COURT OF APPEALS
DECISION
DATED AND RELEASED

June 18, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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

No. 96-2888

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

WAUKESHA COUNTY,

PETITIONER-APPELLANT,

v.

MICHAEL SERWIN AND JUDITH SERWIN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: ROGER MURPHY, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Waukesha County appeals from an order modifying a summary judgment determination that Michael and Judith Serwin violated Waukesha County's zoning ordinance from November 1990 through December 16, 1994. The County argues that there can be no reconsideration of a summary judgment, that no grounds under § 806.07, STATS., supported

reconsideration, and that the circuit court erred in modifying the judgment based on the Serwins' estoppel defense. We conclude that the circuit court erroneously exercised its discretion in reconsidering the summary judgment and that the County is not estopped from seeking a penalty for the entire period. We reverse the order and remand for a determination of the amount of the daily forfeiture.

The Serwins own property on Okauchee Lake which is subject to the Waukesha County Shoreland and Floodland Protection Ordinance. It is undisputed that the Serwins' property includes a two-story boathouse and that in November 1990, the Serwins enclosed the second story with glass in violation of the zoning ordinance. After placing the glass on the boathouse, on several occasions the Serwins sought a variance from the Waukesha County Board of Appeals. The variance was denied and the Serwins were ordered to remove the glass enclosure. The Serwins removed the glass on December 16, 1994.

The County commenced this action to collect a forfeiture for each day the Serwins violated the zoning ordinance by the glass enclosure. Upon concluding that there was no issue of fact that the ordinance was violated, the circuit court granted the County's motion for summary judgment. An order for summary judgment was entered concluding that the violation was "from the period of November 15, 1990 and continuously through December 16, 1994." An additional hearing was scheduled to determine the appropriate level of forfeitures to be imposed for the violations.

The Serwins moved the circuit court for an order modifying the summary judgment by either reconsidering or modifying the dates of the alleged violations. The circuit court modified its earlier order by deleting reference to the period of violations. After taking testimony, the circuit court found that because

the Serwins had been pursuing various remedies and negotiations with the County from November 15, 1990, through October 26, 1994, and because the Serwins had been led to believe that forfeitures would not be sought during that time, the period of violation was November 15, 1994, through December 16, 1994. A forfeiture of $25 per day was imposed for that thirty-one day period. The County appeals.

The County argues that there is no authority for the circuit court to reconsider its summary judgment. While § 805.17(3), STATS.,[1] does not apply in summary judgment proceedings, *see* ***Continental Casualty Co. v. Milwaukee Metropolitan Sewerage Dist.***, 175 Wis.2d 527, 533-34, 499 N.W.2d 282, 284 (Ct. App. 1993), that only means that the time for appeal is not modified when a motion for reconsideration of a summary judgment is filed. The holding in ***Continental Casualty*** does not preclude a party from bringing a motion for reconsideration under the summary judgment statute, § 802.08, STATS. *See* ***Continental Casualty***, 175 Wis.2d at 535 n.2, 499 N.W.2d at 285.

Indeed, motions for reconsideration have become part of our common law and permit a circuit court to correct an erroneous ruling. *See* ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 294-95, 491 N.W.2d 119, 124 (Ct. App. 1992). To this end the circuit court is not necessarily constrained to find that grounds for relief from judgment exist under § 806.07, STATS. *See*

[1] Section 805.17(3), STATS., provides in part:

> RECONSIDERATION MOTIONS. Upon its own motion or the motion of a party made not later than 20 days after entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly.

Fritsche, 171 Wis.2d at 295, 491 N.W.2d at 124. Entertaining a motion for reconsideration of summary judgment is therefore a matter committed to the circuit court's discretion. *See* ***Envirologix Corp. v. City of Waukesha,*** 192 Wis.2d 277, 287, 531 N.W.2d 357, 362 (Ct. App. 1995) (suggesting that the circuit court's decision to substantively reconsider summary judgment is subject to a claim that discretion was misused).

In determining whether the circuit court properly exercised its discretion to reconsider, we consider the purpose of motions for reconsideration.

> Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment .... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987) (quoting ***Keene Corp. v. International Fidelity Ins. Co.,*** 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd,* 736 F.2d 388 (7th Cir. 1984)).

