JUDICIALLY-ORDERED DEVOCALIZATION AND OTHER NUISANCE LAW ANOMALIES

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KREIN V. SZEWC

281 OR.APP. 481 (AUGUST 30, 2017)

The Hills Are Alive With the Sound of Barking

- Dale and Debra Krein are neighbors to Karen Szewc and Jon Updegraff in Jackson Cy., Ore.
- In 2002, defendants bred Tibetan Mastiffs, who caused allegedly uncontrollable barking when left alone.
- Jackson Cy. cited defendants in 2004 and 2005 for nuisance barking. In 2006 a hearing officer found violation of public nuisance under JCC 612.09(c)(2).
- Hearing officer rejected the farm use defense (ORS 30.935-.936).

Farm Use Defense (ORS 30.935-936)

- "Any local government or special district ordinance or regulation now in effect or subsequently adopted that makes a farm practice a nuisance or trespass or provides for its abatement as a nuisance or trespass is invalid with respect to that farm practice for which no action or claim is allowed under ORS 30.936 or 30.937." ORS 30.935
- "[N]o farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass." ORS 30.936.

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Farm Use Defense (ORS 30.935-936)

- "Farm" means "any facility, including the land, buildings, watercourses and appurtenances thereto, used in the commercial production of crops, nursery stock, livestock, poultry, livestock products, poultry products, vermiculture products or the propagation and raising of nursery stock." ORS 30.930(1).

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Farm Use Defense (ORS 30.935-936)

"Farming practice" means "a mode of operation on a farm that:

(a) Is or may be used on a farm of a similar nature;

(b) Is a generally accepted, reasonable and prudent method for the operation of the farm to obtain a profit in money;

(c) Is or may become a generally accepted, reasonable and prudent method in conjunction with farm use;

(d) Complies with applicable laws; **and**

(e) Is done in a reasonable and prudent manner.

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Jackson County Hearing Officer (2006)

- Farm Use Defense (ORS 30.935-.936) Rejected
  - Did not run a "farm"
  - Activities not "farm use"
  - Use exceeded level of agricultural activity allowed per zoning
  - Manner of employing dogs unreasonable.
- Fined $400
- Ordered to Debark Dogs or Move Them
- *Szewc v. Jackson Cy.*, 222 Or.App. 525 (2008) affirmed without opinion

Seven (Well, Six) Years in Tibet

- Kreins sue in 2012 claiming intentional and maliciously-inspired nuisance, seeking damages from 2002 through 2012 and an "injunction against defendants from having any dogs … that bark so as to disturb their neighbors."
- As before, **farm use immunity** defense raised.
  - Claiming Tibetans were livestock protection dogs.
- Kreins brought MPSJ for barking from 2002-2006, asserting collateral estoppel. Also sought MSJ on 2006-2012.
- Before trial, 2nd Amended Complaint filed (seeking $500,000). Defendants counterclaim but *do not raise farm use defense.*

Statute of Limitations on Nuisance Barking

- May 2, 2012 Rule 21 Motion on Statute of Limitations.
- *Smejkal v. Empire Life-Rock, Inc.*, 274 Or. 571 (1976) found no SOL for public nuisance though ORS 20.080(3) sets "action for waste or trespass or for interference with or injury to any interest of another in real property" at six years.
- No ability to acquire prescriptive right to maintain public nuisance no matter how long continued.
- Citing *dicta* from three cases, Judge Harris found that it did not run and allowed Plaintiffs to seek back to 2002.

Jury Verdict and Injunction

- Jury trial:

Found nuisance from 2002 to 2015 due to negligence, nuisance, and intentional conduct.

- Injunction hearing:

Within 60 days from the date of this judgment, Defendants shall either debark all adult Mastiffs by use of a certified veterinarian, or remove all such Mastiffs from the properties located at 14314 E. Evans Creek Road or 14326 E. Evans Creek Road, collectively hereinafter referred to as the properties. If any of the dogs having been debarked thereafter regain their ability to bark, such dogs shall be debarked again by a certified veterinarian. Additionally, thereafter, any new adult Mastiffs brought onto the properties shall be debarked.

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Second Appeal – Get Cake and Eat it Too?

- **Standard of Review**
  - Court not asked to review this equitable claim *de novo* (see ORS 19.415(3)(b) [discretionary *de novo* review]).
  - Thus, reviewed for legal error and substantial evidence.
- **No adequate remedy at law not pleaded by Plaintiffs**
  - Tried by consent of parties (ORCP 23B)
  - After jury verdict, parties agreed to present additional evidence concerning injunction, and did so, thus impliedly consenting.
- **Damages and Injunction?**
  - Yes, damage are retrospective only.
  - Avoids serial lawsuits.

Judge Gerking's Logic

I find under the circumstances that the plaintiffs are, in fact, entitled to injunctive relief by clear and convincing evidence. I was persuaded by that higher standard that the defendants had maintained this nuisance for years and had not taken adequate measures to eliminate that activity which constituted the nuisance. I further find that the plaintiffs are entitled to that injunctive relief because they lack an adequate remedy at law in terms of future activities on defendants' property which constitute that nuisance primarily because of the length of time that it's existed.

