COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

No. 00-0973

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

STATE OF WISCONSIN EX REL. THOMAS R. WARD AND WISCONSIN RESOURCES PROTECTION COUNCIL, FOREST COUNTY CHAPTER,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF NASHVILLE AND NICOLET MINERALS COMPANY,

DEFENDANTS-RESPONDENTS,

RICHARD C. PITTS, SR., EDWARD F. BULA, WILLIAM J. MARQUARDT, CAROL MARQUARDT AND FOREST COUNTY,

DEFENDANTS,

TOWN OF NASHVILLE,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

KEVIN J. LYONS AND COOK & FRANKE, S.C.,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Forest County: MARK A. MANGERSON, Judge. *Affirmed in part and dismissed in part.*

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

¶1 CANE, C.J. Thomas R. Ward and the Wisconsin Resources Protection Council (collectively, Ward) appeal from a summary judgment in favor of Nicolet Minerals Company and from an order denying their postjudgment motion seeking (1) relief from the summary judgment; and (2) supplemental relief based on a declaratory judgment against the Town of Nashville. First, we conclude that the summary judgment was a final judgment that Ward did not timely appeal and, therefore, that appeal is dismissed. Next, we conclude that the circuit court did not erroneously exercise its discretion when it denied Ward's postjudgment motion. Thus, the court's order denying that motion is affirmed.

¶2 This is one of numerous cases involving Nicolet's proposal to open a zinc and copper mine in Forest County. At the outset it is imperative that we recognize what this appeal is not about: whether mining should or will occur in northern Wisconsin. Instead, the focus of this appeal is whether Ward can successfully challenge the circuit court's May 14, 1998, judgment that the December 1996 local agreement between the Town of Nashville and Nicolet cannot be voided based on alleged open meetings violations at town board meetings that occurred before the adoption of the local agreement in December 1996.

BACKGROUND

¶3 Nicolet is seeking state and federal permits to open an underground zinc and copper mine in Forest County. Nicolet negotiated local agreements, *see* WIS. STAT. § 293.41, with the four communities that have zoning authority over the proposed mine: Forest County, the City of Crandon, the Town of Lincoln and the Town of Nashville.[1] Only the agreement between Nicolet and the Town of Nashville is at issue on this appeal.

¶4 From 1993 through 1996, Nicolet negotiated with the Town through the Town's counsel, Kevin Lyons. The town board held numerous meetings with Lyons, some of which were not open to the public. In October 1996, several citizens filed a lawsuit alleging that three town board members and the town clerk had violated the open meetings law, *see* WIS. STAT. §§ 19.81 to 19.98, on three different occasions. The citizens sought findings that each defendant had violated the open meetings law; forfeitures; punitive damages; attorney fees; costs; and the voiding of any action that took place at the meetings.[2]

¶5 On December 12, 1996, the Town and Nicolet entered into a local agreement following a public hearing held pursuant to WIS. STAT. § 293.41(4). Ward filed this action against the same town board defendants, as well as against the Town, the County and Nicolet. The suit raised seven claims, including violations of the open meetings law, open records law, *see* WIS. STAT. §§ 19.31 to

[1] WISCONSIN STAT. § 293.41 details the procedure for creating a local agreement, pursuant to which a county, town, village, city or tribal government enters into an agreement with a mining company operator for the development of mining operations. All statutory references are to the 1999-2000 version.

[2] Their case is noted because it ultimately was consolidated with Ward's action.

19.39, special town meetings law, *see* WIS. STAT. § 60.12, local agreements law and others.

¶6 Ward sought numerous remedies, such as an injunction preventing enforcement of the local agreements with the Town and the County, a declaration that the Town and the County had violated the open meetings law and the open records law, and a declaration that the local agreements are void. In response, Nicolet filed a motion to dismiss on several bases, including that some of the claims were barred by claim preclusion.

¶7 Before Nicolet's motion could be heard, Ward filed an amended complaint alleging two claims, titled as: (1) "Town of Nashville Open Meetings Violations"; and (2) "Forest County Open Meetings Violations." Ward sought (1) a permanent injunction against the County, the Town and Nicolet from abiding by any of the terms of the local agreements with the County and the Town; (2) a declaration that the County and the Town violated the open meetings law; (3) a declaration that the local agreements "are void based upon the unlawful process in which they were negotiated and adopted pursuant to" WIS. STAT. § 19.97(3); (4) a jury trial on all contested factual matters; (5) forfeitures from the named town board defendants and "all County Board members who knowingly attended illegal meetings"; and (6) costs and attorney fees.

¶8 The amendment to the complaint disposed of the need to hear Nicolet's motion to dismiss.[3] The circuit court granted a motion to consolidate

[3] Nicolet explained in a hearing before the circuit court: "[The motion to dismiss] has been mooted by the amended complaint. … [T]here is no live Motion to Dismiss right now."

Ward's case with the October 1996 case filed against the same town board defendants, and the parties proceeded with discovery.

¶9 In 1998, Nicolet and the County moved for summary judgment, while Ward moved for partial summary judgment.[4] Nicolet's motion sought dismissal of all claims to void Nicolet's local agreements with the County and the Town. Nicolet's motion also indicated that if its first request was granted, it would voluntarily dismiss its contingent cross-claims against the County and the Town and seek to be dismissed from the case entirely.

¶10 The circuit court heard oral argument and ultimately dismissed both Nicolet and the County from the case. The court granted Nicolet's motion on two grounds: (1) there was no legal basis to void its local agreement with the Town where the agreement was approved at an open meeting, even if the agreement was negotiated during closed meetings that violated the open records law;[5] and (2) Ward's complaint was time-barred pursuant to WIS. STAT. §§ 893.75 and 19.97(4). Nicolet was dismissed from the action. Ward did not appeal the judgment.

[4] The Town did not oppose Ward's motion for partial summary judgment. It is undisputed that soon after the litigation began, the Town determined that it did not want to enforce its local agreement with Nicolet and even sought to overturn the agreement. Whether the Town can rescind its local agreement is not an issue in this case. That issue is being litigated in ***Nicolet Minerals Co. v. Town of Nashville***, No. 01-1339. However, we note that at the circuit court and on appeal, the Town generally aligned itself with Ward. Accordingly, although the Town is named as a respondent on appeal, it argues for reversal of the circuit court's judgment and order.

[5] The circuit court rejected what was termed a "fruit of the poisonous tree argument"—that the final, public hearing at which the local agreement was approved was the product of prior illegal town board meetings and, therefore, the local agreement should be voided.

¶11 For the next eighteen months, Ward and the town board defendants continued their litigation. Ultimately, they reached a stipulation whereby the town board defendants and the Town admitted that numerous meetings, all occurring before December 12, 1996, had violated the open meetings law.[6] The town board defendants also admitted "that when they approved the Local Agreement between [Nicolet and the Town] on December 12, 1996, it was a product of the closed meetings." The stipulation provided that Ward and the Town

> expressly reserve the right to move for reconsideration and/or to appeal the Court's May 14, 1998, order granting [Nicolet's] motion for summary judgment … regarding the voiding of the Local Agreement between [Nicolet] and [the Town], in light of the evidence gathered through discovery in this matter and the stipulations set forth herein.

¶12 In November 1999, the circuit court entered judgment for Ward based on the stipulation, concluding that the town board defendants and the Town had violated the open meetings law numerous times over a three-year period. However, there were no findings that the December 12 public hearing violated the open meetings law or WIS. STAT. § 293.41(4).

¶13 The judgment specifically granted declaratory judgment against the Town for three years of open meetings violations. The judgment indicated that it would consider the parties' request for supplemental relief pursuant to WIS. STAT. §§ 19.97 and 806.04 and that an evidentiary hearing could be held if requested.

[6] The Town's third-party claim against attorney Kevin Lyons was not addressed by the stipulation and is not at issue on this appeal.

¶14 Ward brought a motion for postjudgment remedial relief pursuant to WIS. STAT. §§ 19.97 and 806.04(8),[7] which it served on Nicolet. Ward asked for an evidentiary hearing and sought (1) an order voiding all actions taken at meetings between November 1993 and November 1996; (2) an order voiding the local agreement between the Town and Nicolet; and (3) an injunction against Nicolet and the Town from enforcing the local agreement "until the Nashville Town Board has an opportunity to determine what impact the Local Agreement would have on the health, safety and welfare of citizens of the Town of Nashville and whether the Local Agreement as drafted is in the best interests of the Town of Nashville."

¶15 Nicolet, appearing as a non-party, filed a response to Ward's motion arguing that because Nicolet is not an "adverse party whose rights have been adjudicated by the declaratory judgment," Nicolet is not subject to a motion for supplemental relief filed pursuant to WIS. STAT. § 806.04(8). Nicolet also observed that the unappealed May 14, 1998, summary judgment had already determined that the local agreement could not be voided even if there were open meetings violations before the public hearing. Nicolet argued that even if Ward were to seek relief from the May 14 judgment pursuant to WIS. STAT.

