No. 2024AP001046

In the Wisconsin Court of Appeal
District IV

VILLAGE OF REESEVILLE,
Plaintiff-Respondent,

v.

FREDERICK J. PROUGH,
Defendant-Appellant.

On Appeal from the Circuit Court of Dodge County
The Honorable Kristine A. Snow, Presiding
Case No. 2023FO000356

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent agrees that oral argument is not necessary but disagrees with Appellant regarding the need for publication, as the issues presented on appeal are straightforward and involve the application of well-settled rules of law. *See* Wis. Stat. §§ 809.22(2)(b), 809.23(1)(b).

STATEMENT OF ISSUES

In the Village of Reeseville, as in many municipalities, property owners are responsible for maintaining the grassy "terrace" between the road and sidewalk adjacent to their properties. When the terrace next to Frederick Prough's property became overgrown with tall, noxious weeds, he blamed the Village and refused to mow it, despite repeated warnings that his inaction violated local ordinances. After being cited for non-compliance, Prough counterclaimed alleging the Village's enforcement violated his constitutional rights under 42 U.S.C. Section 1983. The trial court upheld the citation, found Prough guilty of an ordinance violation, and dismissed his constitutional counterclaims. The issues on appeal are as follows:

1. Whether Reeseville's ordinance, policy, or practice requiring property owners to maintain the public right-of-way violated Prough's constitutional protections against involuntary servitude under the Thirteenth Amendment. The circuit court answered **NO**. This Court should affirm.

2. Whether the Village itself—not one of its agents or employees—retaliated against Prough by issuing the citation, in violation of the First Amendment. The circuit court answered **NO**. This Court should affirm.

3. Assuming, arguendo, that Prough could establish an underlying constitutional violation—which the circuit court correctly determined he could not—can Prough meet the stringent requirements of *Monell v. Department of Soc. Services* to hold the Village liable? This Court should answer **NO**.

4. Whether the citation complied with the statutory requirements of Wis. Stat. § 66.0113(1)(b) and properly stated a claim. The circuit court answered **YES**. This Court should affirm.

STATEMENT OF THE CASE

This case concerns the enforcement of local weed control ordinances, widely adopted by municipalities, that obligate property owners to keep adjacent areas, such as terraces—raised, paved, or landscaped sections near their property—clear of noxious weeds. These ordinances are designed to ensure public safety, preserve property values, and uphold community aesthetics.

This was the condition of the terrace next to Prough's property:

Prough, however, chose not to cut down the overgrown weeds, despite having maintained the terrace before and being informed that failing to do

so violated local ordinances. Prough admitted he was "putting out a statement" by refusing to cut the weeds. (R. 44, Trial Transcript p. 15:2-3.) Eventually, a concerned neighbor, noting that the overgrown weeds obstructed visibility between drivers and pedestrians on the sidewalk, removed the weeds herself. Prough was cited for violating Reeseville's Noxious Weed Ordinance, § 334-3(F).

Prough contested the citation by denying the allegations and counterclaiming against the Village, claiming that requiring him to maintain the terrace violated the United States Constitution. But not every enforcement of a local ordinance rises to the level of a constitutional violation—particularly when, as here, the ordinances are a valid exercise of municipal police powers, sufficient evidence supports their enforcement, and the alleged liability is directed at the municipality itself.

The citation against Prough was upheld at trial, where he was found guilty of violating Reeseville's ordinance. His constitutional counterclaims were later dismissed on summary judgment. Prough now appeals.

A. Factual Background

Frederick Prough owns the property located at 117 N. Main Street in the Village of Reeseville. (R. 4, Answer and Counterclaims ¶ 9; R. 44, Trial Transcript p. 12:8-10.) Directly adjacent to his property, along Jackson Street, is a grassy terrace located between the sidewalk and the roadway. (R.

4 at ¶ 10; R. 12, Ex. 2 – Map; R. 44 at p. 13:11-19.) Below is another depiction of the terrace along Prough's property, showing its overgrown state with tall weeds clearly visible.

(R. 11, Ex. 1 – Photos of Property.)[1]

Prough admitted that the weeds were overgrown but chose not to cut them, attributing the overgrowth to a prior construction project along

[1] The ownership of the terrace—whether by the Village, County, or State—was not definitively resolved in this case, nor is it material. At trial, the Village clarified that it was "not asserting that Mr. Prough owns the terrace. That's never been [its] assertion." (R. 44, p. 19:11-17; 46:6-10.) During summary judgment proceedings, the Village consistently maintained that Prough does not own the terrace, a position it continues to uphold on appeal.

Jackson Street that included the terrace. (R. 44, p. 20:24-25, p. 21:2-11, p. 22:20-22, p. 25:4-9.) While he maintained a small portion of the terrace, he explicitly stated he "wasn't touching [the weeds]." (*Id.* at p. 25:4-9.) In fact, Prough purposely ignored the weeds to "make a statement" that he would not comply with repeated requests to cut them. (*Id.* at p. 31:7-9, p. 14:21-25, p. 15:1-12.)

