

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2009

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. 2008AP3224

Cir. Ct. No. 2008CV266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CHIA VANG AND KOUA VANG,

PLAINTIFFS-RESPONDENTS,

v.

UNITED ASIAN SERVICES OF WISCONSIN, INC.,

DEFENDANT,

**ALEX M. THOR, FUECHOU THAO, MARLYS MACKEN, QUOA HER AND
VANKHAM SOUANNOY,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Alex Thor, Fuechou Thao, Marlys Macken, Quoa Her and Vankham Souannoy appeal from a summary judgment decision removing them from the Board of Directors of United Asian Services of Wisconsin. We affirm for the reasons discussed below.

BACKGROUND

¶2 The United Asian Services of Wisconsin is a non-profit corporation organized under Chapter 181 of the Wisconsin Statutes to provide social services in Dane County to the refugee populations of three affiliated association members: the Southern Wisconsin Hmong Association, the Lao Association of Madison, and the Khmer Association of Wisconsin. Ar of incorporation set forth the membership requirements for any refugee association wishing to join the United Asian Services. Prior to February of 2007, each affiliated association nominated board members to designated seats on the United Asian Services Board of Directors. On February 20, 2007, an amendment to the bylaws eliminated that designation process, further stating that, henceforth, the corporation “shall have no members.” Several board members resigned or were removed after the bylaws were amended. However, Fuechou Thao, Marlys Macken and Vankham Souannoy, who were all members of the board prior to the bylaws amendment, continued to serve on the board. Alex Thor and Quoa Her were appointed to the board after the bylaws amendment.

¶3 The full-time salaried executive director of United Asian Services, Koua Vang, began to raise questions throughout 2007 regarding whether one or more of the board members had conflicts of interest involving directing state grant money to programs in which they had personal involvement. In response, the post-amendment board sent a series of disciplinary letters to Koua Vang between

August of 2007 and January of 2008, regarding his handling of the requested grant funds and other matters. Meanwhile, the board appointed Koua's cousin, Chia Vang, to a position on the board in September of 2007, but then dismissed him the following month.

¶4 On January 16, 2008, Chia Vang began a declaratory judgment suit against the three longest-serving members of the board, Thao, Macken and Souannoy, seeking rulings that the three were not legitimate members of the board in light of the amended bylaws, and that their removal of Chia Vang from the board was therefore invalid. At or about the same time, the affiliated member organizations apparently attempted to appoint an entirely new board, which included Chia Vang, on the theory that the amendment to the bylaws was itself invalid. Meanwhile, the board fired Koua Vang as executive director in March of 2008. In May of 2008, following the filing of various summary judgment materials and an objection to the absence of necessary parties, the complaint was amended to add Koua Vang as an additional plaintiff; to add board members Thor and Her as well as the United Asian Services as additional defendants; and to add claims for declaratory relief stating that the removal of Koua Vang as executive director was improper, and for injunctive relief barring the named members of the board from acting on behalf of the organization.

¶5 The circuit court ultimately concluded on summary judgment that the bylaw amendment had violated the articles of incorporation, and had inadvertently accomplished a wholesale removal of the entire United Asian Services board of directors. The court then issued a declaration that Thor, Thao, Macken, Her, and Souannoy were not legitimate board members, and further ordered that the three affiliated member organizations, who were not parties to the

suit, should elect an entirely new board. The five challenged board members appeal from those determinations.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *See id.*, ¶24. We view the materials in the light most favorable to the party opposing the motion. *Id.*, ¶23.

DISCUSSION

¶7 The appellants do not appear to challenge the substance of the trial court's determinations that the articles of incorporation for United Asian Services prohibited the February 2007 amendment to the organization's bylaws, and consequently, that it was improper to appoint any board members pursuant to the procedure set forth in the amended bylaws. Instead, they raise a host of procedural reasons they believe the trial court's order should be reversed.

Indispensible Parties

¶8 The appellants first claim the trial court erred in acting without first having the three affiliate members of the United Asian Services joined as

indispensable parties to the action. They rely upon WIS. STAT. § 803.03(1)(a) (2007-08),¹ which provides that a person shall be joined as a party, if “[i]n the person’s absence complete relief cannot be accorded among those already parties.” When such a party has not been joined, the trial court shall determine whether the action may proceed or should be dismissed, taking into consideration:

(a) To what extent a judgment rendered in the person’s absence might be prejudicial to the person or those already parties;

(b) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

(c) Whether a judgment rendered in the person’s absence will be adequate; and

(d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

WIS. STAT. § 803.03(3). The appellants point to the fact that the circuit court actually granted relief directed toward the nonparties as conclusive evidence that complete relief could not have been afforded among those already parties. We do not accept that logic, however. The circuit court was being asked only to determine the status of the Vangs and the board members who were serving at the time the suit was filed. The court was not being asked to determine how or when future board members would be appointed in the event that the appointments of current board members were found to be invalid. The fact that the court’s ultimate order may have exceeded the scope of the requested relief does not mean that appropriate and adequate relief could not have been tailored among the actual

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

parties to the action. Moreover, the appellants have provided this court with no argument explaining how they were prejudiced in the lawsuit by the absence of the affiliated members, or addressing any of the other criteria for determining when dismissal is required. We do not see how the absence of the affiliated members in any way affected the determination that the appellants' appointment to the board failed to comply with the articles of incorporation, or prejudiced the appellants' ability to defend the suit, particularly since United Asian Services was itself a party. In sum, the appellants have failed to persuade us that the affiliated members of United Asian Services were indispensable parties.

