STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 24AP1046

VILLAGE OF REESEVILLE,

Plaintiff-Respondent,

v.

FREDERICK J. PROUGH,

Defendant-Appellant.

District: IV
Appeal No. 2024AP001046
Circuit Court Case No. 2023FO000356
Three-Judge Appeal

BRIEF OF DEFENDANT-APPELLANT

On Appeal from the Circuit Court for Dodge County,
The Honorable Kristine A. Snow, Presiding

By: EMINENT DOMAIN SERVICES, LLC

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Statement of the Issues

First Issue: Is Village Ordinance 399-38 unconstitutional under the U.S. Constitution, Thirteenth Amendment, as applied in this case, where the Village required Prough to maintain the terrace in the public right of way next to his property after a Village project had caused the terrace become full of weeds?

The trial court found that the ordinance was not unconstitutional, and therefore found Prough guilty of violating Village Ordinance 334-3(F) and also dismissed Prough's counterclaim under the Thirteenth Amendment.

Second Issue: Was the citation void because it failed to follow the statutory requirements under Wis. Stat. § 66.0113(1)(b)?

The trial court answered no.

Third Issue: Did the Village violate Prough's U.S. Constitution, First Amendment rights by retaliating against him by citing and fining him for an ordinance violation only after he complained about the Village's substandard construction work?

The trial court answered no and dismissed Prough's First Amendment counterclaim.

Statement on Oral Argument and Publication

Prough does not request oral argument. Prough does request publication because this case involves important issues of constitutional and municipal law that are likely to recur.

Statement of the Case

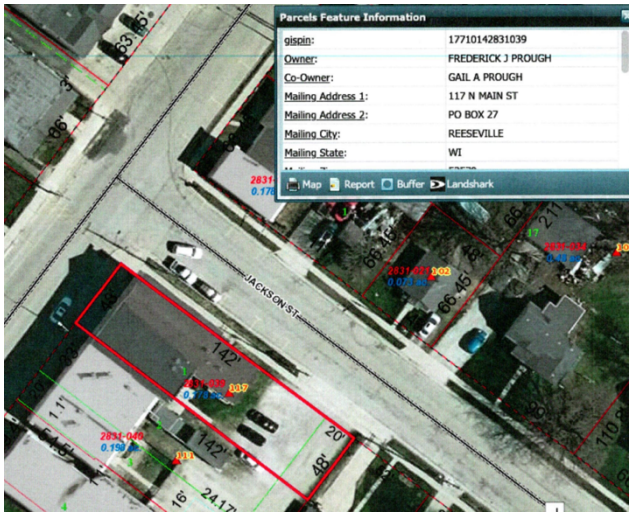
On July 26, 2023, the Plaintiff-Respondent Village of Reeseville mailed a citation to Defendant-Appellant Frederick J. Prough. R.1, A-App 003. The citation stated that the Ordinance Violated was RV334-3(F), and the Ordinance Description was "Public Nuisance – Noxious Weeds." R.1, Citation, A-App. 003. Prough disputed the citation. R.2, Notice of Appearance and Dispute of Citation. Prough then answered the citation, pointing out that the citation's "Violation Description" field was blank and should be dismissed for failure to comply with Wis. Stat. § 66.0113(1)(b)2, vagueness, and failure to state a claim. R.4, Answer and Counterclaims at 1-2. Prough also counterclaimed against the Village, alleging facts that gave rise to constitutional claims against the Village. R.2, Answer and Counterclaims at 2-3. These facts are set forth below in the Statement of the Facts.

The parties appeared for a court trial on November 1, 2023. R.44, Trial Transcript, A-App. 004. At the trial proceeding, the trial judge decided to bifurcate the underlying citation evidence and the counterclaim evidence into two trials, and counsel for Prough objected to bifurcation. R.44, Tr. 8:18-23, A-App. 011. However, the trial judge decided that the counterclaim would be heard separately, and set the counterclaim for summary judgment briefing. R.44, Tr. 8:24-10:23, A-App. 011-013. At the close of evidence of the November 1, 2023 trial, the trial court found Prough guilty of the ordinance violation. R.44, Tr. 59:22-23, A-App. 062. The Village then moved for summary judgment on Prough's counterclaim, the parties briefed the motion, and the trial court held a hearing on January 22, 2024. R. 22; R.25; R. 26; R. 45, A-App. 076. The trial court then issued a written decision granting the Village's motion and dismissing the case. R.32, Decision on Summary

Judgment and Order for Dismissal, A-App. 102. Prough timely appealed. R.39.

