SUPREME COURT LIVE

October 19, 2016
Colony High School, Palmer

ORAL ARGUMENT CASE SUMMARY

Robert Riddle, dba Fairbanks Pumping and Thawing,

Appellant,

v.

Eric Lanser,

Appellee.

Supreme Court Case No. S-15780

Disclaimer: *This summary of the case highlights the major issues raised but is not intended to be comprehensive. It has been prepared for educational purposes only by the Supreme Court LIVE program staff and does not reflect the input or views of any member of the court.*

OVERVIEW OF THE CASE

What happens when land is being used for one purpose but people living in a new development nearby think the original land use interferes with their enjoyment of their property? Robert Riddle, the owner and operator of a septage hauling company, stored septage on land that he also used to grow crops and livestock, applying some of the septage to his land as fertilizer. Eric Lanser, a developer, bought land nearby and constructed houses on it. Lanser and some of the landowners complained about the smell coming from the storage facilities and farm. Lanser asked a judge to order Riddle to stop the odor, and Riddle raised a defense based on a law protecting farms. After a trial, a judge decided that the farm law did not protect Riddle and ordered him to stop or minimize the smell that the homeowners found offensive. Riddle is asking the Alaska Supreme Court to reverse the judge's decision.

ATTORNEYS

Attorney for Appellant, Robert Riddle: William R. Satterberg, Jr., Fairbanks

Attorney for Appellee, Eric Lanser: Susan Orlansky,
Reeves Amodio LLC, Anchorage

QUESTION PRESENTED ON APPEAL

1. Does the Alaska Right to Farm law protect Riddle from a suit for a private nuisance?
2. Did Lanser prove that Riddle had created a private nuisance?
3. Did the trial court improperly award Lanser enhanced attorney's fees?
4. Did the trial court improperly sanction Riddle for not answering discovery?

MAJOR AUTHORITIES TO CONSIDER

Alaska Statutes

- **Alaska Statue 09.45.230**, Action based on private nuisance.
- **Alaska Statute 09.45.235**, Agricultural operations as private nuisances.

Alaska Rules of Court

- **Alaska Rule of Civil Procedure 26**, Discovery (general provisions).
- **Alaska Rule of Civil Procedure 37**, Discovery Sanctions.
- **Alaska Rule of Civil Procedure 65**, Injunctions.
- **Alaska Rule of Civil Procedure 82**, Attorney's Fees.

Alaska Supreme Court Case Law

- ***Young v. Embley***, 143 P.3d 936, 944-45 (Alaska 2006) (discussing principles of statutory construction and the interaction between statutes and common law)
- ***Spenard Action Committee v. Lot 3, Block 1, Evergreen Subdivision***, 902 P.2d 766 (Alaska 1995) (private nuisance for brothel; attorney's fees as sanction for discovery dispute).
- ***Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.***, 995 P.2d 657 (Alaska 2000) (private nuisance for leakage from gas storage tank).
- ***Maier v. City of Ketchikan***, 403 P.2d 34 (Alaska 1965) (public nuisance).
- ***Trails North, Inc. v. Seavey***, 1999 WL 33958785 (Alaska 1999) (unpublished decision about barking dogs as nuisance; injunction) (copy attached).
- ***Alsworth v. Seybert***, 323 P.3d 47 (Alaska 2014) (standard for issuance of preliminary injunction; review of legal rulings in preliminary injunction).
- ***BP Pipelines (Alaska), Inc. v. State, Department of Revenue***, 327 P.3d 185 (Alaska 2014) (discussing factors for enhancing attorney's fees).
- ***Marathon Oil Co. v. ARCO Alaska, Inc.***, 972 P.3d 595 (Alaska 1999) (reversing fee award for unreasonable conduct).

SUMMARY OF THE CASE

Robert Riddle bought land on Eielson Farm Road, near Fairbanks, in 2005. The land was subject to a state Farm Conservation Plan. Riddle owned and operated Fairbanks Pumping and Thawing, a business that, among other things, services septic systems. Riddle used part of the land he acquired for septage lagoons, where he deposited septage he collected in his business; he intended to use the septage for fertilizer for his soil. He did not apply septage to his fields until 2009. In 2010 Riddle began to accept septage from another company.

Riddle got permits from the state, local, and federal governments for his operations, and he updated the Farm Conservation Plan at some point to include the septage lagoons. Riddle did not plant his entire acreage, but he grew some crops, had livestock, and entered into a sharecropping arrangement with another farmer. Riddle showed he had made two sales of hay, one in 2007 and one in 2008. He also donated hay to a camp in 2008. He had planted some acreage with sod, which he intended to sell. Under the sharecropping agreement, another farmer grew crops on Riddle's land in exchange for a share of the crop.

Eric Lanser bought land on Eielson Farm Road in 2007 for developing a housing subdivision. He began building houses for sale the following year. In 2010 Lanser began to notice intermittent odors from Riddle's land, which Lanser found offensive. He attempted to persuade state and local officials to take action to stop the odors, but he was unsuccessful in this attempt.

In late 2011 Lanser filed a lawsuit against Riddle, asking the court to issue **an injunction,** or order, prohibiting Riddle from accepting new septage until the odors were **abated**, that is, eliminated or controlled. (Lanser also sued the State of Alaska, but the trial court decided the State should not have been sued and **dismissed** the State from the lawsuit.) The lawsuit also alleged that the septage lagoons and the resulting odors were both a **public** and a **private nuisance**. In addition to the injunction, Lanser asked the court to enter an order declaring the odors a nuisance and requiring Riddle to permanently decommission the lagoons if their odor could not be reduced or eliminated through an odor-control plan.

