COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP262 **Cir. Ct. No. 2015CV52**

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

SHERIFF GREGORY E. HERRICK,

PLAINTIFF-APPELLANT,

V.

CLARK COUNTY, CLARK COUNTY BOARD OF SUPERVISORS, WAYNE HENDRICKSON, DORIS BAKKER, GORDON HASELOW, SCOTT JALLING, DALE MITTE AND FRIEDA ROLLINS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Clark County: THOMAS B. EAGON, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. Clark County Sheriff Gregory Herrick filed this civil lawsuit against Clark County, its County Board of Supervisors, and six individual County Board supervisors, after supervisors raised questions about the

Sheriff's ordering and planning to take delivery of six vehicles and his plans to sell other vehicles. In the amended complaint, the Sheriff sought injunctive and declaratory relief and alleged a federal civil rights claim and an equal protection claim, based on the Sheriff's allegation that the supervisors have interfered, and will likely interfere again, with the Sheriff's ability to carry out his duties as a sheriff under the Wisconsin Constitution. The circuit court denied the Sheriff's requests for relief and dismissed the action on several grounds. For the reasons explained below, we affirm.

BACKGROUND

¶2 In the amended complaint, the Sheriff[1] made allegations that included the following. The County Board operated in part through a Law Enforcement and Emergency Management Committee ("the law enforcement committee") and a Finance and Illegal Tax Committee ("the finance committee").

¶3 In September 2014, the Sheriff submitted to the law enforcement committee a budget request for the 2015 county budget. This included a request to allocate $187,000 in county funds for the purchase of six new vehicles. The law enforcement and finance committees both approved the Sheriff's budget request. Based on the committee approvals, the Sheriff sought and received bids on six vehicles, and placed orders based on the bids, committing to pay a total of $186,610 in county funds.

[1] For ease of reference, and following the parties, we use the term "Sheriff" broadly, using it to refer both to the person who is the elected sheriff of Clark County and also to his office, including to the activities of employees acting under his authority as sheriff.

¶4 However, according to minutes attached to the amended complaint, at a January 22, 2015 meeting of the law enforcement committee, the chair questioned the process used by the Sheriff to order the six vehicles. The chair asserted that the Sheriff had "always" in the past "brought in quotes to the committee for approval before ordering[,] and [the chair] wanted the [vehicles at issue here] to be put on hold until this could be discussed at the meeting." Nevertheless, at this January 22 meeting the committee voted to approve purchases of five of the vehicles, although the minutes noted that the vehicles "were ordered without committee approval." Similarly, the committee passed a separate motion to approve the purchase of the sixth vehicle, a Dodge Ram 1500 ("the Dodge pickup"), although this motion passed "under protest."

¶5 The chair spoke up again on the topic, primarily about the Dodge pickup, at a law enforcement committee meeting on February 20, 2015, with the Sheriff present. The chair said that committee members were "frustrated" that the Sheriff ordered the Dodge pickup "without their approval." Committee members complained that the Sheriff should have involved the committee more in the vehicle selection process, and raised questions about such details as the colors and the models of the ordered vehicles. In addition to answering specific questions about the vehicles, the Sheriff addressed the allegation that he had failed to sufficiently involve the committee in the vehicle purchases by saying that he "never gave it a thought, he was pushing forward and looking into the future and getting things done ahead of time." In response to an allegation that the Dodge pickup was "for personal use," the Sheriff said that he would "not be hauling hay bales or chopper boxes with his truck[,] if that's what you are asking." Minutes of the meeting reflect that discussion on the vehicle topic ended with the following committee member comment, apparently directed toward the Sheriff: "Let's not

let this happen again going forward; the word is not to let this happen again next year."

¶6 On February 23, 2015, the County Board chair and the Sheriff met, according to an affidavit of the Sheriff attached to the amended complaint. At that time, the chair allegedly told the Sheriff that "the defendants wanted to stop or cancel the purchase of" the Dodge pickup, and "led [the Sheriff] to believe that if [the Sheriff] challenged the defendants' decision to stop or cancel the purchase of [the Dodge pickup], the defendants would withhold funds from future Sheriff's Office budgets."

