Florida Law Review

Volume 14 | Issue 1 Article 4

March 1961

Aesthetic Nuisance in Florida

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company compromise when the exercise of good faith so dictates? Apparently the answer is "no" in Florida if the policyholder is financially irresponsible. The *Sturgis* case, unfortunately, closes the issue as far as the claimant-plaintiff is concerned. To allow an insolvent insured to recover would contravene the dictum in the *Sturgis* case and raise the aforementioned problems.[37] If the Florida Court chooses to follow the overwhelming weight of authority in the United States and allows the insolvent insured to recover, it is submitted that it would be selecting the lesser of two evils. To take the view suggested by the *Sturgis* dictum would absolve the insurer from any duty to settle in most cases, since the majority of insured defendants are judgment-proof.

It would also be desirable to uphold an assignment of the claim by the insured to his judgment creditor. This would act as a substitute for the privity of contract required by the *Sturgis* case and allow the beneficially interested party to enforce the claim.[38]

The great need for prompt and adequate compensation of motor vehicle victims dictates a duty to settle. The temptation of the insurance company to gamble on the vagaries of a jury trial should not be fostered. Considering the overcrowded status of court dockets and the attendant delay of prolonged litigation, the injured claimant should not be coerced into an inadequate settlement by an insurer that may choose to litigate with impunity. The obligation of the insurance company to settle in appropriate cases should be enforced without regard to the financial status of the policyholder.

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AESTHETIC NUISANCES IN FLORIDA

Harold Householder owns a $20,000 home in a residential section of relatively uniform property values and quality of construction. Harold's neighborhood is a subdivision adjacent to an older section of the town, and several older homes are scattered throughout the area. Adjacent to Harold's lot is a frame garage apartment. The exterior has not been painted in well over ten years; a window in an unused

37. See text at note 16 *supra.*

38. It is interesting to speculate as to the availability of FLA. STAT. §55.55 (1959) to the insured's judgment creditor to force an assignment of the insured's right of action or to coerce a sale of this right of action in a levy upon the insured's "property." The assignment of a chose in action pursuant to a judicial sale was upheld in Harris v. Smith, 150 Fla. 125, 7 So. 2d 343 (1942). See also FLA. STAT. §55.20 (1959).

room was broken months ago and has never been repaired; and weeds grow waist high in the entire lot every summer. Because of this eyesore, Harold finds it very difficult to enjoy "Florida living" on his back yard patio, and the view from his dining room picture window is most distasteful. Harold hopes to sell his house in several years, if his business progresses satisfactorily, and move into more elaborate quarters. He is fearful of the effect that the apartment building may have on the resale value of his property. He wonders what can be done to cause the owner to keep his property in a fairly respectable condition.

Harold's lawyer knows that the Florida courts have set forth a broad definition of what may be considered a private nuisance:[1]

> "An owner or occupant of property must use it in a way that will not be a nuisance to other owners and occupants in the same community. Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable may become a nuisance and may be restricted."

But counsel also knows that when a mere eyesore restricts the complete use and enjoyment of property and decreases its value, most courts retreat from their normal indignation at nauseous smells[2] and sleep-robbing noises.[3] The courts admit that aesthetics are entitled to some consideration as one of several factors but refuse to enjoin a purely aesthetic nuisance.[4] It seems odd to Harold that the court should be willing to enjoin insults to his senses of smell and hearing but close its eyes to offensive sights. This note details the progress that has been made in this area and suggests a trend for the future.

Trends in a Related Field

A majority of states reject zoning laws grounded on aesthetic considerations,[5] but the Florida Supreme Court has led in expanding

1. Mayflower Holding Co. v. Warrick, 143 Fla. 125, 128, 196 So. 428, 429 (1940). See also Mercer v. Keynton, 121 Fla. 87, 92, 163 So. 411, 413 (1935).

