NOTICE
Decision filed 08/13/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 160421-U

NO. 5-16-0421

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SHARI MURPHY, CAMILLE INGRAM, and JOE OLIVER,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellants,	)	
v.	)	No. 13-CH-211
HIRAM GRAU, in His Individual Capacity, and LEO SCHMITZ, in His Official Capacity as Director of the Illinois State Police,	)	Honorable Donald M. Flack,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Goldenhersh and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: Order granting summary judgment affirmed where no genuine issues of material fact exist because claims were moot or, in the alternative, *mandamus* was unavailable because applicable statute is directory rather than mandatory and administrative remedy was available to the plaintiffs but not utilized. Summary judgment on additional claim was proper because it was forfeited or, in the alternative, because no violation of the constitution or federal law occurred. Because the plaintiffs' claims were not viable, summary judgment was appropriately granted on class certification claim.

¶ 2 The plaintiffs, Shari Murphy, Camille Ingram, and Joe Oliver, appeal the September 12, 2016, order of the circuit court of Madison County that granted summary

judgment in favor of the defendants, Hiram Grau and Leo Schmitz, on all counts of the plaintiffs' first amended complaint. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 On March 1, 2013, plaintiff Murphy filed a complaint against defendant Grau[1], alleging that Grau did not issue to Murphy a Firearm Owner's Identification (FOID) card within 30 days of receiving Murphy's application for the card, as required by section 5 of the Firearm Owners Identification Card Act (Act) (430 ILCS 65/5 (West 2012)). On February 5, 2014, plaintiffs Murphy, Ingram, and Oliver[2] filed a three-count, first amended complaint against defendant Grau. Count I alleged that Grau violated section 5 of the Act (*id.*), because over 30 days expired before the plaintiffs' FOID cards were issued.

¶ 5 Count II was brought pursuant to section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983 (2012)) and alleged violations of the second and fourteenth Amendments to the United States Constitution (U.S. Const., amends. II, XIV), which the plaintiffs claimed Grau committed by issuing FOID cards to the plaintiffs beyond the 30-day deadline. Counts I and II both requested the circuit court to enter an order of *mandamus*, enjoining defendant Grau, in his official capacity, from failing to issue or deny a FOID card within 30 days of an application being received, ordering Grau to immediately issue

[1]Although Grau was the only named defendant in the original and amended complaints, Schmitz was later substituted for Grau on the official capacity claims for *mandamus* and injunctive relief because he was Grau's successor as Director of the Illinois State Police.

[2]Although Brian Gardina was also named as a plaintiff in the first amended complaint, he later voluntarily dismissed his claims, as memorialized in an order entered by the circuit court on August 8, 2014.

all of the plaintiffs a valid FOID card in count I, and ordering Grau to immediately issue plaintiff Murphy a valid FOID card in count II.

¶ 6 In count III, the plaintiffs sought to certify a class of individuals who applied for FOID cards on or after January 23, 2010—but did not receive a decision within 30 days—to pursue a claim for damages against Grau in his individual capacity.

¶ 7 The defendants filed a motion to dismiss the first amended complaint, arguing, *inter alia*, that the *mandamus* and injunction claims should be dismissed because the plaintiffs all received FOID cards in 2013—before they filed the first amended complaint in 2014—and because the 30-day provision in section 5 of the Act is directory, not mandatory. Although the circuit court agreed that the language in section 5 is directory, it denied the motion to dismiss except to conclude that plaintiff Murphy lacked standing because the defendants' records established that she was issued a FOID card 29 days after her application was received.

¶ 8 On January 20, 2016, the defendants filed a motion for summary judgment. On September 12, 2016, the circuit court entered an order granting the motion for summary judgment in favor of the defendants on all counts of the first amended complaint. The plaintiffs filed a timely notice of appeal. Additional facts will be provided as necessary throughout the remainder of this order.

