

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2001

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. 00-0750

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TOWN OF HARMONY,

PLAINTIFF-RESPONDENT,

V.

**DONALD T. DONAHUE AND HARMONY ANTIQUE CARS,
INC., A WISCONSIN CORPORATION,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County:
JAMES E. WELKER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Donald Donahue and Harmony Antique Cars, Inc., appeal from a judgment imposing a forfeiture and granting injunctive relief to the

Town of Harmony. The issues are whether the trial court properly limited testimony from an expert witness, properly refused to submit Donahue's proposed instructions and jury verdict, imposed excessive forfeitures, or granted injunctive relief beyond its authority. We affirm on the first three issues. We reverse three of the conditions imposed on Donahue's continued operation of Harmony Antique.

¶2 Donahue operates Harmony Antique as a solely owned used car dealership and auto repair shop in the Town of Harmony. He has also used the property for a number of years to store older cars.

¶3 In 1991, Donahue located his business in a district which the town had zoned light industrial. The applicable ordinance, enacted in 1967, allowed auto sales and service establishments, but not the storage of "junked or wrecked automobiles or parts." Elsewhere, the ordinance banned "automobile wrecking yards" and "storage of wrecked and dismantled vehicles." The ordinance allowed "uses similar in character and such accessory uses as are customary in connection with" the business operating in the district.

¶4 In February 1998, the town repealed the 1967 ordinance and enacted a new zoning ordinance that banned auto sales and service in light industrial districts. When first enacted the ordinance also banned the storage of unlicensed vehicles unless contained in enclosed areas. Later, in December 1998, the town amended the ordinance to bar unenclosed storage of abandoned or nonoperable vehicles as well. The ordinance also increased the applicable forfeiture range for zoning violations from \$10 to \$200 per day to \$100 to \$5,000 per day. All nonconforming uses existing as of the enactment of the new ordinances were allowed to continue.

¶5 In March 1999, the town zoning officer notified Donahue that he was in violation of various town ordinances, due to a large number of inoperable or disassembled vehicles and equipment, parts, metal debris, junk lumber and other miscellaneous trash. Donahue took no action and the town commenced this proceeding in April 1999, with a complaint alleging that since 1994 Donahue was in violation of both the old and new zoning ordinances by openly storing nonoperable, unlicensed, and abandoned vehicles on his property.¹

¶6 At Donahue's jury trial there was never any dispute that for years he had kept many unlicensed, inoperable vehicles and vehicle parts scattered throughout his property. What Donahue describes as the "crux" of his defense was evidence that he nevertheless had not violated the 1967 ordinances, and had therefore established a legal nonconforming use of the property under the 1998 ordinance. To prove his point he offered testimony from an expert witness that his operation complied with the 1967 ordinance because the vehicles he kept were neither "wrecked" nor "junked," and he did not operate a "wrecking yard," using definitions of those terms as used in certain state statutes. The trial court disallowed that testimony, concluding that the words in the ordinance were capable of being understood according to their plain and ordinary meaning, without reference to the more narrow statutory definitions. The court then refused to instruct the jury or submit verdict questions on Donahue's nonconforming use defense. In effect, the trial court found as a matter of law that no reasonable jury could find that Donahue was in compliance with the 1967 ordinance, based on the evidence presented at trial.

¹ The complaint also alleged a separate violation of the town's disabled vehicle ordinance. A jury found Donahue not guilty of violating that ordinance, which had a clause excepting disabled vehicles that were necessary to a business.

¶7 The verdict submitted to the jury asked whether Donahue and Harmony violated the amended 1998 ordinance after December 21, 1998, its effective date being December 22. The verdict also asked how many days Donahue and Harmony were in violation. The jury found that Donahue had violated the ordinance for 284 days after December 21. The trial court imposed a forfeiture of \$250 per day, totaling \$71,000. Costs and penalties in the amount of \$17,000 were added to the judgment. The trial court also provided injunctive relief, including the following provisions:

1. [Donahue's business premises] shall have an area of at least 12 feet by 20 feet in size which is accessible for the display of automobiles that are for sale, and which shall be used for no other purpose except for displaying automobiles for sale....
2. The dealership [shall be] open for business ... at least 40 hours per week, and the business shall actually be open for the hours posted except for emergency situations.
3. Said building shall have a repair shop that is regularly staffed by mechanics for the purpose of servicing vehicles during the hours that the dealership is open for business.

¶8 The trial court properly excluded testimony from Donahue's expert witness. An expert may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or determine a fact. WIS. STAT. § 907.02 (1999-2000).² Whether to allow an expert to testify is a discretionary decision. *State v. Brewer*, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995). Here, Donahue's expert had specialized knowledge concerning the meaning and application of certain state statutes that had no bearing on the

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

issues in this case. He had no specialized knowledge as to the meaning of the town's ordinances. Such knowledge was unnecessary, in any event, because the ordinances were plainly worded and readily understandable without resort to specialized knowledge.

¶9 The court properly refused to provide instruction or submit a jury question on Donahue's nonconforming use defense. Whether the evidence presented is sufficient to warrant the submission of an issue to the jury is a question of law we decide de novo. *Zintek v. Perchik*, 163 Wis. 2d 439, 454, 471 N.W.2d 522 (Ct. App. 1991), *overruled on other grounds*, *Steinberg v. Jensen*, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). Here, the evidence conclusively showed that Donahue was not entitled to the defense. Pictures and a video introduced in evidence revealed that for years prior to enactment of the 1998 revised ordinance, Donahue had numerous old, rusted vehicles and vehicle parts spread throughout his property. Those vehicles and parts were "junked," or "wrecked," or "dismantled" under any reasonable definition of those terms. They were in such poor condition that their storage could not be considered a use similar in character to or accessory to a dealership, repair, or antique car business. The jury could not have reasonably found otherwise. A prior nonconforming use can be prohibited or restricted by a subsequent ordinance if it was an unlawful use under the prior ordinance as well. *See Town of Delafield v. Sharpley*, 212 Wis. 2d 332, 337-38, 568 N.W.2d 779 (Ct. App. 1997).

¶10 The trial court did not impose an excessive forfeiture on Donahue. An excessive civil forfeiture may violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. *See State v. Hammad*, 212 Wis. 2d 343, 347-48, 569 N.W.2d 68 (Ct. App. 1997). A person challenging a forfeiture

on constitutional grounds bears a heavy burden, and must have a very clear case. *Id.* at 349.

In determining whether a fine authorized by statute is excessive in the constitutional sense, due regard must be had to the object designed to be accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and the nature of the act for which it is imposed, and in some instances, to the ability of accused to pay. In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

Id. at 355-56. Under this standard, the forfeiture and penalty imposed on Donahue was not excessive. Donahue had violated the town's ordinances for years in a blatant and highly visible manner. He had refused to cooperate with earlier informal efforts to resolve the problem. The total amount imposed by the court was at the low end of the \$100 to \$5,000 per day range of potential forfeitures. Donahue raises no issues concerning his ability to pay. Under these circumstances, the forfeiture the trial court imposed is not so unusual or disproportionate as to shock public sentiment.

¶11 We vacate the provisions of the injunction recited in ¶7 of this opinion, however. They exceed the requirements for auto dealers and repair shops set forth in applicable statutes and administrative rules. There is no apparent relationship between these conditions and Donahue's violation of the zoning ordinance. On remand, the trial court shall enter an amended judgment removing these three conditions. No costs to either party.

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

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

