COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2007

David R. Schanker
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. 2007AP29

Cir. Ct. No. 2006CV3394

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JODI KAMERMAYER,

PETITIONER-APPELLANT,

V.

**CITY OF MILWAUKEE
AND NANETTE HEGERTY,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 CURLEY, P.J. Jodi Kamermayer appeals from an order denying her petition for a writ of mandamus and dismissing the complaint for declaratory judgment that she filed against the City of Milwaukee and former Police Chief Nanette Hegerty (collectively, the City). She contends that the trial court erred in

concluding that she did not make an excusable mistake when she entered into a settlement agreement with the City and subsequently tendered her resignation. We disagree with Kamermayer's contention and affirm the order of the trial court.

I. BACKGROUND.

¶2 This litigation arises out of Kamermayer's dismissal from service with the Milwaukee Police Department (MPD). Kamermayer appealed from the order for dismissal and retained counsel to represent her before the Milwaukee Fire and Police Commission (the Commission). Thereafter, the parties engaged in settlement discussions.

¶3 The attorney who represented Kamermayer during the settlement discussions was deposed and testified that a conference call took place where she, Kamermayer, and one or two representatives from the Employes' Retirement System (ERS) were on the telephone at various times discussing Kamermayer's pension benefits.[1] The attorney admitted that, as she initially understood it, Kamermayer would only have access to her pension funds upon completion of ten years of service. However, following the conference call, her initial understanding was corrected. It was at that time that Kamermayer's attorney was advised that Kamermayer only needed to have four years of service in order to be vested. Kamermayer's attorney stated at her deposition that she was further advised by the representatives of ERS as follows:

> that the only difference or the only benefit that is different for reaching ten years is that you can have like a cash and carry option. In other words, you can withdraw money

[1] Kamermayer retained new counsel to represent her in the proceedings before the trial court.

> now instead of waiting until you're retirement age to withdraw it. In any event you don't entirely forever lose your access to that money.

¶4 Following the conference call, Kamermayer's attorney said that she discussed what she learned with Kamermayer:

> I explained that my initial impression and [another attorney in my office's] initial impression of the pension benefits was obviously incorrect, that she had four years then so getting to ten years would not impact her ability to get a pension when she retires but that if she gets to ten years she can use that money sooner.

On the same day as the conference call, Kamermayer's attorney provided Kamermayer with a letter, which provided:

> [I]n exchange for waiving your right to have an appeal hearing before the Fire & Police Commission, we have negotiated a settlement in which the City of Milwaukee would allow you to resign effective the date that is one day after the ten (10) year anniversary of your application for membership with the Employes' Retirement System (ERS) of the City of Milwaukee.
>
> By resigning effective the date that is one day after the ten (10) year anniversary, you would separate from service with ten (10) years of creditable service, and would therefore be entitled to withdraw the accumulated contributions in your pension fund…. By resigning effective the date that is one day after the ten (10) year anniversary, you would also remain on the City of Milwaukee payroll for approximately two and one-half months longer than if you have an appeal hearing in which your termination is upheld.
>
> If you choose not to enter into this settlement agreement with the City of Milwaukee, you cannot separate from service with ten (10) years of creditable service, and therefore are forever barred from withdrawing the accumulated contributions in your pension fund.
>
> ….
>
> As you know, both [another attorney at this office] and I strongly believe that it is in your best interest to enter into this settlement agreement with the City of Milwaukee,

> and we have therefore recommended that you do not proceed to an appeal hearing before the Fire & Police Commission. Our recommendation is based upon the following:
>
> (1) Our experience and expertise with the Fire & Police Commission leads us to believe that the chances of getting your job back are very slim;
>
> (2) The settlement agreement would provide you with the option of having access to a significant sum of money that you would otherwise have no ability to access, as well as keeping you on the payroll for several additional months....

Kamermayer signed the letter that day indicating that she chose to resign from the MPD effective one day after her ten-year anniversary.

¶5 As a result, Kamermayer's attorney and the attorney for the City sent letters to one another confirming that an agreement was reached whereby Kamermayer would resign effective the day after she reached ten years of creditable service with the City. Kamermayer then submitted her written resignation, which was to go into effect on April 11, 2006.