¶ 9 ANALYSIS

¶ 10 The issue on appeal is whether the circuit court erred by granting the defendants' motion for summary judgment. "We review *de novo* the trial court's grant of summary judgment." *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001). "Accordingly, we

afford no deference to the trial court's decision and instead, we consider anew the pleadings, affidavits, depositions, admissions, and exhibits on file to determine whether the trial court's decision was correct." *Id.*

¶ 11 "Summary judgment is appropriate when the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmoving party and strictly against the moving party, reveal that (1) no genuine issue of material fact exists and (2) the moving party is entitled to judgment as a matter of law." *Id.* at 778-79.

¶ 12 "Summary judgment must be awarded with caution to avoid preempting a litigant's right to trial by jury or the right to fully present the factual basis of a case where a material dispute may exist." *Id*. at 779. "Thus, summary judgment 'should be allowed only when the right of the moving party is clear and free from doubt' " (*id*. (quoting *Jones v. Chicago HMO Ltd.*, 191 Ill. 2d 278, 291 (2000))) and " '[w]here doubt exists, the wiser judicial policy is to permit resolution of the dispute by a trial' "(; *id*. (quoting *Meck v. Paramedic Services*, 296 Ill. App. 3d 720, 725 (1998))).

¶ 13 Here, the first amended complaint was filed on February 5, 2014. The plaintiffs alleged in counts I and II that defendant Grau had a ministerial duty—with no discretion—to issue or deny a FOID card within 30 days of the receipt of an application for the same. The plaintiffs further alleged in counts I and II that *mandamus* relief is available to command a public official to perform a ministerial, nondiscretionary duty to which the party seeking such relief has established a clear right to have performed. Accordingly, in counts I and II, the plaintiffs requested the circuit court to, *inter alia*,

issue a writ of *mandamus* enjoining defendant Grau—in his official capacity—from failing to issue or deny a FOID card within 30 days of receipt of an application for the same, and ordering defendant Grau to immediately issue valid FOID cards to the plaintiffs.

¶ 14 I. *Mootness*

¶ 15 We note at the outset that counts I and II are moot. "As a general rule, courts in llinois do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). Courts lack subject matter jurisdiction over issues that are moot because such issues are not justiciable. See *McCormick v. Robertson*, 2015 IL 118230, ¶ 21. Moreover, "[a] question is moot when no actual rights or interests of the parties remain or when events occur which render it impossible for the reviewing court to grant effective relief ***." *In re L.L.*, 243 Ill. App. 3d 1010, 1011-12 (1993).

¶ 16 Here, counts I and II are moot because affidavits of Jessica Trame—Chief of the Firearms Services Bureau of the Illinois State Police—establish that all of the plaintiffs received their FOID cards in 2013, before the first amended complaint was filed in 2014. When the amended complaint was filed, the plaintiffs sought *mandamus* and injunctive relief, requiring the defendants to issue FOID cards to the plaintiffs. The circuit court could not have compelled the defendants to do what had already been done. Accordingly, there was no actual controversy and no effective relief could have been granted. See *id*. For these reasons, the *mandamus* claims in counts I and II are moot.

¶ 17 In addition to mootness, to the extent that the plaintiffs requested orders requiring the defendants to decide all future FOID card applications within 30 days, they lacked standing to do so because to establish standing, "[a] party must assert its own legal rights and interests, rather than assert a claim for relief based upon the rights of third parties." *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 36.

¶ 18 A. *Exceptions to Mootness*

¶ 19 The plaintiffs argued in their response to the motion for summary judgment that their claims fall within both the public interest and the capable of repetition yet evading review exceptions to the mootness doctrine. We disagree.

¶ 20 1. *Public Interest Exception*

¶ 21 "The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." *In re Alfred H.H.*, 233 Ill. 2d at 355. "The exception is narrowly construed and requires a clear showing of each criterion." *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 292 (2005). "If any one of the criteria is not established, the exception may not be invoked." *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 13. "Indeed, the public interest exception is invoked only on 'rare occasions' when there is an extraordinary degree of public interest and concern." *Id.* (quoting *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 410 (1990)).

