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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

# REPLY BRIEF OF DEFENDANT-APPELLANT

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

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## Argument

### I. Village Ordinance 399-38 is unconstitutional under the Thirteenth Amendment and therefore the trial court's guilty verdict should be overturned and Prough's counterclaim should have been allowed.

The Village's primary argument is that terrace weed ordinances are "widely adopted by municipalities" (Resp. Br. 7) and therefore must not be unconstitutional. The Village's argument is a nonstarter. Review of the cases cited by the Village reveals that forced labor on municipal property under the facts of this case violates the Thirteenth Amendment particularly when there is no alternative to pay a fee in lieu of performing the labor.

The *Butler v. Perry* case, cited by *Kozminski*, involving required road work, gave citizens the option of paying a sum of money ($3.00) rather than doing the work. *United States v. Kozminski*, 487 U.S. 931, 943-44 (1988); *Butler v. Perry*, 240 U.S. 328, 329 (1916). For a more modern example, the City of Wauwatosa ordinance cited by the Village in its brief gives the abutting owner the option of paying a special charge for the city to do the weed removal on the terrace. Resp. Br. 13. Although this option might raise an additional constitutional challenge regarding uniformity of taxation, the fee in lieu of labor option is absent from the Village ordinance in this case.

Citizens may voluntarily help maintain municipal property as Prough did for many years before the Village construction project destroyed the terrace next to his property. However, the Constitution mandates that the Village cannot compel Prough to labor in the public right of way for free, under threat of prosecution and fines.

The Court's decision to overrule the trial court would not "jeopardize countless local ordinances" nor would it "undermin[e] municipalities' ability to promote public welfare." Resp. Br. 19. Prough's as applied challenge to the ordinance in this case is in the context of the facts that, following the

Village road project, the terrace was no longer grass but instead was lumpy soil that grew up in weeds. R.44, Tr. 22:15-22, 32:25-33:3, A-App. 025, 035-36. The fact that the Village caused the weeds was not "based entirely on conjecture and speculation." Resp. Br. 22. Rather it was based on the uncontroverted testimony of Mr. Prough. R.44, Tr. 22:15-22, A-App. 025. Furthermore, the Village never disputed that it caused the damage to the terrace soil and terrace vegetation.

This is not a case about someone who refused to mow an established lawn. Rather, here, the Village tried to compel Prough to essentially finish a municipal improvement project by remediating the defective work of the Village's contractor, when the contractor destroyed the grass in the terrace after the road project and left the soil lumpy and full of weeds. Overturning the trial court would not undermine municipalities' ability to promote public welfare. Citizens should not be prosecuted, found guilty at a trial, and forced to pay a fine for refusing to mow a tract of municipally owned land.

The Village complains that Prough did not cite a Wisconsin case in support of his argument. This is not correct, because Prough cited *State v. Brownson*, which provides clear and controlling guidance on this issue. *Brownson* follows *Kozminski* in identifying only narrow exceptions to the Thirteenth Amendment's requirements. *Brownson* explains the framework for dealing with the ordinance at hand. If a forced labor ordinance does not fall within the "limited exceptions" (civic duties like military service or jury duty, citing *Kozminski*, or "exceptional cases" like parents granted power over their children or laws regarding deserting sailors), then it is not permissible under the Thirteenth Amendment, *Kozminski*, and *Brownson*. *State v. Brownson*, 157 Wis. 2d 404, 413, 459 N.W.2d 877 (1990) (citing *Kozminski*, 108 S.Ct. at 2760).

The Village complains that there is not a Wisconsin case on point finding that a terrace maintenance ordinance was unconstitutional. Perhaps

this is because the Village's actions in this case are unprecedented. Under normal circumstances, residents may not find it particularly onerous to mow the terrace by their properties, and therefore not worth challenging. Similarly, the normal course of action for a village after hearing a complaint about substandard work on a terrace by a village contractor, would have been for the village to simply tell the contractor to finish the job and repair the damage. Rather than taking this reasonable course of action, the Village ticketed Prough and took the case all the way to trial.

The foreign cases cited by the Village also do not help the Village's argument. Probably the most extensive discussion of the issue is contained in *Shoemaker v. City of Howell*, 982 F. Supp. 2d 745 (ED Mich. 2013) and the subsequent appeal to the 6th Circuit in *Shoemaker v. City of Howell*, 795 F.3d 553 (6th Cir. 2015).

*Shoemaker* involved a situation similar to the case at bar. The Shoemakers maintained the grass between the sidewalk and the street and even planted a tree there. *Shoemaker*, 982 F. Supp. 2d 749. Then the City did a road improvement project and re-landscaped the area between the road and the sidewalk. *Id*. Shoemaker was not happy, but according to the District Court, Shoemaker was told by the City that the City owned the property between the road and the sidewalk, after which time Shomaker refused to mow the area. *Id*. at 149-50. The City then insisted that Shoemaker mow the area, however Shoemaker refused and asked to be ticketed. *Id*. at 751. Instead of ticketing Shoemaker, the City of Howell hired a contractor to mow the grass and sent Shoemaker the bill. *Id*. After a thorough legal analysis, the District Court found in favor of Shoemaker, reasoning that forcing a landowner to mow municipally owned property was a violation of substantive due process. *Id*. at 747 ("[T]the Ordinance infringes a much more fundamental right: the right not to be forced by a municipal government to maintain municipal property.")

The City appealed, and the Sixth Circuit Court of Appeals reversed. *Shoemaker v. City of Howell,* 795 F.3d 553. However, the court of appeals in Shoemaker did not say that it was somehow constitutional to force a landowner to mow the City's grass. The court of appeals did not dispute that everybody has a fundamental right "not to be forced by a municipal government to maintain municipal property." Rather, the *Shoemaker* court of appeals found that Shoemaker was actually the owner of the grassy area between the sidewalk and the street. *Id*. at 564 ("In fact, under Michigan law, Shoemaker technically owned the property at all relevant times and the City simply possessed a right of way for public use.").

Thus, in *Shoemaker* the district court ruled that it was unconstitutional for the City to force the landowner to mow City owned property ("the right not to be forced by a municipal government to maintain municipal property.") The court of appeals did not reach the issue of whether all people have a right "not to be forced by a municipal government to maintain municipal property." The court of appeals did not reach this issue because the *Shoemaker* court of appeals found that Shoemaker was actually the owner of the land at issue. It should be remembered that in the case at bar, the Village has conceded that Prough has no ownership interest in the grassy area between the sidewalk and the street, although the Village is unsure of who exactly is the owner of the land. R.44, Tr. 46:7-8, A-App. 049; Resp. Br. 9, n.1.

The other foreign cases cited by the Village also involved situations where the area of long grass or weeds was on land owned by the landowner as opposed to being on land owned by the municipality. The *Gasses v. City of Riverdale* case involved a landowner who ran afoul of a weed ordinance when she failed to cut the grass on her own property near the right of way. "[T]he City cited appellant Linda Gasses for violating this local ordinance when she failed to cut the high grass ***on the portion of her property*** adjacent

to a public right-of-way." *Gasses v. City of Riverdale*, 701 S.E.2d 157, 158, 288 Ga. 75 (2010) (emphasis supplied).

Similarly, the *Norman* case involved the allegation that Georgette Norman was "creating a public nuisance by having weeds over 12 inches in height ***in her yard***, a violation of Ordinance No. 37-91, Montgomery Municipal Code." *City of Montgomery v. Norman*, 816 So.2d 72, 75 (Ala. Crim. App. 1999) (emphasis supplied). The issue in the *Norman* case was not that Norman was refusing to mow City-owned property, but rather that Norman was growing seed rye and other plants in her yard. *Id*. Unlike the case at bar, *Gasses* and *Norman* involved situations where the landowner was ticketed for things that they did or did not do on their own property.

The *Shachter v. City of Chicago* was another property maintenance case that was litigated pro se and involved many assertions, however there was apparently no effort made by Shachter to contest that he did not have an ownership interest in the parkway area, in fact he testified that "he tended the parkway as well." *Shachter v. City of Chi.*, 962 N.E.2d 586, ¶ 9, 356 Ill. Dec. 901 (2011). Accordingly, the *Shachter* case never addressed whether a landowner could be constitutionally forced to maintain City-owned property in which he had no ownership interest.

*Rowe v. City of Elyria*, an unpublished Sixth Circuit case, involved a landowner who did not mow an area in front of his property that he contended was owned by the City, and therefore the City mowed the area and charged the landowner $200 for the work. *Rowe v. City of Elyria*, 38 Fed. Appx. 227 (6th Cir. 2002) (per curiam). In a short decision, the court decided, "even 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.* This case is at best persuasive authority and it is Prough's position that an unpublished, per curiam case issued before 2009 cannot be cited according to Wis. Stat. §

809.23(3)(a)-(b). If the Court does consider this case, *Rowe* held that the special charge for mowing was not "the kind of compulsion that would constitute involuntary servitude." *Id.* This special charge was more akin to the alternative of paying the $3.00 dollar charge instead of doing the road work in *Butler v. Perry*, and is not like the compulsion of a citation, trial, and potential fine up to $1,000 in the case at bar. *See* Village Ordinance § 1-2.

Finally, the *State ex rel. Saveland Park Holding Corp*. case is a zoning case regarding the legality of a building permit ordinance that conditioned the permits on the review by a three person board, two of which had to be architects. *State ex rel. Saveland PH Corp. v. Wieland*, 269 Wis. 262, 274, 69 N.W.2d 217 (1955). This case has nothing to do with the question of whether a municipality can force a landowner to maintain City-owned land.

Therefore, it is the Village who has not produced any authority contrary to Prough's position that it is unconstitutional involuntary servitude to force a landowner to maintain municipal property with no alternatives.

## II. The Village violated Prough's First Amendment rights by retaliating after Prough's complaint about the construction work.

