OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

January 15, 2020

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Nhu Huong Arn
Assistant City Attorney
730 Washington Ave. Rm. 201
Racine, WI 53403-1146

Peter J. Ludwig
Wanasek, Scholze, Ludwig & Ekes, S.C.
P.O. Box 717
Burlington, WI 53105-0717

You are hereby notified that the Court has entered the following opinion and order:

2018AP1784 John H. Apple v. City of Racine (L.C. #2018CV1375)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

John H. Apple appeals from an order dismissing his amended petition to enjoin the Racine building inspector from carrying out a raze order against his property. Upon reviewing the briefs and the record, we conclude at conference this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

On July 1, 2018, the City of Racine served Apple with a raze order for a building located on Washington Avenue in Racine. On August 1, Apple filed a petition with the circuit court to enjoin the raze order pursuant to WIS. STAT. § 66.0413(1)(h). The petition named the wrong party—Village of Wind Point, c/o Building Inspector, Lee Greivell—but attached the correct raze order. Because of this error, on August 7 the circuit court denied Apple's application for a temporary restraining order. Apple corrected the error the same day, filing an amended petition naming the City, c/o Kenneth D. Plaski, Building Inspector. The circuit court signed the amended order, also on August 7. On August 9, Plaski was served with the amended summons, petition, notice of hearing, and temporary restraining order.

The City subsequently filed a motion to dismiss, arguing that the circuit court lacked personal jurisdiction over the City because Plaski was not a city officer, director, or agent authorized to accept personal service on the City's behalf. The City further argued that Apple's petition was barred because Apple did not commence the action within thirty days of service of the raze order, pursuant to WIS. STAT. §§ 66.0413(1)(h) and 893.76, due to the failure to name the correct party. In support, the City overlooked the fact that Apple did not file *any* petition until thirty-one days following service. Instead, the City assumed that Apple's original petition was timely but argued that the statutory deadline for filing such petitions expired before Apple named the proper party—the City—on August 7.

The circuit court agreed with the City, finding that under WIS. STAT. §§ 66.0413(1)(h) and 893.76, Apple was barred from pursuing relief. The circuit court found that Apple was required to, but did not, name the correct party within the thirty-day time frame. The court further found that the August 7 amended petition did not "relate back" to the date of the original filing because the City did not receive notice of the original petition within the statutory time

frame. *See* WIS. STAT. § 802.09(3). Therefore, the amended petition, which did name the correct party, was filed outside the statutory deadline. The court also noted that as of August 28 the City had not been properly served, pursuant to WIS. STAT. § 801.11(4). Therefore, the circuit court granted the City's motion to dismiss.

On appeal, Apple argues that he complied with WIS. STAT. § 66.0413(1)(h), which only requires an "appl[ication] to the circuit court"—not an application *naming the correct or any party*—within thirty days of service of the raze order. We note, however, that Apple had not in fact filed his application by the thirty-day deadline, which expired on July 31. We therefore requested supplemental briefing "as to whether the circuit court lacked competency to consider Apple's application and, if so, whether competency is a proper subject of forfeiture (or waiver)." We find Apple's noncompliance with the statutory time limit deprived the circuit court of competency to proceed. We further hold that the court's loss of competency was not forfeited by the City's failure to raise the issue.

We begin with the undisputed fact that Apple did not comply with the provisions of WIS. STAT. §§ 66.0413(1)(h) and 893.76, which require a person affected by a raze order to apply for a restraining order "within 30 days after service of the [raze] order," or "forever be barred." Our Supreme Court has previously made clear, in the context of Wisconsin's eminent domain statute, that this language creates a jurisdictional barrier to proceeding. Pursuant to WIS. STAT. § 32.06(5), an owner or interested party in most circumstances must file an action contesting the condemnation of his or her property within a specified time limit or "be forever barred from raising any such objection in any other manner." Our Supreme Court observed that "the lapse of time [under § 32.06(5)] deprives the court of jurisdiction to hear the action." ***Weeden v. City of Beloit***, 22 Wis. 2d 414, 417, 126 N.W.2d 54 (1964). The court has since clarified that

noncompliance with statutory mandates does not negate a court's *jurisdiction* but instead may remove the court's *competency* to hear that particular case. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶9-10, 273 Wis. 2d 76, 681 N.W.2d 190. Therefore, our review is best considered an inquiry into the circuit court's competency to hear Apple's untimely petition.

