

IN THE CIRCUIT COURT OF MADISON COUNTY

STATE OF MISSOURI, ex rel.)
ATTORNEY GENERAL ERIC S.)
SCHMITT,)

Plaintiff,)

v.)

GARY HENSON, et al.,)

Defendants.)

Case No. 18MD-CC00147

FILED

5/23/2019

TENIA HERMANN
CIRCUIT CLERK
MADISON COUNTY, MO

JUDGMENT

This matter comes before the Court on the State’s Motion for Preliminary Injunction and its Petition requesting a permanent injunction. Plaintiff appeared by Assistant Attorneys General John Grantham and Brandon Gibson. Defendants Gary Henson and Rebecca Henson appeared in person and by counsel, Clinton Roberts. Defendant Offsets Recreation, LLC, appeared by counsel, Clinton Roberts. This Court finds Defendants are operating a public nuisance and enters an injunction as set forth below.

Findings of Fact

1. Since the early 1980’s, Defendants Gary Henson and Rebecca Henson have owned the land known as the “Offsets” on Highway OO, at its intersection with County Road 220, in Madison County, Missouri.

2. The Offsets includes a former lead mine, which has flooded, forming an approximately five-acre lake. The lake is almost completely

surrounded by bluffs of varying heights up to at least 40 feet above the water level.

3. Since the early 1980s, Gary Henson has managed the Offsets as a commercial enterprise that charges admission for members of the public to swim in a former quarry with the exception of the 2015 and 2016 swimming seasons.

4. Until Gary Henson organized Offsets Recreation, LLC, d/b/a The Offsets in 2009, he ran the business as a sole proprietor. Gary Henson is the sole manager of Offsets Recreation, LLC.

5. Since 2009, Offsets Recreation, LLC has leased the property from the Hensons, with the exception of the 2015 and 2016 swimming seasons.

6. In 2015 and 2016, Paradise Cove, LLC, a business managed solely by the Hensons' son Brian Henson, leased the Offsets from the Hensons.

7. In the 30 years since the Hensons began operating the Offsets, at least 9 individuals have died as a result of swimming in the Offsets, most of whom died when jumping or falling from the high bluffs.

8. On July 26, 1989, 16-year-old Mark C. Pogue died while swimming at the Offsets.

9. Later that summer, on September 2, 1989, 19-year-old Leonard Brand died after he broke his neck jumping into the water at the Offsets.

10. On July 16, 1995, 20-year-old Ryan Graham died from injuries he sustained while jumping into the water at the Offsets.

11. On July 3, 1998, 16-year-old Sylvester Austin died while swimming in the water at the Offsets.

12. On September 1, 2007, 20-year-old Michael Mattingly died from injuries he sustained when he slipped from a rock bluff and fell into the water at the Offsets.

13. The following day, on September 2, 2007, 27-year-old Nicholas Kruz died from injuries he sustained while jumping into the water at the Offsets.

14. On July 18, 2015, 18-year-old Devron Looney died after jumping into the water at the Offsets.

15. On July 4, 2018, 19-year-old Cole Duffell died while swimming in the Offsets.

16. Less than two weeks later, on July 13, 2018, 21-year-old Safion Livingston died while swimming in the Offsets.

17. Despite all of these deaths, Defendants do not carry liability insurance on the Offsets. Defendants also do not have the assets to satisfy any judgments against them. Defendant Gary Henson testified that the property itself has some value, but his testimony was neither specific nor persuasive. Even if the property has some value, there are currently two wrongful death

suits pending against the Defendants and, as this Court finds, continued operation is likely to lead to additional ones in the future. The Offsets property itself is inadequate to satisfy future judgments against Defendants.

18. In addition to the evidence of the deaths, the additional evidence presented by the State demonstrates that there are dangerous conditions at the Offsets that present substantial risks of serious injury and death to the people who use the property for swimming and diving.

19. The State called expert witness Michael Oostman who testified to the unreasonably dangerous conditions at the Offsets.

20. Oostman has extensive experience training lifeguards and developing safety protocols and emergency response plans for recreational aquatic facilities.

21. Oostman toured the Offsets, reviewed records of the deaths, and researched similar facilities.

22. The Court finds Oostman to be a qualified expert and finds his opinions to be well-founded and based on his extensive experience and his observations of the evidence.

23. Oostman testified, and the Court finds, that the Offsets contains many dangers, including the harsh impact of the water on the body when jumping from the high bluffs, the loose terrain, and the lack of institutional

control over the guests due to the complete freedom of guests to jump into the water from anywhere around the lake.

