STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

ANIMAL LEGAL DEFENSE FUND,

Petitioner-Appellant,

v. Appeal No. 2016-AP-000869

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN and RICHARD R. LANE,

Respondents-Respondents.

On Appeal from the Circuit Court for Dane County
The Honorable Ellen K. Berz, Presiding
Case No. 14-CV-2874

BRIEF OF PETITIONER-APPELLANT

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STATEMENT OF ISSUES

1. WHETHER WRITINGS REGULARLY PREPARED TO CAPTURE ALL STATEMENTS MADE AT EVERY MEETING OF A PUBLIC AUTHORITY AND LATER USED AS ESSENTIAL COMPONENTS OF CREATING FORMAL MEETING MINUTES QUALIFY AS "NOTES MADE FOR PERSONAL USE" SUCH THAT THE "PERSONAL USE" EXCEPTION TO WISCONSIN'S OPEN RECORDS LAW EXEMPTS THE WRITINGS FROM PRODUCTION UNDER THE STATUTE.

The circuit court answered this question "yes." It concluded that the 10 pages of documents withheld by the University of Wisconsin's Research Animal Resource Center ("RARC") were "notes" under Wis. Stat. § 19.32(2) and were not required to be produced under Wisconsin's Open Records Law based on the "personal use" exception.[1] It so held despite overwhelming and un-contradicted evidence establishing that the originator's public employer required the originator to take the notes and regulated the manner in which the notes were created and stored, so that the notes would be readily available for use by the originator and others. In deciding this issue, the circuit court improperly resolved credibility issues on summary judgment by giving greater weight to affidavit testimony of one witness over the deposition testimony of others.

The circuit court also refused to address whether RARC's established policy of refusing to produce officially-mandated "notes" of meetings of the University of Wisconsin's Institutional Animal Care and Use Committee (the "Animal Care Committee") is illegal under the Open Records Law.

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[1] As it did below, ALDF uses the phrase "notes" for ease of the Court's reference at various times in this brief. Use of this word in the brief should not be construed as a concession that the records at issue are "notes" for the originator's personal use. It is simply shorthand for more formal phrases such as "writings created at the meetings" or "contemporaneous meeting minutes."

STATEMENT ON ORAL ARGUMENT

The issues on appeal derive from a well-developed summary judgment record. Oral argument is unnecessary because the record and the briefs on appeal will present the issue and develop the legal theories and authorities so that oral argument would be unlikely to aid the Court's analysis. *See* Wis. Stat. § 809.22. Notwithstanding the foregoing, ALDF is prepared to participate in argument if the Court believes it will prove helpful to resolving the case.

STATEMENT ON PUBLICATION

It is the public policy of this state that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. This case involves the definition of "record" in Wis. Stat. § 19.32(2) and application of the so-called "personal use" exception of Wisconsin's Open Records Law. Only a few published decisions address what constitutes "notes" under the statute and when the "personal use" exception applies.

Three reasons support publication of the Court's decision. First, a published decision will clarify this Court's decision in *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, 2015 WI App 53, 364 Wis. 2d 429, 867 N.W.2d 825, on what constitutes an exempted "note" under Wis. Stat. § 19.32(2) and how and when the "personal use" exception can be invoked. *See* Wis. Stat. § 809.23(1)(a)1. Second, publication of the Court's decision will contribute to the legal literature by collecting case law and reciting legislative history for the benefit of all citizens. *See* Wis. Stat. § 809.23(1)(a)4. Finally, a published decision by the Court is appropriate because there is a substantial and continuing public interest in Wisconsin's Open Records Law and cases addressing how it is to be interpreted will assist future litigants. *See* Wis. Stat. § 809.23(1)(a)5.

STATEMENT OF THE CASE

This is an appeal from a final judgment entered June 14, 2016, in the circuit court for Dane County, the Honorable Ellen K. Berz, presiding. The circuit court granted summary judgment to Respondents pursuant to Wis. Stat. § 802.08(6), ruling that 10 pages of handwritten and typewritten documents created by public employees during meetings of the Animal Care Committee as required by their public employer, and in a manner prescribed and regulated by their employer, were not "records" under Wisconsin's Open Records Law.

Instead, the circuit court concluded that the documents **it reviewed** were notes prepared for the originator's personal use and thus protected by the so-called "personal use" exception in the statute.[2] (R.38.) While the circuit court made specific rulings regarding the 10 pages of notes reviewed *in camera* (R.38 at 6-10), it inadequately addressed the threshold question whether these officially-mandated summaries of meetings of the Animal Care Committee were "notes for personal use" in the first instance, and whether RARC's established policy of refusing to produce such documents was illegal under the Open Records Law. (R.38 at 5-6.)

PROCEDURAL STATUS

Petitioner-Appellant Animal Legal Defense Fund ("ALDF") filed its Petition for Writ of Mandamus on October 14, 2014. (R.1-2.) Respondents Board of Regents of the University of Wisconsin and Richard Lane ("UW") answered the Petition on December

[2] We highlight "it reviewed" because a fundamental problem with the circuit court's decision is that six of the ten pages of notes it looked at were not "minutes takers" notes of the kind at issue in this case. Instead, they were those of a supervisor and not the official notes created by official RARC policy and regulated as set out in this brief.

1, 2014. (R.9.) ALDF filed a First Amended Complaint on May 4, 2015, (R.17) and RARC answered on May 28, 2015 (R.18). In the First Amended Complaint, ALDF sought declaratory relief under Wis. Stat. § 806.04 and demanded that UW produce what UW refers to as "notes," which ALDF contends are non-exempt records under the statute. (R.17 at ¶ 56(a)(b).)

On October 1, 2015, ALDF moved for summary judgment and an *in camera* review of the documents: 10 handwritten and typewritten pages that UW had refused to produce in response to ALDF's open records requests. (R.22-25.) UW filed its opposition to ALDF's motion for summary judgment on November 2, 2015. (R.27-29.) On November 16, 2015, ALDF filed its reply. (R.30.) On December 3, 2015, the parties stipulated that UW could file a sur-reply brief (R.31), which UW filed on January 8, 2016. (R.32.)

ALDF sought oral argument before the circuit court on February 15, 2016. (R.35.) UW objected to the request for oral argument (R.34) and the circuit court formally denied ALDF's motion seeking it in a written decision on March 9, 2016. (R.38 at 1 n.1; Appx.1.) That day, the circuit court entered its Decision and Order on Summary Judgment (R.38; Appx.1-11.), granting ALDF's uncontested motion for *in camera* review of the public records in question, denying ALDF's motion for summary judgment, and granting summary judgment to UW. *(Id.)*

UW filed notice of entry of judgment on March 18, 2016. (R.39.) ALDF timely filed its Notice of Appeal on April 21, 2016. (R.40.) On May 26, 2016, this Court entered an order questioning whether it had jurisdiction over the appeal and ordered the

parties to present jurisdictional statements related to the inquiry by June 10, 2016. (5/26/16 Order, p. 3.) The parties agreed that jurisdiction existed and asked the circuit court to enter an order confirming that its March 9, 2016 Decision was final. (6/6/16 Joint Motion, p. 2, ¶ 2.)

Judge Berz advised that she could enter an order reflecting a final judgment, but not immediately due to a planned vacation. (*Id*. at p. 2, ¶ 3.) On June 6, 2016, the parties jointly moved to extend the time period for filing jurisdictional memoranda based on the vacation schedule of the judge. (*Id*. at p. 2, ¶¶ 3, 5.) The circuit court entered final judgment on June 14, 2016 (R.43), and this Court determined on July 7, 2016 (R.42), that the jurisdictional infirmity no longer existed. (7/7/16 Order, p. 2.) The Court ordered the circuit court clerk to supplement the record with the final judgment. (*Id*.) On July 13, 2016, the clerk sent the supplemental record to this Court. (R.44.)

STATEMENT OF FACTS

A. ALDF's Open Records Requests.

On December 6, 2013, ALDF sent an open records request to RARC's Records Custodian Richard R. Lane. (R.25.) ALDF sought records between December 6, 2011, and the date of its request, specifically including: "All [Animal Care Committee] investigation notes and reports, including minutes from and records produced at meetings pertaining to" research on non-human primates regarding social isolation, social deprivation, and/or maternal deprivation (the "maternal deprivation research"). (R.25 at Exh. A, ¶ 6.) UW produced some records on April 9, 2014. (R.25 at Exh. B.)

On June 19, 2014, ALDF wrote UW to clarify the nature of its request. (R.25 at Exh. C.) Specifically, ALDF stated that it sought all "records from [Animal Care Committee] meetings and investigations, including handwritten notes of Committee deliberations, regarding any and all protocols of maternal deprivation and social isolation in primates." (*Id.*, p. 2.)

UW hires people whose principal duties include creating Animal Care Committee meeting minutes. (R.25 at Exh. J, Request Nos. 9-10, Appx.71; R.25 at Exh. G, p. 15:18-24, Appx.19.) Commonly referred to by UW as "minutes takers" (R.26 at ¶ 4), these public employees are formally classified by UW as "Associate [Animal Care Committee] Administrators" (previously known as "University Services Associate 1").[3] (R.25 at Exh. J, Request Nos. 9-10, Appx.71; R.25 at Exh. G, p. 15:18-24, Appx.19.)

UW responded to ALDF's June 19, 2014 letter on August 19, 2014, stating as follows:

> Your emphasis on handwritten notes suggests that you have a particular interest in any such documents produced at meetings. Please be advised that under Wisconsin's public records law, the term "record" does not include "drafts, notes . . . and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working." Wis. Stat. 19.32(2). The official record of [Animal Care] [C]ommittee deliberations is the final version of the minutes of a meeting, which you have received. To the extent that any notes are taken at meetings by individual committee members and that any such notes exist, they are not used by the Animal Care Committee for any official purpose, and would fall within the above-referenced exclusion to Wisconsin's definition of "record." *See State v. Panknin*, 27 Wis. 2d 200, 210-213 (Ct.

[3] The fact that UW itself refers to its employees as "**minutes** takers" is significant. As described throughout this brief, the minutes takers do not doodle or record their own mental impressions in their so-called "notes." Instead, the primary duty of the minutes takers is to **contemporaneously** record what is said and done at Animal Care Committee meetings. It does not matter that these written documents are not perfect transcriptions: they are obligatory writings prepared by public employees at the direction of an authority, and are therefore records under Wis. Stat. § 19.32(2). The notion that they are exempted "notes" under the statute is defied by the actual practice of how they come into existence.

> App. 1998). **The [Animal Care Committee] staff charged with taking meeting minutes may take notes at meetings to refresh their memories as they prepare the minutes; however, to the extent any such notes exist, they are also not "records" under Wisconsin law**.[4]

(R.25 at Exh. D, p. 2; emphasis added.)

On September 12, 2014, ALDF requested, again under the Open Records Law, maternal deprivation study records generated between December 6, 2013, and the date of the request, which received a similar response from UW. (R.25 at Exhs. E-F.) On March 9, 2015, UW reiterated its position on notes:

> To the extent that your request can reasonably be interpreted to include notes produced by [Animal Care Committee] staff at [Animal Care Committee] meetings even if not in an investigation context, such documents are not "records" within the meaning of the Wisconsin public records law, are not subject to public records requests, and will not be produced to you.

(R.25 at Exh. F, p. 2.)

ALDF learned in discovery that the minutes takers "notes" sought for the 2011 and 2012 Animal Care Committee meetings in which the infant primate maternal deprivation research was discussed at length had been destroyed by UW. (R.25 at Exh. K, Interrogatory No. 1, Appx.75-76.) All that the public can learn now about those particular meetings comes from the "official minutes," which use sanitized phrases such as "discussion ensued" and which were created, in part, using the now-destroyed contemporaneous writings of the minutes takers. *(Id.)* This condensed, sanitized version of events, omitting anything about the substance of the "discussion" that "ensued," demonstrates why the public has an interest in having the minutes takers'

[4] To be perfectly clear, ALDF has not and does not presently seek production of the personal notes of Animal Care Committee members. This is solely and exclusively an appeal to the sound logic that the writings of the "minutes takers" are public records and not personal notes under the Open Records Law due to the manner in which they created, used, and regulated.

contemporaneous writings be held to be "records" subject to production under the Open Records Law.

