COURT OF APPEALS
DECISION
DATED AND RELEASED

October 30, 1997

NOTICE

No. 96-2440

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

STATE OF WISCONSIN EX REL. WILLIAM N. LEDFORD,

PETITIONER-APPELLANT,

V.

NANCY TURCOTTE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. William Ledford appeals from an order denying his request for attorney fees in an open records case. We reverse.

The facts are not disputed. The records custodian, Nancy Turcotte, denied Ledford's open records request. Ledford petitioned for mandamus *pro se*,

and lost in circuit court. He appealed to this court *pro se* and won. *See* ***State ex rel. Ledford v. Turcotte***, 195 Wis.2d 244, 536 N.W.2d 130 (Ct. App. 1995). Turcotte petitioned for review, and the supreme court granted the petition.

At that point an attorney began to represent Ledford, and the case was fully briefed to the supreme court. While the case was pending, Ledford's counsel moved for dismissal because a recent change in the open records statute meant that an opinion in this case would have little impact on future cases. The supreme court dismissed the appeal as improvidently granted. The case was remitted to the circuit court. Consistent with the court of appeals opinion, the circuit court ordered the custodian to release the records. Ledford sought attorney fees, but the circuit court denied the motion. Ledford appeals.

The fees are sought under § 19.37(2)(a), STATS., which provides in relevant part that the court "shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part." The test of whether the requester "substantially prevailed" is whether the mandamus action was a substantial factor contributing to the release of the requested records. ***Eau Claire Press Co. v. Gordon***, 176 Wis.2d 154, 160, 499 N.W.2d 918, 920 (Ct. App. 1993). The circuit court concluded that Ledford did not benefit from the work performed by his attorney because he had already substantially prevailed in the court of appeals, and the supreme court never decided the case.

Ledford argues that the court erred because the test is not whether he prevailed in any specific court, but whether he prevailed in the action as a whole. We agree. The statute provides that the requester is entitled to attorney fees when he or she prevails in any "action." Section 19.37(2)(a), STATS. This refers to the

action as a whole, when it is ultimately complete. There has not typically been an analysis of each level of litigation to determine where the requester did or did not prevail. To use such a test regularly would lead to peculiar results. It would mean that a requester who prevails in the supreme court after losing at the lower levels could recover fees only for the part of the case before the supreme court. Alternatively, a requester who prevails in the lower courts but loses in the supreme court would recover fees for the early parts of the case because he or she prevailed in those, even though he or she ultimately was entitled to no records.

Turcotte argues that the work Ledford's attorney performed did not lead to the release of any records because their release was based on the *pro se* work Ledford did in the court of appeals. In other words, Ledford had already prevailed when the attorney entered the case. We disagree. There is no indication in the appellate record that the records Ledford requested were released following this court's decision. The order for Turcotte to release the records was issued by the circuit court after the supreme court dismissed the appeal and the case was remitted. When the attorney entered the case, Ledford had received a favorable court of appeals decision, but it was possible that it would become a nullity because the supreme court had granted review. The records were released only after Ledford's attorney was able to dissuade the supreme court from further review. If the records had not been released and the case was still pending in the supreme court, Ledford would not yet have prevailed.

Turcotte also argues that attorney fees should be allowed in the supreme court only if the court reaches the merits of the case. She argues that if an attorney files a response to a petition for review and the supreme court denies the petition, attorney fees should not be awarded for writing the response, or for convincing the court to dismiss a petition previously granted, as occurred here.

Turcotte cites no authority which supports this argument. We are aware of no case law which would limit recovery of attorney fees to only work performed on the merits of the case, while prohibiting recovery for responding to a petition for review. We reject the argument.

On remand, the circuit court shall enter judgment in favor of Ledford for the amount of fees the court previously determined was reasonable.

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

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