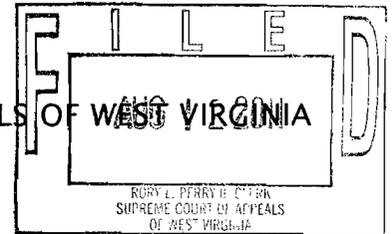


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON

ROBERT P. BANSBACH and
RICKIE BANSBACH,
APPELLANTS,

VS.

SUPREME COURT DOCKET NO. 11-0355

DANIEL HARBIN,
MARY FANOK,
JOHN HARBIN and
DONNA HARBIN,
APPELLEES.

APPEAL FROM THE ORDER OF THE
CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

Counsel for Appellees:
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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

ROBERT P. BANSBACH and
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VS.

CIRCUIT COURT NO. 10-C-5
MARION COUNTY, WV

DANIEL HARBIN,
MARY FANOK,
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APPELLEES.

Appearance by D. Conrad Gall, Esq. for APPELLEES
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(304) 363-5632

Appearance by Patrick Roche, Esq. For APPELLANTS
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TABLE OF AUTHORITIES

1. West Virginia Code §19-19-4
2. Burch v. Nedpower Mount Storm, LLC 220 W.Va. 443, 647 SE 2d 879
(W.Va. 2007)
3. Parkersburg Builders Material Co. v. Barrack 118 W.Va. 608, 191 SE
368 (W.Va. 1937)
4. Sanders v. Rose Lawn Memorial Gardens, Inc. 152 W.Va. 91, 139 SE 2d
784 (1965)
5. Cohen v. California 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284
(1971)
6. Amendment I, Constitution of the United States
7. West Virginia Constitution, Article 7
8. Citizens United v. ECC 11/21/1008-203 U.S. Supreme Court
9. Snyder v. Phelps 09-751 3/21/11 U.S. Supreme Court
10. Chaplinsky v. State of New Hampshire 315 U.S. Supreme Court 568
(1942)

SUPPLEMENTAL FACTS

The Petitioners blocked the Co-Respondent's, Daniel Harbin's, ROW (right of way) in November 2009. (Vol III pp. 16) Prior to that time the Harbins had kept the majority of his farm equipment and other property on the farm owned by his parents. The blocking of the ROW prevented him from having all weather access with anything but a tractor or ATV. (Vol III pp. 31)

The Respondents and Appellees herein sought to prohibit the Bansbachs from photographing them, their guests and their property with Ms. Bansbach having supplied in discovery over 5,000 images, though stating these were only a few hundred specific photos (Vol IV pp. 17) and that she takes photos of the Respondents and guests and activities every day. (Vol III pp. 26, Vol III pp. 9)

RESPONDENTS' REPLY BRIEF IN RESPONSE TO
PETITIONERS' FIRST ASSIGNMENT OF ERROR

West Virginia Code §19-19-4 provides,

“The conduct of agriculture upon agricultural land shall not be deemed adverse to other use or uses of adjoining or neighboring land, whether such other land be used or occupied for residential, commercial, business or for governmental, or any uses other than agricultural. No complaint or right of action shall be maintained in any court of this State against the owner or operator of agricultural lands adverse to the conduct of agriculture upon agricultural lands, unless: 1) The complainant's use and occupancy of land of the complainant existed upon his adjoining or neighboring land before the agricultural operation complained of upon the agricultural land; and 2) The conduct of such agricultural operation complained of has caused or will cause actual physical damage to the person or property of thereafter owner or occupant of such adjoining or neighboring lands.”

The court in its ruling clearly and correctly states that all of the properties are in an agricultural area being 6 to 8 miles from the nearest town. The Plaintiffs' photos in the complaint show that before the dispute that the Fanok property was used for agricultural purposes (note the horses grazing, livestock trailers). Since “unsightly” 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 accomplished by other means. The fallacy in Appellant's argument is defining the neighborhood as residential. The area is not residential, it is rural agricultural as the court in its ruling correctly states.

