Appeal No. 2006AP1143-AC **Cir. Ct. No. 2006CV117**

WISCONSIN COURT OF APPEALS
DISTRICT II

ROBERT ZELLNER,

PLAINTIFF-APPELLANT,

V.

CEDARBURG SCHOOL DISTRICT AND DARYL HERRICK,

DEFENDANTS-RESPONDENTS,

MILWAUKEE JOURNAL SENTINEL AND KATHARINE GOODLOE,

INTERVENORS-RESPONDENTS.

FILED

Oct. 25, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Brown and Nettesheim, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2003-04)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

ISSUES

1. Does a public employee who views copyrighted images on a work computer have standing to raise the copyright exception to Wisconsin's Open Records Law? If so, what is the scope of that exception?

2. Under WIS. STAT. § 19.36(10)(b), does the holding of ***Local 2489, AFSCME v. Rock County***, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644, apply to records generated through further investigation if the employee later initiates a grievance procedure?

BACKGROUND

The facts are not in dispute. After a public evidentiary hearing, the Cedarburg School District discharged high school science teacher Robert Zellner for viewing on his work computer copyrighted images from adult Websites. Zellner did not oppose the *Milwaukee Journal Sentinel*'s open records request for exhibits presented at the hearing. The teacher's union then filed a grievance challenging Zellner's termination, and Zellner met with District representatives to discuss a settlement. At that meeting, the District presented Zellner with a memorandum and a compact disc containing digital images detailing the alleged analysis of his work computer. The investigation was conducted after the evidentiary hearing.

The *Milwaukee Journal Sentinel* and one of its reporters, Katharine Goodloe (collectively, the newspaper), filed an open records request for the memorandum and CD. Zellner responded with a claim for injunctive relief and a request for de novo review of the District's decision to release the materials. Shortly thereafter, the newspaper was granted permission to intervene. After a

hearing, the court denied Zellner's request for an injunction and dismissed the complaint, but stayed release of the records pending appeal.

Zellner appealed, and we granted the newspaper's motion to expedite the appeal pursuant to WIS. STAT. § 19.356(8). The underlying grievance proceedings continued even as the appeal was pursued. After briefs were filed and the case was under submission, the arbitrator rendered a decision ordering that Zellner be reinstated.[2] The order to reinstate Zellner has no bearing on the instant case or the certification, however, because the newspaper persists in its request for the records, the District still intends to comply with it, and Zellner continues to oppose it.

As is relevant to this certification, Zellner objects to the release of the materials on two grounds: (1) the materials the newspaper seeks are copyrighted images and not subject to release pursuant to WIS. STAT. § 19.32(2) and (2) the materials were produced by the District in response to Zellner's grievance, a question left unanswered by the court of appeals opinion in ***Rock County***.[3]

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[2] The arbitration panel's decision is a matter of public record, and by a prior order we notified the parties that we intended to take judicial notice of it, subject to any objections. Zellner and the newspaper, although adversaries, responded that they had no objections. The District, although aligned with the newspaper, did object. The district's objection is based on the fact that it has not reinstated Zellner despite the arbitration ruling. But that does not alter the undisputed adjudicated historical fact that the arbitration ruling orders Zellner's reinstatement. Therefore, we take judicial notice of this undisputed adjudicative fact. *See* WIS. STAT. § 902.02(2)(b).

Our prior order also directed the parties to state whether the arbitration ruling served to alter their stances on this appeal. All the parties have replied that their stances remain as set out in their appellate briefs.

[3] Zellner also contends that the circuit court engaged in an improper balancing of the public interest vis-à-vis his privacy and reputational interests, and that release of the materials also would violate the open meetings law. We do not certify those issues.

