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Case Comments

WEST v. NATIONAL MINES: CREATION OF PRIVATE NUISANCE BY USE OF PUBLIC PROPERTY

I. INTRODUCTION

Private nuisance law has evolved case by case since the early assizes and, at its core, protects an individual's right to quiet possession and enjoyment of one's land. Most jurisdictions, including West Virginia, follow the general rule which defines a private nuisance as any activity that unreasonably interferes with the private use and enjoyment of land.

Underlying this definition, however, are competing policy considerations, and the court is the traditional forum to determine whose interests will dominate in a private nuisance action. Frequently at conflict are the social utility of a business enterprise and the habitation rights of the private landowner. In balancing these interests, the West Virginia Supreme Court of Appeals has been inclined to permit businesses latitude in conducting their activities and not to impose unnecessary restrictions. However, the court has also recognized that this latitude must be restricted when business operations unreasonably interfere with the use and enjoyment of another person's land.

1 The term "nuisance" is incapable of exact and complete definition which will fix all cases since the controlling facts and affected subject matter vary from case to case. See generally, W. Prosser, The Law of Torts § 86 (4th ed. 1971) (hereinafter cited as Prosser). Nuisance law protects the invasion of two distinct interests, private and public: "A private nuisance threatens injury to one or a few persons or which violates only private rights and produces damage to one or to no more than a few persons." Balleinlente's Law Dictionary 993 (3d ed. 1969). "A public nuisance is a violation of a public right either by direct encroachment upon a public right or property or by doing some act which tends to a common injury, or by omitting to do some act which the common duty requires, and which it is the duty of the person to do, which results in injury to the public. It is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law." Balleinlente's Law Dictionary 1023 (3d ed. 1969).

A nuisance may be public and private at one and the same time where conduct constituting a public nuisance substantially interferes with the use of privately owned land. Prosser, supra § 86, at 573.

2 Prosser, supra note 1, § 89, at 591.
4 Restatement (Second) of Torts § 822 (1977).
5 Martin v. Williams, 141 W. Va. 595, 605, 93 S.E.2d 835, 841 (1956).
The notion that a business cannot continue in force an activity which works injury to the property of another was recently expanded in West v. National Mines.\footnote{285 S.E.2d 670 (W. Va. 1981).} According to West, a private nuisance action can be maintained against a user of a public road creating a dust nuisance that substantially violates private land rights.\footnote{Id. at 677.} Furthermore, to abate the nuisance, the liable party may be required to assume the duty of privately maintaining a public road.\footnote{Id. at 679.}

II. Statement of the Case

The West case commenced in 1978, when Grat and Ina West filed a civil action in the Circuit Court of Wyoming County which alleged the existence of a nuisance that effectively rendered their home uninhabitable.\footnote{Id. at 672-74.} The defendants in that action were National Mines Corporation\footnote{Id. at 673.} (hereinafter National) and four companies that were mining coal under contracts with National.\footnote{Id. at 673.} In the course of mining operations,\footnote{Id. at 673.} contract coal haulers\footnote{Id. at 673.} transporting the mined coal along State Route 81, which abuts the Wests' property, were allegedly responsible for creating the dust nuisance that prompted the suit.\footnote{Id. at 673-74.}

After a hearing\footnote{Id. at 673-74.} on the Wests' preliminary injunction to have the nuisance abated,\footnote{Id. at 673.} the circuit court denied the injunction and dismissed the action

\footnote{Id. Coal mined from the leasehold was transported via truck along the road past the West house and ultimately was delivered to a preparation facility owned by National.}

\footnote{Id. It is not entirely clear whether the truck operators were employed directly by National or by the four coal companies producing the coal.}

\footnote{Id. The Wests lived at their present home since 1972 and at the same address for over 45 years. Although mining operations had been ongoing in the vicinity for decades, the volume of coal truck traffic had significantly increased since 1977. As a consequence, the dust conditions had become appreciably worse. The road is also utilized by the general public, but the dust problem is caused primarily by the coal trucks. The dust presumably comes from the road and from the loads carried in the trucks.}

