COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP895 **Cir. Ct. No. 2011CV4913**

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

JEREMY RYAN, LAURI MARIE HARTY, ANNE MARY HOPPE, KATHLEEN D. HOPPE, JENNA BRIANNE POPE AND VALERIE ROSE WALASEK,

PLAINTIFFS-APPELLANTS,

V.

MIKE HUEBSCH, CHARLES TUBBS, IN HIS INDIVIDUAL CAPACITY, DAVID ERWIN, IN HIS OFFICIAL CAPACITY, CHRIS WEISS, STEVEN B. MAEL AND JAMES BROOKS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Reversed and cause remanded*.

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

¶1 BLANCHARD, P.J. In this civil rights action, the plaintiffs allege that state officials violated their rights under the First and Fourteenth Amendments[1] by issuing citations to the plaintiffs and confiscating signs they were holding in a public area of the Wisconsin State Capitol building. The circuit court dismissed the action on summary judgment, and the plaintiffs now appeal.

¶2 The plaintiffs contend that the circuit court erred in dismissing the complaint based on the following allegedly erroneous conclusions of the court: (1) there is no genuine disputed fact on the question of whether state officials relied on a particular administrative code provision (WIS. ADMIN. CODE § ADM 2.07(2) (Feb. 2002)) in issuing the citations, because all evidence demonstrates that the officials did not rely on this code provision; (2) in any case, § ADM 2.07(2) addresses the "display" of signs, which does not include the holding of signs; and (3) the plaintiffs' claims do not involve a prohibition on sign display, but instead boil down to an allegation that the state officials prohibited them from "protesting" or "demonstrating" at a particular location, the First Floor of the rotunda of the Capitol, pursuant to official direction that "protest" or "demonstration" take place only on the Ground Floor of the rotunda.

¶3 On appeal, the state officials do not defend the circuit court's decisions on any of these three issues. Instead, they contend that all issues in this appeal have been rendered moot by the promulgation by the state Department of Administration (the department) of new policies and regulations since the citations

[1] Following common shorthand, for the balance of this opinion we will refer only to the First Amendment, having acknowledged here that "Section One of the Fourteenth Amendment to the United States Constitution incorporated the First Amendment so that it applies to state governments." *See* ***State v. Baron***, 2009 WI 58, ¶12 & n.5, 318 Wis. 2d 60, 769 N.W.2d 34.

were issued. In taking this position, the state officials fail to address the issues that plaintiffs raise in connection with enforcement of the law as it existed when the citations were issued.

¶4 We reverse and remand because the state officials do not defend the court's summary judgment decisions on the three issues identified by the plaintiffs and because we do not believe that the record has been adequately developed for us to resolve mootness issues as they are now framed by the state officials.

¶5 We could stop there. However, we proceed to address the substance of the plaintiffs' claims of error by the circuit court and conclude that the court committed the errors identified by the plaintiffs. We do this for two reasons. First, our analysis of the mootness question is influenced by our concern that the errors may have prevented the parties from squarely addressing, and the court from squarely resolving, issues pertinent to mootness. Second, legal issues raised by or related to the court's errors appear likely to resurface following remand.

BACKGROUND

¶6 In their complaint, plaintiffs Jeremy Ryan, Lauri Marie Harty, Anne Mary Hoppe, Kathleen Hoppe, Jenna Brianne Pope, and Valerie Rose Walasek name as defendants the secretary of the department and four former or current personnel of the Wisconsin Capitol Police Department.[2] The plaintiffs allege the following.

[2] We refer to the plaintiffs collectively as the plaintiffs, because neither party suggests that any plaintiff stands in different shoes from any other plaintiff for purposes of this appeal. We refer to the defendants, including the police officers, collectively as "the state officials" because, similarly, there is no attempt by either party to distinguish among defendants. The Capitol Police Department is a division of the state Department of Administration.

¶7 On various days in late March 2011, Capitol police officers issued citations to each of the plaintiffs at a time when each was holding a sign while standing on the First Floor of the rotunda of the Wisconsin State Capitol. As referenced during the course of this litigation, the street-level floor of the State Capitol is called the Ground Floor, with the next level up being the First Floor. The rotunda is the open, circular, multi-floor area under the Capitol's dome. The First Floor of the rotunda overlooks the Ground Floor of the rotunda.

¶8 The plaintiffs acknowledge that none of them had sought written permission from the department to display signs or to conduct any other activity in the Capitol building before they received their respective citations.

¶9 The plaintiffs allege that, at the time they were issued the citations, none of their signs "obstruct[ed] pedestrian traffic," had "any potential to damage" the Capitol building, or were "disruptive of" business conducted in the Capitol. While the record reflects the alleged content of messages written on at least some of the signs, none of the message content is relevant to any issue we address on appeal.