B. The Animal Care Committee.

The central purpose of UW's Animal Care Committee meetings is to ensure that animals used in research are treated humanely. (R.25 at Exh. G, p. 18:14-19, Appx.22.) The meetings are required by the federal Animal Welfare Act and the Health Research Extension Act of 1985. (Eberly Aff., Ex. G, Deposition of Diane Johnson, 18:14-19:3, Appx.22-23 (hereinafter "Johnson Dep."); Eberly Aff., Ex. H, Deposition of Gayle Orner, 16:4-13, Appx.43 (hereinafter, "Orner Dep.") They generally consist of a review of animal research protocols, inspections of animal-holding facilities, program evaluations of the RARC, and other administrative and statutory oversight tasks. (R.25 at Exh. G, pp. 18:14-19:3, Appx.22-23; R.25 at Exh. H, p. 16:4-13, Appx.43.) The Animal Care Committee's meetings are conducted according to Wisconsin's Open Meetings Law, Wis. Stat. § 19.83. (R.25 at Exh. J, Request No. 11, Appx.71-72.) It is undisputed that UW (and by extension RARC and the Animal Care Committee) is an authority under Wisconsin's Open Records Law. (R.17 at ¶ 2; R.18 at ¶ 2.)

C. The Duties of the Minutes Takers and the Regulation of their "Notes."

From 2007 until 2013, UW relied on Diane Johnson to serve as the Animal Care Committee's minutes taker. (R.25 at Exh. G, pp.12:12-16, 15:11-24, Appx.18, 19.) Between July 2013, and April 2014, Christine Finney performed the role. (R.25 at Exh. I, pp. 15:22-16:11, Appx.55-56.) More recently, UW has had Gayle Orner do this job. (R.25 at Exh. H, p. 32:1-15, Appx.44.) The minutes taker supervisor is Holly McEntee.

(R.25 at Exh. G, p. 12:10-11, Appx.18; R.25 at Exh. I, p. 16:8-20, Appx.56.) Other than some minor filing duties, a minute taker has two main responsibilities in relation to their taxpayer-funded employment: (1) to attend and take notes at Animal Care Committee meetings; (2) to create the official meeting minutes of each meeting (based largely on their contemporaneous notes and their supervisor's notes). (R.25 at Exh. I, pp. 16:21-17:7, 18:11-19, Appx.56-57, 58.)

The minutes takers' job duty is to prepare contemporaneous written records at all Animal Care Committee meetings pursuant to their official duties as public employees. (R.25 at Exh. J, Request Nos. 12, 30, Appx.72, 74; R.25 at Exh. G, pp. 16:21-17:21, 18:4-13, Appx.20-21, 22.) A minutes taker could be disciplined if she failed to keep up her note-taking during Animal Care Committee meetings. (R.25 at Exh. I, pp. 32:24-33:9, Appx.66-67.) The three minutes takers all testified that they were under intense pressure to capture everything that was said in an Animal Care Committee meeting, excepting off-topic chatter about sports or the weather; one minutes taker said the job required her to literally "put [her] head down and write what [she] heard as best as [she] could." (R.25 at Exh. G, pp. 23:12-24:1, Appx.27-28; R.25 at Exh. H, pp. 33:5-11, 45:15-46:8, Appx.45, 51-52; R.25 at Exh. I, p. 21:2-21, Appx.60.)

The notes taken by these individuals did not record the thoughts of the originator (e.g., the "minutes taker"); instead, the minutes takers record what is being said **by Animal Care Committee members** at each meeting. (R.25 at Exh. G, p. 33:16-23, Appx.33.) To the extent possible, the minutes takers would attempt to make a transcription of the meeting, memorializing the actions and words of the Animal Care

Committee. (R.25 at Exh. G, pp. 20:11-22, 23:13-24:18, 50:2-5, Appx.24, 27-28, 36; R.25 at Exh. H, pp. 32:3-15, 33:5-11, Appx.44, 45.)

Johnson testified that minutes takers were instructed to use a notepad and pen for the contemporaneous meeting minutes, an established practice, that both Johnson and Finney abided by. (R.25 at Exh. G, p. 21:24-22:24, Appx.25-26; R.25 at Exh. I, p. 20:11-22, Appx.59.) Orner was specifically exempted from this common practice due to her special request to use a laptop because her handwriting is absolutely terrible; Orner only takes handwritten notes when her laptop is in use for something else. (R.25 at Exh. H, p. 33:22-34:16, Appx.45-46.) Significantly, the minutes takers included subheadings in their notes for each of the agenda items discussed at the Animal Care Committee meeting and stapled their notes together in the order discussed at the end of each meeting. (R.25 at Exh. G, p. 24:9-22, Appx.28.)

D. How the Notes Are Used After Each Meeting.

At some point after each meeting, the minutes taker assigned to a given meeting obtained their supervisor's notes from that meeting, compared them with their own, and prepared the first draft of what would become the official Animal Care Committee meeting minutes from these notes.[5] (R.25 at Exh. G, p. 25:3-16, Appx.29; R.25 at Exh. H, p. 39:3-11. Appx.48; R.25 at Exh. I, p. 23:23-24:8, Appx.62-63.)

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[5] The circuit court focused exclusively on the ten withheld pages and made factual findings about them. (R.38 at pp. 5-6, Appx.5-6.) Yet, six of the pages were not even the kind of writings at issue, namely contemporaneous writings of Animal Care Committee meetings taken by assigned minutes takers like Johnson, Finney, and Orner. Those six pages were notes prepared by McEntee, the supervisor. (R.28 at ¶¶ 6-8; R.25 at Exh. I, p. 16:19-20, Appx.56.) McEntee attested that she used the six pages "to help another RARC employee, Christine Finney, draft meeting minutes of the March 10, 2014" meeting. (R.28 at ¶ 7.) While the circuit court found it relevant that McEntee never shared her notes with anyone (R.38

The minutes takers created the first draft of the official minutes of each Animal Care Committee meeting using a new MS-Word document, as opposed to a modification of the "notes" taken during the meeting itself.[6] (R.25 at Exh. J, Request No. 24, Appx.73; R.25 at Exh. K, Interrogatory No. 2, Appx.76; R.25 at Exh. H, p. 38:8-25, Appx.47.) In their workup of the official minutes, the minutes takers often used placeholder phrases such as "discussion ensued" or "extensive discussion ensued" to abbreviate Animal Care Committee discussions in which members raised their perspectives, viewpoints, or feelings. (R.25 at Exh. G, pp. 41:17-42:9, 42:14-23, 50:15-24, 59:12-15, 61:9-12, Appx.34-35, 35, 36, 40, 41.)

