Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-034

JULY TERM, 2010

Karen Paris, Individually, and as Guardian for Thomas McNelley	}	APPEALED FROM:
v.	}	Rutland Superior Court
Leonard Lussier and Cynthia B. Lussier	}	DOCKET NO. 842-11-08 Rdcv
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal from the trial court's order denying their request for injunctive relief and damages in this trespass and nuisance action. We affirm.

The parties are neighboring landowners. In October 2008, plaintiffs filed a complaint against defendants, seeking to prohibit defendants from using an indoor woodstove to heat their home. Plaintiffs alleged that the use of the stove caused smoke, particulate, and/or carbon monoxide to infiltrate their property and home, and that they suffered physical harm and injury as a result. As noted above, plaintiffs sought injunctive relief and damages. Following a December 2009 court trial, the court made rulings on the record. It indicated that it would make complete findings if requested by the parties, but neither party made such a request. The court found on the record that plaintiff Thomas McNelley suffered from cerebral palsy and the medical problems associated with that condition, including respiratory restrictions. Plaintiff Karen Paris is McNelley's sister, as well as his legal guardian and caregiver. Prior to this litigation, defendants heated their home using a woodstove with a blower-type supplemental heater fueled by propane gas. Plaintiffs claimed that the use of the woodstove caused them irritation and pulmonary distress. The court observed that the stove did not meet EPA standards, but found nothing inherently unlawful in its use.

The court concluded that plaintiffs failed to meet their burden of proving trespass or nuisance. As to the former, the court recited the traditional elements of trespass, indicating in relevant part that there needed to be an intent to enter the land and actual entry upon the land. The court found that regardless of whether the smoke constituted an actual entry on plaintiffs' property, plaintiffs failed to prove the intent component of their claim. The court similarly rejected the nuisance claim. It explained that the law of nuisance required that the complained of use be unreasonable and substantial. To be substantial, the court continued, the use must constitute a definite offensiveness, inconvenience, or annoyance to a normal person in the community. The court found that plaintiffs failed to prove that these elements were satisfied. In reaching its conclusion as to reasonableness, the court noted the high cost of fuel and the

extensive and largely unregulated use of wood stoves in Vermont. The court later issued a written order denying plaintiffs' claims. Plaintiffs appealed from this order.

While plaintiffs initially filed a pro se brief, they supplemented this filing with a brief prepared by counsel. We address the arguments in the latter brief only, although we note that none of plaintiffs' pro se arguments persuade us that the court's decision should be reversed. Plaintiffs first argue that the court misinterpreted the law of trespass by stating that defendants had not engaged in any intentional act of trespass. As to their nuisance claim, plaintiffs argue that the court should have considered plaintiff McNelley's medical condition and the substantial health risk presented by the wood smoke. They maintain that it is irrelevant whether the wood stove violated any applicable state or federal regulation, and that the court should have applied a "gravity of harm" test to evaluate whether they had proved their claim.

The trial court informed the parties at the close of the hearing that it would make complete findings if requested, and plaintiffs made no such request. The court did make partial findings on its own initiative, however, and while it appears to have made a misstatement with regard to the trespass claim, we affirm its conclusion. See Bloomer v. Gibson, 2006 VT 104, ¶ 26 n.4, 180 Vt. 397 (Supreme Court "may affirm a trial court's decision if the correct result is reached, despite the fact that the court based its decision on a different or improper rationale" (quotation omitted)).

As reflected above, plaintiffs raised trespass and nuisance claims based on the fact that smoke from defendants' property allegedly entered their land. "[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it." John Larkin, Inc. v. Marceau, 2008 VT 61, ¶ 8, 184 Vt. 207 (quotation omitted); see also Adams v. Cleveland-Cliffs Iron Co., 602 N.W.2d 215, 218-19 (Mich. Ct. App. 1999) ("[P]ossessory rights to real property include as distinct interests the right to exclude and the right to enjoy, violations of which give rise to the distinct causes of action respectively of trespass and nuisance."). We have stated that "[l]iability for trespass arises when one intentionally enters or causes a thing to enter the land of another." Canton v. Graniteville Fire Dist. No. 4, 171 Vt. 551, 552 (2000) (mem.). At the same time, we have acknowledged that a more nuanced analysis is required when the trespass at issue involves intangible matter, such as airborne particles. See Marceau, 2008 VT 61, ¶ 14. Thus, we have explained that while "the dispersion of airborne particles, whatever their nature, may technically be considered an entry onto land creating liability for trespass irrespective of whether any damage was caused," this cannot be the law because "such a technical reading of trespass would subject countless persons and entities to automatic liability for trespass absent any demonstrated injury." Id.

Numerous courts have confronted the question of whether claims similar to that at issue here sound in trespass or nuisance. As one court has explained,

> Traditionally, trespass required that the invasion of the land be direct or immediate and in the form of a physical, tangible object. Under these principles, recovery in trespass for dust, smoke, noise, and vibrations was generally unavailable because they were not considered tangible or because they came to the land via some intervening force such as wind or water. Instead, claims

> concerning these irritants were generally pursued under a nuisance theory.

Adams, 602 N.W.2d at 219 (citations omitted).

Some courts, however, have "eliminated the traditional requirements for trespass of a direct intrusion by a tangible object," and allowed "recovery in trespass for indirect, intangible invasions that nonetheless interfered with exclusive possessory interests in the land." Id. at 220. These courts generally require the plaintiff to prove "actual and substantial damages," which differs from the traditional requirements of a trespass action. Id. at 219-20 (noting that, historically, "[b]ecause a trespass violated a landholder's right to exclude others from the premises, the landholder could recover at least nominal damages even in the absence of proof of any other injury"). The Adams court declined to adopt such an approach, however, finding that it improperly conflated nuisance and trespass theories. Thus, it held that "[w]here the possessor of land is menaced by noise, vibrations, or ambient dust, smoke, soot, or fumes, the possessory interest implicated is that of use and enjoyment, not exclusion, and the vehicle through which a plaintiff normally should seek a remedy is the doctrine of nuisance." Id. at 222.

This Court faced a similar issue in Marceau, 2008 VT 61. In that case, the parties were neighboring landowners. The defendant operated an apple orchard on his land, and the plaintiffs argued that the defendant had trespassed on their property because the wind carried detectible levels of pesticides onto their land. The trial court concluded that the suit actually sounded in nuisance rather than trespass, and it declined to endorse the fiction that the pesticides "occupied" the plaintiffs' land, which would allow the plaintiffs to evade the Legislature's plain intent to offer heightened protection to agricultural activities with respect to these types of claims. Id. ¶ 6. The parties later stipulated to dismissal of the plaintiffs' claims to the extent that they sounded in nuisance, and the court entered final judgment against the plaintiffs. We concluded on appeal that the plaintiffs failed to make a showing sufficient to survive summary judgment on its trespass claim. Id. ¶ 7. In reaching our conclusion, we recognized that other courts had adopted "a so-called 'modern' theory of trespass that permits actions based on the invasion of intangible airborne particulates." Id. ¶ 11. Under such theory, "invasions of intangible matter are actionable in trespass only if they cause substantial damage to the plaintiff's property, sufficient to be considered an infringement on the plaintiff's right to exclusive possession of the property." Id.

We found it unnecessary to decide in Marceau "whether the physical entry onto land of intangible airborne particulates can ever be a trespass, or whether such an invasion may be actionable only as a nuisance" because the plaintiffs failed to show any impact on their property from defendant's use of pesticides. Id. ¶ 14. "Absent a demonstrated physical impact on [the plaintiffs'] property resulting from the airborne particulates," we concluded that we could not see how a trespass occurred. Id. ¶ 15. In such cases, there is "no interference with the landowner's right to exclusive possession of the land." Id. We recognized that this differed from the traditional trespass analysis, but reasoned that "we cannot presume an intrusion" on a landowner's right to exclusive possession "in situations where the plaintiff fails to show that an intangible invasion of airborne particulates had a demonstrated physical impact." Id.

