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

June 30, 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. 97-3829-FT**

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

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**HOWARD R. WAGNER AND JEANNIE WAGNER,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**COUNTY OF BURNETT,**

**DEFENDANT-RESPONDENT,**

**JAMES TAYLOR AND DONIS TAYLOR,**

**INTERVENORS-DEFENDANTS-APPELLANTS.**

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APPEAL from an order of the circuit court for Burnett County: ROBERT H. RASMUSSEN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. James and Donis Taylor appeal an order denying their motion to intervene and finding their motion for relief from judgment moot.[1] They argue the trial court erred by finding their motion was not timely filed and denying their motion to intervene. Because we conclude the trial court properly exercised its discretion by finding the motion untimely and denying the request for intervention, we affirm the trial court.

This appeal has its roots in an ongoing zoning dispute between the Wagners, owners of the Port Sand Campground, and Burnett County. In 1994, Howard and Jeannie Wagner received citations for expanding their campground and constructing without a permit. The matters were calendared for trial as Case Nos. 94-FO-332 and 94-FO-333, before Judge James Taylor, one of the appellants-intervenors herein.[2] Those cases were resolved by stipulation, providing that the Wagners would pay a forfeiture on each ticket and apply for the necessary permits. If the permits were not granted, the Wagners would either have to remove the noncomplying structures or file an action for declaratory judgment.

Because the County denied their application for an expansion permit, the Wagners filed the declaratory judgment action in the case at hand. The Wagners and the County settled this case by stipulation on January 16, 1997, and the court made an oral order at that time. The written order was filed on March 20, 1997, and the Taylors filed motions to intervene as a matter of right and for relief from the judgment on April 8, 1997. The trial court denied their motion

[1] This is an expedited appeal under RULE 809.17, STATS.

[2] In January 1996, Judge Taylor recused himself after being made aware that he had previously signed a petition opposing expansion of the Wagners' campground. The case was reassigned to Judge Warren Winton and then to Judge Robert Rasmussen upon plaintiffs' § 801.58, STATS., request for substitution of judge.

for intervention and declared the motion for relief from judgment moot. It found that the Taylors did not timely file their motion and therefore could not meet the four requirements for intervention under § 803.09(1), STATS.

The sole issue on appeal is whether the Taylors can intervene in this action as a matter of right under § 803.09(1), STATS. The intervenor must meet the following four requirements in order to intervene as a matter of right:

> (1)that the motion to intervene be made in a timely fashion;
>
> (2)that the movant claims an interest relating to the property or transaction which is the subject of the action;
>
> (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
>
> (4)that the movant's interest is not adequately represented by existing parties.

***Armada Broadcasting, Inc. v. Stirn***, 183 Wis.2d 463, 471, 516 N.W.2d 357, 359-60 (1994).

We initially address the applicable standard of review. The Taylors contend we should review the issue of whether they have the right to intervene de novo, deciding whether the requirements for intervention have been met without deference to the trial court. They argue that the decision to allow or deny intervention as a matter of right is a question of law we should review de novo, citing ***Armada***, 183 Wis.2d at 470, 516 N.W.2d at 359. The Wagners and the County, on the other hand, argue that when the timeliness requirement is in question, the appellate standard of review is whether the trial court properly exercised its discretion. We agree with the Wagners and the County that the critical issue in this case is whether the Taylors' motion to intervene was filed timely, which is a matter within the trial court's discretion.

We conclude ***Armada*** does not state the controlling standard of review on the issue of denial of a motion for untimeliness. ***Armada*** applied a de novo standard of review in a case where the only requirement not in issue was timeliness. ***Id.*** at 470-72, 516 N.W.2d at 359-60. Indeed, the ***Armada*** court specifically noted that timeliness is a matter left to the trial court's discretion. ***Id***. at 471, 516 N.W.2d at 360. The court has also stated in ***State ex rel. Bilder v. Delavan Township***, 112 Wis.2d 539, 550, 334 N.W.2d 252, 258 (1983), that timeliness is a matter necessarily left to the discretion of the trial court. We therefore review the matter to determine whether the trial court erroneously exercised its discretion.[3]

When reviewing a discretionary determination, we do not substitute our judgment for that of the trial court; rather, we review the record to determine whether the trial court erroneously exercised its discretion. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). "[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.*** We will not conclude there is an erroneous exercise of discretion if the record shows the trial court did exercise its discretion and that there is a reasonable basis for its decision. ***Nelson v. Taff***, 175 Wis.2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993).

