



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

July 10, 2018

To:

Hon. Juan B. Colas
Circuit Court Judge
215 South Hamilton, Br.10, Rm. 7103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Reed Cornia
Cornia Law, LLC
306 E. Wilson St.
Madison, WI 53703

Micheal D. Hahn
Lori M. Lubinsky
Axley Brynelson, LLP
P.O. Box 1767
Madison, WI 53701-1767

Rory McGarry
Cynthia E. Smith
Public Service Commission of Wisconsin
P.O. Box 7854
Madison, WI 53707-7857

Gregory A. Thompson
6810 Cross Country Rd.
Verona, WI 53593

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

2017AP1883

TMS Investments, LLC and Gregory A. Thompson v. Public Service Commission of Wisconsin and Delafield-Hartland Water Pollution Control Commission (L.C. # 2016CV2731)

Before Sherman, Blanchard and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gregory Thompson, pro se, and TMS Investments, LLC, by counsel, appeal an order that denied a motion for reconsideration of a prior order that dismissed a petition for judicial review of a decision by the Public Service Commission of Wisconsin (the Commission). 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 (2015-16).¹ We summarily affirm.

On October 18, 2016, Thompson filed a joint petition for judicial review of the Commission's decision related to a sewer connection fee charged to TMS by the Delafield-Hartland Water Pollution Control Commission (Del-Hart). Thompson signed the petition on behalf of himself and on behalf of TMS. In early November 2016, the Commission and Del-Hart each filed a notice of appearance and statement of position. The Commission raised the affirmative defense that the petition was defective because Thompson was not a licensed attorney and therefore was not authorized to sign the petition on TMS's behalf, and requested that the court dismiss the petition. Del-Hart raised the affirmative defense that the property was owned by TMS and therefore Thompson was not a proper party to the action, and also asked that the court dismiss the petition. On November 11, 2016, Thompson filed a letter indicating that he had retained counsel to represent TMS but that he wished to continue to represent himself in his individual capacity. The court responded to Thompson's letter by order dated January 23, 2017, denying Thompson's request to proceed as a party in this action. The court explained that Thompson was aggrieved only as a member of TMS and therefore was not a proper party pursuant to WIS. STAT. §§ 227.52 and 183.0305.

On May 17, 2017, the circuit court issued an order dismissing the petition, explaining that the petition was fundamentally defective on behalf of TMS because it was not signed by an attorney and that Thompson was not a proper party under WIS. STAT. ch. 227 and WIS. STAT.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

§ 183.0305. On June 6, 2017, TMS, by counsel, moved for reconsideration. It argued that the court erred by dismissing the petition as to Thompson because no respondent had filed a motion to dismiss on grounds that Thompson is not a “person aggrieved” under WIS. STAT. § 227.56(3). It argued that, under *Jackson v. LIRC*, 2006 WI App 97, 293 Wis. 2d 332, 715 N.W.2d 654, a respondent must move to dismiss for failure to show that a petitioner is a “person aggrieved” within twenty days of filing a notice of appearance, and that a circuit court may not dismiss a petition on that ground absent a motion from a respondent. It argued that the time had expired for the respondents to move to dismiss on the basis that Thompson is not a person aggrieved, and thus any motion on that basis must be denied. On August 14, 2017, the circuit court denied reconsideration, reiterating its conclusion that Thompson is not a proper party to this action. The court rejected the argument that the court acted on its own motion to dismiss Thompson in his individual capacity, finding that Thompson had raised the issue by requesting that the court allow Thompson to continue as a party. The court denied reconsideration on August 14, 2017.

As an initial matter, we address the limited scope of this appeal. By order dated December 1, 2017, we determined that our jurisdiction over this appeal is limited to the single issue raised for the first time in the June 6, 2017 motion for reconsideration. We noted that the notice of appeal was filed on September 21, 2017, and was therefore untimely as to the court’s May 17, 2017 order dismissing the petition for judicial review. *See* WIS. STAT. § 808.04(1) (appeal must be filed within forty-five days of entry of judgment if notice of entry is given, or within ninety days of entry of judgment if no notice of entry is given). We noted, however, that the notice of appeal was timely as to the court’s August 14, 2017 order denying reconsideration. We explained that our jurisdiction is therefore limited to the single issue raised for the first time in the motion for reconsideration. *See Harris v. Reivitz*, 142 Wis. 2d 82, 86-89, 417 N.W.2d 50

(Ct. App. 1987) (our jurisdiction in appeal that is timely only as to order denying reconsideration is limited to review of any new issues presented on reconsideration). Specifically, we identified the single issue properly before us as whether the circuit court lacked authority to dismiss Thompson in his individual capacity absent a timely motion by a respondent asserting that Thompson is not a “person aggrieved.”

Under WIS. STAT. § 227.56(3), a respondent may move to dismiss a petition for judicial review on the basis that the petition on its face does not state sufficient facts to show that the petitioner is a “person aggrieved.” Upon hearing the motion to dismiss, the court may grant the petitioner leave to amend the petition if the amended petition has been served on the respondents prior to the hearing. *Id.* The court may then determine the validity of the amended petition without further motion. *Id.* A motion to dismiss on the basis that the petition does not state sufficient facts to show that the petitioner is a person aggrieved must be filed within twenty days after the time for filing a notice of appearance. *Id.*

Thompson and TMS argue that the circuit court lacked authority to dismiss Thompson in his individual capacity because the Commission and Del-Hart failed to timely move to dismiss on the basis that Thompson is not a “person aggrieved” under WIS. STAT. § 227.56(3). They contend that the circuit court dismissed Thompson sua sponte and without notice to Thompson of the defect in the petition, after briefing was already underway. They cite *Jackson*, 293 Wis. 2d 332, ¶17, for the proposition that “the court may not dismiss the original petition without a timely motion from the respondent asserting that the petition does not allege facts showing that the petitioner is aggrieved.” Thompson and TMS read *Jackson* as holding that a circuit court may not reach the issue of a petitioner’s standing unless a *respondent* files a timely motion to dismiss under WIS. STAT. § 227.56(3), even if the petitioner timely raises the issue to the court.

We are not persuaded that the circuit court lacked authority to reach the issue of Thompson’s standing under the facts of this case.

In *Jackson*, we held that the circuit court erred by dismissing Jackson’s petition for judicial review on grounds that the petition did not allege sufficient facts showing that Jackson was a person aggrieved, because the court acted sua sponte and without a motion to dismiss from the respondents. *Id.*, ¶¶2, 17-18. We explained that WIS. STAT. § 227.56(3) sets forth a specific procedure for a respondent to challenge a petition on grounds that the petition does not state sufficient facts to show that the petition is a person aggrieved. *Id.*, ¶17. We stated that “[t]his procedure imposes a time period for bringing such a motion, requires the petitioner to serve a proposed amendment by a specific time in order to have permission to amend, and authorizes the circuit court to decide if the amended petition is valid” without requiring further motion by the respondent. *Id.* We explained that, “[u]nder this procedure, the petitioner has notice—through the respondent’s motion—of the asserted deficiency in the petition and the opportunity to correct the deficiency if a proposed amended petition is timely made.” *Id.* We concluded that, “[b]ecause the section specifically describes in the last sentence the circumstances under which a court may dismiss a petition—but only an amended petition—without a motion from the respondent,” we read § 227.56(3) as providing “that the court may not dismiss the original petition without a timely motion from the respondent asserting that the petition does not allege facts showing that the petitioner is aggrieved.” *Id.* We therefore concluded that § 227.56(3) “does not permit the circuit court to sua sponte dismiss a petition without a motion from the respondent and without the petitioner having at least one opportunity to amend the petition on the terms described.” *Id.*, ¶2.

Here, unlike in *Jackson*, the circuit court did not sua sponte dismiss Thompson’s petition for failure to allege sufficient facts to show that Thompson is a “person aggrieved.” Rather, shortly after the notices of appearance were filed, Thompson requested that the circuit court address whether Thompson was a proper party in his individual capacity.² In January 2017, in response to Thompson’s request to the court to allow Thompson to proceed in his individual capacity, the court held that Thompson was not a proper party under WIS. STAT. § 183.0305. The court explained that § 183.0305 provides that “[a] member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, solely by reason of being a member of the limited liability company,” and that Thompson’s petition did not set forth any interest in this action outside of his membership in TMS. Four months later, the circuit court dismissed the petition as to Thompson personally because Thompson was not a proper party under § 183.0305.

We conclude that the circuit court had authority to respond to Thompson’s letter raising the issue of whether Thompson is a proper party to this action and then, ultimately, to dismiss the petition based on the court’s determination.³ *Jackson* holds that a circuit court may not sua

² Thompson requested that the circuit court address whether Thompson could proceed in his individual capacity in November 2016, within the statutory time for a respondent to move to dismiss based on a deficient petition. Thompson asserts, however, that his letter could not serve as a motion to dismiss by a respondent. This opinion does not treat Thompson’s letter as a respondent’s motion to dismiss.

³ Thompson and TMS assert that the circuit court erred by issuing its order denying Thompson’s request to proceed in this action in his individual capacity *after* Thompson and TMS filed their initial circuit court brief but *before* the Commission and Del-Hart filed their response briefs, and without holding a hearing. However, Thompson and TMS do not identify any authority prohibiting the circuit court from responding to a petitioner’s request for a determination of whether he is a proper party in this fashion. Additionally, as set forth above, the circuit court did not dismiss the petition until four months after it issued its order determining that Thompson was not a proper party. Thompson and TMS do not explain why that procedure denied it adequate notice or an opportunity to respond.

sponte dismiss a petition for judicial review for failure to state facts showing that the petitioner is aggrieved, without a motion from the respondent and without the petitioner having an opportunity to amend the petition. *Jackson* does not prohibit a circuit court from responding to a request by a petitioner to determine whether the petitioner is a proper party to the action. Additionally, nothing in *Jackson* prohibits a circuit court from later dismissing a petition after the court has issued an order, at the petitioner's request, determining that the petitioner is not a proper party. Thompson and TMS have not established that the circuit court lacked authority to respond to Thompson's letter seeking to have the circuit court determine whether Thompson may proceed in his individual capacity, and then to later dismiss the petition based on the court's determination that Thompson is not a proper party. Accordingly, we affirm.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals