

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 2, 1998

Marilyn L. Graves  
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 § 808.10 and RULE 809.62, STATS.

Nos. 97-3263, 98-0059-W

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

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No. 97-3263

**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,**

**PLAINTIFFS-RESPONDENTS,**

**STATE OF WISCONSIN,**

**INTERVENOR,**

**V.**

**ROBERT M. PACE,**

**DEFENDANT-APPELLANT.**

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**NO. 98-0059-W**

**STATE OF WISCONSIN EX REL. ROBERT M. PACE, JEAN PACE AND ALL OWNERS OF BOATHOUSES LOCATED BEYOND THE ORDINARY HIGH-WATER MARK OF NAVIGABLE WATERWAYS LOCATED IN ONEIDA COUNTY, WISCONSIN,**

**PETITIONERS,**

**V.**

**CIRCUIT COURT FOR ONEIDA COUNTY, THE HONORABLE MARK A. MANGERSON, PRESIDING, ONEIDA COUNTY, STATE OF WISCONSIN, A MUNICIPAL CORPORATION, AND STATE OF WISCONSIN,**

**RESPONDENTS.**

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

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

PER CURIAM. Robert and Jean Pace appeal an order denying their motion for substitution of judge after the trial court concluded that there were no issues pending before it.<sup>1</sup> The Paces argue that this determination was erroneous. This case was commenced in 1989. A review of its procedural history leads us to conclude that all the issues raised by the pleadings have been ruled upon. Therefore, because no issues are properly before the trial court, its order denying their motion is affirmed.<sup>2</sup>

### I. Facts

The Paces' boathouse was destroyed by fire in 1989. The County denied their application to rebuild it. The board of adjustment affirmed, and the Paces never appealed the board's decision.<sup>3</sup> The Paces rebuilt their boathouse without a permit. They later submitted an additional permit application to the county zoning office on the basis of a newly enacted statute, § 30.121(3r), STATS.,<sup>4</sup> but this application was also denied. The Paces appealed the denial of

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<sup>1</sup> The parties briefed the issue whether the order was a final order. Insofar as the order determined that no further proceedings were pending, we conclude that the order is final within the meaning of § 808.03(1), STATS., because it disposes of the entire action.

<sup>2</sup> Robert and Jean Pace also petitioned for a supervisory writ directing the trial court to grant their request for a substitution of judge. In view of our disposition of the appeal, their petition for writ is denied.

<sup>3</sup> The administrative proceedings are not part of this record because the Paces did not appeal the board's decision to the circuit court. We derive information regarding the administrative proceedings from uncontroverted statements in the parties' briefs.

<sup>4</sup> Section 30.121(2), STATS., provides: "After December 16, 1979, no boathouse or fixed houseboat may be constructed or placed beyond the ordinary high water mark of any navigable waterway."

Subsection (3) of the same statute provides: "The riparian owner of any boathouse ... extending beyond the [OHWM] may repair and maintain the boathouse ... if the cost of the repair or maintenance does not exceed 50% of the equalized assessed value .... "

(continued)

their second application to the county board of adjustment, which tabled the matter pending the outcome of this litigation.

## II. Procedural Background

In order to put the issue on appeal in perspective, a review of the lengthy procedural history is required. In 1989, the Paces filed a summons and complaint seeking a declaratory judgment that ONEIDA COUNTY, WIS., ORDINANCE 951D, prohibiting "wet" boathouses, is unconstitutional and therefore invalid. The County filed a separate action, charging the Paces with building a boathouse without a permit and seeking a forfeiture and an injunction requiring removal of the structure. The actions were consolidated.

The trial court entered judgment against the Paces on February 9, 1995, ordering a \$10 per day forfeiture and an injunction to remove the boathouse. The judgment was stayed pending appeal. On appeal, this court affirmed all issues but one: We held that the Paces did not have to exhaust administrative remedies to challenge the constitutionality of the County ordinance. The matter was remanded for a determination of that issue. *Pace v. Oneida County*, No. 95-1223 (Wis. Ct. App. Dec. 12, 1995). We also affirmed the forfeiture, concluding that it "constitutes a proper exercise of the trial court's discretion." *Id.* at 3.

