COURT OF APPEALS DECISION DATED AND FILED

November 4, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP308

**Cir. Ct. Nos. 2008FO544
2008FO545
2008FO547
2008FO548
2008FO550
2008FO785
2008FO786
2008FO787
2008FO788
2008FO789**

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

COUNTY OF WALWORTH,

PLAINTIFF-APPELLANT,

V.

LAUDERDALE LAKES LAKE MANAGEMENT DISTRICT,

DEFENDANT-RESPONDENT.

COUNTY OF WALWORTH,

PLAINTIFF-APPELLANT,

V.

LAUDERDALE LAKES AQUA SKIERS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Walworth County challenges the authority of the trial court to sua sponte dismiss the County's prosecution of citations before it had formally rested its presentation of evidence. The County argues that it is entitled to present all of its evidence, and the defendants must move for dismissal before the court can dismiss a case during trial. While the issue presented appears to be a question of first impression in Wisconsin, we do not have to address it because the County has failed to properly preserve the question for appeal. Therefore, we affirm.

¶2 What may be more important than the issue the County raises is the issue the County does not raise. The County does not appeal the trial court's determination that the activities that happened on the shores of Lauderdale Lake, which formed the basis for the issuance of the citations, do not constitute a violation of the County's shoreland zoning ordinance. In other words, the County does not have a quarrel with the trial court's conclusion; its only complaint is with how the court reached that conclusion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Starting in 1984, Lauderdale Lakes Aqua Skiers, Inc., presented several water ski shows each summer using the property and piers of the Lauderdale Lakes Lake Management District. In 2006, William Kochlefl, who owns a seasonal residence adjacent to the district's property, started complaining to Walworth County officials about the water ski shows. In 2008, Darrin Schwanke and Nancy Welch, zoning code enforcement officers employed by the County's Land Use and Resource Management Department, attended water ski shows on May 24 and July 5. Shortly after the shows, citations were issued both to the district and the ski club alleging multiple violations of the County's shoreland zoning ordinance, WALWORTH COUNTY, WIS., ORDINANCE ch. 74, art. III (2009), *available at* http://www.municode.com/resources/gateway.asp?pid=12957&sid=49 (follow "Chapter 74 Zoning" hyperlink; then follow "Article III. Shoreland Zoning Ordinance" hyperlink).

¶4 The citations issued to the district included:[2]

> Case No. 08FO544: Date of violation, May 24, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-179, "The defendant allowed Lauderdale Lakes Aqua Skiers, Inc. to perform a water ski show allowing the public to view the show from land zoned C-4 and also in the floodplain."
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> Case No. 08FO545: Date of violation, May 24, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-163, "The

[2] In addition, citations were issued against the district alleging a violation on May 24 and July 5 of WALWORTH COUNTY, WIS., ORDINANCE § 74-203, for failing to provide adequate parking. The County moved to dismiss these citations at the beginning of the trial and they are not part of this appeal.

defendant allowed a water ski show team store/place structures within the shoreyard setback."

Case No. 08FO786: Date of violation, July 5, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-179, "The defendant allowed Lauderdale Lakes Aqua Skiers, Inc. to perform a water ski show allowing the public to view the show from land zoned C-4 and also in the floodplain."

Case No. 08FO787: Date of violation, July 5, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-163, "The defendant allowed a water ski show team to store/place structures within the shoreyard setback."

¶5 The citations issued to the ski club included:

Case No. 08FO547: Date of violation, May 24, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-203, "Failure to provide adequate parking stalls, drives, and area for public assembly business use as required by the parking requirements of the Shoreland Zoning Ordinances relative to location, size, zoning district, etc."

Case No. 08FO548: Date of violation, May 24, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-163, "The defendant stored/placed structures within the shoreyard setback."

Case No. 08FO550: Date of violation, May 24, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-179, "The

> defendant performed a water ski show allowing the public to view the show from land zoned C-4 and also in the floodplain."
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> Case No. 08FO785: Date of violation, July 5, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-179, "The defendant performed a water ski show allowing the public to view the show from land zoned C-4 and also in the floodplain."
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> Case No. 08FO788: Date of violation, July 5, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-163, "The defendant stored/placed structures within the shoreyard setback."
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> Case No. 08FO789: Date of violation, July 5, 2008, violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-203, "Failure to provide adequate parking stalls, drives, and area for public assembly business use as required by the parking requirements of the Shoreland Zoning Ordinances relative to location, size, zoning district, etc."

¶6 Both defendants entered not guilty pleas and requested a court trial. At the trial, the County presented the background testimony of Kochlefl, John Curin, a resident of the area, and Jodi Leahy, the president of the ski club. The County then called Schwanke. Schwanke testified that he attended both ski shows and observed members of the ski club park a white trailer, erect a public address system, and bring in a ski jump ramp, all within seventy-five feet of the lake shore. He testified that all of these items were removed at the conclusion of the show. He also testified that he observed members of the public either stand or sit to watch the show.

