

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

STEVE JANKOWSKI and PETER
SCOTT,

Plaintiffs,

vs.

CITY OF DULUTH; JIM NILSSON,
individually and in his official
capacity as Police Officer for the City
of Duluth,

Defendants.

CASE NO. 0:11-cv-03392-MJD-LIB

**PLAINTIFFS' EMERGENCY
MOTION TO ENFORCE
PRELIMINARY INJUNCTION AND
TO HOLD DEFENDANTS IN
CONTEMPT**

Plaintiffs Steve Jankowski and Peter Scott, pursuant to this Court's preliminary injunction order [Doc. #33] and to the Court's inherent power, move this Court to ensure that Defendants comply with its Preliminary Injunction and to hold Defendants in contempt for violating this injunction.

In the absence of this relief, Steve Jankowski and Peter Scott will suffer irreparable injury, in particular, the loss of rights and freedoms guaranteed by the United States Constitution. In support of this Motion, Plaintiffs rely on the following:

- A. 30(b)(6) Deposition Notice, Exhibit "A";
- B. November 14 email to Jonathan Scruggs, Exhibit "B";
- C. LaCoursiere November 14 letter, Exhibit "C";
- D. Contract between Duluth and Bentleyville, Exhibit "D";
- E. Scruggs November 14 letter, Exhibit "E";
- F. Declaration of Steve Jankowksi, Exhibit "F";

- G. Disk of Videos of Incident During 2012 Bentleyville Event, Exhibit “G”;
- H. Copy of Bentleyville Webpage, Exhibit “H”;
- I. The pleadings and documents already filed in support of Plaintiffs’ Motion for Preliminary Injunction.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Steve Jankowski and Peter Scott respectfully request that this Honorable Court grant their Motion To Enforce the Preliminary Injunction and to Hold Defendants in Contempt.

Respectfully submitted,

<p>s/ Jonathan Scruggs JONATHAN SCRUGGS* TN Bar # 025679 Alliance Defending Freedom 699 Oakleaf Office Lane, Suite 107 Memphis, TN 38117 (901) 684-5485 telephone (901) 684-5499 – Fax</p> <p>NATHAN W. KELLUM* TN BAR #13482; MS BAR # 8813 Center for Religious Expression 699 Oakleaf Office Lane, Suite 107 Memphis, TN 38117 (901) 684-5485 telephone (901) 684-5499 – Fax</p> <p>Attorneys for Plaintiffs</p> <p>*admitted to practice <i>pro hac vice</i></p>	<p>MARK W. PETERSON #86125 Peterson and Jerich 5200 Willson Road, Suite 150 Minneapolis, MN 55424 phone: (612) 760 8980 fax: (952) 836 2785</p> <p>Stan Zahorsky #137534 Zahorsky Law Firm 7129 Bristol Blvd Minneapolis, MN 55435 Phone: (952) 835-2607</p> <p>Attorney for Plaintiffs</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

STEVE JANKOWSKI and PETER
SCOTT,

Plaintiffs,

vs.

CITY OF DULUTH; JIM NILSSON,
individually and in his official
capacity as Police Officer for the City
of Duluth,

Defendants.

CASE NO. 0:11-cv-03392-MJD-LIB

**MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION TO
ENFORCE PRELIMINARY
INJUNCTION AND TO HOLD
DEFENDANTS IN CONTEMPT**

INTRODUCTION

Plaintiffs Steve Jankowski (“Jankowski”) and Peter Scott (“Scott”) move this Court to enforce the injunction it has already issued against Defendants (“Duluth”) because Duluth has purposefully and egregiously violated this injunction.