[7] WISCONSIN STAT. § 806.04(8) provides:

> SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

§ 806.07(1),[8] the motion should be denied because Ward could not establish grounds for relief from judgment.

¶16 Ward responded by filing an amended motion that explicitly sought, in addition to relief sought in his original motion, relief from the May 14 judgment pursuant to WIS. STAT. § 806.07(1)(h). After the circuit court heard argument, it concluded (1) the May 14 summary judgment was final; (2) Ward was not entitled to relief from the summary judgment pursuant to § 806.07(1)(h); and (3) Ward was not entitled to supplemental relief based on the declaratory judgment. This appeal followed.

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[8] WISCONSIN STAT. § 806.07(1) provides:

> **Relief from judgment or order**. (1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

¶17 On appeal, Ward does not address the circuit court's conclusion that the relief he seeks is barred by the court's May 14 judgment and that he is not entitled to relief from that judgment pursuant to WIS. STAT. § 806.07(1)(h). Instead, contending that "[t]he finality of the May, 1998 order and [Nicolet's] presence in this case is irrelevant to [Ward's] claim for declaratory and equitable relief," he argues: (1) the circuit court refused to correctly apply the open meetings law by refusing to apply a mandatory remedy to consider voiding actions taken at illegally-closed meetings; (2) he is entitled to have the court apply the balancing test found in WIS. STAT. § 19.97(3); and (3) the December 12 public hearing constituted a violation of the open meetings law and violated WIS. STAT. § 293.41(4) by depriving plaintiffs of a fair public hearing with maximum public participation. We reject these claims.

STANDARDS OF REVIEW

¶18 Whether the May 14 judgment was a final judgment disposing of the entire matter in litigation as to Nicolet is a question of law we review without deference to the circuit court's conclusion. *See* ***ACLU v. Thompson***, 155 Wis. 2d 442, 444, 455 N.W.2d 268 (Ct. App. 1990) (implicitly applying de novo review to issue whether judgment was final), *overruled on other grounds by* ***Edland v. Wisconsin Physicians Serv. Ins. Corp.***, 210 Wis. 2d 638, 563 N.W.2d 519 (1997).

¶19 Conversely, we defer to the circuit court's discretionary decision to deny Ward's WIS. STAT. §§ 806.07(1)(h) and 806.04(8) motion for relief from judgment and for supplemental relief. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985) (a circuit court's order denying a motion for relief under § 806.07 will not be reversed on appeal unless there has been an erroneous exercise of discretion); ***Klaus v. Vander Heyden***, 106 Wis. 2d

353, 358, 316 N.W.2d 664 (1982) (the granting of relief in a declaratory judgment action rests within the sound judicial discretion of the trial court). We will uphold the court's discretionary decisions unless there is no rational basis to support them. *See* ***M.L.B.***, 122 Wis. 2d at 541.

DISCUSSION

I. Waiver

¶20 We first consider Nicolet's argument that Ward has waived relevant issues by failing to raise them in his opening brief. Specifically, Nicolet notes that although Ward appeals both the circuit court's order denying his motion for postjudgment relief and the May 14 judgment, he does not in his opening brief address whether the May 14 judgment was final or whether the court erroneously denied his WIS. STAT. § 806.07(1)(h) motion.

¶21 Waiver is a rule of judicial administration and does not deprive this court of the power to address the waived issue, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), especially where there are no factual issues that require resolution. ***State v. Skamfer***, 176 Wis. 2d 304, 311, 500 N.W.2d 369 (Ct. App. 1993). Despite the waiver, because of the intense public interest in this case, we will briefly explain why Ward cannot challenge the May 14 judgment and why the circuit court's denial of Ward's motion for postjudgment relief was correct.

II. Finality of the May 14 judgment

¶22 Whether the May 14 judgment was final is relevant both to Ward's appeal of that judgment (filed over a year after the judgment was entered) and to his request that this court consider several legal issues that were decided in the May 14 judgment. Although the parties have briefed the merits of those particular

issues,[9] we cannot reach the merits unless we have jurisdiction over the appeal from the May 14 judgment.