2. See, *e.g.*, Fox v. Ewers, 195 Md. 650, 75 A.2d 357 (1950), and cases cited therein.

3. See, *e.g.*, Meadowbrook Swimming Club, Inc. v. Albert, 173 Md. 641, 197 Atl. 146 (1938), and cases cited therein.

4. See, *e.g.*, Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951), and cases cited therein.

5. *E.g.*, Papioanu v. Commissioner of Rehobath, 25 Del. Ch. 327, 20 A.2d 447 (Ch. 1941); Forbes v. Hubbard, 348 Ill. 166, 180 N.E. 767 (1932); Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1949); Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (1940); Appeal of Liggett, 291 Pa. 109, 139 Atl. 619 (1927).

the coverage of the state police power to support aesthetic zoning. In *Merritt v. Peters*[6] the Dade County commissioners had adopted regulations limiting the size of commercial signs to be erected in certain zones to forty square feet. Advertisers insisted that such regulation was an arbitrary and unreasonable exercise of police power because there was no relationship to the health, safety, morals, or general welfare of the public. In upholding the regulations, the Court included aesthetics as an integral part of general welfare, and declared that "attractiveness of a community like Miami Beach was of prime concern to the whole people and therefore affected the welfare of all."[7] Conceding that the Court was probably thinking of the effect of eyesores on tourist trade in resort areas and that the primary concern was oversized, garish billboards, this decision established aesthetic considerations as a basis for zoning law in Florida. It seems reasonable to anticipate a gradual application of aesthetic zoning to eyesores in Florida communities not so concerned with tourist trade as is Miami Beach. This represents a dramatic lowering of barriers for aesthetic considerations.

Progress of Aesthetic Nuisance

The prevailing attitude at the turn of the century was that the personal discomfort caused by a nuisance must be physical rather than merely mental because there was no common standard by which to measure mental effects. The type of nuisance that caused merely mental discomfort included "things which merely offend the taste, such as an unsightly building near a residence, or a dumping ground for rubbish; or things which annoy by reason of their associations, such as an undertaker's establishment, or a jail."[8]

Junk Yards and Used Car Lots

In a 1956 Maryland case[9] the petitioners (home owners) sought injunctive relief on several counts, including unsightliness, against a junk yard operator. The lower court's decree for the petitioners was reversed specifically because the area was not shown to be primarily residential and the cost of screening off the junk yard was prohibitive. The court refused to decide whether it lacked power to enjoin for aesthetic considerations alone. Perhaps a Maryland home owner in a clearly residential area can enjoin an eyesore that may be eliminated or concealed without unreasonable expense.

6. 65 So. 2d 861 (Fla. 1953).
7. *Id.* at 862.
8. Cooley, Torts 575 (Students' ed. 1907).
9. Feldstein v. Kammauf, 209 Md. 479, 121 A.2d 716 (1956).

Faced with a very similar factual situation,[10] the West Virginia court denied relief in a neighborhood that was not exclusively residential, but it left no doubt as to its ability and willingness to enjoin eyesores in strictly residential areas. This decision was relied on heavily nineteen years later when the court upheld a decree enjoining the operation of a used car lot as a private nuisance.[11] Though noise was a factor, the major consideration seemed to have been aesthetics. The court referred to the used car lot as operating in the "usual garish fashion," using gaudy banners and lights. It is interesting to note that the decree forced the used car business to remove all merchandise, lighting and advertising equipment, and a small structure from the edge of a residential district.

Riparian Owners in Florida

A recent study of Florida water law[12] revealed that the Florida Court has initiated a rule, unique in this country, that the riparian owner "enjoys [the right] of an unobstructed view over the water . . . ."[13] This rule has occasionally taken a back seat when it tended to conflict with substantial public interest[14] or when the plaintiff's view was not materially affected,[15] but there has apparently been no inclination to overturn its basic thesis. Though the right to unobstructed view has not been given the same protection as older riparian rights, "the cases establish aesthetic enjoyment as a judicially protectible interest of the riparian owner."[16]

Funeral Homes and Cemeteries

It will be remembered that Professor Cooley's 1907 summation "of things which merely offend the taste" included not only junk yards but also funeral homes and cemeteries.[17] The weight of authority now holds that although funeral homes are not nuisances per se,[18] operation of a funeral home in a purely residential area is a private nuisance.[19] Occasionally passing reference is made to de-

10. Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368 (1937).

11. Martin v. Williams, 141 W. Va. 595, 93 S.E.2d 835 (1956).

12. Maloney & Plager, *Florida's Lakes*, 13 U. FLA. L. REV. 1, 42 (1960).

13. Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 58, 78 So. 491, 501 (1918).

