

No. 49935-5-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

KYE S. BARKER, a single woman; and D-SONG LLC, a Washington limited liability company,

Appellants,

vs.

TOWN OF RUSTON, a political subdivision of the State of Washington; the RUSTON POLICE DEPARTMENT; BRUCE HOPKINS, the Ruston Town Mayor; JEREMY KUNKEL, the Ruston Police Chief; JAMES KAYLOR, an officer of the Ruston Police Department; VICTOR CELIS, an officer of the Ruston Police Department; and "JOHN DOE 1-5", officers of the Ruston Police Department,

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 14-2-10210-6

BRIEF OF APPELLANTS

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Table of Contents

TABLE OF AUTHORITIES.....	ii
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE.....	3
A. Procedural History.....	3
B. Facts.....	3
IV. ARGUMENT.....	8
A. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.....	8
1. Summary Judgment Standard.....	8
2. Collateral Estoppel Does Not Prevent Re-litigation of the State Claims Which the Federal Court Declined to Address.	8
3. Plaintiffs Presented Evidence of the Elements of Negligent and Intentional Infliction of Emotional Distress.	9
4. Plaintiffs Established the Necessary Elements Of Interference Of Business Expectancy.	12
5. Plaintiffs Have Presented Evidence To Support The Elements Of Private Nuisance.	13
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

State Cases

Benjamin v. Washington State Bar Ass’n, 138 Wn.2d 506, 980 P.2d 742 (1999).....8

Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 116 P.3d 381 (2005).....10

Burt Kutu Revocable Living Trust v. Mullen, 175 Wn. App. 292, 306 P.3d 994 (2013)(.....8

Cameron v. Murray, 151 Wn.App. 646, 214 P.3d 150 (2009).....9

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 629, 96 P.3d 957 (2004).....9

Fabrique v. Choice Hotels Int’l, Inc., 144 Wn.App. 675, 183 P.3d 1118 (2008).10

Keates v. City of Vancouver, 73 Wn. App 257, 869 P.2d 88 (1994).....12

Kloepfel v. Bokor, 149 Wn.2d 192, 66 P.3d 630 (2003)10

Leingang v. Pierce County Med. Bureau, 131 Wn.2d 133, 930 P.2d 288 (1997).....13

Manna Funding, LLC v. Kittitas County, 173 Wn.App. 879, 295 P.3d 1197 (2013)13

MJD Properties, LLC v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015)13

Ranger Insurance Co. v. Pierce County, 164 Wn.2d 545, 192 P.3d 886 (2008).....8

Rodriquez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000)12

Ruff v. County of King, 125 Wn.2d 697, 887 P.2d 886 (1995)10

Seymanski v. Dufault, 80 Wn.2d 77, 491 P.2d 1050 (1971):.....13

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it dismissed plaintiff Kye S. Barker's claim for the tort of negligent infliction of emotional distress.
2. The trial court erred when it dismissed plaintiff Kye S. Barker's claim for the tort of intentional infliction of emotional distress.
3. The trial court erred when it dismissed plaintiffs' claim for the tort of interference of a business expectancy.
4. The trial court erred when it dismissed plaintiffs' claim for the tort of private nuisance.
5. The trial court erred when it dismissed plaintiffs' claims based on collateral estoppel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in granting defendants' motion for summary judgment when disputed material facts existed?

(Assignments of Error # 1- 4).

2. Whether the trial court erred in granting defendants' motion for summary judgment on the basis of collateral estoppel when the federal judge never ruled on the state claims?

(Assignment of Error #5).

III. STATEMENT OF THE CASE

A. Procedural History

Plaintiffs filed a complaint for damages on July 2, 2014, alleging several causes of action based on the Town of Ruston's and its employees' deliberate actions in attempting to cause her tavern to go out of business. CP 1-10. After the defendants moved for summary judgment, the trial court granted their motion in its entirety on January 3, 2017. CP 669-70. In explaining its ruling, the court stated, "I'm satisfied based on the argument I've heard that there are not sufficient issues of fact to take this to trial on those two causes of action—three really—and so I'm going to grant the motion." RP 20: 17-18. Asked for clarification as to whether the decision was based in part on collateral estoppel, the court merely stated, "Both. Not that it matters, not that it matters because as Mr. Force says, ...whether I said Judge Settle decided all these issues and therefore it's only based on collateral estoppel..." RP 22: 5-21.

