INJUNCTION OF HALFWAY HOUSE AS PRIVATE NUISANCE

In *Arkansas Release Guidance Foundation v. Needler*,[1] defendants operated a halfway house for parolees and ex-convicts in a mixed business-residential area. In the lower court equity proceedings plaintiffs, residents of the area, introduced evidence that property values had declined since the announcement of the opening of the halfway house. Plaintiffs also presented testimony of law enforcement officials stating that criminal activity originates[2] where criminals congregate, and evidence contradicting defendants' alleged exclusion of alcoholics and sexual offenders.[3] Finding that the operation of the halfway house diminished property values in the area and caused reasonable fear by plaintiffs for their safety, the lower court held that the halfway house constituted a private nuisance in fact and issued the injunction sought by plaintiffs. The Supreme Court of Arkansas affirmed the decision, ruling that the conclusions of the lower court were not against the preponderance of the evidence.[4]

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1. 252 Ark. 194, 477 S.W.2d 821 (1972).

2. *Id.* at—, 477 S.W.2d at 822.

3. Evidence indicated that one resident had been convicted of carnal abuse and that another had been removed for activities relating to alcohol. *Id.* at—, 477 S.W.2d at 821-22.

4. *Needler* was the second case in which the Arkansas Release Guidance Foundation sought to establish a legal right to operate a halfway house against the wishes of neighboring landowners. In the first action, Arkansas Release Guidance Foundation v. Hummel, 245 Ark. 953, 435 S.W.2d 774 (1969), the Foundation, in order to forestall legal action by the neighbors, sought a declaratory judgment holding the use of property as a halfway house to be within the scope of the local zoning ordinances providing for the use of land in the area for residential, religious, educational and philanthropic purposes. *Id.* at—, 435 S.W.2d at 776-77. The court of chancery found that the halfway house was not an educational, religious or philanthropic use as contemplated in the zoning ordinance and issued a decree enjoining the use of the land for that purpose. The Foundation appealed, contending that the lower court erred on two issues: first, in finding the proposed use to be a violation of the zoning ordinance; and secondly, as "to the extent that the court may have found appellant's proposed use of its property to be a nuisance." *Id.* at—, 435 S.W.2d at 776. The court answered only the first contention, ruling that the finding of the chancellor that the proposed use of the land was in violation of the zoning ordinance was not against the preponderance of the evidence and should be affirmed.

Although *Needler* is the first Arkansas case dealing specifically with the issue of whether a halfway house constitutes an enjoinable nuisance, the court chose not to discuss the quasi-public status and alleged social utility of halfway houses, but rather to treat the problem within the traditional framework of nuisance law as established by Arkansas cases. The court relied on two previous Arkansas cases[5] for the proposition that "equity will enjoin conduct that culminates in a private nuisance in fact where the resultant injury to the nearby property and residents is certain, substantial and beyond speculation and conjecture."[6] In both cases cited, the court refused to enjoin the activities alleged to be nuisances, noting that plaintiffs had sought injunctions prior to actual operation of the alleged nuisances and that a lawful business could not be enjoined "unless it shall be so operated as to become a nuisance in fact."[7]

The *Needler* court cited Arkansas case law[8] supporting its finding that since "[t]he distinction between a private and public nuisance is simply the extent of the injury, *i.e.*, the number suffering the effects of the nuisance,"[9] the nuisance complained of by plantiffs in *Needler* was private rather than public. This finding was necessary to the result since the remedy for a public nuisance "is by action on the part of the municipality to abate the nuisance, either by police interference under an ordinance, or by a suit in equity to restrain the maintenance of the nuisance."[10]

Several other cases contribute to an understanding of the rationale

5. Clark v. Hunt, 192 Ark. 865, 95 S.W.2d 558 (1936); Cooper v. Whissen, 95 Ark. 545, 130 S.W. 703 (1910).

6. 252 Ark. at —, 477 S.W.2d at 822. In *Clark* the court refused to enjoin the erection of a filling station near a church, declaring that "its . . . [the filling station's] erection and operation will not be enjoined unless it shall be so operated as to become a nuisance in fact." 192 Ark. at 868, 95 S.W.2d at 560. In *Cooper*, the court reversed a lower court decree granting an injunction that barred erection of a wagon yard. Plaintiffs had argued that the yard had no provision for the disposal of sewage and would provide a breeding place for filth and disease. 95 Ark. at 546, 130 S.W. at 703.

