COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0628

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

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

¶1 PETERSON, J. Joseph Schultz appeals a judgment declaring his bar a nuisance. He also appeals an order of abatement enjoining him from operating the bar. Schultz argues that: (1) he was denied actual notice of the conduct upon which the judgment was based; (2) the nuisance claim is subject to a

sixty-day statute of limitations thus barring the claim; and (3) the trial court erroneously exercised its discretion by refusing to permit Schultz to post an undertaking to avoid closure of the business. We disagree and affirm the order.

BACKGROUND

¶2 Schultz owns the Island Bar located in Cumberland. The State brought a claim pursuant to WIS. STAT. §§ 823.09 and 823.10[1] to declare the bar a nuisance on the grounds that Schultz permitted prostitution to occur in the bar.

¶3 Schultz initially challenged the constitutionality of the nuisance statutes. The court rejected the constitutional challenge, declared the bar a nuisance, and enjoined Schultz from operating it for one year. We affirmed the trial court's judgment. ***State v. Schultz***, 218 Wis. 2d 798, 582 N.W.2d 113 (Ct. App. 1998).

¶4 Schultz then moved to reopen the trial court's earlier judgment so that he could present evidence of his lack of knowledge of the underlying nuisance conditions as a defense to the State's nuisance claims. The court denied his motion and issued an order based upon its prior judgment. Schultz appealed. We reversed the trial court's order and remanded to reopen the judgment for the limited purpose of permitting Schultz to litigate his claim that he did not have knowledge of the acts of prostitution occurring on his premises. ***State v. Schultz***, 224 Wis. 2d 499, 591 N.W.2d 904 (Ct. App. 1999).

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 On remand, the case proceeded to trial to determine the extent of Schultz's knowledge of the prostitution. The State established that several people had engaged in prostitution at the bar on November 1, 1996, and were subsequently convicted. However, it is undisputed that Schultz was not present at the bar on November 1.

¶6 The State also produced several witnesses regarding prior acts of prostitution. Two female patrons testified that in August of 1994 they observed sexual contact between men and women in exchange for money. The two patrons also testified that Schultz was present at the bar on this occasion and was no more than "six or seven feet" away.

¶7 The trial court found that Schultz permitted prostitution to occur in the bar as early as 1994. The court enjoined Schultz from operating the bar for one year and denied Schultz's request to post an undertaking. The court ordered the bar closed for one year. However, it allowed access to the bar for maintenance purposes for the benefit of tenants who lived in the building.[2] This appeal followed.

DISCUSSION

I. NOTICE

¶8 Schultz argues that the trial court erred by determining that he had knowledge of prostitution occurring at the bar because the court based its finding upon conduct that was never pled in the complaint. According to Schultz, the

[2] There are several apartment units attached to the Island Bar. Heat and water to those apartments run through the bar itself.

State based the nuisance action entirely upon the prostitution convictions as a result of the events of November 1, 1996, yet the court based its findings on events in 1994. As a result, Schultz claims he did not have notice. We disagree that he did not have notice.

¶9 On review, we separate factual determinations from the conclusions of law and apply the appropriate standard of review to each. ***Meyer v. Classified Ins. Corp.***, 179 Wis. 2d 386, 396, 507 N.W.2d 149 (Ct. App. 1993). While findings of fact will not be set aside unless clearly erroneous, the application of facts to a legal standard is a question of law that we review independently of the trial court. ***Id.*** The sufficiency of a complaint is a question of law which we review independently. ***State v. Adams***, 152 Wis. 2d 68, 74, 447 N.W.2d 90 (Ct. App. 1989).

¶10 We conclude that the complaint provides sufficient notice. This is a civil action. For civil actions, Wisconsin is a "notice-pleading" state. ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). Fair notice of a claim is all that is required in a pleading; ascertaining its precise factual basis is left to discovery. ***Id.***

¶11 WISCONSIN STAT. § 802.02(1)(a) requires a complaint to contain a "short and plain statement of the claim, identifying the transaction or occurrence … out of which the claim arises and showing that the pleader is entitled to relief." The liberal scope of discovery rules is necessary in light of the limited function of the pleadings.

¶12 The State's complaint reads:

> 1. That the defendant is an adult residing in the City of Cumberland, County of Barron, who owns and operates a

> business establishment known as the Island Bar located in the City of Cumberland, County of Barron.
>
> 2. The defendant has maintained, and used the Island Bar Lounge or permitted the Island Bar to be used for the purpose of lewdness, and prostitution.
>
> 3. Two persons have been convicted of prostitution committed in the Island Bar ….

We conclude that the complaint does not limit itself to conduct that occurred on November 1, 1996. The allegation in paragraph two of the complaint is sufficient to include the August 1994 conduct.

¶13 In addition to the complaint, the State's answers to interrogatories identify the names of the two female patrons as witnesses. The answers state that the women would testify regarding Schultz's knowledge of the prostitution. These are the women who testified about the prostitution that occurred in August of 1994.

¶14 Thus, the complaint complies with WIS. STAT. § 802.02. And through discovery, Schultz knew who was going to testify and what they were going to testify about. Schultz had sufficient notice.

II. WISCONSIN STAT. § 823.10

¶15 Schultz argues that the State's nuisance claim was subject to a sixty-day statute of limitations. He contends that under WIS. STAT. § 823.10, the State was required to bring its nuisance claim within sixty days of the occurrence of the nuisance or within sixty days of the conviction for prostitution. Consequently, Schultz argues that the State is barred from relying on the 1994 conduct because the nuisance claim was filed in March of 1997, more than sixty days later. We disagree.

¶16 The interpretation of a statute and its application to a known set of facts presents a question of law, which we review independently. ***Tahtinen v. MSI Ins. Co.***, 122 Wis. 2d 158, 166, 361 N.W.2d 673 (1985).

¶17 Schultz relies on the last sentence of WIS. STAT. § 823.10, which states:

> The conviction of any person, of the offense of lewdness, assignation or prostitution committed in the building or part of a building, erection or place shall be sufficient proof of the existence of a nuisance in the building or part of a building, erection or place, in an action for abatement commenced within 60 days after the conviction.

Despite Schultz's argument, § 823.10 is not a statute of limitations. Rather, it is a statute creating a presumption. If a claim of nuisance is brought within sixty days of a conviction, the conviction alone will be enough to prove a nuisance. An action may be brought after sixty days, but the presumption is lost.

¶18 Here, there is only one statute of limitations that applies, WIS. STAT. § 893.87.[3] This section is the general statute of limitations. It requires that an action be commenced within ten years after the claim accrues in favor of the State if no other limitation is prescribed by WIS. STAT. ch. 893. This is a nuisance action under WIS. STAT. § 823.10 in favor of the State. Because there is no other limitation prescribed in ch. 893, the ten-year limitation in § 893.87 applies.

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[3] WISCONSIN STAT. § 893.87 reads as follows:

> Any action in favor of the state, if no other limitation is prescribed in this chapter, shall be commenced within 10 years after the cause of action accrues or be barred. No cause of action in favor of the state for relief on the ground of fraud shall be deemed to have accrued until discovery on the part of the state of the facts constituting the fraud.

III. UNDERTAKING

¶19 Finally, Schultz argues that the trial court erroneously exercised its discretion by refusing to allow Schultz to post an undertaking to avoid closure of the bar. He contends that in exercising its discretion the court must consider the standards set forth in WIS. STAT. § 823.113(4).[4] We disagree.

¶20 The interpretation of a statute is a question of law, which we review independently. ***DOR v. Milwaukee Brewers Baseball Club***, 111 Wis. 2d 571, 577, 331 N.W.2d 383 (1983). The goal of statutory interpretation is to discern and to give effect to the intent of the legislature. ***State v. Cardenas-Hernandez***, 219 Wis. 2d 516, 538, 579 N.W.2d 678 (1998).

¶21 Contrary to Schultz's argument, WIS. STAT. § 823.113 applies only to drug or criminal gang houses. Had the legislature intended those standards to apply to a nuisance as defined by WIS. STAT. § 823.09, it would no doubt have said so.

[4] WISCONSIN STAT. § 823.113(4) reads as follows:

> In ruling upon a request for closure, whether for a defined or undefined duration, the court shall consider all of the following factors:
> (a) The extent and duration of the nuisance at the time of the request.
> (b) Prior efforts by the defendant to comply with previous court orders to abate the nuisance.
> (c) The nature and extent of any effect that the nuisance has upon other persons, such as residents or businesses.
> (d) The effect of granting the request upon any resident or occupant of the premises who is not named in the action, including the availability of alternative housing or relocation assistance, the pendency of any action to evict a resident or occupant and any evidence of participation by a resident or occupant in the nuisance activity.

