STATE OF WISCONSIN
SUPREME COURT

FRIENDS OF FRAME PARK, U.A.,

Plaintiff-Appellant,

v.

Appeal No. 2019AP96
Cir. Ct. No. 17-CV-2197

CITY OF WAUKESHA,

Defendant-Respondent-Petitioner

APPEAL FROM A FINAL ORDER ENTERED ON NOVEMBER 26, 2018 IN CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

PLAINTIFF-APPELLANT-RESPONDENT'S MOTION FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION

Plaintiff-Appellant-Respondent Friends of Frame Park, U.A. ("Friends") files this motion for reconsideration of the Court's opinion and decision of July 6, 2022. This motion is filed pursuant to Wis. Stats. § 809.64 and applicable law and Supreme Court rules. The basis for the motion and request for further briefing is as set forth below.

I. The Court's Decision establishes a new doctrine in Wisconsin for when a party prevails in whole or in substantial part.

This case addressed whether the City had properly withheld certain public records for a period of time that were responsive to an open records request. A second issued was presented as to whether attorneys fees were available to Friends in a mandamus action that they filed to obtain the records. The attorney fees issue was whether, even though the City had produced the records, they had done so after the mandamus action was filed and Friends were thus still potentially entitled to recover attorneys fees.

Friends pursued a declaration that the City had improperly withheld the records. This was significant because even though the records were provided, whether the City had acted appropriately under the narrow exceptions in the public records law warranted judicial review and determination. Friends also argued that the filing of the mandamus court action was the cause of the release of the records

and that they therefore were eligible for recovery of attorneys fees.

The Circuit Court found that the City had properly invoked an exception that allowed it to withhold the records. The Circuit Court further ruled that the City's assertions that it disclosed the records not because of the mandamus action but because the need to withhold the records no longer applied.

The Court of Appeals reversed the Circuit Court. The Court of Appeals determined that the City had not properly withheld the records. Further, and because of that, Friends had prevailed in whole or in substantial part in the mandamus action under Wis. Stats. § 19.37(2). The City filed a Petition for Review in this Court asking that the Court take up the case and reverse the Court of Appeals' decision. The issue presented by the City was:

> 1. Is the test to be applied to determine if a litigant is entitled to attorney's fees under Wis. Stat. § 19.37(2)(a) of the Public Records Law whether the legal custodian properly withheld records under an exception to that law initially, regardless of whether commencement of an action was a cause of the release of the records?

See Record at 10.15.20, Petition for Review at p. 1

The Court granted the City's Petition. *See Record at 2.24.21 Order Granting Review.*

Briefing by the parties was thereafter completed. Amicus briefs were also permitted and filed. Oral argument took place on September 9, 2021.

The Court issued its ruling and decision on July 6, 2022. The ruling and

mandate of the Court directly decided the issue of how a party may obtain attorneys fees in an open records case. *See Opinion at ¶ 3 and 24.* The decision also includes an opinion that reverses the Court of Appeals decision, which had determined and ruled that the City had not acted in compliance with the open records law when it withheld and delayed production of certain records. *See Opinion at ¶ 30-37.*

The July 6th opinion and decision adopted a standard for when a requester is entitled to attorneys fees under Wis. Stats. § 19.37(2). In particular the Court's mandate ruled that to "prevail in whole or substantial part" in a mandamus action seeking public records a requester of open records must obtain a "judicially sanctioned change in the parties' legal relationship." *See Opinion at ¶ 3.*

The controlling opinion on this point also explained that:

> A causation or catalyst theory is not a comfortable fit with statutory text that allows recovery of attorney's fees "if the requester prevails in whole or in substantial part in any action." Wis. Stat. § 19.37(2)(a). The better course is to follow the United States Supreme Court's lead and return to a textually-rooted understanding of when a party prevails in a lawsuit. Absent a judicially sanctioned change in the parties' legal relationship, attorney's fees are not recoverable under § 19.37(2)(a).

See Opinion at ¶ 24.

II. The new test for when a party prevails in whole or in substantial part was not briefed by the parties.

The Court's decision sets aside the so-called "catalyst theory" test. In its place the Court explains that the proper test for when a requester prevails in whole or in substantial part is determined as follows:

> Absent a judicially sanctioned change in the parties' legal relationship, attorney's fees are not recoverable under § 19.37(2)(a).

See Opinion at ¶ 24

This is a new approach in Wisconsin law. It quite significantly alters the test as to whether a requester may be considered as having "prevailed in whole or in substantial part" in its mandamus action. The new test will change the way that citizen-requesters, governmental bodies, and circuit courts manage open records cases.

The "judicially sanctioned change" test was not briefed by the parties or amicus. It was not argued by the parties at oral argument, where the parties focused on the catalyst theory test and the Court of Appeals adherence to that test. However, the Court's July 6th opinion announces a new understanding and test for when a party prevails in whole or substantial part.