In his answer Riddle raised several **affirmative defenses**, including the defenses that his operations were authorized by permits and that "[a]n agricultural operation is not a nuisance." In his answer he relied on sections of the **Alaska Statutes** that give protection to farms from **nuisance** suits; the **parties** (the two sides of the lawsuit) call this law the Right to Farm Act.

Lanser asked the **trial court** to issue a **preliminary injunction** — a legal order requiring or preventing some action during the time the case is pending and unresolved in the trial court — against Riddle to stop the odors until the trial court could reach a decision about

the case. When Lanser asked the court to do this, the **trial court judge** was Randy Olsen. Judge Olsen held a hearing lasting several days in April 2012. Many witnesses testified, and the parties also relied on **exhibits**, such as the Farm Conservation Plan, to make their cases. The parties appeared to agree that using septage for fertilizer is an acceptable farming practice, but they disagreed about the true purpose of Riddle's septage storage.

After the hearing, Judge Olsen denied Lanser's request for a preliminary injunction. Judge Olsen did not think the harm Lanser would suffer while the case was pending was irreparable, nor did he think it was clear that Lanser would win the case at trial. Judge Olsen considered the meaning of the Right to Farm Act, and his written order gives some details about what he thought the law meant. Judge Olsen retired in late 2012, and the case was reassigned to Judge Bethany Harbison.

The parties continued getting ready for a final **trial** of the case, which was scheduled for 2013. As part of preparing for trial, the parties asked each other for information related to the case through a process called **discovery**. Riddle did not respond to some of Lanser's discovery requests; Riddle claimed that the information was not **relevant** because, near the end of the hearing in April 2012, Judge Olsen said he "found Mr. Riddle to be operating a legitimate farm." Judge Harbison ordered Riddle to answer the discovery and later **sanctioned** Riddle for not answering.

Before the trial, the parties asked the judge to rule on some legal issues through a process called **summary judgment**. Judge Harbison decided that Riddle's permit from the State required him to abate odors and that Riddle's permits from government agencies did not prevent the nuisance lawsuit against him. She also decided that Riddle had not created a public nuisance.

DECISION BELOW

The court held an eleven-day trial in the case in 2013 on the remaining issues, mainly whether Riddle had created a private nuisance and whether the Right to Farm Act protected him. Many of the witnesses from the April 2012 hearing testified again. Neither party asked for a jury, so Judge Harbison decided all of the issues at the trial. Judge Harbison first decided that Riddle had created a private nuisance. She then considered what the Right to Farm Act meant, including what it means to have "commercial production" of crops or livestock. Ultimately Judge Harbison decided that Riddle's land and the activities he used it for did not come within the protection of the Right to Farm Act. She ordered Riddle to abate the odors.

At the conclusion of the case, Lanser asked the court to award him attorney's fees because he had won the trial. Under Alaska law, the losing side in a **civil case** has to pay part of the winning side's attorney's fees; the amount is determined by a court rule, which allows the trial court to make some adjustments to the amount. Judge Harbison decided that Riddle's defense in the case had been unreasonable. The **final judgment** in the case

awarded Lanser a total of almost $90,000; it included attorney's fees, costs, and sanctions against Riddle for not complying with discovery.

Riddle **appealed** the decision to the Alaska Supreme Court, asking the Supreme Court to overturn the trial judge's decision.

LEGAL ISSUES GENERALLY

There are several sources of law in our legal system. The Alaska Legislature enacts **statutes**, which are codified and compiled in a set of books called the **Alaska Statutes**. The legislature can create **administrative agencies**, which are part of the **executive branch**, and can write **regulations** to give more detail about how a statute will be applied. In Alaska local governments such as municipalities and boroughs can also enact ordinances that can be applied within the borough or municipality. Both a state agency and the borough government issued permits to Riddle for his operation.

Courts, the **judicial branch**, can make their own **rules** about court procedures. Courts also interpret statutes and the **common law**. The common law is judge-made law that started in England and was brought to the United States. Judges can change the common law when they interpret and apply it in the cases that come before them. The legislature also can, and does, modify the common law. Even when the legislature has changed part of the common law, courts sometimes use the common law to interpret what the legislature meant when it wrote a statute.

This case is about land use, and specifically about a **nuisance**. The common law recognized that the way a person used his property could interfere with another person's use of his own land. One type of **tort**, or civil wrong, that the common law recognized was nuisance; under the common law a person could ask the court for money damages, an injunction, or both to remedy the situation. The common law recognized two types of nuisance: a **private nuisance** and a **public nuisance**. To show a **public nuisance** a person had to show that the condition or action creating the nuisance would interfere with a public right, such as the ability to use a road. The trial court decided Lanser had no public nuisance claim.

Lanser also said Riddle created a **private nuisance**. According to the Alaska Statutes, to show a **private nuisance** a person has to prove that the action or condition causes "a substantial and unreasonable interference with the use or enjoyment" of their land or water. Some types of private nuisances that have been the subject of court cases in Alaska are barking dogs, pollution from underground storage tanks, and operating a brothel.

The Alaska Statues give a defendant in a nuisance suit the right to raise some **defenses**. One defense is for farms: the legislature decided that when land is used as a farm, it cannot be a private nuisance so long as its use for farming came before the competing land use. A defendant usually has to show that a defense applies to him, so in this case

Riddle had to show that the conditions and actions Lanser was unhappy about were covered by the Right to Farm Act.

Sometimes it can be hard to decide whether a statute applies to a situation because the words used in the statute mean different things to different people. One of the issues in this case is what "commercial" means; another word the parties disagree about is "intended." Courts have to decide what the statute means before they can figure out how the facts in the case fit in the statute.

