OPINION/ASSIGNMENT REVIEW FORM

Opinion/Assignment Date: January 7, 2022 *Request Date:* January 7, 2022

Date Request Assigned: January 7, 2022 Drafted By: Nicholas C. Zales

Addressed To: Mayor Cavalier Johnson

Subject: Reckless Driving and the City's Legal Ability to Pursue Injunctive Relief
Comments: City Attorney's Response

Approved By: Tearman Spencer on January 25, 2022

TIME REQUIREMENT MET: *Yes* X *No* _____ *N/A* _____

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January 25, 2022

Mayor Cavalier Johnson
City Hall, 200 E. Wells Street
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RE: Reckless Driving and City's Legal Ability to Pursue Injunctive Relief

Dear Mayor Johnson:

As President of the Common Council, you asked for a legal opinion on the city of Milwaukee's legal ability to pursue injunctive relief, through the doctrine of nuisance per se and/or pursuant to §823.02, Wis. Stats., to enjoin certain individuals from future driving violations subject to contempt of court.

The short answer to your question is that nuisance per se is not available to the City. This is because nothing in the City Code defines reckless driving or speeding as a nuisance per se. Injunctive relief based on nuisance under §§823.02 and 823.03, Wis. Stats. is available to the City. Additionally, an alternative under a state statute is available to the City for persons who are found guilty of two or more traffic municipal ordinance violations for reckless driving within a four-year period. They may be referred to the District Attorney for misdemeanor prosecution.

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I. Nuisance Per Se.

A "nuisance per se" is a nuisance at all times and under any circumstances, regardless of location or surroundings. It is of itself harmful to the health and tranquility of the community, and as such offends the decency of the community. It is an act which in and of itself is a nuisance and therefore is not permissible or excusable under any circumstances. Municipalities have broad authority through their police powers to protect "the health, safety, and welfare" of their residents, including the ability to define and take action against public nuisances. "A nuisance per se may be established by law, and no actual injurious consequences are required to support a finding of a nuisance per se." *City of South Milwaukee v. Kester*, 2013 WI App 50, ¶ 9, 347 Wis.2d 334, 830 N.W.2d 710.

In *City of South Milwaukee*, the court held that "[w]hen a municipality has enacted an ordinance that defines a public nuisance per se, courts should not interfere in this determination absent a showing of 'oppressiveness or unreasonableness.' An injunction is a permissible remedy to enforce an ordinance establishing a nuisance per se." *Id.* (citations omitted). In Chapter 101 of the City Code of Ordinances, the City adopted Chapter 346 of the Wisconsin Statutes defining and describing regulations with respect to vehicles and traffic for which the penalty is a forfeiture only, including penalties to be imposed. There is no provision in the City Code declaring, for example, reckless driving or excessive speeding, as a nuisance per se. Therefore, nuisance per se and injunctive relief under this doctrine would not be available to the City.

II. Wis. Stats. Section 832.02 Injunction Against Public Nuisance.

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. In conjunction, Section 823.03 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."

In *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, the court defined the difference between a public and private nuisance:

> In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' Physicians Plus, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. See, also, Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h.

2005 WI 8, ¶ 28, 277 Wis.2d 635, 691 N.W.2d 658. The court further ruled that: "Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right." 2005 WI 8, ¶ 29.

A public nuisance action may be based on negligent, intentional or abnormally dangerous conduct. There are slight variations in each of these three types of nuisance claims. The four elements common to all three causes of action are that:

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 City 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. "Significant harm" means harm involving more than a slight inconvenience or petty annoyance.

Third, the defendant was negligent, engaged in an intentional conduct, or abnormally dangerous activity. A person is negligent when they fail to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct. Whether an activity is abnormally dangerous goes to whether the conduct is causing great harm.

Fourth, the defendant caused the public nuisance. This does not mean that defendant's conduct 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.

Wisconsin Civil Jury Instructions Nos. 1928, 1930 and 1932.

B. Injunctive relief under Section 823.02 and 823.03, Wis. Stats.

"Modern remedies for a nuisance include summary abatement, suit in equity for injunction or abatement, action at law for damages, and criminal prosecution." *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶ 22, n.18, 254 Wis. 2d 77, 646 N.W.2d 777 (2002). Section 823.02 actions are suits in equity. In equitable actions, a circuit court judge makes all the findings of fact and uses the court's equitable powers to fashion a remedy appropriate to abate the nuisance and ensure compliance with its rulings. No jury is involved. Typically, a plaintiff seeks a preliminary injunction first, and then a permanent injunction following that.

As a hypothetical example, the City might file an action against individuals with three or more Municipal Ordinance Violations for reckless driving or excessive speeding within the past four years under the authority of §§ 823.02 and 823.03, Stats. The Complaint would allege that the defendant's conduct was "unreasonable, dangerous, a threat to the safety and welfare of the community that interfered substantially with the comfortable enjoyment of the life, health, and safety of others, thereby creating a public nuisance." The City would then seek a temporary injunction under § 813.02, Stats. The court would hold an evidentiary

hearing where it would take evidence and hear arguments. In deciding whether to grant the City a temporary injunction, the court would balance four required factors the City would need to show evidence of:

(1) A reasonable probability of ultimate success on the merits;

(2) a temporary injunction is necessary to preserve the status quo;

(3) the lack of an adequate remedy at law; and

(4) irreparable harm if a temporary injunction is not granted.

Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520 (1977).

Going to the fourth factor, while it is generally true that injunctions are not to be issued without a showing of irreparable harm, a City in an action to enforce compliance with the law may obtain an injunction absent a showing of irreparable harm. *Forest County v. Goode*, 219 Wis. 2d 654, 682-683, 579 N.W. 2d 715 (1998).

At this point, if the court found the evidence established a public nuisance and the four factors when weighed and balanced together favored granting a preliminary injunction, in the court's discretion it could issue one. The court would use its equitable authority to fashion an abatement order and, if violated, the City could bring contempt proceedings against the defendant pursuant to § 785.03(1)(a), Stats. and seek remedial sanctions for contempt. Under that statute, "[t]he court, after notice and hearing, may impose a remedial sanction authorized by this chapter." Section 785.04(1), Stats, provides for remedial sanctions including:

(a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

(b) Imprisonment if the contempt of court is of a type included in s. 785.01 (1) (b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.

(c) A forfeiture not to exceed $2,000 for each day the contempt of court continues.

(d) An order designed to ensure compliance with a prior order of the court.

(e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

The City could then seek a permanent injunction and that could be achieved through the use of a motion for summary judgment. The court would apply the same four-factor test that applies to temporary injunctions as set forth in *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520 (1977). Such a motion would be supported by affidavits and no further hearings would be required. *City of Milwaukee v. Burnette*, 2001 WI App 258, ¶8, 248 Wis. 2d 820, 637 N.W.2d 447. A permanent injunction order could provide a set monetary amount for a violation of the order and any other conditions, including Chapter 785, Stats. civil and criminal contempt, necessary to achieve the abatement of the nuisance.

Precedent for this kind of injunction to abate a public nuisance can be found in the *City of Milwaukee v. Missionaries to the Preborn* case, Milwaukee County Circuit Court Case No. 92CV8195. There, in response to a coordinated effort by two unincorporated organizations and about 40 people to impede access to health care clinics and harass those who used them, the City brought a public nuisance action against those with at least three municipal ordinance violation judgments. Three was thought to be sufficient to establish nuisance. Following proceedings in the circuit court, a permanent injunction was issued barring them from trespassing and harassing those who sought access to the clinics, requiring notice of demonstrations and imposing on them the costs to the City for failure to provide notice. It further provided for graduated civil damages of $500 for the first violation, $1,000 for the second, $2,000 for the third, and additional amounts in the event of aggravating circumstances. The Order further provided for civil and criminal contempt sanctions for those who violated the Order and were found in contempt. (Order of December 10, 1992, Hon. Jeffrey A. Wagner, presiding). Judge Wagner's Order was affirmed on appeal in an unpublished decision. *State v. Baumann*, 191

Wis. 2d 824, 532 N.W.2d 144 (Ct. App. 1995). One action could be brought against multiple defendants who are not factually related in any way beyond having committed the same types of offenses.

A key to seeking injunctive relief is the preliminary hearing for temporary relief. In general, a party that wins a temporary injunction will go on to win permanent relief. Conversely, the party who seeks a temporary injunction and loses at the temporary injunction hearing stage will generally lose the lawsuit. Therefore, winning at this early stage is crucial to obtaining both temporary and permanent relief.

III. A Statutory Alternative to Public Nuisance to Address Reckless Driving.

A. Section 346.65(2), Stats. provides that anyone who violates sections 346.62 to 346.64, "or a local ordinance in conformity therewith," twice within four years is subject to monetary and criminal misdemeanor penalties. Section 346.62 is reckless driving. Sections 346.63 and 346.64 go to drunk driving. The penalties include a fine of between $50 and $500 and/or up to one year in jail. Therefore, anyone with two or more municipal ordinance violation convictions for reckless or drunk driving within four years could be referred to the Milwaukee County District Attorney for prosecution.

IV. Wisconsin's Habitual Traffic Offender Law.

One other possibility is under Chapter 346 of the Wisconsin Statutes, a driver may be declared a habitual traffic offender if, during any five-year period, their driving record shows:

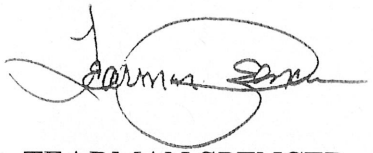
- 12 or more convictions of moving traffic violations under Chapter 346 Wisconsin Statutes committed in Wisconsin or
- 4 or more major violations committed in Wisconsin or other states or
- A combination of 12 or more major or minor convictions.

"Major violations" include reckless driving, operating while intoxicated, homicide involving vehicle use, hit and run involving injury or death, felony use of a vehicle, and attempting to elude an officer.
Being a habitual traffic offender would also be a basis for a public nuisance claim. However, enforcement of this part of the law is beyond the authority of the City Attorney's office. It is appropriate for the District Attorney or the state Attorney General.

V. Conclusion.

There are no easy legal answers to the problem of reckless driving. The Common Council could enact an ordinance that defines reckless driving or speeding at a certain point above the speed limit as a public nuisance per se. Then the City Attorney could seek injunctive relief against an offender with only one municipal ordinance violation judgment. That would occur in circuit court. The City could seek statutory injunctive relief based on public nuisance. That would also occur in the circuit court. That would be far more time-consuming and costly. Referring multiple offenders to the District Attorney for prosecution under Section 346.65(2), Stats. would be a cost-effective way to deter reckless drivers. The Habitual Traffic Offender provisions of Chapter 346 of the Wisconsin Statutes is a matter beyond the authority of the City Attorney.

Very truly yours,



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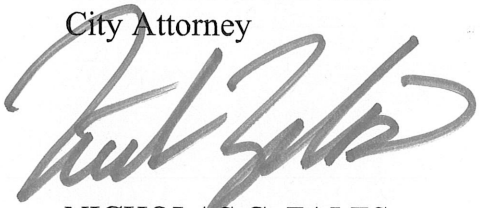

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