¶7 Before redirect examination of Schwanke by the County, the court asked him a series of questions meant to elicit what activities were permitted and were not permitted under the sections of the shoreland zoning code he alleged the defendants had violated. After questioning Schwanke, the court dismissed the citations alleging a violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-179, allowing the public to view a show from land zoned C-4, concluding that the activity of viewing a water ski show was a permitted activity on land zoned C-4. The court also dismissed all of the citations alleging a violation of WALWORTH COUNTY, WIS., ORDINANCE § 74-163, placing a structure within seventy-five feet of the lake shore, concluding that a trailer, PA system and ramp are not structures.

¶8 The County proceeded on the two remaining citations that alleged the ski club failed to provide adequate parking for the public. The County's only witness was Welch. After her examination, the ski club moved to dismiss the citations and the court granted the motion. The County appeals.

¶9 On appeal, the County contends that the trial court erred, as a matter of law, because it did not have statutory or inherent authority to sua sponte dismiss the citations prior to the County completing the presentation of its case and formally resting.

¶10 The ski club contends that the County has failed to preserve this issue for appeal by making an offer of proof or a motion for reconsideration or a motion for relief from the order of dismissal. The ski club argues that the sua sponte dismissal of the citations before the County rested is the functional equivalent of the exclusion of evidence and, under WIS. STAT. § 901.03(1)(b), claimed error cannot be predicated upon a ruling excluding evidence "unless the substance of the excluded evidence was made known to the judge by an offer of

proof." It points to the County attorney's reaction to the dismissal, "I have other witnesses to testify about these things," as proof the sua sponte dismissal excluded evidence. The ski club finally argues that the County failed to make its objections to the sua sponte dismissals known to the trial court either at the time of the dismissals or posttrial in a motion to reopen the judgment.

¶11 We agree with the ski club that the County failed to properly preserve this issue. The County's only response to the court's mid-trial sua sponte dismissal of the petitions was:

> [County's attorney]: Just pretty much, I guess I want to make my objection to dismissal of the other citation known–noted. We didn't finish up our case in chief yet, Judge. I have other witnesses to testify about these things.
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> ….
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> [County's attorney]: I understand. I understand. I just want to make sure that my objections are noted so that if this goes beyond that that it's on the record.

¶12 More is required. The County's attorney failed to pursue this general objection by being more specific in the objection, WIS. STAT. § 901.03(1)(a), or filing a motion for reconsideration, WIS. STAT. § 805.17(3), or filing a motion for a new trial, WIS. STAT. § 805.15. If we were to consider the merits of the County's appeal and reverse the trial court, the only relief we could provide is to remand for a new trial. It is an elementary rule of civil procedure that errors that might be corrected by a new trial must be raised before the trial court in order for those errors to be considered on appeal as a matter of right. ***State v. Monje***, 109 Wis. 2d 138, 151, 325 N.W.2d 695 (1982), *overruled on other grounds by* ***State v. Smith***, 131 Wis. 2d 220, 235-36, 388 N.W.2d 601 (1986).

¶13 There is a very simple reason we require a party complaining of error to first seek relief in the trial court—it gives the court and the adversary an opportunity to deal with the claimed error. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593-94, 218 N.W.2d 129 (1974). In this case, a specific objection or posttrial motion setting forth the County's argument with supporting case law would have given the opposing parties an opportunity to rebut the argument and the trial court the opportunity to carefully weigh both sides' arguments and decide whether it had the authority to dismiss the citations mid-trial. Further, we would have benefited from the opinion of the learned trial court on the question of whether a trial court has the authority to sua sponte dismiss a party's action. *See* ***Heldt v. Nicholson Mfg. Co.***, 72 Wis. 2d 110, 115, 240 N.W.2d 154 (1976). We will not blindside the trial court with a reversal based on an issue which it did not have the opportunity to address. *See* ***Gibson v. Overnite Transp. Co.***, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388 (citation omitted).

¶14 Further, if the issue had been properly preserved, we would not address the issue because, assuming for the sake of argument a trial court does not have authority to sua sponte dismiss an action before the plaintiff rests, any error in this case is harmless error. An error in exercising a trial court's authority does not mandate a new trial unless "the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (emphasis removed) (quoting WIS. STAT. § 805.18(2)).

> For an error to "affect the substantial rights" of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to "undermine confidence in the outcome." If the error at issue is not sufficient to

> undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless.

Evelyn C.R., 246 Wis. 2d 1, ¶28 (citations omitted).

¶15 In this case, the County has failed to establish a reasonable possibility the error contributed to the outcome of the trial. By not making an offer of proof in the trial court, the County has left the trial court and us in the dark about additional witnesses it had planned to call and the nature of their testimony. The trial court found that the activities Schwanke and Welch observed did not constitute a violation of the Shoreland Zoning Ordinance. Not only has the County failed to make an offer of proof that it has evidence calling that legal conclusion into doubt, it has acquiesced to that legal conclusion by not challenging it on appeal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.