COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP745 **Cir. Ct. No. 2011CV1429**

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

STATE OF WISCONSIN EX REL. ROGER PACKARD, MARCIA MACKENZIE, GALEN HASLER AND JOHN AESCHLIMANN,

PLAINTIFFS-RESPONDENTS,

V.

MADISON AUDUBON SOCIETY, INC.,

DEFENDANT,

PETER CANNON AND JON BISHOP,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

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

¶1 LUNDSTEN, P.J. This appeal involves a quo warranto action in which the plaintiffs-respondents sought a declaration that they are the rightfully elected officers of the Madison Audubon Society. The plaintiffs, Roger Packard, Marcia MacKenzie, Galen Hasler, and John Aeschlimann, were candidates for the offices of president, vice-president, secretary, and treasurer. We will refer to the plaintiffs collectively as Packard, except when making specific reference to the actions of particular persons, and will refer to them as the Packard slate when speaking of them in their capacity as candidates. The defendants-appellants, Peter Cannon and Jon Bishop, were candidates for president and secretary. We will refer to the defendants collectively as Cannon, except when making specific reference to the actions of Peter Cannon, and will refer to the two men, along with two other candidates not involved in this suit, as the Cannon slate when speaking of these four persons in their capacity as candidates. The circuit court granted summary judgment in favor of Packard, thus declaring the Packard slate the rightfully elected officers of the Madison Audubon Society. We affirm the circuit court.

Background

¶2 What follows are undisputed facts we have gleaned from the submissions. In some instances, we recite as fact numbers about which there is some dispute. In each of these instances, the dispute is not material because, even if we resolved the dispute in favor of Cannon, the only effect would be on the margin of the Packard slate's victory, not on the outcome of the election.

¶3 Prior to the 2011 annual meeting of the Madison Audubon Society at which officers would be elected, a plan was set in motion to take over control of the Madison Audubon Society from its leadership at that time, which included

Peter Cannon. The plan was to recruit a sufficient number of applicants so that the applicants' votes would outnumber the votes of existing members who both favored the Cannon slate and attended the annual meeting.

¶4 Based on the number of "blue ballots," a term explained below, approximately 70 current members attended the annual meeting. David Musolf, one of the Packard-slate candidates, recruited 173 new applicants, including two persons who had been members but had let their memberships lapse. A "large" but unspecified number of these applicants attended the annual meeting.

¶5 According to "renewal" applicant and Packard-slate candidate Marcia MacKenzie, on the evening of the meeting, the applicants gathered in a separate room in the Memorial Union on the UW-Madison campus and then, together, the applicants went to the annual meeting in the Union's Tripp Commons.

¶6 Current member and Packard-slate candidate Galen Hasler gave applications for 173 people and a cashier's check to member John Minnich, who was manning the table at the door at Tripp Commons.[1] The amount of the cashier's check was sufficient to cover the annual dues for all of the applications. In addition to the cashier's check, David Musolf gave 97 individual applicant checks to Cannon.

¶7 After the submission of applications and payments, there was a dispute over whether the applicants would be allowed to vote. Chairperson Mark

[1] Minnich avers in his affidavit: "I am the only employee at [the Madison Audubon Society] who processes applications and dues."

Martin indicated that only persons listed as current members on a National Audubon Society listing of members would be allowed to vote. After further argument, however, the applicants did vote.

¶8 Persons who were members of the Society prior to the meeting were given blue ballots as they entered Tripp Commons and signed in. The applicants and "renewal" members who did not have blue ballots were given white ballots. Some persons who were members prior to the meeting also voted on white ballots. The blue ballots were preprinted with the Cannon slate of candidates. The white ballots had no preprinted candidate names—only the offices and a blank to fill in a name for each office. All of the filled-out ballots were placed in a bag and sealed. The bag was given to Chairperson Martin, and Martin brought the sealed bag with the ballots in it to the Madison Audubon Society office the next day.

