

IN THE CIRCUIT COURT OF DEKALB COUNTY, ALABAMA

BARBARA GOODWIN, as Executor of)
the Estate of Helen Frazer; Joseph Allen)
Lowman, Jr.; HEATHER NICELY, as)
Trustee of the Harrison Family Trust;)

Plaintiffs,)

vs.)

CIVIL ACTION NO.: CV2006-82

LARRY GRAY, individually and d/b/a)
LARRY GRAY FARMS; GARY GRAY)
and PATSY GRAY, individually and)
d/b/a GRAY FARM, d/b/a P.J.'S)
POULTRYPLAYHOUSE; CITY OF)
MENTONE; et al.,)

Defendants.)

DEFENDANTS' MOTION TO RECONSIDER, MODIFY OR VACATE

COME NOW, the Defendants, Larry Gray, individually and d/b/a Larry Gray Farms; Gary Gray and Patsy Gray, individually and d/b/a Gray Farm d/b/a P.J.'s Poultry Playhouse, and moves this Honorable Court, pursuant to Rule 50, 59, 60, and 65 of the Alabama Rules of Civil Procedure, to reconsider, alter, modify or vacate its Order of August 10, 2007, and as grounds therefore would show and submit unto the Court as follows:

1. The Plaintiffs have failed to present any evidence that they will suffer or have suffered irreparable harm as a result of the Defendants' actions. The Court erred by entering a finding that the Plaintiffs suffered irreparable harm.

2. The Plaintiffs have failed to produce any evidence that they do not have any adequate remedy at law.

3. The Plaintiffs have failed to prove that the alleged nuisance would affect an ordinary reasonable man.

4. Plaintiffs have failed to present any evidence, much less substantial evidence, that the Defendant was guilty of negligence or wantonness.

5. Plaintiffs have completely failed to present any evidence, much less substantial evidence, that the Defendant breached any building standard.

6. The Plaintiffs have failed to present substantial evidence, or any evidence, that the Defendant breached the Mentone building code. In fact, the undisputed evidence is that the proposed chicken houses were presented to the appropriate authorities with the Town of Mentone, and the construction of the chicken houses was approved by the Town of Mentone Building Commission.

7. The Plaintiffs' claims for relief are barred by the "doctrine of laches," in that the clear evidence is that the Grays have raised chickens on their property for 38 years, without complaint from the Plaintiffs. The Plaintiffs also did not file suit until after the chicken houses were completed and Gary Gray had chickens in the houses.

8. The Plaintiffs' claims are barred Section 6-5-127(a) of the Alabama Code, (1975).

9. The Court erred by ordering the Defendants to maintain in place those measures that are by definition only temporary in nature.

10. The Court erred in ordering the Defendants to maintain the ditches of the County Road.

11. The Court's order is vague with regard to what has been ordered of the Defendants.

LEGAL ARGUMENT

In addition to the foregoing factual reasons why the Plaintiffs' claim must fail, the Defendants also assert the following legal grounds and submit this legal argument in support of his Motion for Reconsideration, Alteration, Modification or Vacation of the Court's Order of August 10, 2007.

Under Alabama law, the common law rule regarding surface water run-off has been applied where both the dominant and subservient landowners are within the municipal limits.

[T]he common law rule permits one to restrict or control the flow of surface water with limit or no limitation whatsoever. The proprietor may deal with the surface water as he chooses, regardless of the consequence to his neighbor. The rule applies to owners of property within the municipal limits, but has been limited to the effect that a lower owner may dam surface water, but upper owner may not channelize it so as to injure the lower owner.

Street v. Tackett, 494 So. 2d 13, 14 (Ala. 1986), citing *Mitchell v. Mackin*, 376 So. 2d 1684, 1688 (Ala. 1979) and *Kay-Noojin Development Company v. Hackett*.

In the present case, there is no evidence that the Grays are “channelizing” the water flow to the Plaintiffs property. It is clear, that the surface water follows the same patterns that it always has, perhaps for as much as a million years, according to Plaintiffs’ expert Mr. Patrick.

The Defendants should not be obliged to improve the surface water run-off from its natural condition. Despite this, the Defendants have expended large sums of money to comply with ADEM regulations and try to resolve the dispute with the Plaintiffs. The Defendants have installed temporary sediment traps, hay bales, temporary sediment fences, rip rap, and sown seed on large areas of the farm, and the construction sites.

The Court’s Order granting a permanent injunction indicates that the temporary measures should be permanent. See page 8, paragraph 4, 5, 6, 8, 9, and 10 of the Court’s Order. The Defendants would request that the Court remove these provisions from the permanent injunction or modify it so that the storm water run-off plan reflects the temporary nature of these measures. The undisputed expert testimony of the Defendants’ experts, Plaintiffs’ experts, (with the exception of Mr. Patrick), and the Alabama Department of Environmental Management, and the Alabama Department of Agriculture was that these measures are temporary, and are simply designed to provide stormwater run-off management while the vegetation returns to the construction areas.