¶7 At a law enforcement committee meeting on March 19, 2015, the committee unanimously passed a motion regarding the purchase of the Dodge pickup, specifically "to direct the County Board Chairman not to take possession of [the Dodge pickup] until all options are reviewed and until [the county's attorney] can provide more information on such purchase through the dealership that has been requested …." The committee also unanimously passed a motion "to sell" Sheriff's vehicles that were in a rotation for disposal through auction, except "withholding the two (2) squads as discussed." The amended complaint alleges that the committee passed this motion to "withhold" the planned sale of two vehicles in order to deprive the Sheriff "of several thousand dollars" in revenue, allegedly thereby preventing the Sheriff from possessing the Dodge pickup.

¶8 On March 27, 2015, the Sheriff filed the original complaint in this action, which focused primarily but not exclusively on the Dodge pickup and included requests for an injunction and declaratory relief, but no civil rights or equal protection claims, which were later included in the amended complaint as summarized below. These requests for relief purported to rest, at bottom, on

Wisconsin case law describing the constitutional authorities of county sheriffs, who hold offices created under the Wisconsin Constitution. *See* ***Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO***, 2007 WI 72, ¶¶4, 31, 33, 301 Wis. 2d 266, 732 N.W.2d 828 (Wis. Const. art. VI, § 4 establishes the office of sheriff, but "does not delineate the powers, rights, and duties of the office of sheriff"; a sheriff's constitutional powers include any "time[-]immemorial, principal, and important duty that characterizes and distinguishes the office of sheriff").

¶9 On April 1, 2015, the circuit court held a hearing on the Sheriff's motion for a temporary injunction. Counsel for the Sheriff suggested that the focus of the injunction motion was on the Dodge pickup, "which is due to be delivered within the next few days," including that "the law enforcement committee has made various motions to restrict the sheriff's [receipt] of that pickup or make payment on it." Counsel for the Sheriff acknowledged that the County Board has authority to establish a budget for the Sheriff's office, but argued that, because the Sheriff is a constitutional officer, the County Board "cannot dictate" how the Sheriff decides to spend money already allocated for the Sheriff's use in a committee- or Board-approved budget.

¶10 Counsel for the defendants argued, in part, that the Dodge pickup was "county property" that the Sheriff may use only as permitted by the County Board, and asserted that county departments must present bids for vehicle purchases to the law enforcement committee "for approval[,] and the committee decides [which] vehicles to purchase."

¶11 At this April 1 hearing, the court denied the injunction request, primarily because the Sheriff had not shown that an injunction was needed to

prevent irreparable injury. More specifically, the court determined that the Sheriff had not established that there was a reasonable prospect that any defendant would prevent delivery of the Dodge pickup to the Sheriff or would prevent the Sheriff from selling the two vehicles. The court questioned how the defendants could "stop the sheriff from taking possession of" the Dodge pickup, given the Sheriff's contractual obligation to buy it from the dealership.

¶12 On April 16, 2015, another County Board committee, the executive committee, reviewed *proposed* amendments to the County Board's rules that would create new restrictions on county departments.[2] The Sheriff does not allege that these proposed amendments were ever enacted.

¶13 On April 22, 2015, the County Board voted (1) "to allow the Sheriff to use Clark County's truck [presumably referring to the Dodge pickup] to fulfill his constitutional duties and authority," and (2) "to sell the two [with]held squads at the discretion of the Law Enforcement Committee."

¶14 The amended complaint also alleged that in July 2015 the law enforcement committee voted in favor of the purchase of "a new squad and associated equipment" for the Sheriff, although this purchase apparently had no direct connection to the purchase of the six vehicles referenced above.

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[2] Details of the proposed amendments do not matter to our discussion below, but for context, county departments would be limited in the following ways: no property purchase of $5,000 or more or sale of county property "may be made without prior review/approval by the applicable governing body or the Board except for emergency situations"; "[s]uch prior approval is in addition to approval during the budget process"; and "[w]hen purchasing County vehicles, the applicable department shall seek written quotations or bids and such quotations or bids shall be presented and reviewed/acted upon by the applicable governing body before any orders are placed unless the applicable governing body or Board directs otherwise."

¶15 In February 2015 and again in April 2015 a local newspaper carried front-page headlines referring to the law enforcement committee questioning the Sheriff's vehicle purchases.[3]

¶16 In May 2015, the defendants filed a motion to dismiss the original complaint based on mootness, because the Sheriff had taken delivery of all six of the vehicles at issue, and "any remaining vague and uncertain declarations sought … are not ripe for adjudication and should be dismissed." Attached to the defendants' motion to dismiss was an affidavit of the Board chair, who averred in pertinent part that, as of April 21, 2015, the Sheriff had been in possession of all six vehicles, and that the chair expected "the final two used squad vehicles" to "be sold in the near future."

¶17 In August 2015, the Sheriff filed the amended complaint, making the following requests and claims:

- A permanent injunction, *stated in one place in the amended complaint as*, "enjoining the Board from interfering with any expenditures for equipment or services for the Sheriff's Office from an approved budget" *but stated in another place as*, "enjoining defendants from refusing to take delivery, refusing to make payment, or in any manner whatsoever otherwise interfering with [the Sheriff's] ability to obtain, use, or dispose of items or services purchases as part of an expenditure from an approved budget" and "enjoining the defendants … from preventing the sale of any used vehicles and/or equipment that is under the management and control of the Clark County Sheriff's Office";

[3] These references to newspaper headlines were included in the amended complaint in purported support of the Sheriff's federal civil rights claim, under the theory that he has a constitutionally protected property interest in his reputation and that the defendants "acted under color of law" when they allegedly caused the Sheriff to "endure the public embarrassment and humiliation of vitriol[ic] local press coverage," to which the defendants allegedly did not subject other county constitutional officers.

- A declaratory judgment, *stated in one place as*, "enjoining [sic] the defendants from interfering in any manner whatsoever with the constitutional powers of [the Sheriff] … [, including] from interfering with expenditures made on behalf of the Clark County Sheriff's Office from an approved budget" and "preventing sale of used squad cars and/or any other equipment that constitutes any portion of the Clark County Sheriff's Office [b]udget which would cost lost revenue from the Sheriff's Office [b]udget," *but stated in another place as*, a "[d]eclaration that [the Sheriff] has the constitutional authority to make expenditures from an approved budget without further consultation, approval, or intervention of any kind from the Board and/or [the law enforcement committee] in the exercise of his constitutional office";

- A civil rights claim under 42 U.S.C. § 1983 because the defendants "prevent[ed] [the Sheriff] from taking possession of [the Dodge pickup] and prevent[ed] him from selling two used law enforcement vehicles," and acted "with the sole intent to embarrass, harass, and cause damage to [the Sheriff's] reputation … and undermine his constitutional authority," and acted to "single out [the Sheriff] as a class unto himself among other [county constitutional officers] by requiring that he [(a)] seek approval from [the Board] and/or [the law enforcement committee] for his expenditures from the previously approved [b]udget, [(b)] provide detailed accounting of Sheriff's Office law enforcement activity, and [(c)] otherwise require information about the operation of the Sheriff's Office with the sole purpose to chastise and embarrass [the Sheriff] and undermine [the Sheriff's] constitutional authority with a vindictive purpose and taken with malicious animus and without any rational basis or legitimate governmental purpose."

- An equal protection claim, primarily relying on the same allegations and reasoning as in the 42 U.S.C. § 1983 claim, premised on the theory that the defendants "singl[ed] out [the Sheriff] as a class unto himself among other Clark County Constitutional Officers."

¶18 In subsequent briefing, the Sheriff argued in part that "[f]uture litigation is imminent and inevitable because the Board believes that it has authority to control and limit [the Sheriff's] expenditures from an already approved budget." The defendants argued in pertinent part that they were entitled to qualified immunity and that the amended complaint failed to support a request for injunctive or declaratory relief.

¶19 In November 2015, the circuit court heard extensive argument and granted the defendants' motion to deny each request for relief and deny each claim in the amended complaint on a variety of grounds, including mootness and qualified immunity. The Sheriff appeals.

DISCUSSION

¶20 We now explain why we conclude that the circuit court properly denied each request for relief and dismissed each claim in the amended complaint, addressing them in turn.

¶21 We first pause briefly to stress that nothing we say should be interpreted as taking a position on whether the "powers, rights, and duties" of a Wisconsin sheriff under Wis. Const. art. VI, § 4, include the "unfettered" rights claimed by the Sheriff to sole discretion over the expenditure of funds "approved" in a committee- or Board-approved budget, regardless of the circumstances, and an equally "unfettered" right to sell any equipment or services.[4] *See* ***Kocken***, 301 Wis. 2d 266, ¶¶4, 31, 33. For reasons we now explain, we do not need to resolve

[4] We observe that the Sheriff's request for injunctive relief was in some respects ambiguous. However, we conclude that the precise contours of the Sheriff's request for injunctive relief do not matter, because it is moot no matter how it is interpreted.

