63457-7

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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

NO. 63457-7

CHRISTOPHER BOFFOLI,

Appellant,

v.

BOAZ AND JENI HALL,

Respondents.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. Common-Law and Statutory Nuisance and Trespass Apply to Smoking Claims on Private Property. 1

B. Intent to Harm Is Not an Element of Either Nuisance or Trespass. 3

C. Mr. Hall's Cigarette and Charcoal Smoke is the Problem. 4

III. CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Bradley v. Am. Smelting and Ref. Co.,
104 Wn.2d 677, 709 P.2d 782 (1985) 4

Tiegs v. Watts,
135 Wn.2d 1, 954 P.2d 877 (1998) 3

Statutes

RCW 7.48.010 3

RCW 7.48.120 3

RCW 70.160.075 ..... 2, 3

I. INTRODUCTION

On September 21, 2009, Appellant received Boaz Hall's response brief, which contains a broad range of legal and factual contentions.[1] This reply brief is filed to focus the inquiry on the narrow legal questions presented in this appeal. Christopher Boffoli is entitled to be free of nuisance and trespass in his home. The trial court erred in finding that "smoking is a civil right to the citizens of our community" and in ignoring nuisance and trespass law. 5/26/09 RP at 4-5. Further, Christopher Boffoli was entitled to a jury trial on the issue of whether his neighbor's heavy cigarette and charcoal grill smoking caused the damage Mr. Boffoli alleged. The trial court erred in denying Mr. Boffoli a jury, and in finding that Washington law does not support a cause of action for nuisance and trespass caused by smoke.

II. ARGUMENT

A. Common-Law and Statutory Nuisance and Trespass Apply to Smoking Claims on Private Property.

Defendant Hall correctly notes that "Mr. Hall does not live in a public place, so the laws governing public places don't apply" and

[1] Most of Mr. Hall's factual assertions pertain to interactions between the parties. The record does not support Mr. Hall's version of events, and Mr. Boffoli vigorously contests Mr. Hall's characterization of the interactions between the two men. But these interactions are irrelevant to the appeal, and so are not addressed here.

correctly states that "there are no private residences ord[i]nances" governing smoking. Response at 10. But the lack of a statute expressly prohibiting smoking on private property does not immunize him from tort liability for nuisance and trespass when he decides to smoke in a fashion that injects smoke into Christopher Boffoli's townhome. The Washington Legislature has acted to ban smoking in some public places. RCW 70.160.075. The absence of a statutory prohibition on smoke intrusion onto a neighbor's property does not eliminate the common-law and statutory torts of nuisance and trespass.

Mr. Hall's error in believing he is entitled to inject smoke onto his neighbor's property because there is no statutory ban was adopted by the trial court, and is the source of this appeal. The trial court ruled:

> The legislature has drawn the line with regard to public buildings. So that's clear. So it's a very difficult task for this Court, what both parties are asking the Court to do, which is, in essence, to legislate. 4/22/09 RP at 66.
>
> . . .
>
> Currently, smoking is a civil right to the citizens of our community, and I emphasize our community, albeit, a right restricted in public spaces.

5/26/09 RP at 4-5.

Compliance with law does not insulate a defendant from a claim of nuisance if the statutory elements of nuisance can be met. *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998). In *Tiegs*, the court considered a claim for nuisance based on water pollution caused by a business operating under an NPDES permit. The court found that a nuisance per se existed only if the permit conditions were violated, but that a private nuisance could be maintained even when the offensive conduct was "authorized by proper authority" if the action in question "was conducted in a manner which unreasonably interferes with the use and enjoyment of another's property in violation of RCW 7.48.010 and 120." *Id.* at 14-15. In this case, had Christopher Boffoli lived in a publicly-owned apartment building, he would have had a claim for nuisance per se because Hall would have violated RCW 70.160.075. Because Boffoli lives in a private residence, he is protected by RCW 7.48.010 and the common law's private nuisance provisions. The trial court erred in failing to so find.

B. Intent to Harm Is Not an Element of Either Nuisance or Trespass.

Defendant Hall argues that the trial court's ruling must be upheld because "Mr. Hall is not smoking or barbequing to intentionally cause

harm [to] Mr. Boffoli." Response at 11. As an initial matter, the trial court entered no findings related to Mr. Hall's intent or to any elements of either nuisance or trespass; on remand, the trial court should be instructed to weigh the evidence on this and each element. 4/30/09 RP at 2-7. Moreover, there is no requirement that Mr. Hall intend to cause harm: for the torts alleged here, "intent" is established where an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter. *Bradley v. Am. Smelting and Ref. Co.,* 104 Wn.2d 677, 683-88, 709 P.2d 782, 785 (1985).

C. Mr. Hall's Cigarette and Charcoal Smoke is the Problem.

Defendant Hall argues extensively that there was insufficient evidence that the smoke complained of by Boffoli came from Hall. The trial court entered no findings on the source of the smoke. 4/30/09 RP at 2-7. On remand, the trial court should be directed to consider the evidence and enter findings on this and every element of nuisance and trespass.

Ample evidence supports a finding that it is Hall's smoke that is causing the problem. Although Hall offered conjecture at trial that it might be other charcoal grills in the neighborhood or smokers passing by

in the alley, Boffoli's uncontroverted evidence was that he watched cigarette smoke leave a cigarette smoked by Hall and drift towards Boffoli's windows and air vents. Shortly thereafter, he smelled smoke. He did not smell smoke when he observed persons walking by smoking in the alley. 4/21/09 RP at 47-52; 57-58. Boffoli also entered into evidence a photograph showing heavy, black smoke leaving Hall's charcoal grill and entering his vents. 4/21/09 RP at 60-62; Ex. 1.

III. CONCLUSION

For the reasons argued herein and in Appellant's Opening Brief, the matter should be reversed either for a jury trial or a bench trial for entry of findings on the elements of nuisance and trespass.

DATED this 9th day of October, 2009.

Respectfully submitted,

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DIVISION I

CHRISTOPHER BOFFOLI, Petitioner, v. KEITH and CARMEN ORTON, a marital community; and BOAZ and JENI HALL, a marital community, Respondent.	COURT OF APPEALS NO. 63457-7-1 DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, FLORITA COAKLEY, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Gendler & Mann, LLP, attorneys for petitioner herein. On the date and in the manner indicated below, I caused the Reply Brief of Appellant to be served on:

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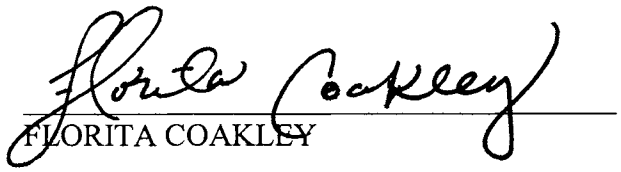
DATED this 9TH day of OCTOBER, 2009, at Seattle, Washington.



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