DISCUSSION

Wisconsin's Open Records Law is codified at WIS. STAT. §§ 19.31-19.39. *See* ***Hempel v. City of Baraboo***, 2005 WI 120, ¶1, 284 Wis. 2d 162, 699 N.W.2d 551. When applying it, the legislatively declared public policy in this state is "a presumption of complete public access." Sec. 19.31. "The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." ***Id.***

A. "Copyright Exception" of WIS. STAT. § 19.32(2)

As a threshold matter, Zellner asserts that the materials at issue are not subject to release because they are not "records" within the meaning of WIS. STAT. § 19.32(2), which specifies what is and is not included in the definition of "record." One of the exceptions provides that a record "does not include … materials to which access is limited by copyright …." ***Id.***

The parties do not dispute that the Websites and the images on the CD specify that they are protected under federal copyright laws. Their disagreement, not surprisingly, lies in how the statute should be read. Statutory interpretation begins with the language of the statute, which we assume expresses the legislature's intent. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 681 N.W.2d 110. If the statute's meaning is plain, the inquiry ordinarily stops. ***Id.***, ¶ 45.

On the one hand, WIS. STAT. § 19.32(2) unequivocally exempts "materials to which access is limited by copyright." Zellner advocates this reading. On the other hand, "[e]xceptions must be recognized for what they are, instances in derogation of the general legislative intent, and must therefore be

narrowly construed." ***ECO, Inc. v. City of Elkhorn***, 2002 WI App 302, ¶19, 259 Wis. 2d 276, 655 N.W.2d 510. A law review article that closely examines Wisconsin's Open Records Law only skims the copyright exception, calling it "self-explanatory." Linda de la Mora, Comment, *The Wisconsin Public Records Law*, 67 MARQ. L. REV. 65, 89 (1983). Unfortunately, in this context "self-explanatory" is not self-explanatory. Does it mean that the exception for copyrighted materials applies to all copyrighted materials, no matter their ilk and no matter who raises the objection? Or does it mean that only the copyright holder has standing to invoke this exception, just as only the party with ownership rights in a copyright has standing to sue for its infringement? *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, §12.02[B], at 12-56 (2006) ("[O]nly parties with ownership rights in a copyright have standing to bring claims for its infringement."). Or, a "hybrid" possibility, if a party can raise the copyright exception, should that right be limited to the party—here, the District—which assumes the risk it might face from the copyright holder due to the material's release?

In addition, as suggested above, if a literal reading[4] of the statute represents the legislative will, what is the scope of the copyright exception? The circuit court expressed uncertainty that adult Websites and images were what the legislature intended to target when it exempted copyrighted materials. Zellner reiterates that plumbing legislative intent is improper when the statutory language

[4] The statute literally excludes only materials whose *access* is limited by copyright. Access is not limited by copyright here, the newspaper posits, because reproduction of the materials represents a "fair use" of them. *See* 17 U.S.C. §107 (providing that the fair use of copyrighted works, "including such use by reproduction in copies … for purposes such as … news reporting … is not an infringement of copyright"). We also do not certify this question.

is clear. He also submits that the exemption is in place to shield copyright holders from entities who use open records laws to circumvent copyright laws. Permitting disclosure of the copyrighted materials at issue here would require honoring open records requests for other copyrighted materials, perhaps the score of a controversial musical staged at a public school, thereby "leading governmental bodies down a slippery slope."

The newspaper argues that Zellner's reading of the copyright exception is far too expansive. A copyright is, in essence, "a property right in an original work of authorship … fixed in any tangible medium of expression." BLACK'S LAW DICTIONARY 361 (8th ed. 2004); *see* 17 U.S.C. §102. Adopting Zellner's position, the newspaper contends, would bar public access to virtually all information recorded in tangible form, effectively gutting the open records law. Such an interpretation is unreasonable, the newspaper continues, and therefore should be avoided. *See* ***State ex rel. Kalal***, 271 Wis. 2d 633, ¶46.

B. Whether Materials Are Part of a "Current Investigation" Under WIS. STAT. § 19.36(10)(b)

Even if the materials are not off limits to the newspaper as copyright material, Zellner contends that WIS. STAT. § 19.36(10)(b)[5] bars disclosure. The statute provides, in relevant part:

19.36 Limitations upon access and withholding.

[5] WISCONSIN STAT. § 19.36(10), created by 2003 Wisconsin Act 47, partially codifies ***Woznicki v. Erickson***, 202 Wis. 2d 178, 193, 549 N.W.2d 699 (1996), and ***Milwaukee Teachers' Education Ass'n v. Milwaukee Board of School Directors***, 227 Wis. 2d 779, 798-99, 596 N.W.2d 403 (1999), which held that a record subject has a right to be notified of a custodian's intent to release records and a right to commence an action to prohibit that release.