Statement of the Facts

Prough has owned a property located at 117 North Main Street, Reeseville, Wisconsin for over 22 years. R.44, Tr. 12:8-24, A-App. 015. Prough lives nearby at 111 North Main Street, Reeseville, Wisconsin. R.44, Tr. 12:6-7, A-App. 015. The 117 North Main property is located at the corner of Main Street and Jackson Street, and has a building with a storefront and an apartment. R.44, Tr. 12:11-21, A-App. 015. As shown in an aerial image that was Exhibit 2 at the trial, the sidewalk and terrace between Prough's property and Jackson Street are not part of the property owned by Prough. R.12; R.44, Tr. 19:11-17, A-App. 022.



R.12. At trial, Prough testified that the terrace was not part of his property, a neighbor testified that she thought the terrace was "communal property," and counsel for the Village stated that "[w]e're not asserting that Mr. Prough owns the terrace. That's never been our assertion." R.44, Tr. 19:11-17, 39:20-22, 40:11-14, 46:7-8, A-App. 022, 042, 043, 049. Counsel for the Village also stated that "I don't know who owns it or doesn't own it" and

refused to make a stipulation that the terrace was public right of way, not owned by Mr. Prough. R.44, Tr. 46:19-47:3, A-App. 041. While it was a little unclear whether the Village, as opposed to the county or the state, had title to the Jackson Street right of way, the undisputed facts at trial and summary judgment showed that Prough did not own the terrace. In its summary judgment decision, the trial court found that the Village owns the terrace. R.32, at 2, A-App. 103.

Despite the fact that the Village or another public entity owned the terrace as part of the right of way, prior to 2023, Prough had maintained the terrace next to his 117 North Main Street property by mowing its grass. R.44, Tr. 14:3-5, A-App. 017. Here is a photo showing the terrace, sidewalk, and building in 2021:

R.13, Exhibit 3.

In 2022 and 2023, the Village commenced a construction project on Jackson Street that included repaving and grading the street, replacing driveway approaches, and replacing the curb and gutter. R.44, Tr. 20:24-21:7, A-App. 023-024. During the construction, the Village contractor

disturbed the grass in the terrace next to the Prough property, taking out the grass and disturbing the soil in the terrace, because the area needed to be re-leveled. R.44, Tr. 21:7-25, A-App. 024. However, the contractor left the soil "lumpy" and not smooth, and whatever the contractor did to reseed the terrace resulted in mostly weeds, and only a little grass, growing in. R.44, Tr. 22:15-22, A-App. 025. Prough proceeded to complain about the condition that the terrace was left in to the Village. R.44, Tr. 24:20-25, A-App. 027. Prough continued to mow the small part of the terrace that did grow back in as grass, but did not mow the part that grew up in weeds. R.44, Tr. 25:8-9, A-App. 028. Here are two photos showing the original grass part of the terrace that Prough continued to mow, with the new weed area next to it. R.15, Exhibit 5; R.44, Tr. 25:12-25, A-App. 028.

R.15, Exhibit 5.

R.11, Exhibit 1, at 1.

After the terrace grew up in weeds, and Prough complained to the Village about the condition of the terrace, Village Trustee Kevin Hankes contacted Dodge County Deputy Sheriff Martin Keberlein, who described Mr. Hankes' complaint as follows in his report:

> Kevin Hankes advised me that he has received multiple complaints about the excessively long, noxious weeds in the terrace area that runs parallel to Jackson Street near the intersection of Jackson Street and Main Street. Kevin Hankes advised the property belongs to Frederick Prough. Kevin Hankes also mentioned Frederick Prough is the same individual that appeared at a board meeting earlier in the year and expressed outrage over a recent village construction project that he claimed negatively affected him.

R.24, at 9.

Deputy Keberlein testified at trial that he was originally "under the impression that that [terrace] area was supposed to be maintained by the Village." R.44, Tr. 50:2-5, A-App. 053. However, he reviewed the Village ordinances, "discovered that was incorrect," explained this understanding to Prough, explained that if the issue was not resolved immediately he would

issue a citation, and then subsequently issued Prough a citation for "Noxious Weeds Village Ordinance 334-4(f)." R.44, Tr. 50:5-6, A-App. 053; R.24 at 10. Deputy Keberlein's report also referenced Village Ordinance 399-38(C), which states, "Every owner of land in the Village whose land abuts a terrace is required to maintain, or have maintained by his tenant, the terrace directly abutting such land as provided in this section and elsewhere in the Code." R.24, at 10.