It's true that the plaintiffs have recovered a substantial verdict but that only relates to injuries that they sustained as a result of that nuisance between the early 2000s up until the day of trial.

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Judge Gerking’s Logic

There was evidence that the—that between that—the defendants had in the past undertaken efforts to eliminate or reduce the dog barking by using a citronella dog collar, dog collars by placing shock collars on the dogs, by covering portions of the fencing so that the dogs couldn't see what was going on, I guess, in plaintiffs'—on plaintiffs' property which they were thinking—I think they were thinking was inciting them to bark. By keeping the dogs indoors at night. Nothing, none of those measures turned out to be satisfactory.

And so that's another basis why I believe that the plaintiffs lack an adequate remedy of law because the defendants, even though they took measures to try and reduce the barking, they were unwilling to deal with the—deal effectively with the problem by eliminating the barking.

Second Appeal – Farm Use Immunity and Preclusion

- Defendants misunderstood scope of MPSJ ruling.
  - It granted it **as to Szewc**, rejecting the farm use defense insofar as "the Administrative Hearing Officer's ruling shall have preclusive effect on defendant Szewc."
  - It denied it **as to Updegraff**, a nonparty to the hearing, due to lack of information about privity between Szewc and Updegraff.
- Thus, defendants were free to raise as to **post-2006 matters** and **Updegraff** was not bound regardless.
- Failed to add to answer to SAC.

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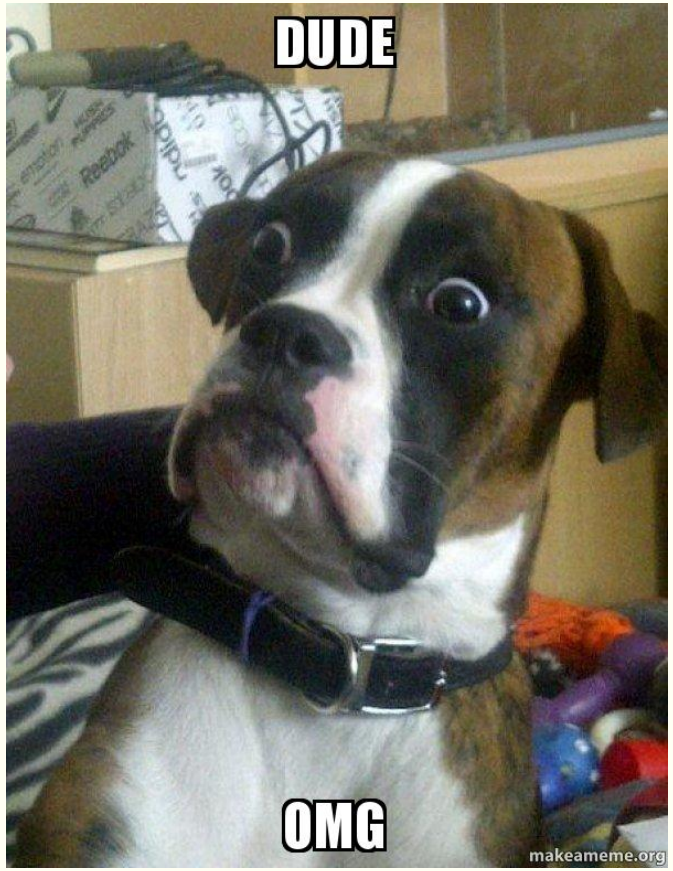
Second Appeal – The Biggest Issue!

"Defendants do not otherwise challenge the propriety of an injunction."

Id., at 486 fn.2.



Other Nuisance Anomalies

- *Allen v. Paulk,* 188 So.2d 708 (La.App.1966):
  - "In the present case it would not be necessary to wring the dog's neck or even for the defendant to have to get rid of him in order to keep the dog from barking. If the defendant wishes to keep his dog he can keep the dog in his house. This would certainly not annoy the neighbors and should be a comfort to defendant's wife who testified it helped her stomach ulcers to have a watchdog on the premises."
- *Hubbard v. Preston,* 90 Mich. 221 (1892):
  - Jury permitted to consider if shooting into group of noisy dogs and killing one (on defendant's lawn) was reasonable and necessary means to abate nuisance when dogs kept family awake by barking and fighting. Reversed for new trial when justice court found no justification.
- *White v. Cornelison,* 244 S.W.2d 758 (Ky.1951):
  - Two penned bird dogs banished due to clamor.

Other Nuisance Anomalies

- *Talbot v. Stiles,* 189 So. 469 (La.App.1939):
  - Where plaintiff "evinced patience, reasonableness, and a commendable amicable attitude toward defendant throughout his unpleasant experience,' the court agreed with the position that he was entitled to relief from the nuisance complained of in the form of ordering that "[t]he dogs should go rather than he."