COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP766 **Cir. Ct. No. 2014CV444**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

TOWN OF IXONIA,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

TIMOTHY KNOPPS,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] The Town of Ixonia appeals from a judgment of the circuit court in this municipal ordinance violation case. The Town asserts that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

the circuit court erred when it failed to impose a forfeiture against Timothy Knopps that totals the minimum forfeiture for two separate violations under the ordinances Knopps violated for the each of the 773 days Knopps was in violation of those ordinances. The circuit court concluded that imposing a forfeiture in the full amount would, under the facts of this case, result in an unconstitutionally excessive fine under the Eighth Amendment to the United States Constitution and article I, section 6 of the Wisconsin Constitution. Timothy Knopps cross-appeals, challenging the imposition of any forfeiture. I affirm on both the appeal and cross-appeal.

BACKGROUND

¶2 This appeal is the end result of a long effort by the Town to force Timothy Knopps to clean up the "accumulated and stored junk, debris and rubbish on [his residential] property." The effort began on April 19, 2013, when the Town's clerk sent a letter to Knopps informing him that he was in violation of Ixonia Municipal Code § 9.09 (Storage of Junk and Vehicles Regulated) and that he was required to comply with the ordinance within 30 days. Knopps did not comply and during the next 16 months, the Town continued its efforts to force Knopps to clean up his property with repeated contacts and letters, without success.

¶3 In September 2014, the Town filed a complaint against Knopps, alleging two causes of action, one for the violation of the Ixonia Municipal Code § 9.09 and the other for maintaining a nuisance in violation of Ixonia Municipal Code § 10.01. The complaint sought a declaration by the court that: (1) Knopps violated the two municipal code provisions; (2) Knopps be immediately enjoined from continuing such violations; (3) Knopps be required to correct such violations within a specified time, and; (4) the Town is authorized, upon Knopps' failure to

correct the violations, to enter upon Knopps' property and bring the property into compliance with the ordinances, abating the nuisance.

¶4 The town also sought the imposition of forfeitures against Knopps. With respect to Knopps' violation of Ixonia Municipal Code § 9.09, the complaint demanded a forfeiture of "not less than $5 nor more than $500, together with the costs and assessments imposed under State law." With respect to Knopps' violation of Ixonia Municipal Code § 10.01, the complaint demanded forfeiture of "not less than $10 nor more than $200, together with the costs and assessments imposed under state law." The complaint demanded that both forfeitures be imposed separately "for each day of violation, commencing from April 19, 2013, until the condition of the Subject Property is brought into compliance." The complaint also demanded that the Town be authorized to impose all of the "damages, costs and expenses incurred by the Town, including attorneys' fees" required to bring Knopps' property into compliance as a "special charge against the Subject Property" under WIS. STAT. § 66.0627.

¶5 Knopps, pro se, wrote a letter to the circuit court instead of filing a formal answer. In response, the Town filed a motion to strike the letter as an insufficient pleading and for default judgment. On December 23, 2014, the court granted the Town's motion. In granting the motion, the court found that Knopps' letter and the materials attached to the letter did not constitute and could not be construed as an answer and that the letter and attached materials were not served upon the Town's counsel as required. The court ordered that they be stricken and that default judgment be granted against Knopps on both causes of action in the complaint.

¶6 In the order granting default judgment in favor of the Town, the circuit court declared that Knopps' continued accumulation and storage of junk, debris and rubbish constituted violation of Ixonia Municipal Code § 9.09. The circuit court further declared that Knopps' continued accumulation of trash, paper, boxes, rubbish, rotting lumber, bedding, packing material, scrap metal, and noxious weed and other rank growth of vegetation violates Ixonia Municipal Code ch. 10 and is a public nuisance affecting health. The court enjoined Knopps from further such illegal conduct and set forth the following procedure for correction of the violations:

> As soon as practicable, the parties and [the circuit judge] shall meet at the Subject Property at which time the Court will set a deadline and explain what must be accomplished with respect to said violations in order to bring the Subject Property into compliance. The Court may require an additional order at that time to memorialize its instructions.

The court also authorized the Town to enter Knopps' property and perform the work itself if Knopps did not comply and set forth a procedure for completion of the matter once the remediation was complete. Significantly, with respect to this action, the court imposed a daily forfeiture on the first cause of action of $5 nor more than $500 and upon the second cause of action of not less than $10 nor more than $200 from April 19, 2013.

¶7 Following the successful remediation of Knopps' property, which was completed "with the aid of community volunteers and the cooperation of the [Town]," the Town moved the circuit court for an order imposing judgment for the forfeitures ordered by the court in its December 2014 order granting default judgment in favor of the town. In the court's written decision, the court found that it was undisputed that there were 773 daily ordinance violations under both causes of action in the complaint. The circuit court found that applying the minimum

forfeitures, along with the statutory "add ons," would result in a judgment of $22,763.40 for the first cause of action and $27,633.30 for the second cause of action, for a total forfeiture of $50,396.70.

¶8 The circuit court determined, however, that a $50,396.70 forfeiture is so disproportionate to the offense and unusual in nature given the circumstances and nature of the act for which it is imposed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. For these reasons, the circuit court held that such a fine would violate article I, section 6 of the Wisconsin Constitution and/or the Eighth Amendment to the United States Constitution.[2] However, the circuit court also held that, under the circumstances, Knopps still required some punishment for his violations and, for reasons not set forth here, imposed a total judgment of $3,631.00. A judgment in favor of the Town for that amount was subsequently entered by the court. The Town appeals and Knopps cross-appeals.

DISCUSSION

¶9 The Town contends on appeal that the circuit court erred in setting Knopps' forfeiture at an amount less than the minimum amount calculated for 773 days, arguing that such an amount would not violate the excessive fines clause of either the state or federal constitution. On cross-appeal, Knopps contends the Town was prohibited from seeking a civil action for forfeiture against him.

[2] Article I, section 6 of the Wisconsin Constitution reads: "Excessive bail shall not be required, not shall excessive fines be imposed, nor cruel and unusual punishments inflicted." The wording of the Eighth Amendment is identical to that of article I, section 6.

¶10 Generally, this court addresses first those issues raised on appeal, and then addresses those issues that are raised on cross-appeal. However, because Knopps' cross-appeal involve the preliminary question of whether the Town had the ability to pursue the present action against him, which, if Knopps' is correct, would be dispositive, I address Knopps' cross-appeal first. *See* ***Butzlaff v. Van Der Geest and Sons, Inc.***, 115 Wis. 2d 535, 538, 340 N.W.2d 742 (Ct. App. 1983) ("this court will not decide a constitutional issue if another issue can dispose of the appeal").

1. Cross-Appeal Issues

¶11 Knopps contends that the Town was prohibited, for numerous reasons, from seeking a civil forfeiture. I address each of Knopps' arguments below.

A. The Town may pursue both a forfeiture and injunctive relief.

¶12 Knopps argues that the express language of Ixonia Municipal Code § 9.09(1)(c) prohibits the Town from pursuing a civil action for forfeiture against Knopps in addition to injunctive relief. This court reviews the interpretation of ordinances de novo and applies the same interpretation rules to ordinances as this court does to statutes. ***State ex rel. Village of Newburg v. Town of Trenton***, 2009 WI App 139, ¶12, 321 Wis. 2d 424, 773 N.W.2d 500.

¶13 Ixonia Municipal Code section 9.09(1)(c) provides:

> (c) Enforcement. The Police Department and the Building Inspector shall be designated as the enforcement agents for this subsection. This subsection may be enforced by use of the municipal citation procedures under [WIS. STAT. ch.] 66, or by any other procedure authorized by law.

Knopps argues that the use of the word "or" in the second sentence is disjunctive and precludes the use of both injunction and forfeiture to enforce § 9.09. Assuming without deciding that the legislative intent of using the word "or" is indeed disjunctive, what that disjunction is limiting is the use of both the procedure of WIS. STAT. ch. 66 and "any other procedure authorized by law." Here, the Town did not proceed under ch. 66, but instead proceeded under the civil procedure of WIS. STAT. chs. 801 - 847, unquestionably an "other procedure authorized by law."