After exchanging two or three drafts of the official meeting minutes between the minutes taker and her supervisor, the Animal Care Committee would be shown the proposed draft, which it either approved or modified. (R.25 at Exh. G, pp. 26:16-23, 27:20-28:6, Appx.30, 31-32; R.25 at Exh. H, p. 41:11-19, Appx.50; R.25 at Exh. I, pp. 22:4-13, 22:25-23:17, Appx.61, 61-62.) Under UW policy, the public employee minutes takers' contemporaneous notes would then be placed in a drawer, in an RARC filing cabinet, in a shared office space, for a year. (R.25 at Exh. G, pp. 54:17-20, 55:25-56:9,

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at pp. 8-10, Appx.8-10), it was not looking at the notes of a minutes taker, which all of the evidence shows were made available for anyone involved in the Animal Care Committee to review for multiple potential purposes for a period of one year. (R.25 at Exh. G, pp. 54:17-20, 56:4-9, Appx.37, 39; R.25 at Exh. H, pp. 40:5-10, 53:11-18, Appx.49, 53; R.25 at Exh. I, pp. 24:14-20, 25:8-16, 25:24-26:6, 35:10-36:9, Appx.63, 64, 64-65, 68-69.)

[6] UW concedes that the contemporaneous writing of the minutes takers taken at each Animal Care Committee meeting are not a "draft" as that term is used in the Open Records Law. (R.25 at Exh. K, Interrogatory No. 2, Appx.76.) This admission wisely recognizes that a "record" under the Open Records Law is not a "draft" if it is used for the purposes for which it was commissioned. *See Fox v. Bock*, 149 Wis. 2d 403, 414, 438 N.W. 2d 589, 594 (1989); *Journal/Sentinel, Inc. v. Sch. Bd. Of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 455-456, 521 N.W.2d 165, 170-171 (Ct. App. 1994).

Appx.37, 38-39; R.25 at Exh. H, pp. 39:23-40:10, 53:11-18, Appx.48-49, 53; R.25 at Exh. I, pp. 24:14-20, 25:8-16, 25:24-26:6, 35:10-36:9, Appx.63, 64, 64-65, 68-69.) These contemporaneous notes of Animal Care Committee meetings are stored primarily for inter-office use, but are available to committee members. (R.24 at ¶¶ 11-15, Appx.79-80; R.25 at Exh. H, pp. 40:18-41:19, Appx.49-50.) Upon reviewing the draft meeting minutes, members of the committee could request a change, and in deciding whether to implement it, the contemporaneous notes of the minutes takers could be consulted to confirm what actually occurred during the meeting. (R.25 at Exh. G, p. 55:3-5, Appx.38; R.25 at Exh. H, pp. 40:18-41:19, Appx.49-50.)

ARGUMENT

I. THIS COURT REVIEWS THE CIRCUIT COURT'S DECISION WITHOUT DEFERENCE.

When a trial court decides a case on summary judgment, this Court employs a de novo standard of review. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 34, 309 Wis. 2d 365, 749 N.W.2d 211. Similarly, "[w]hen a circuit court grants or denies a petition for writ of mandamus by interpreting the public records law and applying that interpretation to undisputed facts, [this Court] review[s] the court's decision de novo." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 21, 284 Wis. 2d 162, 699 N.W.2d 551 (quoted in *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, 2015 WI App 53, ¶ 8, 364 Wis. 2d 429, 867 N.W.2d 825).

The circuit court granted summary judgment to RARC under Wis. Stat. § 802.08(6), which authorizes entry of judgment in favor of a non-moving party. *Monfils*

v. Charles, 216 Wis. 2d 323, 331 n.4, 575 N.W.2d 728 (Ct. App. 1998). In this instance, the parties stipulated that UW could seek summary judgment in this manner without having to formerly move for it in an effort to avoid cross-briefing the issues. (R.31.) When confronted by cross-motions for summary judgment, the Court draws all inferences in favor of the party against whom the motion under consideration was made.[7] *McKinney v. Cadleway Prop., Inc.*, 548 F.3d 496, 500 (7th Cir. 2008.) Having treated the dismissal of this open records action as one for summary judgment, the circuit court's decision should be reviewed de novo. *Olson*, 2008 WI 51 at ¶ 34; *Hempel*, 2005 WI 120 at ¶ 21.

II. THE DOCUMENTS PREPARED BY THE MINUTES TAKERS ARE "RECORDS" REQUIRED TO BE DISCLOSED DUE TO THE MANNER IN WHICH THEY ARE CREATED, USED, REGULATED, AND MAINTAINED.

A. The Law Presumes That Contemporaneous Writings Made By The Animal Care Committee's Minutes Takers Are Public Records.

The circuit court rightly recognized that Wisconsin law presumes open access to public records. (R.38 at p. 6.) After all, the Legislature has clearly stated the purpose of Wisconsin's Open Records Law:

> **Declaration of policy.** In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that **all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them**. Further, providing persons with such information is declared to be **an essential function of a representative government** and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 **shall be construed in every instance with a presumption of complete public access**, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, **and only in an exceptional case may access be denied**.

[7] Federal decisions reviewing the procedural counterparts of Wisconsin rules of procedure are considered persuasive authority. *See Wilson v. Continental Ins. Co.*, 87 Wis. 2d. 310, 316, 274, N.W.2d 679 (1979).

xWis. Stat. § 19.31 (Emphasis added.) *See also Linzmeyer v. Forcey*, 2002 WI 84, ¶15, 284 Wis. 2d 306, 646 N.W.2d 811 (recognizing the presumption that all public records should be open to the public); *Mayfair Chrysler-Plymouth v. Baldarotta*, 162 Wis. 2d 142, 155, 469 N.W.2d 638 (1991) (discussing presumption of open access to public records as having been long recognized); *Hathaway v. Green Bay Sch. Dist.*, 116 Wis. 2d 388, 392, 342 N.W.2d 682 (1984) ("Public policy and public interest favor the public's right to inspect public records."); *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 426-427, 279 N.W.2d 179 (1979) (recognizing the legislative presumption that "where a public record is involved, the denial of inspection is contrary to the public policy and the public interest"); *Osborn v. Board of Regents of University of Wisconsin System*, 2002 WI 83, ¶ 13, 254 Wis. 2d 266, 647 N.W.2d 158 (collecting cases).

