

Bowers v. Westvaco Corp., 244 Va. 139, 419 S.E.2d 661 (1992)

Supreme Court of Virginia

HASSELL, Justice.

In these consolidated appeals, we consider whether certain acts are sufficient to constitute an actionable private nuisance and, if so, the appropriate damages which are recoverable as a result of those acts.

I. Proceedings

Ronald Stephen Bowers, Kathy D. Bowers, David Micah Bowers (an infant suing by his mother and next friend), and Justin Anthony Bowers (an infant suing by his father and next friend) filed their “Consolidated Amended Motion for Judgment and Third Amended Bill of Complaint” against Westvaco Corporation, Jennings & Webb, Inc., and Pounding Mill, Inc. (collectively referred to as defendants). The Bowers alleged, among other things, that the defendants had created and maintained a private nuisance. The Bowers sought compensatory and punitive damages. The defendants filed responsive pleadings in which they denied liability.

II. Facts

Ronald Stephen Bowers and Kathy D. Bowers, husband and wife, have owned and occupied a house located in Alleghany County since September 1986. Their two young children, David Micah Bowers and Justin Anthony Bowers, reside with them. The house is located in an area which has a business zoning classification. Mr. Bowers operates a heating and air conditioning business from his home.

Pounding Mill acquired property, identified in the record as Lots 1 and 2, adjacent to the Bowers’ property in November 1989. Pounding Mill executed a lease with Westvaco Corporation, the owner of a paper mill in Covington which produces approximately 2,500 tons of paper product daily. Pursuant to the terms of the lease, Westvaco utilizes the lots for the location of a truck staging operation. Westvaco retained defendant Jennings & Webb to conduct the truck staging operation.

Jerry L. Webb, president of Jennings & Webb, described the truck staging operation. First, an “off-the-road driver” will park a tractor and an empty trailer on Lot 1 or 2. Next, the driver disconnects the empty trailer and connects his tractor to a loaded trailer. He then takes the loaded trailer to an off-site destination. Jennings & Webb transports the empty trailer to Westvaco’s paper mill where the trailer is loaded with paper product. The loaded trailer is returned to Lot 1 or 2 and the cycle begins again, an “off-the-road driver” connects his tractor to a loaded trailer and transports it to an off-site destination.

Jennings & Webb conducts the truck staging operation 24 hours a day, every day of the year. During the period covering March 1990 through November 1990, Jennings & Webb transported over 28,000 trailers between Lots 1 and 2 and the paper mill.

The truck staging operation is located approximately 25 feet from the Bowers' living room window. One entrance to the truck staging operation is located 10 to 20 feet away from the Bowers' driveway.

Mr. Bowers testified that the "hissing" of the air brakes and the "hitching of the [tractor-trailer] fifth wheels" sound "like a shotgun going off 20 or 30 times a night right near your home." The Bowers hear the sounds of the tractor-trailer horns "at all hours of the night." The sound of the horns interrupts the family's sleep. Lights from the tractors constantly shine into the Bowers' bedrooms and illuminate the living room. "It is like living in an interstate median," Bowers said. The Bowers are unable to rest properly because of the constant noise.

The tractors' engines are constantly idling. Vibrations, created by moving trucks, shake the Bowers' house. The vibrations have cracked the concrete pad on the rear porch.

The truck staging operation created dust which covered the exterior of the Bowers' home and settled on their cars. The Bowers are unable to utilize their side porch because of the dust, confusion, and noise. James C. Forsythe, the owner of an appraisal company, testified that the Bowers incurred a diminution in the value of their home because of the existence of the truck staging operation.

Pounding Mill made changes in the grading of Lots 1 and 2 to accommodate the truck staging operation. These changes have caused water to run off the lots onto the Bowers' property.

Karen McCulley Bowles, a property owner who lives near the truck staging operation, testified that the truck operation "sounds a whole lot like a chain saw running. It's just a roar and then it sounds like thunder." Thomas D. Lair, another property owner who lives in the vicinity of the truck staging operation, observed the noise, dust, and pollution created by the trucks.

Kathy Bowers has incurred medical expenses as a result of the conditions created by the truck staging operation. She was treated by Dr. Deborah G. Allen, an internist, who described Mrs. Bowers as distraught, depressed, and very nervous. Dr. Allen prescribed antidepressant medication for her. Dr. Lewis Richard Sutton, a psychiatrist, also treated Mrs. Bowers, and diagnosed her condition as one of major depression which was caused, in part, by the truck staging operation. He also prescribed medication for her.

Dr. Harry P. Kornhiser, an asthenic physician specializing in neurology and psychiatry, examined David and Justin Bowers. He testified that both boys experienced adjustment disorders associated with the conditions caused by the truck staging operation.

III. Private Nuisance

At the request of defendant Pounding Mill, the Board of Supervisors of Alleghany County rezoned Lots 1 and 2 to a zoning classification which permits the truck staging operation. The Board imposed certain conditions in an attempt to decrease the impact of the truck staging operation upon the Bowers' property. Therefore, defendants argued, both in the trial court and

here, that “when the Board of Supervisors, after reviewing a particular activity and imposing conditions designed to minimize its effect on neighbors, has rezoned a property to accommodate that activity, the court may not superimpose its judgment by declaring the activity a nuisance.” The trial court, rejecting the defendants’ argument, held that the truck staging operation constituted a private nuisance because it unreasonably interfered with the Bowers’ use and enjoyment of their property.

We have, on numerous occasions, discussed the law of private nuisance. In *National Energy Corp. v. O’Quinn*, 223 Va. 83, 286 S.E.2d 181 (1982), we stated:

When a business enterprise, even though lawful, becomes obnoxious to occupants of neighboring dwellings and renders enjoyment of the structures uncomfortable by virtue of, for example, smoke, cinders, dust, noise, offensive odors, or noxious gases, the operation of such business is a nuisance. *Barnes v. Quarries, Inc.*, 204 Va. 414, 417, 132 S.E.2d 395, 397 (1963). The term ‘nuisance’ includes ‘everything that endangers life or health, or obstructs the reasonable and comfortable use of property.’ *Id.* 223 Va. at 85, 286 S.E.2d at 182.

In *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186 (1982), we said that we broadly construe an occupant’s right to the “use and enjoyment of land.” *Id.* at 28, 286 S.E.2d at 190.

The phrase ‘use and enjoyment of land’ is broad. It comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself. The discomfort and annoyance must, however, be significant and of a kind that would be suffered by a normal person in the community. *Id.* at 28, 286 S.E.2d at 190-91 (citations omitted). Additionally, the location of a business enterprise, or the zoning classification of the property on which the business is located, cannot immunize the business from a nuisance action.

It is generally held that the location of an industry in an industrial area and its importance to the wealth and prosperity of the community do not give to it rights superior to the primary or natural rights of those who live nearby. Locality and surroundings are to be taken into consideration only in determining whether the business or industry is so conducted as to constitute a nuisance as a matter of fact. It is of no consequence that an industry or a business is a useful or necessary one, or that it promotes the development of the community.

The issue [is] not whether [the business enterprise is] located in an industrial area, nor whether plaintiff’s damage was unsubstantial, ‘because of the industrial use being made of nearby properties,’ nor whether the operation of defendant’s plant was ‘reasonable when the character of the area is considered,’ but whether or not its operation caused substantial damage to the plaintiff, regardless of the location of the plant and the nature and importance of its operation. *Smith v. The Pittston Company*, 203 Va. 711, 717, 127 S.E.2d 79, 83-84 (1962) (citations omitted).

In *Barnes v. Quarries, Inc.*, 204 Va. 414, 132 S.E.2d 395 (1963), the owners of a quarry, just as the defendants here, argued that their activities could not constitute a private nuisance because those activities were permitted by a local zoning ordinance. Rejecting that argument, we stated: Respondent contends that in this instance it is shielded from liability for a nuisance because it has secured a use permit for its operation pursuant to Fairfax County's zoning ordinance. This contention is without merit. The permit did no more than allow the respondent to do what the zoning law otherwise prohibited.... It is beyond the power of a county or municipality to authorize the maintenance of a nuisance. *Id.* at 417, 132 S.E.2d at 397 (citations omitted).

VIII. Conclusion

The jury which heard the [case] returned the following verdicts:

Ronald Stephen Bowers-- \$358,800;
Kathy D. Bowers-- \$462,800;
David Micah Bowers--\$201,000;
and
Justin Anthony Bowers--\$201,000.

The defendants moved to set aside the verdicts as excessive. The chancellor, in its final decree, reduced the awards:

Ronald Stephen Bowers-- \$158,800;
Kathy D. Bowers--\$212,800;
David Micah Bowers--\$51,000;
and
Justin Anthony Bowers--\$51,000.

Finding no error below, we will affirm the decree of the chancellor.

Affirmed.