

11-0355

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

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

PLAINTIFFS,

v.

CIVIL ACTION NO. 10-CV-005

DANIEL HARBIN, MARY FANOK, and
JOHN HARBIN AND DONNA HARBIN,
husband and wife,

DEFENDANTS.

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RECORDED

**ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION AND DISSOLVING TEMPORARY
INJUNCTION**

Presently before this Court is the plaintiffs' "Motion for Preliminary Injunction" filed by Patrick F. Roche, Esquire, on May 5, 2010. Mr. Roche also filed "Plaintiffs' Memorandum of Law in Support Of Their Motion For Preliminary Injunction" on May 7, 2010. D. Conrad Gall, Esquire, counsel for the defendants, filed "Defendants' Response To Motion For Injunction" on May 21, 2010. The Court conducted a hearing on plaintiffs' motion for a preliminary injunction on May 20, 2010. At the May 20, 2010 hearing, the Court heard the testimony of plaintiff Rickie Bansbach but, because of time constraints, the Court was unable to conclude the hearing. The Court, *sua sponte*, continued the hearing to July 9, 2010. Additionally, the Court ordered that a temporary injunction be issued against the defendants, which prohibited them from harassing the plaintiffs

in any way and from storing any additional items of personal property on the Fanok property. That order was entered on May 21, 2010.

At the July 9, 2010 hearing, the Court heard additional evidence offered in support and in opposition to the plaintiffs' motion for a preliminary injunction. At the conclusion of this hearing, the Court ordered that the previous temporary injunction remain in effect until the Court has finally ruled on the Plaintiffs' motion. Mr. Roche subsequently filed an additional memorandum on July 28, 2010 in support of his motion for a preliminary injunction. Mr. Gall filed "Defendants' Memorandum In Response To Plaintiffs' Request For Injunctive Relief" on September 1, 2010.

After carefully considering the plaintiffs' motion and the parties' memoranda, reviewing the evidence presented at the May 20, 2010 and July 9, 2010 hearings, and researching the applicable law, this Court is of the opinion that the plaintiffs' motion for injunctive relief should be denied and that the temporary injunction should be dissolved, for the reasons expressed herein. In support of its opinion, this court makes the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiffs, Robert and Rickie Bansbach, husband and wife, purchased from Gary L. Butcher, single, and Karen R. Tierny, single, approximately ninety acres of land situate in Mannington District, Marion County, West Virginia in August of 2005. The Bansbachs have continuously resided on the property since then.

2. Defendants John and Donna Harbin, husband and wife, purchased from Fredrick J. Smith and Constance L. Smith, husband and wife, approximately eighty-two acres, more or less, of land situate in Mannington District, Marion County, West Virginia in 2003. The Harbin property borders the northwest side of the Bansbach property.

3. Defendant Daniel Harbin is the son of John and Donna Harbin. In January 2003, John and Donna Harbin, through an oral agreement, granted Daniel Harbin a lease to reside on their property as a tenant-at-will.

4. Defendant Mary Fanok purchased from Thomas F. Sandefur, single, approximately eighty-one acres of land situate on the branch in Mannington District, Marion County, West Virginia in 2006. The Fanok property borders both the northeast section of the Bansbach property and the east side of the Harbin property. Ms. Fanok currently resides on the property with Daniel Harbin.

5. The plaintiffs allege in their motion that the defendants have “created a salvage yard or junkyard on a portion of Mary Fanok’s land, which is situated directly across a public highway from the Plaintiffs’ house.” According to the plaintiffs, the alleged junkyard destroys “the former pristine and pastoral view of their own property from the front porch of their house.”

6. The plaintiffs also allege that the Defendants hung signs on the fence on Ms. Fanok’s property, which were “intended to harass and disturb the emotional tranquility of the plaintiffs.” There were three signs posted by the defendants: the first stated “do not stare you may go blind nose bitch,” the

second stated “coming soon D and M hog farms,” and the third stated “beep three times for entry twice when leaving nose bitch log in.”

7. The plaintiffs further allege that the defendant, Daniel Harbin, “continues to shout profanities at the Plaintiffs as he drives up and down the road that separates Ms. Fanok’s property from the Plaintiffs’, causing further emotional distress to the Plaintiffs.”

8. The defendants contest the characterization of the Fanok property as a “junk yard.” According to the defendants, all the chattels stored on the Fanok property are necessary to run the defendants’ farm. At the July 9, 2010 hearing, Daniel Harbin testified that “90 percent of it [chattels on the property] is farm equipment and machinery.” Mr. Harbin also testified that Ms. Bansbach harasses him and his friends by photographing him constantly, by yelling at him and by making obscene gestures when he passes by her house.

Conclusions of Law

1. “Every judge of a circuit court shall have general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of his circuit, or the party against whose proceeding the injunction be asked reside in or out of the same.” W.Va. Code § 53-5-4 (2010).

2. “Typically, a court may issue an injunction to enjoin only those acts occurring within that court’s territorial jurisdiction.” Kessel v. Leavitt, 204 W.Va. 95, 151, 511 S.E.2d 720, 775 (W.Va. 1998).

3. “Only a circuit court of county where land is located has jurisdiction to consider case directly affecting the land or its title, notwithstanding residence of defendant.” Ray v. Hey, 183 W.Va. 521, 524 396 S.E.2d 702, 705 (W.Va. 1990).

4. “No injunction shall be awarded in vacation nor in court, in a case not ready for hearing, unless the court or judge be satisfied by affidavit or otherwise of the plaintiff's equity; and any court or judge may require that reasonable notice shall be given to the adverse party, or his attorney-at-law, or in fact, of the time and place of moving for it, before the injunction is awarded, if in the opinion of the court or judge it be proper that such notice should be given.” W.Va. Code § 53-4-8 (2010).

5. “ ‘The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case, with regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.’ ” Haislop v. Edgell, 215 W.Va. 88, 91, 593 S.E.2d 839, 842 (W.Va. 2003) (quoting Syl. pt. 4, State ex rel., Donley v. Baker, 112 W.Va. 263, 164 S.E. 154 (1932)).

6. “An injunction . . . shall not take effect until bond be given in such penalty as the court or judge awarding it may direct, with condition to pay the judgment or decree (proceedings on which are enjoined) and all such costs as may be awarded against the party obtaining the injunction, and also such damages as

shall be incurred or sustained by the person enjoined” W.Va. Code § 53-5-9 (2010).

7. “A [c]ourt having jurisdiction of parties and subject matter may issue injunction which must be obeyed regardless of whether it was erroneously or improvidently awarded.” Eastern Associated Coal Corp. v. Doe, 159 W.Va. 200, 207, 220 S.E.2d 672, 677 (W.Va. 1975).

8. “ ‘A nuisance is anything which annoys or disturbs the free use of one’s property, or which renders its ordinary use or physical occupation uncomfortable. A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort.’ ” Mahoney v. Walter, 157 W.Va. 882, 205 S.E.2d 692 (W.Va. 1974) (quoting Martin v. Williams, 141 W.Va. 595, 610, 93 S.E.2d 835, 844 (W.Va. 1956)).

9. Generally, in determining whether acts or conduct constitute a nuisance, the location and surroundings are to be considered. What is a nuisance in one locality may not be a nuisance in another. Rural residents must expect to bear with farm and livestock conditions normally found in the area where they reside. See AmJur 2d. “Property” §§ 102, 108.

10. “ ‘Traditionally courts of equity have hesitated to exercise authority in the abatement of nuisances where the subject matter is objected to by the complainants merely because it is offensive to the sight.’ ” Burch v. Nedpower Mount Storm, LLC., 220 W.Va. 443, 455, 647 S.E.2d 879, 891 (W.Va. 2007) (quoting Parkersburg Builders Material Co. v. Barrack, 118 W.Va. 608, 610, 191 S.E. 368, 369 (W.Va. 1937)).

11. “ ‘Equity should act only where there is presented a situation which is offense to the view of average persons of the community. And, even where there is a situation which the average person would deem offensive to the sight, such alone will not justify interference by a court of equity. The surroundings must be considered.’ ” Burch v. Nedpower Mount Storm, LLC., 220 W.Va. 443, 455, 647 S.E.2d 879, 891 (W.Va. 2007) (quoting Parkersburg Builders Material Co. v. Barrack, 118 W.Va. 608, 613, 191 S.E. 368, 371 (W.Va. 1937)).

12. “While 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.” Syl. Pt. 11, Burch v. Nedpower Mount Storm, LLC., 220 W.Va. 443, 647 S.E.2d 879 (W.Va. 2007).

13. “Congress shall make no law . . . abridging the freedom of speech” Amendment I, Constitution of the United States.

14. Insulting or “fighting words” which tend to cause injury or an immediate breach of the peace are not entitled to Constitutional protection. See Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942).

15. Disturbing the peace is only an offense where there is a disturbance of public peace violative of order and decency or decorum. See State ex rel. Payne v. Mitchell, 152 W.Va. 448, 164 S.E. 2d 201 (W.Va. 1968).

16. “The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable

manner; any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.” Cohen v. California, 403 U.S. 15, 21 (1971).

17. “ ‘An undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.’ ” Cohen v. California, 403 U.S. 15, 23 (1971) (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508, (1969)).

18. “For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” Cohen v. California, 403 U.S. 15, 24 (1971).

19. 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.

20. The use of four-letter words by Daniel Harbin, verbally or on posted signs, to express his contempt for the plaintiffs does not create an immediate breach of the peace, and therefore, his words are not "fighting words." There is no evidence to suggest that Mr. Harbin's use of four-letter words will provoke an immediate breach of the peace. The signs which were displayed on the defendants' property were not so offensive as to overcome the defendants' right to freedom of expression.

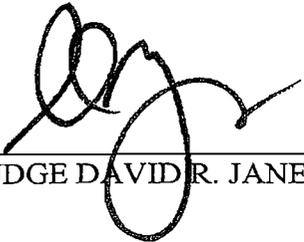
21. Similarly, the defendants' use of profane language is not so outrageous and would not cause an injury so severe that a reasonable person could not be expected to endure it. The defendants' words may be crude or vulgar, and their conduct toward the plaintiffs may be inexcusable, but they are protected as free speech under the First Amendment, just as Ms. Bansbach's gestures toward and constant photographing of the defendants is protected.

Accordingly, it is ORDERED that the "Plaintiffs' Motion For Temporary Injunction" be, and the same is, hereby DENIED. The temporary injunction issued against the defendants by order entered herein on May 21, 2010 is hereby dissolved and the bond posted by the plaintiffs is hereby released.

Upon entry of this order by the Court, the Circuit Clerk of Marion County is hereby directed to prepare and distribute certified copies of this "Order Denying Plaintiff's Motion for Temporary Injunction" to Patrick F. Roche, Esquire, at his

address: 321 Fairmont Avenue, Fairmont, West Virginia 26554; and to D. Conrad
Gall, Esquire, at his address: 3497 Fairmont Avenue, Suite 2, Fairmont, West
Virginia 26554.

ENTER: 1/28/11



JUDGE DAVID R. JANES

A COPY TESTE



CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA