COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 8, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3340

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

**STATE OF WISCONSIN EX REL.
THE NORTH BAY CO.,
CYRIL D. BAYER, PRESIDENT,**

Petitioner-Respondent-Cross-Appellant,

v.

WASHBURN COUNTY ZONING COMMITTEE,

Respondent-Appellant-Cross-Respondent,

**STEVEN W. SATHER, BERNARD P.
SHAW, BERNARD J. FOX AND
FRANK L. LOMBARD,**

Respondents.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Washburn County: JAMES H. TAYLOR, Judge. *Affirmed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Washburn County Zoning Committee (the County) deliberated in closed session and granted Lee Scull a conditional land use permit to operate an auto repair business on property zoned residential. The trial court ruled that the County violated the open meetings law and entered a summary judgment voiding the County's decision and awarding attorney fees to the North Bay Co. The County appeals, arguing that (1) the trial court erroneously applied ***State ex rel. Hodge v. Town of Turtle Lake,*** 180 Wis.2d 62, 508 N.W.2d 603 (1993), retroactively; (2) the County reasonably relied on legal counsel's advice in adjourning into a closed session; and (3) the public interest does not compel voiding the County action. We reject these arguments, affirm the judgment and remand to the court with directions to remand to the County for reconsideration of the permit application in a manner consistent with the open meetings law. *See* ***id***. at 76, 508 N.W.2d at 608.

North Bay cross appeals the trial court's award of attorney fees, arguing that the president of North Bay, Cyril D. Bayer, an attorney licensed in Minnesota, provided a minimum of twenty-five hours legal research to his Wisconsin attorney and should be reimbursed at the rate of $75 per hour. We reject this argument and affirm the trial court's award of attorney fees.

Pursuant to its published notice, the County held a public hearing on the application of a conditional land use permit filed by Lee Scull. North Bay, an adjoining neighbor, appeared. Upon advice of counsel, immediately following the public hearing, the County adjourned into closed session to deliberate the application. The County then voted in open session to grant Scull's permit request subject to certain conditions.

North Bay initiated this lawsuit alleging open meeting violations. After the County meeting but before this lawsuit was commenced, ***Turtle Lake*** was decided. On summary judgment, the trial court concluded that the County did not knowingly attend a meeting held in violation of the open meetings law and that no forfeitures were in order.[1] It concluded, however, that the facts

[1] The committee relied on § 19.85(1)(a), STATS., which provides that a closed session may be held for the purpose of

(a) Deliberating, concerning a case, which was a subject of any judicial or quasi-judicial trial or hearing before a governmental body.

were almost identical to ***Turtle Lake***. Because it concluded that public interest in enforcing the open meetings law outweighed public interest in sustaining the County's action, or any harm to Scull, it voided the County's action and remanded for consideration of the conditional use permit consistent with the open meetings law.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.***, 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment procedure is appropriate when material facts are undisputed leaving only a question of law, which we decide de novo. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 314-315, 401 N.W.2d 816, 820 (1987).

The County does not argue that the open meetings law was not violated. Instead, it argues that ***Turtle Lake*** should not be applied retroactively.[2] We disagree. "Courts generally apply the law as it is at the time of decision rather than at the time of the transaction underlying the lawsuit." ***McKnight v. GMC,*** 157 Wis.2d 250, 253, 458 N.W.2d 841, 843 (Ct. App. 1990). A decision is limited to prospective application only when there are compelling judicial reasons for doing so. ***Id.*** Whether to apply a judicial holding only prospectively is a question of policy and involves balancing equities. ***Bell v. Milwaukee County,*** 134 Wis.2d 25, 31, 396 N.W.2d 328, 331 (1986). Three factors are considered. First, whether the decision establishes a new principle of law; second, whether retrospective application will further or retard the operation of the new rule; and third, whether retrospective application could produce substantial inequitable results. ***McKnight,*** 157 Wis.2d at 254, 458 N.W.2d at 843.

The County argues that ***Turtle Lake*** establishes a new principle of law, as evidenced by the fact that it reversed the court of appeals decision that relied upon earlier case law. *See* ***id.*** at 69-70, 508 N.W.2d at 605. We disagree. ***Turtle Lake*** interpreted an existing statute, § 19.85(1)(a), STATS., which allows closed session for "[d]eliberating concerning a case which was the subject of any

[2] ***State ex rel. Hodge v. Town of Turtle Lake*****,** 180 Wis.2d 62, 508 N.W.2d 603 (1993), held that the application for a permit to store junked automobiles was not a case within the open meetings law exemption permitting closed sessions for certain limited purposes. ***Id.*** at 67, 508 N.W.2d at 604.

judicial or quasi-judicial trial or hearing." ***Id.*** at 70, 508 N.W.2d at 606. We conclude that ***Turtle Lake*** did not establish a new principle of law; rather, it ruled that the court of appeals misinterpreted the language of § 19.85(1)(a), referring to a "case which was the subject of any judicial or quasi judicial trial or hearing," by relying on cases dealing with tort immunity. ***Id***. at 70-71, 508 N.W.2d at 606.

Next, the County relies on an attorney general opinion that indicates precedent for allowing boards to adjourn into closed sessions for deliberations after a quasi-judicial hearing. *See* JAMES E. DOYLE, *Wisconsin Open Meetings Law, A Compliance Guide* (1993). We conclude that ***Turtle Lake*** does not overrule this opinion; ***Turtle Lake*** states only that the term case "does not connote the idea of *mere application and granting of a permit,*" absent an adversarial proceeding with witnesses under oath and rules of evidence. ***Id***. at 73-74, 508 N.W.2d at 607 (emphasis added).

The County also argues that the lack of earlier case law interpreting § 19.85(1)(a), STATS., makes ***Turtle Lake*** a new principle of law. We disagree. A decision is not a new principle of law unless it has overruled "clear past precedent on which the litigants have relied." ***McKnight***, 157 Wis.2d at 254, 458 N.W.2d at 843. That is not the situation here, where ***Turtle Lake*** relied on BLACK'S LAW DICTIONARY and earlier case law for its definition of the word "case." ***Turtle Lake***, 180 Wis.2d at 72-73, 508 N.W.2d at 606-07.

Next, we conclude that retrospective application will advance and not retard the rule that ***Turtle Lake*** establishes. ***Turtle Lake*** interprets the § 19.85(1)(a), STATS., exception "strictly in light of the legislative mandate ... to construe the Open Meetings Law liberally in order to achieve the purpose of providing the public with the fullest and most complete information possible regarding the affairs of government." ***Turtle Lake***, 180 Wis.2d at 71, 508 N.W.2d at 606. Applying ***Turtle Lake***, to void the County's action and require a remand advances rather than retards the rule ***Turtle Lake*** established.

Next, applying ***Turtle Lake*** will not result in any substantial inequity. As the County states: "This appeal is not about an individual named Lee Scull and whether or not he should have granted a conditional ... permit .... [I]t is about ... the public's interest in seeing to it that operation of local government in Wisconsin is maintained in as open a fashion as is practicable

under guidelines established by the state legislature ...." It is fair to both parties that this action be governed by § 19.85(1)(a), STATS., as interpreted by ***Turtle Lake***.

Next, the County argues that its action should not be voided because it reasonably relied on its legal counsel's advice. It contends that reliance on legal counsel's advice has been held to be a defense to criminal actions, relying on ***State v. Davis,*** 63 Wis.2d 75, 216 N.W.2d 31 (1974), and ***State v. Swanson,*** 92 Wis.2d 310, 284 N.W.2d 655 (1979). It argues that because good faith reliance on legal advice may exonerate governmental officials from criminal sanctions, so too should the County be exonerated. We conclude that the cases cited do not support the position advanced. Here, the trial court did not attempt to hold the County criminally liable; in fact, it ruled that the members were not subject to any forfeiture. The court was entitled to void the County's action pursuant to § 19.97, STATS., and remand to the committee for reconsideration of the permit application in a manner consistent with the open meetings laws.

Next, the County argues that the public interest does not compel voiding the County's action because of the County's interest in maintaining order and consistency in its operation of governmental affairs in reliance on reasonable advice of legal counsel. We disagree. "The public's interest in enforcing the Open Meetings Law weighs heavily in matters such as this where governmental bodies discuss topics of public controversy and concern behind closed doors." ***Turtle Lake***, 180 Wis.2d at 75, 508 N.W.2d at 607-08. Based on the similarity between the considerations of this case with those ***Turtle Lake***, we conclude that the trial court correctly voided the County's action.[3]

Finally, North Bay cross appeals, arguing that the trial court's award of attorney fees should be increased to reflect the twenty-five hours of research performed by its president, Bayer, a Minnesota attorney, to compensate him for time he spent researching this case and not in his office. We disagree.

[3] Because we do not overturn the trial court's decision, we do not reach the County's argument that we should overturn the award of attorney fees because the County prevailed.

The trial court found that the rate of $90 per hour for attorney time and $60 per hour for law clerk time, as well as the number of hours spent on the case, was fair and reasonable compensation for North Bay's counsel, but denied Bayer's request to be compensated for his twenty-five hours of research. It approved and awarded a $5,501 fee and $761.11 in costs and disbursements. This sum is supported by the affidavits submitted in support of the fee request and therefore is not clearly erroneous. *See* § 805.17(2), STATS.

Section 19.97(4), STATS., provides that the court may award to the prevailing party the "actual and necessary costs of prosecution, including reasonable attorney's fees." This statute refers to "fees," not to loss of income the prevailing party would have earned but for the time spent on these proceedings. *See* ***Dickie v. City of Tomah,*** 190 Wis.2d 455, 463, 527 N.W.2d 697, 700 (Ct. App. 1994). Also, the pleadings indicate that North Bay appeared and is the prevailing party. It does not appear that Bayer appeared personally as a litigant, but instead appeared only as the president of North Bay. In any event, North Bay submits no case law suggesting that an attorney's fee should be calculated to include time spent by the litigant assisting his employed counsel performing legal research. As a result, we reject this argument.

By the Court.—Judgment affirmed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.