COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2296 **Cir. Ct. No. 2014CV389**

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

MAPLE GROVE COUNTRY CLUB INCORPORATED,

PLAINTIFF-APPELLANT,

COUNTY OF LA CROSSE,

INVOLUNTARY-PLAINTIFF,

V.

MAPLE GROVE ESTATES SANITARY DISTRICT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard, and Kloppenburg, JJ.

¶1 PER CURIAM. Maple Grove Country Club, Inc., appeals a nonfinal order dismissing its statutory claim of inverse condemnation. Addressing only the limited issue on which we granted leave to appeal, we conclude that respondent Maple Grove Estates Sanitary District did not waive its notice of claim defense by failing to plead it. We reach this conclusion based on a 1995 decision of this court that we question, but must follow.

¶2 The Club's complaint alleged a claim of inverse condemnation under WIS. STAT. § 32.10 (2015-16).[1] The circuit court held that this claim must be dismissed because the Club failed to comply with the applicable notice of claim statute, WIS. STAT. § 893.80(1d).

¶3 On appeal, the Club argues that the District waived the notice of claim defense by failing to plead it in the answer. The Club relies on case law holding that such a defense must be affirmatively pled or is considered waived. *See* ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶24, 235 Wis. 2d 610, 612 N.W.2d 59.

¶4 In response, one of the District's arguments is that raising such a defense by summary judgment motion is sufficient. Although we regard the case law on which the District relies as wrongly decided, we conclude that we are

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

bound by that case law and, accordingly, that the District did not waive its affirmative defense.

¶5 The District relies on ***Lentz v. Young***, 195 Wis. 2d 457, 536 N.W.2d 451 (Ct. App. 1995). In ***Lentz***, the defendant first raised an affirmative defense by summary judgment motion. ***Id.*** at 463-64. Although WIS. STAT. § 802.02(3) provides that a defendant waives affirmative defenses that are not affirmatively pled, we described the supreme court as having previously held that "a defendant may raise an affirmative defense by motion." ***Id.*** at 467. Based on that interpretation of case law, we held that the defendant had not waived his affirmative defense by failing to include it in his answer, because he raised it "by motion before trial." ***Id.***

¶6 In the case before us, the District reads ***Lentz*** as essentially having held that all affirmative defenses are preserved when they are raised in a summary judgment motion, even though they were not pled in the answer. The Club's reply brief does not acknowledge or refute this argument. It is not apparent to us that the text of ***Lentz*** provides a basis to reject the District's interpretation of it. Although that interpretation is broad, we see nothing in ***Lentz*** that allows for an alternate interpretation, and the Club has not suggested a way to reject that interpretation, or to distinguish ***Lentz*** from the current case. Accordingly, we conclude that the District preserved its notice of claim affirmative defense by raising it on summary judgment.

¶7 Having said that, in our view, ***Lentz*** almost certainly misinterpreted prior case law in a way that is not consistent with relevant statutes. The rules of civil procedure provide a carefully constructed scheme of pleadings and motions regarding affirmative defenses. In that scheme, affirmative defenses generally

must be set forth affirmatively in a pleading. WIS. STAT. § 802.02(3). However, certain affirmative defenses may also be raised by motion. WIS. STAT. § 802.06(2)(a). But such a motion must be filed *before pleading*. § 802.06(2)(b) (emphasis added).

¶8 Thus, by statute, affirmative defenses must be asserted either in the answer or, for certain affirmative defenses, in a motion that *precedes* the answer. The statutes do not appear to contemplate that affirmative defenses will be asserted for the first time in a motion for summary judgment that *follows* the pleadings.

¶9 The supreme court case that we relied on in ***Lentz*** is consistent with the statutory scheme we just described. In the course of a summary judgment analysis, the supreme court in ***Robinson v. Mount Sinai Medical Ctr.***, 137 Wis. 2d 1, 16-17, 402 N.W.2d 711 (1987), considered whether the complaint stated a claim. The defendant in ***Robinson*** raised an affirmative defense of statute of limitations in its answer, but also appears to have argued that the complaint failed to state a claim because the complaint did not address the timeliness of the claim. ***Id.*** In the course of the court's discussion, it stated that a statute of limitations defense is an affirmative defense that must be "raised in a pleading, or by a motion, or be deemed waived." ***Id.*** The court concluded that the complaint stated a claim, even though the complaint did not make allegations in anticipation of that defense. ***Id.***

¶10 The court's statement in ***Robinson*** quoted above is consistent with the statutory scheme we described above. Statute of limitations is one of the defenses that may be raised either by pleading or by motion. WIS. STAT.

§ 802.06(2)(a)9. However, as we have described, if raised by motion, it must be raised before pleading.

¶11 In ***Lentz***, however, we interpreted that simple and seemingly unremarkable statement in ***Robinson*** as meaning that *all* affirmative defenses may be asserted by motion *at any time before trial*. Such a broad interpretation of ***Robinson*** is not tenable for two reasons.

¶12 First, there is nothing in ***Robinson*** that addresses the *types* of affirmative defenses that may be raised by motion. Although the above statute provides a specific list of those types, the practical effect of our interpretation in ***Lentz*** appears to be that *all* types of affirmative defenses may be made by motion.

¶13 Second, there is nothing in ***Robinson*** that addresses *when* an affirmative defense may be made by motion. ***Robinson*** cannot reasonably be read as altering the statutory requirement that affirmative defenses, if raised by motion, must be raised before pleading. Yet, our interpretation in ***Lentz*** effectively states that affirmative defenses may be raised by motion *after* pleading.

¶14 In summary, the seemingly unqualified rule that was applied in ***Lentz*** obliterates the statutory scheme. ***Lentz*** replaces that scheme with a simple rule that affirmative defenses need not be pled, but instead need only be raised by motion before trial. But ***Lentz*** does not cite any statute or case law that supports such a rule. Nonetheless, we are bound by our own prior decision and may not overrule, modify, or withdraw its language. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We are permitted to "signal" our "disfavor," but may not overrule the prior decision. ***Id.*** at 190.

By the Court.—Order affirmed.

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