¶23 The court of appeals acquires jurisdiction upon the timely filing of a notice of appeal from a final order or judgment. *See* WIS. STAT. § 808.03(1). The focus of our attention is whether the May 14 judgment dismissing Nicolet from the case was "final" as that term is used in § 808.03(1). Section 808.03(1) provides in relevant part: "A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one of more of the parties." This requires an analysis of whether the circuit court contemplated the judgment to be a final judgment at the time it was entered. *See* ***Radoff v. Red Owl Stores, Inc.***, 109 Wis. 2d 490, 493, 326 N.W.2d 240 (1982). In making this determination, we must look at the document itself, not to subsequent events. ***Id.***

¶24 In this case, Nicolet's summary judgment motion sought dismissal of all claims to void Nicolet's local agreements with the County and the Town. Nicolet's motion also indicated that if its first request was granted, it would voluntarily dismiss its contingent cross-claims against the County and the Town and seek to be dismissed from the case entirely. The circuit court granted Nicolet's motion for summary judgment after concluding that even if Ward could prove the open meetings violations alleged in the amended complaint, there was no legal basis in the open meetings law to void the adoption of the local agreement that occurred at a public meeting that was "indisputably properly noticed and attended, with people having an opportunity to be heard."

[9] Nicolet strenuously argues that the merits of the legal issues are not before us because Ward failed to timely appeal the May 14, 1998, judgment. However, "out of an abundance of caution," Nicolet also addressed the merits in its brief.

¶25 The circuit court's May 14 judgment stated in its entirety:

> Defendant Nicolet Minerals Company ("NMC") moved on March 20, 1998 for summary judgment of dismissal and, if its motion was granted, for dismissal without prejudice of its cross claims against co-defendants Forest County and Town of Nashville. The Court held a hearing on NMC's motion on May 5, 1998, and all parties appeared by counsel. The Court considered the submissions of all the parties and the written and oral arguments of counsel and, being advised in the premises, granted NMC's motions for the reasons set out in the Court's oral decision of May 5, 1998. Now therefore it is
>
> ORDERED that NMC's motions for summary judgment and for dismissal without prejudice of NMC's cross-claims are granted and NMC is hereby dismissed from this action.

¶26 We conclude that based on this language, the judgment unequivocally disposed of the entire matter in litigation as to Nicolet, and was therefore a final, appealable judgment.[10] *See* ***Culbert v. Young***, 140 Wis. 2d 821, 825-27, 412 N.W.2d 551 (Ct. App. 1987) (judgment disposing of the entire matter in litigation with respect to one defendant is final with respect to that defendant, but is not final with respect to remaining defendants). Ward failed to timely appeal the judgment. *See* WIS. STAT. §§ 808.03 and 808.04. Accordingly, we dismiss Ward's appeal from the May 14 judgment. Additionally, Ward is barred from relitigating the judgment's legal conclusions. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (no matter how artfully rephrased, an appellant may not relitigate matters previously decided).

[10] Additionally, although the language of the judgment is determinative, *see* ***Radoff v. Red Owl Stores, Inc.***, 109 Wis. 2d 490, 493, 326 N.W.2d 240 (1982), we note that the fact that Nicolet was subsequently uninvolved in any hearings and did not receive correspondence related to the remaining issues in the case is consistent with the judgment being final.

III. Request for relief from judgment under WIS. STAT. § 806.07(1)(h)

¶27 Next, we consider whether the circuit court erroneously exercised its discretion when it denied Ward's WIS. STAT. § 806.07(1)(h) motion for relief from the May 14 judgment. Section 806.07(1)(h) allows a court to consider "any other reasons justifying relief from the operation of the judgment." Our supreme court has observed that this section grants a circuit court broad discretionary authority and invokes a pure equity power of the court. ***Schwochert v. American Fam. Mut. Ins. Co.***, 172 Wis. 2d 628, 633-34, 494 N.W.2d 201 (1993). Furthermore, § 806.07(1)(h) "should be used only when the circumstances are such that the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts." ***M.L.B.***, 122 Wis. 2d at 550.

¶28 As we have previously noted, Ward on appeal has failed to address in both his opening brief and reply brief whether the circuit court erroneously exercised its discretion when it denied Ward's WIS. STAT. § 806.07(1)(h) motion for relief from judgment. That alone is sufficient basis to affirm the circuit court's exercise of discretion. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned); ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted). However, we have reviewed the complete record and have found no reason to disturb the circuit court's determination that Ward has failed to show extraordinary circumstances that would merit granting him relief from the May 14 judgment pursuant to § 806.07(1)(h).

