COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2019

Sheila T. Reiff
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. 2018AP1178 **Cir. Ct. No. 2016CV2210**

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

STATE OF WISCONSIN EX REL. RICHARD ZECCHINO AND ADAMS OUTDOOR ADVERTISING LIMITED PARTNERSHIP,

PLAINTIFFS-APPELLANTS,

V.

DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, PAUL RUSK, SHARON CORRIGAN, DAVID DE FELICE, GEORGE GILLIS, DOROTHY KRAUSE, JEFF PERTL, ANDREW SCHAUER, ROBIN SCHMIDT AND HEIDI WEGLEITNER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Richard Zecchino and Adams Outdoor Advertising Limited Partnership Corporation (collectively, "Adams"), appeal the denial of their motion to reopen an order dismissing Adams's complaint against Dane County and the Dane County Board of Supervisors, an order which was also affirmed on appeal in a published opinion. *See* ***State ex rel. Zecchino v. Dane Cty.***, 2018 WI App 19, 380 Wis. 2d 453, 909 N.W.2d 203.[1] For the reasons that follow, we affirm.

BACKGROUND

¶2 Adams sought to renew leases on three billboards near the Dane County Regional Airport. In April 2016, the County Board rejected the leases in an 18-16 vote. ***Id.***, ¶2. Adams filed suit, alleging that nine of the thirty-seven board members engaged in an illegal "walking quorum"[2] prior to the vote. Adams's argument was primarily grounded in several emails sent by Board Supervisor Paul Rusk to other board supervisors concerning the billboard lease renewals. ***Id.***, ¶3. The County moved to dismiss and the circuit court granted the motion, determining that Adams's complaint failed to state a claim for relief. ***Id.***, ¶6. We agreed with the circuit court and affirmed, stating that the emails failed to plausibly suggest that the County Board either "purposefully engaged in discussions regarding the lease renewal vote [or] that the discussions were held between a sufficient number of board members so as to affect the vote." ***Id.***, ¶11.

[1] The appeal was venued in the Court of Appeals, District IV, but was decided by a panel of District I judges sitting in District IV. The appeal was not, as Adams states, "transferred … to District I."

[2] A "walking quorum" is defined as "a series of meetings of groups less than a quorum." ***State ex rel. Newspapers, Inc. v. Showers***, 135 Wis. 2d 77, 92, 398 N.W.2d 154 (1987).

The Wisconsin Supreme Court denied Adams's petition for review. ***Zecchino v. Dane Cty.***, 2018 WI App 90, 383 Wis. 2d 143, 918 N.W.2d 75.

¶3 Meanwhile, in a separate federal lawsuit against the City of Madison, Adams obtained discovery which included an email thread referencing Adams's claim against Dane County. An August 19, 2016 email from Ronn Ferrell, a former board supervisor, stated: "Of course it is possible that Supervisor Paul Rusk and a majority of the board violated open meetings laws and also participated in a walking quorum. It is SOP for the majority. Did it happen in this case? Only time will tell …." Ferrell next wrote: "I do know this for a fact. I was not involved." He concluded by instructing: "Please only quote me with my prior permission."

¶4 Based solely on the Ferrell email along with an affidavit from Adams's Director of Real Estate averring that he had "seen the acronym 'SOP' used to stand for 'standard operating procedure,.'" Adams filed a motion for relief from judgment under WIS. STAT. § 806.07(1)(h) (2017-18).[3] Adams's brief in support of the motion framed the issue as,

> [W]hether, based on the newly obtained additional information supporting Plaintiffs' Open Meeting Law claim, the Court should exercise its discretion pursuant to WIS. STAT. § 806.07(1)(h) to grant Plaintiffs' request for relief from the Court's decision to dismiss the Open Meeting Law claim for failure to state a claim upon which relief can be granted. Fundamental fairness dictates that the Court should consider this information, grant Plaintiffs' request for relief from the dismissal, and allow the case to proceed on the merits.

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The parties provided written briefs. Following oral argument, the circuit court denied Adams's motion to vacate the order dismissing its action against the County. Adams appeals.

DISCUSSION

¶5 The County first suggests that the appeal should be dismissed as moot because the billboards in question have been removed. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy.") Adams counters that the County has failed to provide any authority for its mootness argument. However, as Adams acknowledges, it took the position in the prior appeal that the circuit court's order dismissing its complaint should be stayed pending appeal because removing the billboards would moot its claim, thereby "rendering any potential relief completely ineffectual." Nevertheless, we reach the merits because the mootness issue was not litigated below, the circuit court's decision on the issue presented is wholly proper, and we are not persuaded that resolution of the issue is without any potential effect.

¶6 WISCONSIN STAT. § 806.07 provides the terms under which a court may relieve a party from a judgment, including a catch-all provision which allows a party to seek relief for "[a]ny other reasons justifying relief from the operation of the judgment," *see* § 806.07(1)(h), based on the existence of extraordinary circumstances, *see* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶¶32, 34, 326 Wis. 2d 640, 785 N.W.2d 493. Extraordinary circumstances exist only in "extreme and limited cases." ***Connor v. Connor***, 2001 WI 49, ¶43, 243 Wis. 2d 279, 627 N.W.2d 182. ""[E]xtraordinary circumstances are those where '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.'"" ***Miller***, 326 Wis. 2d 640, ¶35 (quoted source omitted).

¶7 We conclude that the circuit court properly denied Adams's motion because no reasonable judge could conclude that the Ferrell email justifies reopening Adams's case against the County Board. The email contains no factual assertion that would cure the deficiencies in the previously-dismissed complaint. If authentic, the email establishes that Ferrell believed it was "possible" that some board supervisors participated in a walking quorum and that he disclaimed knowing whether any open meetings laws were violated in Adams's case. Even considering the Ferrell email alongside the allegations in the dismissed complaint, Adams has failed to state a claim as a matter of law. *See* ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693 (whether a complaint states a claim upon which relief can be granted is a question of law we review independently).

¶8 Adams argues that the circuit court improperly failed to assume the truth of the factual allegations contained in its motion and affidavit. *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶10, 282 Wis. 2d 46, 698 N.W.2d 610 ("[T]he circuit court should examine the allegations accompanying the motion with the assumption that all assertions contained therein are true."). Adams misunderstands which "facts" the circuit court was required to accept. The circuit court needed to accept as true that Ferrell was a former board supervisor, that he sent the August 19, 2016 email with the contents as represented, and that "SOP" has been used in some contexts as an acronym for "standard operating procedure." The circuit court was not required to assume that it was "standard operating procedure" for the so-called board majority to engage in a "walking quorum." At oral argument on the motion, Adams admitted: (1) that the email did not contain

"any specific facts," that Ferrell was not a member of the "majority" and that Ferrell did not "have any personal facts about" whether there was a walking quorum in this case; and (2) that Adams was "not alleging that this email … says that Mr. Ferrell has firsthand knowledge that an open meetings violation occurred in this case." Ferrell's musings about other board members' past practices in prior votes, even if true, do not establish what happened in this particular case.

¶9 We also reject Adams's argument that the circuit court erroneously exercised its discretion by failing to consider the "five interest of justice factors" set forth in ***Miller***, 326 Wis. 2d 640, ¶¶36, 41. Before a circuit court holds a hearing and engages in weighing these factors, it must examine the allegations in the WIS. STAT. § 806.07(1)(h) motion to ensure "the facts alleged are extraordinary or unique such that relief may be warranted." ***Sukala***, 282 Wis. 2d 46, ¶10. The movant carries the burden to establish the existence of "extraordinary circumstances … justifying relief in the interest of justice." ***Miller***, 326 Wis. 2d 640, ¶¶34-35. Adams's motion did not establish a factual basis sufficient to trigger the circuit court's exercise of discretion so consideration of the five interest of justice factors was not necessary.

CONCLUSION

¶10 For those reasons, we affirm the order of the circuit court.

By the Court.— Order affirmed.

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