

July 2012 MPT

▶ *LIBRARY*

MPT-2: Ashton v. Indigo Construction Co.

Parker v. Blue Ridge Farms, Inc.
Franklin Supreme Court (2002)

This common-law private nuisance action arises out of the defendant's operation of a dairy farm near the plaintiffs' home. Plaintiffs Bill and Sue Parker live on property located along the west side of Route 65 in Caroline Township. Defendant Blue Ridge Farms, Inc., owns and farms land on the opposite side of Route 65, approximately one-third of one mile north of the Parkers' property. In 1990, Blue Ridge Farms built a 42,000-square-foot free-stall barn and milking parlor to house a herd of dairy cows. It also dug a pit in which to store the manure from the herd.

The Parkers first noticed an objectionable smell from the defendant's dairy farm in early 1991. The Parkers could barely detect the smell at first. Over time, however, the smell became substantially more pungent and took on a sharp, burnt odor. In 1997, Blue Ridge Farms installed an anaerobic digestion system to process the manure from the herd. It intended the system to produce material that could power the generators on the farm. Because the system overloaded, however, the odor from the farm became more acrid and smelled of sulfur. At times, the smell was so strong that it would waken the Parkers during the night, forcing them to close their windows. Eventually, the odor prevented them from spending time outdoors during the day.

The Parkers sued seeking damages and injunctive relief. They based their claims on common-law private nuisance, alleging that Blue Ridge Farms generated offensive odors that unreasonably interfered with the Parkers' use and enjoyment of their property. The Parkers moved to another home, rendering moot their request for an injunction and leaving only their claim for damag-

es. The jury returned a verdict for the Parkers for \$100,000 in damages. The trial court entered judgment. Blue Ridge Farms appealed. The court of appeal affirmed.

Blue Ridge Farms contends that the trial court improperly instructed the jury on a key element of the nuisance claim. The trial court instructed the jury to consider "whether the defendant's use of its property was reasonable." The instruction also stated: "A use which is permitted or even required by law and which does not violate local zoning or land use restrictions may nonetheless be unreasonable and create a common-law nuisance." The verdict form included specific questions for the jury to answer, including the following: "Did the plaintiffs prove that the defendant's dairy farm produced odors which unreasonably interfered with plaintiffs' enjoyment of their property?"

Blue Ridge Farms concedes that the trial court correctly instructed the jury to consider a multiplicity of factors in making the determination of reasonableness. However, it argues that the trial court failed to instruct the jury to consider Blue Ridge Farms's legitimate interest in using its property. In reviewing this claimed error, we use our long-standing standard of review: "whether the instruction fairly presents the case to the jury so that injustice is not done to either party."

"A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land." 4 RESTATEMENT (SECOND) OF TORTS § 821D (1979). "The essence of a private nuisance is an interference with the use and enjoyment of land." W. PROSSER & W. KEETON, TORTS § 87 (5th ed. 1984). We have adopted the basic

principles of the Restatement (Second) of Torts. To recover damages in a common-law private nuisance cause of action, a plaintiff must prove the following elements: (1) the defendant's conduct was the proximate cause (2) of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and (3) the interference was intentional or negligent. 4 RESTATEMENT (SECOND) OF TORTS § 822.

In applying element (2), the reasonableness of the interference with the plaintiff's use, the fact finder should consider all relevant factors, including (a) the nature of both the interfering use and the use and enjoyment invaded; (b) the nature, extent, and duration of the interference; (c) the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and (d) whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property.

As with our prior standard, the focus of the inquiry into the "reasonableness" of the interference is objective, not subjective. The question is what a reasonable person would conclude after considering all the facts and circumstances.

Interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. Thus, a business enterprise that exercises utmost

care to minimize the harm from noxious smoke, dust, and gas—even one that serves society well, such as a sewage treatment plant or an electric power utility—may still be required to pay for the harm it causes to its neighbors. W. PROSSER & W. KEETON, TORTS § 88. A defendant's use of his property may be reasonable, legal, and even desirable. But it may still constitute a common-law private nuisance because it unreasonably interferes with the use of property by another person.

Here, the jury instruction at issue asked, "Did the plaintiffs prove that the defendant's dairy farm produced odors which unreasonably interfered with plaintiffs' enjoyment of their property?" This interrogatory correctly captured the crux of a common-law private nuisance cause of action for damages. It correctly stated that the focus in such a cause of action is on the reasonableness of the interference and not on the use that is causing the interference. The trial court further instructed the jury to consider a multiplicity of factors in determining the unreasonableness element.

In sum, the trial court's charge provided the jury with adequate guidance with which to reach its verdict. Under the circumstances, we are satisfied that the trial court's instructions fairly presented the case to the jury.

Affirmed.

Timo Corp. v. Josie's Disco, Inc.
Franklin Supreme Court (2007)

Plaintiff Timo Corp. owns a cooperative residential apartment building in Franklin City. In June 2006, the defendants opened a bar on the roof of a six-story building next door to the plaintiff's building. In August 2006, the plaintiff filed this private nuisance action, alleging, among other things, that the defendants play music at extremely loud levels, "tormenting the cooperative's residents who live in apartments across from the bar." The complaint also alleges that the pounding and accompanying noise often continues until 3 a.m., and that it creates a nuisance that degrades the residents' quality of life and diminishes the value of their property. The plaintiff seeks damages and injunctive relief.

In September 2006, the plaintiff moved for a preliminary injunction barring the defendants from using the rooftop for music and dancing. Accompanying the motion were affidavits from residents of the cooperative and neighboring buildings. The plaintiff also submitted the affidavit of an acoustical consultant who set up sound-measuring equipment in an apartment in the plaintiff's building and found the sound levels to be four times more intense than the legal limit of 45 decibels.

The defendants offered affidavits from their own consultants who contested the conclusions of the plaintiff's expert. The defendants' experts stated that the defendants were in full compliance with all applicable building and business regulations, and that (despite numerous complaints and a full investigation) City officials had declined to cite them for violations of applicable noise ordinances. Finally, the defendants noted that the rooftop was open only Thursdays, Fridays, and Saturdays, and was closed from

mid-October through mid-April and in periods of bad weather.

The trial court denied the plaintiff's request for a preliminary injunction, noting that the City had never found the bar to be in violation of the noise ordinance. The court concluded that the operation of the bar was "entirely reasonable" and said it could find no precedent for granting relief that would upset the status quo and potentially hurt the bar's business. The court did, however, permit the plaintiff to file an interlocutory appeal. The court of appeal affirmed, and we granted review.

The plaintiff argues that the trial court and the court of appeal misapplied the standard for claims of private nuisance under *Parker v. Blue Ridge Farms, Inc.* (Fr. Sup. Ct. 2002). The plaintiff contends that the courts below erred in focusing on whether the operation of the bar was "entirely reasonable." Rather, the plaintiff argues that, under *Parker*, the reasonableness of a defendant's use of its land is irrelevant to the granting of a preliminary injunction for nuisance.

The standard for granting a preliminary injunction is well-established. The plaintiff must show (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) that the balance of equities tips in the plaintiff's favor. *Otto Records Inc. v. Nelson* (Fr. Sup. Ct. 1984).

In this case, the plaintiff has established a likelihood of success on the merits under *Parker*. The plaintiff has shown that the defendant's operation of a dance bar with loud music on the rooftop of an adjoining building is the source of the noise, and the affidavits filed in support of its motion establish

that the noise constitutes an “unreasonable interference with the plaintiff’s use and enjoyment of his or her property.” Finally, while the plaintiff cannot establish that the defendants intended the noise to cause discomfort to their neighbors, the plaintiff did prove that the defendants were aware of the intrusion and chose to continue their behavior. From that awareness, we can infer that mental state.

The plaintiff has also established irreparable injury. Given the likelihood of success on the merits of its damages claim, the plaintiff could be seen as having an adequate remedy at law. However, our cases have long held that land is unique and that any severe or serious impairment of the use of land has no adequate remedy at law. *Davidson v. Red Devil Arenas* (Fr. Sup. Ct. 1992). In this case, the prospect of nightly intrusions of noise from a nearby neighbor creates a harm for which the law provides no adequate remedy.

The plaintiff has thus established a likelihood of success on the merits and irreparable injury. However, when, in addition to damages, a plaintiff seeks injunctive relief for private nuisance, additional considerations come into play.

As noted in *Parker*, even the most reasonable of uses may become a nuisance, requiring that the defendant pay for the harmful effects of that use on others. However, to *enjoin* a reasonable use of property goes beyond imposing an added cost of doing business. It might well stifle legitimate activity, which could continue while the business pays for the consequences of its actions. To avoid this risk, when ruling on motions for injunctive relief, courts must necessarily dis-

tinguish between those uses which should continue while absorbing the relevant costs, and those which are so unreasonable or undesirable that they should be stopped completely.

Courts must thus balance the social value, legitimacy, and indeed the reasonableness of the defendant’s use against the ongoing harm to the plaintiff. At first glance, this does little more than restate the standard for preliminary relief: “a balance of equities tipping in the plaintiff’s favor.” But in cases involving an underlying nuisance claim, the court must weigh the reasonableness of the defendant’s use in making its determination.

In so doing, a court may consider (1) the respective hardships to the parties from granting or denying the injunction, (2) the good faith or intentional misconduct of each party, (3) the interest of the general public in continuing the defendant’s activity, and (4) the degree to which the defendant’s activity complies with or violates applicable laws. We stress that this judgment is factual in nature.

In this case, the courts below correctly understood *Parker* to state the elements of a cause of action for damages for a private nuisance. At the same time, the trial court properly applied the test for equitable relief. The trial judge understood that in ruling on whether to grant injunctive relief, the court must assess the reasonableness of the defendant’s use in light of all relevant factors. We find no abuse of discretion in the trial court’s denial of the motion for preliminary injunction. The plaintiff remains free to pursue its claim for damages.

Affirmed.