Of course, not all public records are subject to disclosure. *See Osborn*, 2002 WI 83 at ¶ 14. "Access should be denied where the legislature or the court has predetermined that the public interest in keeping a public record confidential outweighs the public's right to have access to the documents." *Id.* "Thus, the general presumption of our law is that public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential." *Hathaway*, 116 Wis. 2d at 397.

While apparently acknowledging the presumption (R.38 at p. 6), the circuit court nevertheless misunderstood it in two significant ways. First, it failed to recognize the significant limitations on the "personal use" exception invoked by UW. Second, it ignored overwhelming evidence demonstrating how RARC approached the creation, use,

maintenance, and regulation of the allegedly "personal" notes used to create the official, sanitized minutes of the meetings. By ignoring the evidence, the trial court turned the general presumption favoring disclosure on its head and contorted the definition of "notes" and the "personal use" exception to allow RARC to withhold the only existing contemporaneous writings of events occurring at the Animal Care Committee meetings.

The decision is particularly troubling given the Affidavit of Richard J. Brown, a veterinarian at RARC who "was charged with reviewing thousands of protocols" for compliance with the Animal Welfare Act and "attended upwards of 100 [Animal Care Committee] meetings." (R.24 at ¶¶ 4-9, Appx.77-79.) Brown told the circuit court:

> 11. For the meetings, the [Animal Care Committee] coordinator or another designated note-taker was **explicitly tasked by RARC with taking notes of everything that was said and done**.
>
> 12. **Other [Animal Care Committee] members, however, were specifically discouraged from taking notes during their meetings, so as to avoid creating any records other than what would become the official version of the meeting minutes**.
>
> 13. After the meetings, the coordinator would bring down the handwritten notes, documenting the [Animal Care Committee's] business and discussions at its meeting, back to the RARC central office.
>
> 14. RARC would receive the notes from the coordinator and **store them in filing cabinets, memorializing the meetings**.
>
> 15. The coordinator's notes from the meetings were RARC property, and thought of as "RARC use only." While members of the [Animal Care Committee] and RARC staff had access to the notes, and could review them if they so chose, in practice the notes were rarely requested.
>
> 16. The coordinator's notes from the meetings often ran several pages, particularly if the meetings were long. **The minutes the coordinator prepared and later circulated to the [Animal Care Committee], however, were seldom the complete portrayal of what occurred at the meetings**.
>
> 17. Instead, these official minutes were an **abbreviated synopsis of the fuller record that was memorialized in the notes**.

* * *

> 19. What I remembered as lengthy discussions during the [Animal Care Committee] meetings were characterized as "discussion ensued" or "extensive discussion ensued" in the minutes, **particularly when the subject was a sensitive or controversial protocol and issue**.

(R.24 at ¶¶ 11-17, 19, Appx.79-80.)

In short, the circuit court had evidence before it from a person with actual knowledge of the minutes takers' practice showing that UW (1) required a public employee to record minutes of all things accomplished at a given Animal Care Committee meeting; (2) discouraged committee members from taking notes for fear of creating a record that UW was clearly trying to manage and control; (3) regulated the maintenance and assured one year's access (for employees and other Animal Care Committee members) to the minutes takers' writings after each committee meeting; (4) sanitized the official minutes, which were scrubbed of sensitive and controversial practices at RARC; and (5) routinely violated the Open Records Act by refusing to disclose the full, contemporaneous writings prepared by RARC's public employees and instead hid behind the production of the sanitized "official minutes."

This is precisely the kind of conduct that Wisconsin's Open Records Law is designed to address because the minutes takers' officially-required notes are the only contemporaneous records of the Animal Care Committee's actions monitoring RARC's compliance with federal law. Phrases like "discussion ensued" are code in the official minutes for actual facts that the public has every right to know.

B. The Contemporaneous Writings of the Minutes Takers are "Records," Not "Notes" Prepared for "Personal Use" of the Originator.

A "record" under the Open Records Law is defined as follows:

> "Record" means **any material on which written**, drawn, printed, spoken, visual, or electromagnetic **information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority**. "Record" includes, but is not limited to, **handwritten, typed, or printed pages**, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved. "Record" does **not include** drafts, **notes**, preliminary computations, and like materials **prepared for the originator's personal use** or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

Wis. Stat. § 19.32(2). In analyzing the issue, the Court is reminded that the statutory presumption of public access "is an important aid in interpreting the meaning of 'record' in § 19.32(2)." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 76, 327 Wis. 2d 572, 786 N.W.2d 177.

While ALDF has never seen the notes withheld (they were inspected *in camera* by the circuit court and are generally described in the circuit court's ruling), the decision of the trial court makes it plain (R.38 at p. 7) that they meet the first-level definition of "record" because they are "handwritten" and "typed" pages upon which "written . . . information . . . is recorded or preserved . . . that has been created or is being kept by an authority." Wis. Stat. § 19.32(2). The only question is whether these particular records are "**notes** . . . prepared for the originator's **personal** use such that they are exempt from production." *Id*.

The answer to that question is "no." The circuit court erred because it failed to fully and accurately consider the facts establishing how and why the minutes takers prepared the public records and, most important, what was done with the records after the minutes takers prepared them. The record here establishes that what the minutes takers created are the antithesis of personal notes, which are intrinsically voluntary, individualized, informal, unique, and remain with the author, when:

(1) The public employees allegedly taking the notes for "personal use" are required to do so by their public employer as a fundamental part of their official job description with UW. (R.25 at Exh. I, pp. 16:21-17:7, 18:11-19, Appx.56-57, 58.)

(2) The employees would be subject to disciplinary action if they did not keep up with their note-taking duties at the Animal Care Committee meetings. (R.25 at Exh. I, pp. 32:24-33:9, Appx.66-67.)

(3) The minutes takers do not record their own independent thoughts or impressions, or only that which they believed was particularly interesting or important, but rather sought to create a virtual and contemporaneous summary (to the best of their ability) of what was said and done at each meeting. (R.25 at Exh. G, p. 33:16-23, Appx.33.)

(4) The minutes takers' notes follow the public agenda of the open meeting they were recording. (R.25 at Exh. G, p. 24:9-22, Appx.28.)

