COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-3145

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

TEE & BEE, INC.,

PLAINTIFF-APPELLANT,

V.

CITY OF WEST ALLIS,

DEFENDANT-
RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. This appeal presents a portion of the legal battle between the City of West Allis and Tee & Bee, Inc., the owner and operator of a retail business known as Super Video & Variety. Tee & Bee brought an action to declare whether its business was an "adult-oriented establishment" subject to

regulation under pertinent provisions of West Allis's municipal code. Tee & Bee appeals from the trial court order denying its motion for summary judgment and granting the City of West Allis's motion to dismiss. Tee & Bee argues that the court erred in concluding that its action did not present a justiciable controversy ripe for a declaratory judgment. Tee & Bee also argues that the court erred in failing to consider and grant its motion to amend its pleadings. We affirm.

¶2 Our review of a trial court's grant or denial of summary judgment is *de novo*. *See* ***Grosskopf Oil, Inc. v. Winter***, 156 Wis. 2d 575, 581, 457 N.W.2d 514 (Ct. App. 1990). While we owe no deference to the trial court's summary judgment decision, we do value the trial court's analysis. *See* ***Halverson v. River Falls Youth Hockey Ass'n***, 226 Wis. 2d 105, 110, 593 N.W.2d 895 (Ct. App. 1999).

¶3 We have examined the record, the briefs on appeal, and the trial court's memorandum decision. We are satisfied that the trial court decision accurately sets forth the factual background and the law and adequately expresses our view of the primary issue on appeal. Therefore, we attach and incorporate the circuit court decision and affirm, in substantial part, on the basis of that opinion. *See* WIS. CT. APP. IOP VI(5)(a) (October 1, 1999) ("When the trial court's decision was based upon a written opinion … that adequately express[es] the panel's view of the law, the panel may incorporate the trial court's opinion … and affirm on the basis of that opinion.").[1]

[1] We note that the trial court opinion, in addition to emphasizing the changes Tee & Bee could make to its store, also offers a passing reference to the City's ability to "alter the facts by amending the ordinance." On appeal, the City asserts that its ability to amend the ordinance "was clearly not the basis of the court's ruling," and the City does not rely on that rationale. We agree. The trial court did not anchor its decision in that rationale, and we do not rely on the portion of the trial court decision discussing the potential for amendment of the ordinance.

¶4 Tee & Bee argues that the trial court "abused its discretion by not considering Tee & Bee's motion to add the 'display space' constitutional claim on the merits." Tee & Bee had sought to amend its complaint in order to challenge, as unconstitutionally vague, the municipal code's usage of the term "display space." *See* WEST ALLIS REV. MUN. CODE § 9.28(1)(s) (1992).[2] A footnote to the trial court's memorandum decision states: "On August 3, 1998, plaintiff filed a motion to amend their [sic] complaint. Because this court has granted defendant's motion to dismiss, this court will not address the merits of plaintiff's motion."

¶5 Tee & Bee reads this footnote as "clearly indicating that [the trial court's] decision on justiciability applied to the amended complaint as well." The City agrees that Tee & Bee "may well be right or the trial court may have denied [Tee & Bee's] motion without so stating." Thus, although Tee & Bee asserts that the trial court erred by not "considering" its motion to amend the pleadings, Tee & Bee actually seems to be arguing that while the court may have considered the motion, it erred in deciding the motion and in failing to explain the basis for its decision.

¶6 A motion to amend the pleadings is addressed to the sound discretion of the trial court. *See* ***Wiegel v. Sentry Indem. Co.***, 94 Wis. 2d 172, 184, 287 N.W.2d 796 (1980); *see also* WIS. STAT. § 802.09(1) (1997-98).[3] Where a trial court fails to explain the basis for its discretionary decision, an appellate

[2] All references to West Allis's municipal code are to the 1992 version. The code's definition of "[a]dult-oriented establishment" includes "adult bookstores," *see* WEST ALLIS REV. MUN. CODE § 9.28(1)(a), and the definition of "[a]dult bookstore" contains the word "substantial," *see* § 9.28(1)(b). The code goes on, in pertinent part, to define "[s]ubstantial" as "fifty percent (50%) or more of a business' … display space," *see* § 9.28(1)(s), but fails to provide a definition of "display space."

[3] All references to the Wisconsin Statutes are to the 1997-98 version.

court may independently review the record and affirm the trial court's decision if it is supported by a preponderance of evidence in the record. *See* ***Cameron v. Cameron***, 209 Wis. 2d 88, 99, 562 N.W.2d 126 (1997). We have reviewed the record and found two bases on which the trial court could have reasonably exercised discretion in denying Tee & Bee's motion to amend the pleadings.

¶7 First, as the City points out, Tee & Bee filed its motion to amend the pleadings long after the filing deadline. Originally, the trial court's scheduling order set August 25, 1995, as the deadline for amending the pleadings. Following reassignment of the case to a different branch of the circuit court, the successor court changed the deadline to June 30, 1997. Tee & Bee filed its motion to amend the pleadings by letter dated July 31, 1998, more than one year beyond the deadline. A trial court may deny a party's motion to amend its pleadings for failure to comply with a scheduling order. *See* WIS. STAT. § 805.03;[4] *see also* ***Buchanan v. General Cas. Co.***, 191 Wis. 2d 1, 8-9, 528 N.W.2d 457 (Ct. App. 1995) (trial court may dismiss claim for failure to comply with scheduling order).

[4] WIS. STAT. § 805.03, provides:

> **Failure to prosecute or comply with procedure statutes.** For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a) [relating to failure to comply with discovery order]. Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07 [relating to relief from judgment or order]. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

¶8 Here, the court could have reasonably exercised discretion to deny the motion to amend the pleadings. The motion was filed long after the deadline, in violation of the scheduling order. Moreover, as the City explains, Tee & Bee's motion was filed after dispositive motions on the merits had been filed, briefed, and argued.

¶9 Second, *as Tee & Bee concedes*, the trial court actually considered and addressed what Tee & Bee now maintains should have been decided had it been able to amend the pleadings. In its reply brief to this court, Tee & Bee writes:

> The amended complaint added the claim that the "display space" measure of adult business is unconstitutionally vague, and an express prayer for declaratory relief requesting that the court render particular definitions or parameters of the various ambiguous terms used to define "adult bookstore." As discussed in the previous section [of the reply brief addressing the justiciable controversy issue], *these issues were already before the court in the original complaint which required the construction of these provisions of the ordinance*.

(Record references omitted; emphasis added.) Tee & Bee's concession is correct. Its original complaint addressed the applicability of the ordinance, including the "display space" terminology. Thus, given the rationale underlying the trial court's decision, whether Tee & Bee would have amended its complaint proved to be of no consequence. Accordingly, on this basis as well, we conclude that the trial court could have reasonably exercised discretion in denying Tee & Bee's motion to amend the pleadings.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

COURT OF APPEALS
OF WISCONSIN
ROOM 215, 110 E. MAIN STREET
POST OFFICE BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE: (608) 266-1880
FAX: (608) 267-0640

Cornelia G. Clark, Acting Clerk
Court of Appeals