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DISTRICT IV

January 13, 2022

To:

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Circuit Court Judge
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Clerk of Circuit Court
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Daniel M. Olson
Electronic Notice

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

2020AP1679 Daniel M. Olson v. Sauk County (L.C. # 2020CV68)

Before Blanchard, P.J., Kloppenburg, and Graham, 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).

Daniel Olson appeals the circuit court's order dismissing the petition for a writ of mandamus against Sauk County that Olson filed after being suspended from his position as Sauk County Corporation Counsel. Olson contends that the circuit court erred in dismissing his petition. He also contends that the court erred in denying his motion for temporary relief and his motion for

recusal. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We affirm.

In January 2020, the Sauk County board voted to suspend Olson from his position, with pay. Olson filed a petition for a writ of mandamus against the County in which he requested that the circuit court compel the County to cease enforcement of the suspension vote and restore his workplace privileges. He alleged that his suspension was unlawful on multiple grounds. Olson also filed a motion for temporary relief in which he requested that the court prevent the County from enforcing the suspension vote during the pendency of his petition. The court denied the request for temporary relief.

While Olson's petition remained pending, the County board voted to terminate Olson from his position. The County then moved to quash Olson's petition and for judgment on the pleadings. The County argued that: (1) the petition was incorrectly pled as a writ of mandamus instead of a writ of certiorari; (2) Olson's claims regarding the alleged unlawfulness of his suspension were flawed; and (3) the petition became moot when Olson was terminated from his position.

Olson moved the circuit court for recusal or disqualification. He argued that several of the court's previous statements or rulings showed actual or apparent bias. The court denied Olson's recusal motion, concluding that Olson had not shown any basis for recusal or disqualification.

The circuit court dismissed Olson's petition. The court reasoned that the relief Olson sought in his petition—reinstatement from his suspension—was no longer available after the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

County terminated Olson. The court stated that it "can't reinstate [Olson] to something that he's been terminated from." The court also stated that it could not reinstate Olson because he was no longer licensed to practice law in Wisconsin.[2]

We turn first to Olson's contention that the circuit court erred in dismissing his petition. "Mandamus is an extraordinary legal remedy." ***Lake Bluff Hous. Partners v. City of S. Milwaukee***, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995). "A writ of mandamus may be used to compel public officers to perform duties arising out of their office and presently due to be performed." ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶24, 252 Wis. 2d 1, 643 N.W.2d 72 (quoted source and internal quotations omitted). "In order for a writ of mandamus to be issued, four prerequisites must be satisfied: '(1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law.'" ***Id.*** (quoted source omitted).

Olson argues that his petition remained viable despite his termination. The County argues that the circuit court properly dismissed the petition as moot based upon Olson's termination. We agree with the County.

Mootness is a question of law that an appellate court reviews independently. ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. "An issue is moot when its resolution will have no practical effect on the underlying controversy." ***Id.*** "In other words, a

[2] The circuit court's dismissal order stated that the dismissal was "sua sponte." We are uncertain why the court viewed the dismissal as sua sponte. As noted above, the County moved to quash Olson's petition and for judgment on the pleadings. In the writ of mandamus context, a motion to quash is the equivalent of a motion to dismiss. *See* WIS. STAT. § 783.01 ("[T]he defendant may move to quash the writ and such motion shall be deemed a motion to dismiss the complaint under [WIS. STAT. §]802.06(2)."). Regardless, our decision to uphold the dismissal of Olson's petition is not affected by whether the dismissal is properly viewed as sua sponte.

moot question is one which circumstances have rendered purely academic." ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

Here, as the circuit court explained, Olson sought to use a writ of mandamus to compel the County to reinstate him from his suspension. When the County later terminated Olson, however, reinstatement from suspension was no longer available, and a decision on Olson's petition could no longer have any practical effect. Once Olson was terminated, it was too late for the court to compel the County to reinstate Olson from his suspension. *See* ***Bjordal v. Town Bd. of Town of Delavan***, 230 Wis. 543, 545, 284 N.W. 534 (1939) ("'The writ will not issue if it is too late to be available as a remedy to enforce the right alleged to have been violated.'" (quoted source omitted)); *see also* ***Pasko***, 252 Wis. 2d 1, ¶24 (Mandamus is used "to compel public officers to perform duties … *presently due to be performed*." (emphasis added)).

Olson disagrees that the relief he sought was limited to reinstatement from his suspension. He argues that he sought additional relief, both in his petition and in a letter that he filed in the circuit court after his termination.

We first address Olson's argument that he requested additional relief in his petition. We then address Olson's arguments based on the letter.

Olson points out that the request-for-relief section in his petition included requests for (1) declaratory relief, (2) damages and costs under WIS. STAT. § 783.04, and (3) "[a]ny and all

other relief that the Court deems just and equitable." Olson argues that the circuit court failed to consider these requests for "non-reinstatement" relief. We address each category of relief.[3]

As to declaratory relief, the County argues that such relief is not available in the context of a mandamus petition under WIS. STAT. ch. 783 and is instead a different legal mechanism under WIS. STAT. § 806.04. The County points out that the purpose of a writ of mandamus is to compel the performance of duties. *See* ***Pasko***, 252 Wis. 2d 1, ¶24. The County acknowledges that, under ***Milwaukee County v. Schmidt***, 52 Wis. 2d 58, 65, 187 N.W.2d 777 (1971), courts have discretion to convert a mandamus petition to a declaratory judgment action. The County argues, however, that Olson did not request conversion and that the circuit court did not exercise its discretion to convert Olson's petition.

Olson does not address ***Schmidt***, the distinction between mandamus under WIS. STAT. ch. 783 and declaratory relief under WIS. STAT. § 806.04, or the County's assertion that he did not request or receive discretionary conversion. Olson also states in his appellant's brief that he

[3] The request-for-relief section of Olson's petition stated, in full, as follows:

> Plaintiff requests that the Court grant the following relief:
>
> 1. An order declaring the January 28, 2020, Board vote to suspend Plaintiff legally insufficient and unenforceable;
>
> 2. A writ of mandamus ordering Defendant to immediately cease enforcement of the January 28, 2020 suspension vote and immediately restore workplace privileges to Plaintiff in full without restriction;
>
> 3. Award Plaintiff reasonable attorneys' fees, actual costs and damages pursuant to WIS. STAT. § 783.04.
>
> 4. Any and all other relief that the Court deems just and equitable.

"brought and prosecuted this action solely under WIS. STAT. § 783.01." Accordingly, Olson does not persuade us that his request for declaratory relief prevents his petition from being moot.

As to damages and costs under WIS. STAT. § 783.04, the County argues that the statute allows for damages and costs only if the petitioner first obtains a favorable judgment on the mandamus petition. Section 783.04 provides: "*If judgment be for the plaintiff*, the plaintiff shall recover damages and costs." (Emphasis added.) Olson replies that the County's argument regarding § 783.04 is incomplete. He argues that the County does not explain what constitutes a mandamus "judgment."

We conclude that Olson's argument on damages and costs is incomplete. Olson appears to be asserting that a "judgment" for a writ of mandamus under WIS. STAT. § 783.04 could mean a judgment that does not include any order compelling the respondent to perform a duty presently due to be performed. Olson does not, however, support this assertion with statutory language or other authority. We conclude that Olson's argument as to damages and costs is insufficiently developed and, on that basis, we decline to consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (explaining that we need not consider inadequately developed arguments).

As to Olson's request for "[a]ny and all other relief that the Court deems just and equitable," Olson develops no argument explaining why this catch-all request in his petition would be sufficient to avoid dismissal on mootness grounds. Rather, Olson asks us to consider this catch-all request in combination with the letter that he filed after his termination. We turn now to Olson's arguments based on the letter.

In the letter, Olson informed the circuit court that he had reconsidered the possibility of voluntarily dismissing his petition after his termination. Arguably, the letter also reflected Olson's position that his termination was unlawful and should not bar his petition from proceeding. The letter stated:

> Please be advised that I have reconsidered my position on a voluntary dismissal of Sauk County case no. 20CV68.
>
> I do not think dismissal is necessitated by any unilateral action of Sauk County, particularly one so tainted by misconduct and bad faith.
>
> I also think the substantial public and personal interests in this matter deserve a thorough development and application of all relevant facts and law.
>
> Accordingly, I intend to move forward with full discovery and a final hearing in this matter pursuant to the court's scheduling order.

Olson argues, as we understand it, that his letter amended his petition or otherwise broadened the scope of his petition to include claims relating to his termination. Olson also argues that the letter clarified that the catch-all request in his petition was intended to encompass future unlawful actions by the County after his suspension. Olson argues that the catch-all request, in combination with his letter, was broad enough to include relief relating to termination. We reject these arguments because we disagree with Olson's strained interpretation of the letter. Olson's letter, no matter how liberally construed, is not reasonably read as amending Olson's petition or as otherwise stating additional claims or requests for relief.

Olson makes an additional argument relating to the letter. He argues that the circuit court relied on the letter to improperly amend his petition so as to narrow its scope. This argument lacks merit. Olson misconstrues the court's statements regarding his letter. The court did not amend Olson's petition or conclude that Olson's letter narrowed its scope. Rather, the court concluded,

as we have now concluded, that Olson's letter is not reasonably read as an expansion of his petition. The court initially stated, perhaps ambiguously, that the court "took [the letter] as an expansion of the writ of mandamus." However, the court went on to clarify that the letter did *not* expand Olson's petition to include claims for wrongful termination. The court stated: "[T]here is another adequate remedy at law here for a wrongful termination which Mr. Olson can, and as I would say from his May 7th letter, intended to sort of transform this case into *but didn't*." (Emphasis added.)

Olson next argues that he lacked sufficient notice of the grounds on which the circuit court dismissed his petition. This argument is not persuasive for two reasons. First, Olson had sufficient notice of the mootness ground. The County raised this ground as one of three main arguments in its circuit court briefing and, although the court did not use the term "moot" or "mootness," the court plainly relied on the substance of the County's mootness argument. Second, even if the County had not raised its mootness argument prior to appeal, we would still affirm the court's dismissal of Olson's petition based on that ground. *See* ***Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer***, 2006 WI App 161, ¶14, 295 Wis. 2d 556, 721 N.W.2d 704 (stating that we "may affirm the circuit court on an alternative ground as long as the record is adequate and the parties have the opportunity to brief the issue on appeal"); *see also* ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154 (stating that the forfeiture rule "generally applies only to appellants," and that "we will usually permit a respondent to employ any theory or argument on appeal that will allow us to affirm the trial court's order, even if not raised previously.").

Olson also argues that, even if his petition is moot, at least three exceptions to the mootness doctrine apply here. We decline to consider the exceptions because Olson raises this argument for the first time in his reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292

Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.").

We turn to Olson's contention that the circuit court erred in denying his request for temporary relief pending the disposition of his petition. Olson argues that the circuit court erroneously exercised its discretion in several respects in denying his request. The County argues that the circuit court properly exercised its discretion and that Olson's request for temporary relief is now moot. We agree with the County that the request is moot. Olson cannot now receive temporary relief pending the disposition of a petition that was properly dismissed.

Finally, we turn to Olson's contention that the circuit court erred in denying his motion for recusal or disqualification based on actual or apparent bias. Olson does not persuade us that the court erred in denying the motion.

"There is a presumption that a judge has acted fairly, impartially, and without prejudice." ***State v. Herrmann***, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772. "The presumption is rebuttable, placing the burden on the party asserting the bias to show that bias by a preponderance of the evidence." ***Id.***

Olson does not rebut the presumption of impartiality and demonstrate actual or apparent bias. His arguments as to bias largely amount to disagreements with the circuit court's rulings. At most, Olson demonstrates good faith error by the court on points that are not relevant to our analysis. For example, Olson argues that some of the court's statements at the temporary relief

hearing show that the court prejudged his case.[4] We disagree and conclude that the court's statements simply reflected the court's explanation of its belief that it lacked authority to grant the temporary relief requested. Olson's other arguments as to bias are similarly unpersuasive and do not warrant individual discussion.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals

[4] Olson complains of the following statements by the circuit court at the temporary relief hearing:

> It is troubling to the Court that the Court is being asked to act through this temporary relief in a way to override the county board. The Court is not interested in being a participant in county board decisions. The county board has mechanisms to deal with Attorney Olson's current situation. And to ask the Court to become involved and become a de facto board is not what the Court believes it has the authority or the inclination to do. So I do believe there is an adequate remedy here through the county board process and through the statutes that govern that process.