The Village's arguments and references to cases on "government speech" have nothing to do with this case. Resp. Br. 25-26. This is a straightforward retaliation claim that the Village retaliated against Prough after Prough's speech complaining about the road project. There is no Village speech at issue here. (The Village ordinance is not insulated from constitutional challenge simply because it is speech, to the contrary, reviewing courts regularly find statutes and ordinances unconstitutional and void. *See, i.e*., *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 10, 284 Wis. 2d 573, 701 N.W.2d 440).

The Village's argument that probable cause is "an absolute defense" to a First Amendment retaliatory arrest claim is not supported at all by the *Nieves*, *Lund*, and *Bondar* cases cited by the Village. Resp. Br. 27-28. To the contrary, the defense is not absolute, rather, there is an exception for objective evidence that the law was applied selectively because of retaliatory treatment. *Lund v. City of Rockford, Illinois*, 956 F.2d 938, 944-45 (7th Cir. 2020). Prough did present this objective evidence in this case, and this evidence was not "conclusory" or "speculative." Resp. Br. 29-30. 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. 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. Furthermore, Deputy Keberlein had actually driven down Jackson Street in the past and noticed the weeds, but had exercised his discretion to not issue any citation. R.44, Tr. 50:2-6, A-App. 053. Then, 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, did Deputy Keberlein issue a citation.

## III. There is municipal liability in this case.

The Court's analysis certainly does not "begin and end" with the *Monell* requirements, as argued by the Village. Resp. Br. 18. Prough's argument that the ordinance was unconstitutional under the Thirteenth Amendment is a defense to the citation itself, accordingly the trial court should have declined to find Prough guilty because it is an unconstitutional ordinance. This is independent of Prough's civil claim against the Village for violating his rights.

Prough's counterclaims do fulfill the *Monell* requirements. It is undisputed that Village Ordinance 399-38 qualifies as the Village authorizing an express policy to require landowners to work to maintain public land. The Village's unconstitutional Village Ordinance 399-38 is an express policy, made by lawmakers, that the Village chose to enforce in this situation.

Furthermore, in the *Campion* case cited by the Village, the court noted that, "[t]his is therefore *not* a case in which the evidence could support a finding that X (the Council) relied on Y's (the Mayor's or McNeil's) intent, making it permissible to base municipal liability on Y's discriminatory animus." *Campion v. City of Springfield, Illinois*, 559 F.3d 765, 771 (7th Cir. 2009) (emphasis added). In contrast, in the case at hand, Prough *is* arguing that there is evidence that could support a finding that Deputy Keberlein, and the resulting prosecution, *did* rely on Trustee Hanke's retaliatory intent to punish Prough for complaining at a board meeting. App. Br. 23-24; R.24, at 8. Trustee Hankes and Deputy Keberlein both had final policymaking authority as it pertains to the action they took in this case. If Trustee Hankes did not have final policymaking authority, he should have not have instructed Deputy Keberlein to ticket Prough. Furthermore, after Deputy Keberlein issued the citation, the Village chose to proceed with the case by pursuing a guilty finding at trial, thereby manifesting a policy decision.

## IV. The citation was void for failing to follow Wis. Stat. § 66.0113(1)(b).

The Village argues that Prough did not argue during summary judgment that the citation failed to meet statutory requirements. Resp. Br. 15-16. However, this issue was dealt with at trial prior to the summary judgment briefing. Prough clearly raised this in his answer to the citation, and then argued that point at trial, and then the trial court ruled on that issue by deciding that the ticket was not deficient. R.44, Tr. 56:7-57:3, 57:21-58:5, A-App. 059-061. This issue was clearly preserved for appeal.

The Village tries to defend its citation by arguing that it follows "the standard citation format outlined in Wis. Stat. § 66.0113(1)(b)." Resp. Br. 36. The problem is not that the Village doesn't follow the standard format, the problem is that the citation at issue in the case left one of the standard required sections blank. R.1, Citation, A-App. 003. The Wis. Stat. § 66.0113(1)(b) requirements are not optional. The Village tries to claim that "the citation was clear on its face" and "clearly described the offense as 'PUBLIC NUISANCE - NOXIOUS WEEDS.'" Resp. Br. 37-38. However, this is actually just quoting text of the ordinance and the citation was not clear on its face. The citation contained no factual allegations whatsoever (and therefore did not allege where on the Prough property the weeds allegedly were), and did not reference the terrace ordinance, Village Ordinance 399-38. R.1, A-App. 003.

The Village argues that interpreting the language of Wis. Stat. § 66.0113(1)(b) that "the form of the citation … shall provide for the following: … The factual allegations describing the alleged violation" as mandatory would produce absurd results, Resp. Br. 37, but this is clearly not the case. The result of interpreting this language as mandatory would be that

officers would fill in the factual allegation section of the citation rather than leaving it blank. This would be simple and easy to do.

The statute's use of "shall" is presumed mandatory. *GMAC Mortgage Corp. v. Gisvold*, 215 Wis. 2d 459, ¶ 32, 572 N.W.2d 466 (1998). The language is simply not optional and a citation that leaves a mandatory section blank is void.

## Conclusion

For the above reasons, and as set forth in Prough's brief in chief, 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 7th day of January, 2025.

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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 2,953 words.

Signed: January 7, 2025.

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