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NUDE RECREATION IN WILDLIFE AREA NEIGHBORHOOD NUISANCE?

As illustrated by the *Mark* decision described herein, a nuisance claim may arise when a landowner uses property, or allows others to use the land, in a manner which annoys or disturbs adjacent property owners. In so doing, the nuisance unreasonably deprives adjacent property owners of the ordinary use and comfortable enjoyment of their land. In determining what constitutes a nuisance, the question is whether a particular land use would produce actual physical discomfort for reasonable persons of ordinary sensibility and taste.

Nuisances are commonly classified as public, private, or a mixture of both public and private. A public nuisance is a threat to the pubic health, welfare, and safety which affects all residents coming within its range of influence, e.g., smoke or objectionable smells. In contrast, a private nuisance is generally more limited in scope interfering with a private individual's use and enjoyment of the property. A nuisance can be both public and private when it injures both the community at large and inflicts special injuries on a limited number of individual property owners. In general, a plaintiff bringing a nuisance claim seeks an injunction, i.e., a court order requiring the offending landowner to abate (remove) the nuisance.

ISLAND WILDLIFE

In the case of *Mark v. State*, No. CA A97066 (Or.App.1999), plaintiffs claimed public nudity in a state wildlife area substantially interfered with the enjoyment of their residential properties and, thus, constituted a nuisance. Accordingly, plaintiffs requested the court to issue an injunction which would prohibit defendants from allowing public nudity in the wildlife area. In their lawsuit, plaintiffs alleged the following facts:

> Plaintiffs [Glen Mark and Teril Powers] have lived on Sauvie Island since June 1990. They bought their land, which is surrounded by the Sauvie Island Wildlife Area (wildlife area), in February 1990. The portion of the wildlife area near where they live is a popular location for public nudity to an extent that, plaintiffs assert, constitutes both a private and a public nuisance. Defendant Division of State Lands (State Lands) owns the wildlife area, which it leases to defendant Department of Fish and Wildlife (Fish and Wildlife)...
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> Defendants own, manage, and control the wildlife area, with the statutory purpose of developing it to provide wildlife management, wildlife-oriented recreation, and public hunting. The wildlife area contains several miles of undeveloped beaches along the Columbia River that attract public use for non-wildlife related activities.

> An increasing number of those users engage in open public nudity, which is not wildlife-oriented recreation. Defendants estimate the total number of yearly visits for that purpose to be in the thousands. Many of those users "parade naked throughout the year all over the wildlife area, including the roads and bushes, and on, around and in view of plaintiffs' and other's private residences."... [As a result,] Plaintiffs and their family, friends, and guests have been forced to witness adult nudity and "repeated acts of depravity, illegality and lewdness" because of their location adjacent to defendants' lands.
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> Plaintiffs, other residents, and other members of the public have reported those facts to defendants and informed them of the harm that results from the public nudity and related activities. According to plaintiffs, defendants have the authority, obligation, and duty to control the activities of the public in the wildlife area in a way reasonably calculated to prevent harm to the rights and safety of adjacent landowners and the public in general and to the value of surrounding private property. Defendants have knowingly and intentionally failed to exercise that control in a way calculated to prohibit or reasonably restrict public nudity, resulting in harm to plaintiffs and their property...
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> The harm to plaintiffs is that their use of their property and their social life have been restricted by their reluctance to expose themselves, family, friends, and guests to public nudity and open sexual activity, that they are fearful for their safety due to their proximity to the nude beach activities, that they are embarrassed, offended and angered by coming in contact with nude adult behavior, that their right to go for a walk and enjoy the public beaches adjacent to their home has been restricted by harassment from nude sunbathers, and that those things have greatly diminished the value of their property.

The trial court dismissed plaintiffs' complaints. Plaintiffs appealed. On appeal, plaintiffs argued that the trial court erred by dismissing their nuisance claims. In response, the state contended that "the facts that plaintiffs alleged do not constitute a public or private nuisance."

INTRUSIVE NUDITY & SEXUAL ACTIVITY

As noted by the appeals court, "the doctrines of public nuisance and private nuisance have different origins and protect different interests." Despite such differences, the appeals court acknowledged that the following "governing rules" for public nuisance and private nuisance are essentially the same:

> A public nuisance is the invasion of a right that is common to all members of the public. Because the primary responsibility for preventing public nuisances is with the public

> authorities, a private action to enforce that right requires proof that the plaintiff suffered an injury distinct from the injury that the public as a whole suffered.
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> A private nuisance is an unreasonable... interference with another's private use and enjoyment of land. The right to recover is in the person whose land is harmed...

As noted by the appeals court, "[u]ndesired exposure to sexual activity....is one of the traditional grounds for finding either a public or a private nuisance." According to the appeals court, such sexual activity constitutes a private nuisance "when it rendered the premises of a neighbor unfit for comfortable or respectable occupation and enjoyment."

Applying these principles to the facts of the case, the appeals court found plaintiffs' allegations, if proven at trial, could establish that "the routine use of defendants' land for public sexual activity was a public nuisance." Moreover, "the intrusive nudity and sexual activity" could constitute a private nuisance if such conduct impaired plaintiffs' use and enjoyment of their land.

> The allegations in plaintiffs' original complaint are not limited to mere nudity, but would support proof of uncontrolled and intrusive nudity occurring on the area immediately around their property...
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> [P]laintiff's allegations would allow finding that the nudity constituted a nuisance. Plaintiffs also allege that they have been exposed not merely to nudity but also to a variety of sexual activity...Plaintiffs' allegations would also allow proof that, because of the proximity of their land to the intrusive nudity and the sexual activity, those things have affected their property or their enjoyment of it. If so, plaintiffs' injury would be different in kind from that of the public at large, and they would be entitled to sue to enjoin the public nuisance.
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> The same facts would support a finding that the intrusive nudity and sexual activity impair their use and enjoyment of their land; they would thus constitute a private nuisance for which they could seek damages or an injunction.