A party's noncompliance with statutory requirements "may under certain circumstances affect the circuit court's competency to proceed to judgment," rendering the judgment "erroneous or invalid." ***Id.***, ¶2. Not all statutory defects, however, defeat a court's competency: "only when the mandate is 'central to the statutory scheme' is a court deprived of the power to act." ***DWD v. LIRC***, 2016 WI App 21, ¶9, 367 Wis. 2d 609, 877 N.W.2d 620 (citations omitted). A mandate is "central to the statutory scheme" where "the legislative purpose of the statutory scheme could [not] be fulfilled without strictly following the statutory directive." ***Id.***, ¶10 (citation omitted). In other words, "procedural and substantive policy choices reflected in statutory schemes may not be simply overlooked." ***Id.***, ¶12. Instead, "minor, nonprejudicial deviations" akin to "technical defects" are permitted, so long as the statute's purpose may still be fulfilled. ***Id.*** Therefore, whether the circuit court lost competency in the present case hinges on whether the thirty-day time frame in WIS. STAT. §§ 66.0413(1)(h) and 893.76 promotes a legislative policy choice or whether, in the alternative, this is an unimportant formality. ***DWD***, 367 Wis. 2d 609, ¶¶9-12.

In light of the plain language of the statute, we have little trouble finding that the thirty-day deadline is central to the operation of WIS. STAT. § 66.0413(1)(h). Importantly, the statute itself does not just create a time frame but specifies that an affected person is "forever ... barred" from filing a petition outside that window. That language is not superfluous. Rather, "[t]he statute is designed to enable the [building] inspector to act swiftly in order to prevent the public

from any long exposures to the risks of an unsafe or unsanitary building." ***Siskoy v. Walsh***, 22 Wis. 2d 127, 130, 125 N.W.2d 574 (1963) (referencing WIS. STAT. § 66.05(3), since renumbered § 66.0413(1)(h)). Indeed, "[t]he specific time limitations imposed on the person affected [by the raze order] are for that purpose." ***Siskoy***, 22 Wis. 2d at 130. The thirty-day window furthers, and is central to, the statute's objective. As such, Apple's failure to file his petition within thirty days caused him to be "forever barred" from challenging the order and deprived the circuit court of competency to proceed.[2]

For the foregoing reasons, we affirm the circuit court's dismissal of Apple's action, albeit on different grounds, without deciding the merits of the appeal. *See* ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 ("we are not constrained to the circuit court's reasoning in affirming or denying its order; instead, we may affirm the circuit court's order on different grounds.").

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[2] In light of this language, we see no need to consider whether the thirty-day deadline is subject to extension, or whether the City's failure to raise the issue creates a forfeiture (or waiver) that might excuse the late filing. We note, however, that the result here would be the same even in the absence of the "forever barred" language. In ***Mikrut***, our Supreme Court explicitly declined to "decide whether the particularized rule of nonwaiver stated in ***B.J.N.*** (statutory time periods *cannot* be waived) should be maintained." ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶30, 273 Wis. 2d 76, 681 N.W.2d 190 (emphasis added); *see also* ***Green Cty. Dep't of Human Servs. v. H.N.***, 162 Wis. 2d 635, 469 N.W.2d 845 (1991) ("***B.J.N.***"). The court noted "that there is an established line of cases holding, in conclusory fashion, that competency challenges premised upon noncompliance with mandatory statutory time limitations cannot be waived." ***Mikrut***, 273 Wis. 2d 79, ¶3 n.1. ***Mikrut*** expressly declined to overrule or modify the rule from those cases, and they remain good law. ***Id.***, ¶30.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals