COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2003AP2816
2005AP434

Cir. Ct. Nos. 1999CV289
1999SC712
2000CV4
2002CV270
2004CV280

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

NO. 2003AP2816

KENNEDY HOUSEBOATS, INC. AND BERNARD KENNEDY,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

CITY OF ST. CROIX FALLS,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

NO. 2005AP434

STATE OF WISCONSIN EX REL.
KENNEDY HOUSEBOATS, INC.,

PLAINTIFF-APPELLANT,

V.

CITY OF ST. CROIX FALLS, LEE UHRHAMMER,
DARRELL ANDERSON, BILL KERSCH,

DAN MEYERS AND DEBRA POINTS,

DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Polk County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part and cause remanded with directions*. (Appeal No. 2003AP2816)

APPEAL from a judgment of the circuit court for Polk County: ROBERT RASMUSSEN, Judge. *Affirmed*. (Appeal No. 2005AP434)

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. This case involves five separate circuit court actions, which have been consolidated for appeal. Four cases involve contracts between Kennedy Houseboats, Inc., and Bernard Kennedy (collectively, Kennedy) and the City of St. Croix Falls, entered as a result of the City's efforts to induce Kennedy to build a manufacturing facility. The fifth case involves Kennedy's allegation that the City violated Wisconsin's open meetings law.

¶2 In Appeal No. 2003AP2816—consisting of the four cases involving the contracts—Kennedy appeals judgments entered after a jury trial. Kennedy argues the circuit court erred when it denied post-verdict, prejudgment interest, pursuant to WIS. STAT. § 814.04(4),[1] and when it awarded the City double rent, pursuant to WIS. STAT. § 704.27, from the date the lease expired to the date Kennedy vacated the City's building. We agree with Kennedy that the circuit

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

court erroneously exercised its discretion when it denied post-verdict interest. We therefore reverse that portion of the judgment and remand with directions to add interest to the judgment. We also conclude that Kennedy had the City's consent, by virtue of a stipulation, to occupy the building for 120 days, beginning on the date of verdict. We therefore reverse the portion of the judgment awarding double rent for that 120-day period and remand with directions to revise the judgment to reflect that reduction.

¶3 The City cross-appeals the judgments, arguing: (1) it did not breach its Development Agreement or Title Agreement with Kennedy; (2) Kennedy breached the Development Agreement; (3) it is entitled to a new trial on whether it breached the Development or Title Agreements; (4) it is entitled to a new trial on damages; and (5) Kennedy is not entitled to attorney fees and expenses. We reject the City's arguments and affirm those aspects of the judgments.

¶4 In Appeal No. 2005AP434—the case involving the open meetings law—Kennedy appeals a summary judgment dismissing its claims against the City and the individual members of the City's common council for violations of Wisconsin's open meetings law. Kennedy argues the circuit court erred by denying Kennedy's motion for summary judgment and granting the City's motion for summary judgment. We conclude the relief Kennedy seeks is precluded by WIS. STAT. § 19.97(3) and therefore affirm the judgment.

BACKGROUND

¶5 In May 1995, Kennedy and the City entered into a Development Agreement in which the City agreed to provide various inducements to Kennedy, such as land, land improvements and tax incentives. In exchange, Kennedy agreed to build a manufacturing facility in the City. Kennedy would build on a parcel

known as "Lot 2." The City agreed to allow Kennedy to use an existing building, known as the "Spec. Building," until Kennedy could complete construction of its facility on Lot 2. A Title Agreement detailed the manner in which title to Lot 2 would pass from the City to Kennedy. The parties also later entered into leases regarding the Spec. Building.

¶6 Problems arose. Kennedy claimed the City had not given clear title to Lot 2, the agreed-upon improvements to the parcel had not been timely completed by the City and, therefore, Kennedy could not proceed to construct its facility on Lot 2. The City claimed Kennedy breached the Development and Title Agreements by not constructing the required building and by continuing to occupy the Spec. Building. The conflicts between Kennedy and the City spawned a series of lawsuits.

¶7 Kennedy commenced Polk County Case No. 1999CV289 in August 1999, alleging, among other things, the City had breached the Development Agreement relating to the City's conveyance of Lot 2 to Kennedy and Kennedy's development of that parcel.