RELEVANT FACTS AND PROCEDURAL HISTORY

On December 13, 2011, Magistrate Judge Leo Brisbois determined that Plaintiffs would likely succeed on their First Amendment claims and therefore recommended that their Motion for Preliminary Injunction be granted and that Plaintiffs be allowed to engage in their peaceful expression during the Bentleyville Tour of Lights event in Bayfront Festival Park. *Jankowski v. City of Duluth*, 2011 WL 7656905 (D.Minn. Dec. 13, 2011); [Doc. Entry #28]. A few days later, this Court affirmed that decision, agreed that Plaintiffs would likely succeed on their First Amendment claims, and issued the

requested injunction. *Jankowski v. City of Duluth*, 2011 WL 7656906 (D.Minn. Dec. 20, 2011).

Once discovery began, a dispute arose over Plaintiffs' ability to depose Duluth's 30(b)(6) representative. Magistrate Judge Brisbois resolved this dispute, granted Plaintiffs' motion to compel, and ordered Duluth to make its 30(b)(6) representative available for deposition. *See* [Doc. #95]. Magistrate Brisbois also ordered the parties to work together to schedule the outstanding depositions. [Doc. #95, p. 10]. Complying with this order, the parties jointly scheduled the 30(b)(6) deposition for 9:00 A.M. on November 14, 2012. *See* [30(b)(6) Deposition notice, attached to Plaintiffs' Emergency Motion as Exhibit A]. Importantly, just three days after the scheduled November 14 deposition, the 2012 Bentleyville Tour of Lights was scheduled to begin --- on November 17, 2012. *See* [<http://www.bentleyvilleusa.org/Home/Hours.aspx>]

Then, on November 14 at 10:45 A.M., as Plaintiffs' local counsel was conducting the 30(b)(6) deposition, Plaintiffs' other counsel (Jonathan Scruggs) received an email from Duluth city officials. [November 14 email, attached to Plaintiffs' Emergency Motion as Exhibit B]. This email contained a letter from Duluth Assistant City Attorney Nathan LaCoursiere. And this letter stated that Duluth had entered into a new contract with Bentleyville Tour of Lights. [LaCoursiere November 14 letter, attached to Plaintiffs' Emergency Motion as Exhibit C; Contract between Duluth and Bentleyville Tour of Lights, attached to Plaintiffs' Emergency Motion as Exhibit D]. LaCoursiere's letter also

stated that “[i]t is the city’s position that the previous injunction issued in this matter no longer applies in light of the nullification of the 2010 – 2013 Agreement.” [*Id.*].

Shockingly, Duluth had entered into the contract attached to LaCoursiere’s letter on October 4, 2012. [Ex. D]. Therefore, even though Duluth knew about the new contract on October 4, Duluth intentionally waited for over a month, until Plaintiffs were conducting their 30(b)(6) deposition and until the 2012 Bentleyville event was about to begin, to disclose that contract. No doubt, this timing was an attempt to prevent Plaintiffs from obtaining discovery about the new contract and to impede Plaintiffs from expressing their beliefs at the 2012 Bentleyville event.

As soon as Plaintiffs’ counsel received LaCoursiere’s letter, he immediately responded with his own letter disagreeing that the new contract nullified the Court’s injunction. [Scruggs November 14 letter, attached to Plaintiffs’ Emergency Motion as Exhibit E]. As this letter explained, the Plaintiffs intended to express “their beliefs at this Bentleyville Event. If City officials attempt to impede them, we will seek to hold the City in contempt for violating the Court’s injunction, and we will also seek damages against the City for violating the Court’s injunction.” [Ex. E].

Despite this clear warning, Duluth brazenly disregarded this Court’s prior injunction and again infringed Plaintiffs’ First Amendment rights. On November 17, 2012, Plaintiff Steve Jankowski went to the Bentleyville Event in order to express his religious beliefs as he peacefully done in the past. [¶3 of Jankowski Declaration, attached to Plaintiffs’ Emergency Motion as Exhibit F]. He went with three other friends,

including one friend named Michael Winandy. [Ex. F, ¶3]. When Jankowski and his friends arrived at the Bentleyville event, Jankowski noticed that nothing had changed about the event from prior years. [Ex. F, ¶4]. The event was still in Bayfront Festival Park and was still free and open to the public. [Ex. F, ¶4]. There were no barriers preventing entrance into the event and no tickets or other requirements to enter into the event. [Ex. F, ¶4].¹

