COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2012AP2179 **Cir. Ct. No. 2011CV4275**

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

FAMILY BUSINESS LLC D/B/A R PLACE ON PARK,

DEFENDANT,

RODERICK FLOWERS,

INTERVENOR-THIRD-PARTY
PLAINTIFF-APPELLANT,

V.

MICHAEL MAY, CHIEF NOBLE WRAY, CAPTAIN JOSEPH BALLES, MARIBETH WITZEL-BEHL AND JENNIFER ZILAVY,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Roderick Flowers, *pro se*, appeals the circuit court's order permanently closing R Place on Park to abate the public nuisance created by its operation, directing The Family Business LLC and Flowers to cease all operation of R Place on Park, dismissing the supplemental counterclaim brought by Flowers against the City of Madison, and dismissing the third-party complaint brought by Flowers against Madison City Attorney Michael May, Madison Police Chief Noble Wray, Madison Police Captain Joseph Balles, City Clerk Meribeth Witzel-Behl and Assistant City Attorney Jennifer Zilavy. The issues on appeal are: (1) whether the circuit court properly concluded that R Place is a public nuisance pursuant to WIS. STAT. § 823.02 (2011-12), and properly ordered R Place permanently closed to abate the public nuisance caused by its operation;[1] (2) whether the circuit court misused its discretion in finding Flowers in contempt of court for violating a temporary injunction; and (3) whether the circuit court properly dismissed Flowers' supplemental counterclaim and third-party complaint. We affirm.

¶2 The circuit court's thorough written decision provides an excellent overview of the procedural history of this litigation:

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The City of Madison … filed this action against The Family Business LLC … under the authority of §§ 823.02 and 823.03, Stats., on September 23, 2011. The Complaint alleged [The Family Business] is the owner, operator and holder of a liquor license for "R Place on Park," located at 1821 S. Park Street in Madison. The Complaint further alleged that "unreasonable, violent and dangerous nuisance activities occurring at R Place…interfere substantially with the comfortable enjoyment of the life, health and safety of others, thereby creating a public nuisance." The City sought a temporary injunction.

On September 27, 2011 [the circuit court] held an evidentiary hearing on the City's motion for temporary injunction. Based on the testimony, the court concluded that the City had met its burden of proof for a temporary injunction, stating "that in balancing the factors which argue against closure, against the extreme level of violence and danger, the city is very likely to succeed in the lawsuit to prove that R Place is a public nuisance." The court granted a temporary injunction closing R Place.

On October 20, 2011 [the circuit court] granted the motion to intervene filed by the agent for [The Family Business], Roderick Flowers. Flowers then petitioned for stay of the temporary injunction and for leave to file a third party complaint and counterclaim. At a hearing on November 22, 2011 the court granted leave to file a third party complaint and counterclaim, denied a stay of the injunction, and set trial on the City's public nuisance claim for January 4 and 5, 2012.

Following the two-day trial, each party submitted proposed findings of fact and conclusions of law. On February 6, 2012 Flowers filed his "Supplemental Counterclaim for Damages and Initial Third Complaint for Damages," naming as third-party defendants Madison City Attorney Michael May, Madison Police Chief Noble Wray, Captain Joseph Balles, City Clerk Maribeth Witzel-Behl and Assistant City Attorney Jennifer Zilavy. The City and the third-party defendants moved to dismiss the counterclaim and third-party complaint on April 3 and 5, 2012, respectively.

In the meantime, the City filed an order to show cause for contempt, alleging that Flowers had repeatedly violated the temporary injunction by hosting parties at R Place, necessitating police presence and enforcement. Following an evidentiary hearing on April 18, 2012 [the circuit court] found that "Mr. Flowers willfully disobeyed

> the Court's October 17th Order by being open and having a party or gathering on October 30, November 16 and December 26, 2011 and on March 23/24, and April 6, 2012." The court also ordered Flowers to pay a $5000 forfeiture and warned of other sanctions for any future violations. [Record citations and footnotes omitted.]

In its decision and order dated August 20, 2012, the circuit court made findings of fact and, based on those findings, concluded that the operation of R Place constituted a public nuisance. The circuit court ordered R Place permanently closed to abate the public nuisance its operation was causing. The circuit court also dismissed Flowers' claims against the City.

¶3 Flowers first challenges the circuit court's ruling that R Place is a public nuisance pursuant to WIS. STAT. ch. 823 and the circuit court's order permanently closing R Place to abate the nuisance caused by its operation. "A nuisance is an unreasonable activity or use of property that interferes substantially with the comfortable enjoyment of life, health, safety of another or others." ***State v. Quality Egg Farm, Inc.***, 104 Wis. 2d 506, 517, 311 N.W. 2d 650 (1981).

¶4 The circuit court made the following findings of fact: (1) Roderick Flowers is a member of [The Family Business], which holds the liquor license and is the primary operator of R Place on Park; (2) city officials and the police met with Flowers on several occasions in an attempt to address the nuisance activities that were occurring at R Place; (3) after a shooting in October 2010, the police asked Flowers to close R Place at 11:00 p.m. for a couple of weeks to let things cool down, but Flowers refused; (4) the police then imposed a security plan on R Place, requiring it to hire two armed security guards; (5) after the plan was imposed, there were violent incidents at R Place, including altercations in March and September 2011, during which people were shot; (6) R Place violated provisions of the police security plan, including failing to have all staff wear

clothing that would readily identify them as staff and exceeding the posted capacity; (7) during proceedings to revoke R Place's alcohol license, Flowers stipulated to fifteen counts of keeping or maintaining a disorderly house; (8) neighbors have been negatively impacted by R Place due to the noise, fights and disturbances that occurred there, causing neighboring residents to suffer sleep deprivation and have difficulty functioning effectively at work; (9) neighbors have witnessed fights, disturbances and gun shots, and neighbors have called 911 or the non-emergency dispatch number on numerous occasions regarding incidents occurring at, or in association with, R Place; (10) neighbors fear for their personal safety and the safety of their family members due to the violence occurring at, or in association with, R Place; (11) noise issues, fights, disturbances, littering and violence did not exist in the neighborhood prior to R Place opening and those same issues have ceased to exist since the bar closed; (12) a shooting a R Place resulted in a bullet going through the window of a nearby home; (13) patrons have been stabbed and shot in the bar on multiple occasions; (14) a former employee fired a gun in the bar during one of these fights, and high powered weapons have been fired in the bar, including one incident after which the police found twenty-five bullet casings on the scene; and (15) Flowers has not fully cooperated with the police in taking measures to abate the nuisance activity and in assisting the police in investigating serious incidents of violence that have taken place at R Place.

¶5 By and large, Flowers does not challenge these findings of fact. He briefly argues that several of the findings are incorrect because "there has been no proof in the record to support the conclusion that the activities were either inside or at" R Place. [Punctuation omitted]. Flowers does not develop this argument. His implicit assertion appears to be that any altercations that occurred *outside the bar and spilled into the street* did not occur "inside or at" R Place, regardless of

whether the altercations began inside the bar or involved bar patrons. However, the circuit court did not find that the incidents occurred "inside or at" R Place; it found that the incidents occurred "at, or in association with" R Place. The circuit court's factual findings are supported by the trial testimony in the record. We conclude that these findings are not clearly erroneous.

¶6 Turning to the legal issues, we agree with and adopt the circuit court's analysis:

> **A. Elements of a public nuisance action.**
>
> Section 823.02, Stats., authorizes a city to commence and prosecute an action to enjoin a public nuisance. Section 823.03 further provides that if the plaintiff prevails in a public nuisance action, it is entitled to "judgment that the nuisance be abated unless the court shall otherwise order."
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> The elements of a public nuisance action are well stated in Wisconsin Jury Instruction–Civil 1928:
>
> > First, a public nuisance exists. A public nuisance is a condition or activity which unreasonably interferes with the use of a public place or with the activities of an entire community…
> >
> > Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference. [Footnote omitted.] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and

> not on the standards of persons who are more sensitive than ordinary persons.
>
> Third, the defendant was negligent. [Footnote omitted.] A person is negligent when [he] fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, [does something or fails to do something] that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with another's use or enjoyment of property….
>
> Fourth, defendant's negligence caused the public nuisance. This does not mean that defendant's negligence was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's negligence caused the public nuisance if it was a substantial factor in producing the public nuisance.

With respect to the first element, the City has shown by clear, satisfactory and convincing evidence that defendant's maintenance and operation of R Place caused a public nuisance [based on the findings of fact]. A public nuisance is not determined by the number of people affected, but whether those persons constituted a local neighborhood or community. ***State v. Quality Egg Farm***, 104 Wis. 2d 506, 515, 311 N.W. 2d 650 (1981). Moreover, the "lawfulness of the business or property does not control, nor do the corrective measures applied by the owner or operator." ***Id.***, at p. 516.

The second element requires that the plaintiff demonstrate that the harm caused by the public nuisance is significant. [The findings of fact] demonstrate the harm to bar patrons, neighbors and law enforcement personnel caused by the operation of R Place.

The third element, defendant's negligence, was established at trial and is reflected in findings of fact [pertaining to Flowers' failure to comply with the security plan set up by the police department to remedy the problems and his failure to cooperate with the City in investigating and preventing violence at R Place].