¶8 The City later commenced a small claims action, Polk County Case No. 1999SC712, seeking to evict Kennedy from the Spec. Building, which Kennedy leased. As part of the eviction action, the City sought double-rent damages in accordance with WIS. STAT. § 704.27. In January 2000, the court ordered, in accordance with the parties' stipulation, that further rent payments by Kennedy for the Spec. Building would be placed in escrow and held until the completion of the litigation.

¶9 The City also commenced Polk County Case No. 2000CV4 against Kennedy, alleging Kennedy breached the Development Agreement. These three cases were consolidated by the parties' stipulation in November 2000.

¶10 Bernard Kennedy commenced a fourth case, Polk County Case No. 2002CV270, against the City on June 14, 2002, alleging the City breached a purchase agreement with him regarding the Spec. Building. That case was consolidated with the other three cases in August 2002.

¶11 A trial was held in the four consolidated cases in January 2003. By agreement of the parties, the City's eviction claim was tried to the court and the other three cases were tried to a jury. The jury found Kennedy had not breached the Development or Title Agreements, the City had breached those agreements, and Kennedy suffered damages of $900,000. After the jury's verdict, the parties stipulated to stay entry of judgment for 120 days. The stipulation also provided that Kennedy would remain in the Spec. Building during that period and that the rent money placed in escrow be returned to Kennedy as a credit against the judgment.

¶12 In February, Kennedy requested the City pay its attorney fees and expenses, as allowed by the Development Agreement. The parties filed post-verdict motions in March. In April, the parties stipulated that the circuit court could decide the City's pending eviction claim.

¶13 On April 18, the court addressed Kennedy's request for attorney fees and expenses. The court found the Development Agreement included a provision to allow Kennedy to recover its attorney fees and expenses and that Kennedy was the prevailing party on the contractual claims. It further found that the various

claims were so intertwined as to not be capable of segregation. The court awarded Kennedy $180,492.26 in attorney fees and expenses.

¶14 The court ruled on all remaining motions and claims on April 25. It denied the City's motions to change the jury's special verdict responses and for a new trial. It granted Kennedy's motion for judgment on the verdict. The court also concluded, "[g]iven the complexity of the issues, both during the litigation and on these motions, the facts that Kennedy did not prevail either at the trial on all issues or at the hearing on these motions," that post-verdict, prejudgment interest was not appropriate.

¶15 Regarding the City's eviction claim, the court found: (1) the City had leased the Spec. Building to Kennedy in exchange for rent payments; (2) the lease expired on September 30, 1999; (3) Kennedy had held over on the lease to the current date; (4) the City was entitled to possession of the Spec. Building, a writ of assistance, and money damages for unpaid rent in the amount of $94,600; (5) the City also was entitled to double the unpaid rent damages, pursuant to WIS. STAT. § 704.27; and (6) the City was due double rent from May 1, 2003, until the date Kennedy vacated the Spec. Building. Kennedy vacated on June 9, 2003.

¶16 The court entered an order for judgment on July 17, 2003. The order provided that judgment be granted awarding damages to Kennedy in accordance with the jury's verdict, less the amount that had been held in escrow, plus attorney fees and expenses; awarding title of Lot 2 to Kennedy; and entitling the City to evict Kennedy from the Spec. Building, along with back rent damages. Three separate judgments were entered reflecting the court's order for judgment: one regarding ownership of Lot 2; one regarding Kennedy's damages, attorney fees and expenses; and one regarding the eviction and back rent.

¶17 The same day the court entered its order for judgment, the City's common council met in closed session to discuss the court's rulings and the City's further litigation options. The council determined it was in the City's best interest for the litigation to end. When the council reconvened in open session, it passed a motion to accept the court's judgment in the Kennedy lawsuits and proceed to comply with said order. However, on October 16, Kennedy filed a notice of appeal, challenging the circuit court's decisions regarding post-verdict interest and double-rent damages.

¶18 On October 27, the council met with its attorneys to discuss strategies in light of Kennedy's appeal. A variety of options were discussed, including cross-appeal, and a consensus of the council authorized attorney Andrew Jones to pursue those options. City attorney John Schneider advised that the discussions about the Kennedy litigation need not be reported in open session because the discussions were protected by statute. Thus, when the council reconvened in open session, it was reported that "no action was taken." On November 12, the City filed a notice of cross-appeal.

¶19 Kennedy then commenced Polk County Case No. 2004CV280, alleging the City's action of filing a cross-appeal in the consolidated cases violated the open meetings law. The parties filed cross-motions for summary judgment in July 2005. The City sought dismissal of Kennedy's complaint. Kennedy sought an order declaring void the City's cross-appeal in the consolidated cases. The court granted the City's motion and denied Kennedy's motion. The court concluded that, even if the City violated the open meetings law by filing a cross-appeal in the consolidated cases, its decision to do so was only voidable, not void, and that the public's interest in enforcing the open meetings law did not outweigh the public's interest in sustaining the City's action.

¶20 Kennedy appealed the court's decision in the open meetings law case. The open meetings law case was then consolidated with the other cases involving the contracts for purposes of appeal.

KENNEDY'S APPEAL, CASE NO. 2003AP2816

A. Statutory Interest

¶21 Kennedy argues the circuit court erred when it denied post-verdict, prejudgment interest, pursuant to WIS. STAT. § 814.04(4). Section 814.04 provides that "when allowed, costs shall be as follows." Subsection (4) states, "if the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs." Here, the circuit court concluded Kennedy was the prevailing party and entitled to attorney fees and costs. However, the court rejected Kennedy's right to § 814.04(4) interest because the litigation was complex and Kennedy did not prevail on all issues.

¶22 Kennedy argues the circuit court did not have discretion to award it costs as the prevailing party as to one category but reject costs under WIS. STAT. § 814.04(4). Kennedy points out the purpose of § 814.04(4) "is not to punish the defendant for nonpayment, but to compensate the plaintiff for the loss of use of the money until judgment is entered." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 224 Wis. 2d 312, 325, 592 N.W.2d 279 (Ct. App. 1998). Because the jury found Kennedy was entitled to damages and the court found Kennedy was the prevailing party, Kennedy argues it is entitled to § 814.04(4) interest.

¶23 The City responds that Kennedy consented to forego this category of costs by virtue of its stipulation to delay entry of judgment for 120 days. Thus, the City argues, Kennedy expressly agreed to surrender post-verdict, prejudgment interest in exchange for the ability to stay in the Spec. Building. However, the stipulation placed on the record does not mention post-verdict, prejudgment interest. Thus, contrary to the City's contentions, Kennedy did not expressly agree to forego these costs.

¶24 The City also argues that Kennedy was not the prevailing party on all issues and therefore is not entitled to interest. However, we note that the statute does not even mention prevailing party. Rather, it provides for costs whenever there is a money judgment. Here there was a money judgment so costs should be awarded. Further, the statute does not contemplate that the circuit court has discretion to award one category of damages, but deny another. The statute provides that, "when allowed, costs *shall*" include post-verdict, prejudgment interest and that the amount "*shall be* computed by the clerk and added to the costs." (Emphasis added.) We conclude the circuit court erroneously exercised its discretion when it denied post-verdict interest and therefore reverse that portion of the judgment and remand with directions to add interest to the judgment.

B. Double Rent

¶25 Kennedy argues the circuit court erred when it awarded the City double rent, pursuant to WIS. STAT. § 704.27, from the expiration of the lease until Kennedy vacated the building. The statute provides in part:

> If a tenant remains in possession without consent of the tenant's landlord after the expiration of a lease … the landlord may recover from the tenant damages suffered by the landlord because of the failure of the tenant to vacate within the time required. In absence of proof of greater

> damages, the landlord may recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession.

"Thus, the statute grants a minimum award and facilitates prompt eviction of holdover tenants." ***Vincenti v. Stewart***, 107 Wis. 2d 651, 655, 321 N.W.2d 340 (Ct. App. 1982). Under the plain language of the statute, then, double rent is the minimum level of damages, unless greater damages are proven.

¶26 However, Kennedy contends that WIS. STAT. § 704.27 should not apply here because the rationale behind the statute is not present. Kennedy argues that evictions are small claims actions with expedited procedures because evictions seldom raise an issue for a trial. Here, the eviction claim was removed from small claims court, consolidated with other issues with the City's consent and was not litigated using expedited procedures. Therefore, Kennedy contends, the City should not be allowed double-rent damages under § 704.27.