Right To Farm Act

The biggest issue in this case is the meaning of the Right to Farm Act. The parties agree that the legislature wanted to preserve farmland from the spread of cities and towns. Because farms can cause odors that people find unpleasant, the legislature decided that if land was being used as a farm, it would be protected from private nuisance suits so long as it met some conditions.

The Right to Farm Act protects both agricultural facilities and agricultural operations; the legislature wrote definitions of "agricultural facility" and "agricultural operation" to explain what it meant. Part of the definition of "agricultural facility" includes land that is used, or is intended to be used, "in the commercial production or processing of crops, livestock, or livestock products." Part of the definition of "agricultural operation" includes "fertilization, growing, and harvesting" of an agricultural or horticultural crop or commodity. The legislature did not give a special meaning for "commercial" in the statute.

The parties do not agree about what "commercial production" means, and they also disagree about what "intended for use" means.

> ***Riddle's Position:*** The trial judge mistakenly believed that the Right to Farm Act only applies when the land is used mostly for farming. The trial court interpreted the phrase "commercial production" too narrowly, basically requiring a farm to show a profit; many farms are not profitable but still are commercially producing agricultural products. The trial court incorrectly found that Riddle had never sold any crops and improperly questioned his intent to expand his farming operations. The trial court was wrong not to consider the sharecropping arrangement he had with another farmer in deciding whether the farm was a commercial operation. Because Riddle has had a sharecropping agreement, sold hay, and planted some of his land in sod for sale, and because the septage lagoons are part of the fertilization process for the land, the Right to Farm Act applies and prevents Lanser from bringing a private nuisance case.
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> ***Lanser's Position:*** Riddle's Right to Farm Act defense is a sham. Riddle has not planted enough land in crops that he sells to make the farm a commercial farm. His main business is septage hauling; he makes far more

money from collecting septage from his own business as well as from a competing septage-hauling company than he does from farming. If Riddle really intended to use the septage for fertilizer, he would not need the large septage lagoons that he has because he is only using a small percentage of the septage he gets. He has enough land that he could be using all of the septage he gets for fertilizer now.

Private Nuisance and Injunction

To win a private nuisance claim Lanser had to show that Riddle had created a substantial and unreasonable interference with the use and enjoyment of Lanser's land. The court decided Lanser had shown that and issued an injunction requiring Riddle to take certain specific measures to control the odors from his septage lagoons.

> ***Riddle's Position***: Lanser did not present enough evidence that the odors substantially interfered with his use and enjoyment of his property. He continued to build and sell houses, and he said the odors were intermittent. Even if Lanser had enough evidence to prove a nuisance, the court did not balance all of the factors it should have when it issued its injunction.
>
> ***Lanser's Position:*** The trial court had more than enough evidence that the odors were a nuisance. Even if the trial court did not mention every possible factor in its order, the order shows that the trial court considered every relevant factor when it decided to issue the injunction. In addition, Riddle told the trial court he would use some specific odor-control measures.

Attorney's Fees and Sanctions

Riddle is also asking the supreme court to reverse the trial court's decision to make him pay more of Lanser's attorney's fees than the court rules require and its decision to **sanction** him for failing to provide discovery.

In most states, each party has to pay his own attorney's fees unless there is statute that shifts the fees to the other side. Alaska is different: Alaska Civil Rule 82 generally permits the trial court to award partial attorney's fees to the winning side. In this case, the trial court awarded more than the fee set out in Rule 82 to Lanser because the court thought Riddle's defense on the Right to Farm Act was unreasonable.

The trial court also made Riddle pay Lanser's attorney's fees for motions Lanser brought when Riddle did not answer some of Lanser's **discovery** requests. **Discovery** is the way parties to a lawsuit can find out information about the other side's case; it helps the parties decide how strong their cases are. This knowledge can lead to **settlements**, which are agreements between the parties that end lawsuits. In Alaska discovery is usually liberal, or expansive, so that the parties have a better understanding of the strengths and weaknesses of their own case as well as the other side's case.

Riddle took the position that some of Lanser's discovery requests were unreasonable or irrelevant because of comments Judge Olsen made when he denied the preliminary injunction about Riddle's farm being "legitimate." Lanser argued that he needed the information to show how much of Riddle's land use was related to farming and how much was related to septage hauling.

> ***Riddle's Position***: The judge was wrong to find unreasonable Riddle's argument that the Right to Farm Act applied and to make him pay extra attorney's fees to Lanser. Riddle had a basis in law for his arguments: Judge Olsen both called the farm "legitimate" and denied Lanser's preliminary injunction request. These decisions show Riddle's position was reasonable. With respect to the discovery sanctions, Riddle refused to respond because he reasonably thought Judge Olsen's preliminary injunction order had already decided whether the farm was legitimate. In any event, Lanser's fees related to discovery were not reasonable.
>
> ***Lanser's Position***: The trial judge correctly decided Riddle's defense was unreasonable because Riddle was in reality running a septage disposal business and not a farm. Judge Olsen's order was based on preliminary evidence, so Riddle should have known Lanser would be able to present evidence at the final trial to try to change the judge's mind.

QUESTIONS FOR STUDENTS TO CONSIDER

1. The parties agree that the Right to Farm Act was intended to protect farms from expanding towns and cities, even though Alaska has a relatively small farming industry. Do you agree that farm preservation is an important goal for this state? Why or why not?

2. A significant issue here is whether Riddle's land is used in the commercial production of crops or livestock. What do you think the legislature meant when it protected commercial production? Do you think the law should apply even if only a small part of the land is being used? Explain the reasons for your opinion.

3. Why do you think the legislature decided to protect only commercial farms? Do you agree that only commercial farms should be protected?

4. Judge Harbison said in her order that Riddle had not sold any crops or farm products at all. Lanser and Riddle agree that Riddle in fact has sold some hay. How important do you think this mistake is?

5. Riddle also argues that his intent to use the land for farming is enough for the Right to Farm Act to apply. Judge Harbison indicated that Riddle was growing sod he intended to sell, and she also concluded, on page 21 of her order (Excerpt of Record page 202), that Riddle intends to use his septage business to support

commercial farming activities in the future. Do you think Riddle's intent to farm in the future should be enough to give his odor-causing activities protection now? If so, how long should he be given to develop a bigger farming operation?

6. Two different trial court judges worked on this case. Read Judge Olsen's order after the preliminary injunction hearing (Excerpt of Record 148-52) and then read Judge Harbison's two orders (Excerpt of Record 163-204). Do you think Judge Olsen and Judge Harbison had different ideas about what the statute meant? Why or why not?

7. How important do you think it is that Judge Olsen called Riddle's farm "legitimate"? Do you agree with Judge Olsen that Riddle has a legitimate farming operation?

8. Do you think Riddle's position that the Right to Farm Act applies to him is unreasonable? Why or why not?

9. What do you think is Riddle's strongest argument on appeal? What do you think is his weakest argument? Explain.

10. What do you think Lanser's strongest argument is? What do you think is his weakest argument? Explain.

11. If you were a justice on the Alaska Supreme Court, how would you decide this case? Explain.

1999 WL 33958785
Only the Westlaw citation is currently available.

NOTICE: UNPUBLISHED OPINION

NOTICE
Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d). Accordingly, this memorandum decision may not be cited for any proposition of law or as an example of the proper resolution of any issue.
Supreme Court of Alaska.

TRAILS NORTH, INC., also d/b/a River Valley Cabins; Michael Van Deusen; and Patricia Van Deusen, Appellants and Cross-Appellees,
v.
Mitch SEAVEY and Janine Seavey, individually and d/b/a Ididaride Sled Dog Tours of Seward; Dan Seavey; and Shirley Seavey, Appellees and Cross-Appellants.

Nos. S-8425, S-8505.
|
Dec. 1, 1999.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Jonathan H. Link, Judge.

Attorneys and Law Firms

Patrick M. Anderson, Hedland, Brennan, Heideman & Cooke, Anchorage, for Appellants and Cross-Appellees.

Sean Halloran, Hartig, Rhodes, Norman, Mahoney & Edwards, P.C., Anchorage, for Appellees and Cross-Appellants.

Before: MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

*MEMORANDUM OPINION AND JUDGMENT**

I. *INTRODUCTION*

***1** The Van Deusens appeal the trial court's refusal to enjoin dog noise from the Seaveys' kennel. The Seaveys cross-appeal the trial court's refusal to designate them as prevailing parties in the litigation. Because neither decision constituted an abuse of discretion under the relevant standard of review, we affirm the trial court's ruling in both respects.

II. *FACTS AND PROCEEDINGS*

Appellees Daniel and Shirley Seavey have occupied their current homestead near Seward since 1964. In 1985 appellants Michael and Patricia Van Deusen moved onto the large plot adjacent to the Seaveys' property that they had purchased the year before. They constructed a cabin on their parcel and have resided there ever since. The area is designated as rural, and the only applicable zoning ordinance provides for unrestricted land use.

The Van Deusens own "Trails North, Inc.," a seasonal tourist business. Trails North operates a fleet of buses, maintains several guest cabins located on the Van Deusens' property, and conducts area tours.

Daniel Seavey is an amateur dog musher and has kept a sizeable kennel of sled dogs on his property for decades. The Seaveys' son Mitch is a professional musher. In 1993 Mitch and his wife Janine began using the Seavey property to operate "IdidaRide Sled Dog Tours," a seasonal business featuring tourist rides on wheeled dog sleds. With the onset of the IdidaRide operation, up to seventy-five dogs have been kenneled on the Seavey property. Many landowners in the area, including the Van Deusens, keep numerous dogs, and several sled dog kennels are located nearby.

The Seaveys' dogs can be heard from the Van Deusen residence. Beginning in 1994, the Van Deusens became annoyed at the increased dog noise coming from the Seaveys' kennel. A number of mitigating measures were explored, but no mutually satisfactory steps were taken.

The Van Deusens and Trails North sued Daniel, Shirley, Mitch, and Janine Seavey for private nuisance in 1995, seeking both injunctive relief and damages. The superior court bifurcated the proceedings, holding a jury trial for the legal claim and a bench trial for the equitable claim. The jury found that the Seaveys' dogs had constituted a private nuisance during the 1995 and 1996 summer tourist seasons and awarded the Van Deusens $5,000 in damages. The jury rejected all claims presented by Trails North.

Despite the jury's finding that the Seaveys' dogs constituted a private nuisance for purposes of damages recovery, the superior court rejected the Van Deusens' request for injunctive relief. The court also refused to award attorney's fees or costs in the litigation, finding that neither the Van Deusens nor the Seaveys were prevailing

parties. The Van Deusens and Trails North appeal from the superior court's equitable ruling. The Seaveys cross-appeal the court's determination of prevailing party status and its refusal to award attorney's fees and costs.

III. *DISCUSSION*

A. *The Superior Court Did Not Err by Refusing to Enjoin the Seaveys' Kennel Operation.*

1. *In rendering its equitable ruling, the superior court was not bound by the jury's factual findings.*

***2** The jury in the present case was instructed to apply the "preponderance of the evidence" standard in evaluating the Van Deusens' claim for damages. In addressing their request for injunctive relief, however, the superior court employed the "clear and convincing" evidentiary standard.

The parties dispute whether the jury's nuisance determination under the "preponderance" formula should have influenced the superior court's equitable ruling under the "clear and convincing" standard. The Van Deusens contend that the superior court was bound by the jury's factual determination regarding the existence of a nuisance, and that it erred by refusing to enjoin the Seaveys' kennel.

Trial courts may employ a dual standard of proof for private nuisance actions which simultaneously seek legal and equitable relief. The preponderance of evidence standard is properly utilized for damage claims,[1] while the clear and convincing standard represents the appropriate burden of proof for injunctive relief.[2]

We have previously noted the

> substantial difference in the quantum of proof necessary to prove a proposition by a preponderance of the evidence and that required to prove the proposition by clear and convincing evidence. The preponderance of the evidence standard is met if the proponent of a proposition satisfies the fact-finder that the asserted facts are "probably true." For clear and convincing evidence, the proponent must "produce[ ] in the trier of fact a firm belief or conviction about the existence of a fact to be proved." [3]

The apparent contradiction between the respective conclusions of the jury and the superior court in the present case simply reflects the different standards of proof which apply to the legal and equitable claims. Courts have long recognized that injunctive relief represents a harsh, drastic remedy warranting cautious application.[4] As Professor Keeton thus notes, "[t]he fact that the conduct is tortious ... does not necessarily mean that court[s] will give the plaintiff equitable relief by way of an injunction" when evaluating an alleged private nuisance.[5]

In light of the above, the trial court properly employed the preponderance standard for the Van Deusens' legal claims and the clear and convincing standard for their equitable claim. Due to these disparate burdens of proof, the court was not bound by the jury's determination. Thus, despite the jury's finding that the Seaveys' dogs constituted a private nuisance, the superior court did not necessarily abuse its discretion by refusing to enjoin the kennel.

2. *The superior court did not err by failing to find that the Seaveys' dogs constituted a private nuisance under the clear and convincing evidence standard.*

The Van Deusens contend alternatively that the superior court erred by refusing to enjoin the Seaveys' dogs as a private nuisance under the clear and convincing evidence standard. They argue that the record conclusively proves their entitlement to injunctive relief.

***3** Alaska Statute 09.45.230(a) establishes a civil cause of action for private nuisances, permitting aggrieved plaintiffs to abate or enjoin the disturbance and recover damages. The statute defines nuisance in relevant part as "a substantial and unreasonable interference with the use or enjoyment of real property."[6]

We have not addressed the extent of "substantial and unreasonable interference" necessary to warrant injunctive relief under Alaska's private nuisance statute. The Restatement (Second) of Torts employs a balancing approach to determine the unreasonableness of the defendant's interference.[7] In the private nuisance context, interference is unreasonable if

> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.[8]

The Restatement emphasizes that the concept of unreasonableness "is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case ."[9] Under this approach, the determination of unreasonableness essentially

represents an objective "weighing process, involving a comparative evaluation of conflicting interests...."[10]

Factors relevant to the Restatement's "gravity of harm" and "utility of conduct" analysis include the extent and character of the alleged harm; the social value of both the defendant's conduct and the plaintiff's property use or enjoyment; the suitability to the locality of both the defendant's conduct and the plaintiff's property use or enjoyment; the burden on the plaintiff of avoiding the harm; and the impracticability of preventing the interference.[11] In determining the appropriateness of injunctive relief, the Restatement employs the "balancing of equities" approach, evaluating the relative hardship likely to result to each party should the court grant or deny the requested equitable remedy.[12]

The superior court generally followed the Restatement's test in the present case. It found that the Seaveys' dogs had, in fact, substantially interfered with the Van Deusens' use and enjoyment of their property. But the court ultimately determined that the dog noise would not have disturbed a reasonable property owner under similar circumstances, and that the Seaveys had not acted unreasonably in permitting the alleged disturbance. The court thus concluded that the Van Deusens had failed to satisfy their burden of proving a private nuisance by clear and convincing evidence, and rejected their request for injunctive relief.

We review a trial court's grant or denial of injunctive relief for abuse of discretion.[13] A reversible abuse of discretion exists only where we are left with a definite and firm conviction, after reviewing the whole record, that the trial court erred in its ruling.[14] We will uphold the trial court's findings of fact absent clear error.[15]

***4** The chief contention between the parties concerns whether the Seaveys' dogs unreasonably interfered with the Van Deusens' enjoyment of their property. The Van Deusens challenge the superior court's characterization of their reaction to the dog noise as unreasonably sensitive. They emphasize the allegedly excessive volume, frequency and duration of the Seaveys' dog noise. Apart from their own trial testimony, the Van Deusens produced statements from a few witnesses, a log documenting the number of barking episodes, and both video and audio recordings of the dogs.

Conversely, the Seaveys offered their own testimony and that of several witnesses attesting to the minimal and innocuous nature of the dog noise. They also presented written comments from numerous overnight guests who had lodged in the Trails North cabins on the Van Deusens' property, a large majority of whom said they either found the noise pleasant or did not notice it. They further note that "nearly everyone" in the vicinity-including the Van Deusens themselves-keeps dogs, and that several nearby landowners maintain sled dog kennels. The Seaveys thus argue that the record amply supports the superior court's decision.

The Restatement notes the difficulty of ascertaining the significance of an alleged private nuisance where the interference complained of consists solely of personal discomfort or annoyance: "If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncracies of the particular plaintiff may make it unendurable to him."[16] That numerous neighbors testified to the minimal nature of the Seaveys' dog noise is evidence which the trial court could accept that the Van Deusens' sensitivity to the alleged disturbance is atypical of the local community.[17] We accordingly find the record sufficient to justify the court's decision.

The Van Deusens cite numerous private nuisance cases from other jurisdictions in which they allege that courts have enjoined dog noise equivalent or less severe than that created by the Seaveys' kennel. They assert that these cases "unequivocally demonstrate[ ] that dog[ ] noise, when made by large numbers of dogs, is offensive and will be enjoined when it offends reasonable people."

The Van Deusens correctly note that most cases addressing the issue of excessive dog noise have affirmed a trial court's grant of injunctive relief. But they are wrong to suggest that dog noise is per se enjoinable. Instead, "there is no exact rule or formula for ascertaining when barking dogs rise to the level of a nuisance...."[18] The case law indicates that a trial court's decision to enjoin dog noise remains subject to general nuisance standards and is evaluated on a case-by-case basis.[19]

Moreover, the cases the Van Deusens cite are factually distinguishable from the present situation in many respects. The courts in most of the cited decisions were influenced by such additional factors as the close proximity of the dogs to the plaintiff's residence;[20] offensive odors;[21] the vicious nature of the dogs and the corresponding danger posed to local children;[22] the residential character of the neighborhood;[23] the aesthetic detriment created by the kennel;[24] or the consensus of numerous neighbors concerning the extent of the alleged disturbance.[25] Because these circumstances are largely absent from the present situation, the cited cases do not demonstrate a mandate for the requested injunction.

***5** The evidence showing that the Seaveys' dog noise would disturb reasonable people in the rural Kenai Peninsula locality remains inconclusive. Because the trial testimony in the present case was mixed, the trial court's refusal to grant injunctive relief fails to evoke a definite and firm conviction of error under the relevant standard of review.[26] We therefore affirm the court's refusal to enjoin the Seaveys' dog kennel operation.

B. *The Superior Court Did Not Err by Failing to Find the Seaveys or Van Deusens Prevailing Parties for the Purpose of Awarding Attorney's Fees and Costs.*

Alaska Civil Rule 82 provides for an award of attorney's fees and costs to the prevailing party in a civil action.[27] The superior court declined to make such an award in the present case, concluding that "[n]either party is a prevailing party in the sense that they are entitled to an award of costs or fees." Both the Van Deusens and Seaveys challenge the trial court's refusal to designate them as prevailing parties.

We review a trial court's designation of prevailing party status and its award or denial of attorney's fees under a "clear abuse of discretion" standard.[28] A clear abuse of discretion exists only where the trial court's determination appears "manifestly unreasonable."[29] Trial courts have particularly broad discretion under this highly deferential standard of review.[30]

1. *The Van Deusens v. the Seaveys*

The Seaveys contend that the equitable relief the Van Deusens sought represented the principal claim in the case, relegating the monetary damages issue to an incidental or secondary status. They therefore argue that the trial court's refusal to grant the Van Deusens' requested injunction makes the Seaveys prevailing parties, notwithstanding the jury's ultimate award of damages. The Van Deusens, in turn, claim prevailing party status due to the jury's award of damages, despite the trial court's denial of their request for equitable relief.

The issue is whether the trial court may decline to award attorney's fees in a bifurcated lawsuit where the plaintiff received a damage recovery from the jury but was denied equitable relief from the judge.

> A party does not have to prevail on all issues to be a prevailing party. The general rule under Civil Rule 82 is that the prevailing party is the party who has successfully prosecuted or defended against the action; it is the one who is successful on the main issue and the judgment entered.... "In order to be the prevailing party, one must ... achieve some of the benefits sought by the litigation." [31]

But although a party may prevail even if he or she failed to recover all of the relief prayed for, "[a] recovery does not guarantee prevailing party status."[32] We have held that a "litigant may be the prevailing party if successful with regard to the main issue, even if the other party receives some affirmative recovery."[33] A plaintiff may therefore achieve prevailing party status if he or she "prevailed on the basic liability question and received an affirmative recovery based on its successful litigation of that question, which was substantial in amount."[34]

***6** The principles recited above could support a fee award to either the Van Deusens or the Seaveys. On one hand, the Seaveys defeated the Van Deusens' request for injunctive relief and were found liable for a small fraction of the monetary damages sought by the Van Deusens.[35] We have previously accepted as prevailing parties defendants found liable for only a small percentage of the plaintiff's requested damages, noting that such a ruling "essentially ... [represents] a defense verdict."[36] Coupled with the defeat of the Van Deusens' equitable action, the jury's small award in this case arguably supports the Seaveys' entitlement to fees and costs.[37]

On the other hand, we have recognized that plaintiffs who prevail on the basic liability question involved in the case can attain prevailing party status-despite their failure to secure their entire attempted recovery-if they receive a recovery "substantial in amount."[38] This principle supports a fee award to the Van Deusens, or at least validates the superior court's refusal to grant prevailing party status to the Seaveys. The Van Deusens convinced a jury that the Seaveys' dogs constituted a compensable private nuisance, thereby arguably prevailing on "the basic liability question in the case."[39]

Because the attorney's fees issue between the Van Deusens and Seaveys is close, the superior court's refusal to designate a prevailing party did not represent an abuse of discretion. While the legal principles cited above could support a fee award to either party in the present case, they fail to mandate such a conclusion. We have repeatedly noted that the trial court's discretion "is broad enough to warrant denial of fees altogether," and that the court does not abuse its discretion by "declaring the case a 'wash' and ordering each party to bear his own costs and fees."[40] Nor is the trial court required to apportion fees among the various issues involved in a case; instead, the court's function is to "determine, *in an overall sense,*

which party the decision favors."[41] As such, "[w]here each party prevails on a 'main issue,' the court retains the discretion not to award any fees and costs."[42]

In light of the trial court's broad discretion, the disparate results reached by the judge and jury, respectively, support the court's refusal to designate a prevailing party. We therefore affirm the court's determination that neither the Van Deusens nor the Seaveys were prevailing parties.

