

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2003

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 No. 02-3293
STATE OF WISCONSIN

Cir. Ct. No. 00-CV-49

**IN COURT OF APPEALS
DISTRICT III**

GPS, INC.,

PLAINTIFF-RESPONDENT,

V.

TOWN OF ST. GERMAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County:
JAMES B. MOHR, Judge. *Reversed.*

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

¶1 PER CURIAM. The Town of St. Germain appeals a judgment granting the petition of GPS, Inc., for a writ of mandamus to compel the Town to release three records that relate to GPS's application for a zoning variance. Because we conclude that the documents are protected by attorney-client privilege, we reverse the judgment.

¶2 GPS applied for a variance in 1999. The application was denied by the Town board of appeals. GPS did not seek certiorari review of that decision, instead making an open records request for all documents pertaining to its application. The board provided all of the documents except the three documents that are the subject of this appeal. It refused to provide those documents based on attorney-client privilege.

¶3 In an earlier appeal, this court concluded that the documents are exempt from disclosure under the open records law if they are subject to attorney-client privilege. *GPS, INC. v. St. Germain*, No. 00-3126, unpublished slip op. at ¶2 (Wis. Ct. App. Aug. 7, 2001. We did not determine whether the documents were subject to attorney-client privilege because that issue was not briefed and GPS's attorney had not seen the documents. We concluded, however, that the board had the right to expect that its communications made in confidence to its attorney would not be disclosed. *Id.* We remanded the matter to the circuit court to determine whether the documents are subject to attorney-client privilege. *Id.* On remand, the circuit court concluded that the privilege did not apply because the requested documents actually represent actions of the appeals board that are required to be open records under WIS. STAT. §§ 59.694(4) and 60.65(4).¹ The circuit court further concluded that none of the records in question contained communications that were intended to be confidential. We conclude that aspects of the circuit court's decision on remand and GPS's arguments on appeal are barred by law of the case. The documents in question are subject to attorney-client privilege and were intended to be confidential.

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

¶4 A decision by an appellate court establishes the law of the case which must be followed in all subsequent proceedings in the trial court or on later appeal. *See State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 261, 500 N.W.2d 339 (Ct. App. 1993). That doctrine binds a litigant on all matters actually presented or that might have been presented to this court on appeal. *See State ex rel. Lisbon Town Fire Ins. Co. v. Crosby*, 240 Wis. 157, 160, 2 N.W.2d 700 (1942). This court's previous decision that attorney-client privilege applies to the board's consultations with its attorney and that the board has the right to expect that communications made in confidence will not be disclosed is law of the case. Therefore, any argument that other statutes supercede attorney-client privilege is not properly before this court and should not have been the basis for the trial court's decision.

¶5 Because the underlying facts are undisputed, we will address as a matter of law whether the documents are privileged. Attorney-client privilege protects communications from the client to the attorney, and from the attorney to the client if disclosure of the attorney's communication would directly or indirectly reveal the substance of the client's confidential communication. *See Borgwardt v. Redlin*, 196 Wis. 2d 342, 352-53, 538 N.W.2d 581 (Ct. App. 1995). The first document, a cover letter from the board chairman to the board's attorney, is a privileged communication. That the letter attaches other publicly disclosed documents is irrelevant. The focus is on the confidential communication, not whether the facts contained in the communication were publicly available. Attorney-client privilege protects the fact that the information was communicated. Nothing in that document suggests any expectation that it would be made public.

¶6 The second document, a legal memorandum drafted by the attorney, is also privileged. Although some of the memorandum merely recites abstract

requirements for variances, it also discusses the facts of the case in a manner that indirectly reveals the chairman's communications with the attorney. Nothing in the memorandum suggests that it was intended to be disseminated to the public.

¶7 The third document included drafts of proposed findings of fact and conclusions of law regarding the specific requests for variances. Again, the content reflects the chairman's prior communication to the attorney and is therefore privileged. It does not matter whether the board ultimately adopted the draft findings and conclusions. The communication itself was not meant for public dissemination.

¶8 Finally, the trial court and the parties refer to possible violations of the open meetings law, suggesting that the board's deliberations were conducted in private. We express no opinion whether the board conducted unlawful deliberations or whether a failure to deliberate might have provided grounds for challenging its decision by writ of certiorari. The only question presented in this case is whether the board must disclose its confidential communications with its attorney. Because those documents are privileged, the board is entitled to invoke attorney-client privilege to prevent disclosure.

By the Court.—Judgment reversed.

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

