbrook School District (and not on any of the Defendants in this case) has an identity of issues and relief with the present case. Such a notion is unsupportable within the bounds of law and fact. The tort claim in question was against the Elmbrook School District rather than either Defendant in this case. R. 20 at 2. The District had neither rejected it nor let the statutory response time lapse

until well after the present forfeiture action was filed.<sup>20</sup> The tort claim was based on claims of intentional torts and negligence involving four officials with the Elmbrook School District, of which the Defendants herein are two. *Id.* at 2-3. Also unlike the present case, the tort claim did not rely on the Wisconsin Open Meetings Act for any right to relief, instead finding its gravamen in Mr. Wheeler's reporting of false results of a closed vote to the rest of the Board and to the public making it appear that Wied had lost a vote in which she had actually tied with Dr. Hassan. *Id.*

Moreover, the relief sought by the tort claim is entirely distinct from the relief sought, or even available, in the present case. The relief available herein is a small forfeiture paid to the State of Wisconsin or County of Waukesha, not Ms. Wied or any other private party. Wis. Stat. 19.97(1); *Fabyan v. Achtenhagen*, 652 NW 2d 649 (Wis. Ct. App. 2002). No forfeiture was referenced in any way in Wied's tort claim against the Elmbrook School District, nor would one be available under any tort claim that Wied made. R.20. In the present case, no relief request was made for any

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<sup>20</sup> As Def. Affidavit from Counsel (R. 19) admits, Wied's tort claim was served on the District on or about October 3, 2020. This civil action for forfeiture was filed on December 11, 2020. The time would not have lapsed until April 2021.

damages payment, statement, or apology of any kind. Instead, Plaintiff-Appellant asked the Court to do the following:

a. Declare the specified conduct from Scott Wheeler and Jean Lambert to be in violation of the Wisconsin Open Meetings Law.

b. Impose civil forfeitures on both Wheeler and Lambert as allowed by law.

c. Grant a judgment for attorney's fees and costs to the Relator, Leanne Wied, for the expenses incurred in prosecuting this action in the public interest.

d. Grant whatever other relief the Court deems just and proper, and is allowed by law. However, at this time the Relator does not ask this Court to declare Dr. Hassan's appointment null and void, given the balance of public interests not favoring the challenges and uncertainties on further Board actions that could be created by his removal.

R.3 at 8-9.

In addition to the distinctions discussed above, it is noteworthy that in subpart (d), Wied specifically requested that this Court refrain from any attempt to void the appointment of the candidate who ultimately prevailed over her in the election, even though such relief would be available under Wis. Stat. §19.97(3). The only possible personal compensation or benefit thus remaining for Wied in the present case would be the reimbursement of the cost she herself has paid to file and prosecute it. However, this interest would be no greater or different than that

of a district attorney who has invested resources in an Open Meetings Act prosecution or for that matter nearly any other party to any lawsuit. This interest is also recognized by the Wisconsin Supreme Court as part of the larger public interest in Open Meetings compliance rather than strictly private, noting that the purpose of the Open Meetings Law is served when an award of attorney's fees and costs can "make [a relator] 'whole,' thus providing him and others in similar positions with economic incentive to privately enforce the Act under sec. 19.97(4)." *State ex rel. Hodge v. Town of Turtle Lake*, 508 N.W. 2d. 603, 609 (Wis. 1993).

In short, it is well-settled that there is nothing conflictual or inappropriate about a relator seeking reimbursement of their actual costs incurred from serving as a relator. *Id*; *State ex rel. Hodge v. Town of Turtle Lake [II]*, 526 N.W.2d. 784 (Wis. Ct. App. 1994). Outside of this reimbursement, Wied has neither asked for, nor would have a means to receive, any monetary award or payment in the present case.

With no inappropriate pecuniary interest in the case, this leaves the Defendants' allegation that Wied was proceeding under an alleged "personal vendetta." R.22 at 1, 2, 5. This allegation is repeated many times in Defendants' Brief, at times portraying Wied as "furious over [her] defeat" in the appointment process and being fueled by animosity. R.22 at 2, 5. This statement, like others in

line with it, was never cited nor sourced to any evidence. For example, there is no source or evidence provided for the repeated and unfounded allegation that Wied “demanded an apology” from the School Board. R.22) at 2, 6, 9. She has never done so. Defendants’ Brief also accuses Wied of having sued the Elmbrook School District, which is likewise unsourced. R.22 at 5. She never did so.

In short, Defendants’ numerous uses of false personal attacks on Wied’s motives, character, and emotional competence were never founded in any evidence, instead representing a stereotyped and thinly crafted “out-of-control crazy woman” cliché. And yet the Circuit Court granted it. In doing so, it denied Wied a right secured by statute.

*b. Inadequate legal basis.*

The Motion to Disqualify should have failed on legal grounds as well. Granting it required applying standards solely governing the qualifications of attorneys to citizen relators in public interest cases. Defendants cited no authority requiring or allowing this extension to non-attorneys, features of the statutes themselves militate against it, and it went against established Wisconsin authority from the Wisconsin Supreme Court.

The entire basis for Defendants' argument to apply the ADA code of responsibility to Wied was their unsourced statement that Wied is a "private attorney general." While this phrase is used in places in cases to refer colloquially to a relator proceeding on behalf of the state, there is no statutory authority specifying or defining it, much less suggesting that it should cause us to regulate relators as if they were attorneys.

If we apply the broader qualifications for district attorneys or the State Attorney General, for example, absurdity quickly results. Wied is not a lawyer, and would thus fail the test established in Wis. Stat. §978.02, which provides, "No person is eligible to hold the office of district attorney unless he or she is licensed to practice law in this state..." This is inconsistent with Wis. Stat. §19.91, which clearly states "any person," may serve as a relator, with essentially the following: *Any person, who is a licensed attorney in good standing from the local prosecutorial district who has been duly elected or appointed as a district attorney or attorney general and whose participation is in compliance with the American Bar Association Model Code of Professional Responsibility, and who is neutral in the matter at hand rather than advocating for anything adverse to the Defendants.* The latter is significantly more restrictive than the former, and would take the potential number of eligible

relators for this or any other Open Meetings case down from approximately 5.82 million Wisconsin citizens to, at most, the 71 actual district attorneys and the 1 state Attorney General.

Likewise, the mere existence of a relator's reason(s) to seek private vindication is clearly insufficient, as noted by the Wisconsin Supreme Court in *State ex rel. Hodge*. In this Open Meetings Law case, the Supreme Court reversed lower court decisions that had denied relief to the relator, Mr. Hodge. *State ex rel. Hodge v. Town of Turtle Lake*, 508 N.W. 2d. 603 (Wis. 1993). The Supreme Court ordered the voiding of an administrative body's action denying him a permit, and it remanded the case for an award of attorneys' fees for Hodge as the prevailing party in this Open Meetings action. *Id.* In doing so, the Supreme Court noted:

Like prevailing parties under the WFEA, FMLA and the Civil Rights Act, the prevailing relator under the Open Meetings Law serves as a private attorney general *by vindicating his or her own rights and the rights of the public to open government.*"

*State ex rel. Hodge v. Town of Turtle Lake*, 508 N.W. 2d. 603, 609 (Wis. 1993) (emphasis added).

A closer inspection of *State ex rel. Hodge* reveals that the issue of the relator Hodge's own rights was significant. The illegal closed session that Hodge was

protesting had been held solely to discuss Hodge's permit application to the Town of Turtle Lake to store junked automobiles on his property. *State ex rel. Hodge v. Town of Turtle Lake*, 508 N.W. 2d. 603, 605 (Wis. 1993). Hodge sought to void the Town Supervisory Board's action denying his permit. *Id.* By ultimately doing so, the Supreme Court conferred a tangible pecuniary benefit to Hodge that altered the use and value of his real property. This would be a vastly stronger private interest than any interest plausibly held by Leanne Wied.

The co-existence of such a strong private interest and the public's interest in compliance with the Open Meetings Law can occur because they are inherently compatible. Just like in Mr. Hodge's case, Wied's vindication of her private rights is served by holding Defendants accountable for violating the Open Meetings Law, and vice versa. As *Hodge* demonstrates, a relator's reasons for serving are not required to be purely public, and a relator is not required to shed any personal desire for accountability at the courthouse door.

## **II. The Circuit Court misapplied the Law in Granting Summary Judgment to Defendant-Appellees.**

The summary judgment/dismissal entered by the Circuit Court rejected two claims by Plaintiff-Appellant, which are addressed individually below.

*a. The change of agenda without public notice.*

Wisconsin open meetings law mandates, *inter alia*, that meetings of governmental bodies like the Elmbrook Board of Education be preceded by public notice made in accordance with specific requirements. Wis. Stat. §§19.83-19.84. The Elmbrook Board's special meeting on May 12, 2020, was initially preceded by such a notice on May 8, but then on May 11, elements were changed on the eve of the meeting without public notice. *See* R.45-47. Given the objections communicated from Board members between the change being decided and implemented, there can be no doubt that both Defendants continued their attendance knowingly, to say nothing of having actually proposed and implemented the non-noticed departure from the public notice and agenda for the May 12 meeting.

Moreover, Wheeler explicitly acknowledged the change in the meeting itself, even after he and Lambert both had just voted to once again approve the posted public notice and agenda that they had already chosen not to follow.<sup>21</sup> While the ultimate matter to be decided—who would be appointed to fill the Board vacancy—did not change, the scope of who was under consideration for it did. A member of the public could not possibly have been reasonably apprised

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<sup>21</sup> <https://www.youtube.com/watch?v=xfTJQWc6XAk>, at 1:37; 2:20.

that the fourth interviewee was under consideration, when the public notice and agenda only indicated the existence of three. *See* Wis. Stat. §19.84.