24. Oostman also testified that the presence of alcohol consumption among guests renders the guests less able to appreciate the risks and less able to physically handle the stresses of such an environment. According to Oostman, the level of alcohol exacerbates the dangers present at the Offsets.

25. Oostman further testified, and the Court finds, that the warnings given at the Offsets are deficient in several ways. First, the warnings are not clear enough to inform guests of the dangers present. Second, the warnings are not close enough to the potential dangers to effect guest behavior. Third, the warnings are not explicit enough about the dangers. Fourth, the warnings fail to adequately instruct guests as to safe means of engaging in the activities, particularly with regard to jumping off the high cliffs.

26. Oostman testified, and the Court finds, that Defendants fail to ameliorate these significant risks to life by failing to provide staff supervision of jumping, failing to provide lifeguards, failing to have a rescue response plan in place, and failing to have proper safety equipment such as backboards, rescue tubes, and ventilation equipment.

27. Defendants advertise and invite members of the public, for a fee, to jump off the high bluffs. Impacting water after falling 40 feet itself is dangerous, creating a risk of injury that increases the risk of drowning.

28. Defendants provide some signs and warnings advising guests to “swim at your own risk,” and telling them not to flip from the high bluffs, but the Court finds these measures fail to adequately warn guests of the dangers associated with swimming and jumping from the high bluffs.

29. The Court finds Defendants have no personnel trained or certified in lifeguarding or water rescue stationed at the Offsets.

30. The Court finds Defendants have no personnel certified or adequately trained to perform CPR or first aid stationed at the Offsets.

31. The Court finds Defendants have no personnel who are solely dedicated to patrolling the facility to insure that guests are following the rules, have the physical capacity needed to swim and dive safely, and are not creating unnecessary risks to their own safety and that of other guests.

32. Ring buoys are the only equipment on the property designed for water rescue, but the Court finds there are no trained safety personnel to use them.

33. Overall, the Court finds Defendants have no formal plans in place to respond to water emergencies. Defendants’ only informal plan is to call 911 and wait for help to arrive.

34. However, given the time it takes for first responders to arrive and reach the Offsets swimming area, by the time they reach the Offsets swimming

area, there is insufficient time to respond to a struggling swimmer in order to prevent a drowning, serious physical injury, or death.

35. Defendants permit guests to jump from any of the bluffs surrounding the water making it more difficult to monitor behavior and look for signs of distress. Also, this practice increases the odds that a guest may inadvertently collide with another guest when jumping, seriously injuring both guests.

36. The Court finds Defendants do not attempt to instruct guests on the safe methods for jumping from cliffs other than advising guests not to perform front flips or back flips from the highest bluffs.

37. Defendants allow guests to bring limitless amounts of alcohol onto the property.

38. Excessive alcohol consumption has contributed to several deaths on the property.

39. Defendants do not require guests to wear life jackets at any time, including when jumping from bluffs.

40. Multiple sinkholes and air shafts into which guests may fall and be injured exist on the property.

41. Despite the nine deaths on the property by patrons using the facility as intended, Defendants have made at most minor attempts to reduce the risks of serious physical injury or death.

Conclusions of Law

A public or common nuisance is an offense against the public order and economy of the state, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights of property of the whole community, or neighborhood, or of any considerable number of persons, even though the extent of the annoyance, injury, or damage may be unequal, or may vary in its effect upon individuals.

City of St. Louis v. Varahi, Inc., 39 S.W.3d 531, 535 (Mo. App. E.D. 2001)
(citation omitted).

The attorney general has common-law authority to seek equitable relief to abate public nuisances. *State ex rel. Detienne v. City of Vandalia*, 94 S.W. 1009, 1011 (Mo. App. 1906); *Shannon Cty. v. Mertzluff*, 630 S.W.2d 238, 239 (Mo. App. S.D. 1982).

Defendants' use of their property as described above constitutes a public nuisance, in that they interfere with common community right of public safety. The deaths caused and the risks borne by the guests of the Offsets is against the public order of the state and endangers a considerable number of persons. The Offsets, as operated by Defendants, is a grave risk to the public. It is also a significant drain on public resources when first responders are called to dive into the water to retrieve bodies, stand by to provide treatment where possible,

and conduct investigations.