¶27 The City counters that WIS. STAT. § 704.27 is part of the landlord-tenant chapter of the statutes, not the small claims or evictions chapters. The City argues the double-rent remedy is not limited to eviction claims; a landlord could recover double rent for the time a tenant held over even where the tenant had already voluntarily vacated the premises. Therefore, the City contends, the remedy provision is not tied to a procedural context.

¶28 Moreover, the City argues, the small claims and evictions statutes expressly contemplate that, where a counterclaim or cross-claim exceeds jurisdictional limits, the entire action is removed from small claims. *See* WIS. STAT. §§ 799.02(1) and 799.43. Yet the statutes do not provide that available remedies are altered. The City asserts it is nonsensical for a defendant to be able to affect a plaintiff's available relief by pleading a cross-claim or counterclaim in

excess of statutory limits. We agree with the City that reading WIS. STAT. § 704.27 as Kennedy suggests leads to an absurd result. Therefore, we reject Kennedy's contention that § 704.27 does not apply under the facts of this case.

¶29 Kennedy also argues that double-rent damages are only appropriate where a tenant remains in possession *without the landlord's consent*. *See* WIS. STAT. § 704.27. Kennedy contends it had the City's consent to occupy the Spec. Building, relying on the Development Agreement, two letters from the City administrator and a City resolution. However, the circuit court found Kennedy had no right to occupy the Spec. Building beyond the lease's expiration on September 30, 1999, and Kennedy has not demonstrated that this finding is clearly erroneous. The documents Kennedy relies on predate the lease and do not trump the lease's express terms.

¶30 Kennedy also contends it had consent to occupy the Spec. Building by virtue of the parties' stipulation to delay entry of judgment. The parties stipulated to stay entry of judgment for 120 days and that Kennedy "will remain in the Spec. Building in that time period." We agree with Kennedy that the stipulation constitutes consent by the City for Kennedy to occupy the Spec. Building during that time period. We therefore reverse the portion of the judgment awarding double rent for the 120-day period commencing on January 31, 2003, and remand with directions to reduce the judgment.

THE CITY'S CROSS-APPEAL, CASE NO. 2003AP2816

A. Jury's Finding That The City Breached The Contracts

¶31 The City argues there is no credible evidence to support the jury's verdict that the City breached the Development and Title Agreements. Our review

of a jury's verdict is narrow. A jury's verdict will be sustained if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We defer to the jury's determinations as to the weight and credibility of witnesses' testimony. ***Id.***, ¶39. Our role is to search the record for credible evidence to support the verdict the jury reached, not a verdict it could have reached but did not. ***Id.*** Because the circuit court approved the jury's verdict, our review is even more limited, allowing reversal only where "there is such a complete failure of proof that the verdict must be based on speculation." ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979).

¶32 At trial, Kennedy presented several theories that the City had breached the contracts. Kennedy contended the City had breached the contracts by failing to resolve or creating encumbrances on the title of Lot 2 and by altering deed documents. Kennedy presented evidence that the City caused title problems including: transferring title to the City's Community Development Authority (CDA); allowing the CDA to pledge Lot 2 as collateral in other transactions and, therefore, causing financing statements to be filed against the parcel; altering the grant deed from the City to Kennedy; and allowing Lot 2 to be referenced in an federal grant application submitted by Polk-Burnett Electrical Cooperative as the designated site for the use of grant funds. Kennedy also contended the City breached the contracts by failing to timely complete the site improvements.

¶33 On appeal, the City's arguments challenging the jury's verdict ignore our standard of review. The City presents evidence that supports a verdict in its favor, but does not acknowledge the evidence that supported the jury's

findings. The City also attacks the credibility of Kennedy's witnesses, despite that issue being uniquely within the jury's province.

¶34 Kennedy cites sufficient credible evidence to support the verdict. Regarding title encumbrances, Beverly Moore, an agent of the title insurance company, testified the CDA had title of Lot 2 on June 19, 1995. This was after the City gave Kennedy a grant deed. The City's mayor also testified the CDA had title from May 1995 through November 1995. City attorney Tim Laux testified errors had caused developers' land to be given to the CDA. Real estate development expert Michael Ayres testified he would not and could not go forward with development because of the title encumbrances and document alterations. Regarding financing statements, the City's real estate expert, John Bushnell Nielson, testified that allowing two financing statements to be filed against Lot 2 constituted a breach. Additionally, Ayres testified he would need an explanation for the alterations to the grant deed before he would proceed with the project. Finally, the City administrator testified the site preparation was not completed on time.