¶9 Present the next day for the vote count were four people: three who had been members of the Madison Audubon Society prior to the annual meeting (including Jim Shurts, who recorded the vote tally), and a person from the office of the attorney representing Packard. The ballots they counted are in the record. We summarize the results of our own review as follows:

- 246 total ballots.
- 72 blue ballots and 174 white ballots.
- For the Cannon slate, 55 votes consisting entirely of blue ballots.
- For the Packard slate, 188 votes consisting of 14 blue ballots and 174 white ballots.[2]

[2] We have ignored ballots that are ambiguous for one reason or another. We do not attempt to reconcile our count with the tally attributed to Jim Shurts. We assume without (continued)

¶10 Five days later, on March 21, 2011, having rejected the votes cast on the white ballots, the leadership at the time announced that the Cannon slate had been elected. The new term began July 1, 2011, and Cannon and Bishop, who had previously been president and secretary, respectively, remained in office. The other two persons on the Cannon slate resigned before taking office.

Discussion

¶11 Cannon argues that the circuit court erred when it granted summary judgment in favor of Packard. We review summary judgment decisions de novo, applying the same method as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). That method is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. It is sufficient to say that we construe the facts in a light most favorable to the non-moving party. ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶7 n.3, 237 Wis. 2d 19, 614 N.W.2d 443.

I. Interpretation Of The By-Laws

¶12 The parties dispute the proper interpretation of Madison Audubon Society's by-laws, but do not dispute the interpretation principles that should guide our review. The parties agree that the principles governing the interpretation of contracts also govern the interpretation of by-laws. *See* ***State ex***

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deciding that the photocopy of the Shurts tally is inadmissible evidence. Nonetheless, we note that the differences between our tally and the Shurts tally are minor.

rel. Siciliano v. Johnson, 21 Wis. 2d 482, 487, 124 N.W.2d 624 (1963). Accordingly, we apply the following principles:

> The interpretation of a contract is a question of law that we review independently of the circuit court. "If the terms of a contract are plain and unambiguous, we construe the contract as it stands and apply its literal meaning." However, if we determine that a contract provision is ambiguous, we look to extrinsic evidence to discern the contract's meaning.

BV/B1, LLC v. InvestorsBank, 2010 WI App 152, ¶19, 330 Wis. 2d 462, 792 N.W.2d 622 (citations omitted). A contract provision that is reasonably susceptible to more than one construction is ambiguous. ***Garriguenc v. Love***, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975). In addition, "[w]hen possible, contract language should be construed to give meaning to every word, 'avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage.'" ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶45, 326 Wis. 2d 300, 786 N.W.2d 15 (citation omitted).

¶13 The relevant provisions of the by-laws are few. Article I of the by-laws states:

> **Section 1** – Membership in Madison Audubon Society, Inc. is open to anyone who is a member of the National Audubon Society.
>
> **Section 2** – Classes of membership shall be the same as those maintained by the National Audubon Society.
>
> **Section 3** – Annual dues of membership shall be as established by the National Audubon Society.
>
> **Section 4** – All classes of membership shall enjoy all the rights and privileges pertaining to the members of both this and the National Audubon Society.
>
> **Section 5** – Membership dues shall be payable at the time of application, and shall be effective from the date of application, and yearly thereafter. In the case of Life

> members, dues shall be paid in full in one sum at the time of application, and will be accepted as of the time of application.
>
> **Section 6** – Members in default of annual dues to the National Audubon Society will be dropped from membership in the Madison Audubon Society, Inc.
>
> **Section 7** – Members in good standing shall each have the right to cast one vote at any duly called regular or special meeting. Members in any membership category constituting two or more individuals shall be entitled to two votes, each of which votes shall be cast by a different individual. Members must be present to cast a vote.

¶14 We agree with Packard's assertion, and the circuit court's conclusion, that the plain meaning of Sections 5, 6, and 7 is that membership and voting rights are immediately obtained upon application and the submission of dues payment. Cannon makes several arguments that purport to show why Packard's interpretation does not make sense or leads to absurd results. In large part, our rejection of Cannon's arguments tracks the reasoning of the circuit court. Where our analysis differs, we generally do not explain the difference because the issues here are purely legal and we do not defer to the circuit court.

¶15 Section 7 explains who may vote, namely, "[m]embers in good standing." The term "members in good standing" is not defined. However, we agree with Packard that the juxtaposition of Sections 6 and 7 shows that the term simply means a person who is current in dues payment. Section 6 explains that members "in default of annual dues ... will be dropped from membership." When Section 7 follows on the heels of this default language, the clear import is that "[m]embers in good standing" are members who are not in default.

¶16 As to what the by-laws say about at what time an applicant becomes a member, Section 5 provides the answer. Section 5 states that "dues shall be payable at the time of application, and shall be effective from the date of

application." Absent additional by-laws language to the contrary, something not present here, if the payment of dues is "effective" as of the time the dues are paid, it follows that membership also becomes effective at that time. To interpret this language differently would be to deny membership during the time paid-dues are "effective."

¶17 To put a finer point on this, we consider the problem with Cannon's contrary interpretation. In Cannon's view, applicants submit a yearly payment with no corresponding right to a one-year membership. According to Cannon, the "shall be effective" language merely dictates the beginning of the one-year time period that the dues cover, and thus establishes the due date for payment of dues the following year for applicants but, at the same time, does not confer membership. Cannon contends that some unspecified amount of processing time is required before membership becomes effective. Thus, under Cannon's interpretation, *yearly* membership dues for the first year provides membership for an unspecified period of less than one year. This is not a reasonable interpretation.

¶18 In sum, we conclude that the plain language of the by-laws directs that persons become members of the Madison Audubon Society upon applying for membership and submitting payment for dues. We acknowledge the possibility that applicants might tender a check that does not clear or that, at some point, an application or payment might otherwise be determined to be deficient. We address that topic below. But, as of the time an application and payment are submitted, the payment and, therefore, the membership are considered effective, and the applicant may vote.

¶19 We now turn our attention to arguments made by Cannon that are not disposed of by the foregoing discussion.

¶20 Cannon argues that logic dictates that the Madison Audubon Society, and perhaps the National Audubon Society, must have an opportunity, after receiving an application and payment, to process the application and verify payment of dues. In a closely related argument, Cannon contends that Packard's immediate-membership interpretation cannot be correct because it would lead to an absurd result. According to Cannon, if the by-laws provide immediate membership and voting rights, a person could obtain immediate membership with a bad check, vote and affect the outcome of an election, and then be dropped from membership the next day because the check bounced. Cannon contends that this is an absurd result that no organization would intend and, therefore, the by-laws must be interpreted to include a delay in the effective date of membership. We are not persuaded.

¶21 First, a membership delay for purposes of processing and payment verification might be a sensible requirement, but it was *not* written into the by-laws. The by-laws do not say, for example, that membership is effective after a certain number of days or after payment has been verified. We agree with Packard that Cannon's interpretation adds language to the by-laws that simply is not present. Moreover, Cannon adds ambiguous language. He does not, and indeed could not, explain in meaningful detail the particulars of his proposed processing and verification requirement.

¶22 Second, even if the by-laws create the possibility of voting abuse—specifically, voting by persons who have purported to pay dues but have not paid those dues—that does not mean that the Madison Audubon Society did not intend to confer immediate membership and voting rights. It may be that the local society simply failed to anticipate the problem. Or, it might be that the society considered this potential problem to be such a remote possibility that it was

willing to run the risk in light of its desire to attract as many new members as possible. Instant participation in the benefits of membership (say, perhaps, attending an annual banquet on the spur of the moment) might well be a useful recruiting tool.[3]

¶23 Accordingly, we reject Cannon's contention that the by-laws must be read to include a processing and verification time period before a membership takes effect.

¶24 Cannon also argues that Packard's interpretation must be wrong because it renders Section 1 surplusage. As best we can tell, Cannon's Section 1 argument proceeds like this:

- The applicants were not existing members of the National Audubon Society.[4]
- The circuit court's decision incorrectly assumes that persons do not need to be existing members of the National Audubon Society in order to qualify for membership in the Madison Audubon Society,

[3] The circuit court gave short shrift to the possibility of bad personal checks in this case because of the cashier's check. Although we agree that the cashier's check constituted the submission of dues payments for all of the applicants, we do not, like the circuit court, place reliance on the proposition that the cashier's check eliminated the possibility of non-payment. *See* ***National Diamond Syndicate, Inc. v. UPS***, 897 F.2d 253, 259 (7th Cir. 1990) ("Cashier's checks are commonly accepted in commercial transactions as a perfect substitute for currency ...."), cited in the opinion of the circuit court. While we readily concede the far greater risk of a bad personal check, it is also possible to proffer a forged cashier's check.