IV. Denial of postjudgment relief on remaining grounds

¶29 As noted, Ward argues that the circuit court erroneously dismissed his amended motion for postjudgment supplemental relief, which he filed based on WIS. STAT. §§ 806.07(1)(h), 19.97 and 806.04(8). We have already concluded that the circuit court did not erroneously exercise its discretion in denying relief pursuant to § 806.07(1)(h). Thus, we consider whether there is any basis for Ward's request for relief pursuant to §§ 19.97 and 806.04(8).

A. Relief pursuant to WIS. STAT. § 19.97

¶30 Ward argues that he is "entitled to have the court consider whether the action taken at any and all meetings held in violation of the open meetings law should be voided when the public interest and enforcement of the open meetings law outweighs the public interest in sustaining the validity of the 'action taken.'" Ward is referring to WIS. STAT. § 19.97(3), which provides:

> Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the attorney general or the district attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.

We reject Ward's argument because this is the precise issue raised before the court in May 1998. The court concluded that because the final public hearing at which the vote to approve the local agreement was taken was an open meeting, there was no basis to void that action under § 19.97.

¶31 As we have already concluded, Ward failed to appeal the circuit court's adverse ruling and cannot now relitigate the issue before this court. *See* ***Witkowski***, 163 Wis. 2d at 990. Accordingly, we decline to consider the merits of the circuit court's May 1998 ruling or to independently apply WIS. STAT. § 19.97(3) in this case.

B. Relief pursuant to WIS. STAT. § 806.04(8).

¶32 WISCONSIN STAT. § 806.04(8) allows a party to seek further relief based on a declaratory judgment or decree. Without considering whether there is any possible relief available to Ward related to his successful declaratory judgment against the Town, we conclude that the circuit court was correct in denying Ward the relief he sought in his motion for postjudgment relief. Ward's motion sought five specific remedies: (1) reconsideration of the May 1998 judgment; (2) a declaration that the December 12, 1996, meeting violated WIS. STAT. § 293.41(4); (3) an order voiding all actions taken at the meetings between November 1993 and November 1996; (4) an order voiding the local agreement; and (5) an injunction against enforcing the local agreement.

¶33 We have already concluded that Ward is not entitled to relief from the court's May 14 judgment. Moreover, that judgment denied the fourth and fifth remedies that Ward seeks because the court ruled that there is no basis to void or order non-enforcement of the local agreement based on previous open meetings law violations. Thus, we address only the circuit court's denial of Ward's two remaining requests: (1) for an order voiding actions taken from 1993 through 1996; and (2) for a declaration that the December 12, 1996, meeting violated WIS. STAT. § 293.41(4).

1. Voiding actions taken from 1993 through 1996

¶34 Although Ward's motion sought an order voiding all actions taken at closed meetings from 1993 to 1996, Ward's written and oral arguments established that the reason he sought additional evidentiary hearings on what happened at each meeting is so that Ward can argue his "fruit of the poisonous tree" argument. In other words, the only actions Ward seeks to void are the preliminary steps that led to the final, open meeting at which the local agreement was adopted. Then, Ward has indicated, he will once again move to void the local agreement. In his written brief to the circuit court, Ward explained:

> If all the "actions taken" are voided, no draft Local Agreement would have been provided to the public and no public hearing would have been scheduled. … If those actions are voided, then the current Town Board will be entitled to decide whether it will ultimately adopt and recommend this agreement to the public, schedule a public hearing and ratify it.

¶35 Once again, we reject Ward's attempt to relitigate the legal issue decided by the May 14 judgment. In that judgment, the court held as a matter of law that it had no legal authority to void the local agreement created after an open public hearing even if the agreement was discussed at prior, illegally-closed meetings. Ward is bound by that judgment, and the circuit court did not erroneously exercise its discretion in denying Ward's request for additional evidentiary hearings to flesh out the specific actions taken at every meeting from 1993 to 1996.

2. Fairness of the December 12 public hearing

¶36 Next, we address Ward's arguments regarding WIS. STAT. § 293.41(4).[11] Ward argues on appeal that the December 12 public hearing (1) constituted a violation of the open meetings law; (2) did not cure the preceding open meetings law violations; and (3) violated the purpose and spirit of § 293.41(4) by depriving Ward of a fair public hearing with maximum public participation. The circuit court rejected Ward's motion for relief based on § 293.41(4), stating: "As to 293.41, I can't find anything on record that indicates a violation of that particular statute and that doesn't give the authority to do what's being suggested here."