¶35 In sum, we uphold a jury's verdict "even though [the evidence] be contradicted and the contradictory evidence be stronger and more convincing." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 390, 541 N.W.2d 753 (1995). Here, Kennedy presented sufficient evidence from which the jury could conclude the City breached the contracts. The City's arguments to the contrary are unpersuasive.

B. Jury's Finding That Kennedy Did Not Breach The Contracts

¶36 The City argues there is no credible evidence to support the jury's verdict that Kennedy did not breach the Development or Title Agreements. The

City contends that the undisputed evidence demonstrates Kennedy did not fulfill its contractual obligation to build a facility on Lot 2. However, the jury found the City materially breached the contracts, a finding we uphold on appeal. A material breach of a contract releases the non-breaching party from performance of the contract. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). Thus, Kennedy's nonperformance does not compel a finding that Kennedy breached the contracts.

C. New Trial Regarding Breach Of The Contracts

¶37 The City contends the circuit court erred by denying its WIS. STAT. § 805.15(1) motion for a new trial on Kennedy's claim that the City breached the contract and on the City's claim that Kennedy breached the contract. Whether to grant a new trial is within the circuit court's discretion. ***Johnson v. American Family Mut. Ins. Co.***, 93 Wis. 2d 633, 649-50, 287 N.W.2d 729 (1980). Accordingly, we reverse only if the circuit court erroneously exercised its discretion. ***Id.*** A court properly exercises its discretion when it considers the applicable facts and law and reaches a conclusion that a reasonable court could reach. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶38 Here, the circuit court concluded that, although the City asserted it was entitled to a new trial, its assertion was "not supported by compelling argument but rather appear[ed] to recite the statutory basis for the motion." The court further stated, "[T]he jury determined the facts. Those facts are supported by the evidence adduced." The court referenced the facts supporting the jury's verdict, which it had enunciated when denying the City's motion to change the jury's answers regarding breach of contract.

¶39 The City offers no compelling argument that the court erroneously exercised its discretion. Indeed, the City merely relies on its arguments challenging the jury's findings that the City did breach, and Kennedy did not breach, the contracts. Therefore, we conclude the circuit court properly exercised its discretion when it denied the City's motion for a new trial on the breach of contract claims.

D. New Trial Regarding Damages

¶40 The City argues the circuit court erred by denying its WIS. STAT. § 805.15(1) motion for a new trial on damages. The circuit court found testimony of Kennedy's expert accountant, Randy Krautkramer, supported damages of as much as $2,600,000 or as low as $210,000, based on the alternate assumptions posited by the City. The court concluded the jury was left to either accept the assumptions presented by one of the parties or to utilize its own assumptions based on the evidence, the jury's award of $900,000 was between the two amounts presented by the parties and did not shock the court's conscience. Therefore, the court approved the verdict.

¶41 The City argues the damages awarded were excessive and were not based on the evidence. It contends Krautkramer's testimony was "deeply flawed" and could not form the basis for the jury's award. However, the weight and credibility of a witness's testimony is for the jury, not this court, to decide. ***Morden***, 235 Wis. 2d 325, ¶39. The jury could have relied on Krautkramer's testimony in making its damage finding and, therefore, the circuit court properly exercised its discretion when it denied the City's motion for a new trial on damages.

E. Attorney Fees And Expenses

¶42 The City argues Kennedy was not entitled to recover any attorney fees related to the claims that pertained to the Spec. Building. Generally, parties must bear their own attorney fees. ***Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd.***, 207 Wis. 2d 1, 36, 558 N.W.2d 83 (1997). However, a losing party may be required to pay the prevailing party's attorney fees where, as here, fee shifting is expressly authorized by a contract. *See* ***id.***

¶43 The City concedes that the Development Agreement included a fee-shifting clause and does not challenge the award of fees incurred litigating those claims. However, the City contends Kennedy cannot recover for those attorney fees related to the Spec. Building claims because the relevant contracts, leases and an alleged purchase agreement, did not include fee-shifting provisions and because Kennedy was not the prevailing party on those claims.