Explaining briefly, at the November 16, 2015 hearing referenced above, counsel for the Sheriff asserted that the Wisconsin Constitution gives the Sheriff "unfettered" control over "his budget," and therefore county officials lack authority to place any limitations whatsoever on funds already approved by the finance committee for use by the Sheriff. According to the Sheriff, this would include any limitation involving a special condition that the Board might want to attach to a budget item (*e.g.*, a rule that if the Sheriff proposes to expend more than $5,000 for an item already approved for purchase, the Sheriff must first receive committee or Board approval) or a limitation arising from an emergency or disaster that might befall the county. Counsel for the Sheriff said: "From the day that [the Sheriff's] budget goes into effect until the last penny is spent on that budget, [the Sheriff] has control over that budget."

these issues, which are disputed by the parties, and we make no observation on these topics. We assume without deciding that the Sheriff has the rights that he claims under the Wisconsin constitution.

I. REQUEST FOR INJUNCTIVE RELIEF

¶22 We conclude that the request for injunctive relief presented to the circuit court was moot, and that no exception to the general rule against considering moot claims should be applied here. The circuit court was not presented with allegations that the harm that the Sheriff sought to enjoin existed.

¶23 The standard of review that we apply to circuit court decisions to grant or deny injunctive relief is not pertinent, because we affirm the circuit court's decision based on mootness, which presents "a question of law that we review independently of the determinations rendered by the circuit court …." *See* ***PRN Associates LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559.

¶24 A claim is moot when it:

> "seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before [the right] has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy."

State ex rel. La Crosse Tribune v. Circuit Ct. for La Crosse County, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983) (quoted source omitted); *see also* ***PRN Associates***, 317 Wis. 2d 656, ¶¶25, 29 ("An issue is moot when its resolution will have no practical effect on the underlying controversy…. '[A] moot question is

one which circumstances have rendered purely academic.'") (quoted source omitted).

¶25 The Sheriff does not dispute that, at the time the circuit court made its challenged decisions:

- The Sheriff had received, and used county funds to pay for, the six vehicles that caused the dispute, including the Dodge pickup that was the main focus of the dispute. The Sheriff now acknowledges that the County Board "capitulate[d]" to his taking possession of the six vehicles.

- The County Board had not adopted the proposed rule changes that were reviewed by the executive board on April 16, 2015, as summarized above.

- No defendant was then interfering with any attempt by the Sheriff to purchase equipment or services reflected in a budget approved by any committee or the County Board, or preventing delivery of any equipment or service to the Sheriff, refusing to make payment, or otherwise interfering with the Sheriff's ability to obtain, use, or dispose of items or services purchases authorized in a committee- or County Board-approved budget.

¶26 Based on these undisputed facts, it is apparent that an injunction would have had no effect and that any potential need for an injunction had vanished by the time the circuit court made its challenged decision.

¶27 While the particular factual contexts vary in the case law, the circumstances here—in which the supervisors responded to the filing of the Sheriff's original complaint by *completely dropping* their objections to his purchasing or selling vehicles—generally resemble those in which our supreme court has concluded that requests for injunctive relief were moot because they would have no effect. *See* ***City of Racine v. J-T Enterprises of Am., Inc.***, 64 Wis. 2d 691, 700-02, 221 N.W.2d 869 (1974) (request for order enjoining illegal

use of premises moot because premises were no longer occupied by defendant and were being used for another purpose); ***Walder v. Allen***, 31 Wis. 2d 70, 72, 141 N.W.2d 867 (1966) (request for order enjoining defendants' use of an advertisement moot because defendants voluntarily removed sign).

¶28 It is not enough that the defendants could in theory, at a future time, attempt to prevent the Sheriff from making purchases of items listed in a committee- or Board-approved budget, or from selling equipment or services, changing course from what they ultimately did with regard to the 2015 county budget according to the Sheriff's own allegations. The court noted in ***City of Racine*** that, in ***Walder***, the defendants had established mootness even though there was "no guarantee that the defendant would not resurrect the sign at some time in the future." ***City of Racine***, 64 Wis. 2d at 701.

¶29 The Sheriff's mootness argument on appeal consists of little more than a recitation of allegations from the amended complaint, accompanied by conclusory assertions. To quote only one of the many conclusory assertions that the Sheriff now makes on the mootness topic, in lieu of a developed argument, he asserts that the "precise[]" "controversy" is that the County Board "lacks understanding of the independent nature of the Sheriff's Office and its legislative limitations over" the Sheriff. We decline to attempt to develop particular arguments that the Sheriff could make on the mootness topic. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address the merits of inadequately briefed issues).

¶30 Put differently, when the Sheriff now contends that he "intends to exercise his constitutional and statutory authority to make expenditures from his approved budget without Board intervention in order to fulfill his sworn duties,"

we have no concrete reason to believe that this will not occur in the absence of an injunction.

¶31 While not well developed as arguments, the Sheriff points to two categories of exceptions to the general rule that moot requests should be denied. That is, the Sheriff suggests that, even if his request for injunctive relief is moot, the circuit court should have addressed the merits of the request under one or both of these mootness exception categories. We now explain why we conclude that neither category should be applied here.

¶32 First, the Sheriff points out that courts may address a moot claim if it involves an issue of "'great public importance, … or a decision is needed to guide the trial courts.'" *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (quoted source omitted). It may be that the constitutional authority of a Wisconsin sheriff to control the use of funds from an approved budget and to sell off assets controlled by the sheriff, free from county board inference, is an issue of great public importance. However, the Sheriff fails to persuade us that the particular facts here present a suitable factual basis for addressing these important issues and for providing helpful guidance. Here, the Board eventually capitulated to the Sheriff and did not, ultimately, stake out a clear position regarding its authority to interfere with the Sheriff's power to spend money budgeted for his office.

¶33 Second, the Sheriff points out that courts may address a moot claim where "the issue is 'likely of repetition and yet evades review' because the situation involved is one that typically is resolved before completion of the appellate process." *See* ***id.*** (quoted source omitted). It is unclear, but if the Sheriff intends to argue that the circumstances he alleged in Clark County call for this

exception, such an argument has no merit, because the record establishes that the Sheriff had a full opportunity to raise and litigate the issues in the circuit court. The Sheriff explicitly contends that the circuit court should have applied this second exception because granting an injunction would "inevitabl[y]" assist "Wisconsin Sheriffs and all other constitutionally elected officers who face similar ongoing conflicts with their respective county boards." However, the vague phrase "similar ongoing conflicts" does not necessarily describe a constitutional violation. Moreover, this assertion of "similar ongoing conflicts" "throughout Wisconsin for every sheriff and constitutional officer" is completely unsupported. We decline to overlook mootness based on pure speculation.[5]

II. REQUEST FOR DECLARATORY RELIEF

¶34 We conclude that the request for declaratory relief was not ripe because the circuit court was presented with a "hypothetical, abstract, [and] remote" issue, not a "real, precise, and immediate" one. *See* ***Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship***, 2002 WI 108, ¶47, 255 Wis. 2d 447, 649 N.W.2d 626. The Sheriff argues that the defendants have created a "controversy [that] is capable of exploding at any time," but it is not enough that it is possible that there will be an "explosion" of some kind at some time in the future.

¶35 If a request for declaratory relief is not justiciable, the circuit court lacks jurisdiction over it. *See* ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶21,

[5] At the final hearing before the circuit court, counsel for the Sheriff represented that she was at that time "representing another sheriff, [for whom] this same issue has arisen …, and I am also representing a sheriff in another county," both presumably in Wisconsin. However, counsel used only vague generalities in referring to circumstances in the other counties, and when the court asked for details, counsel said that attorney-client privilege prevented her from saying more.

309 Wis. 2d 365, 749 N.W.2d 211. A request for declaratory relief is not justiciable if it fails to meet any of four conditions, one of which is that the "issue involved in the controversy must be ripe for judicial determination." ***Id.*** "[R]ipeness, as it pertains to declaratory judgments, is a legal conclusion subject to de novo review." ***Id.***, ¶38.

¶36 Consistent with the language from ***Putnam*** quoted above, our supreme court has provided the following summary regarding ripeness in the declaratory judgment context under WIS. STAT. § 806.04 (2015-16) (the uniform declaratory judgments act):[6]

> By definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions…. [P]otential defendants "may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution." Thus, a plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of [WIS. STAT. § 806.04]. What is required is that the facts be sufficiently developed to allow a conclusive adjudication…. "[T]he facts [must] be sufficiently developed to avoid courts entangling themselves in abstract disagreements." The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment.