> ….
>
> **(10)** EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records containing the following information … :
>
> ….
>
> (b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

The challenged materials were created after Zellner was terminated but before arbitration had concluded. Therefore, Zellner contends, the materials are part of a "current investigation" and the circuit court erred in ordering their release.

The court of appeals stopped just short of answering this question in ***Rock County***. There, after several Rock County Sheriff's Department employees were disciplined for viewing inappropriate internet images on Department computers, the sheriff notified the employees of his intent to comply with a newspaper's open records request seeking release of the investigation reports. ***Rock County***, 277 Wis. 2d 208, ¶5. The employees and their union sought to prevent release of the records on grounds that, because they had filed a grievance, the investigation was incomplete under WIS. STAT. § 19.36(10)(b). ***Rock County***, 277 Wis. 2d 208, ¶6. The court of appeals upheld the trial court's disclosure of the records, concluding that "in keeping with the mandate for narrow construction of excepting language, the term 'investigation' in § 19.36(10)(b) includes only that conducted by the public authority itself as a prelude to possible employee disciplinary action." ***Rock County***, 277 Wis. 2d 208, ¶¶1, 15. However, the court noted an important caveat to its holding:

> If, in preparing his defense of his disciplinary actions, the sheriff collects additional information or generates

> additional records, public access to these new items might arguably be prohibited under the exception in question [§ 19.36(10)(b)] or another one.

Id., ¶20.

This is just what occurred here. The District collected additional information and generated additional records in preparing its arbitration defense to its termination of Zellner, and the newspaper seeks those very records. Zellner contends that releasing such materials before grievance proceedings conclude would thwart the policies behind this exception: ensuring that an employer's investigation is free from public pressure, affording the record subject an opportunity to examine and dispute the records before responding to questions from the press, and preventing the dissemination to the public of one-sided information.[6] Citing ***Rock County***, the newspaper argues that the competing policy of preventing employee-created delays in the release of requested records weighs in favor of a narrow interpretation of "current investigation." *See* ***Rock County***, 277 Wis. 2d 208, ¶14.

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[6] The arbitration ruling reinstating Zellner indicates, at least on the surface, that the arbitration process has been completed. That raises the prospect that Zellner's issue may be moot, since he contends that the materials should not be released *during* the arbitration process. However, the District's response to our prior order states that the district does not intend to comply with the order That suggests that the arbitration process may not be complete in the fullest sense of the process and, therefore, the issue may not be moot.

Moreover, even if the issue is moot, the supreme court has carved out various exceptions to the general rule of dismissal for mootness. *See* ***State ex rel. La Crosse Tribune v. Circuit Ct. for La Crosse County***, 115 Wis. 2d 220, 229, 340 N.W.2d 460 (1983). At least two of those exceptions apply here. First, the unanswered issue is one of public importance: may the public gain access to records showing the content of adult internet Websites viewed by a public school teacher using a school computer while the propriety of that conduct or the penalty is the topic of arbitration? Second, the unanswered issue of public access to records under the open records law during an arbitration process is likely to recur, but will often evade appellate review because, as this case demonstrates, the grievance procedure will be concluded before completion of the appellate process. *See* ***id.*** at 229-30.

CONCLUSION

Wisconsin's Open Records Law is an embodiment of the legislature's policy favoring the broadest practical access to government. ***Hempel***, 284 Wis. 2d 162, ¶22. No Wisconsin court has addressed the scope of the law's copyright exception, whether it can be invoked by a party who does not hold the copyright, and whether it contemplates a blanket exemption of all copyrighted materials. Likewise, WIS. STAT. § 19.36(10)(b) has not been judicially addressed in a published case other than ***Rock County***, and the unanswered scenario envisioned there has now materialized in this case.

Prior supreme court decisions have charted the interpretation and development of the Open Records Law to the benefit of record custodians, the public, the bench and the bar of this state. This case represents the need and opportunity for the supreme court to continue that leadership role.

We respectfully certify this appeal to the Wisconsin Supreme Court.