¶10 The plaintiffs further allege that "[i]n many cases the ... officers, in addition to issuing the citations alleged above, confiscated the signs that led to the issuance of the citations."

¶11 Each challenged citation alleged a violation of WIS. ADMIN. CODE § ADM 2.14(2)(zd), which creates some confusion in this case for the following reasons. Standing alone, § ADM 2.14(2)(zd) does not prohibit any identified conduct. Instead, it is a catchall section of the code that specifies the penalty for conduct that is "otherwise prohibited" in Chapter ADM 2. Although the citations

referenced this catchall penalty section, the citations did not identify the code section prohibiting the plaintiffs' conduct.

¶12 To give context to our discussion below, we now explain the department's authority in this area, the rules it has promulgated that identify prohibited conduct, and the relationship of such rules to WIS. ADMIN. CODE § ADM 2.14(2)(zd), the penalty provision identified in the citations.

¶13 The department has authority to promulgate and enforce rules, punishable by forfeitures not exceeding $500, relating to the use, care, and preservation of property leased or managed by the department. *See* WIS. STAT. § 16.846 (2011-12).[3] There is no dispute that the Capitol building is included in the property covered by this statute. The department promulgated such rules in Chapter 2 of its administrative code. One section of Chapter ADM 2, specifically WIS. ADMIN. CODE § ADM 2.14(2), is entitled "Rules of Conduct." The Rules of Conduct in § ADM 2.14(2) consist of subsections regulating a diverse range of prohibited conduct, such as smoking in non-designated areas and engaging in disorderly conduct.

¶14 However, none of the prohibited conduct identified in WIS. ADMIN. CODE § ADM 2.14(2) is at issue here. The citations merely identify a penalty provision, § ADM 2.14(2)(zd). Subsection (zd) provides in its entirety that the maximum $500 forfeiture may be assessed against anyone who "[e]ngages in conduct otherwise prohibited by this chapter without the express written approval of the department."

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶15 For reasons we explain below, we conclude that there is at least one reasonable inference from the facts in the summary judgment materials that the citations allege a violation of WIS. ADMIN. CODE § ADM 2.07(2), as it existed at the time of the citations. Section ADM 2.07(2) provided in pertinent part:

> **Adm 2.07 Exterior and interior displays and decorations**….
>
> **(2)** DISPLAYS AND DECORATIONS. No displays, signs, banners, placards, decorations or graphic or artistic material may be erected, attached, mounted or displayed within or on the building or the grounds of any state office building or facility without the express written authority of the department. Any graphic or artistic material advertising, promoting, or identifying a commercial enterprise or a political activity is prohibited except as indicated in sub. (4). Any unauthorized material shall be removed and disposed of by the department. The department may set reasonable time limits on permitted activities.
>
> ….
>
> **(4)** DEPARTMENT APPROVAL.... The department may specify the size and location of any display, sign, banner or graphic and artistic material, as indicated in sub. (2).

As we explain below, there is factual support for one argument advanced by the plaintiffs, namely, that the predicate violations for the § ADM 2.14(2)(zd) forfeitures at issue here were the plaintiffs' alleged violations of the "displays and decorations" provision, § ADM 2.07(2).

¶16 All of the citations issued by the state officials were ultimately dismissed on motions of the Dane County District Attorney's Office, without imposition of any forfeiture, penalty, or costs. After the citations were dismissed, the plaintiffs filed their complaint.

¶17 The plaintiffs' complaint alleges in part that "Wis. Admin. Code §§ Adm. 2.07(2) and 2.14(2)(zd) violate the First Amendment to the United States Constitution to the extent that they purport to make it unlawful to display a sign in an area of the Wisconsin State Capitol otherwise open to the public." More specifically, in their briefing before the circuit court, the plaintiffs argued that both §§ ADM 2.14(2)(zd) and 2.07(2) were unconstitutional time, place, and manner regulations as applied to the holding of signs by individuals or members of small groups in public places, and that § ADM 2.07(2) was an unlawful prior restraint because it required permission in advance of the exercise of First Amendment rights without providing necessary procedural and substantive safeguards. While the complaint highlights §§ ADM 2.14(2)(zd) and 2.07(2), it also alleges that the acts of the defendants violated the First Amendment "under whatever authority they were carried out."

¶18 The complaint alleges that, as result of unlawful actions of the defendants, the plaintiffs "incurred attorneys' fees, financial losses, emotional distress, inconvenience [from] the disruption of their constitutionally-protected expressive activity and other damages." For relief, the plaintiffs seek a declaration that WIS. ADMIN. CODE §§ ADM 2.07(2) and 2.14(2)(zd) are "unconstitutional as applied to the holding of signs" in circumstances such as those that occurred here, an injunction from enforcement of these provisions, and damages, costs, and attorney's fees.

¶19 The state officials moved for summary judgment on the grounds that: the defendants are entitled to qualified or governmental immunity; WIS. ADMIN. CODE §§ ADM 2.07(2) and 2.14(2)(zd) were content-neutral and narrowly tailored, served significant government interests, and left open "ample alternative channels of communication"; the plaintiffs "have suffered no injury as all of their

citations were dismissed"; and "the rules of which the plaintiffs complain have not been enforced since" the last citation here was issued.

¶20 Before the circuit court, when moving for summary judgment, the state officials appeared to take the position that the plaintiffs had, in fact, been issued citations under WIS. ADMIN. CODE §§ ADM 2.07(2) and 2.14(2)(zd). In addition, the state officials appeared to take the position that the plaintiffs had been issued citations for "holding signs in public areas of the Capitol Building," in the terms used by the then Capitol Police chief in an affidavit submitted by the state officials.

¶21 After considering cross-motions for summary judgment, the circuit court granted the defendants' motion for summary judgment, dismissing the action.

¶22 As set forth in more detail below, the court explained that it would "frame[] and decide[]" the summary judgment issues "somewhat differently than how the Plaintiffs presented and how Defendants defended." The court rested its summary judgment decision on conclusions that included the following: (1) the plaintiffs failed to establish what conduct of theirs might have formed the predicate Chapter ADM 2 violations of WIS. ADMIN. CODE § ADM 2.14(2)(zd); (2) even if § ADM 2.07(2) were the predicate violation in each case, § ADM 2.07(2) "does not apply to the Plaintiffs' conduct of holding signs on the first floor of the rotunda" ; and (3) summary judgment submissions reveal that the gravamen of the plaintiffs' complaint is that the state officials used the citations as a method to "requir[e] the Plaintiffs to protest on the ground floor of the rotunda" (as opposed to using the First Floor for protest activities) as directed by state officials,

not that the state officials used the citations as a method to prohibit the holding of signs in public areas of the Capitol without prior written permission.

¶23 We pause to note that the third conclusion of the circuit court challenged by the plaintiffs, and not only the first two, involved the court's view of or application of WIS. ADMIN. CODE § ADM 2.07(2). Having decided that this code provision addressing the display of signs could not be at issue in this case, the circuit court proceeded to base its analysis on the factual assumption that the citations did not allege a violation of a rule prohibiting the display of signs.

¶24 One additional set of background facts is necessary to understand the decision of the circuit court and the arguments of the parties on appeal. These facts involve changes to department policies and regulations since the citations were issued.

¶25 In May 2012, the state officials submitted to the circuit court, in support of their motion for summary judgment, an affidavit that attached an undated document, which counsel for the state officials described as "the December 16, 2011" "new permitting policy" entitled "Wisconsin State Facilities Access Policy," which counsel represented "is now being promulgated by the Department of Administration." We will refer to this document as "the new facilities access policy." The new facilities access policy made various references to "exhibits at the state capitol" and to "signs & decorations."[4]

[4] The State now submits that the new facilities access policy was superseded by yet another version, in April 2013, and in support references a document that the State tells us can be found on a state government website.

¶26 In January 2014, this court granted a motion by the state officials in this appeal to file a supplement to its appendix containing an "Order of the Department of Administration Adopting Emergency Rules," dated November 21, 2013. We will refer to this as the emergency modification. In pertinent part, the emergency modification amends WIS. ADMIN. CODE § ADM 2.07(2) as follows:

> No ~~displays, signs, banners, placards, decorations or graphic or artistic material~~ exhibit may be erected, attached, mounted or displayed within or on the building or the grounds of any state office building or facility without the express written authority of the department. Any ~~graphic or artistic material~~ exhibit advertising, promoting, or identifying a commercial enterprise or a political activity is prohibited except as indicated in sub. (4). Any unauthorized ~~material~~ exhibit shall be removed and disposed of by the department. This provision shall not be applied to any individual who holds a sign that is not larger than 28 inches in length or width, or to any item of clothing worn by an individual. ~~The department may set reasonable time limits on permitted activities.~~[5]

[5] While the details are not significant to the issues we address on appeal, for general context, we note that the emergency modification also provides:

- A definition for the term "exhibit," which states in pertinent part that "exhibits" are "signs ... that are not held by an individual or are larger than 28 inches in length or width." WIS. ADMIN. CODE § ADM 2.03(3r).

- That the department "may ~~permit~~ allow buildings and facilities to used by any person ... to display an exhibit" so long as certain circumstances exist. WIS. ADMIN. CODE § ADM 2.04(1).

- That the "department may grant use of a portion of the interior of the State capitol building to a person providing contemporaneous notice of a spontaneous event." Sec. ADM 2.04(2r).