7. 192 Ark. at 868, 95 S.W.2d at 560.

8. City of Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724 (1922).

9. 252 Ark. at—, 477 S.W.2d at 822.

10. City of Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 101, 239 S.W. 724, 725 (1922).

behind the decision. One Arkansas decision[11] quoted with approval an Alabama decision[12] which stated:

> Under the provisions of the constitution, private property cannot be taken for public uses, or for corporations, without just compensation being first made to the owner, except by his consent. The courts, and it was never intended to be otherwise, are not the "masons" to "chisel" away vested rights of property of individuals, however humble and obscure the owner, for the benefit of the public or great corporations.[13]

This passage indicates the reluctance of Arkansas courts to invoke the doctrine of comparative injury:

> [A] court of equity should deny injunctive relief, notwithstanding the fact that the existence of a nuisance and substantial injury to plaintiff have been established, when issuance of the injunction would cause defendant much greater hardship than continuance of the nuisance would cause plaintiff.[14]

Several jurisdictions that generally reject the doctrine make an exception for the situation in which "the public has an interest in the continuation of the nuisance."[15] Arkansas courts have rejected both the doctrine and this exception. Instead, Arkansas courts have repeatedly affirmed their strict adherence to the doctrine that men must use their property so as not to injure the property of others.[16] Rejecting the tendency to consider the reasonableness of a defendant's use of his property under the circumstances, as several other jurisdictions do,[17] Arkansas courts prohibit any use which interferes "with

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11. Meriwether Sand & Gravel Co. v. State *ex rel* Attorney Gen., 181 Ark. 216, 26 S.W.2d. 57 (1930).

12. Drake v. Lady Ensley Coal, Iron & R.R. Co., 102 Ala. 501, 14 So. 749 (1894).

13. *Id.* at 508, 14 So. at 751.

14. Note, *Torts—Comparative Injury Doctrine of Nuisance,* 49 N.C.L. REV. 402, 403 (1971).

15. *Id.* at 406.

16. Eddy v. Thornton, 205 Ark. 843, 846, 170 S.W.2d 995, 996 (1943); Moore v. Wallis, 191 Ark. 551, 553, 86 S.W.2d 1111, 1112 (1935).

17. *See, e.g.,* Chazen v. City of New Britain, 148 Conn. 349, 355, 170 A.2d 891, 894 (1961); McClosky v. Martin, 56 So. 2d 916, 918 (Fla. 1959); Merriam v. McConnell, 31 Ill. App. 2d 241, 244, 175 N.E.2d 293, 295 (1961); Louisville Ref. Co. v. Mudd, 339 S.W.2d 181, 185 (Ky. 1960); Clinic & Hosp., Inc., v. McConnell, 241 Mo. App. 223, 236 S.W.2d 384, 390 (1951); Sans v. Ramsey Golf & Country Club, 29 N.J. 438, 449, 149 A.2d 599, 605 (1959); Reid v. Brodsky, 397 Pa. 463, 469-70, 156 A.2d 334, 338 (1959); Caldwell v. Knox

another's lawful right to use and enjoy his own property."[18]

In some nuisance cases, Arkansas courts have relieved defendants of some of the burden imposed by this doctrine by ordering remedies more flexible and specialized than permanent injunctions.[19] It has been held that in a case involving an activity that is not a nuisance per se "the injunction should not restrain the entire operation . . . but only that part of the operation that created the nuisance."[20] A flexible remedy is not available to a defendant in the absence of a showing that defendant's business could be operated in some way that would not continue the nuisance complained of.[21] In any case, the parties are free at any time to move the trial court to modify the order.[22]

In considering the possible application of the reasoning embodied in these opinions to the *Needler* case, it is noteworthy that in one case[23] defendants were permitted to continue operation of a quarry and rock crusher that threw rocks onto adjoining land. The continued operation was to be allowed only if defendant met certain conditions, including the hiring of a special bailiff to oversee the operation.[24] The Supreme Court of Arkansas upheld the authority of the trial court to impose conditions on defendant's continued operation of the quarry, stating that defendants had "the option to comply with the terms of the decree or be permanently enjoined from operating."[25] Thus the *Needler* court had before it precedent that would allow the

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Concrete Prods., Inc., 54 Tenn. App. 393, 402, 391 S.W.2d 5, 9 (1964); Hoene v. City of Milwaukee, 17 Wis. 2d 209, 214, 116 N.W.2d 112, 115 (1962).

