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DISTRICT I

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

2021AP256-LV

Hunter Nation Inc. v. Wisconsin Department of Natural Resources
(L.C. # 2021CV31)

Before Brash, P.J., Dugan and Donald, JJ.

Wisconsin Department of Natural Resources, Wisconsin Natural Resources Board, and the Secretary of the Department (collectively, “DNR”) have filed both a notice of appeal and a petition for leave to appeal from a February 12, 2021 order of the circuit court “in which the Court granted a writ of mandamus, issued separately[.]”¹

¹ On February 12, 2021, the circuit court issued an order granting Hunter Nation’s request for a writ of mandamus and denying their request for a temporary injunction. In that order the circuit court stated that the writ of mandamus would be issued in a separate order—the writ order was also issued on February 12, 2021.

Hunter Nation Inc., and Luke Hilgemann (collectively, “Hunter Nation”) have filed responses in which they indicate their intent to move to dismiss the DNR’s “improper notice of appeal” and in which they oppose the DNR’s petition for leave to appeal. In the response to the petition for leave to appeal, Hunter Nation has filed a conditional petition for leave to cross-appeal the same February 12, 2021 order, which also denied Hunter Nation’s request for a temporary injunction.

As a threshold matter, we must determine whether the order the DNR seeks to challenge is a final order appealable as a matter of right or whether it is a non-final order requiring our permission for an appeal. *See* WIS. STAT. § 808.03(1)-(2) (2017-18)²; WIS. STAT. RULE 809.50(1). In its petition for leave to appeal, the DNR explains why it believes the order is final and appealable as a matter of right. Hunter Nation, in its response to the petition, explains why it believes the order is non-final. Having considered the parties’ submissions and the documents currently before us, we conclude that the DNR is seeking to appeal from a non-final order.

“[W]hether an order or judgment is final for the purpose of appeal turns on the answer to two questions.” *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶27, 299 Wis. 2d 723, 728 N.W.2d 670. “The first [question] is whether the document is final as a matter of substantive law insofar as it disposes of the entire matter in litigation as to one or more parties.” *Id.* “The second [question] is whether the document is final because it is the last document in the litigation, which is to say that the circuit court did not contemplate a subsequent document from which appeal could be taken.” *Id.*

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Here, the grant of mandamus does not resolve the entire matter in litigation. Hunter Nation’s complaint asserted two claims for declaratory relief and a third claim for mandamus relief, and the claims for declaratory relief remain pending.³ In addition, the February 12, 2021 order identified by the DNR in the notice of appeal is clearly not the last contemplated document; by its own terms, it indicates that the “writ will issue by separate order[.]”⁴

In arguing for finality, the DNR asserts that this case is “identical to the situation in” *State ex rel. Tiner v. Milwaukee County*, 81 Wis. 2d 277, 278-79, 260 N.W.2d 393 (1977), where the Wisconsin Supreme Court stated that the circuit court order awarding a writ of mandamus was a final judgment. However, the DNR’s notice of appeal did not indicate that the DNR was attempting to appeal the separate writ order. Nevertheless, the failure of the notice of appeal to correctly identify the final appealable document in a case is not necessarily fatal to appellate jurisdiction, *see Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267 (1992), so we must determine whether the separately issued writ order is a final judgment or order for purposes of an appeal as a matter of right.

³ The DNR argues that “nothing remains to be resolved, since the court plainly declared its view that the Department violated the law[.]” However, neither February 12, 2021 order contains language that expressly disposes of the claims for declaratory relief; a court must do more than simply decide a matter to dispose of it. *See Kenosha Prof’l Firefighters v. City of Kenosha*, 2009 WI 52, ¶23, 317 Wis. 2d 628, 766 N.W.2d 577.

⁴ Hunter Nation notes that the circuit court expressly declined to sign an order that would have stated it was final for purposes of appeal. *See Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶44, 299 Wis. 2d 723, 728 N.W.2d 670 (requiring final judgments and final orders to state they are final for purposes of appeal). However, this is not necessarily dispositive; whether a document is final is a question of law, *see Kenosha Prof’l Firefighters*, 317 Wis. 2d 628, ¶20, and the absence of a finality statement cannot be used to create ambiguity in an otherwise unambiguously final order or judgment, *see Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, ¶¶29-30, 339 Wis. 2d 291, 811 N.W.2d 351.

The actual jurisdictional question in *Tiner* was not one of finality but whether the “writ of mandamus” was an appropriate type of document—that is, a judgment or order—from which an appeal could be taken. *See id.* at 278-79; WIS. STAT. § 817.09(2) (1975-76) (“right of appeal applies to final orders and judgments”). Further, Tiner had also sought declaratory relief, *see Tiner*, 81 Wis. 2d at 279, which had been granted prior to the appeal, *see id.* at 291 n.9. Thus, the entire matter in litigation in *Tiner* had been resolved, creating finality. *Cf. Kenosha Prof'l Firefighters v. City of Kenosha*, 2009 WI 52, ¶6, 317 Wis. 2d 628, 766 N.W.2d 577 (“[B]ecause the circuit court has not entered a final, appealable judgment or order disposing of the firefighters’ underlying litigation against the City relating to the release of public records, the circuit court’s decisions relating to attorney fees, statutory damages and costs should not be accorded the status of final judgments or final orders for purposes of appeal.”).

Based on the foregoing, we conclude that both February 12, 2021 circuit court orders in this matter are non-final. Accordingly, we dismiss the notice of appeal for lack of jurisdiction. We now turn to consideration of the petition and conditional petition for leave to cross-appeal.

Upon review of the DNR’s petition, Hunter Nation’s response, and the circuit court orders, we conclude that the DNR’s petition fails to satisfy the criteria for permissive appeal. *See* WIS. STAT. § 808.03(2) (2017-18); *State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991). Further, we note that Hunter Nation’s petition for leave to cross-appeal is conditioned on this court’s granting the DNR’s petition for leave to appeal. Therefore, because we deny the DNR’s petition for leave to appeal, Hunter Nation’s conditional petition for leave to cross-appeal is moot. *See PRN Assocs., LLC v. Dept. of Admin.*, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559 (“An issue is moot when its resolution will have no practical effect on the underlying controversy.”).

Finally, the DNR moved for a stay of the circuit court order pending appeal. *See* WIS. STAT. RULE 809.12. Because there is and will be no appeal at this time, the motion for a stay pending appeal is also moot.

Upon the foregoing, therefore,

IT IS ORDERED that the notice of appeal filed in appeal No. 2021AP256-LV is dismissed for lack of a final judgment or order. This court lacks jurisdiction over a direct appeal at this time. No costs to either party.

IT IS FURTHER ORDERED that the petition for leave to appeal is denied. No costs to either party.

IT IS FURTHER ORDERED that the conditional petition for leave to cross-appeal is denied *ex parte*. No costs to either party.

IT IS FURTHER ORDERED that the motion for a stay pending appeal is denied as moot.

Sheila T. Reiff
Clerk of Court of Appeals