We reach a similar conclusion here. The trial court found that plaintiffs failed to prove that defendants intended to enter their property, which, as plaintiffs argue, appears to overlook the question of whether they "cause[d] a thing to enter the land of another." Canton, 171 Vt. at 552. Nonetheless, because this case involves intangible air particulates, there must be a demonstrated physical impact on plaintiffs' property. Plaintiffs did not argue in their proposed conclusions of law that this requirement was satisfied here.[*] Instead, plaintiffs focused on the effect that the smoke allegedly had on their physical health, making no mention of any "demonstrated physical impact on [their] property resulting from the airborne particulates." Marceau, 2008 VT 61, ¶ 15 (emphasis added); cf. Adams, 602 N.W.2d at 223 (observing that "[d]ust particles do not normally occupy the land on which they settle in any meaningful sense; instead they simply become part of the ambient circumstances of that space," and stating that "[i]f the quantity and the character of the dust are such as to disturb the ambiance in ways that interfere substantially with the plaintiff's use and enjoyment of the land, then recovery in nuisance is possible"). This omission is fatal to their claim. Thus, regardless of the court's statement about intent, it properly found that plaintiffs failed to sustain their burden of proving trespass.

The court properly denied plaintiffs' nuisance claim as well. To sustain such a claim, a party must show that "an individual's interference with the use and enjoyment of another's property [is] both unreasonable and substantial." Coty v. Ramsey Assocs., Inc., 149 Vt. 451, 457 (1988). "The standard for determining whether a particular type of interference is substantial is that of definite offensiveness, inconvenience or annoyance to the normal person in the community. Substantial harm is that in excess of the customary interferences a land user suffers in an organized society." Id. (citation and quotations omitted). Plaintiffs urge us to apply a subjective standard to evaluate if the smoke from the woodstove constituted a nuisance here. They cite no case, however, where a court has applied such a standard. As Prosser explains, where the invasion of another's property:

> involves mere personal discomfort or annoyance, some other standard must obviously be adopted than the personal tastes, susceptibilities and idiosyncrasies of the particular plaintiff. The standard must necessarily be that of definite offensiveness, inconvenience or annoyance to the normal person in the community—the nuisance must affect the ordinary comfort of

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[*] We acknowledge that smoke or soot, in a strict sense, is "tangible" in the sense that it is comprised of physical elements, but we agree with other courts that have recognized, for practical purposes, that airborne particulates do not normally present themselves "as a significant physical intrusion." Adams, 602 N.W.2d at 223; cf. Mock v. Potlatch Corp., 786 F. Supp. 1545, 1549 (D. Idaho 1992) (favorably citing passage from W. Keaton et al., Prosser & Keeton on the Law of Torts § 13, at 71 (5th ed. 1984), explaining that a defendant's act must result in an invasion of tangible matter, otherwise, there is no use or interference with possession, and stating that it is "reasonably clear that the mere intentional introduction onto the land of another of smoke, gas, noise, and the like, without reference to the amount thereof or other factors that are considered in connection with a private nuisance, is not actionable as a trespass" (emphases omitted)).

> human existence as understood by the American people in their present state of enlightenment.

W. Prosser, Handbook of the Law of Torts § 71, at 558 (1941) (footnote and quotation omitted); see also id. at 559 (stating that it is not a nuisance, for example, "to run a factory where the smoke aggravates the plaintiff's bronchitis, or the vibration shakes a rickety house" (footnote omitted)). We applied this standard in Coty, and we find no basis to apply a different standard here.

We similarly reject plaintiffs' argument concerning the court's evaluation of the "gravity of harm." The question of whether a particular use is "reasonable" requires the court to consider the competing interests of the parties. See, e.g., Prosser, supra, § 73, at 580 ("In every case the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be weighted against the utility of the defendant's conduct."). The court engaged in such an analysis here. The court did not require plaintiffs to show that the use of the stove violated state or federal law to establish their claim, as plaintiffs suggest. Rather, the court properly considered the lack of regulation of woodstoves in Vermont as part of its analysis of the reasonableness of the use. The court also noted the high cost of fuel and the extensive use of woodstoves in Vermont. Essentially, plaintiffs urge us to reweigh the evidence and reach a different conclusion. This we will not do. It is exclusively the role of the trial court, not this Court, to weigh the evidence. Cabot v. Cabot, 166 Vt. 485, 497 (1997). Having concluded that defendants' use of this particular woodstove was not unreasonable, the trial court did not need to consider whether a different woodstove would produce less smoke and have less of an impact on plaintiffs' use and enjoyment of their property. We find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice