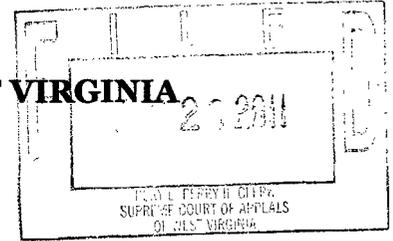


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' Reply Brief

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SUMMARY OF ARGUMENT

1. Does West Virginia Code §19-19-4 afford Appellees, DANIEL HARBIN and MARY FANOK, with immunity under the law for their intentional and malicious creation of a nuisance on MARY FANOK's property for the purpose of interfering with the Appellants' enjoyment of their property?

ARGUMENT

I. DOES WEST VIRGINIA CODE §19-19-4 AFFORD APPELLEES, DANIEL HARBIN AND MARY FANOK, WITH IMMUNITY UNDER THE LAW FOR THEIR INTENTIONAL AND MALICIOUS CREATION OF A NUISANCE ON MARY FANOK'S PROPERTY FOR THE PURPOSE OF INTERFERING WITH THE APPELLANTS' ENJOYMENT OF THEIR PROPERTY?

Although the thrust of their argument is not very clear, Appellees, in their Answer Brief, appear to be taking the position that, since MARY FANOK's property was utilized for agricultural purposes (Appellees note, in this regard, that one of the photographs introduced into evidence during the Appellees' Motion for Temporary Injunction depicted horses grazing on Ms. Fanok's property) prior to the commencement of the ongoing feud between themselves and the Appellants, West Virginia Code §19-19-4 precludes their activities on Ms. Fanok's property from being found to be a nuisance. Appellees also argue that since the neighborhood in which the parties live is "rural agriculture" (as opposed to one that is predominantly residential), this fact, in and by itself, would have prevented the trial court from finding that the junkyard that Mr. Harbin and Ms.

Fanok created on the Fanok property that is directly across from that of the Appellants, constituted a nuisance solely on the ground that it was “unsightly.”

Finally, Appellees make the clearly specious claim that Mr. Harbin created the mess on Ms. Fanok’s property only to further his activities as a legitimate farmer, while at the same time admitting, later in their brief, that the purpose for their hanging a porta-potty on one of the fence posts on the Fanok property, directly across from the Appellants’ own property, was intended to get back at the Appellants (or, as they characterize it in their brief, was “tit for tat”).

Although it is true that the legislature can authorize a person to perform an activity which, in the absence of such a legislative authorization, could be deemed to constitute a nuisance, the legislative act will not confer such immunity where the act is done carelessly and unskillfully, and damage results therefrom. In this case, they will be held accountable. *See Spencer v. Point Pleasant & R. R. Co.*, 23 W.Va. 406 (1884); *Arbenz v. Wheeling & H. R. Co.*, 33 W.Va. 1, 10 S.E. 14 (W. Va. 1889); *Taylor v. Baltimore & R. R. Co.*, 33 W.Va. 39, 10 S.E. 29 (W.Va. 1889); and *Watson v. Fairmont & S.R. Co.*, 49 W. Va. 528, 39 S.E. 139 (W. Va. 1901). Moreover, it would be absurd to accept the Appellees’ point of view that West Virginia Code §19-19-4 affords them immunity where their putative agricultural activities on the Fanok property were obviously intended solely to harass the Appellants and interfere with their enjoyment of their own property.

The Appellees’ position that the rural nature of the neighborhood they share with the Appellants automatically prevents their junkyard¹ on the Fanok

¹ It appears, from reading the Appellees’ Answer Brief, that they are making the erroneous claim that the Appellants, in their Initial Brief, referred to the junkyard created by Mr. Harbin and Ms. Fanok on her

property from being deemed to be a nuisance solely on the ground of unsightliness, regardless of its whether it serves any utilitarian purpose, and regardless of the Appellees' actual reason for creating it in the first place, is plainly wrong. Their position in this regard presumes that a legal precedent such as Parkersburg Builders Material Co. v. Barrack, 118 W.Va. 608, 193 S.E. 368 (W.Va. 1937) creates a "one size fits all" type of ruling that must be blindly applied, without taking into consideration the unique facts and circumstances of a particular case. If this were so, then justice would be dispensed based purely on technicalities, without taking into regard the ethics and fairness of the parties' relative positions. As previously stated by Appellants in their Initial Brief, the facts of Parkersburg Builders Material Co., Id., involved a dispute between a legitimate business located in what was predominantly a business district and the owner of a residential home located in the same area. This is most certainly not the case with the instant dispute between the Appellees and the Appellants. As this Court stated in Burch v. Nedpower Mount Storm, LLC, 220 W.Va. 443, S.E. 2d 879 (W.Va. 2007):

...nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations." Sharon Steel Corp. v. City of Fairmont, 175 W.Va. 479, 483, 334 S.E.2d 616, 621 (1985). In fact, "[i]t has been said that the term 'nuisance' is incapable of an exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing." Harless v. Workman, 145 W.Va. 266, 273-74, 114 S.E.2d 548, 552 (1960). Nonetheless, "the term ['nuisance'] is generally 'applied to that class of wrongs which arises from the unreasonable, unwarrantable or unlawful use by a person of his own property and

property as a "salvage yard." In actuality, the word "salvage" only appears in the Initial Brief on pages 3, 9, and 10, when recounting one of the signs that Ms. Fanok posted on her property, which read "Lazy Man Salvage. call 1-800-KISSMY ____ .ww.LazyMan.com." The term "junk" is informally defined as "articles that are worn-out or fit to be discarded;" while the meaning of the word "junkyard" is defined as "a yard or lot that is used to store junk." See The American Heritage Dictionary, 737 (3rd ed. 1993).

produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.” Harless, 145 W.Va. at 274, 114 S.E.2d at 552 (citation omitted). Stated another way, “nuisance is the unreasonable, unusual, or unnatural use of one’s property so that it substantially impairs the right of another to peacefully enjoy his or her property.” 58 Am.Jur.2d *Nuisances* § 2 (2002).

The facts and circumstances in the case currently before this Court do not involve a dispute between a legitimate business located in a predominantly business district and the owner of a residence in the same neighborhood. Rather, it involves the deliberate creation by Mr. Harbin and Ms. Fanok of a blight on the Fanok property that is intended to serve no other purpose than to upset and harass the Appellants, as part of their ongoing feud against the Appellants. Therefore, the policy considerations that led to the rule of law established in Parkersburg Builders Material Co., *supra*, and its progeny have no application in the dispute currently before this Court. Rather, there are important public policy considerations present in the instant case that would be undermined by a rigid application of this Court’s precedent in Parkersburg Builders Material Co. As this Court knows, the state slogan that is commonly displayed on the state’s automobile license plates is “Wild, Wonderful West Virginia.” The obvious purpose of this slogan is to advertise to persons who reside outside the state West Virginia’s great natural beauty; presumably, in order to boost the state’s economy through tourism and other activities. To permit persons such as Ms. Fanok and Mr. Harbin (who, by the way, is originally from Ohio) to intentionally create a blight on their property for no purpose other than to harass their neighbors not only tends to undermine this purpose by permitting people to mar the natural beauty of the countryside with impunity, but also naturally tends to confirm the

old stereotype that West Virginians, *a la* the Hatfields and McCoys, are overly fond of feuding with their neighbors.

Additionally, the nature of our society is not stagnant, but rather, it is constantly evolving, and it is necessary for the common law to itself evolve in order to keep up with societal changes. Thus, the dichotomy between “residential” and “rural” neighborhoods established in Parkersburg Builders Material Co. (which, itself, represented a significant advancement in the common law with respect to the law of nuisance), which was decided in 1937, during a time when West Virginia and the rest of the country was experiencing the economic agony of the Great Depression, may no longer be appropriate in contemporary West Virginia, where people today, in deciding where they want to live, may be just as drawn to the bucolic beauty of a rural area as to the convenience of a residential area. This was certainly the case with the Appellants, who, as stated in their Motion for Preliminary Injunction, were motivated to purchase their property because of the “...pristine and pastoral view of their own property from the front porch of their house.” (A.R. Vol. II, 28.) As stated by the late William L. Prosser, under the common law system:

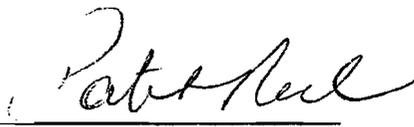
...a rule once laid down is to be followed *until the courts find a good reason to depart from it*. Thus, others now living and even those yet unborn, may be affected by a decision made today. There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result both for the present and for the future. *See* W. Page Keeton, et al., Prosser and Keeton on Torts, § 3 (5th ed. 1984). (Emphasis supplied.)

The Court now has *a good reason* to make a further advancement in the rule laid down in Parkersburg Builders Material by expanding its applicability to rural areas where the facts and circumstances are similar to the one presently

before the Court. To do otherwise, would effectively deprive trial courts of the ability to remedy offensive and uncivil conduct such as that of the Appellees towards the Appellants.

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: 

Patrick F. Roche, Esq. (WV ID# 10159)
Counsel of Record for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2011, true and accurate copies of the foregoing **Appellants' Reply 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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