No. 41557-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

HAL MOORE and MELANIE MOORE; and LESTER KRUEGER and BETTY KRUEGER,

Appellants,

v.

STEVE'S OUTBOARD SERVICE, and STEVEN LOVE, and MARY LOU LOVE,

Respondents.

SECOND SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. Introduction

The appellant's Complaint alleged three causes of action against the respondents: (1) Continuing Public Nuisance, (2) Continuing Nuisance, and (3) Violation of Shoreline Management Act. At trial, appellants also argued a mixed theory of nuisance per se by way of a violation of the Shorelines Management Act.

The trial court heard the testimony of numerous witnesses, some of whom lived as near or nearer to the respondents as did the appellants; some who lived in the general area a bit farther away than the appellants, and others who were customers or acquaintances of the respondents.

The trial court carefully considered all of the evidence, balanced the rights, interests, and convenience of the parties, and ruled in favor of the respondents on all claims. In essence, the trial court found that the appellants suffered no injury from which either an injunction or damages could be awarded.

II. Answers to Supplemental Assignments of Error

The appellants allege generally and specifically that the trial court erred when it found that the facts did not support their claims of nuisance. The appellants assign error to numerous findings of fact "as unsupported by substantial evidence when the whole record is considered and/or internally inconsistent and/or an erroneous application of the facts to the

law." The respondents answer that the record as a whole does support the trial court's rulings, the findings of fact are not internally inconsistent and the trial court did not err in applying the facts to the law.

Specifically, appellants claim that more than two dozen findings of fact are in error, as is the court's award of attorney's fees in numerous specifics. Respondents respectfully disagree with each of appellants' claimed errors, and support their disagreement with specific portions of the record, as follows, in the same order used by appellants:

16. Mr. Love's business did not cause any tangible injury to Plaintiff's properties, and there was no contrary testimony. (SCP 211). The appellants' complaints were limited to the alleged impact on their use and enjoyment of their properties. There was no testimony that tangible damage occurred to their properties. (RP 7-119).

20. The outboard is not deafening up close. (SCP 212). Although Ms. Moore testified to the contrary, the trial court found her testimony to be not credible. (SCP 212-213). The trial court's determination of credibility will not be disturbed on appeal. Garofalo v. Commellini, 169 Wash. 704, 705, 13 P.2d 497 (1932).

22. Appellants do not indicate what the objection with this finding of fact is, other than generally as above. The record supports the finding. (RP 16).

23. The trial court was within its discretion to find that Ms. Moore's testimony was not credible. Her testimony was significantly more extreme than any other witness. (RP 88-119, Ms. Moore) (entire record for all other witnesses, (RP 7-87; 121-397).

24. The record supports this finding of fact. All witnesses named testified consistently. (RP 122-184).

25. (RP 16); (RP 65).

28. (RP 51-52, 6-67, 124, 126, 140, 149, 151, 163, 203, 208, 265, 292).

32. (RP 207-209, 215-216, 271, 278-79, 321, 323-331).

33. (RP 16, 51-52, 124, 146, 151, 208, 212-213, 229-230, 265, 277-278, 292, 312, 317-318, 328).

37. (RP 122-184).

49. (15, 51-53, 63, 67-68, 99, 156, 177, 226-227, 290).

54. Both #54 and #55 refer to the same facts. There was no testimony that the business obstructed or impeded traffic on the highway. Several testified that it had not. (RP 72-73, 148-153, 156, 216-218).

55. See 54.

66. (RP 142, 155, 162, 297-298, 308-314, 350-351).

79. There was no testimony by appellants that property values had decreased.

86. (Ex. 1-5).

88. (Ex. 1-5).

91. Appellants offered no evidence that their property was damaged. See 16 above.

C.3, 4, 5, 10. (RP 155, 238-245, 253-254, 263-266, 270-272, 285-286, 310, 313, 342-346).

C.16.2. (RP 16, 51-52, 124, 146, 151, 208, 212-213, 229-230, 265, 277-278, 292, 312, 317-318, 328).

C.16.4. See 32 and 33 above.

C.16.7. See 24 above.

C.16.8. See 22, 24, 33, 37 above.

C.17.1. Credibility is for the trial court. See 20 and 54 above.

D. The Shorelines Management Act provides explicit authority for the attorneys fee award. There was no requirement to segregate where the claims were not able to be segregated.

E. The statute itself supplies the basis for attorneys fees.

F.4. Defendants were in fact the prevailing party.

F.5. This is a correct statement of appellants' arguments. Unclear what the claimed error is.

F.6. Same as F5 above.

F.8. No error. Appellants cannot have it both ways. They cannot seek damages under the Shorelines Management Act should they prevail and at the same time claim they are not subject to damages if they do not prevail.

F.9. No error. The Complaint speaks for itself, as does the trial record.

F.17. No error. Applicable case law supports the fee award, as previously argued in respondents' brief to this court.

F.22. Same as F.17 above.