¶14 Knopps seems to have confused the question of whether the Town can proceed under both the procedure of WIS. STAT. ch. 66 or the civil procedure with the question of whether a party can proceed under the civil procedure in both law and equity. That is not an issue which the Ixonia Municipal Code addresses, but it has been addressed by the Wisconsin Supreme Court in ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 164-65, 288 N.W.2d 129 (1980). Our supreme court stated in ***Bylewski***, "The right of injunctional relief is a separate and distinct form of remedy from forfeiture actions and thus should be specifically requested by the county in its complaint." ***Id.*** at 165. In other words, both can be pled in the same action, as long as they are separately pled.[3]

---

[3] The supreme court also stated in ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 165 n.4, 288 N.W.2d 129 (1980):

> This is not to say that an action to recover a fine or penalty for the violation of a municipal zoning ordinance may never be brought in the same proceeding with a suit for injunctional relief. While the merger of law and equity did not abolish the essential differences between actions for legal and those for equitable relief, there is no procedural prohibition which would impede a county from bringing a forfeiture action and a suit for injunctional relief in a single ordinary civil proceeding…. (Internal citations omitted.)

(continued)

¶15 In the case before me, the complaint contains a prayer for relief, or "wherefore" clause, that treats each cause of action separately. As to each cause of action, the prayer asks the circuit court in separately numbered subparagraphs to "immediately enjoin[]" the illegal actions of Knopps and to impose a forfeiture in accordance with the provisions of the ordinance. Accordingly, I affirm the circuit court on this issue.

B. The Town is not required to use only the citation procedure of WIS. STAT. ch. 66 in order to obtain a forfeiture against Knopps.

¶16 Knopps argues that to obtain a forfeiture against him, the City could only use the citation method of WIS. STAT. ch. 66. Once again, Knopps bases his argument on the interpretation of a specific provision of the Ixonia Municipal Code, in this case § 25.05, which provided:

> 25.05 CITATION METHOD OF ENFORCEMENT. (1) STATUTORY AUTHORIZATION. Pursuant to [WIS. STAT. §] 66.119 [], the Town shall use the citation method of enforcement of certain chapters.

It bears repeating that we review the interpretation of ordinances de novo and apply the same interpretation rules to ordinances as we do to statutes. ***Newburg***, 321 Wis. 2d 424, ¶12.

¶17 Knopps argues that, when Ixonia Municipal Code § 9.09 is read in pari materia with Ixonia Municipal Code § 25.05, it demonstrates a legislative intent that the use of the municipal citation procedure be exclusive. The problem

---

Knopps argues in his cross-reply that a change in the language of the small claims statute subsequent to the time that ***Bylewski*** was decided renders ***Bylewski*** obsolete. I am not persuaded. I discuss the current language of WIS. STAT. § 799.01 in section 1.D., below. Considered in its entirety, § 799.01 is not inconsistent with the quoted language in ***Bylewski.***

with Knopps' argument is two-fold. First, he bases it in part on his interpretation of § 9.09, which I rejected in paragraphs ¶¶12-15 above. Second, Knopps does not come to grip with the fact that § 25.05 only requires the use of the citation method of enforcement for the enforcement "of certain chapters" and does not define which chapters that refers to. Perhaps Knopps intends to show that § 9.09 is one of those "certain chapters" because § 9.09 refers to the use of the municipal citation procedure, but if so, he fails to carry his argument. As I have already explained, the municipal citation procedure is only one of the procedures authorized under § 9.09. Beyond those notions, Knopps' argument rambles without focus and I find it undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address insufficiently developed arguments). I therefore affirm the circuit court on this issue as well.

C. The Town is not precluded from bringing its nuisance action in a civil action in circuit court.

¶18 Knopps argues that Ixonia Municipal Code § 10.03 can only be enforced using the municipal citation procedure. This assertion, totally unsupported by authority, is contrary to the plain language of the section. For example, Knopps begins by quoting section 10.03(4), but the language of that section clearly states that the town should bring its action to abate a nuisance by bringing an action in the circuit court of Jefferson County. Knopps then goes on to point out that this method is not exclusive, quoting § 10.03(5), which provides:

> (5) OTHER METHODS NOT EXCLUDED. Nothing in this ordinance shall be construed as prohibiting the abatement of public nuisances by the Town in accordance with the laws of the State of Wisconsin.

Knopps argues that "in accordance with the laws of the State of Wisconsin" § 10.03(5) "must be construed as a reference to the citation method of enforcing

ordinances." There are two problems with Knopps' argument. First, Knopps offers no authority whatsoever for the claim that "in accordance with the law of Wisconsin" refers to the citation method in WIS. STAT. ch. 66. Second, Knopps' argument totally overlooks the fact that § 10.03(5) offers an alternative to bringing a civil action in circuit court, not an exclusive remedy. In other words, even if this section authorizes the use to the citation method of enforcement, it necessarily authorizes it as an alternate method of proceeding, not as an exclusive remedy. Knopps' unsupported assertion to the contrary has no merit and the circuit court is, again, affirmed on this issue.

D. The Town is not precluded from proceeding under the civil procedure by WIS. STAT. § 801.01(2).

¶19 Knopps argues that under WIS. STAT. § 801.01(2), the Town was required to proceed under either the municipal citation procedure or the small claims procedure. Section 801.01(2) provides that WIS. STAT. chs. 801 through 847 govern procedure and practice in all civil actions and special proceeding whether at law, equity or statutory origin "except where different procedure is prescribed by statute or rule." Knopps' argument requires that § 801.01(2) be read together with WIS. STAT. § 799.01(1)(b) and Ixonia Municipal Code §§ 9.09 and 25.05.

¶20 I have already rejected Knopps' interpretation of the two cited Municipal Code sections and need not rehash that discussion. However, I will address here whether WIS. STAT. § 799.01(1)(b) can be interpreted, together with

WIS. STAT. § 801.01(2) to require that only the municipal citation procedure in WIS. STAT., ch. 66 may be used. Section § 799.01(1)(b) provides as follows:[4]

> (1) Exclusive use of small claims procedure. Except as provided in [WIS. STAT. §] 799.02(1) and 799.21(4) and except as provided under sub. (2), the procedure in this chapter is the exclusive procedure to be used in circuit court in the following actions:
>
> ....
>
> (b) *Forfeitures.* Actions to recover forfeitures except as a different procedure is prescribed in chs. 23, 66, 345 and 778, or elsewhere, and such different procedures shall apply equally to the state, a county or a municipality regardless of any limitation contained therein.

Knopps overlooks several aspects of this language, which are fatal to his argument. First, he does not discuss WIS. STAT. §§ 799.02(1), 799.21(4) or 799.01(2). He offers no argument, even in summary fashion, that these exceptions to the general rule that small claims is the exclusive procedure do not apply here. Second, he totally overlooks the phrase "or elsewhere" in § 799.01(1)(b). This has a significant implication here.

¶21 There is no definition for "or elsewhere" in WIS. STAT. § 799.01(1)(b). Nothing in the context of § 799.01(1)(b) indicates that "or elsewhere" means "or elsewhere in the statutes." Generally, we do not add words to legislation. *See* ***State Dep't of Corrections v. Schwarz,*** 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703. ("We will not 'read into the statute language that the legislature did not put in.' 'One of the maxims of statutory construction is that

[4] Knopps argues in his cross-reply that the language of WIS. STAT. § 799.01(1)(b) has changed since the time of ***Bylewski***, adding language that makes the small claims procedure exclusive in some cases. However, that is not relevant to this issue, since I do not rely on ***Bylewski*** here, but rather on the language of the statute itself.

courts should not add words to a statute to give it a certain meaning.'" (citations and quoted source omitted)). When a word or phrase is used in a statute and is not specifically defined, common and approved usage of the word or phrase and other accepted rules of statutory construction apply. ***Sullivan Brothers, Inc. v. State Bank of Union Grove***, 107 Wis. 2d 641, 646, 321 N.W.2d 545 (Ct. App. 1982). Applying these rules of construction, I hold that "or elsewhere" could apply to any legal source that sets the appropriate procedure for a forfeiture action. As I have already determined, Ixonia Municipal Code §§ 9.09 and 25.05 provide for use of the civil procedure to enforce these particular forfeitures and qualify as "or elsewhere." Accordingly, I reject Knopps' argument.