¶37 We affirm the circuit court's decision, but not because we conclude that the December 12 hearing violated WIS. STAT. § 293.41(4). Instead, we affirm the decision denying Ward relief based on § 293.41(4) because we conclude that issue was not pled or litigated in this case.

¶38 Ward's original complaint alleged numerous claims, including that the open meetings and open records law violations resulted in an unfair WIS. STAT. § 293.41(4) hearing. The fourth claim specifically alleged that § 293.41(4) had been violated because the December 12 hearing was scheduled at the same

[11] WISCONSIN STAT. § 293.41(4) provides:

> **(4)** The county, town, village, city or tribal government shall hold a public hearing on an agreement under sub. (1) before its adoption. Notice of the hearing shall be provided as a class 2 notice, under ch. 985. After the public hearing, the governing body of each county, town, village, city or tribal government which is to be a party to the agreement must approve the agreement in a public meeting of the governing body.

time as the Forest County hearing. However, in response to Nicolet's motion to dismiss, Ward filed an amended complaint that alleged only two claims: open meetings violations by the Town and by the County.

¶39 The introduction to the amended complaint explained the nature of the suit:

> Plaintiffs challenge the validity of local agreements entered into by the Town of Nashville and Forest County with the Crandon Mining Company in December 1996 to allow the construction of a massive sulfide mine in their respective jurisdictions which were negotiated, drafted and ratified in violation of the requirements of the Wisconsin open meetings law Sec. 1981 et seq. Wis. Stats. Plaintiffs seek relief from the court enjoining the defendants from abiding by the terms of the agreements and declaring the agreements null and void.

Notably, this introduction did not state that the ratification of the local agreements violated WIS. STAT. § 293.41(4).

¶40 Additionally, the jurisdictional basis for the amended complaint did not include WIS. STAT. § 293.41(4). The amended complaint stated: "This is an action for declaratory and injunctive relief pursuant to Secs. 19.97 and 806.04, Wis. Stats. which gives the Circuit Court jurisdiction to hear this matter."

¶41 The amended complaint did reference WIS. STAT. § 293.41(4) once in its general factual allegations, and did allege that the "formulation of local agreements in closed sessions violated the Wisconsin Open Meetings Law and deprived plaintiffs of a meaningful public hearing pursuant to Sec. 293.41(4) and renders" the local agreements void. To the extent the complaint alleged any violation of § 293.41(4), it alleged a violation on the narrow basis of open meetings law violations. It did not allege that events that occurred at the meeting

itself would justify voiding the agreement, regardless of any previous open meetings violations.

¶42 Because the circuit court rejected Ward's claim that open meetings violations before December 12 would justify voiding the local agreement approved at the public hearing on December 12, there was no other litigated basis upon which to void the local agreement based on WIS. STAT. § 293.41(4). Ward even acknowledged this at the hearing before the circuit court, noting that § 293.41 raises the issue whether the December 12 hearing was fair, "and that issue has never been litigated. It was not dealt with by the summary judgment motion brought by [Nicolet] because that only dealt with open meetings issues. It didn't deal with the fairness of the hearing itself."

¶43 We agree. Whether the December 12 hearing was unfair for any reason other than previous open meetings law violations was not an issue litigated in the summary judgment motion—because it was not pled in the complaint. The parties and the court acknowledged on numerous occasions in the months following the summary judgment that what remained was an open meetings case. There was no hint that Ward intended to argue that events that occurred at the December 12 hearing could serve as a basis to void the local agreement.

¶44 Accordingly, we reject Ward's attempt to litigate issues not raised in the amended complaint. The circuit court correctly rejected Ward's motion for relief based on WIS. STAT. § 293.41(4).

CONCLUSION

¶45 We conclude that we have no jurisdiction to overturn the circuit court's May 14 summary judgment and, therefore, dismiss that appeal. We also

conclude that the circuit court did not erroneously exercise its discretion by denying Ward's WIS. STAT. § 806.07(1)(h) motion for relief from the summary judgment. Finally, we conclude that the circuit court correctly denied Ward's motion for supplemental relief based on the declaratory judgment against the Town because the motion is based on issues that were decided against Ward in the May 14 judgment and seeks remedies based on theories not alleged in the amended complaint. The order denying Ward's motion is affirmed.[12]

By the Court.—Affirmed in part and dismissed in part.

Not recommended for publication in the official reports.

[12] Because we reject Ward's appeal on the aforementioned bases, we do not address Nicolet's argument that Ward's claims for relief are also barred by the statute of limitations.