Chia Vang's Standing

¶9 The appellants next contend that the circuit court should have dismissed the action prior to the amended complaint being filed because Chia Vang lacked standing. We note that once the trial court permitted the complaint to be amended, however, the amended complaint superseded the original complaint and any flaws in the original complaint became moot. We will therefore address the question of Chia Vang's standing in light of the amended complaint.

¶10 To have standing, a party seeking declaratory relief must have a legally protected interest in the controversy, giving him or her a personal stake in its outcome. *State ex rel. Village of Newburg v. Town of Trenton*, 2009 WI App 139, ¶10, ___ Wis. 2d ___, 773 N.W.2d 500. Since a declaratory judgment action necessarily involves uncertainty regarding a party's rights, we construe standing liberally in such cases. *Id.*

¶11 The amended complaint alleged that Chia Vang was improperly removed from the board not only because the board had ceased to exist upon the adoption of the flawed bylaw, but also because the board lacked cause to remove

him and failed to follow the proper procedures. The appellants point out that if the board had ceased to exist upon the adoption of the bylaw, it also had no authority to appoint Chia Vang in the first place, in which case he would have no personal stake in the outcome. However, the legitimacy of the board was only one of the issues in the case. In the event the court were to determine that the board was in fact legitimate, Chia Vang would certainly have had a personal interest in the question whether the board had cause to remove him and followed the proper procedures to do so. We are therefore satisfied that he did have standing.

Estoppel Claim Against Chia Vang Based on Inconsistent Theories

¶12 The appellants make a related argument that Chia Vang should be judicially estopped from asserting both that the board had the authority to appoint him and that it lacked the authority to remove him. The doctrine of judicial estoppel precludes a party from asserting one position during the course of litigation, only to later argue the opposite. *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). A party asserting judicial estoppel must show: “(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position.” *Mrozek v. Intra Financial Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54 (citation omitted).

¶13 This is not an estoppel situation because Chia Vang did not convince the court to adopt one position before he asserted the other one. Rather, he argued both positions in the alternative from the beginning. See *State v. Petty*, 201 Wis. 2d 337, 350 n.6, 548 N.W.2d 817 (1996) (a party may argue inconsistent positions in the alternative, so long as he has not already obtained the advantage of a favorable ruling on one of them).

Estoppel Claim against Koua Vang Based on Joint Representation

¶14 The appellants next contend that Koua Vang should be judicially estopped from challenging the legitimacy of the board because he was represented by the same attorney who was representing Chia Vang. They rely on *Hannenbaum v. Drenzo and Bomier*, 162 Wis. 2d 488, 469 N.W.2d 900 (Ct. App. 1991), in which co-defendants were denied the right to ask for separate special verdicts based on alternate theories of negligence after having presented a joint defense at trial. Even if we were to accept the proposition that the Vangs should be treated as one entity in this lawsuit based upon their collective representation, we have already explained why it was permissible to make alternate arguments to the trial court, given the uncertainty regarding the legitimacy of the board. Koua Vang was no more precluded from making alternative arguments than was Chia Vang.

Waiver Claim Against Koua Vang Based on Failure to Object to Bylaw

¶15 The appellants next argue that Koua Vang waived any right to complain about the consequences of the bylaw amendment because he was present at the meeting where it was passed and failed to point out its unintended effect of removing the board. We first note that the term “waiver” means the intentional relinquishment of a known right, while the failure to timely assert a right is more properly referred to as a “forfeiture.” *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. In any event, we do not see how either the waiver or forfeiture doctrine applies here. Since Koua Vang was not a board member, he had no personal right at stake at the time the bylaw amendment was passed to change the method of selecting board members. His rights were not affected until

his employment was terminated, after which he promptly sought relief by joining this lawsuit.

Trial Court's Acceptance of Supplemental Summary Judgment Materials

¶16 The materials the Vangs initially submitted on summary judgment were not properly supported by affidavits, and the trial court allowed them to correct that omission with additional materials submitted with their reply brief. The appellants claim this deprived them of any meaningful opportunity to respond to the materials. However, WIS. STAT. § 802.08(3) plainly authorizes the circuit court to allow supplemental materials to be filed during summary judgment proceedings, and the appellants have not convinced us it was an erroneous exercise of discretion for the trial court to do so here. In particular, the appellants have not shown any prejudice. They have not adequately explained what arguments they would have made had the affidavits been included with the initial materials,² nor shown why such arguments could not have been made at the summary judgment hearing after the additional affidavits had been accepted. We therefore see no reversible error in allowing the Vangs to support their previously supplied documents with affidavits.

Scope of Relief

¶17 Finally, the appellants allege in their statement of issues that the circuit court “erred in granting relief *sua sponte* that directed future actions by

² They suggest that they might have been able to conduct additional discovery concerning the credentials of the affiliated members. But they do not explain how the credentials of the affiliated members would have changed the fact that the bylaw amendment was enacted in violation of the articles of incorporation.

non-party affiliate members without first affording the defendants an opportunity to prepare to join issue with regard to that form of relief.” However, the argument section of the appellants’ brief does not contain any corresponding section developing that issue. We will therefore not address it. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments which are undeveloped or unsupported by references to relevant legal authority).

By the Court.—Judgment affirmed.

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