¶22 Having determined that none of the procedural issues raised by Knopps on cross-appeal preclude consideration of the appeal itself, I turn to the Town's appeal.

2. Issue on Appeal

¶23 The Town challenges the circuit court's determination that the minimum forfeiture imposed by the ordinances, $5 and $10 per day, respectively, would result in an unconstitutionally excessive forfeiture under the circumstances of this case if imposed separately for the entire 773 days of violation.[5] This is an "as applied" challenge to the constitutionality of the ordinances.[6] In reviewing

[5] Our supreme court stated in ***Village of Sister Bay v. Hockers***, 106 Wis. 2d 474, 479, 317 N.W.2d 505 (Ct. App. 1982): "When a legislative body, acting within its authority, sets minimum and maximum forfeitures, the court has no authority to impose less than the minimum forfeiture." However, this rule has no bearing on the constitutional issue raised here.

[6] In ***State v. Wood***, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63, our supreme court succinctly explains the difference between facial and as applied constitutional challenges:

(continued)

questions of constitutionality, I will uphold a circuit court's factual findings unless they are clearly erroneous, but I will independently decide whether those facts meet the constitutional standard. ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423.

¶24 In the circuit court's decision on the Town's motion that the court impose forfeitures against Knopps for his violation of the Town's municipal ordinances, the circuit court made the following relevant factual findings:

1. It is undisputed that there are 773 daily violations of both the first and second causes of action (that being Ixonia Municipal Code sections 9.09 and 10.01, respectively)
2. Knopps' property was brought into compliance with the codes, with the help of volunteers and the cooperation of the municipality.
3. Knopps is disabled and poor, and has been afforded "Civil Gideon" counsel under these circumstances by the circuit court.
4. Imposition of the minimum forfeiture required under the ordinance, plus statutory "add ons" results in a total judgment of $22,763.40 for the first cause of action and $27,633.30 for the second cause of action, for a total judgment of $50,396.70.
5. The forfeitures are, in whole or in part, driven by a desire to punish.
6. Knopps' violations of the municipal ordinances were the result of disability and poverty.
7. Knopps' violations of the ordinance were not related to economic profit or gain.

> A party may challenge a law or government action as being unconstitutional on its face. Under such a challenge, the challenger must show that the law cannot be enforced "under any circumstances." If a challenger succeeds in a facial attack on a law, the law is void "from its beginning to the end." In contrast, in an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us, "not hypothetical facts in other situations." Under such a challenge, the challenger must show that his or her constitutional rights were actually violated. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim. (Citations omitted.)

¶25 Findings of fact will not be set aside unless clearly erroneous, and due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. WIS. STAT. § 805.17(2). A circuit court's factual findings are not clearly erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

¶26 Of the above seven findings of fact, only two are challenged by the Town. The town asserts that finding No. 3 above, that Knopps is disabled and poor, is clearly erroneous, arguing that "there is no evidence in the record that Knopps is disabled or poor." However, taking into account the opportunity of the judge to observe both Knopps and the property which is the subject of this action, I have to reject the Town's characterization of the record. While the written record may not contain many specific references to either Knopps' physical or financial condition, the circuit court had the opportunity to observe evidence of both of those matters and to draw reasonable inferences from its observations. Not only did the court have multiple opportunities to observe Knopps in court to assess his physical condition,[7] the court personally went to the property and observed the conditions under which Knopps was living. Finally, as the Town itself notes, Knopps was appointed "Civil Gideon" counsel, evidence that the circuit court

[7] The Town refers in its brief to Knopps receiving Social Security Disability, a payment which only people who are unable to engage in any gainful employment can receive. *See* 20 C.F.R. § 404.1505. This alone is sufficient support for the court's finding that Knopps is disabled.

determined that Knopps was unable to afford his own counsel.[8] For all of these reasons, I conclude that the court's finding that Knopps is disabled and poor is not clearly erroneous.

