COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

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.

No. 98-2350

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed.*

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

PER CURIAM. Robert Harris appeals a judgment holding him liable for civil forfeitures and contempt of court under § 30.126(2) and (3), STATS. Without obtaining a DNR permit under that statute, Harris replaced his old roof on his commercial Mississippi River fishing raft with a new roof deck. Both sanctions pertain to Harris' inclusion of a railing and stairway on the roof deck.

Sections 30.126(2) and (3) bar capital improvements without a permit. On January 22, 1998, in a nonfinal order, the trial court held the new roof deck to be a capital improvement and ordered the railing's and stairway's immediate removal, intending to disable the deck aspect of the roof. Harris did not remove them. On August 14, 1998, the trial court issued its final judgment, levying a daily $10 forfeiture for each day Harris had left the railing and stairway in place, with limited exceptions. The trial court made the contempt finding for the same conduct and conducted all aspects of the proceedings by summary judgment.

On appeal, Harris attacks the trial court's ruling that the new roof deck, including the railing and stairway, were capital improvements. He also attacks the manner in which the trial court levied sanctions. Harris makes five basic arguments: (1) the railing and stairway were permissible maintenance, part of the essential repairs to an aging roof, and thereby needed no DNR permit under the statute; (2) the trial court should have stayed its nonfinal removal order until the final judgment to permit Harris to appeal without incurring daily forfeitures and contempt sanctions; (3) he had a right to appeal the nonfinal removal order as part of a subsequent final judgment and therefore was not in contempt or subject to forfeitures before the trial court issued that final appealable judgment; (4) because the DNR never told Harris to specifically remove the railing and stairway, he has no liability for the time frame before January 22, 1998; and (5) federal OSHA rules permitted the railing and stairway, and thereby the deck. We reject these arguments and affirm the summary judgment.

Summary judgment is proper if there is no genuine issue of material fact and the State is entitled to judgment as matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). Here, the trial court correctly granted summary judgment and properly ordered the

railing's and stairway's removal. Harris failed to supply evidence showing that the roof work was ordinary maintenance, undertaken solely to sustain the structure's existing capability. Rather, the facts showed that the roof work constituted capital improvements, something that expanded the existing capability of the structure by converting a roof into a roof deck. The roof work included reinforcement of lateral and vertical weight-bearing elements, and this allowed patrons to stand on the new roof and use it for new purposes. The old roof would not permit patrons to stand on it. New uses are a characteristic of capital improvements. In short, the roof work did more than maintain the existing structure; it gave the structure new uses. Such capital improvements needed a prior DNR permit.

We also reject Harris' remaining arguments. First, the trial court had no duty to stay its nonfinal removal order pending entry of a final judgment. The trial court could rightfully demand compliance on an interlocutory basis, and Harris had a choice to either obey on an interlocutory basis or seek interlocutory relief from an appellate court. The trial court also correctly held Harris in contempt for violating the nonfinal removal order. Trial courts may hold litigants in contempt as long as they have the ability to obey trial court orders. *See* ***Balaam v. Balaam***, 52 Wis.2d 20, 29, 187 N.W.2d 867, 872 (1971). Here, disobeyance was not Harris' only option. Harris had the ability to comply with the trial court order. Harris could have temporarily removed the railing and stairway until all trial court and appellate court proceedings were resolved. This would have saved him from contempt and still preserved his appellate rights. Harris could also have sought interlocutory relief from an appellate court. He did not, however, have the choice of simply disobeying the order and using his appeal rights as a defense to the contempt.

Harris was subject to forfeiture for any part of the structure that the trial court ultimately found improper, including the stairway and railing, in spite of the fact that the DNR did not give him specific notice to remove the railing and stairway. The DNR gave Harris notice that the roof deck as a whole was in violation of the zoning provisions. The stairway and railing were integral parts of the roof deck, and without those parts, the roof was unusable as a deck. Under the circumstances, the DNR had no duty to itemize each part of the structure that was in violation. Moreover, Harris misapprehends the import of the trial court's ruling. The trial court did not absolve Harris in any way by limiting its removal order to the railing and stairway. Rather, the trial court found that the roof deck, in its capacity as a functioning deck, constituted an improvement, with the railing and stairway acting as the linchpin of the improvement. The trial court merely used the least costly remedy from Harris' standpoint, by limiting its removal order to the railing and stairway, instead of the roof deck's larger elements. *Cf.* ***White v. Ruditys***, 117 Wis.2d 130, 142, 343 N.W.2d 421, 427 (Ct. App. 1983).

Last, the trial court correctly rejected Harris' claim that sundry OSHA rules allowed the railing and stairway, and thereby as a byproduct, the roof deck. Harris cites OSHA rules requiring a railing and stairway for his kind of roof deck. Harris misunderstands the purpose of the OSHA rules. Those rules operate concurrently with state and local zoning laws. They complement those zoning laws in the event they both cover the same subject matter; they do not displace more restrictive state and local laws. *Cf.* ***DeRosso Landfill Co. v. City of Oak Creek***, 200 Wis.2d 642, 651, 547 N.W.2d 770, 773 (1996). Further, the OSHA rules are not a federal zoning code and do not deal with zoning per se. Rather, they are safety regulations, setting safety standards in specified circumstances. In that sense, they act to narrow, not enlarge, Harris' legal rights. They do not act to

grant Harris the right to have a stairway and railing if state or local zoning laws bar the underlying structure itself. The OSHA rules are restricting, not enabling, in terms of what Harris could do to his property. *Cf.* ***Nitardy v. Thayer***, 275 Wis. 459, 462, 82 N.W.2d 325, 327 (1957). In short, Harris has given us no basis to overturn the trial court.

By the Court—Judgment affirmed.

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