Timeliness is a matter left to the trial court's discretion, to be determined under all the facts and circumstances of the case. ***Milwaukee***

[3] We do note, however, that even under a de novo review, we would still reach the same conclusion as the trial court, because we agree the motion was not timely under all the facts and circumstances in the case and, therefore, the requirements of § 803.09(1), STATS., were not met.

***Sewerage Comm'n v. DNR***, 104 Wis.2d 182, 186, 311 N.W.2d 677, 679 (Ct. App. 1981). There is no precise formula to determine whether a motion to intervene is timely, but the critical factor is whether the proposed intervenor acted promptly in view of all the circumstances. ***Bilder***, 112 Wis.2d at 550, 334 N.W.2d at 258. The trial court's decision is not based solely upon the lapse of time between the date of entry of judgment and the date of filing the motion. It may also consider whether allowing intervention will prejudice the original parties to the lawsuit. ***Id***.

The Taylors maintain their motion was timely because they filed their motion promptly after learning the judgment had been entered. In essence, they contend they did not intervene earlier because they believed the County was representing their interests as neighboring landowners. They state it was not until they learned of the actual stipulation that they realized the County had negotiated a settlement that, in their opinion, did not fairly address and account for their interests and objectives. The trial court was not persuaded, nor are we.

The trial court was aware of the Taylors' involvement in the litigation by virtue of James Taylor's role as judge in the first suit between the Wagners and the County. It heard comments from counsel, as officers of the court, that James Taylor was a contact person for an attorney working on behalf of the Sand Lake Property Owners Association during the pendency of the case and that the attorney had been invited to participate in settlement negotiations. James Taylor was present at the January 16, 1997, hearing when the settlement was put on the record. At that time he expressed his concerns about the authority of Burnett County to enter into the settlement, but did not otherwise formally object to the proceedings. The trial court considered the fact that the Taylors knew of their opportunity to intervene and chose not to do so until the matter had been

settled in all respects.[4] The trial court also concluded that allowing intervention would run counter to the aims and goals of intervention to promote judicial efficiency.

We conclude the trial court properly exercised its discretion in denying the Taylors' motion to intervene. Here, the record demonstrates that the trial court considered the facts and circumstances of the case together with the appropriate law. The trial court considered the Taylors' awareness of the action; the length of time the litigation had been in process (since 1995); James Taylor's actual awareness of the settlement by virtue of his presence at the January 16, 1997, hearing; and the three-month period between the January 16, 1997, settlement and the filing of the motion to intervene on April 8, 1997, and concluded the motion was not timely.

Because we conclude the trial court properly exercised its discretion on the timeliness issue, we affirm its denial of the motion to intervene and agree with the trial court that the motion for relief from judgment under § 806.07(1), STATS., is moot.[5]

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[4] The court in ***Milwaukee Sewerage Comm'n v. DNR***, 104 Wis.2d 182, 186, 311 N.W.2d 677, 679 (Ct. App. 1981), noted that the Wisconsin supreme court in two cases found it significant that the proposed intervenors knew about the action affecting their interests but failed to act *until after judgment had been entered*, citing ***Hoppmann v. Reid***, 86 Wis.2d 531, 273 N.W.2d 298 (1979), and ***Mercantile Contract Purch. Corp. v. Melnick***, 47 Wis.2d 580, 177 N.W.2d 858 (1970).

[5] The Taylors argue in their reply brief that the declaratory judgment action was not a proper means of adjudication because it improperly bypassed the exclusive means of agency review. They also argue that they should have been made parties to the action under § 806.04(11), STATS. We are not obligated to address issues raised for the first time in the reply brief and decline to do so here. ***In re Estate of Bilsie***, 100 Wis.2d 342, 346, n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.