

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ROBERT M. PACE,

Plaintiff-Appellant,

**JEAN PACE and ALL OWNERS OF BOATHOUSES
LOCATED BEYOND THE ORDINARY HIGH WATERMARK
OF NAVIGABLE WATERWAYS LOCATED IN ONEIDA
COUNTY, WISCONSIN,**

Plaintiffs,

v.

ONEIDA COUNTY,

Defendant-Respondent,

STATE OF WISCONSIN,

Intervenor-Respondent.

**ONEIDA COUNTY, STATE OF WISCONSIN,
a municipal corporation,**

Plaintiff-Respondent,

STATE OF WISCONSIN,

Intervenor-Respondent,

ROBERT M. PACE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Oneida County:
MARK A. MANGERSON, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Robert Pace appeals a summary judgment concluding that he violated provisions of the Oneida County Zoning and Shorelines Protections Ordinance by building a new wet boathouse without first obtaining a permit. The court imposed a \$10 per day forfeiture for each day of violation and ordered that the boathouse be removed. Pace argues that he should not have been required to exhaust his administrative remedies before presenting some defenses to this action, that an outstanding issue of material fact precludes summary judgment and that the forfeiture was excessive. We conclude that Pace was not required to exhaust his administrative remedies before challenging for the validity of the ordinance. All other defenses were properly rejected by the trial court based on Pace's failure to seek court review of the Board of Adjustment decision. The sentence constitutes a proper exercise of the trial court's discretion. We therefore affirm in part, reverse in part and remand for further proceedings.

Pace's original boathouse was destroyed by heavy snow and fire. The zoning administrator denied his request for a permit to replace the boathouse, concluding that the boathouse could not be repaired under the Oneida County Shoreline Zoning Ordinance. Pace appealed that decision to the Oneida Board of Adjustment and that appeal was denied. Despite receiving notice of his right to appeal to the circuit court, Pace did not file an appeal. Rather, he informed the Board that he intended to build the boathouse without a permit and if the administrator came around, "he better have a gun." That threat was repeated in a letter to a county board member.

After Pace completed construction of his new boathouse, the County brought this action seeking removal of the illegal structure and a forfeiture. Pace defended on the grounds that the Board of Adjustment violated due process by not swearing all of the witnesses that made statements before the Board, that the new boathouse is not in violation of the ordinance because the repairs to the boathouse did not exceed 50% of the current market value and that Pace was the victim of selective prosecution. After the trial court granted partial summary judgment to the County and allowed additional time for discovery on the selective prosecution defense, Pace filed an amended answer also alleging that the ordinance constituted a taking of property without compensation. When Pace failed to conduct additional discovery on the selective prosecution defense, the trial court granted summary judgment to the county on all issues. In its findings of fact and conclusions of law, the court itemized the defenses raised in the final amended answer, and ruled that the issue of whether the ordinance created a taking without compensation was waived because Pace did not raise that issue by appealing the board of adjustment's decision.

The law relating to exhaustion of administrative remedies was set out in *Jefferson County v. Timmel*, 269 Wis. 39, 63, 51 N.W.2d 518, 530 (1952): if a zoning ordinance provides for appeal to a board of adjustment and court review of the board's decision or order is specifically provided for by statute, that remedy is exclusive of all other remedies and must be exhausted before a party can resort to the courts for other relief "except in cases where the validity of the ordinance itself is attacked." Because Pace challenges the validity of the ordinance as a taking without compensation, that issue cannot be resolved based solely on Pace's failure to exhaust his administrative remedies. Therefore, we reverse that part of the summary judgment disposing of the taking issue and remand the cause to the trial court to consider the merits of that issue.

The trial court properly rejected the remaining defenses based on Pace's failure to exhaust administrative remedies. The factors that are considered in determining whether to consider an issue raised in an enforcement action when the party failed to seek judicial review of the underlying administrative decision are (1) whether the question presented in the enforcement action is the same as would have been presented in a certiorari action; (2) what issues remain outstanding; (3) whether the record indicates that the defendant in the enforcement action had a sound defense; and (4) whether application of the exhaustion doctrine would be harsh. See *County of Sauk v. Trager*, 118 Wis.2d 204, 215-16, 246 N.W.2d 756, 761-62 (1984). Pace's defenses do not satisfy these criteria.

Pace first contends that the Board of Adjustment violated his due process rights by not swearing in all of the witnesses who spoke at the hearing. The "witnesses" in question provided their legal analysis, not factual information. This procedural anomaly provides no defense for Pace's deliberate decision to build the boathouse without a permit.

Pace's next defense was that the new boathouse is not in violation of the ordinance because it did not exceed the 50% limit. In support of that argument, he presents substantial evidence that was never presented to the board. That evidence, however, is internally inconsistent and contradictory and does not establish that the board's decision was incorrect. This information appears to be an attempt to circumvent the Board's fact-finding authority and the court's deferential standard of review.

As to the selective prosecution defense, the trial court allowed Pace additional time to conduct discovery to support that defense. Pace conducted no additional discovery during that time. The court properly concluded that his bare allegations, unsupported by any evidence, do not constitute a defense to this action.

From the onset, Pace has attempted to circumvent the board's decision. He failed to cooperate with county authorities during discovery, failed to prove the existence of a recognizable hardship for which variances are granted and failed to offer any credible evidence that could be utilized in the application of the 50% rule. When presented with an adverse ruling by the

board, Pace responded with threats and refusal to abide by the board's decision rather than seeking review in the circuit court. The hardships of the fine and injunction to remove the boathouse are hardships created by Pace and do not provide any basis for ignoring his failure to exhaust administrative remedies.

Pace next argues that the trial court should not have granted summary judgment because there remain outstanding issues of material fact. The facts cited, relating to the 50% rule, are not material facts because the trial court correctly determined that the issue was barred by Pace's failure to exhaust administrative remedies.

Pace argues that the sentence was excessive. The trial court imposed the minimum forfeiture of \$10 per day for each day of violation. Pace contends that the court should not have included the days in which the proceedings were adjourned pending a decision in *Oneida v. Converse*, 173 Wis.2d 78, 496 N.W.2d 124 (Ct. App. 1992), *rev'd*, 180 Wis.2d 120, 508 N.W.2d 416 (1993). The trial court imposed a forfeiture for the time in which the *Converse* case was being decided for two reasons. First, the court imposed the minimum daily forfeiture even though there were substantial aggravating circumstances. Had the court reduced the number of days of violation, it would have been appropriate to increase the amount of the daily forfeitures. Pace has enjoyed the benefits of his illegal construction throughout the pendency of this action. Second, the court noted that Pace had throughout these proceedings indicated an intent to ignore the zoning ordinance and demonstrated disregard for the law.

Finally, Pace argues that recent changes to § 30.121, STATS., constitute a "new factor" that should be considered when deciding Pace's permit application and the penalty. This issue was not raised before the board or in the trial court and will not be considered for the first time on appeal. See *Goranson v. DILHR*, 94 Wis.2d 537, 545, 289 N.W.2d 270, 274 (1980); *Wirth v. Ehly*, 93 Wis.2d 433, 443-43, 287 N.W.2d 140, 145-46 (1980).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.