The State has prayed in its Motion for Preliminary Injunction and its Petition for permanent injunction that the Court enjoin the Offsets from operating. To show entitlement to injunctive relief, the plaintiff must show: (1) the plaintiff has no adequate remedy at law, and (2) irreparable harm will result if the relief is not granted. *Id.* Generally, the phrase “adequate remedy at law” means “that damages will not adequately compensate the plaintiff for the injury or threatened injury.” *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo. App. W.D.1999). “Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct.” *Id.*

Here, there is no adequate remedy at law. The risk of serious physical injury and death constitutes irreparable harm because monetary damages cannot adequately compensate for physical injury or the loss of life. *See St. Hilaire v. Arizona Dept. of Corrections*, 934 F.2d 324, 324 (risk of being infected with an invariably fatal disease constitutes potential irreparable injury); *Smith v. Western Elec. Co.*, 643 S.W.2d 10, 14 (Mo. App. E.D. 1982) (the risk to health caused by exposure to smoke in the work place is irreparable harm for “which money damages cannot adequately compensate”).

Moreover, even if money could somehow compensate for the loss of life, Defendants do not have the assets to satisfy any judgments against them. Defendants carry no liability insurance on the property. Defendant Gary

Henson testified that the property itself has some value, but his testimony was neither specific nor persuasive. Even if the property has some value, there are currently two wrongful death suits pending against the Defendants and, as this Court finds, continued operation is likely to lead to additional ones in the future. This property itself is inadequate to satisfy future judgments against Defendants.

Relief

Based on the foregoing findings of fact and conclusions of law, as well as the evidence presented at the hearing before the Court on May 15, 2019, the Court orders that the Offsets be permanently closed to the public as a commercial swimming and diving facility unless and until the conditions set out below are met. The Court finds that the conditions ordered are both reasonable under the circumstances and necessary to eliminate the unnecessary risks of serious injury and death and abate the public nuisance created by the Offsets in its present state of operation.

It is hereby ORDERED, ADJUDGED, AND DECREED that Defendants Gary Henson, Rebecca Henson, Offsets Recreation, LLC, and their officers, agents, employees, sales persons, contractors, representatives, assigns, successors in interest and any other individuals acting on their behalf or at their direction are permanently enjoined and prohibited from operating the Offsets as a commercial swimming and diving facility and/or charging

admission to the Offsets property until the following conditions are met:

A. Defendants shall operate The Offsets only under **ALL** of the following conditions:

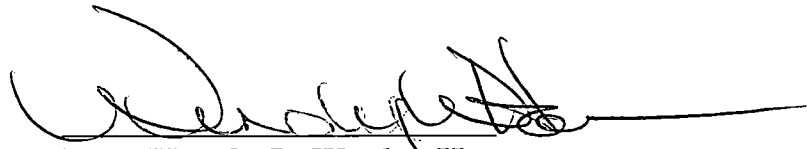
1. Defendants shall establish an emergency response plan prepared by a water safety expert and will conduct trainings with all staff prior to the start of each operating season and at least monthly intervals during the operating season; and
2. Jumping will only be permitted from designated jumping and diving areas; and
3. Each designated jumping area will be staffed by a certified lifeguard; and
4. Each designated jumping area will have signage warning and advising the users that previous patrons have died jumping off the cliffs and providing a pictograph and instructions on safe entry technique; and
5. The lifeguard staffing each jumping area will: 1) direct patrons to the signage explaining the risks of jumping and proper technique; 2) instruct the patrons on how to jump from the heights to minimize the risks of serious physical injury or death; 3) only permit jumping feet-first into the water; 4) only permit

patrons to enter the water after ensuring that the entry point in the water is clear of other swimmers; and

6. An additional certified lifeguard will be stationed in the water in a boat; and
7. Lifeguards will be equipped with rescue tubes equipped with lanyards equal to the depths of the water in the swimming zones; and
8. Lifeguards will be equipped with hip packs containing sanitary gloves and face masks suitable for the provision of CPR; and
9. A trauma bag will be maintained on the property containing an Automated External Defibrillator (AED) in proper working order and an emergency oxygen system capable of administering oxygen to an adult or child, and a bag valve mask; the bag will be able to be promptly delivered to the scene of any emergency event in or near the water; and
10. At least one appropriate backboard with a head immobilization device shall be kept so as to be easily retrievable for use in emergency events in or near the water; and
11. Throwable flotation devices will be available at each of the designated jump areas and least every 100 feet around the perimeter of the water at The Offsets; and

12. Defendants shall require guests (other than certified scuba divers equipped with scuba diving equipment) to wear appropriately fitting, U.S. Coast Guard approved life jackets when entering the water; and
13. Sinkholes will be fenced off or otherwise maintained so that patrons cannot fall into them.

So ORDERED this 23rd day of May, 2019.



Hon. Wendy L. Wexler Horn
Circuit Judge, Madison County