As the Court has rightly explained in other cases, "Opinions of this court should not "reach out and decide issues" without the benefit of full briefing by the parties. *State v. Allen,* 322 Wis.2d 372, 379 (2010). The Court in *Allen* further explained that "Sound judicial decision making requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute. *Id.*

In another case, members of the Court have explained the importance of not reaching out to decide new issues or un-briefed issues in a case involving impairment of contracts but raising a problem similar the one faced in this matter:

> *The contract impairment issue was never before the court in Panzer.*

> *Panzer,* 271 Wis.2d 295, ¶ 102, 680 N.W.2d 666. No party briefed or argued contract impairment in *Panzer;* therefore, we did not decide it. As various members of this court have said, we should not "reach out and decide issues" that were not presented to the court by the parties. *Town of Beloit v. County of Rock,* 2003 WI 8, ¶ 72, 259 Wis.2d 37, 657 N.W.2d 344 (Abrahamson, C.J., dissenting). However, in *Panzer,* the dissent did not follow that rule. Instead, it created and then decided the contract impairment issue, without *186 the benefit of briefing or argument. *Panzer,* 271 Wis.2d 295, ¶¶ 210–218, 680 N.W.2d 666 (Abrahamson, C.J., dissenting).

See Dairyland Greyhound Park, Inc. v. Doyle, 295 Wis.2d 1, 185 (Roggensack, J. concurring in part and dissenting in part).

This Court has also favorably noted the U.S. Supreme Court's discussion of its own similar rule. In *State v. Allen* the Court included the following as part of its discussion regarding the issue:

> Justice Souter states that in *Ladner v. United States,* 358 U.S. 169, 173, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958), the Court declined "to address 'an important and complex' issue concerning the scope of collateral attack upon criminal sentences because it had received 'only meagre argument' from the parties, and the Court thought it 'should have the benefit of a full argument before dealing with the question'." ... The United States Supreme Court has well expressed the value of briefing. *See, e.g., Penson v. Ohio,* 488 U.S. 75, 84, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) ("This system is premised on the well-tested principle that truth-as well as fairness-is 'best discovered by powerful statements on both sides of the question.' " (citations omitted)); *Polk County v. Dodson,* 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); *Mackey v. Montrym,* 443 U.S. 1, 13, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error...."). *See also* Stephan Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* (1988); Jerold H. Israel, *Cornerstones of the Judicial Process,* Kan. J.L. & Pub. Pol'y,

> Spring 1993, at 5; Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System,* 64 Ind. L.J. 301, 316-19 (1989).

State v. Allen, 322 Wis.2d 372, 379 n. 9 *citing Church of the Lukimi Babalu Aye Inc. v. City of Hialeah,* 508 U.S. 520, 572 (1993). (Souter concurring)

The Court's July 6th opinion and decision implements a major change with respect to the determination of how one "prevails in whole or in substantial part" (and thus the chance to recover attorneys fees) in an open records case. While the Court's July 6th Opinion addresses the language in the open records law, the discussion, analysis and holding of the Court necessarily invokes the contours of the term "prevailing party." Given the use of that term - prevailing party- in other statutory provisions, and as a feature of fee-shifting law generally, the Court's decision will very likely have far-reaching impact on Wisconsin parties, practitioners, and lower courts in litigating not only open records but many other cases.

In other fee-shifting contexts, Wisconsin courts have found that "a party has prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefit sought by bringing suit." *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988) (awarding fees under Wisconsin Consumer Act); *In re J.S.*, 144 Wis. 2d 670, 679, 425 N.W.2d 15 (Ct. App. 1988) (awarding fees using the same standard under act to enforce rights of those admitted to treatment facilities). Courts have also defined prevailing

similarly as being "successful in a litigated trial court proceeding." *Finkenbinder v. State Farm Mut. Auto Ins. Co.*, 215 Wis. 2d 145, 151, 572 N.W.2d 501 (Ct. App 1997).

The nature of the Court's July 6th Opinion is such that further briefing by the parties would be appropriate. It would allow for further analysis and potentially explanation by the Court regarding the "judicially sanctioned change" test and clarification of how that test will operate in the lower courts. Undersigned believes additional briefing will be very beneficial to the Court.

Friends is not seeking to engage, in this filing, with a discussion of Friend's position on the "judicially sanctioned change" test or its applicability to the specifics of this matter. However, Friends believes that further briefing by the parties and Amici would be very beneficial to the Court in reconsidering the new doctrine and its implementation in Wisconsin courts.

III. Conclusion.

Friends therefore requests that the Court grant this motion for reconsideration and order further briefing on the issue of the applicability and implementation of the "judicially sanctioned change" test under the language "prevails in whole or substantial part" in Wis. Stats. § 1937(2).

Dated this 26th day of July, 2022

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CERTIFICATIONS PURSUANT TO WIS. STATS. § 809.19.

I certify that this motion for reconsideration confirms to the standards for a motion under Wis. Stats. § 809.14 and 809.64. The motion is produced with a proportional serif font. The length of this brief is 1852 words.

Joseph R. Cincotta