By definition, the identity of who is under consideration for a potential appointment by a public body can completely change the outcome. Who is considered determines dispositively who is eliminated and who may be appointed. The difference in meeting scope between whether the fourth candidate is interviewed or eliminated is absolute in relation to the fourth candidate themselves and their chances for appointment. It should also be noted that what Wheeler and Lambert did was not a matter of insufficient specificity, as in cases such as *Buswell v. Tomah*, but a matter of deliberately changing the process from what was intended by the Board from its previous notice. *See State ex rel. Buswell v. Tomah Area School*, 732 N.W.2d 804, 2007 WI 71, 301 Wis. 2d 178 (Wis. 2007). Defendants admit that the intention evinced in the meeting's approved notice was to interview the three top candidates and vote openly. R.55 at 20. Their change from what was originally intended did not render the prior notice vague, but wrong.

Perhaps just as importantly, the public notice and agenda indicated that voting would be in open session. As such, a member of the public could not

possibly have been reasonably apprised of, or have opportunity to object to, the actual voting process that Wheeler and Lambert utilized. As such, the notice simply did not match the ultimate meeting in ways that are both material and deliberate rather than incidental.

*b. The use of secret ballots via email.*

Board members, including both Defendants, failed to communicate their votes or preferences for appointment candidates in the actual public meeting, but instead emailed them privately to Wheeler and the Board's clerk during the meeting. This precludes members of the public from observing or hearing the preference votes or communications of members. By directing that major portions of the May 12, 2020, meeting's discussion and action process on the vacancy appointment take place through a process of direct private emails resulted in a contemporaneous closed session or walking quorum (depending on the formulation one chooses) in violation of Wis. Stat. §19.83(1). See *Zecchino v. Dane County*, 2018 WI App 19, 380 Wis. 2d 453, 909 N.W.2d 203 (Wis. App. 2018). As noted by the Court in *Zecchino*:

A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a

quorum...The essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum.

*State ex rel. Zecchino v. Dane Cnty.*, 909 N.W.2d 203, 2018 WI App 19, 380 Wis.2d 453, 461 (Wis. App. 2018) (quoting "Wisconsin Dep't. of Justice, Wisconsin Open Meetings Law Compliance Guide (Nov. 2015)).

In the present case, the Board members used the email voting process (in which communications were only between two of them at a time, but added up to the will of the entire Board when compiled) to come to a consensus whereby they started with four candidates for appointment and ended with the one they agreed to appoint. R.49. The email process violates open meetings law regardless of whether the emails themselves are held to constitute formal votes.

Assuming first for the sake of argument that the emails were not votes, by default they would still constitute discussion or informal action because they represent deliberative communication from the entire governmental body on an item of public business. As such, communicating them via discreet emails outside of public hearing or view would clearly violate one of Wisconsin's most important open meetings mandates: "At any meeting of a governmental body, all discussion

shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session..." Wis. Stat. §19.83(1).

However, the emails were clearly votes, not just discussion. Throughout the May 12 meeting process detailed in the Summary of Facts, above, Wheeler and numerous others consistently refer to what they are doing as voting. Never do they indicate otherwise, though they do draw a distinction between a vote on a formal motion and the votes they were casting in order to communicate preferences or come to a consensus. This distinction speaks only to the purpose of a vote, not whether it is one. This Court should have no difficulty recognizing that the emailed votes are in fact votes. Beyond the fact that the actual people casting them refer to them as such, the use of the emails is consistent with voting rather than merely general communication. Specifically, the emails were directed to include only names, and the number of members who put down a particular name were then counted, and the name(s) that were chosen by more members were advanced to the next stage of the process.

In other words, it should not be subject to serious dispute that the emails from the full membership of a voting body that are explicitly referred to as votes, were used to express votes, and tabulated as votes to arrive at a winner, are in fact

votes. This means that not only would Wis. Stat. §19.83 still be violated, but that §19.88(1) may be implicated as well since the emails functioned as secret ballots for all intents and purposes. They were not secret to Mr. Wheeler and Ms. Westfall, but they were secret from everyone else on the Board and in the public.

The Circuit Court erred fundamentally in disregarding all this in favor of looking only through the lens of Wis. Stat. §19.88(3), which specifies specific preservation and public records requirements. The Circuit Court found that because this section was complied with via subsequent open records preservation and release, summary judgment should be granted for the Defendant-Appellees. The illogical and unfounded nature of this interpretation needs no further explanation, as nothing in the plain language of §19.88(3)—or any other pertinent section for that matter—places this provision in a mutually-exclusive framework against the general open session provisions clearly violated by Wheeler and Lambert.

## CONCLUSION

In short, the Circuit Court disregarded or refused to enforce important parts of Wisconsin's public meetings law. This not only created an erroneous result in the present case, but one that could establish a dangerous precedent of allowing

public officials to deliberately keep open session votes and discussions from their constituents with impunity. As such, Plaintiff-Appellant respectfully requests this Court to reverse the judgment of the Circuit Court of Waukesha County.

Respectfully submitted:

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### **Certifications of Compliance**

I hereby certify that this brief conforms to the rules contained in §§809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 29 pages, and 5514 words.

I further certify that the Brief's content is identical in both the electronic and any paper copies filed.

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