With regard to pages 7 and 8, paragraphs 1, 2, 3, 7, 9, 10, and 11 of the Court’s Order, the Defendants object to these provisions because they are vague and the Defendants would be incapable of determining what is required of them under these provisions. With regard to paragraph 1, the amount of ground cover the Defendants are capable of maintaining is dependant upon many factors beyond their control. For example, the current drought in Alabama is prohibiting grass from growing across the Northern half of the state. A sprinkler system to cover many acres of land is simply cost prohibitive and not an economically feasible measure to insure adequate vegetation. The same arguments apply to paragraphs 2 and 7 regarding enhancing the vegetation between the chicken houses and the Goodwin property.

Directive number 3 under the Permanent Injunction Order, states that Mr. Larry Gray is to triple the area covered in rip rap in certain areas. Without reference to a map, it is unclear as to precisely where the Court wishes the rip rap to be placed.

With regard to paragraphs 4 and 5, the consensus of all experts, except Mr. Patrick, is that it is impossible to remove all solid material from storm water run-off. These paragraphs also contain the instructions that this is to be accomplished “regardless of the size and intensity of a rain fall event.” Again, the Plaintiffs are not entitled to improvements concerning the storm water run off from the dominant property. The

expert testimony clearly indicates that it is physically impossible to prohibit storm water run off if the rain event is substantial enough.

The Defendant objects to paragraph 9 of the Permanent Injunction to the extent that it is placing a public government responsibility on the private landowners adjoining the public road. This provision specifically requires that the Defendants to “use their best efforts to ensure that the ditches along the public road adjoining their property are maintained and cleaned out as needed, and shall further use their best efforts to obtain the paving of that road by the appropriate public authority.” The direction given in paragraph 9 is also vague in that it refers to “best efforts.” Paragraph 10 is a general direction for the Defendants to “employ whatever measures may be reasonable and necessary to prevent excessive storm water from running from their properties onto the properties of the Plaintiffs.” This is vague and indefinite. This portion of the Order fails to comply with Rule 65(d) of the *Alabama Rules of Civil Procedure*.

In addition to the foregoing specific objections to the injunction, the Defendants would further submit that the injunction should not have been issued under the general concepts of Alabama law set forth below.

NUISANCE

The Plaintiffs’ claim to entitlement of an injunction appears to be based on a claim of private nuisance. A nuisance is defined by the Alabama Code, § 6-5-120 (1975) as follows:

A ‘nuisance’ is anything that works hurt, inconvenience, or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man.

Section 6-5-120 of the Alabama Code (1975).

The Alabama Code distinguishes between a private nuisance and public nuisance as follows:

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of

the state. A private nuisance gives a cause of action to the person injured.

The Plaintiffs' Complaint repeatedly refers to the West fork of the Little River, and the camps thereon. Apparently, despite the fact that they have no right to assert such cause of action, the Plaintiffs are attempting to claim the right to recover based on public nuisance. The statutory law of Alabama clearly gives them no such right. Their sole recovery, if in fact a nuisance exists, is under the theory of private nuisance.

The vast majority of Plaintiffs' testimony and evidence were photographs of cloudy water flowing into the Little River. Plaintiffs have no right to recover for any trespass into a navigable waterway. Furthermore, the testimony of numerous State employees, from ADEM to the Department of Agriculture, indicates there has been no damage or injury to the Little River.

Under the Alabama Code, the Plaintiffs may have been entitled to injunctive relief under Section 6-5-125 of the Alabama Code, (1975):

Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages and such consequences are not merely possible but to a reasonable degree certain, a court may interfere to arrest a nuisance before it is completed.

Section 6-5-125 of the Alabama Code (1975).

In the instant case, the chicken houses have been completed. Therefore, the Plaintiffs have no right to injunctive relief under Section 6-5-125 of the Alabama Code, (1975).

SECTION 6-5-127 BARS THIS ACTION

The Defendant Grays have operated chicken houses on the property in question for 38 years. The Plaintiffs claims are barred by Section 6-5-127(a) of the Alabama Code, (1975). In pertinent part, the code states that no agricultural, ..., farming operation facility, ...,

or any of its appurtenances or the operation thereof shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one year during which such plant, facility, establishment, farming operation facility, or race track, its appurtenances or the operation thereof has not been found by a court of competent jurisdiction to be a nuisance; ...[....]

The Plaintiffs claims concerning the construction of the houses, noise, smell, or use of chicken litter as fertilizer are barred by this statute.

The Defendant acknowledges that there is an exception to subsection (a) contained in subsection (b) of Section 6-5-127. However, this limits the Plaintiffs' remedies to a recovery of damages for injuries or damages sustained by them for a changing condition of any streams or overflow from the property. A preliminary injunction is not allowed under subsection (b).