In addition, the state officials attach as an appendix to their response brief a document that purports to be an earlier promulgated set of emergency rules, dated April 11, 2013.

¶27 With this background in mind, we turn to the arguments on appeal.

DISCUSSION

¶28 We first explain why we conclude that the state officials' position that all issues in this case are moot may be incorrect, and then explain why we decline to decide mootness as to any aspect of this appeal, based on the record developed to date. Our approach to the state official's mootness argument is influenced by the nature of the circuit court errors. We conclude that the errors prevented the parties from squarely addressing pertinent issues under summary judgment methodology. Therefore, we cannot discern what might have happened, or should have happened, in the proceedings before the circuit court absent the errors, adding to the difficulty of concluding that any issue should be treated as moot.

¶29 The review standards we use to address an appeal of an order granting summary judgment have been summarized as follows by our supreme court:

> We review a circuit court's decision granting summary judgment independently, but we apply the same methodology as the circuit court. Pursuant to WIS. STAT. § 802.08(2), summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Therefore, "[s]ummary judgment should not be granted, 'unless the facts presented conclusively show that the plaintiff's action has no merit and cannot be maintained.'" In determining whether summary judgment was appropriately granted, "[w]e view the summary judgment materials in the light most favorable to the nonmoving party." "In reviewing a circuit court's grant of summary judgment, this court will reverse the [circuit court] only if the circuit court incorrectly decided a legal issue or if material facts are in dispute."

Mrozek v. Intra Fin. Corp., 2005 WI 73, ¶14, 281 Wis. 2d 448, 699 N.W.2d 54 (citations and quoted source omitted).

I. MOOTNESS

¶30 It appears that the state officials' arguments on appeal rests entirely on the premise that all issues in this case must now be analyzed under the emergency modification, which has changed pertinent code provisions, and not under the law as it existed at the time the citations were issued. This includes the primary argument of the state officials that this appeal is moot. According to the state officials, "the enactment of the new administrative code sections—including the complete revision of the section most relevant to this case [WIS. ADMIN. CODE § ADM 2.07(2)]— rendered the issues underlying this appeal, and the appeal itself, moot."

¶31 This court has explained our essential approach to mootness claims:

> "An issue is moot when its resolution will have no practical effect on the underlying controversy." We determine independently whether an issue is moot....
>
> ….
>
> "Generally, moot issues will not be considered by an appellate court."

State ex rel. Milwaukee Cnty. Pers. Review Bd. v. Clarke, 2006 WI App 186, ¶¶28, 31, 296 Wis. 2d 210, 723 N.W.2d 141 (citations and quoted source omitted).

¶32 It appears likely that some of the relief sought by the plaintiffs is now moot. However, we first explain why the state officials' position that all issues must be moot may be incorrect, and then explain why we decline to decide mootness as to any aspect of this appeal, based on the record developed to date.

¶33 The state officials cite authority on mootness that appears limited to cases in which plaintiffs have sought only prospective relief, and not relief in the form of damages resulting from constitutional violations. However, the state officials do not present a developed legal argument supporting the view that the only relief to which the plaintiffs in the instant case are entitled is prospective. At no point in their briefing do the state officials even attempt to address a main thrust of the plaintiffs' arguments, namely, that the plaintiffs should be allowed, at a trial, to attempt to persuade a jury that they are entitled to damages on the grounds that they were unconstitutionally prohibited from displaying signs in a public area of the Capitol because they were stopped from doing so and were issued citations under the then-existing terms of WIS. ADMIN. CODE § ADM 2.07(2). The plaintiffs allege that at that time § ADM 2.07(2) had "*no* criteria for deciding whose applications for permission to hold signs will be granted and whose will be denied." (Emphasis in original.)

¶34 The state officials persistently switch the topic to subsequently modified code provisions. In doing so, the state officials come perilously close to conceding that they lack any arguments whatsoever on the questions of whether there were constitutional violations, causing injury, with potential damages, as of the time that the signs were confiscated, the citations were issued, and the plaintiffs incurred legal bills to defend themselves and to pursue this action. We emphasize that we do not decide any of these issues. We simply note that the state officials do not explain why these issues are moot.

¶35 In sum, the state officials fail to support their position that all issues are moot. We now explain why we proceed no further on the topic of mootness.

¶36 First, a complete record bearing on mootness, with input from both sets of parties in the appellate briefing before us, is not now before us. The plaintiffs' responses to this court on this issue are, in part, out of date, because they filed their reply brief in this court before we granted the motion by the state officials to file the supplement to their appendix containing the emergency modification. In a similar vein, it is not clear to us at this juncture whether there are issues that might now appear settled, but are not and would likely continue to evade appellate review absent remand to the circuit court at this time.