One such request came from Deputy Martin Keberlein, who was contacted by Village Trustee Kevin Hankes. (R. 24, Incident Report p. 9.) Hankes informed Keberlein that he had received multiple complaints about the excessively long weeds on the terrace adjacent to Prough's property. (*Id.*) This conversation was documented in Keberlein's Incident Report:

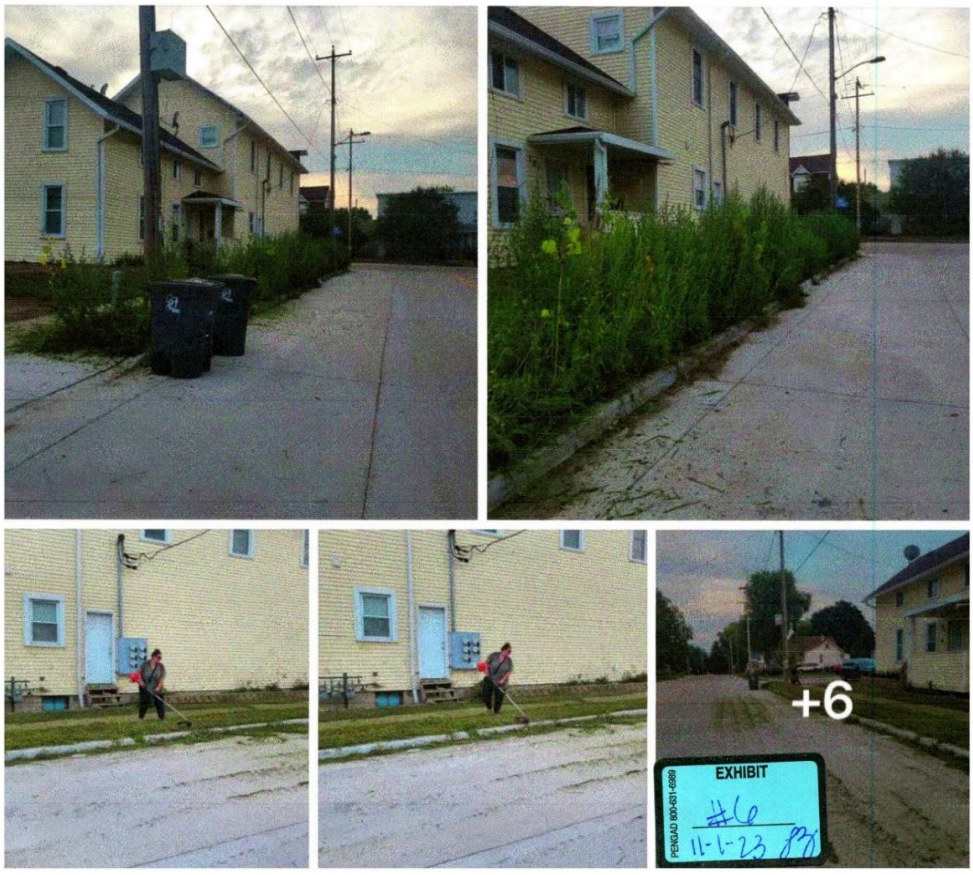
> Kevin Hankes advised me that he has received multiple complaints about the excessively long, noxious weeds in the terrace area that runs parallel to Jackson Street near the intersection of Jackson Street and Main Street. Kevin Hankes advised the property belongs to Frederick Prough. Kevin Hankes also 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.

(*Id.*)[2] Keberlein contacted Prough to inform him of the complaints and explained that the Village was simply looking for him to comply by

[2] Even before this, Prough testified that another Village employee, Dean Ziegel, had asked him to maintain the terrace by cutting the grass. However, Prough insisted that he would only cut what he considered to be "grass" and "wasn't touching [the weeds]." (R. 44, p. 25:3-9.)

maintaining the terrace. (*Id.* at p. 10; R. 44, p. 42:4-10.) The next morning, Keberlein drove past Prough's property and noticed that the weeds had not been cut. (R. 24, p. 10.) Prough was cited for violation Village Ordinance 334-3(F), Public Nuisance – Noxious Weeds. (R. 1, Citation.) He countered by suing the Village for alleged constitutional violations. (R. 4.)

Prough never cut the weeds. Instead, a concerned citizen took it upon herself to address the issue, citing health and safety concerns: "When you pulled up to the stop sign, you couldn't clearly see going down the road. I feared for people that were walking their dogs at night. It's just – it was unsafe." (R. 44, p. 35:19-25, p. 36:1-2.)



(R. 16, Ex. 6.)

B. The Ordinances at Issue

Two Village ordinances were triggered by the condition of the terrace: the Village's general nuisance ordinance and the specific ordinance governing the terrace areas. Village Ordinance § 334-3 (Public nuisances affecting health) states, in part:

> The following acts, omissions, places, condition and things are hereby specifically declared to be public health nuisances . . . :
>
> ***
>
> F. Noxious weeds. All noxious weeds and other rank growth of vegetation.

Section 334-3(F); (R. 18, Ex. 8 – Reeseville Ordinances p. 1-2.)

Additionally, Village Ordinance § 399-38(B), concerning "terrace areas"[3] states, in part: "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 be maintained as a lawn . . ." (R. 18, p. 7.) Section 399-38(C) goes on to say that "[e]very owner of land in the Village whose land abuts a terrace is required to maintain, or have maintained by his tenant, the terrace

[3] The definition of "terrace area" is defined in Village Ordinance § 415-2: Boulevard or Terrace Areas - The land between the normal location of the street curbing and sidewalk. Where there is no sidewalk, the area four feet from the curb line shall be deemed to be a boulevard for the purpose of this chapter. "Boulevard" shall have the same meaning as "terrace." Where there are only sidewalks, the area four feet from the curb shall be deemed boulevard areas under this chapter.

directly abutting such land as provided in this section and elsewhere in this Code." (*Id.* at p. 7.)[4]

[4] Similar provisions can be found in the codes of ordinances for other Wisconsin municipalities, including the following examples, though this is not an exhaustive list:

City of Wauwatosa, 12.06.010 - Duty of abutting property owner.

> A. In accordance with the provisions of Section 12.04.040A, the abutting property owner is responsible for maintaining the street right-of-way between his property line and the edge of the street pavement including weed cutting or removal.
>
> B. Any property owner who fails to cut or remove weed growth which occurs within the street right-of-way between the property line and street pavement abutting his property shall be subject to a special charge imposed by the city pursuant to Wisconsin Statutes 66.0627 if such weed removal or cutting is performed by the city.

City of Neillsville, 4-2-8 Terrace Areas.

> (a) Definition. The definition of "terrace" shall be as defined in Section 4-4-2(f).
>
> (b) Noxious Weeds; Paving. 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 Common Council or its designee.
>
> (c) Responsibility to Maintain. Every owner of land in the city 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. Every owner shall keep mailboxes located on a terrace free and clear of snow.

City of Sun Prairie, 12.36.020 - Terrace areas.

> A. Definition. The terrace or street terrace shall be defined as that area between the edge of a street pavement, or the back of the street curb and gutter, and the right-of-way line of any public street or alley.
>
> B. 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 common council or its designee.

C. Procedural History

In November 2023, the parties proceeded to a bench trial on Prough's municipal citation. (R. 44.) The trial court elected to address the citation first and defer ruling on Prough's constitutional counterclaims. (*Id.* at p. 9:16-19.) After hearing arguments, reviewing the evidence, and considering the parties' positions, the court found Prough guilty of violating the Village's ordinances. The key portions of the court's ruling are as follows:

> With respect to the responsibility to maintain the terrace, the Village of Reeseville – ordinance 399.38, certainly it provides notice to the landowners that they're required to maintain the terrace. (*Id.* at p. 57:4-8.)

> ***
>
> D. Responsibility to Maintain. Every owner of land in the city whose land abuts a terrace is required to maintain, or have maintained by his or her tenant, the terrace directly abutting such land as provided in this section and elsewhere in this code.

City of Chilton, 26-102 – Terrace maintenance.

> (a) Purpose and intent. It is the intent of this section to promote and protect public health and safety by the maintenance of terraces.
>
> (b) Terrace defined. As used in this section, the term "terrace" means the area between the sidewalk and street, or when there is no sidewalk, the area between the right-of-way line and street.
>
> (c)Required maintenance. In addition to other obligations placed upon a person who owns land abutting upon a road right-of-way, including the removal of obstructions, the planting of trees and other such matters described in this Code, such owner of abutting property shall be responsible for the maintenance of the terrace, including existing trees.
>
> (d) Failure to maintain. Any person who fails to maintain the terrace as provided in subsection (c) of this section and such failure continues more than ten days after a person is sent written notice by the city to effect maintenance of the terrace, then in that event the owner shall be liable for the expense incurred by the city in doing the maintenance.

> In fact, Mr. Prough even testified that up until this point, when he wanted to make a statement, he was maintaining the terrace . . . He certainly knew that he had the responsibility to maintain that, had maintained it in the past. (*Id.* at p. 57:9-20.)
>
> The ticket was issued. I think that the ticket is not deficient on its face. It indicates that the ordinance that's being violated is for public nuisance and noxious weeds. It indicates that the location is on Main Streets, Highway G, North 40 feet of South Jackson Street, which is certainly the location where that terrace area is. And so I think the – I reject the argument that the ticket is not sufficient on its face under these circumstances. I think it provides adequate notice to Mr. Prough of the ordinance that they are alleged to – that he has violated. (*Id.* at p. 57:21-25, p. 58:1-5.)
>
> Notably, and understandably, it doesn't matter how the weeds got there. If how the weeds got there is a defense, we're going to have all kinds of problems because weeds are dispersed by the wind, they're dispersed by other people's plants, and in fact, that's exactly the problem here and how they become noxious because they were allowed to grow to such an extent. (*Id.* at p. 58:14-20.)
>
> He is liable for his actions, or in this case inactions, and failing to maintain that property. The Court will find him guilty of the ordinance violation.

(*Id.* at p. 59:20-23.)

The Village moved for summary judgment on Prough's counterclaims. (R. 21.) The parties fully briefed the legal issues and later presented oral arguments before the court. (R. 22; R. 25; R. 26; R. 45, Motion Hearing Transcript.) Notably, during summary judgment, Prough did not argue, as

he does on appeal, that the citation failed to meet the statutory requirements of Wis. Stat. § 66.0113(1)(b) or properly state a claim. Instead, the briefing focused on whether the Village violated Prough's constitutional rights.[5] In its written decision, the court determined that the Village did not. (R. 32, Decision and Order.)

Prough now appeals.

STANDARD OF REVIEW

Following a bench trial, this Court reviews the circuit court's decision under a well-established standard. The Court's review is highly deferential to the circuit court's findings of fact. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶ 11, 290 Wis. 2d 264, 714 N.W.2d 530. "On review of a factual determination made by a [circuit] court without a jury, an appellate court

[5] It is also worth noting that Prough's counterclaims included alleged violations of the Fifth and Fourteenth Amendments to the U.S. Constitution. These issues were fully briefed on summary judgment, and the court found no violations under either amendment. In his Docketing Statement (R. 40), Prough identified eight issues for appeal, including claims under the Fifth and Fourteenth Amendments. However, his opening brief addresses only three of those issues and fails to substantively discuss the applicability of the Fifth and Fourteenth Amendments. (Brief of Appellant, p. 4.) He has therefore waived those issues.

Issues not raised or properly briefed on appeal are deemed waived. *See Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981). Additionally, this Court has made clear that it will not address issues that are inadequately briefed. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

Prough cannot attempt to revive these issues in his reply brief. Raising new issues or arguments at that stage would not only be highly prejudicial to the Respondent but is also improper because this Court does not address arguments raised for the first time in a reply brief. *See Richman v. Security Sav. & Loan Ass'n*, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973).

will not reverse unless the finding is clearly erroneous." *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) (*citing* Wis. Stat. § 805.17(2)). "A circuit court's findings of fact are clearly erroneous when the finding is against the great weight and clear preponderance of the evidence." *Royster-Clark, Inc.*, 2006 WI 46, ¶ 12. "Under the clearly erroneous standard, 'even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding.' " *Id.* (citation omitted). In contrast, "[t]his Court reviews conclusions of law independently and without deference to the decision of the circuit court." *Id.*, ¶ 13 (citation omitted).

Whether the circuit court properly granted summary judgment is a question of law that this Court reviews independently as well, applying the same standards used by the circuit court. *Tatera v. FMC Corp.*, 2010 WI 90, ¶ 15, 328 Wis. 2d 320, 786 N.W.2d 810. Governed by Wis. Stat. § 802.08, "[s]ummary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Tews v. NHI, LLC*, 2010 WI 137, ¶ 42, 330 Wis. 2d 389, 793 N.W.2d 860.

ARGUMENT

Because Prough seeks to hold the Village of Reeseville liable for alleged constitutional violations under 42 U.S.C. § 1983, this case is governed by federal constitutional law, including the onerous requirements for suing a governmental entity under the United States Supreme Court's decision in *Monell v. Department of Social Services*. 436 U.S. 658 (1978). Under *Monell*, Prough must first establish that a constitutional violation occurred and, if he can, he must then show that the Village maintained or authorized a policy, custom, or practice that approved the unconstitutional conduct. *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994). If no constitutional violation occurred, there can be no municipal liability, and the case ends there. *See Sallenger v. City of Springfield, Ill.*, 630 F.3d 499, 504 (7th Cir. 2010) ("[A] municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee").

The Court's analysis begins and ends at this first stage.

I. Requiring Prough to keep the terrace free of noxious weeds does not violate the Thirteenth Amendment's ban on slavery or involuntary servitude, nor did the Village violate the First Amendment by issuing a citation for noncompliance with its ordinances.

A. Reeseville's weed control ordinances do not violate the Thirteenth Amendment.

The paucity of case law cited by Prough underscores the fundamental weakness of his Thirteenth Amendment claim: no court—certainly none in

Wisconsin—has found that requiring property owners to maintain adjacent terraces violates the Amendment's prohibition on slavery or involuntary servitude. In the rare instances where similar claims have been raised, courts have quickly and emphatically rejected them, recognizing that such ordinances serve legitimate governmental interests. Accepting Prough's argument would not only contradict this well-established principle but also jeopardize countless local ordinances in Wisconsin[6] and across the nation, undermining municipalities' ability to promote public welfare.

The Thirteenth Amendment prohibits "slavery" and "involuntary servitude," narrowly defined by the Supreme Court in *United States v. Kozminski*, 487 U.S. 931, 942 (1988), as the compulsion of labor through physical coercion or legal threats akin to slavery. Courts have consistently held that ordinances requiring property maintenance—such as mowing grass, clearing noxious weeds, or maintaining adjacent public right-of-way areas—do not rise to this level of compulsion.

For example, in *Rowe v. City of Elyria*, 38 F. App'x 277, 282-83 (6th Cir. 2002) (unpublished) (*see* R. 28 for full opinion), the Sixth Circuit rejected a claim that a mowing ordinance constituted involuntary servitude. It concluded that such laws are rationally related to legitimate governmental purposes, such as public safety and aesthetics, and do not involve the type

[6] *See* footnote 4 for several examples.

of compulsion prohibited by the Thirteenth Amendment. As the court stated, "[e]ven if the tree lawn is owned by the City, enforcement of the mowing ordinance does not involve the kind of compulsion that would constitute involuntary servitude under the Thirteenth Amendment." *Id.* at 283.

Similarly, in *Gasses v. City of Riverdale*, 288 Ga. 75, 701 S.E.2d 157 (2010), the court affirmed that requiring citizens to maintain vegetation under threat of penalty was a valid exercise of municipal police power. The city ordinance stated, in relevant part, that "[i]t is unlawful for either the occupant or the owner of property . . . to have . . . [on or near] . . . [a] sidewalk or right-of-way . . . any overgrown grass or weeds of a height of six inches or more or any unkempt vegetation [.]" *Id.* at 75–76. The court determined that the ordinance served a legitimate purpose: to abate nuisances and promote the community's health, safety, and welfare. It addressed issues like overgrown vegetation, which can harbor pests and detract from community aesthetics, objectives well within the municipality's police power and substantially related to public welfare. *Id.* at 77–78, 701 S.E.2d at 159.

The appellant also argued that the ordinance violated the Thirteenth Amendment, an argument the court swiftly rejected.