The citation, No. CD80MT1TKP, referenced Village Ordinance 334-3(F), and stated "PUBLIC NUISANCE – NOXIOUS WEEDS" in the "Ordinance Description" section. R.1, A-App. 003. However, the "Violation Description" section of the citation was left blank. R.1, A-App. 003. Furthermore, the citation did not reference the terrace ordinance section, Village Ordinance 399-38. R.1, A-App. 003.

At trial, Prough was the first witness, who testified about his property (the boundaries of which did not include the sidewalk and terrace next to Jackson Street), about the Jackson Street construction project, and about how the Village had caused the terrace next to his property to become infested with weeds. R.44, Tr. 19:11-17, 20:24-25:24, A-App. 022, 023-028. Prough also tried to put into evidence that in the fall of 2023, the Village acknowledged that the terrace had become weed infested, and then the Village removed the weeds and reseeded the area, however, the Village objected to this on relevance grounds. R.44, Tr. 26:6-29:19, A-App. 029-032.

The second witness at trial was Prough's neighbor, Becky Johnson, who testified that the terrace weeds at the corner of Jackson and Main were a health and safety issue, that she thought the terrace was "communal property," and therefore she went on the communal property and mowed the weeds because she thought they were a health and safety issue. R.44, Tr. 34:12-40:17, A-App. 037-043.

The third witness at trial was Deputy Keberlein, who testified that he issued a citation to Prough "for the weeds that were growing in the terrace next to his property at 117 North Main Street." R.44, Tr. 43:15-22, A-App. 046. He also testified that he observed noxious weeds in the terrace, including ragweed, that were excessively long, close to 6 feet tall if not taller, with pollen emanating from them, that "would cause health issues to members of the public." R.44, Tr. 47:23-48:18, 49:25-51:14. A-App. 050-051, 052-054. He also testified that he did not recall any weed problems in the terrace prior to the road construction. R.44, Tr. 50:13-16, A-App. 053.

In closing argument at trial, counsel for Prough argued:

> Clearly the Village did some work. They dug up the terrace and then instead of restoring it properly, they did a bad job of restoring it and they filled it with weeds. And what we have right here is the epitome of government gone wrong. Instead of doing the job correctly and putting grass in the area that they ruined like they had it before, they filled it with weeds. And then instead of going out and fixing it, they fined the landowner.
>
> This is the epitome of what's wrong with government. The admission or the assertion by opposing counsel that this provided -- this was some sort of a safety or public health type of a situation makes it even more egregious. The Village actually went out -- we have Exhibit 3, which shows how nicely this landowner maintained this area prior to the construction. And instead of evading this or going back to the contractor and asking them to fix the situation, the Village allowed this situation to get to the extent of what's shown in Exhibit 4, to the point that other neighbors actually stepped in and cut it down. Now, the very fact that opposing counsel elicited from Ms. Johnson that the neighbors cut those weeds down because they assumed that they could -- because they assumed they understood that it was communal property -- goes to an important underlying fact in this case.
>
> Mr. Prough does not own that terrace area. That terrace area is public right of way, owned by the Village. And whatever this ordinance purports to say here about requiring people to maintain part of the public right of way, first of all, it's unconstitutional.
>
> You cannot force a citizen to go out and work for free in the public right of way. And even if you could do that, when you make the work difficult or dangerous or impossible by restoring the terrace in a rough, uneven condition and planting it up with weeds, that, by the Village's own admission, were full of pollen and could have caused a health issue to Mr. Prough.

> You have a situation where you have ordinance that, even if it is possibly constitutional on its face, is not constitutional as it's being applied in this case. It is simply unconstitutional under the Fifth Amendment and under the Thirteenth Amendment, both of which we raised here, to go out, do a public project that creates an unhealthy situation – as the plaintiff's own witnesses have elicited -- and then try to use Village ordinances to force a landowner who owns abutting property to essentially abate the nuisance caused by the village itself.

R.44, Tr. 54:12-56:6, A-App. 057-059. Counsel for Prough also argued that the citation itself did not comply with Wis. Stat. § 66.0113(1)(b) and included no factual allegations and no reference to the terrace statute. R.44, Tr. 56:7-23, A-App. 059.