18. Clark v. Hunt, 192 Ark. 865, 867, 95 S.W.2d 558, 560 (1936).

19. *See, e.g.*, Flippin v. McCabe, 228 Ark. 495, 308 S.W.2d 824 (1958) (defendant enjoined from operating charcoal kilns during period between December 15 and March 15 because atmospheric conditions during that period kept the smoke from the kilns close to the ground); Jones v. Kelley Trust, 179 Ark. 857, 18 S.W.2d 356 (1929) (defendant allowed to continue operation of quarry subject to restrictions as to the time of blasting and expert supervision); Durfey v. Thalheimer, 85 Ark. 544, 109 S.W. 519 (1908) (defendant ordered to close permanently windows on second story of stable that opened onto plaintiff's bedroom windows).

20. Flippin v. McCabe, 228 Ark. 495, 499, 308 S.W.2d 824, 827 (1958).

21. Ozark Bi-Products, Inc. v. Bohannon, 224 Ark. 17, 271 S.W.2d 354 (1954).

22. *Id.* at 21, 271 S.W.2d at 357; Jones v. Kelley Trust, 179 Ark. 857, 864, 18 S.W.2d 356, 359 (1929).

23. Jones v. Kelley Trust, 179 Ark. 857, 18 S.W.2d 356 (1929).

24. *Id.* at 865, 18 S.W.2d at 359.

25. *Id.*

imposition on defendants of conditions designed to eliminate the features complained of by plaintiffs. One possible condition would be to require the halfway house to hire a special bailiff, to be approved by the court, to inspect the records of potential residents to assure that no men who had been convicted of sex or drug-related offenses were admitted and to oversee the general operation of the halfway house.[26] If this condition, or other measures designed by the court and the parties, was not successful in eliminating the causes of plaintiffs' reasonable fears, then the operation of the halfway house could be enjoined permanently.

The importance of the *Needler* decision lies not so much in the court's treatment of the principles it applied to the facts of the case, as in the initial choice by the court of the principles to be discussed. The court found that the evidence supported the chancellor's finding that the damage to plaintiffs resulting from the continued operation of the halfway house was "certain, substantive, and beyond speculation and conjecture."[27] Following earlier cases, the court noted that the correct remedy for a private nuisance is an injunction.[28] The *Needler* court chose not to discuss the possibility of a more flexible remedy, the reasonableness of defendant's use of its property, or the considerations of public policy that arise in the case.

Defendants in *Needler* relied almost exclusively on *Nicholson v. Connecticut Halfway House,*[29] a Connecticut case which, as the *Needler* court stated, involved "strikingly similar facts . . . and reached an opposite result."[30] In *Nicholson,* a group of residents in primarily residential middle-class neighborhoods sought an injunction barring the use of a house in the neighborhood as a halfway house for parolees and released prisoners. Petitioners argued that they feared residents of the halfway house would commit crimes in the area and property values would decline if the halfway house were permitted to open. The court rejected these arguments on the grounds that fears of criminal activity were speculative and intangible[31] and that

26. The problem of alleviating the reasonable fears of the neighbors concerning criminal activity seems more amenable to this solution than the problem of declining property values. It is also possible that defendant could not afford to hire another employee to meet the condition suggested in the text.

27. 252 Ark. at—, 477 S.W.2d at 822.

28. *Id.*

29. 153 Conn. 507, 218 A.2d 383 (1966).

30. 252 Ark. at—, 477 S.W.2d at 822.

31. 153 Conn. at 511-12, 218 A.2d at 386.

the depreciation in property values was, by itself, insufficient to warrant a finding that the halfway house was a nuisance.[32] The court emphasized that the determination of whether a particular use of land constituted a nuisance must take into account the reasonableness of the use of the land under the circumstances.[33]

The *Needler* court refused to follow *Nicholson,* distinguishing the Connecticut case on two grounds: first, that the fears of petitioners in *Nicholson* were speculative but that the fears of plaintiffs in *Needler* were supported by the evidence;[34] and secondly, that the case of *Howard v. Etchieson*[35] placed Arkansas law "in a different posture than *Nicholson.*"[36] This distinction cannot withstand analysis. First, the *Nicholson* court did not find all fears of the residents to be speculative. Only the fears concerning criminal activity were rejected because they were based on conjecture. The *Nicholson* court did not find that the evidence of depreciated land values was speculative but rather that "the mere depreciation of land values . . . cannot sustain an injunction sought on the ground of nuisance."[37] The evidentiary status of plaintiffs' case in *Needler* was the same: evidence supporting fears of criminal activity was speculative and inferential while evidence of diminished land values was certain and substantial.[38] Secondly, the *Howard* case, relied on by the *Needler* court to distinguish Arkansas law from Connecticut law, concerned the construction of a funeral home. The Supreme Court of Arkansas affirmed the lower court's injunction of the construction upon a showing that the funeral home would decrease property values, was depressive, and restricted the activity of children. The *Nicholson* court considered a Connecticut precedent similar to *Howard.*[39] The *Nicholson* court, however, found the funeral home case to be "clearly distinguishable on its facts from the present situation."[40]

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32. *Id.*
33. *Id.* at 510, 218 A.2d at 385.
34. 252 Ark. at—, 477 S.W.2d at 822.
35. 228 Ark. 809, 310 S.W.2d 473 (1958).
36. 252 Ark. at—, 477 S.W.2d at 822.
37. 153 Conn. at 512, 218 A.2d at 386.
38. 252 Ark. at—, 477 S.W.2d at 821-22.
39. Jack v. Torrant, 136 Conn. 414, 71 A.2d 705 (1950). The court enjoined operation of a funeral home in a residential neighborhood which was found to have caused a depreciation in the value of land and a "depressed feeling to the families in the immediate neighborhood." *Id.* at 421, 71 A.2d at 709.
40. 153 Conn. at 512, 218 A.2d at 386. Generally, complaints involving funeral homes in residential areas have been treated as a special branch of the law of

The *Needler* court did not use all the analytical tools available in dealing with the unique case before it. The most important of these tools is an explicit consideration of the various interests involved in the case. In *Gus Blass Dry Goods Co. v. Reinman*,[41] the Supreme Court of Arkansas refused to enjoin the operation of a livery stable in a commercial area, noting:

> The necessities of life and growth of towns and cities require the establishment and continuance of certain occupations, business enterprises and works, in the conduct of which some degree of annoyance and discomfort is necessarily incident.[42]

As the court in *Gus Blass Dry Goods* recognized a public interest in the maintenance of livery stables, so the *Needler* court could have recognized that the public has an interest in the development of more effective methods of restoring criminals to a useful place in society.[43] These considerations might have led the court to attempt to formulate a remedy more flexible than a permanent injunction. Regardless of what decision the court might have reached, a fuller and more explicit discussion of the public and private interests at stake would have provided clearer guidance to defendants in their attempts to establish a private agency of potentially substantial benefit to the public.

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nuisance. *See, e.g.*, Annot., 39 A.L.R.2d 1000 (1955) and cases therein cited. *See also* Comment, *Equity-Funeral Homes and Cemeteries as Nuisances*, 4 ARK. L.R. & B. Ass'N J. 483 (1949-50).

41. 102 Ark. 287, 143 S.W. 1087 (1912).

42. *Id.* at 293-94, 143 S.W. at 1090.

43. Although the efficacy of halfway houses as measured by recidivism rates is questionable (Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971)), the humanitarian benefits are generally recognized (Grygier, Nease & Anerson, *An Exploratory Study of Halfway Houses*, 16 CRIME & DELINQUENCY 280 (1970)).