Once Jankowski and his friends entered the event, Winandy began to peacefully distribute religious literature in one area as Jankowski wandered in another part of the event. [Video 1 of 2012 Bentleyville event on disk attached to Plaintiffs' Emergency Motion as Exhibit G; Ex. F, ¶5]. Soon thereafter, a Duluth police officer (Adam Hewitt, badge #464) dressed in full police uniform approached Winandy and ordered him to move to a particular zone because "this right here is private property." [Ex. G, video 1 at 8:40 mark].² Immediately, Winandy responded that "we have an injunction against the City that allows us to be here. I'd like you to look at this please." [Ex. G, video 1]. Although Winandy tried to get Officer Hewitt to look at the injunction issued by the Court, the officer refused because "even if you have an injunction against the City it

¹ These facts are also confirmed by the video Jankowski shot as he walked throughout the 2012 Bentleyville Event [video 2 of 2012 Bentleyville event on disk attached to Plaintiffs' Emergency Motion as Exhibit G]. It is also confirmed by Bentleyville's website that confirms that "Bentleyville is free to the public" [copy of page on Bentleyville's website, taken November 19, 2012, attached to Plaintiffs' Emergency Motion as Exhibit H].

² Video 1 is entitled "Incident with Police" and Video 2 is entitled "Walking Around Event at Night." Unfortunately, the first few minutes of each video appear paused. But the video begins shortly thereafter.

doesn't mean you can be inside private property, I think." [Ex. G, video 1]. Again, Winandy tried to get Officer Hewitt to look at the injunction. [Ex. G, video 1].

But then, Officer Hewitt revealed that this was no misunderstanding. Rather, the officer revealed that the order to silence Plaintiffs and their friends came directly from the Duluth City Attorney: "Ok, what I'm telling you is that our City Attorney has...has uhh given us direction that if you want to practice your First Amendment right which is perfectly fine that you have to be in that First Amendment zone. This is actually private property rented by Bentleyville. Ok. So they have exclusive rights to this particular area." [Ex. G, video 1].

Winandy then asked what would happen if he didn't leave. Officer Hewitt responded: "If you didn't leave, you would be escorted and trespassed. You would be escorted out and trespassed and if you were to come back inside of the private property area, you could be cited and/or jailed for trespass." [Ex. G, video 1]. As a result, Winandy stopped engaging his expression inside Bentleyville. [Ex. G, video 1]. Winandy did go and look at the "First Amendment Zone" referenced by the officer. [Ex. G, video 1]. But this zone was not even inside the Bentleyville event. [Ex. G].

Soon after Winandy's encounter with the police, Jankowski talked to Winandy and heard about Winandy's encounter with the police. [Ex. F, ¶6]. As a result of this incident, Jankowski realized that he would be arrested if he attempted to express his beliefs at the 2012 Bentleyville Event. [Ex. F, ¶6]. Therefore, for fear of arrest, Jankowski and his

friends no longer attempted to express their beliefs at the 2012 Bentleyville Event, and they left the area. [Ex. F, ¶6].

ARGUMENT

The City of Duluth has egregiously impugned this Court's authority by violating this Court's injunction. This violation has not only been caught on videotape, but city police officers even admit that the Duluth City Attorney instructed them to ignore this Court's injunction. [Ex. G, video 1]. Thus, Duluth cannot hide behind any alleged factual dispute or any alleged misunderstanding by one police officer. The City's actions are both intentional and malicious. For this reason, Duluth should be held in contempt and this Court should use fines, damages, and/or other sanctions to see that its injunction order is complied with.