G. The Shorelines Management Act provides the statutory authority for the fee award.

H. No error. The judgment is supported by the entire record.

III. Issues on Appeal.

A. Did the trial court abuse its discretion in finding that the respondents' business did not cause the appellants injury sufficient to constitute an award of damages or injunction under any of their legal theories?

B. Did the trial court abuse its discretion in awarding the respondents reasonable attorneys fees?

IV. Argument.

A. Nuisance.

An actionable nuisance is defined broadly as "whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to ... interfere with the comfortable enjoyment of ... life and property...." Tiegs v. Boise Cascade Corp., 83 Wn. App. 411, 415, 922 P.2d 115 (Div. III, 1996); RCW 7.48.010; RCW 7.48.120.

'Nuisance' is an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property. In order to recover for nuisance, a plaintiff must show substantial interference with the use and enjoyment of his land. RCW 7.48.010; City of Moses Lake v. United States, 430 F.Supp. 2d 1164, 1184 (2006).

For an actionable nuisance, the interference must be material and substantial, and also unreasonable, and redress may not be had for every slight discomfort or inconvenience. Brady v. City of Tacoma, 145 Wash. 351, 360, 259 P. 1089 (1927).

Further, where the acts complained of cause some interference with property, but do not cause interference that would be considered unreasonable by persons of normal and ordinary sensibilities

under all the facts and circumstances, nuisance is not proved. This is an objective test rather than a subjective test. Riblet v. Ideal Cement Co., 57 Wn.2d 619, 622, 358 P.2d 975 (1961).

In Riblet, neighbors in the same proximity to a cement plant as the plaintiffs testified that they did not find the small amount of cement dust deposited on their properties after the cement plant made improvements to be offensive. The court held that it was proper to instruct the jury on whether the plaintiffs were persons of normal and ordinary sensibilities and upheld the verdict for the cement company defendant. Riblet, at 622- 24.

As stated by another court:

> [T]he enjoyment of one's premises must be sensibly diminished, either by actual tangible injury to the property itself, or by the promotion of such physical discomforts as detract sensibly from the ordinary enjoyment of life. It is not enough that the business sought to be enjoined is productive of inconvenience, or shocks the taste, or diminishes the value of the property in the vicinity, or causes a reduction in rentals. Every person has a right to do with his own property as he sees fit so long as he does not invade the rights of his neighbor unreasonably, judged by the ordinary standards of life, according to the notions and habits of people of ordinary sensibilities and simple tastes.

Crawford v. Central Steam Laundry, 78 Wash. 355, 357-58, 139 P. 56 (1914).

The appellants, Hal and Melanie Moore and Lester and Betty Krueger, argue that violation of a statute constitutes nuisance per se in a strict liability sense. That is, if the respondents Steve's Outboard Service and Steven and Mary Lou Love violated *any* statute or ordinance, they have committed a nuisance per se and are subject to damages and injunction in favor of the Moores and Kruegers. However, this is an erroneous interpretation of the law.

As an example, assume a homeowner builds a shed in his backyard without a required building permit. Could a person residing across town sue for nuisance? The answer is obviously no; there must be some injury to the plaintiff. Mere violation of permit requirements cannot be the proximate cause of injuries; there yet must be something that injures the plaintiff. Tiegs v. Watts, 135 Wn.2d 1, 15, 954 P.2d 877 (1998).

A nuisance per se is a thing that is a nuisance under all times and conditions. A violation of a statute cannot constitute nuisance per se unless there is persuasive proof that the plaintiffs suffered interference with the comfortable enjoyment of life or property, based on an objective standard. Motor Car Dealers Assoc. of Seattle v. Fred S. Haines Co., 128 Wash. 267, 273-74, 222 P. 611 (1924) (Car dealer open on Sunday in

violation of statute not a nuisance per se, because not acts that constitute a nuisance at all times and conditions).

In other words, a nuisance per se is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance. Tiegs v. Watts, at 13. Thus, in order to prevail, a plaintiff pursuing a nuisance per se cause of action must prove that he has suffered injury of the kind needed to prove nuisance.

Here, the trial court was not persuaded that the Moores and Kruegers suffered any particular injury, and that is fatal to all their causes of action. Appellants misconstrue the holding of Tiegs v. Boise Cascade Corp., as holding that any failure to comply with the law renders a defendant strictly liable for nuisance per se. But, in that case, the defendants' actions had poisoned the plaintiff farmers' water wells, causing crop damage. The plaintiffs were significantly injured. Here, the Moores and Kruegers established no significant injury, or injury that would be objectionable to a person of reasonable sensibilities, as shown by the testimony of numerous other witnesses.

The appellant also misconstrued this Court's direction to the trial court, at page 13 of its brief. This Court did not direct the trial court that nuisance per se turns on whether defendants interfered with plaintiffs use and enjoyment of their property, ***and/or*** whether SOS operates lawfully.

This Court did not use the and/or construction; it only used "and", which is completely consistent with the case law. No case holds that violation of any statute or ordinance results in strict liability. There must be injury proved. Where no injury is proved, no damages or injunction can lie.

Appellants also argue that the length of time that the offending acts occur is irrelevant. Again, they are mistaken. The trial court is required to use an objective analysis, balancing the parties competing interests, considering how a person of ordinary sensibilities would be affected, and the injury must be significant. The trial court found that any injury was not significant, based on all of the evidence. That finding is fully supported by the evidence in its totality. Appellants cite Finding of Fact 23 specifically, along with others. But, Finding of Fact 23 was specifically not believed by the trial court, as the judge found Ms. Moore's testimony to be not credible. (SCP 213).

In a footnote at page 15 of their brief, appellants state that this Court directed in its Order at page 2 that "The court may not consider whether interference with Plaintiffs' enjoyment of their property is "reasonable", or should be balanced against any other factors, when analyzing a nuisance *per se* claim." This appears to be an erroneous quote, as the Order does not contain this language. If it was not meant as a quote, it appears to be an erroneous reading of the Court's order. The bottom

line is that the appellants must prove significant injury to prove a claim of nuisance per se. The trial court was not persuaded that the appellants had suffered such injury.

B. Shorelines Management Act.

Finally, the appellants argue that the respondents violated the Shorelines Management Act (SMA). As shown above, even if the respondents did violate the SMA, appellants cannot prevail unless they prove damages. The trial court was not persuaded that they did.

Moreover, the appellants cannot establish that respondents violated the SMA. As shown by the evidence, Steve's Outboard Service (SOS) has been operating in the same location without substantial change since at least 1994. (Ex. 1-5). Currently, SOS operates out of a 300 square foot carport that was built to replace the existing carport in 1994. Mason County permitted the carport replacement in 1994. The appellants did not appeal the decision to issue the permit for the carport.

This issuance of a building permit is a land use decision under the Land Use Petition Act (LUPA). The issuance of a building permit must be appealed within 21 days of the decision to issue the permit. If no appeal is filed, the challenger to the issuance of the permit is barred from challenging the permit. Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006).

In Asche, the plaintiffs claimed that Kitsap County erroneously issued a building permit for a neighbor's house. The house would block their view of Mt. Rainier. But, the claim was barred by LUPA's 21 day statute of limitations for appeal of a land use decision. The plaintiffs also argued that the new home was a nuisance per se, because it violated a Kitsap County zoning ordinance that provided that any permit issued in violation of the zoning ordinances is a public nuisance and is null and void. But again, the 21 day appeal deadline barred the claim, because the plaintiffs would have had to appeal and obtain a decision declaring the permit to be in violation of a zoning ordinance. According to the court, even illegal decisions under local land use codes must be appealed under LUPA. Asche, at 795.

Here, the building permit for the carport was the land use decision; it was issued in 1994; no appeal under LUPA was filed. Indeed, the appellants waited until twelve years later to file their lawsuit in the superior court. There is no decision declaring the permit to be unlawful; appellants arguments that it is unlawful are without requisite support.

But regardless of whether the carport's use as a business violates the SMA, the appellants were unable to persuade the court that they suffered damages sufficient to support any of their claims. Therefore, all claims failed.

C. Attorneys Fees.

As to attorneys fees, appellants again argue that they abandoned any claim for damages under the SMA. This argument was fully answered in the respondent's first brief to the Court of Appeals. The appellants did ask for damages; their two witnesses also testified that they were not necessarily requesting damages, and then they requested damages in their closing argument. They cannot have it both ways; they cannot seek damages in case they prevail, but not seek damages if they do not prevail.

The SMA clearly authorizes a trial court to award attorneys fees to a prevailing defendant, in the court's discretion. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 823, 828 P.2d 549 (1992). The appellants did not prove damages; therefore they did not prevail. The respondents are the prevailing party.

The appellants also mischaracterize Hunt v. Anderson, 30 Wn. App. 437, 635 P.2d 156 (1981). The court in that case did not decline to award attorneys fees because there was "no malicious intent" on part of the defendant. Rather, that was what the plaintiff claimed. Instead, the trial court simply exercised its discretion under the circumstances of the case. Since the plaintiffs did not show an abuse of discretion, the trial court's decision would not be overturned.

Here, there is no showing that the trial court abused its discretion in awarding attorneys fees. The award should stand.

V. Conclusion

For the foregoing reasons, this Court should uphold the decisions of the trial court. The appellants did not persuade the trial court that they suffered damages under any of the theories presented. The respondents were the prevailing party under the SMA; no abuse of discretion was established; the award of attorneys fees should stand.

Respectfully submitted this 25th day of March, 2013.

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I hereby certify that on this 25th day of March, 2013, I caused the original and one copy of the document to which this certificate is attached to be delivered for filing via U.S. Mail to:

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Court of Appeals, Division II
950 Broadway, Suite 300
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I further certify that on this 25th day of March, 2013, I caused a copy of the document to which this certificate is attached to be delivered to the following via U.S. mail:

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Declared under penalty of perjury under the laws of the State of Washington at Shelton, Washington this 25th day of March, 2013.

Bruce J. Finlay
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