COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-0230
02-0231
02-0232
02-0233

Cir. Ct. Nos. 00-CV-645
00-CV-646
00-CV-647
00-CV-648

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

TOWN OF EAST TROY,
A MUNICIPAL CORPORATION,

PLAINTIFF-RESPONDENT,

V.

VILLAGE OF MUKWONAGO,
A MUNICIPAL CORPORATION,

DEFENDANT-RESPONDENT,

V.

LINDEN PROPERTIES, LLC,

APPELLANT.

APPEAL from an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 ANDERSON, J. This case involves a motion to intervene. Claiming that the trial court committed reversible error, Linden Properties, LLC, (Linden) appeals an order denying its motion to intervene in the Town of East Troy's (Town) challenge to the legality of the Village of Mukwonago's (Village) annexation of four parcels of land. The trial court did not err in its decision to deny Linden's motion to intervene; therefore, we affirm.

Facts

¶2 On May 12, 2000, Linden, along with other property owners, petitioned the Village board to annex their properties from the Town. On June 20, 2000, in response to the landowners' petition, the Village passed ordinances annexing the four parcels of land. On September 13, 2000, the Town filed four separate actions against the Village challenging the annexation. The four cases were scheduled for joint trial. On September 18, 2001, Linden filed a motion to intervene and submitted an answer denying the Town's assertions. On October 22, 2001, the trial court denied Linden's motion to intervene, finding: "There are two parties that have been involved in the onset, going back to September of 2000. They've participated fully. They've got matters all set up. They're proceeding." Linden filed this appeal in all four actions because its motion to intervene relates to whether it has a right to participate at the trial of the jointly scheduled cases. We consolidated the four actions for purposes of appeal.

Law

¶3 In ***City of Madison v. WERC***, 2000 WI 39, ¶11, 234 Wis. 2d 550, 610 N.W.2d 94, our supreme court summarized Wisconsin law on intervention.

There are two types of intervention: intervention "as a matter of right" or "permissive" intervention. The decision under either type of intervention determination is a discretionary decision because the trial court must weigh the evidence on the relevant factors. ***Id.*** at ¶11 n.10. WISCONSIN STAT. § 803.09(1) (1999-2000)[1] relates to intervention as a matter of right. To intervene as a matter of right, a movant must meet four requirements:

> 1) the motion to intervene must be timely; 2) the movant must claim an interest in the subject of the action; 3) "the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest;" and 4) the existing parties do not adequately represent the movant's interest.

City of Madison, 2000 WI 39 at ¶11 (citation and footnotes omitted). Section 803.09(2) relates to permissive intervention. While intervention as a matter of right requires a person to be necessary to the adjudication of the action, permissive intervention requires a person to be merely a proper party. ***City of Madison***, 2000 WI 39 at ¶11 n.11. Thus, it is entirely within the trial court's discretion to decide whether a party may permissively intervene. ***Id.*** Specifically, § 803.09(2) states:

> *Upon timely motion* anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common…. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. (Emphasis added.)

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

Discussion

¶4 We begin by disposing of Linden's argument that it is a necessary party pursuant to the joinder statute, WIS. STAT. § 803.03. Linden did not raise its joinder argument before the trial court. On appeal, we will not consider for the first time an issue not raised or considered by the trial court. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶5 That determined, we move to our discussion of whether Linden had the right to intervene under WIS. STAT. § 803.09(1) or if the trial court erroneously exercised its discretion in denying permissive intervention under § 803.09(2). Linden first raised the intervention as a "matter of right" argument in its January 18, 2002 motion for reconsideration. Linden's motion for reconsideration was filed more than twenty days after entry of the trial court's November 2, 2001 judgment denying Linden's motion for intervention. Thus, Linden's motion for reconsideration was untimely under WIS. STAT. § 805.17(3), which governs motions for reconsideration and provides in relevant part:

> Upon its own motion or the motion of a party made *not later than 20 days after entry of judgment*, the court may amend … the judgment accordingly. (Emphasis added.)

Because Linden raised the issue of intervention as a matter of right for the first time in an untimely motion for reconsideration, we will not consider the merits of Linden's claim on appeal that it, as a matter of right, should have been able to

intervene. The trial court acted properly in choosing not to hear Linden's untimely motion.[2]

¶6 Finally, we address whether the trial court erroneously exercised its discretion in denying permissive intervention under WIS. STAT. § 803.09(2). When we review a discretionary determination, we examine the record to determine if the trial court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. ***Brandon Apparel Group, Inc. v. Pearson Props. Ltd.***, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544. We will affirm the trial court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). The trial court stated numerous times that the motion to intervene was brought at a late date in the proceedings. The court determined that the proposed intervenors "sat on their rights," specifically noting that the motion to intervene was brought a year after the original matter had been pending, that a scheduling order was in place, and that a trial date had already been set. The court also pointed to the potential for delay in adjudication which customarily results when parties are added late in the proceedings.

¶7 This record demonstrates that timeliness, or lack thereof, served as a significant basis for the trial court's decision. The question of timeliness of a

[2] Linden asserts that the time provisions of WIS. STAT. § 805.17(3) do not apply to it because it is not "a party." We disagree. If a party seeking intervention were not bound by § 805.17(3), it could use that to its tactical advantage—for example, after being denied intervention it could wait until a significant event that adversely impacted it and then file a motion to reconsider. For the purposes of the motion to intervene, Linden is a party and is bound by the time limits of the statute.

motion to intervene is left to the sound discretion of the trial court. ***City of Madison***, 2000 WI 39 at ¶11 n.10. Further, when determining whether permissive intervention is appropriate, the requirement concerning undue prejudice is to be determined by the court in an exercise of its discretion. ***Id.*** Here, the trial court specifically noted the prejudice and difficulty in allowing the untimely intervention of individual property owners because it would significantly delay trial. It was appropriate for the court to consider the impact intervention would have on the original parties. ***State ex rel. Bilder v. Township of Delavan***, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983).

¶8 Our examination of the record leads to our determination that the trial court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. *See* ***Brandon Apparel***, 2001 WI App 205 at ¶10. The trial court did not err in denying Linden's motion to intervene in the Town's challenge to the legality of the Village's annexation of the four parcels of land.[3]

[3] We add that Linden is not without remedy if the Town and the Village enter into a cooperative boundary agreement. WISCONSIN STAT. § 66.0307 provides a detailed scheme for such agreements; under § 66.0307(4)(e) an advisory referendum can be forced and under § 66.0307(5)(b) *any person* can demand a public hearing before the Department of Administration.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.