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DISTRICT IV

July 21, 2016

To:

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2546

Peter Bernegger v. Cara Thompson (L.C. # 2015CV157)

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

Peter Bernegger appeals a circuit court order denying his postjudgment motion for recusal and his motion for relief from judgment under WIS. STAT. § 806.07 (2013-14).¹ Bernegger argues that the circuit court judge should have recused herself on the basis of apparent bias, and that the court should have granted relief from the judgment because the court made manifest errors of law and fact. Bernegger also argues that WIS. STAT. § 757.19(2)(g), a

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

subsection of the recusal statute, is unconstitutional. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

As to the motion for recusal, the burden is on Bernegger to demonstrate that the circuit court judge is biased. *See State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114 (presumption “that the judge was fair, impartial, and capable of ignoring any biasing influences” in place, though presumption is rebuttable). Bernegger does not allege that the judge is related to or aligned with any of the parties or attorneys in the action, that the judge has any financial or personal interest in the outcome of the matter, or that there is any other evidence demonstrating that the judge might be biased against Bernegger. *See generally* WIS. STAT. § 757.19(2)(a)-(g). Instead, Bernegger’s only allegations in support of his assertion that the circuit court judge is biased against him rest on the fact that the judge dismissed his case based on what Bernegger argues are manifest errors of law and fact. Bernegger argues that “[e]ach of the 16 errors by themselves, and certainly in totality, gave a clear appearance of bias by [the circuit court judge] against Bernegger.” In a related opinion released today, *Bernegger v. Thompson, et al.*, No. 2015AP2168, unpublished slip op. (WI App July 21, 2016), we affirm the circuit court and conclude that the court correctly dismissed Bernegger’s underlying action. We see no content whatsoever to Bernegger’s assertion of judicial bias based on the circuit court’s purported “manifest errors.”

Turning to Bernegger’s argument that WIS. STAT. § 757.19(2)(g) is unconstitutional, we observe that Bernegger failed to provide the requisite notice to the attorney general of his challenge to the constitutionality of the recusal statute at any point during the circuit court proceedings. *See* WIS. STAT. § 806.04(11); *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280

N.W.2d 757 (1979). In fact, Bernegger asserts notice for the first time in his reply brief, and without proper citation to the record, stating that Bernegger served the attorney general with notice via U.S. mail sent two days before Bernegger filed his reply brief in this action. Moreover, even if we were to take Bernegger's assertion of notice at face value, we conclude that such notice would not have been timely, because Bernegger apparently did not attempt to provide notice to the attorney general until two days before briefing on appeal was concluded, which means that for all practical purposes, the attorney general did not receive notice before briefing was concluded in this case. *See* WIS. STAT. § 806.04(11) (notice must be provided and attorney general entitled to be heard when party making claim of unconstitutionality of a statute). Thus, we conclude that we are precluded from considering the constitutionality of the statute because Bernegger failed to timely serve the attorney general with notice of his challenge. *See Bollhoffer v. Wolke*, 66 Wis. 2d 141, 144, 223 N.W.2d 902 (1974). *See also Walt v. City of Brookfield*, 2015 WI App 3, ¶36 n.7, 359 Wis. 2d 541, 859 N.W.2d 115 (failure to give attorney general notice of challenge to constitutionality deprives this court of subject matter jurisdiction over this appeal).

Bernegger's argument that the circuit court erred in denying his motion for relief from judgment under WIS. STAT. § 806.07 is equally unavailing. Bernegger argues that the circuit court made "manifest errors of law and fact," but, as with the motion for recusal, Bernegger again fails to point to anything in support of his argument apart from Bernegger's apparent disagreement with the circuit court's decision. As discussed above, in a related opinion we release today, we affirm the court's decision to dismiss Bernegger's complaint. Thus, we have no basis to conclude that the circuit court erred in denying Bernegger's motion for relief from judgment.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals