COURT OF APPEALS DECISION DATED AND FILED

August 7, 2001

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.

No. 00-3126

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

GPS, INC.,

PLAINTIFF-RESPONDENT,

V.

TOWN OF ST. GERMAIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Reversed and cause remanded with directions.*

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

¶1 PETERSON, J. The Town of St. Germain appeals an order granting GPS, Inc.'s petition for a writ of mandamus seeking to compel the Town to release three documents under WIS. STAT. § 19.35,[1] the open records law. The Town

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

argues that the circuit court erred by conducting a balancing test to determine whether the release of the documents was in the public's interest.[2]

¶2 We conclude that the circuit court did err by conducting a balancing test. We hold that documents subject to the attorney-client privilege are exempt from disclosure. Because the court did not determine whether the withheld documents are subject to the attorney-client privilege, we reverse the order and remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 GPS applied for a zoning permit to construct a single-family residence. The application was denied because the proposed structure was in violation of the Town's zoning ordinances.

¶4 GPS then applied for a variance. At the final hearing to determine the variance application, the town chairman circulated copies of proposed findings of facts, conclusions of law, and a proposed order to the other Town board members. The board's legal counsel had prepared the order. The board then unanimously denied the variance request without holding any discussion or debate.

¶5 Subsequently, GPS made a written request for all records relating to the Town's decision to deny the variance, pursuant to WIS. STAT. § 19.35(1)(a).[3]

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[2] The Town additionally argues that the attorney-client privilege applies to the documents and that the circuit court erred by presupposing a violation of the open meetings law. Because our resolution of the balancing test issue is determinative of the appeal, we do not address these other arguments. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

[3] WISCONSIN STAT. § 19.35(1)(a) reads as follows:

(continued)

The Town provided GPS with most of the requested documents. However, three documents were withheld. The Town claimed the three documents were communications protected by the attorney-client privilege and therefore exempt from disclosure.

¶6 GPS petitioned for a writ of mandamus to compel the Town to comply with its records request. The circuit court assumed that the attorney-client privilege applied and conducted a balancing test,[4] relying on WIS. STAT. § 19.81,[5]

> **(1)** RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

[4] The circuit court did not decide whether the attorney-client privilege applied to the withheld documents.

[5] WISCONSIN STAT. § 19.81 reads as follows:

> **(1)** 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.
>
> **(2)** To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.
>
> **(3)** In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

(continued)

the open meetings law. The court ordered the documents released because it determined that the "public's interest in open government exceeds the public's right to insure attorney-client privilege under the facts of this case." This appeal followed.

STANDARD OF REVIEW

¶7 Whether the Town properly denied access to the documents at issue in this case presents a question of law which we review independently of the circuit court. ***Wisconsin Newspress v. Sheboygan Falls Sch. Dist.***, 199 Wis. 2d 768, 775, 546 N.W.2d 143 (1996).

BACKGROUND

¶8 Wisconsin has long recognized that the open records law "reflects the common law principles favoring access to public records …." ***Mayfair Chrysler-Plymouth v. Baldarotta***, 162 Wis. 2d 142, 155, 469 N.W.2d 638 (1991). The general presumption is that public records shall be open to the public unless there is a clear statutory exception, unless a limitation exists under the common law, or unless there is an overriding public interest in keeping the public record confidential. ***Hathaway v. Green Bay Sch. Dist.***, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984); *see also* WIS. STAT. § 19.31.

> **(4)** This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

¶9 WISCONSIN STAT. § 19.35(1) provides that "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." The section further provides that, "[s]ubstantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect." In addition, WIS. STAT. § 19.36(1) provides that "[a]ny record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure …."

¶10 When an exception does not apply, a balancing test is implemented. The balancing test involves a determination whether the public policies favoring disclosure are outweighed by the public policies favoring nondisclosure. ***Mayfair Chrysler-Plymouth***, 162 Wis. 2d at 164-65.

¶11 The Town argues that the circuit court erred by conducting a balancing test to determine whether it was in the public interest to allow inspection of the documents. According to the Town, the attorney-client privilege is an exception contemplated by WIS. STAT. §§ 19.35 and 19.36. The Town argues that under ***Wisconsin Newspress***, documents subject to the attorney-client privilege are exempt from the open records law. We agree.

¶12 In ***Wisconsin Newspress***, our supreme court held that no blanket exception exists under the open records law for public employee disciplinary or personnel records. ***Id.*** at 774. Instead, "the balancing test must be applied in every case in order to determine whether a particular record should be released, and there are not blanket exceptions other than those provided by the common law or statute." ***Id.*** at 780.

¶13 However, the court explicitly ruled that the attorney-client privilege[6] is an exception contemplated by the open records law. ***Id.*** at 782. As an exception, no balancing test is required.

¶14 GPS argues that ***Wisconsin Newspress*** does not stand for the proposition that once the attorney-client privilege applies, no balancing test takes place. It contends that ***Wisconsin Newspress*** did not consider whether the privilege applies in this context. GPS argues that application of the balancing test under WIS. STAT. § 19.85, the open meetings law, is appropriate.[7]

¶15 These arguments ignore the holding in ***Wisconsin Newspress***, the controlling authority in this case. Contrary to GPS's arguments, ***Wisconsin Newspress***, 199 Wis. 2d at 782, recognized that attorney-client privileged communications are among the "exceptions to disclosure created under the common law or by statute" and that those exceptions apply under the open records law. Therefore, a client, whether a public body or a private entity, has the right to expect that communications made in confidence to its attorney will not be disclosed. As a result, we conclude that the circuit court erred by conducting a balancing test.

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[6] The attorney-client privilege is recognized in both WIS. STAT. § 905.03(2) and SCR 20:1.6(a). Section 905.03(2) states that a "client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client …." Under the comment to SCR 20:1.6(a) (1999-2000), the attorney-client privilege applies in situations other than those "where evidence is sought from the lawyer through compulsion of law."

[7] GPS additionally contends that: (1) the attorney-client privilege is an evidentiary privilege that does not apply under the open records law; (2) the Town's attorney was an agent of the governmental body and the attorney-client privilege did not attach to any communications; and (3) WIS. STAT. § 19.85(4), the open meetings law compels disclosure of the documents because of the public interest. We do not specifically discuss each contention because our holding disposes of the issue.

¶16 However, the circuit court did not actually determine whether the attorney-client privilege applied to the withheld documents. It only assumed that the attorney-client privilege had attached for purposes of the balancing test. Therefore, we reverse the order granting GPS's petition for mandamus and remand with directions to determine whether the attorney-client privilege applies.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.