(5) The notes reflect the only full and accurate record of the Animal Care Committee meetings because the official minutes were an "abbreviated synopsis" of what actually was discussed at each such meeting, and are also used to create the official minutes. (R.25 at Exh. G, pp. 41:17-42:9, 42:14-23, 50:15-24, 59:12-15, 61:11-12, Appx.34-35, 35, 36, 40, 41); (R.24 at ¶¶ 11-17, 19; Appx.79-80.)

(6) RARC, not the individual minutes takers employed by RARC, maintained the so-called "personal notes" in a central file cabinet, treated them as RARC property subject to access by the public employees working for RARC, and other non-employee Animal Care Committee members involved in Animal Care Committee meetings. (R.25 at Exh. G, pp. 54:17-20, 56:4-9, Appx.37, 39; R.25 at Exh. H, pp. 40:5-10, 40:18-41:19, 53:11-18, Appx.49, 49-50, 53; R.25 at Exh. I, pp. 24:14-20, 25:8-16, 25:24-26:6, 35:10-36:9, Appx.63, 64, 64-65, 68-69; R.24 at ¶¶ 11-15, Appx.79-80.)

The circuit court's failure to consider these undisputed facts, and its myopic focus on the "quality" and "legibility" of the particular notes submitted for *in camera* review

(R.38 at 7-10), caused it to miss the fundamental point: UW has a formal policy at RARC designed to shield from public access contemporaneously-created documentation of what actually occurs at RARC's Animal Care Committee meetings. Assuredly this is not what the Supreme Court had in mind in *Schill* when it directed that courts give great weight to the statutory presumption favoring access in deciding whether a document qualifies as a "record" under the statute.

C. The Circuit Court Selectively Invoked *Voice* And Ignored The Court's Teachings About The "Personal Use Exception.

The circuit court relied almost exclusively on *Voice* to make its determination that the Animal Care Committee writings were "notes . . . prepared for the originator's personal use." (R.38 at 7-10.) This case turns on the "personal use" exception but the circuit court erred by selectively applying *Voice* and ignoring facts of record that demonstrate the exception could not apply to the minutes takers' activities.

In *Voice*, a newspaper challenged a school district's decision to deny access to notes created by "district employees in connection with interviews that the employees conducted as part of a district investigation." 2015 WI App 53 at ¶ 1. Based on its analysis of the statute, a 1988 opinion of Wisconsin's Attorney General, and the holding of *Panknin*, 217 Wis. 2d at 200-216, this Court affirmed the circuit court's decision immunizing the interview notes under the "personal use" exception. *Id.* Central to the Court's analysis was its adoption of the Attorney General's 1988 opinion taking a narrow approach to "personal use":

> **[E]xclusion of material prepared for the originator's personal use is to be construed narrowly**. Most typically this exclusion may be invoked properly where a person takes

> notes for the **sole purpose** of refreshing his or her recollection at a later time. If the person confers with others for the purpose of verifying the correctness of the notes, but the sole purpose for such verification and retention continues to be to refresh one's recollection at a later time, … the notes continue to fall within the exclusion. **However, if one's notes are distributed to others for the purpose of communicating information or if notes are retained for the purpose of memorializing agency activity, the notes would go beyond mere personal use and would therefore not be excluded from the definition of a "record."**

77 Wis. Op. Att'y Gen. 100, 102 (1988) (quoted in *Voice*, 2015 WI App 53 at ¶ 21) (emphasis added).

While the circuit court cited this passage in its decision (R.38 at 7-8), it then proceeded to selectively parse quotations from *Voice* (and focus so heavily on the appearance of the notes almost to the exclusion of other factors) to support its decision granting summary judgment to UW. For example, the circuit court relied almost exclusively on UW's sole affiant (Holly McEntee), who attested that her notes were used "solely to refresh [her] recollection when [she] later assisted in the drafting of meeting minutes."[8] (R.38 at p. 8, Appx.8.) The circuit court emphasized this fact because *Voice* recognizes that "notes" are typically not meant to be shared. 2015 WI App 53 at ¶ 21. Yet, the record here unquestionably demonstrates that all of the minutes takers' work was used to create the official minutes and then placed in a public file cabinet accessible to everyone involved with the Animal Care Committee. (R.25 at Exh. G, pp. 54:17-20, 56:4-9, Appx.37, 39; R.25 at Exh. H, pp. 40:5-10, 40:18-41:19, 53:11-18, Appx.49, 49-50, 53; R.25 at Exh. I, pp. 24:14-20, 25:8-16, 25:24-26:6, 35:10-36:9, Appx.63, 64, 64-65, 68-69; R.24 at ¶¶ 11-15, Appx.79-80.)

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[8] We reiterate: McEntee's notes, some of which constitute the materials submitted *in camera*, are not documents created by the minutes taker assigned to take notes at the March 10, 2014 meeting. For that particular meeting, UW assigned Finney to that task.

The circuit court also relied on *Voice* to conclude that it was compelling that the "handwritten notes" it reviewed "are barely legible or even illegible" and that all 10 pages of the notes were "replete with indicia of 'hurried, fragmentary, and informal writing'." (R.38 at 7, citing *Voice*, 2015 WI App 53 at ¶ 16.) Again, by focusing on form and ignoring substance, the circuit court honored *Voice* more in the breach than in the observance.

For several reasons, the principles of *Voice* applied to the facts in this record compel the conclusion that the records created by the minutes takers do not qualify for the "personal use" exception. First, in rejecting the newspaper's broad assertion that notes cannot be subject to the personal use exception if their content "has relevance to a government function," this Court focused on "how closely the originator held the notes, used them, or planned to use them." *Voice*, 2015 WI App 53 at ¶ 18. In fact, it found dispositive the Attorney General's opinion that, "if one's notes are distributed to others for the purpose of communicating information or if notes **are retained for the purpose of memorializing agency activity**, the notes would go beyond mere personal use and would therefore not be excluded from the definition of a 'record'." *Id*. at ¶¶ 20-22. The circuit court determined that these minutes takers' "notes were decidedly not 'distributed to others for the purpose of memorializing agency activity.'" (R.38 at p. 10.) Yet, unlike the school district in *Voice* (whose note-takers were not acting in accordance with an official policy), the minutes takers here prepared their writings pursuant to their official (and predominant) duties as public employees as part of a mandatory, established process for the memorialization of Animal Care Committee meetings. (R.25 at Exh. J, Request

Nos. 12, 30, Appx.72, 74; R.25 at Exh. G, pp. 16:21-17:21, 18:4-13, Appx.20-21, 22; R.25 at Exh. I, pp. 32:24-33:9, Appx.66-67.) Can there be a clearer example of how "notes" could be used to memorialize agency activity?