Finally, there is no dispute that defendant's negligence was a cause of the nuisance: "Roderick Flowers

> is a member of [The Family Business], which holds the liquor license for [The Family Business] and is the primary operator of R Place on Park." The City has met its burden to prove that defendant's maintenance and operation of R Place on Park caused a public nuisance.
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> **B. Remedy**
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> As noted above, § 823.03, Stats., requires the court to abate the nuisance unless it "shall otherwise order." The court need not find irreparable harm to order permanent closure of R Place, for two reasons. First, the standard of "irreparable harm" applies to requests for temporary injunctive relief. Section 823.03, Stats., requiring abatement of the nuisance, does not mention irreparable harm. Instead, the second element of a public nuisance action sets a lower threshold, "significant harm."
>
> Second, the Court in ***State v. Spielvogel***, 193 Wis. 2d 464, 479, 535 N.W. 2d 28 (Ct. App. 1995) relieved public enforcement entities of the need to show irreparable harm in a nuisance action. The Court stated:
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> > It is generally true that injunctions are not to be issued without a showing of irreparable harm. [Citation omitted.] However, a public entity in actions to enforce compliance with the law may obtain an injunction absent a showing of irreparable harm where the law is silent on injury caused.
>
> *See also* ***Forest County v. Goode***, 219 Wis. 2d 654, 682-683, 579 N.W. 2d 715 (1998).
>
> The evidence established that the operation of R Place on Park has caused a public nuisance over a significant period of time. Efforts to lessen the impacts of the facility's operation have ultimately failed. Balancing the equities between allowing the facility to remain open against the demonstrable harm caused by its operation, the court's abatement order must be permanent closure of the facility. [Record citations omitted.]

¶7 Flowers next argues that the circuit court erred by finding him in contempt for willfully disobeying the October 17, 2012 temporary injunction closing R Place. The City brought contempt proceedings against Flowers pursuant to WIS. STAT. § 785.03(1)(a), which seeks remedial sanctions for contempt. Under

that statute, "[t]he court, after notice and hearing, may impose a remedial sanction authorized by this chapter." The circuit court gave Flowers notice and held a hearing, at which several Madison police officers testified about seeing people entering R Place, seeing cars in the parking lot, and seeing the R Place sign illuminated on October 30, 2011, November 16, 2011, December 26, 2011, March 23 and 24, 2012, and April 6, 2012, after the temporary injunction closing R Place was issued. Flowers was at the hearing and presented testimony on his own behalf. The circuit court found that R Place was in fact open on those dates and that Flowers willfully disobeyed the court order. The circuit court then found Flowers in contempt and ordered him to pay a $1000 forfeiture for each contempt violation. The circuit court acted properly in finding Flowers in remedial contempt.

¶8 Finally, Flowers raises multiple arguments in his third-party complaint and his supplemental counterclaim. We agree with and adopt the circuit court analysis of these issues:

> Flowers apparently concedes that his state law claims are barred by the notice of claim provisions in § 893.80(1), Stats.: "Flowers agrees with defendants' assessment and is willing to dismiss any statutory claims on actions by the defendants that fall outside the time allowed" (response brief, p. 3). This eliminates all claims except those founded on federal law. Likewise, Flowers' assertion that he does not represent [The Family Business] makes unnecessary further consideration of the defense based on unauthorized practice of law, and limits his claims to those he has standing to raise.
>
> [T]he only remaining claims are Roderick Flowers' federal constitutional claims….
>
> ….
>
> Section 802.06(2)(a)10., Stats., provides a basis for dismissal when there is "[a]nother action pending between the same parties for the same cause." The City moves to

> dismiss the counterclaim and the individual City defendants move to dismiss the third-party complaint on this basis. They attach to their motions the February 2, 2012 Opinion and Order of the United States District Court for the Western District of Wisconsin and March 27, 2012 Decision and Order of the Dane County Circuit Court, Branch 10.
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> In ***Barricade Flasher Serv. v. Wind Lake Auto Parts***, 2011 WI App 162, ¶ 7, 338 Wis. 2d 144, the Court noted that a party may not file a new lawsuit to circumvent a ruling it does not like in another case, unless the second action is based on claims that could not have been brought in the first action. In our case, Flowers' federal constitutional claims precisely mirror the claims asserted against the same defendants in the federal case. Accordingly, the City and the individual City defendants are entitled to dismissal of the counterclaims and third-party complaint pursuant to ***Barricade*** and § 802.06(2)(a)10., Stats. [Record citations omitted.]

By the Court.—Order affirmed.

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