

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 25, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-2133**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**ROBERT M. PACE AND JEAN PACE,**

**PLAINTIFFS-APPELLANTS,**

**ALL OWNERS OF BOATHOUSES LOCATED BEYOND THE  
ORDINARY HIGH-WATER MARK OF NAVIGABLE WATERWAYS  
LOCATED IN ONEIDA COUNTY, WISCONSIN,**

**PLAINTIFF,**

**v.**

**ONEIDA COUNTY, STATE OF WISCONSIN, A MUNICIPAL  
CORPORATION,**

**DEFENDANT-RESPONDENT,**

**STATE OF WISCONSIN,**

**INTERVENOR.**

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**ONEIDA COUNTY, STATE OF WISCONSIN, A MUNICIPAL  
CORPORATION,**

**PLAINTIFF-RESPONDENT,**

**STATE OF WISCONSIN,**

**INTERVENOR,**

**V.**

**ROBERT M. PACE,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Oneida County:  
MARK A. MANGERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Robert and Jean Pace appeal orders calculating a forfeiture based on their unlawful construction of a boathouse and denying their motion to vacate a February 9, 1995 judgment that imposed the initial \$10 per day forfeiture commencing July 28, 1989. They argue that the forfeiture violates their Eighth Amendment rights because it is excessive and resulted from an error calculating the correct number of days. They also argue that the underlying judgment is void because its foundation was preempted by a previous decision of this court, the passage of WIS. STAT. § 30.121(3r)<sup>1</sup> and the Oneida County Board of Adjustment's ruling of September 25, 1998 that allowed reconstruction of the boathouse without a permit. We reject these arguments and affirm the orders.

¶2 The boathouse was destroyed by fire in March 1989. The Board of Adjustment denied the Paces' appeal from the zoning administrator's denial of

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

applications to rebuild the boathouse. The Paces did not commence a certiorari appeal of that decision, and rebuilt the boathouse without a permit. On February 9, 1995, the circuit court ordered the Paces to remove their boathouse and they were assessed the minimum \$10 per day forfeiture from July 28, 1989 through the date of its removal.

¶3 While the circuit court's order was pending on appeal, the legislature enacted WIS. STAT. § 30.121(3r), which allows rebuilding of a fire-damaged boathouse without a permit. After numerous additional proceedings and appeals that will not be recited here, the Paces commenced a new circuit court action seeking certiorari review of the Board of Adjustment's October 17, 1998 decision denying them a permit for reconstructing the boathouse. The circuit court found that the new boathouse substantially exceeded the size of the boathouse that was destroyed by fire. The circuit court affirmed the Board's conclusion that § 30.121(3r) did not allow construction of a larger boathouse without a permit. That decision was not appealed. The circuit court then issued an order finding that the parties had never stipulated to suspend the daily forfeiture during pendency of the litigation and imposed the minimum \$10 per day forfeiture for 3,451 days plus \$200 per day for thirteen days, representing the time from the January 8, 1999 hearing until the boathouse was made to conform with the law.

¶4 Although the Paces begin their Eighth Amendment argument by stating that they do not contest the amount of the daily forfeiture,<sup>2</sup> they nonetheless argue that the total forfeiture exceeding \$37,000 is excessive. They argue that reconstruction of the boathouse would be lawful if they did it today.

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<sup>2</sup> The amount of the forfeiture was previously affirmed by this court in appeal No. 95-1223.

We conclude that the minimum daily forfeiture is not unjustified, excessive or disproportionate for several reasons. First, the court has no authority to impose less than the minimum forfeiture or to ignore some of the days of violation. *See Village of Sister Bay v. Hockers*, 106 Wis. 2d 474, 479, 317 N.W.2d 505 (Ct. App. 1982). Second, the same construction if done today would be a violation because WIS. STAT. § 30.121(3r) does not allow construction of a larger replacement boathouse. Third, the Paces undertook construction in flagrant disregard of the law at the time of construction. The Paces argue that WIS. ADMIN. CODE § NR 325.065 was valid and in effect during most of the decade in question and that this provision allowed them to reconstruct their boathouse. The Natural Resources Code only permitted “maintenance and repair,” not expansion of a boathouse without a permit.

¶5 The total forfeiture is based on the minimum amount allowed by law multiplied by a decade of delay. The Paces do not directly challenge the trial court’s finding of fact that the parties did not stipulate to suspend the forfeiture pending the outcome of litigation. The record contains no such stipulation. Therefore, the trial court had no choice but to impose the minimum daily forfeiture for the 3,451 days leading up to the hearing. *See id.*

¶6 The court properly exercised its discretion when it imposed a \$200 per day forfeiture from the date of the hearing until the boathouse was made to comply with the law. The court properly concluded that it had to do something to bring this matter to a close. Dramatically increasing the amount of the forfeiture to compel compliance after almost a decade of delay does not shock public sentiment. *See State v. Trailer Services*, 61 Wis. 2d 400, 409, 212 N.W.2d 683 (1973).

¶7 The Paces’ argument that the underlying judgment is void ignores the fact that they did not simply rebuild the boathouse destroyed by fire, but substantially enlarged it. This court’s previous decisions and WIS. STAT. § 30.121(3r) authorize “rebuilding” without a permit. Neither our decisions nor the statute allow constructing a larger replacement building without a permit. The statute does not preempt or void the local ordinance because requiring a permit to build a larger boathouse is not inconsistent with the statute. *See DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996). Therefore, the ordinance has not been preempted by the statute, and the foundation for the underlying judgment has not been eroded.

*By the Court.*—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