¶22 The trial court has discretion in accepting an undertaking. WIS. STAT. § 823.15.[5] We must affirm a discretionary ruling "if it is supported by a logical rationale, is based on facts of record and involves no error of law." ***In re Shawn B.N.***, 173 Wis. 2d 343, 367, 497 N.W.2d 141 (Ct. App. 1992). Therefore, the issue is whether the trial court's reasoning was consistent with applicable law.

¶23 The trial court considered Schultz's argument that there have been no acts of prostitution at the bar since 1996 and that he should be trusted to run the premises in the future. Despite Schultz's assurances, the court found that he directly permitted illegal activity in 1994 and that he "at least tacitly permitted it in 1996 by not exercising adequate control over his employees who were directly in charge of his premises and his policies." The court further found that Schultz was untruthful about how he ran his business.

¶24 The trial court conceded that Schultz may not have permitted prostitution at the bar since 1996. However, the court questioned why Schultz did

[5] WISCONSIN STAT. § 823.15 reads as follows:

> The owner of any building or structure, or the owner of the land upon which the building or structure is located, affected by an action under s. 823.10 or 823.113 may appear at any time after the commencement of the action and file an undertaking in a sum and with the sureties required by the court to the effect that he or she will immediately abate the alleged nuisance, if it exists, and prevent the same from being reestablished in the building or structure, and will pay all costs that may be awarded against him or her in the action. Upon receipt of the undertaking, the court may dismiss the action as to the building or structure and revoke any order previously made closing the building or structure; but that dismissal and revocation shall not release the property from any judgment, lien, penalty, or liability that the property is subject to by law. The court has discretion in accepting any undertaking, the sum, supervision, satisfaction, and all other conditions of the undertaking, but the period that the undertaking shall run may not be less than one year.

not prohibit it before 1996. It concluded that Schultz did not prohibit the prostitution because he did not care to. According to the court, that kind of indifference was not a guarantee that Schultz would stop prostitution from occurring in the future. Determining credibility is a function of the trial court. WIS. STAT. § 805.17(2). We conclude that the trial court's rationale is logical, based on the facts in the record.

¶25 Schultz further argues that the trial court was not authorized to close the bar while allowing the tenants to continue living there. He relies on WIS. STAT. § 823.114(1)(c) to argue that the only way the court could authorize access to the building for maintenance purposes for the benefit of the tenants is to authorize an undertaking in lieu of closure. We disagree.

¶26 WISCONSIN STAT. § 823.114[6] only applies to nuisances established under WIS. STAT. § 823.113. As we have already stated, § 823.113 is restricted to

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[6] WISCONSIN STAT. § 823.114 reads as follows:

> **(1)** If the existence of the nuisance is established in an action under s. 823.113, an order of abatement shall be entered as part of the judgment in the case. In that order, the court shall do all of the following:
>
> (a) Direct the removal from the building or structure of all furniture, equipment and other personal property used in the nuisance.
>
> (b) Order the sale of the personal property.
>
> (c) Order the closure of the building or structure for any purpose.
>
> (d) Order the closure of the building or structure until all building code violations are corrected and a new certificate of occupancy is issued if required by the city, town or village within which the property is located and the building or structure is released under s. 823.15 or sold under s. 823.115.
>
> (e) Order the sale of the building or structure and the land upon which it is located or, if the requirements under s. 66.05 (1m)(b) [s. 66.0413 (1)(c)] are met, order that the building or structure be razed, the land sold and the expense of the razing collected under s. 823.06.
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> ….

(continued)

nuisances based on drug or criminal gang houses. The nuisance here was established under a different statute. *See* WIS. STAT. § 823.09. Schultz does not cite any authority that prohibits the court from allowing access to the bar for maintenance purposes for the benefit of tenants upon a finding of a nuisance pursuant to WIS. STAT. § 823.09.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

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(2) Any person breaking and entering or using a building or structure ordered closed under sub. (1) shall be punished for contempt under s. 823.12.