¶6 Kamermayer's version of the events leading up to the settlement agreement differs from her former attorney's version. Kamermayer contends that she agreed to the settlement because she understood it to be the only way that she could recover her pension contributions. Shortly after submitting her resignation letter, Kamermayer claims to have been contacted by a union steward who told her she was misinformed and that she was entitled to her pension contributions so long

as she had completed four years of service. At the time that she learned this information, she had completed four years of service.[2]

¶7 Approximately one week after she submitted her letter of resignation and seventy days prior to the effective date, Kamermayer notified the Commission and counsel for Chief Hegerty that she was rescinding the settlement agreement. The City refused to acknowledge Kamermayer's attempt to withdraw her resignation. Instead, Kamermayer received correspondence notifying her that her resignation was effective April 11, 2006.

¶8 Kamermayer subsequently filed a petition for a writ of mandamus to require "the City of Milwaukee and Nanette Hegerty, Chief of Police of the City of Milwaukee, to refrain from treating Ms. Kamermayer as resigned from her employment as a police officer with the City of Milwaukee." In the alternative, she filed a complaint for declaratory relief requesting "that judgment be entered in her favor declaring that the settlement reached with the City of Milwaukee is void and ordering her resignation from employment withdrawn."

¶9 In a supplemental affidavit filed in support of her petition for a writ of mandamus, Kamermayer acknowledged, after reading her former attorney's deposition transcript, that she recalled her former attorney "telling me that an ERS representative told her in a telephone conference that there was a distinction between the significance of having 4 years of service and having 10 years of service." However, Kamermayer further stated that following the telephone

[2] The City contends that following her resignation, Kamermayer learned that a similarly-situated former officer had his discharge reduced to a suspension and that Kamermayer wanted to rescind her resignation so that she too could have the opportunity for a suspension, as opposed to a discharge.

conversation, her former attorney told her that ten years had always been the triggering point for accessing accumulated pension contributions and that the ERS representative was wrong in advising them otherwise.

¶10 Kamermayer contends that she signed the resignation letter on the advice of her former attorney and with the understanding that resigning was the only way she could retain and receive the pension benefits. According to Kamermayer, if she had known she was entitled to her pension benefits regardless of whether she reached her tenth anniversary of participation in the pension plan at the time of the settlement discussions, she would not have agreed to the settlement and would have proceeded with the hearing on her appeal. She asserted in her affidavit: "I do not and would not have considered the cash and carry option to be a significant benefit to me to have induced me to agree to resign my employment as a police officer with the MPD."

¶11 In denying Kamermayer's petition for a writ of mandamus and dismissing her declaratory judgment action, the trial court stated:

> The City of Milwaukee offered a settlement agreement with certain terms. The petitioner accepted those terms and formed a settlement contract with the City. There was consideration on both sides. The City made an offer with the following consideration for the plaintiff-petitioner. She would not be subject to public scrutiny or public hearing. She would have the benefits of resigning versus the possible stigma of being fired. She'd receive two more months of paid compensation, and she would receive pension benefits. In exchange in consideration, the City would be released from defending their initial dismissal against the petitioner.
>
> ….
>
> The petitioner entered into a Settlement Agreement when she accepted the City's offer. Even though she dislikes the outcome now, she has not presented justification for voiding this contract. She may not have

> understood the actual pension benefits that the settlement was offered, was offering, but she was not presented any, she has not presented any evidence that this mistake, if material, being unilateral, was also excusable. The party seeking rescission of the unilateral mistake must show that mistake was excusable. In this case there is no showing of that.

Kamermayer's attorney subsequently requested that the trial court limit its decision to a denial of the petition for a writ of mandamus and that it allow the parties to proceed on the declaratory judgment action; however, the trial court declined to do so and dismissed the action as to both causes.

II. ANALYSIS.

A. Standard of Review

¶12 "Mandamus is an extraordinary legal remedy, available only to parties that can show that the writ is based on a 'clear, specific legal right which is free from substantial doubt.'" ***Lake Bluff Hous. Partners v. City of South Milwaukee***, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995) (citations omitted). In addition to establishing a legal right, the "party seeking mandamus must also show that the duty sought to be enforced is positive and plain; that substantial damage will result if the duty is not performed; and that no other adequate remedy at law exists." ***Id.***

¶13 "The writ will issue only to compel performance by a public officer of a duty which he is bound by law to perform." ***Eisenberg v. Estkowski***, 59 Wis. 2d 98, 102, 207 N.W.2d 874 (1973). We will affirm a trial court's decision to deny a petition for a writ of mandamus so long as the decision was not based on an erroneous understanding of the law. ***Lake Bluff***, 197 Wis. 2d at 170.