¶44 The circuit court concluded that Kennedy was the prevailing party on the claims regarding the Development Agreement. It also considered the additional claims not related to breach of contract and found that "[t]he issues were so intertwined that separation of the costs and expenses and fees between the various causes of action is not practical or easily possible." The City asserts that Kennedy bore the responsibility to segregate its fees between the various claims. However, the City has not demonstrated that the circuit court's finding that the issues were intertwined and thus incapable of segregation is clearly erroneous.

¶45 The City makes two additional arguments that the amount of fees and expenses awarded should be reduced. The City contends that the award improperly included $11,315.50 in charges for experts who were not called to testify at trial. However, the contract allows damages to the prevailing party of

"reasonable fees of attorneys and other expenses so incurred by the prevailing party." Thus, the contract does not limit recovery of expenses to those allowed by statute and the statutory rule that a party may only recover expert witness expenses for testifying experts does not apply. The City also contends an undocumented charge for an expert in the amount of $4,822 should be deducted. However, the only record citation the City provides that this charge is "undocumented" is its own assertion in its circuit court brief in opposition to Kennedy's request for attorney fees and expenses. The circuit court's factual finding of the amount of attorney fees and expenses is supported by the affidavit of Kennedy's attorney; the City has not demonstrated that the court's finding was clearly erroneous.

KENNEDY'S APPEAL, CASE NO. 2005AP434

¶46 Kennedy argues the circuit court erred by denying its summary judgment motion and granting summary judgment in the City's favor regarding Kennedy's claim that the City violated the open meetings law. We review a summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶47 Wisconsin's open meetings law provides, in relevant part:

> In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

WIS. STAT. § 19.81(1). The enforcement provision states:

> Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable …. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.

WIS. STAT. § 19.97(3).

¶48 Kennedy raises a number of arguments asserting that it was entitled to summary judgment and the City was not entitled to summary judgment.[2] However, like the circuit court, we conclude that, even assuming the City's actions violated the open meetings law, WIS. STAT. § 19.97(3) precludes the relief Kennedy seeks. Therefore, we need only address Kennedy's arguments regarding the public's respective interests.

¶49 Kennedy argues "the public benefit in voiding the City's secret action outweighs the public benefit of upholding the secret action." Kennedy contends the council members' testimony indisputedly establishes that accepting the court's judgment was in the best interest of the City and its residents. "Voiding the City's cross-appeal would faithfully and accurately reflect what the residents of the City were led to believe—that its Council was not taking any action contrary to its earlier announced action to accept and comply with the trial court's judgment." Kennedy posits that the council, behind closed doors, has subjected the City to the costs and risks of prolonging the litigation or a new trial.

[2] Kennedy argues: (1) authority to file a cross-appeal was possessed only by the council and the council never authorized the action; (2) the City was not entitled to veil its decision to cross-appeal based on the "conferring with legal counsel" exception to the open meetings law; and (3) the City's action was not protected by good faith reliance on legal advice.

¶50 Kennedy only analyzes the enforcement side of the equation and concludes it "far outweighs" the public's interest in allowing the cross-appeal. However, the City responds that, while it was in the City's best interest to abide by the judgment and not prolong the litigation when the City first considered it, the public interest changed when Kennedy prolonged the litigation by filing its appeal. We agree with the circuit court's analysis:

> In this particular case the plaintiff has failed to demonstrate that the alleged failure of the City to comply with the letter and/or spirit of Wisconsin's Open Meeting Law outweighs the public interest in preserving procedural legal options available to it by the timely filing of the cross-appeal.
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> ….
>
> …. The plaintiff has stated as its "good" reason (its altruistic reason) the need for actions of the City Council to be taken in full view of the citizenry so as to protect the "process of public decision making" from the potential abuses of government decisions made in the shadows of secrecy. However, the reasonable inferences arising from the undisputed facts in this case indicate unequivocally that the plaintiff's "real" reason for this lawsuit is to gain a huge procedural advantage with regard to the appeal process now pending with regard to the "Kennedy lawsuits."

We conclude the public's interest in enforcement of the open meetings law does not outweigh the public's interest in sustaining the City's cross-appeal. Therefore, we affirm the summary judgment in the City's favor dismissing Kennedy's claims.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions in Appeal No. 2003AP2816. Judgment affirmed in Appeal No. 2005AP434. No costs on appeal.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.