2. *Trails North, Inc. v. the Seaveys*

The Seaveys also allege their prevailing party status as to Trails North, the Van Deusens' seasonal tourist business and a named plaintiff in the litigation below. The jury awarded Trails North no damages, and the trial judge rejected the company's request for equitable relief. On the basis of their seemingly complete victory over Trails North at trial, the Seaveys contend that the trial court abused its discretion by failing to label them prevailing parties with respect to that plaintiff.

***7** The Van Deusens respond that they wholly own Trails North, that they share an "identity of interests" with the company, and that Trails North essentially represented only a minor party in the case. They argue that the Seaveys spent minimal effort and resources upon trial issues specific to Trails North, and should not receive a fee award for such an insignificant additional expenditure.

We find merit in the Van Deusens' argument. Trails North shared an almost complete identity of interests with the Van Deusens for purposes of trial; the Seaveys' legal defense incurred virtually no additional costs traceable to the company's presence as a plaintiff in the lawsuit.

Trial courts have great discretion in determining fee awards in multi-party litigation,[43] including the discretion to adapt such awards to the unique circumstances of each particular case.[44] Moreover, we will affirm a superior court's denial of fees to a prevailing party absent a finding of arbitrariness, capriciousness, or improper motive.[45] The Seaveys have failed to show that the court abused its discretion or acted with impropriety in the present case. We accordingly reject their request for fees concerning Trails North's claim.

IV. *CONCLUSION*

The superior court did not abuse its discretion by refusing to grant the Van Deusens' requested injunction or by failing to designate a prevailing party for purposes of awarding attorney's fees. We accordingly AFFIRM the trial court's ruling in all respects.

All Citations

Not Reported in P.3d, 1999 WL 33958785

Footnotes

* Entered pursuant to Appellate Rule 214.

1 *See, e.g., Hartzler v. Kalona,* 218 N.W.2d 608, 610 (Iowa 1974); *Kriener v. Turkey Valley Community Sch. Dist.,* 212 N.W.2d 526, 532 (Iowa 1973); *Gorman v. Sabo,* 122 A.2d 475, 479 (Md.App.1956); *Dunlop v. Daigle,* 444 A.2d 519, 520 (N.H.1982). *See also* 58 Am.Jur.2d *Nuisances* §§ 246, 315 (1989).

2 *See Spenard Action Comm. v. Lot 3, Block 1, Evergreen Subdivision,* 902 P.2d 766, 774-75 (Alaska 1995) (applying clear and convincing standard to public nuisance abatement action under AS 09.50.170-.240 and noting clear and convincing standard in other cases involving real property issues) (citations omitted). *See also, Rose v. Chaikin,* 453 A.2d 1378, 1381 (N.J.Super.App.Div.1982); *Sharp v. 251st Street Landfill, Inc.,* 925 P.2d 546, 549 (Okla.1996); *Smith v. Wallowa County,* 929 P.2d 1100, 1103 (Or.App.1996); *Jewett v. Deerhorn Enters., Inc.,* 575 P.2d 164, 166 (Or.1978).

3 *Alaska Marine Pilots v. Hendsch,* 950 P.2d 98, 111 (Alaska 1997) (citations omitted) (alteration in original).

4 *See, e.g., Dupre v. Schering-Plough Health Care Prods., Inc.,* 656 So.2d 786, 788 (La.App.1995); *Scott v. Jordan,* 661 P.2d 59, 64 (N.M.App.1983); *LeFurgy v. Long Cove Club Owners Ass'n,* 443 S.E.2d 577, 578 (S.C.App.1994).

5 W. Page Keeton et al., *Prosser and Keeton on Torts* §§ 87, 88A (5th ed.1984).

6 AS 09.45.255.

7 *See* Restatement (Second) of Torts § 826 (1965).

8 *Id.* Professor Keeton also advocates this approach for determining the appropriateness of equitable relief in private nuisance actions. *See* W. Page Keeton et al., *supra* note 5, § 88A.

9 Restatement (Second) of Torts § 826 cmt. b (1965).

10 *Id.* at § 826 cmt. c.

11 *Id.* at §§ 827, 828.

12 *Id.* at § 941.

13 *See Sharp,* 925 P.2d at 549 (citations omitted). *See also North Kenai Peninsula Rd. Maintenance Serv. Area v. Kenai Peninsula Borough,* 850 P.2d 636, 639 (Alaska 1993) (recognizing applicability of abuse of discretion standard for reviewing orders concerning both temporary and preliminary injunctions).

14 *See Wright v. Shorten,* 964 P.2d 441, 443 (Alaska 1998).

15 *See Linstad v. Sitka School Dist.,* 963 P.2d 246, 248 (Alaska 1998); *Parker v. Northern Mixing Co.,* 756 P.2d 881, 892 (Alaska 1988).

16 Restatement (Second) of Torts § 821F cmt. d (1965).

17 *See, e.g., Schneider v. Fromm Lab., Inc.,* 53 N.W.2d 737, 739-40 (Wis.1952) (affirming trial court's refusal to enjoin alleged nuisance created by defendant's barking dogs where most neighbors were undisturbed by noise).

18 *Rae v. Flynn,* 690 So.2d 1341, 1343 (Fla.Dist.App.1997).

19 *See Herbert v. Smyth,* 230 A.2d 235, 237 (Conn.1967); *Larsen v. McDonald,* 212 N.W.2d 505, 508 (Iowa 1973); *Tichenor v. Vore,* 953 S.W.2d 171, 177 (Mo.App.1997).

20 *Parker v. Reaves,* 505 So.2d 323, 324 (Ala.1987); *Herbert,* 230 A.2d at 237 (one hundred seventy-five feet); *Larsen,* 212 N.W.2d at 508 (one block); *Dunlop v. Daigle,* 444 A.2d 519, 520-21 (N.H.1982) (four feet).

21 *Brewton v. Young,* 596 So.2d 577, 578 (Ala.1991); *Parker,* 505 So.2d at 324; *Herbert,* 230 A.2d at 237-38; *Larsen,* 212 N.W.2d at 508; *Dunlop,* 444 A.2d at 521. *See also Fredericktown v. Osborn,* 429 S.W.2d 17, 21-22 (Mo.App.1968).

22 *Brewton,* 596 So.2d at 578; *Parker,* 505 So.2d at 324.

23 *Parker,* 505 So.2d at 324; *Larsen,* 212 N.W.2d at 508. *See also Fredericktown,* 429 S.W.2d at 20.

24 *Dunlop,* 444 A.2d at 521.

25 *Brewton,* 596 So.2d at 577-78; *Parker,* 505 So.2d at 323-24; *Higgs v. Anderson,* 685 S.W.2d 521, 523 (Ark.App.1985); *Larsen,* 212 N.W.2d at 508.

26 *See Tichenor,* 953 S.W.2d at 174-78 (upholding trial court's equitable ruling in analogous private nuisance case despite heavily conflicting trial evidence and noting appellate court's limited and deferential role on review); *Traiteur v. Abbott,* 327 N.E.2d 130, 133-34 (Ill.App.1975) (deferring to trial court's weighing of evidence in public nuisance case where neighbors' testimony concerning extent of defendant's dog noise sharply conflicted).

27 Alaska R. Civ. P. 82(a).

28 *Leisnoi, Inc. v. Stratman,* 960 P.2d 14, 19 (Alaska 1998) (citations omitted).

29 *Id.*

30 *See id.*

31 *Hayes v. A.J. Assoc.,* 960 P.2d 556, 568 (Alaska 1998) (citations omitted) (quoting *In re Application for Water Rights,* 891 P.2d 981, 984 (Colo.1995)).

32 *Blumenshine v. Baptiste,* 869 P.2d 470, 474 (Alaska 1994).

33 *Apex Control Sys., Inc. v. Alaska Mechanical, Inc.,* 776 P.2d 310, 314 (Alaska 1989) (citation omitted).

34 *Ashley v. Baker,* 867 P.2d 792, 797 (Alaska 1994) (citation omitted).

35 The Van Deusens indicated their intent to seek $50 for each of the thousands of dog noise disturbances they allegedly suffered during the relevant grievance period. The jury, however, ultimately awarded the Van Deusens only $5,000 in damages.

36 *Hillman v. Nationwide Mut. Fire Ins. Co.,* 855 P.2d 1321, 1327 (Alaska 1993) (discussing *Hutchins, infra*). *See, e.g., Hutchins v. Schwartz,* 724 P.2d 1194, 1204 (Alaska 1986) (defendant prevailing party where he faced potential liability of $275,000 but found liable for only $1,937.09); *Owen Jones & Sons, Inc. v. C.R. Lewis Co.,* 497 P.2d 312, 313-14 (Alaska 1972) (defendant prevailing party where forced to pay only $7,363.12 compared to plaintiff's initial request of $119,663.12).

37 *See Blumenshine,* 869 P.2d at 474 (citing *Hutchins*). The Seaveys also argue that the monetary damages aspect of the Van Deusens' lawsuit remained "incidental" relative to the injunctive relief issue as a matter of law. They contend that AS 09.45.230 subordinates damages recovery in private nuisance cases to equitable relief, relegating the former to incidental status.

This argument fails for two reasons. First, the Van Deusens sought compensatory damages in excess of $250,000 for past disturbances. This figure is sufficiently substantial to establish the Van Deusens' attempted monetary recovery as equivalent in nature to their equitable claim. Second, AS 09.45.230 does not draw the distinction asserted by the Seaveys.

38 *Ashley,* 867 P.2d at 797 (citation omitted).

39 *Id.*

40 *Pavone v. Pavone,* 860 P.2d 1228, 1233 (Alaska 1993) (citations omitted).

41 *Alaska Wildlife Alliance v. Rue,* 948 P.2d 976, 981 (Alaska 1997) (emphasis added). We noted in *Rue* that "[a]pportionment of attorney's fees among issues is not the standard practice." *Id.*

42 *Shepherd v. State, Dep't of Fish & Game,* 897 P.2d 33, 44 (Alaska 1995) (citing *Tobeluk v. Lind,* 589 P.2d 873, 877 (Alaska 1979)).

43 *See Hughes v. Foster Wheeler Co.,* 932 P.2d 784, 792 (Alaska 1997); *Myers v. Snow White Cleaners & Linen Supply, Inc.,* 770 P.2d 750, 752-53 (Alaska 1989).

44 *See Hughes,* 932 P.2d at 792 (quoting *In Re Soldotna Air Crash Litig.,* 835 P.2d 1215, 1223 (Alaska 1992)).

45 *See Bowers Office Prods., Inc. v. Fairbanks N. Star Borough Sch. Dist.,* 918 P.2d 1012, 1016 (Alaska 1996) (citations omitted).