> Appellant contends the instant statute is akin to involuntary servitude outlawed by the federal and state constitutions. We disagree. In response to this country's past institutional enslavement of

> people of African descent, the Thirteenth Amendment of the United States Constitution and Article I, Section I, Par. XXII of the Georgia Constitution outlaw involuntary servitude. The United States Supreme Court has held 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." *United States v. Kozminski*, 487 U.S. 931, 944, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). Key examples of such civic duties are jury service, military service, and roadwork. *Id.* A municipal ordinance requiring a citizen to maintain grass, weeds, and vegetation for the welfare of the community is not constitutionally prohibited involuntary servitude.

Id. at 78, 701 S.E.2d at 159–60 (emphasis added).

Reeseville's ordinances align squarely within this framework. Section 334-3(F) classifies noxious weeds as public nuisances affecting health, while §§ 399-38(B) and (C) require property owners to keep adjacent terraces clear of nuisances like noxious weeds. These ordinances are a valid exercise of municipal police power, aimed at promoting public safety and welfare by controlling the growth of noxious weeds to protect environmental health, preserve property values, enhance community aesthetics, and prevent hazards such as fire risks from accumulating debris. *See State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 270–71, 69 N.W.2d 217 (1955) (The protection of property values as well as aesthetic considerations are objectives which fall within the exercise of the police power to promote the "general welfare of the community"); *Shachter v. City*

of Chicago, 2011 IL App (1st) 103582, 356 Ill. Dec. 901, 962 N.E.2d 586 (App. Ct. 1st Dist. 2011) (holding that the city's weed control ordinance serves a rational, legitimate interest in promoting aesthetics); *City of Montgomery v. Norman*, 816 So.2d 72, 79 (Ala.Crim.App.1999) (upholding municipal weed ordinance as constitutional exercise of police power in support of legitimate public interest in aesthetics).

Prough's assertion that the Village "caused" the issue—based entirely on conjecture and speculation—serves only to distract from the fact that requiring him to maintain the terrace next to his property is both reasonable and legitimate, as confirmed in *Rowe* and *Gasses*, and does not violate the Thirteenth Amendment.

This civic responsibility is far removed from the coercion or exploitation the Thirteenth Amendment was intended to prevent. As the Supreme Court explained in *Kozminski*, the Amendment does not prohibit governments from compelling civic duties through law, such as military service, jury duty, or maintaining public spaces. *Kozminski*, 487 U.S. at 944. The Court offered the following insight:

> Our precedents reveal that not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment. By its terms the Amendment excludes involuntary servitude imposed as legal punishment for a crime. Similarly, 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 [e.g., jury service, military service, and roadwork].

Id. at 943-44. Under this reasoning, the Village's ordinances are both lawful and a routine exercise of municipal authority to safeguard community welfare.

Accepting Prough's argument would undermine the enforceability of dozens, if not hundreds, of similar ordinances statewide and across the country, jeopardizing the ability of local governments to uphold basic property maintenance standards. The Sixth Circuit reached a similar conclusion in *Shoemaker v. City of Howell*, 795 F.3d 553 (6th Cir. 2015), upholding an ordinance requiring property owners to maintain grassy areas between the sidewalk and street curb adjacent to their properties. The court found that the ordinance served legitimate governmental interests, including "traffic safety, sanitation, animal and rodent control, protection of property values, aesthetics, and public health, safety, and welfare." *Id.* at 567.

Recognizing the widespread nature of such ordinances, the court noted, "Ordinances like the one challenged here, on the other hand, are ubiquitous from coast to coast. In fact, a cursory internet query reveals similar ordinances in countless municipalities across the country. *See, e.g.*, [citing multiple examples]." *Id.* at 566. The court further dismissed the

plaintiff's claims as exaggerated, concluding, "[t]his suggests that the Ordinance in question is not nearly as conscience-shocking or draconian as Shoemaker would make it out to be." *Id.* If ordinances like this were plainly invalid or in violation of the Thirteenth Amendment, as Prough contends, the legal landscape would be replete with cases striking them down. Instead, the overwhelming body of case law affirms their constitutionality and validity.

Prough fails to identify a single court decision where an ordinance promoting public health, safety, and welfare was found to violate the Thirteenth Amendment. Instead, he relies on *State v. Brownson*, 157 Wis. 2d 404, 459 N.W.2d 877 (1990), a case wholly unrelated to the present matter. *Brownson* addressed a state administrative code provision criminalizing the breach of a labor contract, with the court holding that absent fraud or misrepresentation, the state could not criminalize such breaches without implicating involuntary servitude concerns. *Id.* at 411–13. Contrary to Prough's assertion, *Brownson* is neither "clear" nor "controlling" law in this context and has no bearing on the validity of municipal ordinances like those at issue here.

The Thirteenth Amendment simply has no application here. Prough's claim not only misinterprets constitutional protections but also invites a precedent that would undermine essential local governance across the

country. For these reasons, the Court should reject his Thirteenth Amendment challenge and uphold the Village's ordinances as a valid and necessary exercise of municipal authority—far from the egregious constitutional violation required to invoke the Amendment's prohibition on slavery or involuntary servitude.

B. The Village did not infringe on Prough's First Amendment rights by issuing him a citation.

Prough admitted that the weeds on the terrace adjacent to his property were overgrown (R. 44, p. 20:24-25, p. 21:2-11, p. 22:20-22, p. 25:4-9). He even testified that he intentionally ignored the weeds to "make a statement" by refusing to comply with repeated requests to cut them (*Id.* at p. 31:7-9, p. 14:21-25, p. 15:1-12). Despite this, Prough claims the Village ticketed him in retaliation for his complaints about the construction along Jackson Street and seeks to hold the Village liable for a First Amendment violation.