Second, this Court determined in *Voice* that the personal use exception would not apply "if the originators . . . had distributed their notes to other district employees to rely on . . . ." *Id*. at ¶ 21. This is exactly what happened to the documents created by the minutes takers: under UW policy, they were placed in a common file drawer maintained by RARC (not the individual minutes takers) in shared office space for a full year. (R.25 at Exh. G, pp. 54:17-20, 56:4-9, Appx.37, 39; R.25 at Exh. H, pp. 40:5-10, 53:11-18, Appx.49, 53; R.25 at Exh. I, pp. 24:14-20, 25:8-16, 25:24-26:6, 35:10-36:9, Appx.63, 64, 64-65, 68-69.) They were stored in order to enable inter-office or collective use of the notes, including providing access to Animal Care Committee members themselves. (R.24 at ¶¶ 11-15, Appx.79-80; R.25 at Exh. H, pp. 40:18-41:19, Appx.49-50.) ALDF's evidence thus raises more than a "reasonable inference that the notes in question **were** distributed to others" for very specific and official reasons.[9] *Voice*, 2015 WI App. ¶ 24.

Third, *Voice* concluded that "whenever notes are **used to establish** a **formal position or action of an authority**, such uses go beyond any personal uses of the originator." *Id.* at ¶ 25. ALDF demonstrated that the minutes takers' notes are used for the precise purpose of establishing the Animal Care Committee's "formal position or action." (R.25 at Exh. G, p. 25:3-16, Appx.29; R.25 at Exh. H, p. 39:3-11. Appx.48; R.25

[9] The fact that the circuit court focused on Supervisor McEntee's "notes" and took McEntee's word for it in relation to the four pages attributed to Finney (without seeing what Finney had to say about her notes) constitutes impermissible weighing of evidence on summary judgment.

at Exh. I, p. 23:23-24:8, Appx.62-63.) In *Voice*, the school "district employees each created their set of notes individually and then each used his or her notes to refresh his memory on subsequent occasions regarding aspects of the investigation that he or she directly participated in, without ever distributing the notes to anyone else." *Voice*, 2015 WI App. ¶ 36. In direct contrast, the record below establishes that the minutes takers' notes are an essential step in sharing what occurred at a committee meeting in order to establish the finalized formal minutes of Committee action.

When seeking summary judgment, ALDF deliberately did not ask the circuit court to require UW to produce the personal notes of individual members of the Animal Control Committee, which presumably are more like those of the district employees in *Voice* because, unlike the minutes takers' "notes," no one requires them to be prepared, no employer regulates their use, and no one has access to them based on internal policy.[10] The minutes takers' notes are the exact opposite.

McEntee's claim that her notes (taken as a supervisor and **not** as a minutes taker) of the March 14, 2014 meeting were only used to refresh her recollection and were "not created for the purpose of communicating information to any other person" is a red herring that knocked the circuit court off the right path of justice. The central issue concerns not McEntee's notes, but those taken by the minutes takers; and the undisputed fact is that UW's policy is for the minutes takers' notes to be shared and used to create the official minutes and be accessible for a year by any member of the Animal Care

[10] ALDF limited its demand on summary judgment because in the period between the filing of this action and the pursuit of summary judgment, this Court decided *Voice*, which provided ground rules for when "notes" are for personal use.

Committee. (R.25 at Exh. I, pp. 16:21-17:7, 18:11-19, Appx.56-57, 58; R.25 at Exh. J, Request Nos. 12, 30, Appx.72, 74; R.25 at Exh. G, pp. 16:21-17:21, 18:4-13, Appx.20-21, 22; R.25 at Exh. G, p. 25:3-16, Appx.29; R.25 at Exh. H, p. 39:3-11. Appx.48; R.25 at Exh. I, p. 23:23-24:8, Appx.62-63; R.25 at Exh. G, pp. 54:17-20, 56:4-9, Appx.37, 39; R.25 at Exh. H, pp. 40:5-10, 53:11-18, Appx.49, 53; R.25 at Exh. I, pp. 24:14-20, 25:8-16, 25:24-26:6, 35:10-36:9, Appx.63, 64, 64-65, 68-69; R.24 at ¶¶ 11-15, Appx.79-80; R.25 at Exh. H, pp. 40:18-41:19, Appx.49-50.) Thus, our facts are distinguishable from those in *Voice,* where the newspaper failed "to explain why **personal** retention for later **personal** review should transfer personal use into non-personal use." *Id*. at ¶ 40 (emphasis added).

In *Voice,* several fact clusters converged to support the conclusion that the personal use exception applied: (1) in their content, "none of the notes individually or collectively appear[ed] to establish formal positions or actions of the district;" (2) the "notes consistently have the appearance of fragmentary notations of the type commonly created by people when they anticipate being the only users of the notes," and were not "written in a style or format that would ordinarily be used when the originators' purposes included distribution to others or establishment of formal authority positions or actions;" (3) the employees "each created their sets of notes individually and then each used his or her notes to refresh his or her memory on subsequent occasions;" (4) the employees never distributed the notes to anyone else; (5) the employees kept the notes "in their individual offices" and never placed them in any "official files maintained by the district"; and (6) there was "no evidence that the notes were retained for the purpose of establishing any

formal position or action taken by the district, as opposed to being retained by the originators to refresh their memories." *Voice*, 2015 WI App. ¶¶ 36-37.

The record in this case points to the opposite conclusion. The minutes takers' notes do not contain thoughts or impressions of the originator, preliminary or otherwise, refuting any assertion that ALDF's claim is to "ransack and pillage" through the originator's "personal notes." *Panknin*, 217 Wis. 2d at 212. While the circuit court asserts that the notes it reviewed were "replete with indicia of 'hurried, fragmentary, and informal writing,'" (R.38 at 7), how accurately any particular minutes taker transcribed the dialogue at a committee meeting should not govern whether the writings are "records" under the law. The appearance is a factor to consider, but hardly the deciding factor; after all, Wis. Stat. § 19.32 defines "record" "regardless of physical form or characteristics." However "fragmentary" they might be, the transcriptions done by the minutes takers do not reflect "personal" impressions of the originator. There is a difference between notes created that are voluntary, *Panknin*, 217 Wis. 2d at 212, versus obligatory.