[4] Cannon supports this factual assertion with the following argument: a Packard ally, Musolf, alleged that 171 applicants were "new members" and two applicants were renewal members and the "most reasonable inference" from this assertion, along with the lack of evidence that the applicants were existing National Audubon Society members, is that the applicants were not National Audubon Society members at the time they applied to the Madison Audubon Society. We do not accept this argument as sufficient to show that there is undisputed evidence on this topic. However, for purposes of this opinion, we will treat the assertion as an undisputed fact because Packard's arguments assume that it is a fact.

and this assumption is incorrect because it is premised on a reading of Section 1 that renders that section meaningless and, therefore, surplusage.

- The only reasonable reading of Section 1 is that Madison Audubon Society membership is open only to persons who are already National Audubon Society members.

¶25 Cannon's Section 1 argument is puzzling because of the unexplained tie-in with Packard's immediate-membership interpretation, which is based on Sections 5, 6, and 7. That is, it is not apparent why, even if membership in the National Audubon Society is a prerequisite to membership in the Madison Audubon Society, Packard's immediate-membership interpretation would be incorrect. The parties do not discuss, and we perceive, no inherent conflict between the prospect that Section 1 imposes a requirement that applicants already be National Audubon Society members and Packard's assertion that, under Section 5, applicants to the Madison Audubon Society immediately become local members upon applying and submitting dues payments.

¶26 Rather, so far as we can tell, Cannon's Section 1 argument is a distinct argument that might support the proposition that, even if applicants can sometimes immediately obtain local membership status under Section 5, the particular applicants in this case did not obtain immediate membership because they were not existing members of the National Audubon Society. This appears to constitute a stand-alone argument as to why summary judgment should not have been granted to Packard. With this clarification in mind, we now address and reject Cannon's Section 1 argument.

¶27 Section 1 provides that "[m]embership in Madison Audubon Society, Inc. is open to anyone who is a member of the National Audubon

Society." Cannon contends that this section plainly limits local Madison membership to persons who are already members of the National Audubon Society. This is true, according to Cannon, because any other reading renders Section 1 meaningless. Cannon reasons that there is no point in saying that membership is open to members of the National Audubon Society if membership is open to *all* persons, which necessarily includes National Audubon Society members. It follows, according to Cannon, that a prerequisite to membership in the local society is existing membership in the national society. However, we agree with Packard that Cannon's interpretation of Section 1 is not reasonable because it renders meaningless language in Section 4 and because there is an alternative reasonable interpretation that gives meaning to both Sections 1 and 4. *See* ***Stanhope v. Brown County***, 90 Wis. 2d 823, 848-49, 280 N.W.2d 711 (1979) ("Other things being equal, a construction which gives reasonable meaning to every provision of a contract is preferable to one leaving part of the language useless or meaningless.").

¶28 Packard reasonably posits that Section 1 explains that persons who are members of the National Audubon Society are entitled to be members of the Madison Audubon Society without paying any additional dues. We agree with Packard that this reading gives meaning to Section 1 and to Section 4's rights and privileges language. Section 4 provides:

> All classes of membership shall enjoy all the rights and privileges pertaining to the members of both this and the National Audubon Society.

As the circuit court aptly observed, if membership in the Madison Audubon Society was limited to persons who were already members of the National Audubon Society, Section 4's reference to the rights and privileges of the National

Audubon Society would be superfluous because national members do not need local membership to give them the rights and privileges of national membership. Rather, as the circuit court correctly observed, the clear implication of Section 4 is that persons who become members of the local society automatically become members of the national society.[5]

¶29 Cannon asserts that Section 4 cannot provide National Audubon Society rights to Madison Audubon Society members because the national society is "its own corporation." Cannon apparently believes it is self-evident that the local society may not act as a conduit for membership in the national society. We disagree. Quite obviously, as a means of making it easy to join the National Audubon Society, that organization might choose to have an arrangement with some or all local societies to provide exactly the sort of dual-and-immediate-membership opportunity envisioned by Packard and the circuit court.[6]

¶30 We also note that Cannon's proposed interpretation of Section 4 does not fit the language of that section. In Cannon's view, Section 4 "simply

[5] This interpretation is additionally buttressed by the symbiotic relationship between national and local membership evinced by Sections 3 and 6. Section 3 explains that membership dues are established by the National Audubon Society. This section draws no distinction between local and national dues. Section 6 provides that a person in default of dues to the National Audubon Society will be dropped from the Madison Audubon Society. As we understand the by-laws scheme, application and payment of dues to the local society confers membership in the national society and, similarly, membership in and payment of dues to the national society entitles a person to membership in a local society. For that matter, without detailing them here, we observe that Cannon's descriptions of the interaction of local and national membership discloses that, in practice, local membership and national membership go hand in hand.

[6] Cannon complains that Packard improperly relies on extrinsic evidence, namely, language on the Madison Audubon Society's website asserting that persons who join the Madison Audubon Society "online" also become members of the National Audubon Society. Like the circuit court, we do not rely on this evidence and, therefore, need not address whether it is proper evidence for purposes of summary judgment.

requires that [Madison Audubon Society] membership classes be treated the same as the corresponding membership classes in National Audubon." That, however, is not what Section 4 says. Rather, it states: "All classes of membership [in the Madison Audubon Society] shall enjoy all the rights and privileges pertaining to the members of both this and the National Audubon Society." Under a correct reading of the plain language, there may be differences in the local and national "rights and privileges," and Section 4 states that Madison Audubon Society members "enjoy" the rights and privileges of both.

¶31 Cannon makes a number of additional by-laws interpretation arguments that we do not address separately. In each instance, our discussion to this point either implicitly rejects the argument or the argument is meritless on its face. An example of the latter situation is Cannon's assertion that the "by-laws are clear that no one becomes a member in good standing until [Madison Audubon Society] processes both the application *and* the payment, *and* National Audubon accepts the applicant as a member." Even a cursory review of the pertinent by-laws language discloses that there is no such clarity in the by-laws.

¶32 Therefore, we conclude that the plain language of the by-laws directs that persons become members of the Madison Audubon Society upon applying for membership and submitting payment and, at that time, obtain the right to vote.

II. Whether A Material Factual Dispute Precludes Summary Judgment In Favor Of Packard

¶33 Cannon contends that, even if we do not agree with his by-laws interpretation, the record here does not support summary judgment in favor of Packard. Cannon's arguments are not easily categorized and, therefore, we address them in the order he presents them.

¶34 Cannon first asserts that the undisputed evidence shows that applicants could not have become voting members for purposes of the annual meeting because Packard and the applicants failed to follow the application process prescribed by the Madison Audubon Society. More specifically, Cannon asserts:

- Packard "doctored" the Madison Audubon Society application form to remove the mailing instructions and, consequently, the applicants failed to follow the form's directive that applications be mailed to the Madison Audubon Society headquarters. Instead, the applications were hand-delivered at the annual meeting. The failure to mail the applications rendered them invalid.

- The applications were handed to a Madison Audubon Society member at the annual meeting at 5:30 p.m.—after business hours—along with a cashier's check. Existing members lacked the ability to "immediately verify the number and accuracy of 170 applications" and had "no way to deposit" the cashier's check before the meeting. This situation deprived the Madison Audubon Society of the opportunity to process applications and verify payments.

- The "vast majority" of applicants did not give permission to have their dues paid for with a lump-sum cashier's check, and there is no evidence that the applicants intended that the cashier's check cover their dues.

- The submission of both personal checks and the cashier's check created "double payments for the majority of the Applicants" and confusion as to which funds covered which applications.

Cannon concedes that the "mess" was "eventually worked through" and that "the Applicants eventually became members," but Cannon contends that "none of the Applicants could have been considered *immediate* members in good standing ... with voting rights" at the annual meeting.

¶35 As to the mailing requirement, Cannon's premise seems to be that, despite the absence of mailing language in the by-laws, the applicants were required to follow the mailing instructions on the application forms, thereby giving Madison Audubon Society personnel an opportunity to process the applications and payments before the applicants could vote. However, we agree with the circuit court that, in the absence of by-laws language to the contrary, it is unreasonable to conclude that hand-delivery is an inadequate substitute for mailing. And, it is undisputed that the applications were hand-delivered to the person who ordinarily processes applications. Cannon's submissions do not point to evidence indicating that there is a rule requiring that applications be mailed to be valid. In the absence of such evidence, no reasonable jury could find that applications were invalid simply because they were hand-delivered.

¶36 As to Cannon's other assertions listed above, they fail for two reasons. First, some are based on propositions that we have already rejected. For example, we have already rejected the proposition that the effective start of membership must be delayed to provide time for processing applications and verifying payments. Second, the remaining assertions are unsupported by developed argument. For example, Cannon provides no authority or reasoned argument for the proposition that an application is invalid if the applicant does not give permission to another person to make a dues payment for that applicant. On this topic, we observe that, absent unusual circumstances not present here, it is not apparent why an applicant would object, or the Society care, if a third party paid an applicant's dues.