\footnote{Id. at 673-74. At the hearing on Sept. 21, 1979, Mr. West described the oppressive conditions caused by the dust:

"You can stay out in the dust, I believe, and it would actually kill you in the end. I have to get out of it. You all ought to really understand what I am trying to say here, that the dust can be that bad down there. You take a dirt road down there, as much big traffic as is on it, that is the kind of atmosphere we have to live in every day except when it is raining, and, believe me it is not good. It is hard to breathe. I tell you, I've often thought about it like this: A man would be better off over there in jail in solitary confinement than to have to put up with this kind of conditions for the rest of his life. It is just that bad."}

\footnote{Id. at 673. The Wests requested that the truck traffic be temporarily halted, or in the alternative that National water the road to abate the dust.}
against the coal companies.\textsuperscript{20} The court concluded that National was absolved of any liability because none of its trucks or employees were directly involved in creating the dust nuisance and that the other coal companies were not liable because the dust problem resulted from the use of a public road.\textsuperscript{21}

The Wests appealed the ruling, claiming that the circuit court erred in three respects. They first argued that even though the coal trucks were using a public road, the severity of the dust conditions operated to prove the existence of a nuisance which must necessarily be enjoined. Second, they claimed the independent contractor defense did not relieve National of responsibility for the nuisance. Finally, the Wests alleged that the circuit court erred in denying their motion for preliminary injunction.\textsuperscript{22}

In reversing the lower court's decision,\textsuperscript{23} the West Virginia Supreme Court of Appeals held that it was error to dismiss the Wests' complaint because the evidence adduced at the hearing established an actionable nuisance. Most significantly, the court held that a cause of action may lie in nuisance, even if it involves the use of public property, when that use is made in an unreasonable, negligent or unlawful manner.\textsuperscript{24} The court also held the independent contractor relationship did not immunize National from liability in this factual setting because it shared a "community of interest" with the contract haulers who directly created the nuisance.\textsuperscript{25} The final point made by Justice McGraw in West was that the trial court abused its discretion in not granting preliminary injunctive relief. Consequently, a preliminary injunction was ordered whereby the coal companies would institute an ameliorative plan that included continuing maintenance of the public road, and the circuit court was directed on demand to fashion an appropriate method for permanent abatement of the dust problem.\textsuperscript{26}

III. PRIOR CASE LAW

A. Nuisance Law

Generally, a private nuisance occurs when anything under one person's control injuriously affects another person's property.\textsuperscript{27} It has been stated as a

\textsuperscript{20} Id. at 673-74. After filing an answer and two amendments, National moved to dismiss the complaint. The trial court did not act upon the motion to dismiss until after the hearing. The coal companies presented only a memorandum in support of their motion and offered no evidence at the hearing.

\textsuperscript{21} Id. at 674.

\textsuperscript{22} Id.

\textsuperscript{23} Id. It was not clear from the memorandum opinion whether the circuit court had granted a motion to dismiss under Rule 12(b)(6) of West Virginia Rules of Civil Procedure or a motion for summary judgment under Rule 56. The motion was treated by the West Virginia Supreme Court of Appeals as one for summary judgment because matters outside the pleadings had been presented to the court.

\textsuperscript{24} Id. at 677.

\textsuperscript{25} Id. at 678.

\textsuperscript{26} Id. at 679.

general rule in West Virginia that a fair test of whether a particular business operation that is not unlawful in itself, constitutes a nuisance "is the reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all existing circumstances."\textsuperscript{28} In many cases, the question of whether or not a private nuisance exists depends upon the degree of injury done, since not every inconvenience, discomfort or annoyance will constitute a nuisance. The amount of interference necessary to constitute an actionable nuisance, therefore, must be decided according to the circumstances of the particular case.\textsuperscript{29}

It is a well-established principle of law that dust may constitute a nuisance\textsuperscript{30} and a private right of action is available when that dust substantially interferes with the landowner's right to use and enjoy the land.\textsuperscript{31} And even though an act done with the best of care may result in a nuisance,\textsuperscript{32} the West Virginia Supreme Court of Appeals found the operation of a dust producing preparation plant reasonable where the defendant-coal company used "every means available" to control the dust.\textsuperscript{33} In similar cases involving burning "gob piles," the court has awarded damages and injunctive relief to aggrieved plaintiffs when fumes and dust emanating from the piles caused property damage and health problems.\textsuperscript{34}

However, the West Virginia court has never decided a question involving the effect of conditions which would constitute a nuisance, but which arose from the use of a public road or facility.\textsuperscript{35} Other jurisdictions confronting this issue have disposed of it with varying results.

In a case factually similar to West, the Supreme Court of Iowa in Shannon v. Missouri Valley Limestone Co.,\textsuperscript{36} affirmed a lower court ruling that a common law nuisance was created by dust raised from trucks hauling crushed rock from a limestone quarry along an unpaved public road adjoining private property. Also in Shannon, the court affirmed an injunction\textsuperscript{37} ordering the quarrying company to halt truck traffic, or in the alternative, treat the road to prevent the dust.\textsuperscript{38}

In a similar case, the Supreme Court of Texas favorably cited Shannon,

\textsuperscript{28} Mahoney v. Walter, 157 W. Va. 882, 205 S.E.2d 692 (1974).
\textsuperscript{29} Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968).
\textsuperscript{30} Reinhart v. Stanley Coal Co., 112 W. Va. 82, 163 S.E. 766 (1932); See also Annot., 24 A.L.R.2d 194 (1952).
\textsuperscript{31} PROSSER, supra note 1, § 59 at 593; RESTATEMENT (SECOND) OF TORTS § 822 (1965).
\textsuperscript{33} Harless v. Workman, 145 W. Va. 266, 114 S.E.2d 548 (1960).
\textsuperscript{34} Board of Comm'rs v. Elm Grove Mining Co., 122 W. Va. 422, 9 S.E.2d 813 (1940); Reinhart v. Stanley Coal Co., 112 W. Va. 82, 163 S.E. 766 (1932).
\textsuperscript{35} 285 S.E.2d at 674.
\textsuperscript{36} 255 Iowa 528, 122 N.W.2d 278 (1963) (class action suit brought by persons residing along a public road).
\textsuperscript{37} Id. The plaintiffs sought only injunctive relief.
\textsuperscript{38} Id. at 529. The trucks were also required to cover their loads and were enjoined from following closer than at intervals of 300 feet.
but factual differences in Wales Trucking Co. v. Stallcup\(^\text{48}\) dictated a different result. In Wales, the activity which caused the dust nuisance was only of a temporary nature and involved the lawful use of a public road to deliver pipe for a public water project.\(^{49}\)

When a court determines that it is not possible to alleviate the injurious effects of a nuisance created by traffic on a public highway, an abutting property owner cannot obtain an injunction to abate the nuisance.\(^{41}\) Thus, in Jacobson v. Crown Zellerbach Corp.,\(^{42}\) the Oregon Supreme Court denied relief because the harmful effects to an abutting landowner's structures could only be ameliorated by halting a timber hauler from using the only available public road.

B. Independent Contractor Defense

As a general principle, an employer of an independent contractor is not liable for any harm caused to others by the contractor's wrongful acts.\(^{43}\) But one of the numerous exceptions\(^{44}\) to this rule occurs when a nuisance is created by a contractor engaged in some activity that was authorized by the employer.\(^{45}\) Hence, if an employer knows or has reason to know that the contractor's operations may create a nuisance, the employer is subject to liability.\(^{46}\)

The West Virginia Supreme Court of Appeals has also disallowed the independent contractor defense when there was a breach of an inescapable duty owed the public;\(^{47}\) or a breach of a duty imposed upon the employer to promote public safety;\(^{48}\) or where the law imposed a continuing duty to exercise reasonable care or to cease any unnecessary practices.\(^{49}\)

Other jurisdictions that recognize the exception to the independent contractor defense have uniformly held that the beneficiary of a contractual relationship should bear the burden for the losses caused by the risks such an enterprise has created.\(^{50}\) This was the logic of the Iowa court in Shannon v.
**Missouri Valley Limestone Co.** Even though the truck operators in *Shannon* were independent contractors, the defendant-company was held liable and singularly responsible for abatement of the nuisance.

### IV. Analysis

Before the liability issue was addressed in *West* the court established that the truck traffic along State Route 81 created an actionable nuisance. The court expanded the traditional private nuisance definition to conclude there is also an implied obligation to use public property so that it will not be "unreasonably injurious" to others. Presumably, this obligation is imposed not only on business users of public roads, but all users. Thus, when a complaint alleges "unreasonable, negligent, or any unlawful use of public property," a cause of action for nuisance exists.

Because a nuisance action arising from the use of a public road had never before been decided in West Virginia, the court discussed at length the relevant decisions from other jurisdictions. In support of its conclusion, the court in *West* reviewed with approval the holdings in *Shannon* and *Wales Trucking Co. v. Stalcup.*

Both decisions support the conclusion that a dust nuisance caused by using a public road is actionable. However, the holding in *Shannon* is directed only at the particular activity of trucks hauling limestone along an unpaved public road. *Shannon* was expressly limited by the Iowa court to the particular factual situation of that case and, accordingly, did not contain the broad, prospective language adopted by the West Virginia court in *West.* Although the rationale in *Wales* appears to be more in line with *West,* its persuasive value is questionable because it was later reversed by the Texas Supreme Court on the ground that the nuisance was only temporary.

*West* distinguished *Jacobson v. Crown Zellerbach Corp.* as holding only that an actionable nuisance does not lie where the public road use conforms to "rules laid down therefor." Moreover, the court in *West* broadly interpreted *Jacobson* as inferring that alleged unreasonable or unlawful use of the streets involved would warrant a cause of action for nuisance. It should also be noted that in *Jacobson* there was virtually no means of curing the nuisance short of

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81 255 Iowa 528, 122 N.W.2d 278 (1963). See text accompanying note 36, supra.
82 285 S.E.2d at 674-677.
83 Id. at 676. See PROSSER, supra note 1, § 89, at 591; See also Pope v. Edward M. Rude Carrier Corp., 138 W. Va. 218, 75 S.E.2d 584 (1953). The traditional rule is expressed in the maxim, *sic utere tuo et alienum non leadas* (that no one may use his property to injure another).
84 285 S.E.2d at 677.
85 Id. This accords with *Martin v. Williams,* 141 W. Va. 595, 93 S.E.2d 835 (1956).
86 465 S.W.2d 444 (Tex. App. 1971), rev'd, 474 S.W.2d 184 (Tex. 1971), see text accompanying note 39, supra.
87 *Shannon,* 255 Iowa at 528, 122 N.W.2d at 279; *Wales,* 465 S.W.2d at 448.
88 474 S.W.2d 184 (Tex. 1971). The Texas Supreme Court did imply, however, that a permanent dust nuisance incident to public road usage may be actionable.
89 273 Or. 15, 539 P.2d 641 (1975).
90 285 S.E.2d at 675-76.
completely closing down the public highway. Consequently, the Oregon Supreme Court concluded that the property owners’ sole remedy would lie in inverse condemnation proceedings against the government if the public highway usage “was sufficiently invasive to amount to a taking of adjacent land.”

Throughout the *West* decision, the court continually described the coal companies’ activity as being both “unreasonable” and “unlawful.” Although the evidence supports a claim for unreasonable use of the public road, the decision does not reflect an allegation of unlawful use. However, an allegation of unlawful use would be proper had there been a violation of weight limitations, or breach of any other statutory standard of care.