The plaintiffs timely filed their notice of appeal of the trial court's decision on January 30, 2017. CP 671-75. This appeal follows.

B. Facts

The plaintiffs in this case, Kye S. Barker and D-Song LLC, have owned and operated the Unicorn Bar in Ruston, Washington since 2002. CP 488-91 (Declaration of Darrell Bone at 2). Defendant David Bruce Hopkins, the current mayor of Ruston, bought his current home in 1992 along with his wife. CP 492-98 (Deposition of David Bruce Hopkins at 8). When he bought the home, Hopkins was aware that it was located 150 feet from the Unicorn Bar. *Id.* at 9, 16. Over the years, Hopkins and his wife have made numerous complaints about the noise coming from the bar. CP 492-998 (Deposition of David Hopkins at 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 25,

27); CP 499-509 (Deposition of Victor Celis at 44); CP 579-82 (Deposition of Jeremy Kunkel at 17, 27); CP 583-86 (Declaration of James Reinhold at 2).

Many of defendant Hopkins' complaints were made prior to his election as mayor. In one situation he went so far as to videotape what he considered to be loud behavior outside the bar and then show it to the City Council. CP 492-98 (Deposition of David Bruce Hopkins at 22). He would later make a formal complaint to the Liquor Control Board. Id. (Deposition at 26). Upon being elected mayor in 2008 defendant Hopkins applied pressure to police telling them that they "were giving way too many verbal warnings" to the Unicorn Bar about noise. CP 579-82 (Deposition of Jeremy Kunkel at 31).

James Reinhold was the Ruston Chief of Police from 2002 until 2008. CP 583-86. It was Chief Reinhold's observation that defendant Hopkins intended to use his position to drive the Unicorn Bar out of business. Id. Chief Reinhold observed that the noise from the Unicorn was no different from an average bar. Id. Chief Reinhold specifically observed Hopkins' increasing frustration as smokers were required to move outside of the bar and outdoor noise increased. Id. He observed increased pressure being applied to the mayor at the time, Michael Transue, and town council members by Hopkins – Hopkins going so far as to show council members the video of Unicorn patrons outside the bar allegedly being too loud. Id. Chief Reinhold was specifically directed to issue the Unicorn Bar employees more citations for over-serving alcohol to bar patrons and instructed by town officials to cite more Unicorn Bar patrons with DUI – a directive Chief Reinhold refused. Id. at 2-3.

It was Chief Reinhold's opinion, based on his observations, that Mayor Transue began insisting that the Ruston Police Department begin issuing excessive noise violation tickets even though there were no noise ordinances in the town. Id. The Chief worked to find a fair noise

ordinance for the city but none was enacted. Id. He specifically told town officials that, without rules or ordinances in place, he could not direct Ruston Police Department officers to arrest or cite someone for simply being outside the bar. Id. Further, former Chief Reinhold did not observe any other citizens, other than Mr. Hopkins, complain about the Unicorn Bar. Id. Based on all of these observations, it was and continues to be former City of Ruston Police Chief James Reinhold's "impression that pressure on [the plaintiffs] would not end until [they] changed the bar into a different restaurant model or closed the Unicorn Bar." Id. As stated, Chief Reinhold left his position in 2008 – the same year defendant Hopkins was elected Mayor.

Darrell Bone has worked as a bartender at the Unicorn Bar off and on for roughly 20 years. CP 488-91 (Declaration of Darrell Bone at 1-2). He has also worked at other local taverns during that time such as the West End Tavern, The Strap, Magoo's and the Goldfish Tavern. Id. at 3. He has specifically observed that Ruston Police officers entered the Unicorn nightly and that he had never once seen police enter any other bar unannounced in such a manner. Id. at 2. It has been his observation that Ruston officers enter the Unicorn Bar, cruise the parking lot and stop customers nearly every night with the clear intent to single out the plaintiffs and hurt their business. Id. Specifically, Mr. Bone has observed:

1. On weekend nights, officers usually come into the bar and stand by the door for at least a half hour, making customers uncomfortable.
2. Near the Unicorn's 2:00 a.m. closing time, officers usually come and look in the windows.
3. Female customers have had sexual advances made to them by officers and been followed home by them.
4. On an almost nightly basis, officers park on the corners near the Unicorn and in the alley, waiting for customers to make a mistake, such as not stopping at a stop sign.
5. On nearly every night, officers run, walk or drive through the parking lot, checking license plates of customers without any cause.
6. Officers routinely walk up to customers' vehicles and look inside with flash lights.

7. On weekend nights, officers walk through the alley, measuring the decibel level of the music with a hand-held device in order to cite the bar if the music is too loud.

Id. at 1-4.

It has been Mr. Bone's observation that targeting the Unicorn Bar in the manner described above has caused the Unicorn to lose "many customers." Id. at 2.

Statements from Ruston Police officers confirm the observations made above. Specifically, according to defendant Celis – who has worked as a police officer in Ruston since 2010, he would visit the Unicorn bar "a couple of times a shift." CP 499-501 (Deposition of Victor Celis at 25, 26). He also admits parking outside the bar and randomly running license plates on cars that were parked outside the bar. CP 501 (Deposition at 28-29). He acknowledges "undercover surveillance" at the bar. CP 502 (Deposition at 33). He admits talking with Mayor Hopkins about the bar and personally responding to at least two noise complaints made by Mayor Hopkins and his wife. Id. at 44, 53. On December 2, 2013 defendant Celis cited the plaintiff Barker for "noise disturbance" pursuant to Ruston Municipal Code 9.19.060. See CP 587-89. Importantly, that statute provides that the cited person is only liable if he/she "intentionally fail[s] to cease the unreasonable noise when ordered to do so by a police officer." Id. Review of defendant Celis' report reveals he did not provide plaintiffs an opportunity to "cease" the noise issue or any type of warning. See CP 590-92 (Infraction Report). The infraction was later dismissed at a contested hearing. CP 593 (Dismissal Order).

During his deposition, defendant Celis confirmed having made multiple arrests of citizens while "monitoring" the Unicorn Bar. CP 499-509 (Celis Deposition at 36-59); see also CP 510-78 (Exhibits 1-14 from deposition). One of those arrests was specific to Unicorn bartender

Darrell Bone, who was arrested by Celis and charged for serving alcohol to an intoxicated individual and later acquitted following a jury trial. CP 508-09 (Celis Deposition at 57-59).

Defendant Officer James Kaylor has been a Ruston Police officer since approximately 2007 or 2008. CP 594-97 (Deposition of James Kaylor at 5). He acknowledges that plaintiff Barker “thinks we’re [police] bad for business.” CP 596 (Deposition at 15). As such, he attempts to do his “bar checks” and “business checks” from the outside – meaning he will talk to the doorman or look in the windows. Id. He also states, however, he still enters the business – stating he will go in, “sit at a table, and ... talk and hang out for a while.” CP 596 (Deposition at 14-15). Specifically, as it relates to plaintiff Barker’s frustration with the frequent police visits, defendant Kaylor states:

Yes. I – it wasn’t a secret that she thought the police were bad for business or that, you know, she really didn’t want us inside her bar unless we needed to be there. Just to go in there randomly for a bar check, it wasn’t a secret that she preferred us not to be inside but knew that legally we could walk through.

CP 597 (Deposition at 18-19).

As part of the lawsuit, plaintiffs sought the assistance of expert Shelley A. Drury to provide an assessment of economic damages sustained as a result of the actions of defendants. Specifically, Ms. Drury concluded that “past lost profits” from 2006 through 2013 total \$157,722 and that future damages from the actions of defendants are estimated at \$24,000 per year. CP 598-600 (Report of Shelley A. Drury, CPA, ABV, CFF).

In her interrogatory response, plaintiff Barker described the stress associated with the constant police presence and the impact their presence had on her physical health and of course, on the business. CP 601-605 (answers to Town of Ruston’s first set of interrogatories and

requests for production of documents propounded to plaintiff Kye S. Barker, interrogatory no. 13, page 9).

IV. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

1. Summary Judgment Standard

A decision to grant summary judgment is proper only if, after considering all of the pleadings, affidavits, depositions or admissions and the reasonable inferences therefrom in favor of the nonmoving party, the court can find that no genuine issue of fact exists, all reasonable persons can reach only one conclusion, and the moving party is entitled to judgment as a matter of law. Burt Kutty Revocable Living Trust v. Mullen, 175 Wn. App. 292, 303, 306 P.3d 994 (2013)(citation omitted). Ranger Insurance Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). An issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. Review of an order granting summary judgment is a question of law reviewed *de novo*. Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, 980 P.2d 742 (1999).

Here, plaintiffs did not contest the summary judgment motion as to the alleged claims based on the theories of defamation and unlawful taking. RP 14: 14-18. However, the court granted defendants' request for summary judgment on the other claims despite the existence of disputed material facts to the litigation. This court should reverse.

