**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

October 7, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**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* § 808.10 and RULE 809.62, STATS.**

**No. 97-2811**

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

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**INTERLAKEN SERVICE CORPORATION, A WISCONSIN CORPORATION,**

**PLAINTIFF-RESPONDENT,**

**V.**

**INTERLAKEN CONDOMINIUM ASSOCIATION, INC., A NON-STOCK DISSOLVED WISCONSIN CORPORATION, INTERLAKEN CONDOMINIUM ASSOCIATION, AN UNINCORPORATED CONDOMINIUM ASSOCIATION, AND INTERLAKEN CONDOMINIUM ASSOCIATION, INC., A WISCONSIN CORPORATION,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

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

NETTESHEIM, J. Over twenty years ago, the parties to this action, Interlaken Condominium Association, Inc. (Association) and Interlaken Service Corporation (Service Corporation), entered into an agreement by which the Service Corporation would provide certain services necessary to maintain the Association's condominium complex. In 1995, the Association stopped making payments to the Service Corporation under the agreement. The Service Corporation commenced this breach of contract action to recover past due service fees owed to it under the agreement. The trial court struck certain of the Association's affirmative defenses and all of its counterclaims. In addition, the court limited the time period covered by the Association's setoff claim. Thereafter, the trial court entered summary judgment in favor of the Service Corporation. The Association challenges these rulings on appeal.[1] We affirm.

## FACTS

The facts and procedural history underlying this appeal are lengthy. The Association consists of 286 separate condominium units located in Walworth county. The condominiums were developed by the Service Corporation's predecessor in interest, Anvan Company, an Illinois general partnership. On March 1, 1977, the Association's predecessor, Interlaken Condominium Association No. 1, entered into a written agreement (hereinafter, Service Agreement) with Anvan. The agreement obligated Anvan to provide the Association with maintenance and utility services, including the collection and treatment of sewage waste. Because the condominiums are land locked within the

[1] By petition for leave to appeal, the Association also appealed the trial court's dismissal of its slander of title counterclaim. We previously granted the Association's petition. *See* § 808.03(2), STATS. Our decision affirming the trial court's dismissal is set forth in a separate opinion released this same day. *See* ***Interlaken Serv. Corp. v. Interlaken Condominium Ass'n***, Inc., No. 97-1107 (Wis. Ct. App. Oct. 7, 1998).

Interlaken Resort Complex which was owned by Anvan, the Service Agreement additionally provided for easements allowing ingress and egress over the resort grounds. In exchange, Interlaken Condominium Association No. 1 agreed to pay Anvan a monthly base price which would be adjusted biannually in accordance with a formula set forth in the Service Agreement.

In January 1978, Anvan and the Association entered into the first of three amendments to the Service Agreement. This first amendment identified the Association as the successor to Interlaken Condominium Association No. 1. The amendment additionally provided that the Association agreed to purchase all services included in the Service Agreement from Anvan on the same terms and conditions set forth in the original agreement.

In April 1979, Anvan and the Association entered into the second amendment to the Service Agreement. This second amendment provided that the base price and monthly fees as set forth in the Service Agreement would be increased on a pro rata, per-unit basis.

On September 23, 1991, the Association and the Service Corporation entered into the third amendment.[2] This amendment recited Anvan's assignment of its right and title to and interest in the Service Agreement to the Service Corporation. It additionally set forth the Service Corporation's obligations in transferring the treatment of the condominium complex's sewage from the Service Corporation to the Walworth County Metropolitan Sewerage District. This amendment also set out the terms and cost adjustments in the Association's base price as a result of this change.

[2] The third amendment is incorrectly titled "Second Amendment to Service Agreement."

The original agreement together with the 1978, 1979 and 1991 amendments comprise the parties' current Service Agreement. The Service Corporation and its predecessor Anvan have provided the Association with services under this agreement for approximately twenty years.