Furthermore Rickie Bansbach testified that her property gets an agricultural use for tax purposes and that Mary Fanok had been there about 10 years and the Harbins 7 years and that she purchased her property AFTER both the Harbins and Fanok properties were used for agricultural purposes. (Vol II pp 35)

In cross-examination Ms. Bansbach identified in the photos that with only 2 or 3 exceptions the items were farm equipment or building materials to use to construct another barn on the Fanok property. (Vol II 4-30-24)

Additionally, there was never any finding by anyone that a salvage yard was operated and in fact the testimony was that there was not a salvage yard. (Vol III pp 27)

Ironically the Appellant in citing Burch v. Nedpower Mount Storm LLC 220 W.Va. 443, 647 SE 2d 879, (W. Va. 2007) where the Appellants essentially agreed that the wind turbines would adversely impact their view shed, is cited by the Appealants. The argument therein given is it affects the view shed but remains protected under West Virginia Code §19-19-4.

The Appellants citing Parkersburg Builders Material Co. v. Barrack 118 W.Va. 608, 191 SE 368 W.Va. (1937) argues that because here the alleged nuisance was in a business district it is inapplicable trying to argue that the area is "residential in character".

For example, in Sanders v. Rose Lawn Memorial Gardens, Inc. 152 W.Va. 91, 139 SE 2d 784 (1965), the Court found that a cemetery is not a nuisance per se even with the office and other buildings necessary for its operation, even with the additional noise and artificial lights to which neighbors have access in

a rural area was not entitled to abatement. Again, the operative word here is rural area. The Bansbachs own 75 acres, Fanok owns 87 acres and the Harbins own 80 acres. There are 2 additional farms before the road dead ends. This is rural.

Ironically, before the current situation arose, both Mr. And Mrs. Bansbach both acknowledged assisting in tending to the hogs and poultry for Mr. Harbin and Ms. Fanok.

Concluding the Trial Court did not err and denied the Injunction and finding that a nuisance needed abated.

RESPONSE TO PETITIONERS'
SECOND ASSIGNMENT OF ERROR

The Petitioner in his brief and statement of facts omits very important facts. The signs and other items were precipitated by Rickie Bansbach's photographing everything and everyone that went into or on the Fanok property and portrays the Respondents' acts as unprovoked attacks which the Respondents removed before the Trial Court hearing.

The Circuit Court and Appellant cited Cohen v. California 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed 2d 284 (1971) and both correctly acknowledged that just because language may be offensive it is entitled to protection.

Both the First Amendment to the U.S. Constitution and West Virginia Constitution Article 7, which is considered to be broader in its protection than the U.S. Constitution protects freedom of speech and recognizes that speech can take many forms including signage and symbols. The Petitioner complains about the port-a-potty of the Appellees but has a toilet adorning her residence. (Vol II pp 30) Arguably one could say it is childish doing tit for tat, but the Appellants somehow argue that the Respondents' actions are different merely because the Respondents do them.

The U.S. Supreme Court in its most recent rulings Citizens United v. ECC (1/21/1008-203) gives unions and other non-persons the right to election expression and influence political campaigns through speech and that laws can not prevent them from expressing their opinions. An even broader recognition of free speech is Snyder v. Phelps 09-751 (3/21/11) recognizing the right to protest an Iraqi war veteran's funeral.

The use of insulting or fighting words when they tend to cause injury or an immediate breach of peace are not entitled to Constitutional protection. Chaplinsky v. State of New Hampshire 315 U.S. Supreme Court 568 (1942). But here there is no evidence of such. Wherefore, the Appellees assert that the court was correct in its ruling on this issue.

In spite of all the rhetoric and considering that there is not one scintilla of evidence that either Mary Fanok or Daniel Harbin ever threatened the Petitioners nor took any physical act of aggression towards her and as irritating as the Appellees find it, the Trial Court in its ruling, infers even Ms. Bansbach's constant photographing of the Respondents is protected speech.

SUMMARY

Wherefore, your Appellees pray that this court deny the Appellants' Appeal and allow the trial court's ruling to stand for reasons set forth in the record and in this Memorandum.



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CERTIFICATE OF SERVICE

I, D. Conrad Gall, acting as counsel for the herein named Appellees, Daniel Harbin, Mary Fanok, John Harbin and Donna Harbin, do hereby certify that a true copy of the foregoing document was delivered by hand-delivery to the following named persons at their listed addresses, on this the 27th day of August 2011.

Patrick Roche, Esq.
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