¶ 22 Here, this exception does not apply because a decision on the merits of the plaintiffs' claims will not provide future guidance to public officers in the performance of their duties. The defendants concede that they have an obligation under section 5 of the Act to rule on a FOID card application within 30 days of receiving it. The remaining question is whether the plaintiffs could have obtained the specific relief they were seeking. Answering that question will not provide any future guidance to public officers because the 30-day obligation under the Act remains the same regardless of how that question is answered. For these reasons, we find the public interest exception to mootness does not apply.

¶ 23 2. *Capable of Repetition Yet Evading Review Exception*

¶ 24 The capable of repetition yet evading review exception is comprised of two elements: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation[;] and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998). Regarding the second element, there must be a substantial enough relation between the present action and a potential future action that the resolution of the question in the present action would impact a similar question in the future action involving the same complaining party. *In re Donald L.*, 2014 IL App (2d) 130044, ¶ 29. Like the public interest exception, this exception is narrowly construed and also requires a clear showing that each requirement is satisfied. See *In re J.T.*, 221 Ill. 2d 338, 350 (2006). Moreover, this exception does not apply when a decision turns on the specific facts of the present case. *In re Daniel K.*, 2013 IL App (2d) 111251, ¶ 18.

¶ 25 We find this exception does not apply here because, although the plaintiffs argued that they will be subject to the same action again when the renewal of their FOID cards is due in 2023, they failed to demonstrate a likelihood that it will take longer than 30 days to grant their applications if renewal is sought. The record shows that the percentage of FOID card applications being processed within 30 days improved from 40% in 2008 to 80% in 2009 and to 70% in 2010. The record further reflects that since Jessica Trame began her term as Chief of the Firearms Services Bureau of the Illinois State Police in 2012, she has taken measures to improve the efficiency in processing FOID card applications by hiring more staff, providing additional training for the staff, improving communications with circuit courts, and updating to a new computer system. These noted improvements and measures taken to expedite the application process decrease a likelihood that applications will take longer than 30 days to process in the future.

¶ 26 Moreover, the evidence presented by the plaintiffs regarding the number of applications taking longer than 30 days to process does not establish a reasonable expectation that it will take longer than 30 days to process the plaintiffs' applications for renewal, if they opt to seek the same in 2023. We add that a decision on the plaintiffs' request for orders requiring the defendants to issue them FOID cards would necessarily turn on whether they were qualified to obtain cards in light of the specific facts presented by their applications, thereby making this exception further inapplicable. See *In re Daniel K.*, 2013 IL App (2d) 111251, ¶ 18 (exception does not apply when a decision turns on the specific facts of a case). For these reasons, we find the capable of repetition yet evading review exception to mootness does not apply here.

¶ 27 II. *Merits of Counts I and II*

¶ 28 Assuming, *arguendo*, that counts I and II are not moot, we address the claims on their merits.

¶ 29 A. *Count I*

¶ 30 Count I of the first amended complaint requested the circuit court to enter an order of *mandamus*, enjoining defendant Grau, in his official capacity, from failing to issue or deny a FOID card within 30 days of an application's being received, and ordering Grau to immediately issue all of the plaintiffs valid FOID cards. We find the motion for summary judgment was properly granted on count I because *mandamus* was unavailable for two reasons: (1) the 30-day requirement in section 5 of the Act (430 ILCS 65/5 (West 2012)) is directory, not mandatory; and (2) the plaintiffs failed to exercise the administrative remedy that is available under section 10 of the Act (*id.* § 10).

¶ 31 1. *Directory v. Mandatory*

¶ 32 " '[*M*]*andamus* is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved.' " *People ex rel. Glasgow v. Carlson*, 2016 IL 120544, ¶ 15 (quoting *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 38 (2011)). "This court awards *mandamus* relief only when 'the petitioner establishes a clear right to the relief requested, a clear duty of the public official to act, and clear authority in the public official to comply.' " *Id.* (quoting *Alvarez*, 241 Ill. 2d at 39). *Mandamus* is unavailable "when the act in question involves the exercise of a public officer's discretion." *McFatridge v. Madigan*, 2013 IL 113676, ¶ 17. Moreover, *mandamus* may not be used to direct a public official to exercise his or her

discretion in a particular manner or to reach a particular decision. *Foley v. Godinez*, 2016 IL App (1st) 151814, ¶ 22.

¶ 33 "Under the mandatory or directory question, 'statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision.' " *In re M.I.*, 2013 IL 113776, ¶ 16 (quoting *People v. Delvillar*, 235 Ill. 2d 507, 514 (2009)). "However, in the absence of such legislative intent[,] 'the statute is directory and no particular consequence flows from noncompliance.' " *Id.* (quoting *Delvillar*, 235 Ill. 2d at 515).

¶ 34 " 'With respect to the mandatory/directory dichotomy, we presume that language issuing a procedural command to a government official indicates an intent that the statute is directory.' " *Id.*, ¶ 17 (quoting *Delvillar*, 235 Ill. 2d at 517). "This presumption is overcome under either of two conditions": "[(1)] when there is negative language prohibiting further action in the case of noncompliance[;] or [(2)] when the right the provision is designed to protect would generally be injured under a directory reading." *Delvillar*, 235 Ill. 2d at 517.

¶ 35 Applying these principles to the instant case, summary judgment was proper on the *mandamus* claim in count I because deciding whether to grant or deny a FOID card pursuant to section 5 of the Act (430 ILCS 65/5 (West 2012)) is discretionary in nature. The plaintiffs sought an order of *mandamus* in count I directing the defendants to exercise their discretion in a particular manner by requiring them to issue FOID cards to the plaintiffs. An applicant may obtain a FOID card only after satisfying numerous requirements set forth in section 8 of the Act. See 430 ILCS 65/8 (West 2012). The

nature of those requirements and others relevant to deciding whether to grant a FOID card application is a fact-intensive inquiry, and a final decision will turn on a discretionary consideration of each applicant's qualifications. Accordingly, *mandamus* is unavailable on count I because the plaintiffs were seeking an order directing the defendants to exercise their discretion in a particular way. See *Foley*, 2016 IL App (1st) 151814, ¶ 22. Namely by reaching a particular decision regarding the plaintiffs' qualifications for FOID cards. See *id*.

¶ 36 We add that, to the extent the plaintiffs requested an order of *mandamus* requiring the defendants to grant or deny all future applications within 30 days, they lack standing to pursue such a claim because it is based on the asserted rights of third parties. See *Powell*, 2012 IL 111714, ¶ 36 (parties must assert their own rights rather than those of third parties). Accordingly, summary judgment was proper on counts I for this reason.

¶ 37 Section 5 of the Act is also directory because the Act provides no consequence for failure to comply with the provision. See *In re M.I.*, 2013 IL 113776, ¶ 17. Section 5 of the Act provides that "[t]he Department of State Police shall either approve or deny all applications within 30 days from the date they are received, and every applicant found qualified pursuant to Section 8 of this Act by the Department shall be entitled to a [FOID] [c]ard upon the payment of a $10 fee." 430 ILCS 65/5 (West 2012). There is no provision of any consequence if the applications are not approved or denied within 30 days. Accordingly, *mandamus* is unavailable.

¶ 38 Furthermore, the plaintiffs failed to overcome the presumption that the Act is directory because neither of the conditions have been met to overcome that presumption.