Between the time of the remand and the trial court's decision thereon, § 30.121(3r), STATS., was passed, which permitted the rebuilding of wet boathouses destroyed by fire after 1984. On remand the trial court considered not

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The newly-created exception, § 30.121(3r), STATS., effective July 29, 1995, provides: "EXCEPTION; DAMAGES AFTER JANUARY 1, 1984. Subsections (2) and (3) do not apply to the repair or reconstruction of a damaged boathouse if the boathouse was damaged by violent wind, vandalism or fire and if the damage occurs after January 1, 1984."

only the constitutionality of the County ordinance, but also the constitutionality of the new statute. The trial court held: (a) that the ordinance was not an unconstitutional taking without compensation and (b) the new legislation is an unconstitutional private law that violated separation of powers.

The Paces appealed a second time. The sole issue on appeal was whether the new statute, § 30.121(3r), STATS., was an unconstitutional private bill that violated the separation of powers. We held that it was not and reversed the trial court. There was no remand. See *Pace v. Oneida County*, 212 Wis.2d 448, 569 N.W.2d 311 (Ct. App. 1997). We also observed that the new legislation "permits the [Paces'] rebuilding of the boathouse[.]" *Id.* at 459, 569 N.W.2d at 316.

The County moved for reconsideration of our decision, and asked us to "remand to the trial court the issue whether the structure satisfied the requirements of § 30.121(3r)." In response, we held:

The motion is not necessary; that issue was never before us in this appeal. The parties' briefs did not raise that issue, and our July 22, 1997 decision did not address it. As a result, our July 22, 1997 decision placed no limitation on the trial court concerning that issue. The parties are free to raise that issue in the trial court, and the trial court is free to consider it without an authorizing remand by this court.

The Paces then filed a motion in the trial court for substitution of judge. The County objected, arguing that there was no issue left to be litigated and there were no further proceedings within the meaning of § 801.58(7), STATS.<sup>5</sup>

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<sup>5</sup> Section 801.58(7), STATS., provides:

If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a

(continued)

The trial court agreed, stating that there were no issues before it that required judicial determination. It further pointed out: "The court of appeals [in its 12/95 decision] specifically affirmed the court's ruling that, whether the structure was conforming or nonconforming, it was built without a permit, justifying the forfeiture and requiring its removal." The trial court entered an order denying the Paces' motion for substitution. The Paces appealed the order and sought a writ directing the trial court to grant their request for substitution.

### III. Discussion

We conclude that no issue remains before the trial court. After the first appeal, the forfeiture was affirmed and the matter was remanded solely for a determination whether the county ordinance constituted an unlawful taking. *Pace*, No. 95-1223 unpublished slip op. at 4. We further concluded that: "The trial court properly rejected the remaining defenses based on Pace's failure to exhaust administrative remedies." *Id.* at 5. On remand, the trial court resolved the constitutional issue in favor of the County, and that issue was not subject to further appeal. In the same proceeding, the court considered the constitutionality of the new statute, § 30.121(3r), STATS.,<sup>6</sup> and declared the new legislation unconstitutional as a private bill and that it violated the separation of powers doctrine.

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manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the filing of the remittitur in the trial court whether or not another request was filed prior to the time the appeal or writ of error was taken.

<sup>6</sup> Although there were no pleadings raising this issue, the record does not indicate the parties objected to the court's consideration of this issue.

On the second appeal, we reversed the trial court's determination with respect to constitutionality. *Pace*, 212 Wis.2d at 451, 569 N.W.2d at 313. The February 9, 1995, judgment assessing the forfeiture had been affirmed in the previous appeal, except insofar as the constitutionality of the County ordinance was concerned. In the second appeal, we concluded that in view of the new legislation, which permits the rebuilding of the boathouse, the constitutionality of the ordinance as an unlawful taking need not be addressed. *Id.* at 459, 569 N.W.2d at 316. No other issues were pending and, as a result, we did not remand for further proceedings. *See id.* The parties have yet to litigate the scope of the new statute and its applicability to the boathouse constructed by the Paces. Because this issue was not raised before the trial court, it is not properly before us.

The Paces' right to a permit for a boathouse under the new legislation has yet to be litigated. As a result, there are no proceedings presently pending before the trial court and the petition for a supervisory writ is premature.

*By the Court.*—Order affirmed.

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