The trial court then ruled on the citation, finding that Village Ordinance 399-38 requires landowners to maintain the terrace, that Prough had the responsibility to mow and maintain the terrace, that the ticket was not deficient, and that Prough was guilty of the ordinance violation. R.44, Tr. 57:4-59:23, A-App. 060-062. Prough was then fined $175.30 and also had to pay costs. R.44, Tr. 61:16-18, A-App. 064; R.35, A-App. 114; R.38, A-App. 116.

Argument

I. Village Ordinance 399-38, requiring Prough to maintain the terrace in the public right of way next to his property, is unconstitutional under the Thirteenth Amendment.

Village Ordinance 399-38, which requires abutting owners to maintain the publicly owned terrace, is unconstitutional as applied in this case because it violates the Thirteenth Amendment of the U.S. Constitution. The trial court dismissed the counterclaim on summary judgment. Summary judgment decisions are reviewed *de novo*. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). The Court also reviews the constitutionality of a statute *de novo*. *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis.2d 520, 665 N.W.2d 328. Because Village Ordinance 399-38 requiring abutting owners to maintain the publicly owned terrace was unconstitutional, Prough should have been found not guilty of violating Village Ordinance 334-3(F).

Prough was ticketed for violating Village Ordinance 334-3(F), the public nuisance (noxious weeds) ordinance. R.1, A-App. 003. However, it was undisputed that the noxious weeds were not actually on any part of Prough's property. R.44, Tr. 19:11-17, 39:20-22, 40:11-14, 46:7-8, A-App. 022, 042, 043, 049. Rather, the weeds were located on public land, part of the Jackson Street right of way. R.44, Tr. 19:11-17, A-App. 022; R.32, Decision at 2, A-App. 103. Furthermore, the undisputed testimony established that the Village construction project was what caused the weeds to be there, as the Village contractors did not complete the work in a satisfactory manner, rather, they left the terrace next to Prough's property uneven and full of weeds. R.44, Tr. 22:15-22, A-App. 025. The weeds then grew to a height and had pollen that was considered to be unhealthy. R.44, Tr. 47:23-48:18, 49:25-51:14, A-App. 050-051, 052-054. There was no allegation the Prough had noxious weeds on his own property. The only basis

for the citation was weeds that the Village had caused to grow up on Village property.

The only reason that the Village ticketed Prough for noxious weeds that were not even on his property was Village Ordinance 399-38(C), which states: "Responsibility to maintain. Every owner of land in the Village whose land abuts a terrace is required to maintain, or have maintained by his tenant, the terrace directly abutting such land as provided in this section and elsewhere in this Code." R.18, Exhibit 8, Village Ordinances at 7, A-App. 074.

It is unconstitutional under the Thirteenth Amendment to compel a landowner to labor for free in the public right of way under threat of prosecution and fines, especially under the conditions of this case, where the work was difficult or dangerous by the Village's own admission, because the weeds were full of pollen that could pose a health issue. R.44, Tr. 47:23-48:18, 49:25-51:14, A-App. 050-051, 052-054. Village Ordinance 399-38 requires abutting owners to perform mandatory maintenance on Village property, with no compensation. Village Ordinance 399-38(B) states: "Noxious weeds; paving. All that part of the terrace not covered by a sidewalk shall be kept free and clear of all noxious weeds and shall not be paved, surfaced or covered with any material which shall prevent the growth of plants and shall be maintained as a lawn, except in areas specifically approved by the Village Board or its designee. Basketball backstops, statuary, structures, flagpoles and other objects shall not be placed in the terrace area." R.18, Exhibit 7, Ordinances at 7, A-App. 074.

Village Ordinance 399-38 as applied in this case and policy and practice of forcing landowners to maintain portions of the public right of way adjacent to their properties is a violation of the Thirteenth Amendment. The Village's enforcement of the ordinance is unconstitutional in this case

because it is undisputed that the terrace area in question is owned by the Village.

The Thirteenth Amendment states, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The *Kozminski* case describes the standard for involuntary servitude: "[W]e find that in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction." *United States v. Kozminski*, 487 U.S. 931, 943 (1988). The *Kozminski* case described a necessary feature of involuntary servitude as "use or threatened use of physical or legal coercion." *Id.* at 944. Here, the Village tried to force Prough to perform unpaid labor to maintain the public terrace, under threat of legal coercion: ticketing and the payment of a fine.

Kozminksi did note that "the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties." *Id.* at 943-44. The Village may argue that maintaining the terrace is a civic duty that citizens commonly perform without complaint. In fact, Prough himself was willing to mow the terrace by his property for many years prior to the construction project, back when the terrace was simply grass that was easy to maintain. It is all well and good for citizens to voluntarily help out with maintaining public property. However, if a citizen objects to doing work in the public right of way, the Village cannot compel this unpaid labor without violating the Thirteenth Amendment.

The *Kozminski* case gave three examples of required civic duties that do not violate the Thirteenth Amendment: jury duty, military service, and the 1916 *Butler v. Perry* case, involving required road work, which gave the option of paying a sum of money ($3.00) rather than doing the work.

Kozminski, 487 U.S. at 943-44; *Butler v. Perry*, 240 U.S. 328, 329 (1916). None of these examples are like the Village ordinance in this case, which requires the abutting owners to maintain the public terraces, with no alternatives. In the *Butler* case, the citizens had an alternative to doing the road work, therefore there was no involuntary servitude because the citizens essentially had the option of simply paying a tax to contribute to the roads instead. *Butler*, 240 U.S. at 329.

It may be argued that the forced labor of maintaining a terrace does not rise to the horror of slavery or even the coerced labor and abuse of the victims in the *Kozminski* case, so therefore, is the ordinance in violation of the Thirteenth Amendment? The answer under Wisconsin law is yes. In the *State v. Brownson* case, the Wisconsin Court of Appeals determined that,

> There are only limited exceptions to the rule expressed by the thirteenth amendment and art. I, sec. 2, of the Wisconsin Constitution. One is when the state compels its citizens to perform civic duties such as military service or jury duty. *Kozminski,* 108 S.Ct. at 2760. The second is in 'exceptional cases' such as those granting parents certain powers over their children or laws preventing sailors from deserting. *Id.* The rule at issue here falls in neither of these categories.

State v. Brownson, 157 Wis. 2d 404, 413, 459 N.W.2d 877 (1990). In the *Brownson* case, the defendant failed to finish building a garage that he had contracted to build, and was then charged under an administrative code provision for "failure to comply with the terms of a home improvement contract." *Brownson*, 157 Wis. at 406. The cost of the garage was $5,525. *Id*. The defendant claimed that the code provision was unconstitutional:

> Brownson argues that criminalizing the breach of a labor contract, in the absence of any finding of fraudulent intent, constitutes involuntary servitude since an individual is forced to complete the work or risk criminal penalties. The thirteenth amendment prohibits involuntary servitude enforced by the use or threatened use of physical or legal coercion. *United States v. Kozminski,* 108 S.Ct. 2751, 2760-61 (1988). A criminal penalty certainly qualifies as legal coercion.

Id. at 411. The Court of Appeals agreed with Brownson and concluded that the code provision violated the Thirteenth Amendment. *Id.* at 413. The

involuntary servitude in *Brownson* was the relatively minor labor of finishing a $5,000 garage. Nevertheless, the Court of Appeals explained that "there are only limited exceptions" to the Thirteenth Amendment prohibition on involuntary servitude. *Id.* at 413.

The *Brownson* case is clear and is the controlling law here. Unless a law compelling involuntary labor falls within the "limited exceptions" identified in *Brownson*, the law violates the Thirteenth Amendment. The terrace ordinance (Village Ordinance 399-38) does not fall into any of the exceptions. Maintaining Village property (which in this case necessarily included addressing the faulty work of the Village's contractor, not just the simple mowing of established grass) is not at all like jury duty or military service. Nor is the ordinance anything like the "'exceptional cases' such as those granting parents certain powers over their children or laws preventing sailors from deserting." *Brownson*, 157 Wis. 2d at 413.

Although the Village may argue that terrace maintenance would qualify under the "civic duties" exception, this is clearly not the case particularly when the Village's contractor destroyed the grass on the terrace. This is particularly true where Mr. Prough *was* maintaining the terrace until it was destroyed by faulty work performed by a Village contractor. R.44, Tr. 14:3-5, 22:15-22, A-App. 017, 025. As testified to and shown at trial, Prough was perfectly willing to maintain the terrace that was preserved as a lawn. ECF No. 15, Trial Exhibit 5. However, the Village destroyed the aesthetics of part of the terrace by creating an area of uneven soil that grew up in weeds. R.44, Tr. 22:15-22, A-App. 025. This area that the Village destroyed was the area that Prough refused to mow. The Village's attempted enforcement of its ordinance under these circumstances would have forced Prough to go above and beyond what other abutting landowners do to maintain the terraces near their property. Rather than maintaining an existing lawn, the ordinance would have forced Prough to "repair defective work performed by a

contractor" when the defective work performed by the contractor left an area of uneven ground, low quality vegetation, and noxious weeds full of pollen. It essentially would have forced Prough to do the (unpaid) labor that a Village contractor should have done to finish up the construction project.

In the last (rather dated) example of a civic duties exception given in the *Kozminski* case, citizens had the option of paying a fee rather than engaging in the required road work. *Kozminski*, 487 U.S. at 944 (citing *Butler v. Perry*, 240 U.S. 328 (1916)). It is also interesting to note that the *Butler* case noted that Wisconsin was a possible exception to early laws requiring labor on public roads. *Butler*, 240 U.S. at 332.

Unlike the law at issue in *Butler*, the Village ordinance in question does not have any options other than coerced labor under threat of prosecution and fines. Village Ordinance 334-8(B) states that anybody violating the nuisance provision of the ordinances is subject to the penalty in Village Ordinance 1-2. That ordinance in turn states that first offense violators shall be fined $25 - $1000 and that "in default of payment of such forfeiture and costs of prosecution shall be imprisoned in the county jail until such forfeiture and costs are paid, but not exceeding 90 days." The series of events in this case outlines governmental conduct which is coercive, unconstitutional, and unreasonable.

Village Ordinance 399-38 is unconstitutional because it violates the Thirteenth Amendment of the U.S. Constitution. Therefore, the trial court's finding that Prough was guilty of an ordinance violation for failing to maintain the terrace in the public right of way should be reversed. It is not constitutional for the Village to use an ordinance to force a local property owner to maintain Village property under threat of prosecution and the payment of fines. The Village's actions are particularly odious in this case, where the Village destroyed its own property through substandard construction work, failed to remediate the problems when it was notified of

them, and then tried to force the abutting landowner to clean up the mess. The Village ordinances specifically state that terrace areas "shall be maintained as a lawn." Village Ordinance 399-38(B). R.18 at 7, A-App. 074. Here, the Village destroyed the lawn and replaced it with uneven soil and low-quality vegetation that grew up into noxious weeds. The Village tried to force Prough to not only maintain Village property, but to go above and beyond in mitigating a problem of the Village's own creation. When Prough refused to do the work that the Village or its contractor should have completed as part of the construction project, the Village ticketed Prough.

Procedurally, the circuit court did not rule on Prough's constitutional defense at the citation trial, rather, the court waited and dismissed Prough's Thirteenth Amendment counterclaim on summary judgment. R.32, A-App. 102. However, Prough raised the unconstitutionality of the ordinance at the citation trial, which was the first part of the bifurcated proceeding limited to the citation itself. R.44, Tr. 55:22-56:6, A-App. 058-059 ("You have a situation where you have ordinance that, even if it is possibly constitutional on its face, is not constitutional as it's being applied in this case. It is simply unconstitutional under the Fifth Amendment and under the Thirteenth Amendment, both of which we raised here, to go out, do a public project that creates an unhealthy situation – as the plaintiff's own witnesses have elicited -- and then try to use Village ordinances to force a landowner who owns abutting property to essentially abate the nuisance caused by the village itself.").

Therefore, Prough had both a defense to the citation itself as well as a counterclaim for damages against the Village for violating his constitutional rights. It is very common for the unconstitutionality of a statute or ordinance to be a defense that prevents or overturns a conviction. *See, i.e., State v. Popanz*, 112 Wis. 2d 166, 168, 332 N.W.2d 750 (1983). In some cases, the same facts may give rise to a civil claim for damages against the municipality

under 42 U.S.C. § 1983. Here, because Village Ordinance 399-38 violates the Thirteenth Amendment, the trial court's guilty finding should be overturned, and independently, Prough's counterclaim against the Village should be allowed to proceed.

II. The citation was void because it failed to follow the statutory requirements under Wis. Stat. § 66.0113(1)(b).

The citation issued to Prough failed to follow the statutory requirements under Wis. Stat. § 66.0113(1)(b) because it did not contain any factual allegations, therefore, it was void. Statutory interpretation and the application of a statute to the facts are reviewed de novo. *Columbus Park Housing v. City of Kenosha*, 2003 WI 143, ¶ 9, 267 Wis. 2d 59, 671 N.W.2d 633.