2. Collateral Estoppel Does Not Prevent Re-litigation of the State Claims Which the Federal Court Declined to Address.

While the trial court gave a vague response, without any analysis as to dismissing the complaint based on collateral estoppel, what is not vague is the fact that the federal court never ruled on the state pendant claims when the case was originally filed in federal court.

To establish collateral estoppel, the moving party must establish four elements:

- (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding;
- (2) the earlier proceeding ended in a judgment on the merits;
- (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party to, the earlier proceeding; and
- (4) application of collateral estoppel does no work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 629, 305, 96 P.3d 957 (2004).

Defendants sought summary judgment, in part, because the allegations contained in the case were part of the same complaint that was ruled upon by the federal court. CP 404. While the allegations were part of the same complaint, the federal court never ruled on the state pendant claims, which are the claims in this case. Specifically, in dismissing the federal claims, the court stated, "...Plaintiffs no longer have a federal action before this Court. Absent a federal claim, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims." CP 618-19. Thus, there was no issue decided as to the claims at issue here, nor was there a final judgment on the merits. Thus, the trial court's vague pronouncement that it found that doctrine of collateral estoppel applied in this case was in error and the court should reverse on this basis.

3. Plaintiffs Presented Evidence of the Elements of Negligent and Intentional Infliction of Emotional Distress.

In a negligence claim, the plaintiff must establish that (1) the defendant owes the plaintiff a duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. Cameron v. Murray, 151 Wn.App. 646, 651, 214 P.3d 150 (2009).

To recover for negligent infliction of emotional distress (NIED), the plaintiff must prove the four elements of negligence, as well as objective symptomatology. Kloepfel v. Bokor, 149 Wn.2d 192, 199, 66 P.3d 630 (2003). Conversely, no objective symptomatology is required in the context of a claim for intentional infliction of emotional distress. Id. at 198.

The first question is one of proximate cause. A proximate cause of an injury is defined as a cause that, in a direct sequence, unbroken by a new, independent cause, produces the injury complained of and without which the injury would not have occurred. Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). Issues of negligence and proximate cause are generally not susceptible to summary judgment. Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Only when reasonable minds can reach but one conclusion may questions of fact be determined as a matter of law. Id., at 703-04.

With regard to objective symptomatology of emotional distress, neither testimony from doctors nor medical records are necessary to prove emotional distress damages. See Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005). In Bunch, the Supreme Court upheld an emotional distress award in a case involving no medical testimony. The Court stated:

The county argues that Bunch never consulted a healthcare professional, and no one close to him testified about his anxiety. That is true, but such evidence is not strictly required; our cases require evidence of anguish and distress, and this can be provided by the plaintiff's own testimony.

Id. at 181. That is precisely the case here.

Ms. Barker testified as to the anguish and distress she has suffered resulting from the continued pressure that she has been subjected to by the Town of Ruston and its officers. As such she has provided evidence of all of the elements of intentional infliction of emotional distress.

Specifically, in questioning during her deposition, she answered as follows:

- Q Do you have any physical things that are wrong with you because of the Ruston Police Department interaction with your sports bar?
- A A lot. Many things. I have hard time sleeping. When I see a police person, I say "again" without even realizing saying it. I have difficulty eating.
- Q Anything else?
- A Hard time sleeping, eating. Were there anything more worse than that? I used to tell my kids long time ago that they need to -- needed to trust police person. And now I tell them not to trust any police person. That's how much I have been stressed out about this. Stress kills people, so this is really bad.
- Q Who's your primary physician?
- A Moo Keun Lee. That's the name of the doctor. If I am sick and I'm -- I feel stressed out and if I can't sleep at night, then I go see a Chinese doctor.
- Q Is it Dr. Moo, M-o-o, middle initial K., Lee, L-e-e? Does that sound right?
- A Yes.
- Q And are you taking any medication because you're stressed out because of running the bar and the interaction with the City of Ruston?
- A I don't accept the fact that I need to take any Western medication for my stress. So I believe it's better for me to go see a Chinese doctor and take Chinese herbal medicine.
- Q So you don't take any prescription medication for your stress?
- A Well, I don't know if this was stress related or not, but I've been experiencing some numbness on my hand. But I rarely go see a doctor. I don't like seeing a doctor. But the numbness came to my legs as well. So I went to see a doctor. They drew the blood, and they did -- they did all the exams on me. And they ended up giving me some medication for a muscle relaxant or something like that.
- Q Who's Dr. Choi, C-h-o-i?
- A I thought the person was kind of a woman's doctor for woman's cancer and something like that for breast cancer and uterine cancer. I don't know.
- Q Were you seeing her because you had a lot of hemorrhoid problems, that kind of thing?
- A Yes. Hemorrhoid, yes.
- Q And that's not related to -- that was all occurring before your complaints about the City of Ruston, correct?
- A I wouldn't know, because the stress had been accumulated already anyway.

Q So you think your hemorrhoid problems are the result of the interaction with the police department in your sports bar?

A In my condition, that's the only way to think.

RP 620-21, Deposition of Kye S. Barker at 55:13-57:17, see also RP 622, excerpted medical records from Moo K. Lee, M.D.

While objective symptomology is not necessary, Ms. Barker has demonstrated that it exists here in the above testimony. Thus, the court should not have granted the defendants' motion for summary judgment. All of the elements for both claims were established.

The defendants relied on the cases of Keates v. City of Vancouver, 73 Wn. App 257, 269, 869 P.2d 88 (1994) and Rodriquez v. Perez, 99 Wn. App. 439, 443, 994 P.2d 874 (2000) for the general proposition that law enforcement officials can never be sued for negligent infliction of emotional distress. CP 635-36. However, those cases involved the alleged negligent investigation/interrogation of suspects, which the courts held could not be used as a basis for the tort. Here, the plaintiffs identified the unjust invasion of their property rights/ability to lawfully conduct a business as a basis for their claims. To be sure, there never was an investigation into the tavern—what was alleged is the continued unlawful harassment that was designed specifically to run them out of business. This goes well beyond some general cause of action for negligence. It was behavior that was specifically addressed at them. As such, the trial court erred in granting the motion for summary judgment on both of these claims.

4. Plaintiffs Established the Necessary Elements Of Interference Of Business Expectancy.

The five elements of a tortious interference with a business expectancy are: "(1) the existence of a valid ... business expectancy; (2) that defendants had knowledge of that [expectancy]; (3) an intentional interference inducing or causing a breach or termination of the ...

expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage." Leingang v. Pierce County Med. Bureau, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

A valid business expectancy is any type of business relationship that would have pecuniary value. Manna Funding, LLC v. Kittitas County, 173 Wn.App. 879, 897, 295 P.3d 1197 (2013). As stated in Scymanski v. Dufault, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971):

All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectation of fruition. And this relationship must be know, or reasonably apparent, to the interferon.

Here, plaintiffs provided sufficient facts to show that they were running a tavern that had been in existence for many years before they purchased it. The defendants were aware of the type of business and the clientele and acted in a way that was specifically designed to hurt the business – hoping to either drive it out of business or force it to change its character. They have shown that the actions of police were for an improper purpose and/or were done by improper means and they have shown clear evidence that those actions cost them customers and income. For these reasons, summary judgment was inappropriate.

5. Plaintiffs Have Presented Evidence To Support The Elements Of Private Nuisance.

A nuisance includes acts that annoy, injure, or endanger the comfort, repose, health, or safety of others and that "render other persons insecure in life, or in the use of property." An activity constitutes nuisance when it interferes unreasonably with a neighbor's use and enjoyment of his or her property." To apply the nuisance doctrine, a court balances the rights, interests, and convenience unique to the case. MJD Properties, LLC v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015).

Here, the facts plainly show that this is a nuisance case – the entirety of the dispute surrounds Mayor Hopkins' frustration with the alleged noise level at the bar. All of the actions of

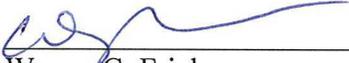
police – which he has encouraged – were intended to annoy and injure plaintiffs and make them insecure in their use of the Unicorn property. Summary judgment was inappropriate.

V. **CONCLUSION**

Based on the foregoing, plaintiffs request that the court reverse the trial court and remand this case for trial on all of the contested claims.

DATED THIS 15th day of June, 2017.

HESTER LAW GROUP, INC., P.S.
Attorneys for Plaintiffs

By: 
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

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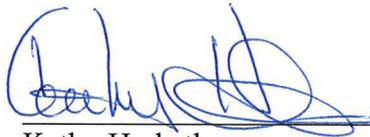
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Signed at Tacoma, Washington this 15th day of June, 2017.



Kathy Herbstler

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