COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2667

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

EAST OF THE RIVER ENTERPRISES II, L.L.C.,

PLAINTIFF-APPELLANT,

MELISSA SOMAN AND DONALD BUSCH,

PLAINTIFFS,

V.

CITY OF HUDSON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. East of the River Enterprises II (ERE) appeals a declaratory judgment rejecting its First Amendment challenge to a city ordinance that regulates sexually oriented businesses. ERE operates Centerfolds Cabaret, a business featuring live nude dance entertainment. The ordinance prohibits physical contact between the dancers and patrons, requires all performances to occur on a stage or table at least eighteen inches above floor level, creates a five-foot buffer zone between the dancers and patrons, and restricts the operating hours, requiring the cabaret to close at 2 a.m. on week days, 2:30 a.m. on Saturdays and Sundays.

¶2 ERE argues that (1) no contact and five-foot buffer regulations constitute content-based censorship; (2) even if the regulations were content-neutral, they constitute an unlawful prior restraint on freedom of expression because they would have the effect of totally suppressing a distinct medium of communication; (3) the regulations are not narrowly tailored to prevent adverse secondary effects; and (4) the hours of restriction cannot be justified as content-neutral time, place and manner regulations under the First Amendment. We reject these arguments and affirm the judgment.

¶3 After the parties submitted their briefs in this appeal, the United States Supreme Court issued its decision in ***City of Erie v. Pap's A.M.***, 120 S. Ct. 1382 (2000), reiterating and clarifying First Amendment principles as they apply to nude entertainment. The Court upheld an ordinance prohibiting public nudity, the effect of which was to require exotic dancers to wear, at a minimum, pasties and a G-string. The Court reiterated that nude dancing is expressive conduct that falls only within the "outer ambit" of the First Amendment's protection. *See* ***id.*** at 1391. To determine the level of scrutiny that applies to an ordinance, the courts must consider whether the regulation relates to the suppression of expression. *See*

id. If the governmental purpose is unrelated to the suppression of expression, such as combating negative secondary effects, the regulation need only satisfy the less stringent standard set out in ***United States v. O'Brien***, 391 U.S. 367 (1968).[1] *See* ***id.*** Even if the regulation has some minimal effect on the erotic message by muting a portion of the expression, the regulation is not deemed unconstitutional if it has merely a *de minimis* or incidental effect. *See* ***id.*** at 1393-94.

¶4 The City of Hudson's ordinance does not prohibit nude dancing or any expression of eroticism arising from the dance. Therefore, it is deemed a content-neutral regulation measured by intermediate scrutiny, and subject to the traditional time, place and manner doctrine. *See* ***Turner Broadcasting System v. F.C.C.***, 512 U.S. 622, 642 (1994).

¶5 The ordinance satisfies the ***O'Brien*** test. Its stated intent and the City's legislative findings show that the ordinance is aimed at the undesirable secondary effects of sexually oriented business, particularly crime, decreased property values and public health risks. The City has the constitutional power to pass ordinances that relate to these traditional police powers. *See* ***Erie***, 120 S. Ct. at 1386. The regulation furthers the City's interest in combatting crime.[2] It is supported by numerous studies that establish undesirable secondary effects that

[1] The four-factor test set out in ***O'Brien*** requires that: (1) the regulation is within the constitutional power of the government to enact, such as protecting public health or safety and deterring crime; (2) the regulation must further an important or substantial government interest, although the municipality need not conduct new studies or produce independent evidence to demonstrate the problem of secondary effects and is allowed a reasonable opportunity to experiment with solutions; (3) the government interest must be unrelated to the suppression of free expression; and (4) the restriction must be no greater than is essential to further the governmental interest. *See* ***City of Erie v. Pap's A.M.***, 120 S. Ct. at 1394-97.

[2] Because the ordinance furthers the government's interest in combatting crime, we need not review its other stated intentions of protecting property values and promoting public health.

arise from the nude dancing industry. Affidavits of police officers presented to the city counsel establish that contact between the dancers and patrons during the performance entailed either acts of prostitution or sexual assault. Requiring a five-foot buffer assists law enforcement in determining whether the dancer or the patron initiated the contact. *See* ***DLS Inc. v. City of Chattanooga***, 107 F.3d 403, 411 (6th Cir. 1997). Further, maintaining a five-foot buffer only minimally interferes with any expression or communication. The no touching and five-foot buffer restrictions do not have the effect of banning individual, patron-focused exotic dance. Therefore, the ordinance is sufficiently narrowly tailored to achieve the municipality's legitimate interest in preventing crime.

¶6 The restrictions on the cabaret's operating hours do not infringe on ERE's First Amendment rights. Similar and more restrictive restrictions have been upheld in numerous other cases. *See, e.g.,* ***Richland Bookmart, Inc. v. Nicols***, 137 F.3d 435 (6th Cir. 1998); ***Star Satellite, Inc. v. City of Biloxi***, 779 F.2d 1074 (5th Cir. 1986); ***Schultz v. City of Cumberland***, 26 F. Supp. 2d 1128 (W.D. Wis. 1998). Restricting the hours of operation can promote public safety by permitting local law enforcement to focus its limited resources on other matters. *See* ***Schultz***, 26 F. Supp. 2d at 1145. Operating hours may be restricted during times when people are generally sleeping and when peaceful enjoyment of the home is most important. *See* ***Tee & Bee, Inc. v. City of West Allis***, 936 F. Supp. 1479, 1492 (E.D. Wis. 1996).

¶7 ERE argues that all of the restrictions have the effect of destroying its business and excluding nude dancing in the city. The test for determining whether a sexually oriented business's First Amendment rights are threatened is whether the City has effectively denied the business a reasonable opportunity to open and operate within the city. *See* ***City of Renton v. Playtime Theatres, Inc.***,

475 U.S. 41, 54 (1986). Patron-focused erotic performances are allowed in the City of Hudson 127 hours per week. The City is not obligated to design its attack on the secondary effects of nude entertainment in a manner that insures the business's economic viability. *See* ***id.***

By the Court.—Judgment affirmed.

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