

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2008

David R. Schanker
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 No. 2006AP2987

Cir. Ct. No. 2006CV56

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**FLORENCE WILDES, DONALD WILDES, STASIA ZILINSKI,
MELVIN ZILINSKI AND LOIS YOUNG,**

PLAINTIFFS-RESPONDENTS,

v.

JUNEAU COUNTY HUMANE SOCIETY, INC.,

DEFENDANT-APPELLANT,

LYNN RITTENHOUSE-LEATHERBERRY AND MICHELE OTT,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Juneau County:
JOHN P. ROEMER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. The Juneau County Humane Society appeals a judgment that held one of its bylaws to be void as a matter of public policy and concluded that Florence Wildes, Donald Wildes, Stasia Zilinski, Melvin Zilinski and Lois Young were society members entitled to relief under Chapter 181 of the Wisconsin Statutes.

BACKGROUND

¶2 The Juneau County Humane Society is a nonstock corporation organized subject to Chapter 181 of the Wisconsin Statutes. In 1991 and 2001, the Society passed bylaws “to prohibit any or all individuals who have intentionally brought legal action of any kind against the Humane Society[] from holding any office or having a membership.” In 2005, a number of animals were removed from the Society’s care and three of its Board members were placed under criminal indictment for reasons not directly relevant to this appeal.

¶3 The Wildeses, Zilinskis and Young—who the trial court found were all society members in good standing prior to this action¹—filed suit pursuant to various provisions in Chapter 181, seeking to compel the Society to hold an annual membership meeting; to accept nominations and distribute ballots to determine the membership of the Board of Directors; and to allow the members to inspect and copy certain Society records.

¹ The society argued below that each of the record-seekers’ memberships had either lapsed or been terminated prior to their accounting requests. However, the trial court found that all five were current members based upon holding lifetime membership cards and/or testimony to that effect, with no evidence that the Board had taken any formal action to terminate their memberships. The society does not appear to challenge that factual finding on appeal, and we conclude it is not clearly erroneous in any event.

¶4 The Society responded that, under the bylaws, the record-seekers had lost their membership status by filing suit, and thus lacked standing to maintain this corporate accountability action. It further argued that the record-seekers were not entitled to relief because they had failed to follow the proper procedures to obtain copies of documents under Chapter 181. The circuit court determined that the bylaw in question was void as against public policy; that the record-seekers remained members of the Society with standing to seek an accounting under Chapter 181; and that they were entitled to the relief sought. The Society appeals.

STANDARD OF REVIEW

¶5 We will uphold the factual findings of the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2005-06).² However, we will independently consider whether the facts found by the trial court establish a violation of public policy. *Cf. Schlomer v. Perina*, 169 Wis. 2d 247, 252, 485 N.W.2d 399 (1992) (applying de novo review to determine whether to void a contract on public policy grounds).

DISCUSSION

¶6 The first issue on appeal is whether the trial court properly concluded that the bylaw terminating society membership for filing suit against the corporation was void as against public policy. Bylaws are void when they are contrary or inconsistent with “the terms and with the spirit and intent” of a

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

corporation's charter, articles of association or incorporation, or a governing statute. *Security Sav. & Trust Co. v. Coos Bay Lumber & Coal Co.*, 219 Wis. 647, 653, 263 N.W. 187 (1935). WISCONSIN STAT. § 181.0206(3) also prohibits corporations from including within their bylaws provisions that are inconsistent with the laws of this state.

¶7 Chapter 181 of the Wisconsin statutes confers a number of legal rights upon members of nonstock corporations, allowing them to petition the circuit court to hold their corporation or its board accountable in various ways. *See, e.g.*, WIS. STAT. §§ 181.0160 (to hold meetings or elections), 181.0304(1) (to enjoin any act or the transfer of property), 181.0810 (to remove an officer), 181.1604 (to produce documents for inspection or copying). WISCONSIN CONST., art. I, § 9 guarantees a litigant's access to the courts to enforce an existing legal right. *Aicher v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶43, 237 Wis. 2d 99, 613 N.W.2d 849.

¶8 Here, we agree with the circuit court that the bylaw terminating the membership of any society member who attempted to sue the Society to enforce statutorily protected membership rights was plainly inconsistent with Chapter 181 and WIS. CONST. art I, § 9, in that its application would prevent the statutory rights from ever being enforced. The Society does not appear to directly dispute this point. Instead, the Society cites *Watts v. Watts*, 137 Wis. 2d 506, 521, 405 N.W.2d 303 (1987), for the proposition that, "A declaration that the contract is against public policy should be made only after a careful balancing, in the light of all the circumstances, of the interest in enforcing a particular promise against the policy against enforcement." The Society then argues that the circuit court failed to apply a balancing test and give consideration to the purpose of the bylaw, which it contends was "to discourage the same kind of hostile combination of power

struggle and document requests that had plagued the Juneau County Humane Society throughout its recent history.” The Society further contends that there was a competing public policy interest at stake—namely, protecting board members from attempts at malicious prosecution and the violation of their Fifth Amendment rights, since one alleged purpose behind the document requests was to assist the district attorney in collecting evidence for a criminal prosecution. We do not find either contention persuasive.

¶9 Even assuming the same balancing test is to be applied to bylaws as to contracts, we are not persuaded the Society has shown any interest in enforcing the bylaw which outweighs the reasons for not enforcing it. First, we do not see how it is relevant whether a particular record-seeker was “hostile” to a particular board member. Board members of a nonstock corporation are accountable to all of the general membership, including those who might wish to displace them. Furthermore, the fact that a record-seeker might suspect misconduct on the part of a board member, or be planning to turn over the requested documents to law enforcement, is all the more reason why the records should be turned over. If the records do not show misconduct, they could not be used in a prosecution, but would instead be used to bring any ongoing investigation to a close; if they do show misconduct, any prosecution would not be malicious.

¶10 In sum, we agree with the trial court’s conclusion that the bylaw was void as against public policy, and the record-seekers did not lose their membership in the Society by filing suit to enforce their statutory membership rights. They had standing to maintain the action.

¶11 The second issue raised on appeal is whether the record-seekers were entitled to the relief sought. The Society argues that the record-seekers did

not make a written demand for inspection and copies at least five business days before the date on which they wanted to inspect as required by WIS. STAT. § 181.1602(1). However, the record includes a written demand letter from the record-seekers marked as Trial Exhibit 6 which was presented to the board nearly a month before the suit was filed. The letter did not demand inspection within less than five business days; it asked for the Society to name a time for the inspection. Since the suit was filed several weeks after the request, the Society was given sufficient time under the statute to comply with the inspection request before the suit was filed.

¶12 Finally, the Society argues for the first time in its reply brief that the trial court erred by refusing to grant it a continuance to seek successor counsel after its attorney withdrew for nonpayment of funds shortly just before the hearing on standing. It now claims that this violated the rule that only attorneys can appear on behalf of corporations. *See Jadair, Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 562 N.W.2d 401 (1997). The Society did not bring *Jadair* to the trial court's attention, however. Rather, the Society argued below only that it was handicapped in obtaining counsel by the fact that the court had frozen its funds, and that it would be difficult for successor counsel to prepare so close to trial.

¶13 We do not generally address issues raised for the first time in the reply brief. *Schaeffer v. State Pers. Comm'n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). We decline to do so here, particularly because this argument was also not raised in the circuit court with sufficient prominence that the trial court would have understood that it was called upon to make a ruling regarding whether a society board member could properly represent the Society. *See Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772.

By the Court.—Judgment affirmed.

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