¶27 The Town also challenges the court's inclusion in finding No. 4 above of the "add-ons" in determining that the total judgment against Knopps would be $50,396.70, arguing that the total forfeiture is actually only $11,595. However, the Town offers no authority for the proposition that the statutory additions are not to be considered when assessing whether the penalty imposed is unconstitutionally excessive. I cannot consider arguments unsupported by citation to authority. *See* ***Pettit***, 171 Wis. 2d at 646. Accordingly, I reject this contention.

¶28 I now turn to whether the particular forfeiture in this case is unconstitutionally excessive. As with all constitutional challenges, the civil forfeiture is presumed constitutional and the challenger must prove it unconstitutional beyond a reasonable doubt. ***State v. Hammad,*** 212 Wis. 2d 343, 348, 569 N.W. 2d 68 (Ct. App. 1997). The threshold question to be addressed is whether the excessive fines provision of the Eighth Amendment to the United States Constitution, and article I, section 6 of the Wisconsin Constitution applies to this civil forfeiture. As we noted in ***Hammad***, prior to ***Austin v. United States***, 509 U.S. 602 (1993), it was generally considered that the Eighth Amendment

[8] The record on appeal does not contain any record of a hearing or of any findings supporting the appointment of the Civil Gideon counsel. The Town does not challenge the circuit court's exercise of discretion in making that appointment. Therefore, it has to be considered as conceded that the appointment was appropriate. Further, in its memorandum decision, the circuit court specifically decided that "[i]n order to facilitate payment by this disabled, poor individual, the Court will not require him to re-pay the County for Civil Gideon attorney fees." The Town does not challenge this exercise of the court's discretion, either.

applied primarily to criminal prosecutions and punishments. ***Hammad***, 212 Wis. 2d at 349. However, in ***Austin***, the United States Supreme Court enlarged the reach of the excessive fines clause to include civil forfeitures if the forfeiture was imposed as punishment in whole or in part. ***Id.*** at 350. In the present case, the circuit court found that the forfeiture against Knopps was intended as punishment, and neither party challenges that finding. The excessive fines prohibition therefore applies.

¶29 Next, I must determine what standard to apply in analyzing whether the forfeiture is excessive. ***Hammad*** reviews the alternate standards that have been applied in the past. *See* ***id.*** at 354. The two most common tests are the "proportionality test" and the "multi-factor test." ***Id.*** The parties do not agree which test is required in Wisconsin. The Town argues for the multi-factor test, which is set forth in ***State v. Seraphine***, 266 Wis. 118, 121, 62 N.W.2d 403 (1954). This is also the test that the circuit court said it was applying, although the Town argues that it was improperly applied. On the other hand, Knopps argues that the appropriate test in Wisconsin is the proportionality test found in ***State v. Boyd***, 2000 WI App 208, 238 Wis. 2d 693, 618 N.W.2d 251. In its reply brief, the Town attempts to distinguish ***Boyd***.

¶30 I am bound by this court's holding in ***Boyd***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 185–190, 560 N.W.2d 246 (1997). Having said that, it does not appear that the difference between the multi-factor test in ***Seraphine*** and the three factor proportionality test in ***Boyd*** would alter the outcome of this case. In ***Boyd***, we explained that the controversy over whether the multi-factor test or the proportionality test was the appropriate standard was resolved by the United States Supreme Court in ***United States v. Bajakajian***, 524 U.S. 321 (1998). ***Boyd*** 238 Wis. 2d 693, ¶9. We explained in ***Boyd*** that in ***Bajakajian***, the Court adopted a

proportionality test that utilized three factors.[9] It first considered the gravity of the offense. ***Id.***, ¶12. We explained that the Court in ***Bajakajian*** emphasized the defendant's culpability rather than the crime's severity, noting that the crime was solely a reporting offense and not connected to any of the types of illegal activity that the law was intended to deter. ***Id.*** We explained that the Court also considered the maximum fine that the defendant could have received in a criminal prosecution. ***Id.*** Finally, we explained that the Court emphasized that Bajakajian's conduct caused minimal harm, and that only to the government. ***Id.***