On April 28, 1995, the Association sent the Service Corporation a letter canceling and repudiating the Service Agreement. The Association additionally filed a declaratory action in the Walworth County Circuit Court seeking to invalidate the Service Agreement. The Association argued that the Service Agreement had been canceled pursuant to §§ 703.35 and 703.38(8), STATS.[3] The trial court dismissed this action for failure to state a claim. The Association appealed. We affirmed the trial court's dismissal. *See* ***Interlaken Condominium Ass'n, Inc. v. Interlaken Serv. Corp.***, No. 96-0828-FT, unpublished slip op. (Wis. Ct. App. July 31, 1996) (***Interlaken I***).

Following ***Interlaken I***, the Association refused to make the full payments called for under the Service Agreement. On April 2, 1996, the Service

[3] Section 703.35, STATS., provides:

> If entered into before the officers elected by the unit owners under s. 703.10 take office, any management contract, employment contract, lease of recreational or parking areas or facilities, any contract, or lease to which a declarant or any person affiliated with the declarant is a party and any contract or lease which is not bona fide or which was not commercially reasonable to unit owners when entered into under the circumstances then prevailing, may be terminated by the association or its executive board at any time without penalty upon not less than 90 days' notice to the other party thereto. This section does not apply to any lease the termination of which would terminate the condominium.

Section 703.38(8), STATS., speaks to the applicability of § 703.35, stating that it is "applicable only to leases or management and similar contracts executed after August 1, 1978."

Corporation filed this action against the Association alleging breach of contract. The Service Corporation sought to collect past due fees and costs in the amount of $189,960.48. In addition, the Service Corporation sought a lien against the condominium units pursuant to § 703.25, STATS.[4] Thereafter, the Association made a series of payments to the Service Corporation.[5] As of the filing of the Service Corporation's first amended complaint on December 20, 1996, the Association was in arrears in the amount of $135,390.10.[6]

In response to the Service Corporation's amended complaint, the Association raised the following affirmative defenses: (1) the Association was entitled to a setoff for services which were not provided by the Service Corporation, (2) the Service Agreement had become unconscionable, (3) the Service Corporation failed to provide consideration for the agreement, and (4) certain condominium owners did not receive full disclosure regarding the terms of the Service Agreement and amendments. The Association additionally raised counterclaims alleging unconscionability and slander of title pursuant to § 706.13, STATS.

On January 29, 1997, the Service Corporation filed a motion to dismiss the Association's counterclaims and an amended motion to strike the Association's affirmative defenses. The trial court denied the Service

[4] In conjunction with its lien request, the Service Corporation filed a lis pendens. This filing prompted the Association's slander of title counterclaim.

[5] The Association paid the Service Corporation $29,325.15 on May 8, 1996. On June 25, 1996, the Service Corporation sent the Association an invoice stating an amount due of $246,203.84. Thereafter, the Association made payments to the Service Corporation on July 1, July 3 and July 5 in the amounts of $99,486.28, $50,000 and $49,486.28 respectively.

[6] The Service Corporation's amended complaint provided additional information regarding the amount due under the Service Agreement.

Corporation's motion to dismiss the Association's affirmative defense seeking a setoff. However, the court limited the time period during which setoffs could be claimed from January 1, 1995 to March 31, 1997, the date of the court's ruling. The court granted the balance of the Service Corporation's motion to strike the Association's remaining affirmative defenses and its counterclaims on a variety of alternative grounds. The court ruled that the Association's affirmative defenses and counterclaims of unconscionability, failure of consideration and failure to disclose condominium documents were barred on the basis of claim preclusion by ***Interlaken I***. The court also ruled that these allegations failed to state a claim or an affirmative defense.[7]

These rulings narrowed the issue in the case to the Service Corporation's complaint for monies allegedly due on the contract and the Association's setoff claim as limited by the trial court's previous order. On June 2, 1997, the Service Corporation filed a motion for summary judgment. In support, the Service Corporation filed affidavits from Elizabeth A. Dunning, its chief accounting officer, detailing the invoices for the services rendered and attesting to their accuracy. The Service Corporation also submitted the affidavits of James H. Gavin and Phil S. Johnston, two employees responsible for providing the services under the Service Agreement.

On July 11, 1997, the Association filed a brief in opposition to the Service Corporation's motion and an affidavit by William Sanders, the business manager for the Association. In relevant part, Sanders' affidavit stated that the

[7] As to the Association's slander of title claim, the trial court ruled that the Service Corporation's filing of the lis pendens was both privileged and required by statute. As previously noted, we have affirmed that ruling in a separate opinion. *See supra* note 1.

Service Corporation had: (1) failed to open the pool for substantial portions of 1996 and 1997; (2) failed to provide pool supervision during 1995, 1996 and 1997; (3) failed to provide maintenance, upgrade and repair to certain portions of the Association's property; and (4) improperly assessed 18% interest charges against all amounts due whereas interest was to be charged only as to outstanding sewer charges. In response, the Service Corporation argued that its summary judgment evidence demonstrated that it had substantially performed under the agreement. Alternatively, the Service Corporation argued it had the legal right to suspend performance of any services in light of the Association's repudiation of the contract on April 28, 1995.

Following a hearing on the summary judgment motion, the trial court granted the Service Corporation's motion. The trial court determined that the Service Agreement unambiguously set forth the contract price which the Association was obligated to pay and that the invoices were properly calculated with the exception of the 18% interest charge for unpaid amounts. The court calculated the Service Corporation's damages under the correct calculation for interest.[8] The trial court additionally found that the Association had repudiated the Service Agreement. Based on the Association's repudiation, the court determined that the Service Corporation was "legally entitled to suspend performance of services." However, the court found that the Service Corporation had nonetheless "substantially performed its duties under the Service Agreement."

Finally, the trial court concluded that "[t]he Association did not submit any evidence sufficient to indicate that any genuine issues of disputed

[8] Neither party challenges the trial court's calculation or that the court "litigated" this dispute at summary judgment.

material fact exist for trial." The court based this ruling on its determination that Sanders' affidavit was conclusionary. The court entered judgment in favor of the Service Corporation on August 5, 1997, in the amount of $185,674.83. The Association appeals.

## DISCUSSION

*Claim Preclusion*

We first address the Association's challenge to the trial court's dismissal of its affirmative defenses of unconscionability and failure of consideration on the basis of claim preclusion. The Association contends that the trial court's order is contrary to our supreme court's holding in ***Barbian v. Lindner Bros. Trucking Co.***, 106 Wis.2d 291, 316 N.W.2d 371 (1982). We agree.

The trial court's claim preclusion ruling was based on the Association's earlier declaratory action against the Service Corporation. In that action, the Association raised two claims against the Service Corporation: (1) the Service Agreement could be canceled pursuant to § 703.35, STATS., with a ninety-day notice; and (2) inconsistencies between the Declaration of Condominium and the Service Agreement and its amendments resulted in excess payments to the Service Corporation. The Association requested declaratory relief as to both claims pursuant to § 806.04, STATS. The trial court denied the Association's request and that decision was affirmed by this court in ***Interlaken I***.

Whether claim preclusion applies to the issues in this case is a question of law which we review de novo. *See* ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983).

The general law of issue preclusion holds that a final judgment between the parties is conclusive for all subsequent actions between those same parties as to all matters which were, or which could have been, litigated in the proceeding from which the judgment arose. *See* ***Dane County v. Dane County Union Local 65***, 210 Wis.2d 267, 277-78, 565 N.W.2d 540, 545 (Ct. App. 1997). However, ***Barbian*** holds, "[A] declaratory judgment is only binding as to matters which were actually decided therein and *is not binding to matters which 'might have been litigated' in the proceeding.*" ***Barbian***, 106 Wis.2d at 297, 316 N.W.2d at 375 (emphasis added). Thus, issue preclusion is narrower where the prior action was one for declaratory relief. The Association relies on this law in support of its argument that the prior declaratory action did not preclude its claims in this case.