A party may be held in civil contempt for failure to comply with an order of the court, including a preliminary injunction. *Ford Motor Co. v. B & H Supply, Inc.*, 646 F.Supp. 975, 989 (D.Minn. 1986). Although Plaintiffs carry the burden of proving facts warranting a civil contempt order by clear and convincing evidence, *Indep. Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998), Plaintiffs easily satisfy this standard in light of LaCoursiere's November 14 letter and Jankowski's videotape. This videotape clearly shows a Duluth police officer threatening to arrest Michael Winandy if Winandy continues his peaceful expression in Bayfront Festival Park. Ironically, the officer justifies his order on the theory that Bayfront Park is private property, not public property, but this Court already rejected this exact theory in its

preliminary injunction ruling. *See* [Doc. #33, pp. 16-19]. Thus, there is no question that Duluth has already violated and intends to continue violating this Court's injunction.

Faced with these facts, Duluth will be hard-pressed to deny its willful violation of this Court's injunction. Instead, Duluth will probably try to excuse its behavior by pointing to the alleged change in the contract between itself and Bentleyville Tour of Lights, Inc. But this defense does not justify Duluth's actions for two reasons. First, even assuming that the alleged change has affected the injunction, Duluth should have sought to modify or dissolve the injunction, rather than violate it. Second, the alleged change has not altered any material fact underlying the injunction.

I. Even a Material Change in Facts Does Not Excuse Duluth for Violating A Valid Injunction

Duluth may not justify violating an injunction because of its belief that the injunction is no longer valid. *See Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967). For this reason, it simply does not matter whether Duluth thought the injunction was invalid or whether the injunction had actually lost its validity. If Duluth believed the injunction invalid, it should have sought to modify it or dissolve it. By failing to pursue judicially sanctioned relief and by instead acting on its own accord to violate the injunction, Duluth has engaged in conduct worthy of contempt.

Indeed, a similar situation occurred in *Popular Bank v. Banco Popular*, 180 F.R.D. 461 (S.D.Fla. 1998). There, the plaintiff obtained a preliminary injunction to stop defendants from broadcasting certain commercials, but the injunction order did not address the posting of security pursuant to Rule 65(c). *Id.* at 462-63. The defendants then

violated the injunction and the plaintiff brought contempt proceedings. *Id.* To defend its actions, the defendants claimed they were not bound by the injunction until the court ruled on the posting of security. *Id.* But the district court quickly rejected this justification and held the defendants in contempt:

The proper method to challenge the validity of a preliminary injunction is to file an appeal or seek other means of review. In this case the defendants did not file an appeal. One day before the deadline for ending the commercials, they filed a belated motion to amend or alter order. Without waiting for the Court's ruling on that motion, the defendants disobeyed the express terms of the injunction by airing their commercials. In so doing, the defendants violated well-established law that an order duly issued by the court having subject matter over the controversy, and personal jurisdiction over the parties, must be obeyed, regardless of the ultimate validity of the order....If the defendants believed that the preliminary injunction was procedurally defective for failure to post bond, before violating the preliminary injunction, the defendants should have filed a timely motion to require the plaintiff to post bond. Instead, defendants chose to violate the order before allowing the Court to remedy any alleged defect. Such conduct is sanctionable.

Id. at 466 (citations omitted).

Just like the defendants' beliefs in *Popular Bank*, Duluth's beliefs about the invalidity of the injunction do not actually dissolve or modify that injunction. The Court's injunction remains in place and remains valid until this Court declares otherwise. Therefore, Duluth has purposefully violated a valid injunction, and clearly intends to keep violating this valid injunction.

This situation greatly harms Plaintiffs since Duluth's actions are discouraging Plaintiffs from exercising their First Amendment rights in Bayfront Park. [Doc. F]. Thus, Plaintiffs stand in desperate need for this Court to take action, including the use of fines

and other sanctions, to ensure that Duluth will comply with this Court's injunction in the future.

II. The Alleged Change to the Contract Between Duluth and Bentleyville Does not Alter this Court's Injunction

Even though it does not matter whether the change in Duluth's contract actually affected this Court's injunction for purposes of this contempt motion, Duluth's alleged change did not affect this motion. Thus, this Court's motion continues to be valid even in the future.