¶31 The Town's attempt to distinguish ***Boyd*** and ***Bajakajian*** is unconvincing. The Town claims that the standard enunciated in these cases does not apply because the civil forfeitures in those cases arose in cases where people had also been exposed to criminal prosecution. Given the reasoning in ***Bajakajian*** and the direct statement of a broad standard in both cases, this seems beside the point. *See* ***Bajakajian,*** 524 U.S. at 334. ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The

[9] We stated in ***State v. Boyd***, 2000 WI App 208, ¶14, 238 Wis. 2d 693, 618 N.W.2d 251:

> In the simplest terms, the [] Court [in ***United States v. Bajakajian***, 524 U.S. 321 (1998)] applied the proportionality test by considering these factors: the nature of the offense, the purpose for enacting the statute, the fine commonly imposed upon similarly situated offenders and the harm resulting from the defendant's conduct. These factors are strikingly similar, but yet not identical, to those in the [] standard [set forth in ***State v. Seraphine***, 266 Wis. 118, 62 N.W.2d 403 (1954)].

amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.")[10]

¶32 Applying this standard to the facts before me, I reach the same conclusion that the circuit court reached applying the standard in ***Seraphine***, that the forfeiture constitutes an excessive fine. Beginning with the nature of the offense, here we have a poor and disabled man who allowed his property to become littered and disreputable to the point that it disturbed the community. That would seem to be exactly the kind of behavior that the ordinance was designed to discourage. However, he was not engaging in this behavior for profit, as if he were running an unlicensed junk yard. The court held that the violations were the result of his poverty and disability. It is a reasonable inference from the facts that he was simply incapable of maintaining his property in the condition called for in the statute. After all, the property was only brought into compliance with the help of volunteers and the cooperation of the municipality.

¶33 It is also appropriate to point out that the massive accumulation of the forfeiture was at least partly the result of the long pendency of the actions taken by the municipality to abate the violation. While this is not improper in itself, when the forfeiture at issue is one based upon the accumulation of separate daily penalties, comparison with "the fine commonly imposed upon similarly

---

[10] "My object all sublime
I shall achieve in time,
To let the punishment fit the crime,
The punishment fit the crime."

W. Gilbert & A. Sullivan, ***The Mikado, Act II.***

situated offenders"[11] would have to factor in the length of time. Would a similarly situated offender have been in a situation where the offense was allowed to continue for 773 days, accumulating a daily forfeiture?

¶34 Finally, there is the matter of the harm resulting from the offender's conduct. Here, though it took a while, the remediation was successful and no permanent harm resulted.

¶35 Taking all of these factors into consideration, as I am directed to do by ***Boyd***, I conclude that it would be disproportionate to the offense and shocking to the conscience for a poor disabled man to be penalized by such a large forfeiture that he could well lose his home. In this regard, I draw the same inference as the circuit court.

¶36 There is one final matter. The circuit court did not only find the forfeitures required by imposing the minimum forfeitures for 773 days unconstitutionally excessive, it also crafted an alternative forfeiture of its own and imposed it upon Knopps. While the Town in its brief mentions this in a summary fashion in a footnote, and addresses the issue to some extent in its reply brief, neither party otherwise raises this directly as an issue nor develops an argument concerning the alternative forfeiture calculation. We do not address issues or arguments raised for the first time in a reply brief. *See* ***Richman v. Security***

[11] The Town argues that the fine imposed is actually only $5 and $10 and that the number of days is simply caused by Knopps' continued noncompliance. In neither case does the Town cite authority that the daily forfeiture multiplied by the number of days is not the appropriate measure of whether the forfeiture is excessive. In fact, the Town cites language in ***Seraphine*** that approves of the graduated fine utilized in that case, which does not state that only the base, ungraduated fine is under consideration, undermining its own argument. I do not consider this issue further.

Savings & Loan Ass'n, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973). Any question of the propriety or amount of the alternative forfeiture has therefore been abandoned. *See* ***State v. Allen***, 2004 WI 106, ¶26 n.8, 274 Wis. 2d 568, 682 N.W.2d 433 (issue not argued is forfeited).

CONCLUSION

¶37 For all of the reasons given above, I affirm both the appeal and the cross-appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.