First, there is no negative language in the Act prohibiting further action in the case of noncompliance with the 30-day deadline. See *Delvillar*, 235 Ill. 2d at 517. Second, the right the provision is designed to protect is not injured under a directory reading. See *id*. The defendants argue that "the very right to a FOID card within 30 days is stated in the statute." We disagree. The statute does not give the right of a FOID card within 30 days but provides that a *decision* regarding an applicant's rights based on certain qualifications must be made within 30 days.

¶ 39 The defendants add—citing the second amendment—that "the entire [Act] is a regulation of a fundamental constitutional right," implying that the right to keep and bear arms is what the Act was designed to protect. Again, we disagree. Pursuant to section 1, the express legislative purpose behind the Act is to identify individuals who are not qualified to acquire or possess firearms in order to protect the safety of the public. See 430 ILCS 65/1 (West 2012). This purpose is certainly not injured under a directory reading of the Act. Because the required conditions have not been met in this case, the presumption of a directory reading of the Act has not been overcome. See *Delvillar*, 235 Ill. 2d at 517.

¶ 40 2. *Alternative Remedy*

¶ 41 Besides the Act's being directory in nature, *mandamus* is also unavailable if an alternative adequate remedy is available. See *Cordrey v. Prisoner Review Board*, 2014 IL 117155, ¶ 18. In this case, the plaintiffs were afforded the opportunity to utilize the remedy of appealing to the Director of State Police, as provided in section 10 of the Act

(430 ILCS 65/10 (West 2012)), but did not do so. Accordingly, summary judgment was also proper on the *mandamus* claim in count I for this reason.

¶ 42 B. *Count II*

¶ 43 Like count I, count II of the first amended complaint also requested the circuit court to enter an order of *mandamus*, enjoining defendant Grau, in his official capacity, from failing to issue or deny a FOID card within 30 days of an application's being received, and ordering Grau to immediately issue plaintiff Murphy a valid FOID card. For the same reasons stated in our discussion of count I, *mandamus* is unavailable and summary judgment was properly granted on the same basis in count II.

¶ 44 Count II was brought under section 1983 of the Civil Rights Act of 1871. 42 U.S.C. § 1983 (2012). We initially note that the plaintiffs forfeited any argument of error as to this claim by failing to mention it in their opening brief on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing).

¶ 45 Forfeiture notwithstanding, a claim under section 1983 provides a cause of action only for violations of federal law or the United States Constitution. See *Gonzaga University v. Doe*, 536 U.S. 273, 279 (2002). Neither occurred here. As previously discussed, no constitutional right or violation is at issue here. Accordingly, besides *mandamus* being unavailable, summary judgment was also proper for these reasons regarding the section 1983 claim in count II.

¶ 46 III. *Count III*

¶ 47 Count III of the first amended complaint sought to certify a class of individuals who applied for FOID cards on or after January 23, 2010—but did not receive a decision within 30 days—to pursue a claim for damages against Grau in his individual capacity. In order to satisfy the requirement of section 2-801(2) of the Code of Civil Procedure (735 ILCS 5/2-801(2) (West 2012))—that there be questions of law or fact common to the class—"it must be shown that 'successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members.' " *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 128 (2005) (quoting *Goetz v. Village of Hoffman Estates*, 62 Ill. App. 3d 233, 236 (1978)).

¶ 48 In this case, for the reasons previously discussed, the plaintiffs as purported class representatives have no right of recovery in their individual claims. It follows that there would be no recovery in other class members on the same claims and summary judgment was properly granted on count III.

¶ 49 IV. *Motion to Dismiss*

¶ 50 As a final note, because we are affirming summary judgment for the defendants on all counts, we need not address the arguments posed by the plaintiffs regarding the circuit court's decision in the motion to dismiss on plaintiff Murphy's lack of standing because the claims of the remaining defendants are identical to those of Murphy in all other respects.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, we affirm the September 12, 2016, order of the circuit court of Madison County that granted summary judgment in favor of the defendants.

¶ 53 Affirmed.