The Service Corporation argues that the Association's claims are precluded because the Association is seeking the same relief in this case which was denied in ***Interlaken I***—the invalidation or modification of the Service Agreement. Nevertheless, it remains that the prior declaratory action was decided, both in the trial court and in the court of appeals, on the limited basis of whether §§ 703.35 and 703.38, STATS., served to cancel the Service Agreement. The Association has not renewed that claim in this case. Assuming that the Association could have asserted the claims it raises in this case in the prior action, the fact remains that it did not do so. Since the prior action was one for

declaratory relief, ***Barbian*** permits the Association to raise its additional claims in this case.[9]

The Service Corporation further attempts to distinguish ***Barbian***, arguing that in ***Interlaken I*** the trial court dismissed the Association's declaratory action for failure to state a claim whereas in ***Barbian*** the declaratory judgment actually declared the rights of the parties. We reject this argument. We first note that in ***Barbian*** the request for declaratory relief, like the Association's in ***Interlaken I***, was dismissed on the merits. *See* ***Barbian***, 106 Wis.2d at 297, 316 N.W.2d at 375. Second, and more importantly, ***Interlaken I*** produced a judicial declaration that §§ 703.35 and 703.38, STATS., did not bar the Service Corporation from enforcing the Service Agreement. Correspondingly, that declaration pronounced the Association's obligation to honor the agreement. Thus, the parties' rights and obligations were declared even though the action was dismissed for failure to state a claim.[10] The Service Corporation's attempts to distinguish ***Barbian*** fail.

[9] The facts and history of this case might question the wisdom of ***Barbian v. Lindner Bros. Trucking Co.***, 106 Wis.2d 291, 316N.W.2d 371 (1982). However, we are required to follow the rulings of our supreme court. *See* ***State ex rel. McCaffrey v. Shanks***, 124 Wis.2d 216, 221, 369 N.W.2d 743, 747 (Ct. App. 1985).

[10] Based on this logic, we reject the Service Corporation's related argument that this case is more akin to ***Juneau Square Corp. v. First Wisconsin National Bank***, 122 Wis.2d 673, 364 N.W.2d 164 (Ct. App. 1985). Although that case involved a dismissal of the first action followed by a dismissal of the second action based on claim preclusion, it did not involve a declaratory judgment. *See* ***id.*** at 680-81, 364 N.W.2d at 168.

We therefore reject the trial court's dismissal of the Association's affirmative defenses of unconscionability and failure of consideration on the basis of claim preclusion.[11]

[11] In light of our holding, we need not address the parties' dispute regarding whether the Association's declaratory action was based on the same "transaction" as the current litigation. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

*Affirmative Defenses and Counterclaims*

Alternatively, the trial court struck the Association's unconscionability and failure of consideration affirmative defenses for failure to state a defense. The court also dismissed the counterclaims for failure to state a claim. Whether a pleading states a claim presents a question of law which we review de novo. *See* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 635, 517 N.W.2d 432, 435-36 (1994). We construe a pleading liberally and dismiss for failure to state a claim only if it is quite clear that under no conditions can the plaintiff recover. *See* ***id***. at 635, 517 N.W.2d at 436.

1. Unconscionability

The Association alleged, both as a counterclaim and affirmative defense, that the Service Agreement had become unconscionable. The trial court determined that the Association's unconscionability cause of action accrued in 1977 when the parties entered into the original Service Agreement. Noting that § 893.43, STATS., requires that "[a]n action upon any contract … shall be commenced within 6 years after the cause of action accrues or be barred," the trial court ruled that the Association's action was time barred.

A contract is unconscionable when no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice. *See* ***Foursquare Properties Joint Venture I v. Johnny's Loaf & Stein***, 116 Wis.2d 679, 681, 343 N.W.2d 126, 127 (Ct. App. 1983). The unconscionability of a contract is determined as of the time the parties entered the agreement. *See* ***Gertsch v. International Equity Research***, 158 Wis.2d 559, 578, 463 N.W.2d 853, 861 (Ct. App. 1990). In determining whether a claim of unconscionability of contract is time barred, we apply the statute of limitations set

forth in § 893.43, STATS. *See* ***Dairyland Power Coop. v. Amax Inc.***, 700 F. Supp. 979, 992-93 (W.D. Wis. 1986).

The Association does not argue that the Service Agreement was unconscionable when it was originally made.[12] Instead, the Association contends that "the long-standing Service Agreement in question *had become unconscionable over the passage of time.*" This argument is based on the fact that the agreement provides for a flat fee plus a cost of living adjustment applied to services rendered. Because there were only seventy condominium units when the agreement was made, whereas now there are 286, the Association contends that the agreement has become unconscionable. At a minimum, the Association argues that there is a genuine issue of material fact on this question.

However, as we have already noted, the law clearly states that the unconscionability is determined at the time the contract was entered. *See* ***Gertsch***, 158 Wis.2d at 578, 463 N.W.2d at 861. In this case, that moment was March 1, 1977, when the parties entered into the original Service Agreement.[13] If we were to accept the Association's position that unconscionability can arise at any point during a contractual relationship, we would create chaos and uncertainty in the law of contracts. The validity of a contract would be in a constantly fluid state. At times the contract would be conscionable, at other times unconscionable. The

[12] The fact that the parties have operated under the Service Agreement without difficulty for almost twenty years demonstrates that the contract was not unconscionable when the parties made the agreement.

[13] Although the parties have entered into three amendments to the 1977 Service Agreement, these amendments ratified that Agreement and do not constitute new agreements. *See* ***Interlaken Condominium Ass'n, Inc. v. Interlaken Serv. Corp.***, No. 96-0828-FT, unpublished slip op. at 4 (Wis. Ct. App. July 31, 1996).

purpose of a contract is to provide the parties with certainty and stability despite future events. That purpose is not served by the Association's logic.

On the same theme, but with a different variation, the Association further contends that the Service Agreement is unconscionable because it is a continuing, or perpetual, contract. The Service Corporation responds that such a contract is necessitated by the relationship between the condominium complex and the Interlaken Resort & Country Spa. We agree. The condominium complex was developed to complement the Interlaken Resort hotel complex which was owned by the same developer, Anvan. As part of the Service Agreement, the condominium owners would have access to the hotel recreational facilities such as the swimming pool and tennis courts. In order to access the condominium complex, the owners would have to pass over lands and use roads belonging to the hotel. In addition, the condominiums' water and sewer services were accessed through the existing infrastructures used to provide the same services to the hotel. The Service Agreement was designed to protect both the developer's ownership of the recreational facilities and the Association's need to access the condominium complex and obtain water and sewer services.

It is evident from the language in the Service Agreement that the parties intended it to be continual:

> Term: this Service Agreement shall remain in full force and effect so long as the non-exclusive use rights and easements for the facilities granted by the developer to the owners of the units represented by Condominium Association number one remain in effect ….

Given the relationships between the Association, the developer, the condominium complex and the hotel, the logic underlying such an agreement is apparent.

The Association persists, however, relying on the law which holds that "[i]f a contract is silent as to duration, then either party may terminate it by giving reasonable notice to the other party of the intent to terminate." ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 125 Wis.2d 224, 234-35, 372 N.W.2d 471, 476 (Ct. App. 1985).[14] Thus, the Association argues that the Service Agreement is terminable upon reasonable notice. However, the Association overlooks that the Service Agreement is not silent as to its duration. It expressly states that the agreement will be in effect "so long as the non-exclusive use rights and easements for the facilities granted by the developer to the owners … remain in effect." The Association's reliance on ***Oostburg*** is misplaced.

Instead, we conclude that applicable law holds that while Wisconsin courts are reluctant to interpret a contract as being perpetual, they will do so if the document itself clearly states that is the intention of the parties. *See* ***Schneider v. Schneider***, 132 Wis.2d 171, 175, 389 N.W.2d 835, 837 (Ct. App. 1986). The Service Corporation argues that the intent of the parties in this case was clearly to have a perpetual contract. We agree. Both the language of the Service Agreement and the history underlying the relationship between the Service Corporation and the Association support this conclusion.

The continuing nature of the contract reflects the parties' intentions at the time the Service Agreement was made. We therefore reject the Association's contention that the continuing nature of the contract rendered it

[14] The Association's brief presents its arguments on unconscionability and the duration of the contract in separate sections. However, the Association also argues that the continual nature of the contract contributes to its unconscionability. In the interests of presenting a cohesive discussion on this issue, we address both of the Association's arguments in this discussion of the unconscionability issue.

unconscionable. We also hold that the agreement cannot be canceled upon reasonable notice because the agreement is not silent as to its duration. We conclude that the trial court properly dismissed the Association's affirmative defense and counterclaim of unconscionability as time barred.

2. Failure of Consideration

The Association next argues that the trial court erred by striking its affirmative defense of failure of consideration. The court first held that the Association had waived its right to raise this defense because of language in the third amendment to the Service Agreement. Although we ultimately uphold the trial court's rejection of this defense, we disagree with this aspect of the court's ruling.

The third amendment related to a change in the condominium complex's sewerage service and the obligations of both the Service Corporation and the Association in facilitating and financing the service change. One of the general provisions to the amendment provides that "the Operator and the Association each acknowledge and waive any claim contesting the existence and the adequacy of the consideration given for the execution and delivery of this Agreement."

The Service Corporation contends that by this language the Association has waived its right to claim a failure of consideration with respect to the entire Service Agreement. The Association argues that lack of consideration was waived only as to the execution and delivery of the third amendment and nothing more. We agree with the Association.

The cornerstone of contract construction is to ascertain the true intention of the parties. *See* ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155

Wis.2d 704, 710-11, 456 N.W.2d 359, 362 (1990). Here, the parties' third amendment addresses only the manner in which the sewerage service will be transferred from the Service Corporation to the Walworth County Metropolitan Sewerage District. The amendment does not address the other services which were to be provided under the 1977 Service Agreement nor the consideration which supported that agreement. In short, we see no indication that the parties intended the waiver to apply to anything but the Third Amendment. We reject the Service Corporation's contention that the Association waived its claim for lack of consideration as to the entire Service Agreement.

We thus turn to the trial court's further ruling that the Association's failure of consideration claim was barred by statute of limitations principles. The Association relies on Sanders' affidavit which alleges certain failings on the part of the Service Corporation during 1995, 1996 and 1997—years well within the six-year statute of limitations. However, in the course of its summary judgment ruling, the trial court held that Sanders' affidavit, the document upon which the Association's failure of consideration defense was based, was insufficient to raise an issue of material fact as to this question. In our later discussion on the summary judgment issue, we uphold the trial court's ruling in this regard. We will not repeat those remarks here. Suffice it to say for now that Sanders' affidavit does not state with adequate particularity in what manner the Service Corporation failed to provide the services under the agreement or how such failures caused any damage to the Association.

Because the Association's evidence raises no material issue of fact, we affirm the trial court's rejection of the Association's failure of consideration affirmative defense.

3. Limitation of Setoff Claim

The Association contends that the trial court erroneously limited its potential setoff recovery to claims which may have occurred from January 1, 1995 to the date of the order, March 31, 1997. The trial court did so because the setoff was raised as an affirmative defense, not as a counterclaim, to the Service Corporation's claim for fees owing since January 1, 1995. We conclude that the trial court's action was a proper exercise of discretion.

The Service Corporation's complaint limited its claim to those fees owing after January 1, 1995. As an affirmative defense, the Association alleged that it was entitled to a setoff for services not provided by the Service Corporation. However, the Association's response did not identify a time frame for this claim. In limiting the Association's setoff to the time period indicated, the trial court did not dismiss any claims the Association may have had prior to January 1, 1995. Instead, the court informed the Association that it could pursue any additional claims as a separate counterclaim.

Section 802.02(3), STATS., provides: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall permit amendment of the pleading to conform to a proper designation." Despite the trial court's suggestion, the Association failed to pursue an amendment to its pleadings or a further counterclaim. We view the trial court's limitation of the time period for a setoff as a proper attempt to formulate and

simplify the issues in this complex case for trial. *See, e.g.,* § 802.10, STATS.[15] This is especially so in light of the fact that: (1) the Association's setoff claim was in response to the Service Corporation's amended complaint which identified a specific time frame; (2) the Association's setoff defense did not reference a particular period of time; and (3) the trial court otherwise protected the Association's right to make additional claims for periods of time beyond the limitation period set by the court. We conclude that the trial court did not misuse its discretion when limiting the time period covered by the Association's setoff claim.

*Summary Judgment*

Last, we address the trial court's grant of summary judgment to the Service Corporation.

On review of a summary judgment, this court applies the same summary judgment methodology as the circuit court. *See* ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it presents a material issue of fact or law. *See* ***id***. If we conclude that the complaint and the answer are sufficient, we examine the moving party's affidavits to determine whether they establish a prima facie case

[15] We appreciate that § 802.10(5), STATS., refers to judicial action taken at a pretrial conference whereas here the trial court's ruling was made during a summary judgment proceeding. Regardless, the court's ruling here was made in a pretrial mode. Moreover, the statute states that a trial court "may" take such action at a pretrial conference. We do not view the statute as barring a trial court from entering other pretrial orders designed to simplify the issues so long as the ruling represents a proper exercise of discretion.

In addition, we note that § 906.11(1), STATS., authorizes a trial court to exercise reasonable control over the mode of presenting evidence so as to make the presentation effective for the ascertainment of the truth and to avoid needless consumption of time.

for summary judgment. *See* ***id***. If the moving party has done so, we then look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. *See* ***id***. at 232-33, 568 N.W.2d at 34.

After the trial court's dismissal of the Association's counterclaims and affirmative defenses, the issue to be determined at summary judgment was the amount owing to the Service Corporation and whether the Association was entitled to a setoff for services allegedly not provided pursuant to the Service Agreement. The trial court determined that the Service Corporation was entitled to summary judgment based on its findings that "the Service Corp[oration], by its pleadings and affidavits, has stated a *prima facie* case for collection of the contract price pursuant to the Service Agreement" and that "[t]he Association did not submit any evidence sufficient to indicate that any genuine issues of disputed material fact exist for trial."

In its brief in support of summary judgment, the Service Corporation argued that, based on the Service Agreement, the Association owed the Service Corporation $207,607.87. In support, the Service Corporation submitted the affidavit of Elizabeth A. Dunning, the chief accounting officer for the Service Corporation. Dunning stated that she was responsible for gathering financial information, preparing invoices and crediting the Association for payments made pursuant to the Service Agreement. According to Dunning, as of May 19, 1997, the Association owed the Service Corporation money for services under the Service Agreement in the amount of $207,607.87. Dunning attached to her affidavit copies of the monthly invoices prepared under the Service Agreement and forwarded to the Association for payment.

In support of its assertion that the services under the agreement had been substantially provided, the Service Corporation also submitted the affidavits of James H. Gavin and Phil S. Johnston. Gavin stated that he is the chief engineer for Interlaken Resort & Country Spa and also performs services for the Service Corporation. He has been employed at the Interlaken Resort & Country Spa since May 23, 1977, and has provided services under the Service Agreement since that date. According to Gavin's affidavit, "[t]he services required to be performed under the Service Agreement, as amended, have been performed by me personally and by other employees over the course of the past 20 years, regardless of whether the Association has paid for the provision of services, and regardless of whether past-due amounts were outstanding." Johnston, the grounds supervisor at Interlaken Resort & Country Spa, stated that since his involvement in providing the services under the Service Agreement in 1989, the Service Corporation has "substantially performed and completed any obligations required."

The Association contends on appeal, as it did before the trial court, that the Service Corporation failed to make a prima facie case for summary judgment. The Association first contends that Dunning's affidavit alleges a legal conclusion because she states that she calculated the invoices correctly based on the terms of the Service Agreement. We disagree. In addition to providing the court with an amount due, Dunning's affidavit was accompanied by invoices which set forth an accounting of the base fee (as adjusted by the Consumer Price Index) and any additional fees provided for under the Service Agreement. We reject the Association's assertion that Dunning's affidavit alleges only a legal conclusion.

The Association additionally contends that the affidavits of Gavin and Johnston are conclusory because they each fail to specify what services were

provided under the agreement. However, the agreement itself sets forth the services to be provided. Both affidavits reference the Service Agreement and its amendments making it clear that the services provided are those required under the agreement. Because Gavin and Johnston are alleging that all of the services were performed, we see no need to require them to list with specificity those services already listed in the agreement. We conclude that the affidavits of Dunning, Gavin and Johnston, together with the accompanying materials, state a prima facie case for summary judgment.