Assuming for the sake of argument that Section 6-5-127 of the *Alabama Code* (1975) does not relate to Charles Gray's operation of the chicken farming operation, Larry Gray has been operation the chicken houses continuously for more than one (1) year before this suit was filed. This action was filed after construction was completed. More than one (1) year passed before this Court entered a ruling fining that the construction of the chicken houses were a nuisance. Therefore, Section 6-5-127 of the *Alabama Code* (1975) bars the entry of an injunction in this case.

DOCTRINE OF LACHES

Furthermore, the Plaintiffs claims are barred by the doctrine of laches. The Plaintiffs cannot be allowed to sit on their hands for 38 years, and then claim that the chicken-raising operations of the Grays are a nuisance. In 1889, the Alabama Supreme Court addressed an issue where the plaintiff waited three (3) years after a coal washing operation had begun to sue for nuisance. The court described the plaintiff's duty and his failure in that duty as follows:

Clearly it was the duty of complainant to give the company some intimation of his objection, and not to stand by with full knowledge, and permitted to make large outlays on these washers, and then seek the aid of the court of equity to arrest their operations. Reasonable diligence in the assertion of his rights was the measure of complainant's duty in this case, and, failing in this, he must now seek relief in a court of law for any damage he may have suffered.

Clifton Iron Company v. Dye, 6 So 2d. 192 (1889).

Plaintiffs were also aware that the chicken houses were about to be built, but took no action. The proposed construction was disclosed to the Town of Mentone in open meeting in the Summer and Fall of 2005. Despite this, Plaintiffs did not sue until construction was completed. Gary Gray had chickens in his houses when suit was filed. Each Defendant has borrowed over \$500,000.00 to build the chicken houses. The Plaintiffs sat on their hands and did not file suit in a timely fashion. It would be

inequitable to grant injunctive relief after the Plaintiffs' failure to act allowed the Defendants to expend huge amounts of time and money.

MENTAL ANGUISH

With regard to the claims of the Plaintiffs for mental anguish, the courts have consistently held that damages for mental anguish may only be awarded in a nuisance case, if the mental suffering inflicted is accompanied by malice, insult, inhumanity, or contumely. See *Seal v. Pearson*, 736 So 2d 1108 (Ala. Civ. App. 1989). *Gregath v. Bates*, 359 So 2d. 404 (Ala. Civ. App. 1978). In the instant case, there has been no evidence presented to satisfy the burden of proof for award of mental anguish furthermore, the state and trust are incapable of suffering a mental anguish injury.

COMPARATIVE INJURY

Additionally, the Alabama Courts have long followed the "comparative injury doctrine" in injunction cases. See *Brown v. Allied Steel Products Corporation*, 273 Ala. 184, 136 So 2d. 923 (1962). "But it is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. In determining this question, the court should weigh the injury that may accrue to the one or the other party, and also to the public, by granting or refusing an injunction." See *Clifton Iron Company v. Dye* [citations omitted].

In the present case, Larry Gray has invested substantial energy, time, and money in to the erection of the new chicken houses. The Estate of Helen Frazer has suffered the damage of having silt or dirt flow through a pipe under the edge of their property. The Harrison Trust property, on which no dwelling house exists, is completely unaffected by any water flow or construction on Larry Gray property. The Harrison Trust property does not abut the Larry Gray's property, but does abut the road. However, the flow of storm water off of Larry Gray's property does not go onto the Harrison Trust property. Dr. Lowman's property has been affected by one incident where substantial rainfall caused silt to flow onto a wet weather stream located at the extreme edge of their property. The silt flowed onto an over-grown powerline easement which is undeveloped.

The mere fact that a contemplated use of property will result in depreciation of value of surrounding property is not grounds for equitable relief. [interior citations omitted]. Whether a use of property is such as would not affect adversely an ordinary reasonable man, and such use is lawfully authorized, it will not constitute a nuisance and may not be enjoined.

Shell Oil Company v. Edwards 81 So 2d. 535 (Ala. 1955). [other citations omitted]. The Plaintiffs presented no evidence of diminution of their property. By contrast, Larry Gray and Gary Gray have invested over One Million Dollars to improve their property. Their

chicken houses provide food and employment in Dekalb County, Alabama. Requiring the Defendants to invest more of their scarce resources to appease the unreasonable demands of the Plaintiffs is inequitable and not supported by the evidence.

CONCLUSION

For the foregoing reasons, the Defendants respectfully requests that the Court reconsider, amend, modify or vacate its permanent injunction of August 10, 2007; Defendants further request that the Court conduct a hearing on their Motion; and enter judgment in favor of Defendants.

Respectfully submitted this the 27th day of August, 2007.

/s/Robert V. Rodgers

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon all attorneys of records, on this the 27th day of August, 2007, by depositing same in the United States Mail, postage prepaid, addressed as follows:

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