After recognizing that the Wests’ complaint stated a legally cognizable nuisance, the court in *West* summarily disposed of the question concerning the availability of the independent contractor defense, simply stating that an employer will not be protected when it knows or has reason to know that the contracted activity creates a nuisance. Thus, National was jointly and severally liable with the other coal companies for the dust nuisance. In view of the factual setting in *West*, this conclusion is consistent with prior decisions in West Virginia and other jurisdictions.

The court noted that it is unclear whether National or the other coal companies employ the contract haulers. Nevertheless, the fact that the enterprise is a vertically integrated mining concern would preclude National from escaping liability.

In granting the Wests’ request for a preliminary injunction, the court relied on a well-settled principle of law that allows injunctive relief pending final hearing when the evidence indicates a prima facie case of nuisance. Although the court in *West* did not specifically prescribe how the dust nuisance was to be abated, it is apparent that the coal companies could only cure the problem by actively maintaining or paving the public road. The court in *West* found no law that prohibited the private repair of public roads to remedy a nuisance even though the West Virginia Department of Highways is charged with the maintenance responsibility.

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61 273 Or. 15, 19, 539 P.2d 641, 644 (1975).
62 285 S.E.2d 670.
65 285 S.E.2d at 677-78.
69 285 S.E.2d at 679.
70 *Id*. The court also suggested other possible methods of abatement such as imposing speed limits, requiring spacing intervals between trucks, and placing covers over the loads.
71 W. Va. Code § 17-2A-8 (1974) provides that the Department of Highways Commissioner has the power to (1) “exercise general supervision over the state road program and the construc-
However, this solution shifts part of the responsibility for maintaining state highways from the public to the private sector, and consequently conflicts with an Act of the State Legislature. It is also conceivable that a faulty or incomplete maintenance program could expose private entities to the risk of further liability from damages occasioned by other travelers of the road. Therefore, before any private program is initiated, the Department of Highways would have to be consulted for guidance on the standards of maintenance required. Even then, the risk of exposure to possible liability would not be completely eliminated.

Before the *West* decision, the coal companies had already maintained the road by frequently grading the surface to facilitate coal haulage. Therefore, it is arguable that they could absorb the expense of periodically watering or otherwise treating the road. It was unnecessary, however, for the court in *West* to consider whether the injunction would impose an undue hardship on the coal companies because they did not present any evidence of potential hardship. But the court implied that before granting injunctive relief in a private nuisance action, it will continue to compare the economic consequences resulting from the injunction with the gravity of harm caused by the nuisance.

This comparative injury analysis would become particularly important where the public road abuser is financially unable to conduct an ongoing road repair program. A *West*-type injunction in this instance would afford the liable party no alternative but to cease operations on that road. The economic consequences of such a restriction could be devastating, especially if there was no alternate route. Here the court should cautiously balance the interests of the parties before enjoining the nuisance-causing activity.

In weighing these respective interests, the court in the past has considered what remedial measures have been taken by the creator of the nuisance. However, it is apparent from *West* and prior case law that when the nuisance imperils health and safety, the complainant is entitled to injunctive relief regardless of hardships imposed.

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77 See generally, State ex rel. Firestone Tire and Rubber Co. v. Ritchie, 153 W. Va. 132, 168 S.E.2d 287 (1969). "[D]amages resulting from negligence . . . are subject to independent actions for damages." 153 W. Va. at 140, 168 S.E.2d at 291. See also W. Va. Code § 17-16-1 (1974), which prohibits the placing of "obstructions" on a public road and defines "obstruction" to include "ashes, cinders, earth, stone or other material placed on a public road . . . in such a way as to interfere with the use thereof; or any other thing which will prevent the easy, safe, and convenient use of such public road for public travel."
78 285 S.E.2d at 679.
79 Id.
82 Id.; see also Board of Comm’rs v. Elm Grove Mining Co., 122 W. Va. 442, 9 S.E.2d 813
Whenever an injunction is ordered involving repair of a state road, the interests of the Department of Highways are also at stake. The Department should therefore be included in such orders because they are better able than the courts to insure that maintenance is satisfactorily accomplished.

Although not mentioned in West, if general disrepair of the state road contributes to creating the nuisance, an injured party may pursue another course of action. The Department of Highways is constitutionally immune from lawsuit, however, but an action in mandamus could be sought to require improvement of the road conditions.

Property owners in West Virginia might alternatively seek an action in mandamus to compel the Department of Highways Commissioner to institute eminent domain proceedings when private property is taken or damaged for public use. Thus, a landowner who proves that the government permitted even lawful public road usage which substantially interferes with the enjoyment and use of property, could pursue an inverse condemnation action against the state as suggested by the court in Jacobson v. Crown Zellerbach Corp.

The general rule in West Virginia, however, is that damages resulting from negligence, nuisance, and trespass are not recoverable in eminent domain proceedings. Therefore, an inverse condemnation action was not viable in West and the plaintiffs were able to obtain an injunctive remedy to protect their property rights. Furthermore, the court in West presumably did not address the eminent domain issue because the dust nuisance was exclusively attributable to the defendants' unreasonable use of the road and not any direct action by the state. The availability of the inverse condemnation action continues, however, and would serve as a real alternative for plaintiffs facing the same situation as the Wests. The decision to pursue alternative remedies would, of course, depend on the relief sought and the circumstances of the case.

(1940).

78 W. VA. CONST. art. VI, § 35.
81 Art. III, § 9 of the W. Va. Constitution provides that "[p]rivate property shall not be taken or damaged for public use, without just compensation. . . ." However, Art. VI, § 35 of the Constitution provides "that the State of West Virginia shall never be made defendant in any court of law or equity. . . ." Although these constitutional provisions appear to be irreconcilable, the West Virginia Supreme Court of Appeals has traditionally held that a writ of mandamus should be awarded directing the Department of Highways Commissioner to institute eminent domain proceedings to ascertain damages if private property has been damaged or taken for public highway purposes. State ex rel. Rhodes v. W. Va. Dep't of Hwys, 155 W. Va. 735, 187 S.E.2d 218 (1972); State ex rel. Phoenix Ins. Co. v. Ritchie, 154 W. Va. 306, 175 S.E.2d 428 (1970); State ex rel. French v. State Rd. Comm., 147 W. Va. 619, 129 S.E.2d 831 (1962); State ex rel. Cutlip v. Sawyers, 147 W. Va. 687, 130 S.E.2d 345 (1963); Murray v. Graney, 143 W. Va. 643, 103 S.E.2d 888 (1958); Hardy v. Simpson, 118 W. Va. 440, 106 S.E. 880, 191 S.E. 47 (1937). But see State ex rel. Firestone v. Ritchie, 153 W. Va. 132, 168 S.E.2d 287 (1969), where it was held that eminent domain proceedings could not be instituted to compensate a store owner for damages to personal property or a leasehold.
82 273 Or. 15, 533 P.2d 641 (1975).
V. Conclusion

The public policy objectives announced in West, while seemingly radical at first blush, are really no more than an expansion of the principle that any substantial interference with the right to use and enjoy one's land will sustain a cause of action and justify injunctive relief. West also imposes a duty of care on public road users that had never before been judicially enunciated in West Virginia. To promote these objectives, West gives state courts the power to compel abatement of the nuisance conditions even if it requires the private maintenance of a public road.

West Virginia courts have traditionally granted protection of private property rights in nuisance actions and this trend was soundly continued in West. After West, state citizens are afforded substantial redress through a new and additional remedy when their habitation rights are jeopardized by nuisances created by public road users.

However, the West decision leaves unresolved the role of the State Department of Highways in nuisance litigation involving public roads. This issue may eventually need to be addressed either by the legislature or the court.

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