In so doing, the court also considered whether a nuisance could arise as a result of defendants' alleged failure to implement a "management plan" adopted by defendant in 1993 "to regulate nudity in the wildlife area." As described by the plaintiffs, the 1993 management plan, "among other things, distinguish[ed] between 'clothing optional' and 'clothed' areas, providing for buffer areas between the clothing optional area and private lands, and prohibiting any use of those buffer areas during the warmer months." The plan also contained provisions concerning signs and other matters that were intended to discourage or eliminate public nudity outside of the designated nude beach area.

In their complaint, plaintiffs alleged that defendants had "failed to implement this policy adequately in a number of respects, with the result that_hundreds of members of the public traverse nude throughout the Sauvie Island Wildlife Area, including the beaches outside the designated 'clothing optional' beach, the roads, the woods and the lands surrounding plaintiffs' residence." As a consequence of defendants' alleged failure to "develop a plan that is adequate to control, discourage, or eliminate nudity," plaintiffs claimed that they and the other residents are "helpless to prevent continuous and oftentimes daily exposure to nudity." Moreover, plaintiff's claimed that defendants had failed to consider "the effect that nude recreation would have on plaintiffs' interests in their private property."

According to the appeals court, the specific issue was, therefore, "whether a court can hold defendants responsible for the acts of third parties when those third parties' actions on defendants' land may constitute a nuisance." While acknowledging that "these actions on defendants' land may constitute a nuisance," the appeals court noted that defendants' failure to "prevent third parties from engaging in public nudity and sexual activity on defendants' lands." did not, in itself, create a claim against defendants.

Citing Section 838 of the Restatement (Second), Torts, the appeals court found plaintiffs had to establish the following before defendants could be held "liable for the acts of third parties that create a nuisance on their land":

> [Defendant landowners must] (1) know that the activity is being carried on and will involve an unreasonable risk of causing the nuisance and (2) consent to the activity or fail to exercise reasonable care to prevent it. Restatement (Second), Torts § 838 (1979).

Applying these principles to the facts of the case, the appeals court found sufficient allegations in plaintiffs' complaint, if proven, would establish that "defendants are responsible for the actions of the public under the criteria of section 838."

> Plaintiffs allege that defendants have the authority to exercise control over the behavior of the members of the public who congregate in the wildlife area and that defendants, either knowingly and intentionally, or with reckless disregard for the rights and safety of the public, failed to exercise control over nudity in the wildlife area... [P]laintiffs sufficiently pled a claim for an injunction requiring defendants to take reasonable steps to end either a public or a private nuisance.

As a result, the appeals court found plaintiffs had stated "a claim for both a public and private nuisance" based upon defendants' alleged failure to "implement the management plan." The appeals court,

therefore, held that plaintiffs were entitled to pursue their nuisance claims against defendants.

INVERSE CONDEMNATION

Plaintiffs had also argued on appeal that the trial court had erred in dismissing their claims against the state for inverse condemnation, i.e., "the nudity has interfered with plaintiffs' use of their property, thereby substantially reducing its value." Inverse condemnation may occur when governmental action effectively takes away the value of private property, even though no formal exercise of eminent domain was intended or undertaken by the government.

As noted by the appeals court, the state constitution was very similar to the federal constitution in prohibiting the taking of private property for public purposes without just compensation. As described by the court, "a taking under Article I, section 18, of the Oregon Constitution is any destruction, restriction, or interruption of the common and necessary use and enjoyment of the property."

> The only property right of the possessor of land which has any value is his ability to use and enjoy his land. If the government substantially deprives the owner of the use of his land, such deprivation is a taking for which the government must pay. If, on the other hand, the government merely commits some tort [i.e., in this context, injury to property] which does not deprive the owner of the use of his land, then there is no taking...

Accordingly, the specific issue was "whether, as a matter of fact, the governmental activity has resulted in so substantial an interference with use and enjoyment of one's land as to amount to a taking of private property for public use."

> [A] taking would require that a nuisance be so aggravated as to amount to a complete ouster or deprivation of the beneficial use of property... [T]here is a compensable invasion of an individual's property rights in a nuisance case when the interference with the use and enjoyment of the land is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money...
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> [This is not to] suggest that a nuisance that simply reduces the value of the property can constitute a taking... [On the contrary] a taking requires the deprivation of all feasible private uses of the property or of some specific right in the property and that the Oregon constitution does not treat damage to property as a taking requiring just compensation... [T]here could be a taking if the nuisance substantially deprived the owner of the use of the land...

Applying these principles to the facts of the case, the court found the nudity had not deprived plaintiffs of all feasible private uses of their property.

> [Plaintiffs] do not allege that the nudity has made their land unusable. Rather, they allege that they have lived on their property since 1990; their complaints about the difficulty of having friends and family visit them would be meaningless without such an allegation.
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> Although plaintiffs allege that the nudity has affected the value of their property, they do not assert that the property has become valueless. Because they are currently using the property for a residence, they are necessarily receiving some economic benefit from it; the property must, therefore, have some value.

As a result, the appeals court found the trial court had "correctly dismissed" plaintiffs' claims for inverse condemnation. Accordingly, the appeals court affirmed the trial court's determination on the inverse condemnation claims and remanded (i.e., sent back) plaintiffs' nuisance claims to the trial court for further proceedings. On remand, the trial court would determine whether defendants would be ordered to abate (i.e., remove) the nuisance on their land by requiring defendants to prohibit or better control public nudity in the state wildlife area.