¶37 Cannon next argues that Packard was not entitled to summary judgment because Packard failed to present undisputed and admissible evidence that the applicants "properly applied" for membership and actually attended the

annual meeting and voted. Cannon's "application" argument adds nothing to the arguments we have already addressed. He merely repeats his assertions relating to mailing instructions and the method used to pay dues. Thus, we turn our attention to Cannon's attendance and voting arguments.

¶38 Cannon makes the following assertions:

- There was no orderly distribution of white ballots.
- Some individuals who cast white ballots cannot be identified as applicants.
- Some individuals who were eligible to cast blue ballots instead cast white ballots and, therefore, may have voted twice.
- There was no mechanism for preventing "proxy voting."

We agree with Packard and the circuit court that these assertions are based on the speculative premise that Roger Packard and others attending the meeting voted improperly themselves or on behalf of applicants who did not attend the meeting. We agree that it is possible that voting misconduct occurred, but, in the absence of contrary evidence, the only reasonable inference from the submissions is that more than a sufficient number of new members applied, that dues for those applicants were paid, and that the new applicants present voted in sufficient numbers to top the 55 votes cast for the Cannon slate.[7]

[7] We acknowledge that Cannon frames this part of his argument in terms of an assertion that the circuit court improperly shifted the burden of proof to Cannon. To the extent that this is Cannon's complaint, it does not fit our standard of review. It would not matter even if the circuit court had improperly shifted the burden to Cannon because we are bound to engage in a de novo review of the summary judgment arguments and submissions. And, we do not shift the burden to Cannon. Nonetheless, we also note that we disagree with Cannon's assertion regarding the circuit court's analysis. When the circuit court commented that Cannon failed to present evidence, it was in the context of supporting the court's proper observation that some of Cannon's assertions (continued)

¶39 Cannon contends that the affidavits of Packard, Musolf, and Hasler contain inadmissible evidence. More specifically, Cannon challenges the assertions by each of these men that all persons who did not have a blue ballot voted on a white ballot, that the ballots were collected and secured, and that persons voting on white ballots placed their names on the ballots and signed them. According to Cannon, this "testimony lacks foundation and knowledge" and is hearsay because none of these men "submitted any record evidence that they personally witnessed each and every Applicant filling out a ballot." However, on their faces, the assertions are not hearsay. The three men aver that they were present at the meeting and, thus, they could have witnessed the events they attest to. Further, we perceive no serious dispute that the new applicants voted on white ballots and that all ballots were collected and secured by Chairperson Martin. To the extent Cannon is concerned that some applicants may not have filled out their ballots *at the meeting*, the circuit court aptly observes that such is not required by the by-laws.

¶40 Cannon also complains that Packard relies on a copy of a handwritten note that Packard saw Jim Shurts make that tabulated the results of the vote. According to Cannon, this document is hearsay because it is offered for the truth of the matter asserted, namely, that the Packard slate received the most votes. We agree with Cannon that Packard does not dispute that the note is hearsay. However, reliance on the Shurts note is not necessary because the ballots

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were based on mere speculation. For example, the circuit court observed that Cannon speculates that some white ballots may have been filled out by persons who did not attend the meeting. The court's corresponding observation that there is no evidence of such behavior simply highlights the speculative nature of Cannon's assertion.

themselves are in the record and those ballots show the very large margin of victory for the Packard slate.

¶41 In his reply brief on appeal, Cannon argues for the first time that the ballots themselves are hearsay and there is a lack of authentication. These arguments are not in Cannon's brief-in-chief, and they are not in Cannon's circuit court brief. We deem the argument waived. Waiver in this context is appropriate because, had the arguments been timely raised before the circuit court and, assuming there even are authentication or hearsay problems, Packard would have had an opportunity to attempt authentication or procure the individual applicant affidavits that Cannon now contends were necessary. *See* ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692 ("Application of the waiver rule is appropriate where a waived argument could have been rebutted with factual information.").

Conclusion

¶42 For the reasons above, we affirm the circuit court's decision granting summary judgment in favor of Packard and, therefore, the court's declaration that the Packard slate of candidates are the rightfully elected officers of the Madison Audubon Society.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.