As noted above, the citation issued by Deputy Keberlein left the "Violation Description" section blank. R.1, Citation, A-App. 003. The citation had the "Week Day" ("Wednesday"), "Date" ("07/26/2023"), "Time" ("01:44 PM"), and "From/At Hwy No. and/or Street Name" ("On Main St/G North 40 Ft S of Jackson St") sections filled in, but otherwise did not contain any facts about the nature of the alleged violation. R.1, A-App. 003. Village Ordinance 32-3 requires that, "The form of the citation to be issued by Village police officers, the Dodge County Sheriff's Department or other designated Village officials is incorporated herein by reference and shall provide for the information required in § 660113(1)(b), Wis. Stats."

Wis. Stat. § 66.0113(1)(b) requires that a citation for an ordinance violation include "[t]he factual allegations describing the alleged violation" and "[a] designation of the offense in a manner that can be readily understood by a person making a reasonable effort to do so." Wis. Stat. § 66.0113(1)(b)(2); Wis. Stat. § 66.0113(1)(b)(5). It is undisputed that the citation in this case did not contain "factual allegations describing the alleged

violation" and without these allegations, it is difficult to see how the offense could be designated "in a manner that can be readily understood by a person making a reasonable effort to do so."

The Village may argue that this was a simple case that did not require factual allegations, but Wis. Stat. § 66.0113(1)(b) does not contain any exemption from its requirements. The statute is clear and unambiguously requires "factual allegations." The statute simply requires that citation *shall* meet the listed requirements, period. Wis. Stat. § 66.0113(1)(b). Rather than complying, the Village's citation conspicuously left the "Violation Description" section blank. R.1, A-App. 003. This citation did not meet the statutory requirements, which were obviously designed to provide adequate notice and due process to the recipient. A citation that fails to meet these basic requirements is simply void. The citation therefore violated both Village Ordinance 32-3 and Wis. Stat. § 66.0113(1)(b) and should have been dismissed for failure to comply with these requirements, vagueness, and failure to state a claim.

III. The Village violated Prough's First Amendment rights by retaliating against him after he complained about the substandard construction work.

The Village violated Prough's rights under the First Amendment by citing and fining him in retaliation for his protected speech when he complained about the substandard construction work on the terrace as part of the Jackson Street project. The trial court dismissed this claim on summary judgment, therefore, the standard of review is de novo. Summary judgment decisions are reviewed de novo. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997).

The Village retaliated against Prough after Prough complained about the substandard quality of the construction work near his property. The

reasonable course of action for the Village after being notified about substandard work by a Village employee or contractor, would have been to cause the repair of the damage at the Village or contractor's expense. The Village never disputed that it caused the damage to the terrace vegetation. However, rather than undertake the reasonable course of action, the Village retaliated against Prough by trying to coerce Prough into cleaning up the Village's weeds, and then by issuing him a ticket with a threatened fine.

"'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech. If an official takes adverse action against someone based on that forbidden motive, and 'non-retaliatory grounds are in fact insufficient to provoke the adverse consequences,' the injured person may generally seek relief by bringing a First Amendment claim." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

> To prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." *Hartman,* 547 U.S., at 259, 126 S.Ct. 1695. It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured —the motive must *cause* the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.

Nieves, 139 S. Ct. at 1722.

Although under *Nieves*, "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim," *Nieves*, 139 S. Ct. at 1726, *Nieves* explains the exception to this as follows:

> Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose "a risk that some police officers may exploit the arrest power as a means of suppressing speech."

Nieves, 139 S. Ct. at 1727 (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953-54 (2018)). The *Nieves* court discussed the *Hartman* case and concluded:

> For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of *Hartman*'s logic.
>
> For those reasons, we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.

Nieves, 139 S. Ct. at 1727 (citing *Hartman*, 547 U.S. at 256). Therefore, there are exceptions to the no-probable cause rule. This exception should apply to the case at hand, because the evidence established that Deputy Keberlein was aware of the excessively long weeds in the past, but had exercised his discretion to not issue a citation until Trustee Hankes complained to him about Prough's speech. R.44, Tr. 50:2-6, A-App. 053.

If the plaintiff shows that there was no probable cause (or that an exception to the no-probable cause rule should apply), "then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Nieves*, 139 S. Ct. at 1725 (citing *Lozman*, 138 S. Ct. at 1952-53) (citing *Hartman*, 547 U.S. at 265-66)).

Here, the fact of Prough's complaint to the Village about the construction work was included in Deputy Keberlein's report. R.24 at 8. According to the report, Village Trustee Kevin Hankes contacted Deputy

Keberlein and told him about the noxious weeds by the Prough property, including the information that Frederick Prough had complained to the board about the construction project. R.24, at 8. "Kevin Hankes also mentioned that Frederick Prough is the same individual that appeared at a board meeting earlier in the year and expressed outrage over a recent village construction project that he claimed negatively affected him." R.24, at 8. If the Village did not intend to retaliate against Prough for his speech, there was no reason for the Village Trustee to discuss the past board meeting with Deputy Keberlein.

It is clear that the Village took this adverse action against Prough based on the forbidden motive of retaliation. Therefore, for the purpose of summary judgment, Prough did establish that his speech was a substantial or motivating factor behind the Village's retaliatory actions. After that, the burden was on the Village to prove that that citation and fine would have happened even without the motivating factor of Prough's speech. The Village cannot do that, because the evidence established that Deputy Keberlein had actually driven through the area in the past and had observed that the weeds were excessively long, but Deputy Keberlein did not issue a citation until after he was contacted by Trustee Hankes, and this contact included a complaint about Prough's speech. R.44, Tr. 50:2-6, A-App. 053.

Deputy Keberlein did not just happen to notice an alleged ordinance violation that he thought should be corrected for public health and aesthetic purposes while driving down Jackson Street. In fact, when Deputy Keberlein had actually driven down Jackson Street in the past and noticed the weeds, he exercised his discretion to not issue any citation. R.44, Tr. 50:2-6, A-App. 053. Rather, it was only after Village Trustee Hankes brought up the matter with Deputy Keberlein, and complained about Prough's speech about the construction project at a board meeting, that Deputy Keberlein issued the citation. Therefore, it is reasonable to conclude that "non-retaliatory grounds

[were] in fact insufficient to provoke the adverse consequences." *Nieves*, 139 S. Ct. at 1722 (quoting *Hartman*, 547 U.S. at 256).

The Village ordinance in this case is akin to the example of misdemeanor offenses given in the *Nieves* case, where, it is "insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest." *Nieves*, 139 S. Ct. at 1727. In addition, the case at hand is different from *Hartman* and *Nieves*, which were cases brought against the prosecutor and investigators, and the arresting officers. *Hartman*, 547 U.S. at 254; *Nieves*, 139 S. Ct. at 1721. Here, Prough's claim is against the Village itself. "*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered. With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembauer v. Cincinnati*, 475 U.S. 469, 480 (1986).

"We hold that municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembauer*, 475 U.S. at 483-84. It is clear that Village Trustee Hankes was the one who contacted Deputy Keberlein about the terrace weeds and it is also clear that the Village's motivation was the fact that Prough had complained at a board meeting. R.24, Village App. 8. Prough's claim is that the Village retaliated against him due to his speech, including by refusing to fix the weed and sidewalk problems and then ticketing Prough. Trustee Hankes and Deputy Keberlein both had final policymaking authority as it pertains to the action they took in this case. Furthermore, after Deputy Keberlein issued the citation, the Village chose to proceed with the case by

pursuing a guilty finding at trial. Furthermore, the Village's unconstitutional Village Ordinance 399-38 is an express policy that the Village chose to enforce in this situation. For these reasons, Prough had established sufficient evidence that his First Amendment rights were violated by the Village, and the trial court should not have dismissed his counterclaim.

Conclusion

For the above reasons, Prough requests that the Court overturn the trial court's finding that Prough was guilty of violating Village Ordinance 334-3(F), reverse the trial court's finding that the ordinance complied with Wis. Stat. § 66.0113(1)(b), and reverse the trial court's dismissal of Prough's counterclaims under the Thirteenth and First Amendments and remand the case for further proceedings consistent with this Court's decision.

Respectfully Submitted this 20th day of November, 2024.

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WIS. STAT. § 809.19(8g)(a) FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 6,577 words.

Signed: November 20, 2024.

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WIS. STAT. § 809.19(8g)(b) APPENDIX CERTIFICATION

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed: November 20, 2024.

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