

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 1, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP1  
STATE OF WISCONSIN**

Cir. Ct. No. 2008CV561

**IN COURT OF APPEALS  
DISTRICT III**

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**CITY OF PRESCOTT,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PREMIUM PROPERTIES, LP,**

**DEFENDANT-CO-APPELLANT,**

**VICTORY FIREWORKS, INC.,**

**SUBSTITUTED-PARTY-APPELLANT.**

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APPEAL from a judgment of the circuit court for Pierce County:  
ROBERT W. WING, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The City of Prescott issued thirteen citations to Premium Properties, LP, alleging it violated a municipal ordinance that prohibits the storage of fireworks within five-hundred feet of a residence. After an evidentiary hearing, the circuit court ruled that Victory Fireworks, Inc., not Premium Properties, was the proper defendant. The court amended the citations by substituting Victory Fireworks as the defendant. It then found Victory Fireworks guilty of the ordinance violations. Because the amendment prejudiced Victory Fireworks, we conclude the circuit court erroneously exercised its discretion. We therefore reverse.

### BACKGROUND

¶2 Premium Properties owns a warehouse in Prescott. Victory Fireworks leases the warehouse, using it to store fireworks. Premium Properties and Victory Fireworks are distinct legal entities, and neither company holds any interest in the other. However, Wayne Schulte, the general partner of Premium Properties, is also the sole owner of Victory Fireworks.

¶3 Beginning in February 2006, the City issued thirteen citations to Premium Properties. Each citation alleged Premium Properties had violated municipal ordinance § 7-6-1(d)(4),<sup>1</sup> which prohibits a “wholesaler, dealer or jobber” from storing fireworks within five-hundred feet of a residence. *See* PRESCOTT, WIS., ORDINANCES § 7-6-1(d)(4), *available at*

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<sup>1</sup> The citations actually alleged Premium Properties had violated municipal ordinance § 7-6-1(7)(4). There is no such ordinance. The circuit court acknowledged that the ordinance number on the citations was incorrect and amended them to state the correct number. On appeal, neither Premium Properties nor Victory Fireworks challenges the court’s correction of the ordinance number.

<http://www.prescottwi.org/ordinances.html>. The citations were prosecuted in municipal court. After two years of litigation, the municipal court determined the City could not enforce ordinance § 7-6-1(d)(4) because it contained a fireworks storage restriction more onerous than that imposed by state law.

¶4 The City appealed to the circuit court, which concluded the ordinance was enforceable. Premium Properties then moved to dismiss, arguing it was not the proper defendant. Premium Properties conceded it owned the warehouse where the fireworks were stored, but it contended Victory Fireworks actually owned the fireworks.

¶5 After an evidentiary hearing, the circuit court held that Premium Properties was not a proper defendant to the citations. However, rather than outright dismissing the citations, the court amended them to substitute Victory Fireworks as defendant. The court determined that “Victory Fireworks and Wayne Schulte are one in the same thing with Premium Properties” and concluded, “[T]here’s absolutely no prejudice to Mr. Schulte, in my opinion, or to Victory Fireworks ... to amend this to have [Victory Fireworks] be the defendant[.]” Immediately thereafter, the court found Victory Fireworks guilty of all thirteen ordinance violations. Premium Properties and Victory Fireworks now appeal.<sup>2</sup>

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<sup>2</sup> In addition to arguing the circuit court improperly amended the citations, Premium Properties and Victory Fireworks raise several other claims of error. Because we hold the circuit court improperly amended the citations to substitute Victory Fireworks as defendant, we need not address these additional arguments. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground.”).

(continued)

## DISCUSSION

¶6 “It is within a trial court’s discretion to allow amendment of pleadings until and even after judgment[.]” *Wright v. Mercy Hosp. of Janesville, Wis., Inc.*, 206 Wis. 2d 449, 460, 557 N.W.2d 846 (Ct. App. 1996). We review a decision to amend pleadings for an erroneous exercise of discretion. *Suchomel v. University of Wis. Hosp. & Clinics*, 2005 WI App 234, ¶14, 288 Wis. 2d 188, 708 N.W.2d 13. A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶7 Here, the circuit court did not articulate the legal basis for its decision to amend the citations.<sup>3</sup> However, the City argues we should nevertheless affirm because the amendment was proper under either WIS. STAT. § 800.025 or WIS. STAT. § 802.09. *See State v. Baeza*, 156 Wis. 2d 651, 657, 457 N.W.2d 552 (Ct. App. 1990) (appellate court may affirm a circuit court’s ruling if it states the right result for the wrong reason).

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Furthermore, because Victory Fireworks was substituted as defendant for Premium Properties, we note that Premium Properties should no longer be a party to this action. We therefore question whether Premium Properties is a proper party to this appeal. However, because we nevertheless reverse the circuit court’s judgment, we need not address this issue further.

<sup>3</sup> Victory Fireworks asserts the circuit court relied on WIS. STAT. §§ 803.01 and 803.03. The record does not support this contention.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶8 WISCONSIN STAT. § 800.025 governs amendment of a citation in municipal court. Because the statute governs municipal court proceedings, it would not have applied in the circuit court. Thus, § 800.025 cannot justify the circuit court's amendment of the citations.

¶9 The corresponding civil procedure statute, WIS. STAT. § 802.09, allows late amendment of pleadings “by leave of court” and states that “leave shall be freely given at any stage of the action when justice so requires[.]” WIS. STAT. § 802.09(1). The statute grants the court broad discretion to amend pleadings, but the amendment may not prejudice the opposing party. *See Suchomel*, 288 Wis. 2d 188, ¶14; *Wright*, 206 Wis. 2d at 460. The *Wright* court explained, “[A] late amendment may not unfairly deprive an adverse party of the opportunity to contest the issues raised by the amendment.” *Wright*, 206 Wis. 2d at 460.

¶10 The City argues the amendment of the citations did not prejudice Victory Fireworks because both Victory Fireworks and Premium Properties are controlled by Schulte. Because Schulte was present at the evidentiary hearing, the City contends he had notice and an opportunity to rebut the City's claims. The circuit court came to a similar conclusion, stating, “Victory Fireworks and Wayne Schulte are one in the same thing with Premium Properties .... [T]here's absolutely no prejudice to Mr. Schulte ... or to Victory Fireworks [by granting the substitution of parties].”

¶11 The problem with the City's argument and the circuit court's conclusion is that, regardless of its relationship with Schulte and Premium Properties, Victory Fireworks is a separate legal entity. The citations were issued against Premium Properties. Victory Fireworks was never served as required by statute. *See* WIS. STAT. § 801.11(5). Victory Fireworks did not appear as a party

at the evidentiary hearing and was not represented by counsel. It never had notice of the charges, and it never had the opportunity to hear and dispute the evidence against it. This is prejudicial as a matter of law, to say nothing of violating basic notions of due process. The circuit court erroneously exercised its discretion by allowing the amendment.<sup>4</sup>

¶12 The City argues Premium Properties waived<sup>5</sup> any objection by litigating the case for three-and-one-half years before objecting. However, the City fails to note that Premium Properties spent those years challenging the municipal and circuit courts' jurisdiction on the basis that ordinance § 7-6-1(d)(4) was invalid. After the circuit court issued its final decision on the validity of the ordinance, Premium Properties quickly asserted other defenses, including that the citations named the wrong defendant.

¶13 The City also argues Victory Fireworks waived its right to object to being substituted as a defendant. However, up until the final evidentiary hearing, Victory Fireworks was not a party to the case. While the City contends Victory Fireworks should have intervened to defend its rights, we do not agree that Victory Fireworks was required to offer itself to the City to be accused of an ordinance violation.

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<sup>4</sup> Admittedly, in limited circumstances courts disregard the corporate fiction by “piercing the corporate veil” and imposing personal liability on shareholders for corporate debts. *See, e.g., Consumer’s Co-op of Walworth Cnty. v. Olsen*, 142 Wis. 2d 465, 472-75, 419 N.W.2d 211 (1988). However, the circuit court did not rely on the doctrine of piercing the corporate veil in this case, and none of the parties contend that the doctrine applies.

<sup>5</sup> Waiver is the “voluntary and intentional relinquishment of a known right.” *Consumer’s Co-op*, 142 Wis. 2d at 492 (quoted source omitted).

¶14 Finally, the City contends Victory Fireworks is equitably estopped from arguing it was improperly substituted as a defendant. Equitable estoppel requires proof of: “(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, ... (4) which is to his or her detriment.” *Milas v. Labor Ass’n of Wis., Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). Here, any reliance by the City on Victory Fireworks’ failure to intervene was unreasonable. Victory Fireworks was not a party to the action. It had no obligation to inform the City that it, rather than Premium Properties, was the correct defendant. The City was aware that two entities existed. At the time it issued the citations, it was aware that Victory Fireworks, not Premium Properties, owned the fireworks. If the City wanted to cite Victory Fireworks for ordinance violations, it should have done so long before the final evidentiary hearing.

*By the Court.*—Judgment reversed.

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