¶37 Second, as we explain below, several aspects of the circuit court's summary judgment approach improperly limited the issues, thus limiting the options available to counsel for both sides in developing and refining evidence and argument regarding the constitutional challenges raised by the plaintiffs. This makes it difficult for us to be certain what aspects of this case might be moot, and what aspects might remain.

II. ISSUES RELATED TO WIS. ADMIN. CODE § ADM 2.07(2)

¶38 We make two initial observations to provide context, before addressing the circuit court's decisions relating to WIS. ADMIN. CODE § ADM 2.07(2). Our first observation pertains to *whether* § ADM 2.07(2) applies to the citations issued here. This case involves unusual ambiguity in that there is a question regarding the violation alleged in the citations. Ordinarily, when a person makes a First Amendment challenge to a statute or regulation as government officials applied it to the person, there is no ambiguity about which statute or regulation the government applied. Enforcers, either at or near the time of enforcement, normally record or inform the accused in some fashion the statute or regulation that the accused allegedly violated and there is no doubt about the

offense being alleged. Thus, typically there is no dispute regarding the pertinent alleged violation. Here, however, the circuit court appeared to treat the issue as a question of fact that could be decided based on undisputed facts in the summary judgment submissions. On appeal, neither party takes a different position. Thus, we lack briefing on whether this is indeed simply a factual question. In sum, this topic may be more complicated than is suggested by the circuit court's decision and the briefing before us, but we confine our analysis below to assumptions seemingly accepted by the circuit court and the parties.

¶39 Our second observation pertains to the *significance* of whether WIS. ADMIN. CODE § ADM 2.07(2) applies to the citations issued here. The main, though not exclusive, thrust of the complaint and the arguments of the plaintiffs in this action to date has been the question of whether the state officials violated the constitution through unlawful applications of § ADM 2.07(2). The plaintiffs, in part, seek relief that includes an injunction preventing the state officials from further enforcement of that code provision. For this reason, it is not surprising that the circuit court would, for some purposes, focus on the question of whether § ADM 2.07(2) was in fact applied here.

¶40 As noted in our background section above, however, the plaintiffs also allege that the acts of the state officials violated their rights under the First Amendment "under whatever authority" the state officials acted. Thus, depending on the facts, the plaintiffs may not need to establish that they were cited for violating WIS. ADMIN. CODE § ADM 2.07(2), because they argue that no predicate regulation in Chapter ADM 2 authorized the acts of the state officials consistent with the First Amendment. Thus, if a fact finder were to determine that the state officials acted without relying on *any* predicate violation of any regulation in Chapter ADM 2, this in itself would appear to weigh in favor of a finding that there

was a constitutional violation, not in the opposite direction. Put differently, depending on the facts, § ADM 2.07(2) may be seen either as a potential defense for the state officials, or in the alternative as a potential indication of a constitutional violation. If § ADM 2.07(2) is constitutional on its face and was applied here in a constitutional manner, then such factors add up to a defense for the state officials. However, if those factors are not present, this defense is absent, perhaps supporting a conclusion that the state officials acted unconstitutionally. We now explain why the authority pursuant to which the state officials acted is a disputed material fact that precluded summary judgment.

A. WIS. ADMIN. CODE § ADM 2.07(2) as Potential Predicate Violation of WIS. ADMIN. CODE § ADM 2.14(2)(zd)

¶41 We turn to the circuit court's conclusion that summary judgment was proper in part because the plaintiffs failed to point to proof that WIS. ADMIN. CODE § ADM 2.07(2) was the predicate violation for the citations. Plaintiffs seek the opportunity to prove that it was. We conclude that the circuit court erred in basing its decision in part on the absence of proof that the citations were based on § ADM 2.07(2).

¶42 As summarized above, the version of WIS. ADMIN. CODE § ADM 2.07(2) in place at the time the citations were issued stated that "[n]o ... signs ... may be ... displayed within ... any state office building or facility without the express written authority of the department," including the display of "[a]ny graphic or artistic material advertising, promoting, or identifying a commercial enterprise or a political activity."

¶43 The circuit court characterized its conclusion on this issue as follows: "there is no definitive indication from the five [police] Offense Reports

written by the officers [and attached to an affidavit submitted to the court in support of summary judgment] that the Plaintiffs were issued citations for violating § Adm. 2.07(2)." The court concluded that the police reports "establish that there was no consensus as to what substantive provision the Plaintiffs' conduct violated," which "extinguishes the Plaintiffs' as applied challenges to the constitutionality of § Adm. 2.07(2)" or any other substantive rule. Based in part on this conclusion, the court determined that "the Plaintiffs' as applied challenges to § Adm. 2.07(2) can be dismissed without addressing any constitutional arguments."

¶44 While not dispositive under our de novo review, we note that the state officials now agree with the plaintiffs that, contrary to the view of the circuit court, "the citations were issued under [WIS. ADMIN. CODE §] Adm. 2.07(2)." We now explain why we conclude that the court's approach of dismissing the possibility that police relied on § ADM 2.07(2) represented an improper choice among competing factual inferences.

¶45 In the terms of summary judgment methodology, we construe the court to have reached the following conclusions on this issue: the complaint stated claims based on the attempted enforcement of WIS. ADMIN. CODE §§ ADM 2.14(2)(zd) and 2.07(2), which claims were answered by the responses of the state officials; the state officials established, through the submission of police reports, at least a prima facie case that the state officials did not rely on § ADM 2.07(2) in issuing the citations; and the affidavits and other proof before the court did not raise "'disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle'" the plaintiffs to a trial. *See* ***Swatek v. County of Dane***, 192 Wis. 2d 47, 62, 531 N.W.2d 45 (1995) (quoted source omitted).

¶46 Regarding the last step, we conclude that there is evidence in the record to support an inference that the state officials relied on WIS. ADMIN. CODE § ADM 2.07(2) in issuing the citations. We assume without deciding that, in all relevant respects, the substance of the statements contained in the five police reports referenced by the circuit court "set forth such evidentiary facts as would be admissible in evidence." *See* WIS. STAT. § 802.08(3).[6] We also assume without deciding that the state officials did not concede in argument to the circuit court that the citations were issued for violations of § ADM 2.07(2). Even with those assumptions in favor of the state officials, we conclude that there is a genuine dispute regarding this material fact.

¶47 As referenced above, one affidavit submitted by the state officials to the court, from then Chief of the Capitol Police, Charles Tubbs, directly undercuts the circuit court's conclusion that there were no disputed facts on this issue. In his averments, Chief Tubbs characterized the citations as having been "issued to the named plaintiffs *for holding signs in public areas of the Capitol Building*."[7] (Emphasis added.) This would appear to be an unambiguous characterization of the conduct of the plaintiffs that the police sought to deter or punish by issuing the

[6] WISCONSIN STAT. § 802.08(3) provides that "affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." However, in the absence of an objection in the circuit court, we may consider the materials as presented. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶9 & n.8, 241 Wis. 2d 804, 623 N.W.2d 751.

[7] The state officials use nearly identical language in their brief in this appeal: "In the instant case, the plaintiffs-appellants received citations for holding signs in certain areas of the State Capitol." They made the point in even more emphatic language before the circuit court: "The plaintiffs allege that they did 'nothing more offensive than holding signs in the Rotunda of the Capitol.' However they wish to parse the language of what they did, it *was* an offense to hold signs in certain areas of the State Capitol." (Emphasis in original.)

citations. Moreover, it is a very close match to the substance of WIS. ADMIN. CODE § ADM 2.07(2).

¶48 Further, still assuming without deciding that the police reports relied on by the court constitute admissible assertions of fact for summary judgment purposes, one of the reports contains the following passages:

> I asked [several plaintiffs] if they knew why I was there and Valerie said[,] probably *because we have the sign*. I told Valerie she was *correct* and told her I really didn't want to give them a ticket for it.... It should also be noted that I've explained administrative code 2.03, 2.04, *2.07* and 2.14(2)(ZD) and its subsections to Valerie and Jeremy.... I also told [a person not among the plaintiffs here that] she was not allowed *to have the sign placed like it is*.

(Emphasis added.) Thus, at least two plaintiffs were allegedly expressly told that the police were relying, at least in part, on WIS. ADMIN. CODE § ADM 2.07(2). If the circuit court believed that a more "definitive indication" or proof of "consensus" was required than this, this would have been an erroneous view of summary judgment methodology.

¶49 For these reasons, we conclude that the circuit court erred in dismissing the as applied constitutional challenges to WIS. ADMIN. CODE § ADM 2.07(2) without addressing any constitutional arguments on the grounds that the court did not have before it facts raising a reasonable inference that the state officials relied on that provision when issuing the citations.

B. "Display" of "Signs"

¶50 As a separate basis for its conclusion that it did not need to reach constitutional arguments, the circuit court relied on its interpretation of WIS. ADMIN. CODE § ADM 2.07(2) as not prohibiting the plaintiffs' alleged conduct.

We now explain why we conclude that, as a matter of law, § ADM 2.07(2) applies to the "display" of "signs," as alleged by the plaintiffs in their complaint.

¶51 The circuit court focused on the code language, recited more fully above, that reads in pertinent part: "No ... signs, ... may be ... displayed." WIS. ADMIN. CODE § ADM 2.07(2). The court concluded that § ADM 2.07(2) did "not prohibit the Plaintiffs' conduct," because the word "displayed" as used in the code provision "implies something more than an individual *holding* a handmade sign over [his or her] head." (Emphasis in original.)