¶14 Kamermayer contends that she is entitled to a writ of mandamus based on her mistaken understanding of the settlement agreement. She argues that the trial court erred when it refused to allow her to rescind the settlement agreement that she entered into with the City based on her unilateral mistake. When a court affords relief from a unilateral mistake, the relief is equitable in nature. ***Miller v. Stanich***, 202 Wis. 539, 548-49, 233 N.W. 753 (1930). We review cases involving a trial court's grant or denial of equitable relief for an erroneous exercise of discretion. ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984). "The [trial] court properly exercises its discretion if it applies the appropriate law and the record shows there is a reasonable factual basis for its decision." ***Spencer v. Kosir***, 2007 WI App 135, ¶13, 301 Wis. 2d 521, 733 N.W.2d 921.

¶15 Kamermayer also appeals the trial court's dismissal of her declaratory judgment action. The decision to grant or deny declaratory relief is within the sound discretion of the trial court. *See* ***State ex rel. Lynch v. Conta***, 71 Wis. 2d 662, 668, 239 N.W.2d 313 (1976), *superseded by statute on other grounds as stated in* ***State ex rel. Newspapers, Inc. v. Showers***, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). In our review, "all that this court need find to sustain a discretionary act is that the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). In so doing, we will look for reasons to sustain the trial court's discretionary decision. ***Looman's v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

B. Kamermayer did not make an excusable mistake entitling her to rescission of the settlement agreement.

¶16 Kamermayer contends that she agreed to the settlement terms based on an excusable unilateral mistake. As a result, she argues the settlement agreement should be rescinded. To support her argument, she relies on ***Miller*** for its discussion of the equitable relief that may be afforded due to a unilateral mistake. ***Id.***, 202 Wis. at 548-49. ***Miller*** provides as follows:

> Equitable relief from a mutual mistake is frequently given by a reformation of the contract. But a contract will not be reformed for an [sic] unilateral mistake. Equitable relief may, however, be given from an [sic] unilateral mistake by a rescission of the contract. Essential conditions to such relief are: (1) The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable. (2) The matter as to which the mistake was made must relate to a material feature of the contract. (3) Generally the mistake must have occurred notwithstanding the exercise of ordinary diligence by the party making the mistake. (4) It must be possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him *in statu quo*.

Id. (quoting 59 A.L.R. 809) (one set of quotation marks omitted).

¶17 Despite the above-quoted language, on which she relies in her initial brief, Kamermayer in her reply brief argues that "[p]roof of unconscionablility is unnecessary." This statement is wholly at odds with the language in ***Miller*** delineating the essential conditions that must be present before rescission will ensue and requiring that "[t]he mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable." ***Id.*** at 549. Thus, proof that enforcement of the agreement would be unconscionable *is* required. A transaction is unconscionable if it "show[s] no regard for conscience; affront[s] the sense of justice, decency, or reasonableness." BLACK'S LAW

DICTIONARY 731 (2d pocket ed. 2001). Because Kamermayer argues she is not required to offer proof that enforcement of the contract as made would be unconscionable, this "essential condition[]," which is required before a court can find that equitable relief is warranted, is not satisfied. ***Miller***, 202 Wis. at 549.

¶18 With respect to the remaining three conditions set forth in ***Miller***, Kamermayer argues: she "would not have entered into the settlement absent the consideration she thought she was going to receive with respect to the pension benefits"; "[t]here is no evidence that [she] was less than diligent in trying to understand the specific benefit she was getting by agreeing to resign after she had 10 years of service"; and "clearly the prejudice running to [her] is far more grave than the prejudice which [the City] may have to face."

¶19 First, it is far from established how Kamermayer's statement that she would not have entered into the settlement agreement had she known about the pension benefits establishes ***Miller***'s requirement that "[t]he matter as to which the mistake was made must relate to a material feature of the contract." ***Id.***, 202 Wis. at 549. No additional analysis or legal citations are provided regarding what constitutes a "material feature" of a contract or how Kamermayer's understanding of her pension benefits leads to the conclusion that this condition is satisfied. As it stands, this argument is undeveloped, and we need not consider it. *See generally* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we need not consider undeveloped arguments).

¶20 Moreover, Kamermayer's conclusory statement that there is no evidence that she was less than diligent in trying to understand the specific benefit she was getting is refuted by evidence in the record to the contrary. Kamermayer's former attorney's recollection is that she went over the details of

the settlement with Kamermayer, and Kamermayer acknowledges she was informed that there was a distinction between four years and ten years of service. The trial court, in concluding that there was no unilateral mistake entitling Kamermayer to rescission, referenced the aforementioned facts.