Although Duluth allegedly changed its contract with Bentleyville to give Bentleyville exclusive use of Bayfront Park, rather than non-exclusive use, *compare* [Ex. D] *with* [Doc. #33], this change makes no material difference. It makes no difference because the Bentleyville Event is still in a public park free and open to the public. [Ex. F]. There are no barriers to enter and there is no fee or ticket requirement. Bentleyville remains a public event, open for all. Therefore, the Bayfront Park area remains a traditional public forum.

Indeed, as this Court explained:

The takeaway from these cases is that a municipality "cannot . . . claim that one's constitutionally protected rights disappear [where] a private party is hosting an event that remain[s] free and open to the public." *Parks*, 395 F.3d at 652. It is important to note that the *Parks* rule does not extend to situations where a private entity holds an event that is not free and open to the public. Families renting public parks for weddings and groups organizing music festivals which charge admission remain free to exclude unwanted speech or speakers.

[Doc. #33, p. 17] (emphasis added). In other words, the relevant fact is not whether Duluth places the word "exclusive" or "non-exclusive" in its contract with Bentleyville.

“Congress, no more than a suburban township, may not by its own ipse dixit destroy the ‘public forum’ status of streets and parks which have historically been public forums...” *United States Postal Service v. Council of Greenberg Civic Ass’n.*, 453 U. S. 114, 133 (1981). *See also United States v. Grace*, 461 U.S. 171, 175 (1983) (government may not “transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.”). The relevant fact is whether the event in question is actually free and open to the public. And the Bentleyville event remains free and open to the public, even under the recent change to the contract between Bentleyville and Duluth. Therefore, Bayfront remains a traditional public forum, and Plaintiffs retain their right to speak in this forum.³

In light of this conclusion, Duluth has absolutely no basis for its prior violations of the injunction or for any future violations of this injunction. Nothing has changed to materially alter the validity of this Court’s injunction. And this continued validity is simply another reason to hold Duluth in contempt for its egregious actions and to take actions to enforce this injunction.

³ In actuality, it does not matter whether the property is deemed private property or public property. Even private property can be deemed a traditional public forum if it looks like and acts like a city park or city sidewalk. *See, e.g., United Church of Christ v. Gateway Economic Development Corp.*, 383 F.3d 449, 452 (6th Cir. 2004); *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1094-95 (9th Cir. 2003); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1126 (10th Cir. 2002); *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937, 944 (9th Cir. 2001); *Lewis v. McCracken*, 782 F.Supp.2d 702, 711-12 (S.D.Ind. 2011). And there is no question that Bayfront Festival park looks like and acts like a traditional public forum, even during the 2012 Bentleyville event, since this event is free and open to the public.

CONCLUSION

For reasons set forth herein, Jankowski and Scott respectfully request that this Court grant their Motion to Enforce the Preliminary Injunction and to Hold Defendants in Contempt.

Respectfully submitted,

<p>s/ Jonathan Scruggs JONATHAN SCRUGGS* TN Bar # 025679 Alliance Defending Freedom 699 Oakleaf Office Lane, Suite 107 Memphis, TN 38117 (901) 684-5485 telephone (901) 684-5499 – Fax</p> <p>NATHAN W. KELLUM* TN BAR #13482; MS BAR # 8813 Center for Religious Expression 699 Oakleaf Office Lane, Suite 107 Memphis, TN 38117 (901) 684-5485 telephone (901) 684-5499 – Fax</p> <p>Attorneys for Plaintiffs</p> <p>*admitted to practice <i>pro hac vice</i></p>	<p>MARK W. PETERSON #86125 Peterson and Jerich 5200 Willson Road, Suite 150 Minneapolis, MN 55424 phone: (612) 760 8980 fax: (952) 836 2785</p> <p>Stan Zahorsky #137534 Zahorsky Law Firm 7129 Bristol Blvd Minneapolis, MN 55435 Phone: (952) 835-2607</p> <p>Attorney for Plaintiffs</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------