¶52 Using a de novo standard of review, we are guided by the following principles. "Administrative code provisions are interpreted according to principles of statutory construction." ***State v. Harenda Enters., Inc.***, 2008 WI 16, ¶25, 307 Wis. 2d 604, 746 N.W.2d 25 (citing authority that includes WIS. STAT. § 227.27(1)). "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). Plain meaning may also be ascertained from the context of the statutory provision at issue. ***Id.***, ¶46. We interpret statutory language "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** If the words exhibit a "'plain, clear statutory meaning,'" without ambiguity, the statute is applied according to the plain meaning of the statutory terms. ***Id.*** (quoted source omitted).

¶53 The plaintiffs apply a plain language interpretation of WIS. ADMIN. CODE § ADM 2.07(2), contending that one way for a person to "display" a sign is to hold it in one's hands for others to view it. The state officials do not defend the

circuit court's contrary interpretation of § ADM 2.07(2). In fact, they state that it is "entirely possible" that the court's interpretation is wrong. For the following reasons, we agree with the plaintiffs.

¶54 Addressing the code language, "No ... signs, ... may be ... displayed," we first consider the word "signs." The plaintiffs allege, without contradiction on this point by the state officials, that they were issued citations for holding "signs," as that term is used in the regulation. However, the circuit court appears to have been concerned both about the fact that the signs were held in the plaintiffs' hands and also about the apparently "handmade" nature of the signs, because the court contrasted "handmade signs" with the "freestanding exhibits" that the court thought one would ordinarily "display." As to the "handmade" reference, we see no meaningful difference in this context between a handmade sign and one created by, say, a commercial sign maker. We address the court's "freestanding exhibit" versus hand held concept below, because it is intertwined with the court's discussion of the term "displayed."

¶55 We now turn to the word "display." Webster's New Universal Unabridged Dictionary includes the following definitions: "to show … to disclose; to reveal." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 528-29 (2d ed. 1983). We conclude that this is plainly what the plaintiffs allege, without contradiction from the state officials, that they were issued citations for doing: holding up signs in order to show, disclose, or reveal the content of those signs to other people. Further, no other terms in WIS. ADMIN. CODE § ADM 2.07(2) or any closely related regulation called to our attention undermine the conclusion that a plain meaning interpretation of the regulation is that "display" includes holding up a sign for other people to see it.

¶56 The circuit court stated that it was influenced by the title of the rule, "Exterior and interior displays and decorations." However, assuming without deciding that the title here is a sound contextual indicator of meaning, we fail to see an element of the title that contradicts the interpretation advanced by the plaintiffs, which is that the regulation prohibited displays outside (exterior—"the grounds") or inside (interior) the Capitol building without advance permission.

¶57 The court further relied in part on the idea that it is "generally known" that "the Capitol rotunda is frequently a place where *freestanding* artwork and such things are showcased, especially around the holiday season." (Emphasis in original.) Assuming without deciding that the court could properly rely on what it deems to be "generally known" about types of displays or modes of sign display in the Capitol, the court did not explain why freestanding artwork must be the *only* type of display addressed by WIS. ADMIN. CODE § ADM 2.07(2), especially absent any language in that code provision corresponding to the court's view of what is "generally known." The language of the regulation sweeps broadly, and by its terms is not limited to freestanding exhibits.

¶58 For these reasons, we conclude that the circuit court erred in dismissing the as applied constitutional challenges to WIS. ADMIN. CODE § ADM 2.07(2) without addressing any constitutional arguments, partially on the grounds that this provision did not apply to "display" of "signs" in the manner alleged by the plaintiffs.

C. Constitutional Claim Involves Display of Signs

¶59 The third challenged decision of the circuit court follows from its treatment of WIS. ADMIN. CODE § ADM 2.07(2) described above. Having decided that this code provision, addressing sign display, is not pertinent to this case, the

court explained its view that the parties were mistaken in focusing on the First Amendment right to express oneself by displaying a sign in a public place.[8] At the hearing on summary judgment, the court stated: "I don't think this is a case about signs at all. This is a case about demonstrators on the first floor of the rotunda." The court explained further, saying in part:

> The officers didn't care what was [on] the signs. All they were ... concerned about is people demonstrating on the first floor, and they wanted demonstrators [on] the [Ground Floor], and the only way a police officer could differentiate between the tourist from northern Wisconsin and the demonstrator was the fact that, if someone was holding a sign, [police] knew they were a demonstrator, and presumably [police] went up and said you got to go to the ground floor. The demonstrator said, I want to demonstrate on the first floor, the police officer said you can't demonstrate, so I'm going to turn you from being a demonstrator into a tourist by taking away your sign ....

¶60 Consistent with this view, in its written decision dismissing the plaintiffs' action on summary judgment, the court stated:

> What transpired in the Capitol in early 2011 was far more than whether anyone could have a sign on the first floor of the rotunda. The clash between what the Plaintiffs wanted and what the police were instructed to do raises for review the question of the extent of the lawful authority of the Capitol Police Department and whether it could *confine protesters to one part of the Capitol rotunda*.

(Emphasis added.) Thus, the court further explained, "the issue presented in this lawsuit is whether the Defendants violated the Plaintiffs' First Amendment right

[8] We use the phrase "public place" as shorthand for either a traditional or designated public forum, as those phrases are used in constitutional law. *See* ***Kissick v. Huebsch***, 956 F. Supp. 2d 981, 999 (W.D. Wis. 2013) ("The Wisconsin State Capitol may be thought of as either a traditional or a designated public forum.").

of free speech when in March, 2011 they required Plaintiffs to protest on the ground floor."

¶61 After framing the claims of the plaintiffs exclusively in this manner, the court proceeded to explain its conclusion that "the Defendants are entitled to qualified immunity because a reasonable public official could have believed that requiring the Plaintiffs to protest on the ground floor of the rotunda was [a] reasonable time, place, [and] manner restriction." As result, the court also concluded, "[t]he Plaintiffs are not entitled to damages because the Defendants are protected by qualified immunity."

¶62 Having framed the sole question as involving a limitation on the location of the "protest" and not the prevention of the display of signs, the court limited its qualified immunity and resulting damages decisions to issues such as (1) whether a reasonable state official would have considered "limited space on the first floor of the rotunda" as a justification for restricting "the protest area to the ground level," and (2) whether a reasonable state official would have considered the Ground Floor as an alternative "protest" or "demonstration" location to the First Floor.[9]

¶63 We now explain why we conclude that the plaintiffs are entitled to pursue their claims of constitutional violations arising from police stopping the plaintiffs from displaying signs and from the use of citations to deter or punish the

[9] We use the terms "protest" and "demonstration" to reflect the circuit court's use of those terms, but note that these terms do not appear in the relevant administrative code provision and that the complaint in this case speaks in terms of "expressive activities ... advocating various political positions," not "protest" or "demonstration." The circuit court's use of these terms was part and parcel of its characterization of the plaintiffs' First Amendment claims as relating solely to a prohibition of "protest" on the First Floor of the Capitol rotunda.

display of signs in public areas of the Capitol building, and why the plaintiffs are not limited to a claim that state officials sought only to deter or punish "protest" or "demonstration" on the First Floor of the rotunda at a time when state officials were directing that "protest" or "demonstration" occur only on the Ground Floor of the rotunda.

¶64 In essence, the court made a finding of fact that the state officials acted without concern for whether the plaintiffs held signs or not. That is, the court found that the state officials issued the citations to the plaintiffs only because they were "protesting" or "demonstrating" in a public area of the Capitol where "protest" or "demonstration" was not allowed. This approach had the inadvertent effects of prejudging potentially contested factual issues in the case and improperly narrowing the analysis. As stated above, the plaintiffs plainly included among their allegations the claim that the state officials violated their constitutional rights by prohibiting them from expressing themselves in a public area by holding signs. And, as noted above, former Chief Tubbs averred that the citations were in fact issued to the plaintiffs "for holding signs in public areas of the Capitol Building," and one officer allegedly informed at least two plaintiffs that his actions were prompted by the plaintiffs' alleged violation of provisions that include WIS. ADMIN. CODE § ADM 2.07(2), the provision limiting the displaying of signs.

¶65 For these reasons, we conclude that the circuit court erred in dismissing this action based in part on qualified immunity, and a resulting absence of damages, on the grounds that it was a reasonable time, place, and manner restriction for the state officials to require the plaintiffs to "protest" on the Ground Floor, as opposed to the First Floor.

¶66 In closing, we emphasize our view that the summary judgment approaches used by the circuit court, and the positions of the parties on appeal, weigh against our addressing in this appeal pertinent First Amendment or immunity doctrines any further than we have done above. To cite only one example of the many potential issues we do not reach, we express no view on the question of whether the state officials could have acted constitutionally under these circumstances if they sought to prevent the display of signs and seized signs but did so only incidentally to the lawful enforcement of non-sign related statutes or administrative code provisions in existence at the time. However, the circuit court improperly assumed a contested fact when it concluded that it could ignore the allegation that the state officials unconstitutionally acted to prevent the display of signs, based in part on the court's misreading of WIS. ADMIN. CODE § ADM 2.07(2).

CONCLUSION

¶67 We conclude that the state officials fail to establish that they are entitled to summary judgment or that all issues in this appeal are necessarily moot, and accordingly we reverse the circuit court's order dismissing plaintiff's action on summary judgment and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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