This claim fails at the outset if it merely challenges the Village's nuisance and terrace ordinances or their enforcement on public property. These ordinances, established well before the events at issue, reflect the Village Board's reasonable and necessary standards to protect community health, safety, and welfare, particularly in public areas. Their creation and enforcement constitute government speech, expressing the Village's commitment to maintaining community standards and public order. As

such, they are not subject to the constitutional challenge Plaintiff attempts to assert and should be deemed government speech. "[G]overnment speech is not restricted by the Free Speech Clause" of the First Amendment. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). "[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). This is because government would be "radically transformed" if it were subject to the same free speech limits in speaking as it is in regulating the speech of private persons. *Id.* at 468.

As reflected by these cases and others, governments own property, run programs, and set policy agendas; when they engage in such conduct they must be allowed to express viewpoints and beliefs about matters. *See Id.* (license plate program); *Summum*, 555 U.S. 460 (regulations of monuments in public park and denial of religious monument).

Here, The Village has the authority to make decisions concerning public health, safety, and welfare, as reflected in these ordinances and their enforcement. A government entity is free to "speak for itself, to say what it wishes, and to select the views that it wants to express." *Summum*, 555 U.S. at 467. The Village—not Prough—"effectively controls" the messaging and enforcement of ordinances designed to maintain public health, safety, and

welfare, including the nuisance and terrace ordinances. *Id.* at 473. *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (government could prohibit doctors who receive federal funds for federal health family planning services from discussing abortion with their patients. "The Government can . . . selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way."); *Strickland v. City of Seattle*, 394 F. App'x 407 (9th Cir. 2010) (To the extent that city-approved best management practices (BMP) plan that marina owner was required to distribute to tenants to obtain permit to modify marina's structure conveyed city's endorsement of specific practices, it was government speech exempt from First Amendment scrutiny, and thus did not support owner's claim of censorship.).

Even assuming there is no government speech that blocks the retaliation claim, it is still legally defective because the United States Supreme Court has already rejected Prough's notion that the First Amendment can be used as a free pass to evade enforcement of facially neutral and generally applicable laws, whether through arrest or prosecution. In *Nieves v. Bartlett*, 587 U.S. 391 (2019), the Court unequivocally stated that "[a] plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." *Id.* at 402 (emphasis added). In other words, probable cause is an absolute defense

to a First Amendment claim based on allegations that the defendant arrested or prosecuted a plaintiff out of a retaliatory motive. *See Lund v. City of Rockford, Illinois*, 956 F.3d 938, 944 (7th Cir. 2020). This absolute defense applies with equal force to civil code enforcement cases like this one. *See Bondar v. D'Amato*, 2007 WL 1700114, at *16-17 (E.D. Wis. June 11, 2007) (applying Seventh Circuit case law).

A finding of probable cause already occurred in this case—the trial court found Prough guilty of an ordinance violation. That finding bars Prough's First Amendment retaliation claim. Even without the court's determination, the record—including photos, witness accounts, and Prough's own admissions—demonstrates that, at a minimum, probable cause existed to issue Prough a citation for failure to maintain the terrace next to his property. The cumulative record leaves no doubt that the citation was warranted (supported by probable cause) and not issued in retaliation.

Because Prough falls under the *Nieves* general rule, He mistakenly contends that he falls within the narrow exception outlined in *Nieves*, where the Court held that a plaintiff need not demonstrate a lack of probable cause if they present objective evidence showing they were arrested while similarly situated individuals not engaged in the same protected speech were not. 587 U.S. at 407. The Seventh Circuit adopted Justice Gorsuch's view that this exception should be applied "'commonsensically.' " *Lund*, 956 F.3d at 945

(*quoting Nieves*, 587 U.S. at 419 (Gorsuch, J., concurring in part and dissenting in part)). "We must consider each set of facts as it comes to us, and in assessing whether the facts supply objective proof of retaliatory treatment, we surmise that Justices Gorsuch and Sotomayor are correct—common sense must prevail." *Id.*

The narrow exception does not apply here. Prough offers no evidence that his speech was curtailed due to retaliation, nor does he provide any "objective" proof of retaliatory conduct or show that retaliation was a "substantial" or "motivating" factor behind the citation. Furthermore, he fails to present evidence demonstrating that he was ticketed while similarly situated individuals were not. Instead, Prough relies entirely on conclusory, matter-of-fact assertions that the Village targeted him for his complaints about the construction along Jackson Street, grounded solely in a single sentence from Deputy Keberlein's incident report:

> 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, p. 9.) This is neither evidence of speech being curtailed due to retaliation, nor does it demonstrate that retaliatory animus was a substantial or motivating factor.

Prough also misrepresents Keberlein's testimony in an attempt to manufacture a retaliatory motive, claiming that Keberlein "was aware of the excessively long weeds in the past" but only issued the citation after Hankes "complained to him about Prough's speech." (Brief of Appellant, p. 23.) First, claiming that Hankes "complained" about Prough's speech based solely on a single sentence from the incident report is absurd—no further explanation is needed. Equally baseless is the claim that the citation was retaliatory based on Keberlein's trial testimony that he recalled "driving through the area and seeing the weeds excessively long" but initially believed the Village was responsible for maintenance, only to later learn through reviewing ordinances that this was incorrect. (R. 44, p. 50:2-6.)