¶21 Lastly, with respect to prejudice, Kamermayer's unsubstantiated statement that the prejudice running to her is far more grave than that faced by the City, without further elaboration, is unpersuasive and fails to establish that it is "possible to give relief by way of rescission without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him *in statu quo*." ***Miller***, 202 Wis. at 549. In this regard, the City argues:

> If the agreement were set aside, the City would have to reschedule and proceed with the hearing before the Board (and assemble the many witnesses involved in the incident leading to Kamermayer's termination, the beating of Frank Jude, Jr.). Ms. Kamermayer would also undoubtedly seek to have the City return her to the payroll retroactively, including, of course, all benefits until her hearing could be conducted.

¶22 Kamermayer does not refute that she will seek past wages and benefits accrued while the instant litigation was pending and instead asserts "all of this could have been avoided if [the City] had simply accepted [her] written notification that she was withdrawing the settlement and her resignation. [The City's] refusal to do so should not weigh in the court's analysis of prejudice." In the absence of any legal authority to support her position in this regard, we decline Kamermayer's invitation to engage in her proposed one-sided weighing of the prejudice condition.

¶23 Based on our review, we conclude that the trial court properly exercised its discretion when it concluded that Kamermayer did not present

justification for rescinding the settlement agreement due to an alleged excusable unilateral mistake. *See* ***Spencer***, 301 Wis. 2d 521, ¶13. Furthermore, we agree with the City's position that to allow rescission based on a unilateral mistake under these circumstances "would severely undermine far too many transactions by essentially freeing any party who becomes dissatisfied with a deal to claim ignorance of some important circumstance."[3]

C. Kamermayer failed to establish that the duty sought to be enforced is positive and plain such that she is entitled to a writ of mandamus.

¶24 As noted, in order for the issuance of a writ of mandamus to be warranted, Kamermayer must show, among other things, "that the duty sought to be enforced is positive and plain." ***Lake Bluff***, 197 Wis. 2d at 170. To support her argument in this regard, Kamermayer relies on MPD Rules and Regulations governing resignations. Specifically, she relies on MPD Rule 2/600.30, which provides:

> Members of the Department wishing to resign from the service shall submit written notice of such intention to the Chief of Police on Form PI-4 (In the Matter Of Report). Such notice of resignation shall be effective at the time indicated therein, or if no time is therein indicated, then upon delivery of the written resignation to the Chief of Police or duly authorized delegate.

[3] Kamermayer contends that the circumstances present in ***Sheedy v. Popp***, 82 Wis. 2d 755, 264 N.W.2d 565 (1978), are analogous to her own circumstances. In ***Sheedy***, the court concluded that a trial court order incorrectly authorized a disbursement that did not conform to the amount the parties had agreed upon at the time of hearing. ***Id.*** at 767. As a result, the court ordered that the amount be modified to properly reflect the amount agreed upon. ***Id.*** at 770. We fail to see how the ***Sheedy*** court's discussion pertaining to modification of the order at issue there lends support to Kamermayer's argument that the settlement agreement should be rescinded.

¶25 Kamermayer argues that because her resignation was not submitted to Chief Hegerty on a Form PI-4 and because she rescinded her resignation before the effective date, her resignation did not comply with MPD Rule 2/600.30. Kamermayer's reliance on her violation of MPD Rule 2/600.30 is misplaced. She attempts to use her violation of the rules to her advantage; however, we agree with the City that there is nothing in the rules that leads to the conclusion that noncompliance with MPD Rule 2/600.30 automatically results in a finding that Kamermayer's resignation was ineffective.

¶26 The City argues that Kamermayer's written resignation complied with WIS. STAT. § 17.01(13) (2003-04), which governs the resignation of public officers.[4] Section 17.01(13) requires that resignations "be made in writing," "be addressed and delivered to the officer or body prescribed," and "take effect … at the time indicated in the written resignation." Because Kamermayer's written resignation satisfied the aforementioned statutory requirements, the City asserts that "[a]ny claimed noncompliance with a rule of the [MPD], therefore, is irrelevant as Kamermayer has shown nothing that would indicate that the [MPD] rule did (or could) supersede the governing requirements of the statute." Kamermayer neglected to offer any argument in her reply brief on this issue. We deem this omission a concession. *See generally* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶4, 293 Wis. 2d 668, 721 N.W.2d 127, *review*

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

granted, 2007 WI 16, 298 Wis. 2d 94, 727 N.W.2d 34 (concluding that cross-appeal issues were conceded when party failed to respond in reply brief to the cross-respondent's argument). We therefore do not address this issue any further.

