

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 11-0355

ROBERT P. BANSBACH and
RICKIE BANSBACH,
husband and wife,

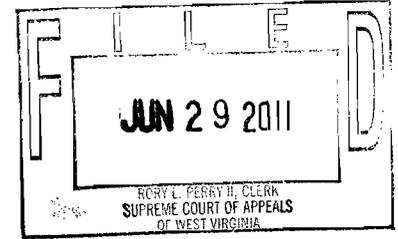
Appellants,

v.

Appeal from a final order
of the Circuit Court of Marion County
(10-C-5)

DANIEL HARBIN and
MARY FANOK,

Appellees.



Appellants' Initial Brief

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TABLE OF CONTENTS

Assignments of Error	1
Statement of the Case	1
Summary of Argument	5
Statement Regarding Oral Argument and Decision	6
Argument	6
Conclusion	21
Certificate of Service	21

TABLE OF AUTHORITIES

1. Case Law

<u>Cohen v. California</u> 403 U.S. 15, S. Ct. 1780, L. Ed. 2d 284 (1971) (Blackmun J.).....	18
<u>Hustler Magazine, Inc. v. Fallwell</u> 485 U.S. 46, 108 S. Ct. 876, L. Ed. 2d 41 (1988) (Rehnquist, J.).....	19
<u>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</u> 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (Powell, J.).....	19
<u>Frisby v. Schultz</u> 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)	20
<u>State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. Telecheck Services, Inc.</u> 213 W.Va. 438, S.E. 2d 885 (W. Va. 2003)	7
<u>Burch v. Nedpower Mount Storm, LLC</u> 220 W.Va. 443, S.E. 2d 879 (W.Va. 2007).....	12
<u>Parkersburg Builders Material Co. v. Barrack</u> 118 W.Va. 608, S.E. 368 (W.Va. 1937)	13
<u>Hendricks v. Stalnaker</u> 181 W.Va. 31, S.E. 2d 198 (W.Va. 1989)	15
<u>Harvey v. Ryan</u> 59 W.Va. 134, 53 S.E. 7 (W.Va. 1906).....	17
<u>Medford v. Levy</u> 31 W.Va. 649, 8 S.E. 302 (W.Va. 1888)	19
<u>State v. Berrill</u> 196 W.Va. 578, 474 S.E. 2d 508 (W.Va. 1996)	20
<u>State v. Thorne</u> 175 W.Va. 452, 333 S.E. 2d 817 (W.Va. 1985)	20
<u>Larkin v. Tsavaris</u> 85 So. 2d 731 (Fla. 1956).....	15

Smith v. Morse
 148 Mass. 407, 19 N.E. 393 (Mass. 1889) 15

Welsh v. Todd
 260 N.C. 527, 133 S.E. 2d 171 (N.C. 1963)..... 15

Hollowood Silver Fox Farm v. Emmett
 2 K.B. 468 (1936)..... 15

2. Statutory Law

West Virginia Code §61-16(a)(4) (1984) 20

3. Other Authority

Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* 31 (2d ed. 1898) 17

State of West Virginia Department of Environmental Protection Litter Control Standard Operating Procedure (LCSOP) 15

ASSIGNMENTS OF ERROR

1. THE LOWER COURT ERRED IN FINDING THAT DANIEL HARBIN AND MARY FANOK'S DELIBERATE AND SPITEFUL CREATION OF A JUNKYARD ON A PORTION OF MARY FANOK'S PROPERTY THAT LIES DIRECTLY ACROSS A PUBLIC RIGHT-OF-WAY FROM THE APPELLANTS' RESIDENCE, DOES NOT CONSTITUTE A NUISANCE.
2. THE LOWER COURT ERRED IN FINDING THAT MARY FANOK'S PLACING SIGNS OF AN INSULTING AND OFFENSIVE NATURE TO RICKIE BANSBACH IN PLACES THAT MADE THEM PLAINLY VISIBLE TO THE APPELLANTS ON THEIR PROPERTY, AND THE PRACTICE BY DANIEL HARBIN AND MARY FANOK OF YELLING PROFANITIES AND INSULTS AT THE APPELLANTS AS THEY PASSED BY THE APPELLANTS' RESIDENCE, WAS PROTECTED SPEECH UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

STATEMENT OF THE CASE

For approximately the last six years, Appellants, ROBERT P. BANSBACH and his wife, RICKIE JEAN BANSBACH, have resided at their residence fronting Soap Hollow Road, a public road near the City of Mannington, West Virginia. At the time of the initial hearing on the Appellants' Motion for Preliminary Injunction, the Appellants' adult daughter, Leyna Bansbach, a member of the Army Reserve and veteran of the Afghanistan War, also resided with them. Appellee DANIEL HARBIN and his girlfriend, Appellee MARY FANOK, reside together at MARY FANOK's residence on her land, which is located directly across a public road commonly known as "Soap Hollow Road" from the Bansbach property. (A.R. Vol. II, 4-8.) Additionally, DANIEL HARBIN is an at-will tenant on another property, consisting of 80 acres, which is owned by his parents, John

and Donna Harbin, that is located adjacent to the western boundary of the Bansbachs' property. (A.R. Vol. III, 33-35; A.R. Vol. I, 8)

During the normal workday week, Appellant ROBERT P. BANSBACH, who is employed as an instrumentation technician at a nuclear power plant in Pennsylvania, which is located approximately 300 miles from the Bansbachs', is absent from the Bansbach property, and is only in residence during the weekends. (A.R. Vol. II, 5.)

Up until the summer of 2009, the Appellants enjoyed "generally friendly" relations with both DANIEL HARBIN and MARY FANOK. (A.R. Vol. II, 6) During that summer, the Appellants experienced what they described as a "falling-out" with DANIEL HARBIN. (A.R. Vol. II, 7; A.R. Vol. III, 39.) Prior to the occurrence of this "falling-out," the portion of MARY FANOK's property directly across from the Appellants' house had had an uncluttered and pastoral appearance. (A.R. Vol. II, 8; A.R. Vol. I, 9-11, 85-90.) Commencing on August 12, 2009, however, this all changed, as DANIEL HARBIN started to haul various items of junk from his parents' property to MARY FANOK's former pasture across the road from the Appellants' residence. (A.R. Vol. II, 10-13.) These items of junk included such items as trailer frames; an abandoned bucket seat; a dehumidifier; a "porta-potty," which, along with several tires, was utilized by DANIEL HARBIN to festoon the fence posts on MARY FANOK's property bordering Soap Hollow Road; a discarded television set; a discarded computer monitor; an engine block; a camper trailer; numerous items of building materials; horse trailers; a large black hose tied to the fence; a dryer; PVC cots; corrugated tubing pipe, etc.) Around the same time, DANIEL HARBIN also

posted a sign on his newly-created junkyard that was plainly visible from the Bansbachs' house and which stated: "Lazy Man Salvage. Call 1-800-KISSMY____. ww.LazyMan.com." (A.R. Vol. I, 12-14, 41-42, 63-65, 75, 78, 91-98.)

As time passed, the Appellees' harassment campaign against the Appellants continued to escalate. For instance, MARY FANOK posted several signs on her property along Soap Hollow Road which were clearly visible to the Bansbachs on their own property, and which were directed at RICKIE BANSBACH. One sign stated: "Nosey [*sic*] bitch, look out, no photos;" another sign stated: "When entering beep 3 times, when leaving beep twice. Nosey [*sic*] bitch log in;" a third sign stated: "Do not stare, you may go blind, nosey [*sic*] bitch;" while a fourth sign stated: "Coming soon, D&M Hog Farm." (Subsequent to MARY FANOK's posting this sign, presumably in order to reinforce the effect of this apparent threat to the Bansbachs to create a "hog farm" on MARY FANOK's property, DANIEL HARBIN deposited a quantity of pig manure on MARY FANOK's property not far from Soap Hollow Road.) (A.R. Vol. II, 13-14, 17; A.R. Vol. III, 38; A.R. Vol. I, 82-84, 92-94.)

Additionally, MARY FANOK frightened the Bansbachs' daughter, Leyna, by stalking her while she was jogging along Soap Hollow Road as part of her Army Reserve physical training regimen. (A.R. Vol. III, 11.) On another occasion, DANIEL HARBIN scared RICKIE BANSBACH and a second daughter, Erica Bansbach (who had moved into her parents' residence after being released from active duty in the U.S. Navy), by blocking them with his truck from returning to their home from a neighbor's property located further down Soap Hollow Road.

(A.R. Vol. IV, 6-12.) Additionally, both MARY FANOK and DANIEL HARBIN would frequently harass the Bansbach family by yelling out profanities and insults when driving by on Soap Hollow Road past the Bansbachs' house. (A.R. Vol. II, 27.)

On January 7, 2010, the Appellants filed a civil action against DANIEL HARBIN and MARY FANOK and DANIEL HARBIN's parents, John Harbin and Donna Harbin. In Count I of their Civil Complaint, the Bansbachs sought injunctive relief requiring Defendants MARY FANOK and DANIEL HARBIN to eliminate the "junkyard" on MARY FANOK's property, and which further enjoined DANIEL HARBIN "from stalking RICKIE BANSBACH and any other members of her household." (A.R. Vol. I, 1-14.) Additionally, subsequent to filing their civil action against DANIEL HARBIN, MARY FANOK, John Harbin, and Donna Harbin, the Appellants filed a Motion for Preliminary Injunction seeking to enjoin them from various types of conduct, including the maintenance of a junkyard on MARY FANOK's property, the posting of the insulting signs directed at RICKIE BANSBACH on MARY FANOK's property, and which sought to otherwise enjoin DANIEL HARBIN and MARY FANOK from continuing their "campaign of harassment" against the Appellants. (A.R. Vol. I, 28-37.)

The lower court conducted an evidentiary hearing on the Plaintiffs' Motion for Preliminary Injunction, which, due to the limitations of time, was heard in three separate sessions: May 20, 2010; July 9, 2010; and October 21, 2010. On May 21, 2011, the court entered an Order styled: "Order Continuing Hearing on Preliminary Injunction and Issuing Temporary Injunction," which, in pertinent part, issued a temporary injunction prohibiting the Defendants "...from erecting

any additional signs, from harassing the Plaintiffs in any way, and from storing any additional items of personal property, except implements of husbandry, on the Fanok property across the road from the Plaintiffs' property." (A.R. Vol. I, 47-48.) Following the completion of the evidentiary hearing on the Appellants' Motion for a Preliminary Injunction, the court, on January 28, 2011, entered its "Order Denying Plaintiffs' Motion for Preliminary Injunction and Dissolving Temporary Injunction." On February 4, 2011, Appellants timely filed the instant Appeal from the lower court's Order Denying the Appellants' Motion for a Preliminary Injunction and Dissolving the Temporary Injunction that the lower court had previously entered on May 21, 2010. (A.R. Vol. I, 49-58.)

SUMMARY OF ARGUMENT

1. That the lower court erred in finding that the junkyard created by Appellee DANIEL HARBIN on Appellee MARY FANOK's property was not a nuisance, because Mr. Harbin's sole motive in creating the junkyard was to harass and upset the Appellants, with whom he was feuding.

2. That the lower court erred in finding that the insulting and offensive signs posted by Appellee, MARY FANOK, on her property, and which were directed at Appellant RICKIE BANSBACH, and DANIEL HARBIN's and MARY FANOK's practice of yelling out profanities and insults to the Appellants was constitutionally protected conduct under the First Amendment of the U.S. Constitution. The insults rendered by the Appellees against the Appellants were not protected speech because they had no public significance and, although

taking the form of speech, constituted harassment, which is not protected under the First Amendment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants respectfully request to be afforded oral argument with respect to this Appeal, which they believe is suitable for oral argument under Rule 19 because this case involves assignment of errors in the application of civil law. Additionally, Appellants believe that this case is suitable for Rule 19 argument because it involves matters of important public policy. Alternatively, Appellants believe that this case is likewise suitable for Rule 20 argument, because they believe it involves issues of first impression in West Virginia, i.e., whether the establishment of an unsightly junkyard on a landowner's property that is created for no other motive than to spite another neighbor can be enjoined by a court of competent jurisdiction.

ARGUMENT

I. THE LOWER COURT ERRED IN FINDING THAT DANIEL HARBIN AND MARY FANOK'S DELIBERATE AND SPITEFUL CREATION OF A JUNKYARD ON A PORTION OF MARY FANOK'S PROPERTY THAT LIES DIRECTLY ACROSS A PUBLIC RIGHT-OF-WAY FROM THE APPELLANTS' RESIDENCE, DOES NOT CONSTITUTE A NUISANCE.

In reviewing the exceptions to the Findings of Fact and Conclusions of Law supporting the denial of a temporary or preliminary injunction, the Supreme Court of Appeals of West Virginia applies a three-pronged deferential standard of

review. It reviews the final order denying the temporary injunction and the ultimate disposition under an abuse of discretion standard, it reviews the circuit court's underlying factual findings under a clearly erroneous standard, and reviews questions of law de novo. *See State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. Telecheck Services, Inc.*, 213 W.Va. 438, 448, 582 S.E. 2d 885, 895 (W. Va. 2003). Paragraph 19 of the lower court's Conclusions of Law contained in its Order Dissolving the Temporary Injunction and Denying the Appellants' Motion for Preliminary Injunction states as follows:

This Court is of the opinion that the materials stored on the Fanok property does not create a private nuisance, that the defendants' posting of signs and shouting profanities at the plaintiffs does not amount to "fighting words," and that the defendants' behavior is not so outrageous that it must be enjoined.

The plaintiffs' main complaint about the Fanok property is that it is unsightly. According to West Virginia case law, the courts have been hesitant to find a private nuisance based on an activity's unsightly nature without it being accompanied by other complaints. *Additionally, the property is not in a residential area: the property is located six to eight miles outside of the city of Mannington and the surrounding properties are primarily farm land.* Therefore, the defendants' storing of farm equipment, building materials, *and, perhaps, junk* on the Fanok property does not create a nuisance which must be abated by this court. (Emphasis supplied.)

The foregoing Conclusion of Law is clearly erroneous in the following respects:

In finding that the "junkyard" created by DANIEL HARBIN on MARY FANOK's property, while conceding that some of the items placed in the junkyard constituted "perhaps, junk," the court appears to have accepted Mr. Harbin's disingenuous argument that the creation of the junkyard was part and parcel to his alleged "husbandry." The record below, however, is replete with overwhelming evidence that Mr. Harbin's motivation in creating the junkyard directly in front of the Appellants' house had no other purpose but to aggravate

and upset the Appellants. The hanging of tires on the fence posts on MARY FANOK's property bordering Soap Hollow Road, for instance, clearly could not have any legitimate connection with farming activities, nor, for that matter, could the placing of porta-potties on other fence posts on the Fanok property serve any conceivable legitimate purpose, nor could the tying of a large hose on one of the fence posts, or the leaning of a discarded door against the fence, realistically, further any of Mr. Harbin's claimed agricultural pursuits. The photographic evidence contained in the record clearly shows that Mr. Harbin has cluttered the field on the Fanok property in front of the Appellants' house with many derelict items (a computer monitor, television sets, a clothes dryer, an engine block, a discarded bucket seat, etc.) that could not reasonably be found to further any of Mr. Harbin's agricultural or any other legitimate activities. That the goal on the part of Mr. Harbin and his girlfriend, Ms. Fanok, in creating the junkyard was to aggravate and upset the Appellants is further borne out by the fact that the creation of the junkyard closely coincided with the falling-out between Mr. Harbin and Mrs. Bansbach, which occurred during the summer of 2009.

Prior to August 2009, the field on the Fanok property across from the Appellants' house had, as is clearly illustrated by several of the photographs in the record, a highly bucolic quality. On August 12, 2009, that all changed, for it was on that date that DANIEL HARBIN started hauling miscellaneous items of worn-out and discarded articles from his parents' 80-acre property to MARY FANOK's field. Additionally, if there could be any conceivable lingering doubt as to Mr. Harbin's true motive in creating his junkyard in the front of the Plaintiff's house, such doubt would be entirely dispersed by the sign that he erected on the

fence, obviously so as to annoy his neighbors even further, which stated: “Lazy Man Salvage. Call 1-800-KISSMY_____. ww.LazyMan.com.”

In the face of this glaring evidence of Mr. Harbin’s antagonistic motive towards the Appellants in creating the junkyard, during his testimony at the hearing, he attempted to portray himself as a “farmer” who created the junkyard solely to further his husbandry pursuits. The disingenuous nature of Mr. Harbin’s position in this regard was clearly revealed by the answers he gave to questions that were addressed to him during cross-examination. For instance, during Mr. Harbin’s cross-examination, the following colloquy occurred:

Q. Who put the tires on the fence there?

A. I did.

Q. Couldn’t you find someplace else to put your tires other than that fence post?

A. No. Those were new posts and you can put those on to protect it, plus I could have – it kept them up off the ground so that they didn’t get water in them.

Q. So you just did that to protect the fence, right?

A. Yeah.

Q. And then you see the porta-potty on the fence post?

A. Yeah.

Q. You couldn’t find another place to store that porta-potty except the top of the fence post directly across from my clients’ property?

A. No. That’s where I put that to match the landscaping that she had put up.

Q. I see. So you did that to retaliate against Mrs. Bansbach?

A. No.

Q. Right?

A. Just keeping up with the Joneses.

Q. I see. Okay. now, do you see the door there against the fence there?

Is that what you would refer to as building materials?

A. Yes.

Q. And you have all these buildings on your parents' property that you have access to, but you couldn't store that in your parents' property's outer buildings, is that correct?

A. Correct.

Q. The only place you could put that door was in front of my clients' fence – on the fence directly across from my clients' house? You couldn't find any other place to put it?

A. At that time, no.

Q. I see. Now do you see the "Lazy Man Salvage, call 1-800-kiss my," do you see that sign there, sir?

A. Yes.

Q. Who put that sign there?

A. I did.

Q. And was that directed to my clients?

A. No.

Q. You just put it there for what reason?

A. Because people had been saying that I was a lazy man, so I wanted to prove that I wasn't.

Q. So you weren't doing that to be malicious towards my clients, is that right?

A. Right.

Q. But that sign was directly across from my clients' house, right?

A. Yes, it was.

Q. And could be easily visible from their front porch, correct?

A. Yes.

Q. And you did that on August 12, 2009, right?

A. That's when the picture was taken.

Q. Would you agree that's the date when you did it?

A. Yeah, I would say so.

Q. Now, that's a long time before November 14, 2009, when you testified that they denied you right to what you believe is your right-of-way across their property, correct?

A. Yeah.

(A.R. Vol. III, 35-38.)

The relentlessness of Mr. Harbin's campaign of hostility, aided and abetted by Ms. Fanok, against the Bansbachs, is further demonstrated by the clear evidence that even after the court issued a temporary injunction on May 21, 2010, enjoining the Appellees from harassing the Appellants "in any way, and from storing any additional items of personal property, except items of husbandry, on the Fanok property across the road from the Plaintiffs' property,"

Mr. Harbin apparently could not resist the urge to harass the Bansbachs. For instance, after the temporary injunction was issued, he continued to transport new items of junk to MARY FANOK's field; after the initial hearing session, Mr. Harbin moved a large amount of broken glass and other materials to the site which he alleged he was going to utilize in the construction of a shed on the property, a project which, after some desultory efforts by him, he apparently abandoned. Then, there was the incident during the late summer of 2010, when Mr. Harbin harassed Mrs. Bansbach and her daughter, Erica Bansbach, by deliberately blocking the road with his truck so they could not return to their home on their ATVs from a visit to a neighbor's property.

In its decision to deny the Appellants' Motion for Preliminary Injunction, the court appears to have relied heavily on this Court's prior decision in Burch v. Nedpower Mount Storm, LLC, 220 W.Va. 443, 647 S.E. 2d 879 (W.Va. 2007). That case involved the appeal by seven homeowners of an order of the Circuit Court of Grant County dismissing (by granting the defendants' Motion for Judgment on the Pleadings) the homeowners' nuisance claim against two wind energy companies. It had been the homeowners' objective to obtain an injunction enjoining the defendant wind energy companies from constructing and operating a wind power facility which they maintained would reduce their enjoyment of their respective properties, on the ground that they would otherwise be negatively impacted by noise, be exposed to equipment dangers, and experience property value reductions. Although the Supreme Court of Appeals reversed the order dismissing the homeowners' action, and remanded the case back to the Grant County Circuit Court, the lower court below was evidently impressed by the

Supreme Court of Appeals' apparent reaffirmation in Burch of its earlier holding in Parkersburg Builders Material Co. v. Barrack, 118 W.Va. 608, 191 S.E. 368 (W.Va. 1937). In the latter case, this Court stated that "...unsightliness alone rarely justifies interference by a circuit court applying equitable principles, an unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances." Id. at 456.

For a number of reasons, however, the lower court's reliance on Parkersburg Builders Material Co., *supra*, was erroneous. Firstly, the lower court appears to have misconstrued what this Court meant by the term "residential" as utilized in that opinion. The facts set forth in the case show that the area in which the offending automobile storage area was located was overwhelmingly in the nature of a business district. The court noted that although there were few residents close to the automobile storage area, the immediate area was occupied by several other business establishments, including three automobile service stations, a restaurant and dance hall, a creamery, and an automobile repair shop. Moreover, located only about 200 feet east of the automobile storage facility was a storage place for pipe used by a natural gas producing company. Id. at 609. Although the court found that, due to the fact that the objectionable storage facility was located in a neighborhood that was occupied predominantly by businesses as opposed to private residences, it was not a private nuisance, the court also held that

An automobile junk yard is not necessarily an objectionable place. The business of buying old automobiles, wrecking them and selling serviceable parts as such and junking the residue is an honorable and useful business. But an outdoor lay-out of a business of that kind necessarily is not pleasing to the view. Such business,

therefore, should not be located in a community of unquestioned residential character. Id. at 613.

The situation involving the automobile storage facility in Parkersburg Builders Material Co. is easily distinguishable from Mr. Harbin's junkyard.

Firstly, although the neighborhood in which both the Appellants and Appellees dwell is admittedly a rural one, it is, nevertheless, still a residential neighborhood.¹ There are only a few families residing along Soap Hollow Road; Appellant ROBERT P. BANSBACH works for a nuclear facility in Pennsylvania; Mrs. Bansbach is a homemaker; and while Mr. Harbin and Ms. Fanok may have a few animals on the Harbin and Fanok properties, they cannot seriously claim that they are, in any meaningful way, deriving their respective livelihoods from farming of any kind.²

Therefore, Mr. Harbin's contention that his storage of his junk on Ms. Fanok's property is simply intended to further his agricultural pursuits is pure sophistry; that is, it is a poorly-concealed attempt to cloak his old-fashioned Hatfield and McCoy feuding against his neighbors in a veil of legitimacy. The practical fact of stripping Mr. Harbin of his disguise as a genuine farmer should, likewise, strip him of any protection under such precedents as Parkersburg Builders Material Co. and its progeny. The underpinning of Parkersburg Builders Material Co. was a desire on the part of this Court to balance the societal interest in protecting legitimate business activities with the inconvenience that some business activities may naturally occasion private homeowners. This Court's

¹ The word "residential" is defined: "of, relating to, or having residents."

² Although Mr. Harbin testified that he had in the past maintained a few pigs on his parents' property as part of a 4-H project, it appears that he mainly derives his income from selling secondhand property at various flea markets. (A.R. Vol. III, 17, 48-49.)

decision in that case was obviously influenced by the fact that the offending automobile storage lot was located in a locale that had an overwhelmingly commercial character.

But, such a balancing of commercial interests with private interests in the case presently before the Court would be entirely superfluous, because Mr. Harbin's junkyard on Ms. Fanok's property is not intended and, in fact, does not serve any useful societal purpose; it is intended solely to annoy and upset the Bansbachs.³ Thus, the lower court, in denying the Appellants' Motion for a Preliminary Injunction, which, in practical effect, permits Mr. Harbin and Ms. Fanok to continue their campaign of harassment against their neighbors, does not further the public policy that Parkersburg Builders Material Co. and its progeny were intended to do. At the same time, the lower court's decision undermines two other important public policies.

Firstly, the State of West Virginia, as is reflected by its establishment of the Rehabilitation Environmental Action Plan (REAP) under the auspices of the Department of Environmental Protection (DEP), has clearly adopted a public policy of discouraging litter and other forms of blight. In November 2005, the DEP promulgated its Litter Control Standard Operating Procedure (LCSOP). Section 1 of the LCSOP states:

³ Even where the use by an offending landowner of his or her property that forms the basis for a neighboring landowner's nuisance complaint is perfectly lawful, a nuisance may be found nevertheless where the offending landowner's motivation in engaging in the complained-of conduct is intentional, i.e. intended to maliciously interfere with the neighboring landowner's use and enjoyment of his or her own property. *See Larkin v. Tsavaris*, 85 So. 2d 731, 732 (Fla. 1956). *See also Hendricks v. Stalnaker*, 181 W.Va. 31, 35, 380 S.E. 2d 198, 202 (W.Va. 1989); *Smith v. Morse*, 148 Mass. 407, 19 N.E. 393 (Mass. 1889); *Welsh v. Todd*, 260 N.C. 527, 133 S.E. 2d 171 (N.C. 1963); and *Hollowood Silver Fox Farm v. Emmett*, 2 K.B. 468 (1936).

The purpose of this Litter Control Standard Operating Procedure (SOP) is to provide a consolidated reference document for counties and municipalities to take ownership in planning, managing and conducting the cleanup of litter than spoils West Virginia's scenic beauty. Unsightly litter causes a great hindrance in recruiting businesses and jobs and ultimately reduces the rate of return on state economic development stimulus provided to counties and communities.

For the purpose of this SOP, the term litter encompasses highway litter, open dumps, waste tire piles, junk cars, dilapidated structures and any other discarded solid waste that blights our state. The SOP identifies the statutory authorities and technical information needed to provide a strong deterrence to illegal littering. It also provides the impetus for litter cleanup.

County and local government officials wishing to obtain the full economic assistance provided by state government must aggressively utilize all available authorities and resources to clean up their communities and rural areas. These efforts will be rated in the context of this SOP.

Permitting Mr. Harbin and Ms. Fanok to maintain an unsightly and, potentially, unhealthful⁴ junkyard that is intended to serve no other purpose than to cause the Appellants distress and to undermine their ability to fully enjoy their property clearly is contrary to the prevailing strong public policy of the State of West Virginia to discourage the proliferation of "litter."

Secondly, the lower court's decision in denying the Appellants' Motion for Preliminary Injunction also tends to undermine the long-standing tradition in Anglo-American jurisprudence of discouraging feuding between neighbors. The evidence that Mr. Harbin and Ms. Fanok are indeed engaged in a feud against the Appellants is demonstrated not only by the creation of the junkyard on the Fanok property, but also by their campaign of insulting and harassing their neighbors.

⁴ On at least one occasion, as a result of rainfall, numerous items of junk washed from the Fanok property onto Soap Hollow Road. (A.R. Vol. II, 21; A.R. Vol. I, 96.)

The evolution of the administration of justice by courts in England was, to a large degree, brought on by the need to eliminate disruptions of order and lawlessness that was brought on by feuding in medieval times. Essentially, the courts implicitly entered into a compact with the citizenry by assuming the obligation of regulating disputes between neighbors, thereby forcing the disputants to resolve their disputes within the confines of the court, rather than by themselves, which would, inevitably, result in violence and the spilling of blood. *See* Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* 31 (2d ed. 1898).

The lower court, in declining to regulate the ongoing dispute between the Appellants and Appellees, notwithstanding the fact that the Mr. Harbin's and Ms. Fanok's conduct towards the Bansbachs is obviously motivated by nothing more than malice, has effectively disregarded one of the inherent roles of an equity tribunal, i.e. to protect a party against probable future misbehavior by dispensing "preventive justice." *See Harvey v. Ryan*, 59 W.Va. 134, 139, 53 S.E. 7, 10 (W.Va. 1906). As stated above, Mr. Harbin and Ms. Fanok's conduct in creating the junkyard is simply one facet, albeit a major facet, of their continuing campaign of harassment against the Bansbachs, and particularly, against RICKIE BANSBACH. A highly probable practical effect of the lower court's having denied the Bansbachs preventive justice will be to encourage Mr. Harbin and Ms. Fanok to continue to harass their neighbors.

II. THE LOWER COURT ERRED IN FINDING THAT MARY FANOK'S PLACING SIGNS OF AN INSULTING AND OFFENSIVE NATURE TO RICKIE BANSBACH IN PLACES THAT MADE THEM PLAINLY VISIBLE TO THE APPELLANTS ON THEIR

PROPERTY, AND THE PRACTICE BY DANIEL HARBIN AND MARY FANOK OF YELLING PROFANITIES AND INSULTS AT THE APPELLANTS AS THEY PASSED BY THE APPELLANTS' RESIDENCE, WAS PROTECTED SPEECH UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

In its Order Denying the Appellants' Motion for Preliminary Injunction and Dissolving Temporary Injunction, the lower court found that the insulting and offensive signs that Ms. Fanok had posted on her property in such a way that they were plainly visible to the Appellants from their own property and the practice of Ms. Fanok and Mr. Harbin of shouting profanities and insults at the Appellants as they passed by their house in their vehicles on Soap Hollow Road, constituted protected speech under the First Amendment of the U.S. Constitution. The circuit court, in reaching this conclusion, relied chiefly on Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (Blackmun J.). In this case, the United States Supreme Court reviewed the conviction of a Paul Robert Cohen by the Los Angeles Municipal Court of violating that part of the California Penal Code which prohibits a person from "maliciously and willfully disturbing the peace of any neighborhood or person...by...offensive conduct..."

The basis for Mr. Cohen's alleged disturbance of the peace was his appearing in a municipal courtroom wearing a jacket on which the words "fuck the draft" were plainly visible. The U.S. Supreme Court, however, in reversing Mr. Cohen's conviction, found that Mr. Cohen's conviction had rested solely upon speech; that his vulgar allusion to the selective service system did not constitute obscene expression; that Mr. Cohen's words did not fall within the constitutional principal authorizing the state to proscribe the use of "fighting words," that

California could not excise as offensive conduct, one particular scurrilous epitaph from the public discourse, either upon the theory that its use was inherently likely to cause violent reaction, or upon a more general assertion that the states, acting as guardians of public morality, could properly remove this offensive word from the public vocabulary; and that absent a more particularized and compelling reason for its actions, the State could not consistently with the First and Fourteenth Amendments, make the defendant's simple public display of this single four-letter expletive a criminal offense.

The reliance by the circuit court, however, on Cohen, *supra*, to find that Mr. Harbin's and Ms. Fanok's conduct in insulting the Bansbachs was constitutionally protected speech, was clearly an erroneous one. This is because, unlike the case with Mr. Cohen, the insulting and offensive words of the Appellees was not speech that concerned an important public issue; but, instead, was speech that lacked any public significance and concerned purely a private matter. Speech that has no public significance is entitled to much less rigorous protection under the First Amendment. *See Hustler Magazine, Inc. v. Fallwell*, 485 U.S. 46, 50-51, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (Rehnquist, J.) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758, 105 S. Ct. 2939, 86 L. Ed. 2d 593 [1985] [Powell, J.]).

The insulting and offensive words of Mr. Harbin and Ms. Fanok towards the Appellants constitute an infringement on the Bansbach family's ability to peacefully enjoy their home. As this Court stated in Medford v. Levy, 31 W.Va. 649, 655, 8 S.E. 302, 306 (W.Va. 1888): "Every family possesses, under the law, the legal right to security in its home; *to have peace, quiet and comfort against*

purely wanton and needless attacks from those whose hostility they may have in some way incurred." (Emphasis supplied.) Moreover, as this Court has also previously held, the rights afforded by the U.S. Constitution are not a license to trample upon the rights of others. Rather, they must be exercised responsibly without depriving others of their rights, the enjoyment of which is equally precious. See State v. Berrill, 196 W.Va. 578, 586, 474 S.E. 2d 508, 516 (W.Va. 1996). The Appellees' conduct, even though it may have taken the form of speech, was harassment, plain and simple. In State v. Thorne, 175 W.Va. 452, 333 S.E. 2d 817 (W.Va. 1985) (*cert. denied*), 474 U.S. 996, 106 S. Ct. 413, 88 L. Ed. 2d 363, (1985), this Court reviewed the conviction of Hillary Thorne in the Cabell County Circuit Court. Mr. Thorne, a civil rights activist, was convicted of having violated West Virginia Code §61-16(a)(4) (1984), which prohibits a person from making repeated telephone calls during which conversation ensues, with the intent to harass any person at the called number. In his appeal to this Court, Mr. Thorne contended, in part, that the statute under which he had been convicted unduly infringed the First Amendment because it was overbroad.

This Court, however, in denying Mr. Thorne's appeal, held that harassment is not protected speech, even though it may take the form of speech. Id. at 454. Further, as the U.S. Supreme Court stated in the case of Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988):

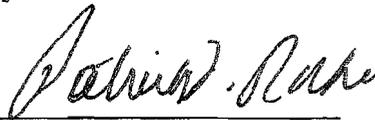
One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different...[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech

into their own homes and that the government may protect this freedom.

Given the fact that MARY FANOK's signs and she and Mr. Harbin's practice of yelling out insults as they pass by the Bansbachs' residence is simply harassment, albeit harassment that takes a verbal form, and which in no way concerns a communication of any type of message that has public significance, the lower court's finding that their activities were protected under the First Amendment of the U.S. Constitution was plainly in error.

CONCLUSION

For the reasons set forth herein above, the Order of the Marion County Circuit Court vacating its earlier Temporary Injunction against the Appellees and denying the Appellees' Motion for a Preliminary Injunction should be reversed.

Signed: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2011, true and accurate copies of the foregoing **Appellants' Initial Brief** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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