This is exactly why Prough's First Amendment claim fails at a fundamental level: allowing retaliation to be found—and a First Amendment violation established—based solely on conclusory and speculative assertions would create a chilling effect on municipal enforcement. Municipalities would be paralyzed, unable to issue citations to individuals who had previously voiced complaints, out of fear of retaliation claims.

The undisputed facts tell a different story: noxious weeds were visibly present on the terrace next to Prough's property; Prough was aware of the weeds but refused to cut them, claiming the Village planted them; he admitted he was "making a statement" by not cutting the weeds; people

asked him to address the issue; he was ticketed only after the Village received multiple complaints about the weeds; and, fearing for pedestrian safety, Prough's neighbor ultimately cut the weeds—a simple action the Village had repeatedly requested of Prough.

Prough simply does not fit within the narrow exception carved out in *Nieves*, common sense tells us as much. His First Amendment retaliation claim fails as a matter of law.

II. Municipal liability cannot be established because Prough does not meet the necessary requirements for a *Monell* claim.

Even if Prough could demonstrate evidence of a constitutional injury, he still cannot satisfy the requirements for a *Monell* claim. The standards for *Monell* liability are well established.

A plaintiff can prevail on a *Monell* claim for municipal liability only when challenging the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. The Seventh Circuit has recognized three types of municipal action that can support municipal liability under § 1983: "(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking

authority." *Spiegel v. McClintic*, 916 F.3d 611, 617 (7th Cir. 2019) (quotation marks omitted).

Next, a plaintiff bringing a *Monell* claim against a municipality "must show that the policy or custom demonstrates municipal fault." *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 235 (7th Cir. 2021) (quotation marks omitted). Municipal fault is easily established when a municipality acts, or directs an employee to act, in a way that facially violates a federal right. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404–05 (1997). On the other hand, where the plaintiff does not allege that the municipality's action was facially unconstitutional but merely alleges that the municipality caused an employee to violate a federal right, a "rigorous standard[ ] of culpability . . . applie[s] to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at 405. The plaintiff must demonstrate that the municipality itself acted with "deliberate indifference" to his constitutional rights. *Id.* at 407. This is not an easy showing. It requires the plaintiff to "prove that it was obvious that the municipality's action would lead to constitutional violations and that the municipality consciously disregarded those consequences." *First Midwest Bank Guardian of Est. of LaPorta v. City of Chicago*, 988 F.3d 978, 987 (7th Cir. 2021).

Finally, a plaintiff bringing a *Monell* claim must prove that the municipality's action was the "moving force" behind the federal rights violation. *Brown*, 520 U.S. at 404. This is a "rigorous causation standard" that requires the plaintiff to "show a 'direct causal link' between the challenged municipal action and the violation of his constitutional rights." *LaPorta*, 988 F.3d at 987 (*quoting Brown*, 520 U.S. at 404).

These three requirements to establish a *Monell* claim—policy or custom, municipal fault, and "moving force" causation—are well established. And they "must be scrupulously applied" to avoid a claim for municipal liability backsliding into an impermissible claim for vicarious liability. *Id*. Yet, Prough has failed to substantively address *Monell* at any stage of this case.

Prough now appears to argue that his alleged constitutional injuries were caused by Village Trustee Hankes and Deputy Keberlein acting as final policymakers. This is absurd. Prough points to nothing in *Monell* or its progeny supporting such a theory. Additionally, the governing body is the Village Board as a full body when it votes as a full body, not one or two trustees, as set forth in Wisconsin Statutes §§ 61.32 and 61.34. The statutes aside, it's common sense that "what matters are the motives of the legislative body as a whole, not the idiosyncratic views of each legislator." *Campion v. City of Springfield,* 559 F.3d 765, 770-771 (7th Cir. 2009) (one alderman's

unlawful retaliatory motivation cannot be imputed to the others). In another First Amendment retaliation case, the Seventh Circuit explained:

> And in arguing [First Amendment] retaliation she encounters an unsuspected obstacle: it is more difficult to prove the bad intent of a legislative body, which is a collective, than of an individual. Remember that a majority of the Board voted in favor of the rezoning; they, at least, must be exonerated from the charge of having retaliated against the plaintiff for her state court suit. As for the others, only two of them expressed irritation at the suit. Several others said they wanted to protect agriculture in this part of the county—a nonretaliatory motive for voting against the applications. Some of the members who voted against rezoning didn't indicate a reason, and as a result we don't know whether enough votes were motivated by a desire to retaliate to defeat the rezoning. Finally, the refusal to rezone the parcels could not be thought an irrational destruction of value actionable as a denial of substantive due process, . . .

Guth v. Tazewell Cnty., 698 F.3d 580, 586 (7th Cir. 2012).

Neither Hankes nor Keberlein possesses final policymaking authority in any capacity. As the circuit court correctly observed, "Hankes is one of six Village trustees, and Deputy Keberlein is one of the Sheriff deputies assigned to patrol the Village and enforce its ordinances. There is absolutely no basis asserted by Prough for the Court to attribute the actions of Hankes or Keberlein to the Village of Reeseville as a whole." (R. 32, p. 4.) Prough provides no valid reason for this Court to conclude otherwise.

Although unclear, other sections of Prough's Opening Brief suggest he is arguing that Reeseville's "policy" and "practice" of requiring property owners to maintain terraces violate his constitutional rights, particularly under the Thirteenth Amendment. (Brief of Appellant, p. 14.) In any event, arguments are unconvincing. The authority discussed above, e.g., *Gasses* and *Shoemaker*, shows that similar ordinances are not constitutionally offensive. There is simply no constitutional "policy" at play here, and there is no reason why the Court should find otherwise here.

Although somewhat unclear, portions of Prough's Opening Brief appear to argue that Reeseville's "policy" and "practice" of requiring property owners to maintain terraces serve as the constitutional foundation for his *Monell* claim. (Brief of Appellant, p. 14.) This argument is unconvincing. As demonstrated by the authority discussed above, including *Gasses* and *Shoemaker*, similar ordinances have consistently been upheld as constitutionally valid. There is no evidence of a constitutional violation in this case and, therefore, no basis to conclude the existence of an unconstitutional municipal policy.

Regarding the Village's alleged "practice" of requiring property owners to maintain terraces, *Monell* claims based on allegations of an unconstitutional municipal practice require evidence that the identified practice caused multiple constitutional deprivations and that the

municipality knew of the same and deliberately turned a blind eye. *Chatham v. Davis*, 839 F.3d 679, 685 (7th Cir. 2016). Not the case here. Prough has not and cannot show any evidence of comparators, a practice of events reflecting constitutional deprivations, nor that the government body was aware of such. In sum, he has failed to identify anything suggesting the Village should have "conclude[d] that the plainly obvious consequences" of the practice "would result in the deprivation of a federally protected right." *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002) (citation omitted). Prough did not offer any such evidence at trial, on summary judgment, or on appeal.

Prough's *Monell* claim fails at the threshold because he cannot establish an underlying constitutional violation, as previously discussed. Even if he could overcome that obstacle, he has failed to provide any support that meets *Monell's* exacting standards. Therefore, this Court should affirm the circuit court's judgment dismissing Prough's counterclaims.

III. The citation was valid.

Lastly, Prough contends that the citation was void and invalid due to a lack of factual allegations. This argument is unpersuasive.

Reeseville follows the standard citation format outlined in Wis. Stat. § 66.0113(1)(b). *See* Village Ordinance § 32-3. Section 66.0113(1)(b) states,

in part, that "[a]n ordinance adopted under par. (a) shall prescribe the form of the citation which shall provide for the following:

1. The name and address of the alleged violator.
2. The factual allegations describing the alleged violation.
3. The time and place of the offense.
4. The section of the ordinance violated.
5. A designation of the offense in a manner that can be readily understood by a person making a reasonable effort to do so.
6. The time at which the alleged violator may appear in court and a statement describing whether the appearance is mandatory.
7. A statement which in essence informs the alleged violator . . ."

Prough contends that the citation issued to him was invalid because it lacked "factual allegations." Relying on the word "shall," he claims that the citation must include all seven criteria specified in § 66.0113(1)(b), rendering it invalid if any are missing. However, this interpretation would lead to absurd and unreasonable results, as cautioned against in *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutory language is interpreted "reasonably, to avoid absurd or unreasonable results"). This is especially true where, as here, the citation was clear on its face and Prough was explicitly warned about his noncompliance beforehand.

The citation specifically cites the ordinance being violated, § 334-3(F), and clearly describes the offense as "PUBLIC NUISANCE – NOXIOUS WEEDS." It names Prough as the defendant, provides his address, and specifies the court appearance date. Additionally, it details the exact time and location of the violation: "WEDNESDAY 07/26/2023 – 01:44 PM" "ON MAIN ST/G NORTH 40 FT S OF JACKSON ST." (R. 1.) Whether a pleading states a claim is generally evaluated based on "the four corners" of the pleading itself. *See Pagoudis v. Keidl*, 2023 WI 27, ¶4, 406 Wis. 2d 542, 988 N.W.2d 606. Within the four corners of this citation, Prough was clearly put on notice of the alleged violation of Reeseville's noxious weed ordinance.

As the trial court correctly concluded:

> The ticket was issued. I think that the ticket is not deficient on its face. It indicates that the ordinance that's being violated is for public nuisance and noxious weeds. It indicates that the location is on Main Streets, Highway G, North 40 feet of South Jackson Street, which is certainly the location where that terrace area is. And so I think the – I reject the argument that the ticket is not sufficient on its face under these circumstances. I think it provides adequate notice to Mr. Prough of the ordinance that they are alleged to – that he has violated.

(R. 44, p. 57:21-25, p. 58:1-5.)

Moreover, this is not a case where the citation simply references a local ordinance, such as one prohibiting disorderly conduct, without any further detail. In such a situation, a defendant might have a valid argument

for failure to state a claim, as the citation would leave critical questions unanswered—was the alleged conduct disruptive or loud behavior, a physical altercation, or public intoxication? Those are legitimate uncertainties in that context. Here, however, the case is entirely different.

Nor is this a case where the citation was issued without adequate warning or valid justification. The factual record is clear: the weeds were visibly overgrown, and Prough was well aware of the issue yet refused to act. Deputy Keberlein informed him of complaints about the weeds and explained that the Village simply wanted him to cut them down. The citation was issued only after Prough declined to resolve the problem. It is simply not invalid and should be upheld.

CONCLUSION

For these reasons, the Village of Reeseville respectfully requests that the Court affirm the circuit court's grant of summary judgment in favor of the Village, as no constitutional violation occurred, and uphold the validity of the citation issued to Prough.

Dated this 20th day of December, 2024.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is **7,607 words**.

Dated this 20th day of December, 2024.

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