¶27 In addition, we disagree with Kamermayer's contention that her resignation cannot stand because she withdrew it prior to the effective date. Once she and the City agreed to the terms of the settlement, she was bound by the agreement. *See* ***State ex rel. Mellen v. Public Sch. Teachers' Annuity and Ret. Fund Trs.***, 185 Wis. 653, 656-57, 201 N.W. 383 (1924) (concluding that a binding agreement was reached with respect to a teacher's resignation once the teacher and the school board agreed on the date the resignation was to be effective).[5] The fact that Kamermayer's resignation, which was required pursuant to the terms of the settlement agreement, pertained to an event that was to take place on a date

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[5] Both parties cite ***State ex rel. Mellen v. Public School Teachers' Annuity and Retirement Fund Trustees***, 185 Wis. 653, 201 N.W. 383 (1924), in their briefs as support for their respective positions. We read ***Mellen*** to support the City's position. Like the Wisconsin Supreme Court in ***Koeling v. City of Milwaukee***, 251 Wis. 46, 27 N.W.2d 892 (1947), we conclude that ***Mellen*** did not involve "the right of an employee to withdraw his resignation after it had been duly accepted." ***Koeling***, 251 Wis. at 49-50. Rather, ***Mellen*** is pertinent,

> in so far as this court held that when the resigning school teacher made a new proffer, specifying another day as the effective date of her resignation, and the appointing school board agreed on that date--which thereupon constituted its acceptance of the newly proffered resignation--there was a valid and binding contract between them on the subject of the termination of the relationship, so far as the rights of the parties under the resignation was concerned.

Koeling, 251 Wis. at 50.

effective in the future (i.e., the day after she reached ten years of creditable service) is of no consequence. A valid and binding settlement agreement was entered into by the parties when Kamermayer accepted the City's settlement offer and agreed to tender her resignation.

¶28 Kamermayer does not direct us to any rule or statutory provision that enables her to withdraw her resignation. *Cf.* ***Koeling v. City of Milwaukee***, 251 Wis. 46, 49, 27 N.W.2d 892 (1947) (holding that city employee's proffered resignation and city's commissioner's acceptance thereof, without withdrawal of the resignation by the city employee within the time period provided by statute, resulted in a finding that once the withdrawal period expired, employee was "effectively bound by his resignation and was no longer an employee of the city"). Moreover, Kamermayer has not presented any rule or regulation reflecting that the City has a plain and positive duty to reinstate her; as a result, her resignation was effective upon the City's acceptance of the terms thereof.

¶29 Because Kamermayer has failed to establish "that the duty sought to be enforced is positive and plain," ***Lake Bluff***, 197 Wis. 2d at 170, we need not address the other criteria that must be satisfied for the issuance of a writ of mandamus, *see* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide nondispositive issues). We conclude that the trial court properly concluded that a writ of mandamus could not properly compel the City to reinstate Kamermayer.

D. The trial court properly dismissed Kamermayer's declaratory judgment action.

¶30 Kamermayer also asks that this court reinstate her declaratory judgment action and remand for further proceedings. She argues the trial court's dismissal of her declaratory judgment action was improper pursuant to WIS. STAT. § 802.09(1), which provides that leave to amend pleadings "shall be freely given at any stage of the action when justice so requires." Because her action was dismissed summarily, she contends that she never had an opportunity to replead.

¶31 The underlying facts and inferences on which Kamermayer relies to support her claim for a writ of mandamus are the same ones that she uses to support her declaratory judgment action. Kamermayer acknowledges that she has not provided this court with any information regarding the nature of additional pleadings, evidence or arguments that she would have made had she been allowed to amend and replead her declaratory judgment action. As a result, she has failed to convince this court why "justice so requires" that she be allowed to amend her pleadings. WIS. STAT. § 802.09.

¶32 Because the trial court properly concluded that there was no mistake that warranted rescinding the settlement agreement, and because those facts were the basis for Kamermayer's declaratory judgment action, we are satisfied that the trial court did not erroneously exercise its discretion in dismissing Kamermayer's declaratory judgment action.[6] *See* ***Loy***, 107 Wis. 2d at 414-15. Based on the

[6] Kamermayer references a comment made by the trial court that she may have a claim against her former attorney as further support for her argument that the trial court improperly dismissed her declaratory judgment action. Kamermayer's former attorney was not named as a party to the instant lawsuit; as a result, the trial court's dismissal of Kamermayer's declaratory judgment action against the City does not impact Kamermayer's ability to proceed with litigation against her former attorney if she so chooses.

foregoing, we conclude that the trial court properly denied Kamermayer's petition for a writ of mandamus and properly dismissed her declaratory judgment action. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.