The purpose and treatment of the records are also relevant to whether they must be produced in response to a request. The minutes takers' notes are akin to the draft study commissioned in *Fox v. Bock*, 149 Wis. 2d 403, 438 N.W.2d 589 (1989). While stamped "draft" and claimed by the authority to be exempt under the Open Records Law, the *Fox* court ordered the report produced because the "draft" report had been delivered and approved by the commissioners and used to change practices and procedures in the Sheriff's department. 149 Wis. 2d at 413-414. In the same way, the notes of the minutes

takers, while allegedly for "personal use," are a mandatory, regulated, memorialization of agency activity that are kept in a central file cabinet, where they can be accessed by co-workers and other Animal Care Committee members alike; they were never intended to be, nor treated as, "personal notes."

D. All Animal Care Committee "Notes" Taken By Minutes Takers Pursuant to Official Policy Should Be Deemed Public Records.

Although it acknowledged "the distinct disadvantage of Petitioner's position of being unable to view the documents at issue" (R.38 at 10), the circuit court rejected ALDF's request that it declare that "all handwritten notes taken during [Animal Care Committee] meetings" be construed as public records not subject to the personal use exception. (R.38 at 5.) This overstates the relief ALDF actually sought inasmuch as ALDF does not seek an order holding that **all** notes "taken during Animal Care Committee meetings" be construed in this manner. Rather, based on the evidence showing a systematic and official process for taking notes at Animal Care Committee meetings by public employees hired, and paid, by taxpayers for the precise purpose of taking notes, it seeks an order mandating that all requested minutes takers' notes be subject to production and not subject to the personal use exception. ALDF specifically implicated UW's established policy of withholding "such notes from records requesters, as a rule" (R.17 at ¶ 35) and there is no reason this Court cannot order on this record that the writings of **minutes takers**, given their unrefuted role in the process used to prepare the Animal Care Committee's official minutes, be produced because such writings can never be deemed the personal notes of those originators. (R.17 at pp. 14-15.)

If the Court accepts the circuit court's premise that it cannot adjudicate **the policy** invoked to prohibit disclosure of the 10 pages withheld here, UW will effectively **and always** insulate its production of the minutes takers' notes because RARC and the university generally will cite this case, based on one set of records, as dispositive of the larger principle: that the minutes takers' notes are personal notes. But this finding of the circuit court defies the larger record showing that UW and RARC have an official and established approach to creating meeting minutes of the Animal Care Committee. If ALDF is denied access to the notes that are literally the only contemporaneous writings of Animal Care Committee meetings, the strong presumption afforded public access to public records will be destroyed.

III. THE CIRCUIT COURT IMPROPERLY DREW CONCLUSIONS ABOUT THE EVIDENCE AND ACCEPTED THE WORD OF A SINGLE UW WITNESS WITHOUT CONSIDERATION OF DEPOSITION TESTIMONY MADE PART OF THE RECORD BY ALDF.

In granting summary judgment, the circuit court improperly made credibility determinations about the evidence, selectively relied on certain evidence without consideration of any other, and failed to view the evidence in the light most favorable to non-moving party ALDF. *See McKinney*, 548 F.3d at 500. "In deciding if there is a genuine issue of material fact," a trial court must "view the evidence most favorably to the nonmoving party and draw all reasonable inferences in favor of that party." *Metropolitan Ventures, LLC v. GEA Assoc.*, 2006 WI 71, ¶ 20, 291 Wis. 2d 393, 717 N.W.2d 58. "Competing reasonable inferences from undisputed facts **may create genuine issues of fact**." *Hennekens v. Hoerl*, 160 Wis. 2d 144, 162, 465 N.W.2d 812

(1991) (emphasis added). On a motion for summary judgment, "the trial court is not to make credibility determinations." *Pomplun v. Rockwell Int'l. Corp.*, 203 Wis. 2d 303, 306-307, 552 N.W.2d 632, 633 (Ct. App. 1996). In short, the trial court's job on summary judgment is not to decide an issue of fact, but only to decide if a genuine issue of fact exists. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473, 477 (1980) (overruled on other grounds by *Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448.)

In reaching its decision, the circuit court ignored these rules and focused almost exclusively on the Affidavit of Holly McEntee to assess whether the 10 pages produced *in camera* were "records" under the law. (R.38 at p. 8.) While McEntee may have many things to say about notes she drafted (none of which constitute the writings of a minutes taker as described in the record) (R.28 at ¶¶ 4-8, 11-14), the circuit court's sole reliance on McEntee's self-serving affidavit testimony for evidence about what Finney intended (or did not intend) to the exclusion of any consideration of what Finney and the other minutes takers said about the Animal Care Committee note-taking requirements in deposition testimony constitutes clear error. ("The notes on pages NOTES001 through NOTES004 do not resemble meeting minutes, but rather **appear to be** the personal notes of Christine Finney that she **likely used** to refresh her recollection while she later prepared draft meeting minutes.") (Emphasis added.) (R.28 at ¶ 12.)

The fact that the circuit court ignored altogether the deposition testimony submitted by ALDF from the three people who have served as minutes takers over the last 8 years (Johnson, Finney, and Orner) and chose instead to accept a conclusory

affidavit from UW's sponsored witness undercuts a fundamental rule on summary adjudication because it suggests the judge made credibility determinations over disputed issues without a trial.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Animal Legal Defense Fund respectfully requests that this Court reverse the March 9, 2016, Decision and Order on Summary Judgment and grant its motion for summary judgment seeking an order finding that the contemporaneous writings used by UW's minutes takers were not "notes . . . prepared for the originator's personal use." Alternatively, the Court should reverse and hold the matter over for trial.

Dated this 29th day of August, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a Brief and Appendix produced with a proportional serif font. The length of this Brief is 9,271 words.

Dated this 29th day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the Appendix, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the court and served on all opposing parties.

Dated this 29th day of August, 2016.

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CERTIFICATION OF MAILING

I certify that this Brief and Appendix were deposited with United Parcel Service, a common carrier, with overnight delivery to the Clerk of the Court of Appeals, or other class of mail that is at least as expeditious, on August 29, 2016.

I further certify that the Brief and Appendix were correctly addressed and postage was pre-paid.

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