In opposition to summary judgment, the Association submitted an affidavit by William Sanders, the business manager for the Association. Sanders is responsible for the Association's bookkeeping, including reviewing and paying the Service Corporation's invoices. Sanders' affidavit states that the Service Corporation failed to provide required services under the Service Agreement. According to Sanders, the Service Corporation failed to provide a pool attendant in 1995, 1996 and 1997, failed to open the pool for substantial portions of 1996 and 1997, and failed to provide "standard maintenance, upgrade and repair … to the roads, the tennis court, and road signage" which caused "premature deterioration." Sanders stated that the Association is entitled to an offset of $37,548.37.[16] Sanders' affidavit also traveled to the Association's claim of failure of consideration—a matter we earlier reserved to this portion of our discussion.

[16] Sanders additionally alleged that the Service Corporation improperly applied an 18% interest charge to nonsewer-related services. Presumably, a portion of Sanders' setoff calculation reflects the amount of the allegedly improper interest charges. The trial court ruled in favor of the Association on this matter and the Service Corporation does not appeal from that ruling. Prior to the entry of judgment, Dunning recalculated the owed amount applying a 5% interest rate to nonsewer-related services and 18% interest to those outstanding charges relating to sewer services. Based on Dunning's revised calculations, the Association owed the Service Corporation $183,751.31 as of May 31, 1997.

We agree with the trial court's ruling that Sanders' affidavit fails to allege facts with sufficient specificity to show that a genuine issue of material fact existed for trial. In summary judgment proceedings a "party may not rest upon the mere allegations" set out in the pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Section 802.08(3), STATS. We address each of the relevant portions of Sanders' affidavit.

Sanders' affidavit claims that the Service Corporation failed to provide "standard maintenance, upgrade and repair" to certain Association property. Sanders goes on to aver that these failings caused "premature deterioration" to the property causing "extra costs" to the Association. But these statements are conclusionary, not factual. Sanders failed to provide any specifics regarding the nature of the absent maintenance, upgrades or repair. Nor did he provide any specifics as to the nature or extent of the alleged "deterioration."

Sanders also alleged that the Service Corporation failed to open the pool for "substantial portions of 1996 and 1997." However, he failed to specify the dates during which the pool was closed such that the court could determine whether a pool would normally be open or whether the pool closures were for "substantial portions" of the years indicated.

Sanders' affidavit does specifically allege that the Service Corporation failed to provide pool supervision during 1995, 1996 and 1997. To that extent, the affidavit draws an issue of fact with the Service Corporation's proof of substantial performance. However, Sanders' affidavit fails to show how this translates into a setoff to the Association.

This was a common failing as to all of the allegations made by Sanders. It is important to note that this was not a case in which the Association

claimed that it had performed under the Service Agreement and that it did not owe the Service Corporation any money. To the contrary, the Association admitted that it had failed to make the full payments called for under the agreement. Rather, the Association's defense was an affirmative claim for a setoff—meaning that the Association had sustained monetary losses as a result of the Service Corporation's alleged failings and a right to recoup that loss by way of a setoff. Sanders' affidavit as to all of his claims—lack of pool supervision, failure to open the pool and lack of maintenance—fails to establish with the requisite specificity how these events resulted in a money loss to the Association and thus necessitated a setoff. In sum, Sanders' affidavit was insufficient to defeat the detailed summary judgment evidence offered by the Service Corporation demonstrating its substantial performance. *See* ***Fritz v. McGrath***, 146 Wis.2d 681, 689, 431 N.W.2d 751, 755 (Ct. App. 1988) (affidavits that consist merely of conclusory allegations and fail to set forth specific facts are insufficient to defeat summary judgment). We affirm the trial court's summary judgment ruling.[17]

## CONCLUSION

We conclude that the trial court improperly struck the Association's affirmative defenses and improperly dismissed the Association's counterclaims on the basis of claim preclusion. However, we nevertheless uphold the court's ruling that the Association's claims of unconscionability were time barred and the Association's failure of consideration claim was not supported by sufficient

[17] In light of our conclusion, we need not address the parties' arguments with respect to the trial court's ruling that the Association was estopped from alleging a breach of the Service Agreement by the Service Corporation because the Association had repudiated the agreement by virtue of its letter of April 28, 1995. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of appeal, we need not decide other issues raised).

summary judgment evidence. We further conclude that the trial court properly limited the time period covered by the Association's setoff affirmative defense. Finally, we uphold the trial court's grant of summary judgment in favor of the Service Corporation.

*By the Court.*—Judgment affirmed.

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