Olson, 309 Wis. 2d 365, ¶43 (citations and footnote omitted).

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[6] The court in ***Olson v. Town of Cottage Grove***, 2008 WI 51, 309 Wis. 2d 365, 749 N.W.2d 211, was construing the 2003-04 version of WIS. STAT. § 806.04. However, there is no difference that matters here between the language of the 2003-04 version and the current 2015-16 version.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶37 We conclude that the facts here are not, in the words of ***Olson***, "sufficiently developed to avoid" the circuit court "entangling [itself] in abstract disagreements." *See* ***id.***, ¶43. "[A]ll adjudicatory facts" have not been "resolved." *See* ***id.***

¶38 It is true that, depending on the circumstances, the Sheriff is not required to wait to seek declaratory relief until after he or his office has suffered an injury due to interference with his exercise of a constitutional right. *See* ***id.*** But, as the defendants aptly put it, the circuit court was presented with only "abstract disagreement about contingent events," arising from the Sheriff's general apprehension about what supervisors *might* decide to do in the future about the Sheriff's portion of the county budget. The Sheriff's allegations fail to provide a "real, precise, and immediate" basis for us to conclude that, as a result of potential future actions of the Sheriff and of supervisors in Clark County, supervisors will infringe on a constitutional right of the Sheriff in the future.

¶39 Despite the expression of concerns and protests by some supervisors, the Sheriff timely took possession of each vehicle that he sought. The Board considered but, so far as the circuit court was informed, had *not* enacted rule amendments creating more supervisor oversight for county department purchases.

¶40 In sum, as the circuit court told counsel for the Sheriff, "[Y]ou're asking the Court to make a specific ruling … that [the defendants] can never [interfere with Sheriff expenditures from approved budgets] without the Court having the benefit of the circumstances" as they might unfold in the future. *See* ***City of Janesville v. Rock County***, 107 Wis. 2d 187, 199, 202, 319 N.W.2d 891 (Ct. App. 1982) ("A declaratory judgment will not determine hypothetical or

future rights.… Courts will not render merely advisory opinions.") (citations omitted).

I. CONSTITUTIONAL CLAIMS: QUALIFIED IMMUNITY

¶41 We conclude that the circuit court correctly dismissed both of the Sheriff's claims grounded in federal constitutional law, the 42 U.S.C. § 1983 claim and the equal protection claim, based on qualified immunity.[7]

¶42 "Qualified immunity protects government officials from civil liability if their conduct does not violate a person's clearly established constitutional rights." ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 469, 565 N.W.2d 521 (1997). Although qualified immunity is an affirmative defense, the Sheriff has the burden to demonstrate, by closely analogous case law, that the defendants violated a clearly established right under the federal constitution. *See* ***id.*** at 470-72. That is, by reference to specific allegations, the Sheriff must point to a controlling case, decided before the discussions and actions surrounding the 2015 county budget, that establishes a constitutional violation on materially similar facts. *See* ***id.*** ("The plaintiff's claimed right must be sufficiently

[7] The parties and the circuit court separately addressed the doctrine of legislative, or absolute, immunity, as opposed to qualified immunity, but we do not base our decision on the legislative/absolute immunity doctrine.

On a related note, we now clarify the determination that the circuit court made regarding qualified immunity. The court appears at times to have addressed the two types of immunity in tandem, sometimes referring generally to "immunity." However, the transcript reveals that the court determined that dismissal of the two federal constitutional claims was appropriate for reasons that included application of the doctrine of qualified immunity. Moreover, the Sheriff does not now argue that the circuit court did not base its dismissal of the constitutional claims in part on qualified immunity.

particularized to put the defendants on notice of analogous case law indicating that their conduct is unlawful.") (quoted source omitted).

¶43 We now briefly explain why we reject a preliminary argument that the Sheriff makes, namely, that we cannot affirm the circuit court's qualified immunity decision because the decision was made on a motion to dismiss, instead of after the defendants moved for summary judgment. The Sheriff forfeited this procedural argument by failing to raise it in his principal brief on appeal, which he needed to do in order to challenge the court's qualified immunity determination. This is sufficient to forfeit the issue. *See* ***id.***, at 469 n.6 ("Although usually, the defense of qualified immunity is raised at the summary judgment stage, [the plaintiffs] do not assert that it is premature for a qualified immunity determination simply because they are here on a motion to dismiss"). On appeal, the Sheriff's principal brief does not include a single use of the word "immunity," much less does it develop an argument as to the procedural qualified immunity issue. Only in his reply brief does the Sheriff make an argument that "[t]he issue of immunity must be decided on a motion for summary judgment." And, even this late-delivered appellate argument does not contain reference to any particular fact or category of evidence that the Sheriff submits might have been developed in discovery that could matter to the qualified immunity issue.[8]

[8] Separately, it appears likely that the Sheriff forfeited a procedural challenge on appeal by failing to develop the argument in the circuit court, and it would blindside the circuit court to reverse based on this issue. However, we need not decide this question because we conclude that the Sheriff forfeited the issue on appeal by not raising it in his principal brief.

Explaining briefly, the defendants submitted a detailed qualified immunity argument to the circuit court. The Sheriff responded in kind, addressing the merits of the qualified immunity issue, without making reference to the concept that the defendants' qualified immunity argument should be entertained only at the summary judgment phase. At a hearing before the court on the (continued)

¶44 Turning to the merits of the qualified immunity issue, we may be brief, because the Sheriff has little or nothing of substance to say, which was also the case in the circuit court. The Sheriff acknowledges that the constitutional right that he now claims for Wisconsin sheriffs represents a "legal issue … of first impression in Wisconsin," and that the declaratory judgment he seeks "*will formulate* his right to exercise his constitutional authority …." (Emphasis added.) This amounts to a concession that the Sheriff could not carry his burden to demonstrate, *by closely analogous case law*, that the defendants violated a *clearly established* right under the federal constitution. *See* ***Penterman***, 211 Wis. 2d 458, 470-72. In other words, if, as the Sheriff asserts, the power-of-sheriffs' issue is an issue of first impression, it is difficult to see how the defendants could possibly have known that their conduct would violate a *clearly established* constitutional right of the Sheriff.

¶45 At the final hearing, the circuit court pressed counsel to provide a controlling case establishing the contours of the Sheriff's constitutional powers in the budgeting context, which would obviously be a necessary first step in putting the defendants on notice of a potential federal constitutional violation. Counsel referenced ***Wisconsin Professional Police Ass'n v. Dane County***, 106 Wis. 2d 303, 316 N.W.2d 656 (1982), but appropriately acknowledged that this case is

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motion to dismiss, counsel for the Sheriff argued in pertinent part as follows: "Your Honor, we believe we've provided sufficient facts in the complaint, and *I'll stand on what's in the amended complaint*…. And we believe our complaint at this stage, at this stage in the proceeding, sufficiently brings forth the allegations to support proceeding with this matter." (Emphasis added.) It was only toward the end of the hearing, when counsel for the Sheriff was offered a final opportunity for argument, that counsel merely raised a question, without citing legal authority, as to whether a summary judgment analysis might be more appropriate for resolution of the immunity issue.

"not … specific" to the question of county board authority versus sheriff authority regarding county budgets, and further acknowledged that counsel had "not found any Wisconsin cases on point." This was a clear admission that the Sheriff could not come close to meeting the high bar necessary to defeat a qualified immunity defense, because it was an admission that counsel could not establish a first step in the analysis of the question of whether defendants should have been on notice of potential federal constitutional violations.

¶46 On appeal, the Sheriff points again to ***Wisconsin Prof'l Police Ass'n***. However, consistent with his concession to the circuit court, the Sheriff cites ***Wisconsin Prof'l Police Ass'n*** for the broad proposition that the office of sheriff is a constitutional office in Wisconsin with fundamental duties that may not be legislatively modified. *See* ***id.*** at 309 ("'In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State and he has no superior in his county.'") (quoted source omitted). To repeat, ***Wisconsin Prof'l Police Ass'n*** seemingly provides, at best, a *starting point* for analysis of a potential federal constitutional violation. That case does not provide controlling authority that, on the facts here, clearly establishes a federal constitutional violation.

CONCLUSION

¶47 For these reasons, we affirm the denial of each request for relief and dismissal of each claim in the amended complaint.

By the Court.—Order affirmed.

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