We conclude that the circuit court erroneously exercised its discretion in reconsidering its summary judgment. The Serwins' motion for reconsideration was not based on newly discovered evidence. The exhibits presented at the reconsideration hearing included letters which, except one, were attached to Michael Serwin's affidavit in opposition to the motion for summary

judgment.[2] A variance application and a prior circuit court judgment affirming the denial of the variance were also exhibits at the hearing. These documents did nothing more than confirm undisputed facts concerning the procedural history of the dispute. The Serwins' "proof" at the hearing was nothing more than an expansion of their estoppel argument presented and rejected on summary judgment.[3]

Reconsideration was not necessary either to correct a manifest error of law or fact. Upon reconsideration the circuit court questioned whether the written order comported with its recitation at the summary judgment hearing of the undisputed facts. It was regrettable that a transcript of the summary judgment hearing was not available for the circuit court's review.[4] The transcript reflects the circuit court's conclusion that the glass enclosure had been in place for four years.[5] Thus, the provision in the summary judgment order which stated that the Serwins

[2] An August 13, 1993 letter from the Waukesha county zoning administrator to the Serwins was admitted at the hearing. That letter was attached to the County's affidavit in support of summary judgment.

[3] The Serwins contend that the summary judgment was not final because the circuit court stated that an additional hearing would be scheduled to determine "the dates as alleged that the violations occurred and for the Court to determine whether the defendants were somehow strung along by the board." However, the circuit court went on and stated that the Serwins' claim of governmental estoppel was rejected. The Serwins' estoppel claim was litigated and rejected upon the County's motion for summary judgment. It is not determinative whether the summary judgment was final or nonfinal.

[4] The circuit court noted that the court reporter for the summary judgment hearing had moved and could not be reached for timely completion of the transcript.

[5] The County sought clarification of the undisputed dates that the glass was installed and removed so as to eliminate the need for a further hearing on that issue. In response, the circuit court indicated that the glass was installed in November 1990 and removed on December 16, 1994.

had violated the zoning ordinance from the period of November 15, 1990, and continuously through December 16, 1994, reflected the circuit court's oral ruling.[6]

Moreover, the circuit court correctly ruled on summary judgment that the County was not estopped from seeking forfeitures for the entire period of the Serwins' noncompliance. Estoppel cannot be used to prevent a government entity from enforcing an ordinance enacted under its police power, as is the zoning ordinance here. *See* ***City of Milwaukee v. Leavitt,*** 31 Wis.2d 72, 76, 142 N.W.2d 167, 171 (1966). Even if the Serwins were told by the County zoning administrator that they would not be subjected to fines so long as they were attempting to rectify the problem,[7] estoppel would not lie. *See* ***id.*** at 77, 142 N.W.2d at 172 (a municipality is not estopped by mistaken conduct of a public official). Reconsideration of the summary judgment to permit the Serwins' estoppel defense was an erroneous exercise of discretion. The order amending the summary judgment order is reversed.

It is undisputed here that the glass was in place at the boathouse from November 15, 1990, to December 16, 1994. The ordinance defines each day as a violation. The circuit court could not determine the violation for any lesser period. *See* ***Village of Sister Bay v. Hockers,*** 106 Wis.2d 474, 479, 317 N.W.2d 505, 507-08 (Ct. App. 1982). The only thing that remains to be determined is the amount of the forfeiture for each day of the four-year period. The range of forfeiture is not less than $10 nor more than $200 for each day. *See* WAUKESHA

[6] The order for summary judgment was submitted for the circuit court's approval. No objection was made to its wording prior to its entry.

[7] It was disputed whether the zoning administrator told the Serwins that fines would not be imposed while applications for variances were pending. Neither party addresses the circuit court's resolution of this disputed fact in light of the Serwins' demand for a jury trial.

COUNTY SHORELAND AND FLOODLAND PROTECTION ORDINANCE, § 20.03(1). The circuit court may not impose less than the minimum forfeiture. *See* ***Village of Sister Bay,*** 106 Wis.2d at 479, 317 N.W.2d at 507. It shall determine the appropriate forfeiture on remand.

By the Court.—Order reversed and cause remanded.

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