

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 2010

David R. Schanker
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. 2009AP2794

Cir. Ct. Nos. 2008SC1329
2008SC1330

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WILLIAM SEEGER AND SUSAN SEEGER,

PLAINTIFFS-RESPONDENTS,

V.

JENNIFER KREUZPAINTER AND COLIN PATEL,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Jennifer Kreuzpainter and Colin Patel appeal from a judgment in favor of William and Susan Seeger in the amount of \$3500. They contend that the circuit court incorrectly held that a private nuisance existed, made erroneous credibility determinations, and improperly admitted evidence. We disagree and affirm.

¶2 This matter originates from a small claims action² against Patel for “loud music, loud obnoxious talk ... sounds of wrestling in unit, litter thrown off the deck into common area and onto below deck, spilled beer” and a “dog continuously barking while running to and fro” in a condominium unit located above the Seegers’ unit. The court case proceedings spanned three days, during which the court heard testimony from Susan Seeger, Patel, Kreuzpainter, Kreuzpainter’s mother, and Gregory and Amy Johnson (who leased the Seegers’ condominium unit when the Seegers left). Afterward, the parties submitted closing arguments and rebuttals.

¶3 The circuit court held that Patel and Kreuzpainter “fail[ed] to abate the noisy barking of their dog [and] created and maintained a private nuisance which interfered with the plaintiffs use and enjoyment of their unit and caused them significant harm.” The court, in its written decision, set forth extensive findings of fact and conclusions of law, and entered judgment against Patel and Kreuzpainter, jointly and severally, for \$3500 together with costs and disbursements of the court case. Patel and Kreuzpainter appeal.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The Seegers filed two complaints, one against Kreuzpainter and one against Patel. The court consolidated the cases for trial.

¶4 Kreuzpainter and Patel (from here forward, “Patel”), make three primary arguments on appeal: (1) the circuit court improperly applied the law of private nuisance, (2) the court made erroneous findings of fact, and (3) the court made erroneous credibility determinations. Essentially, from the arguments presented in support of these appellate issues, we read Patel to challenge the sufficiency of the evidence to support the court’s judgment.³

¶5 We begin by emphasizing that the court of appeals is an error-correcting court. *Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). We are not a proper venue to retry a case, offer arguments derived from facts not in the record, or reassess the credibility of witnesses who appeared before the circuit court. Rather, when reviewing the sufficiency of the evidence to support the outcome of the circuit court proceedings, we give great deference to the fact

³ For example, Patel asserts that the letters of complaint the Seegers wrote about Patel being too loud were “false” and “no evidence supported this.” Patel posits that the Seegers’ expectations of peace and quiet in a condominium setting were “not within reason.” Patel challenges the Seegers’ assertion that they made a written petition to police to declare Patel’s dog a nuisance, stating that “the Seegers never presented any document during trial that supported this.” Patel also criticizes the Seegers’ failure to present testimony from other owners of nearby condominium units. In terms of the circuit court’s credibility determinations, Patel again questions the sufficiency of the evidence to support them. With regard to Susan Seeger’s testimony, which the court found to be credible, Patel asserts that Susan’s “need for peace and quiet was not defined accordingly.” Patel suggests that Susan complained daily about the normal sounds associated with daily life and she should have been assessed as too sensitive to be credible. Patel also challenges some of the dates associated with complaints of the barking dog, noting that the dates given by Susan Seeger were for days that the Seegers no longer lived in the condominium. Most notably, Patel challenges the circuit court’s characterization of Gregory and Amy Johnson as credible because they “have no interest in the outcome of this case,” while Kreuzpainter’s mother was deemed not credible because it was “clearly biased in favor of her daughter.” On appeal, Patel claims that Gregory Johnson was Susan Seeger’s son and therefore had the same family bias as Kreuzpainter’s mother. Patel does not direct us to any place in the record where the court was made aware of a familial relationship between Johnson and Seeger; therefore, we cannot consider this allegation. *See* WIS. STAT. § 809.19(1)(d) (statement of the facts must be accompanied by cites to the record). The arguments continue in this vein throughout Patel’s appellate and reply briefs. Accordingly, we address the issues raised in the context of a sufficiency of the evidence analysis.

finder. *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. This highly deferential standard of appellate review of a challenge to the sufficiency of the evidence is the same whether the fact finder is a jury or the circuit court. *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¶6 WISCONSIN STAT. § 805.14(1) sets forth the standard that applies to our review of a challenge to the sufficiency of the evidence. See *Richards v. Mendivil*, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). It provides, in relevant part, as follows:

No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

Sec. 805.14(1). We will affirm unless there is no credible evidence to sustain the circuit court's determination that a private nuisance existed.

¶7 A private nuisance exists when there is a condition or activity that unduly interferes with the use of land. *Hocking v. City of Dodgeville*, 2009 WI 70, ¶37, ___ Wis. 2d ___, 768 N.W.2d 522. Here, the circuit court rested its determination that a private nuisance existed on extensive findings of fact. The court set forth the spatial relationship of the condominium units (Patel lived in the upper unit and the Seegers lived in the lower unit). Next, the court found that Patel's dog barked continuously; the noise prompted the Seegers to contact the condominium association, the management company, and the police; the condominium management company contacted Patel to explain that the continued barking of the dog was not acceptable; the condominium association imposed fines as a result of the continuing disturbances, and, in a letter dated April 23,

2008, the condominium association informed Patel that the dog was “being allowed onto the balcony unsupervised and [was] urinating on the balcony and onto the property below.” Patel did not stop the dog from persistent barking; the Seegers moved out of their unit and leased it to the Johnsons; and, the Johnsons moved out of the unit before the expiration of the lease. Our review of the record revealed testimony and documentary evidence sufficient to support the court’s factual findings.⁴

¶8 The court explained that “continuous noise of the barking dog over an extended period of time at all hours of the day and night” interfered with the Seegers’ use and enjoyment of their condominium. The court also held that the dog “us[ing] the [upper] deck as a bathroom” supported the claim of nuisance.

¶9 Patel argues that the facts do not rise to the level of private nuisance. He directs us to *Smart v. Sokolski*, No. 2008AP802 (WI App Apr. 8, 2009), an unpublished per curiam opinion. Patel asserts that *Smart* supports his contention that no nuisance occurred here. We reject the analogy for three reasons: (1) unpublished opinions dated prior to July 1, 2009, may not be cited for their persuasive value, *see* WIS. STAT. § 809.23(3)(b); (2) per curiam opinions may not be cited as authoritative, *see id.*; and (3) the facts of *Smart* are sharply distinguishable from the facts here.

⁴ The record on appeal contains the transcript from the trial date October 22, 2008, at which Susan Seeger testified. No other trial transcripts were supplied by the appellants. The record also contains an envelope of exhibits offered at trial, with notations concerning which exhibits were received into evidence. Because Patel was responsible for ensuring that the record on appeal is complete, we assume that the missing transcripts further support the circuit court’s findings. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

¶10 Our review of the record, the findings of fact, and the conclusions of law of the circuit court persuade us that no error occurred. Credible evidence supports the circuit court's holding that a private nuisance existed. The evidence demonstrated a pattern of unreasonable disturbances that interfered with the Seegers' use and enjoyment of their condominium unit. The result was a private nuisance that Patel and Kreuzpainter had the opportunity and ability to abate, but they failed to resolve the problem. The judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