14. Duval Eng. & Contracting Co. v. Sales, 77 So. 2d 431 (Fla. 1954).

15. See Freed v. Miami Beach Pier Corp., 93 Fla. 888, 112 So. 841 (1927).

16. Maloney & Plager, *supra* note 12, at 45.

17. COOLEY, TORTS 576 (Students' ed. 1907).

18. *E.g.*, Smith v. Fairchild, 193 Miss. 536, 10 So. 2d 172 (1942); Clutter v. Blankenship, 346 Mo. 961, 144 S.W.2d 119 (1940); Heimerle v. Village of Bronxville, 168 Misc. 783, 5 N.Y.S.2d 1002 (Sup. Ct. 1938).

19. *E.g.*, Mutual Serv. Funeral Homes v. Fehler, 254 Ala. 363, 48 So. 2d 26

preciation in property values,[20] but the real basis for these decisions is the depressing influence on normal persons resulting from observation of the undertaking establishment.[21] Mere property rights of the undertaker are subservient to "the rights of human beings and homes, and environments."[22]

The Florida Court in *Jones v. Trawick*,[23] a 1954 decision, indorsed this "funeral home nuisance doctrine" and extended it to include cemeteries. The plaintiffs were a group of Negro home owners of modest means whose properties were adjacent to a prospective cemetery. The area was not zoned. The stated basis of their claim was that their happiness would be destroyed, their property depreciated, and their well water contaminated. The possibility of water contamination was disproved by the defendant; and, though the Court judicially noticed the probability of reduction of resale value, it observed that such had not been proved. The Court held that when a cemetery adjoining a home owner's land interferes with the comfort, repose, and enjoyment of his home, it is a private nuisance that can be enjoined even though there is not sufficient evidence to prove impairment of property value. It is important to note that the Court, in enjoining a nuisance to taste and feelings purely by way of sight, grounded its decision on the traditional nuisance doctrine that property owners are not to be disturbed or made physically uncomfortable in the use and enjoyment of their property. Factual elements that the Court seemed to consider essential or very important were: the character of the area, no matter how humble, was predominantly residential; the plaintiffs had given the defendant ample notice of their objections; the injunction would not result in any appreciable loss; and the cemetery was a commercial enterprise for profit.

Spite Fences

A human tendency to demonstrate animosity for unliked neighbors has caused the development of a doctrine that appears to be of great interest in a discussion of aesthetic considerations in nuisance law. Though older authorities held that the offended home owner had no legal recourse for maliciously erected unsightly fences,[24] the modern trend has been to permit him to enjoin spite fences that interfere

(1950); Brown v. Arbuckle, 88 Cal. App. 2d 258, 198 P.2d 550 (1948); Jack v. Torrant, 136 Conn. 414, 71 A.2d 705 (1950); cases cited note 18 *supra*.

20. See Albright v. Crim, 97 Ind. App. 388, 185 N.E. 304 (1933).

21. Cases cited note 18 *supra*.

22. Williams v. Montgomery, 184 Miss. 547, 556, 186 So. 302, 304 (1939).

23. 75 So. 2d 785 (Fla. 1954).

24. *E.g.*, Falloon v. Schilling, 29 Kan. 207 (1883); Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765 (1896).

with his view or his access to light and air.[25] The cases maintain that usefulness must be subordinate to malicious intent in order to support an injunction.[26] It has been pointed out, however, that no matter how much malicious intent is proved, the courts will not enjoin a spite fence unless it is so unsightly that it actually interferes with the complaining neighbor's enjoyment of his property.[27] It appears that once a foundation of malicious intent has been established by the evidence, the courts are willing to decree that a fence must be removed or modified because it is unsightly.

In *Larkin v. Tsavaris*[28] the Florida Supreme Court accepted and applied the spite fence doctrine, but close examination of the case indicates that the Court may have gone further. The defendant had erected a log fence between his and the plaintiff's residential properties. The chancellor found that the fence was of unreasonable height, that it served no useful purpose other than to annoy the plaintiff and his family, and that it deteriorated the value of the plaintiff's property. The chancellor did not mention malicious intent on the part of the defendant, but in his decree he ordered a reduction in height to not more than five feet (the original height did not appear in the decision). The Supreme Court overlooked the absence of a finding of malicious intent and said that the "spite fence" was not a lawful use of property and that it could be enjoined as a private nuisance. It appears, therefore, that the Supreme Court used the term *spite fence* for lack of a more convenient manner of referring to the log fence, and that it upheld a decree enjoining an aesthetic nuisance because it unreasonably annoyed the plaintiff and detracted from the value of his property. It might be suggested that the chancellor, in finding that the fence served no other useful purpose than to annoy the plaintiff, recognized a malicious intent by implication; but any unreasonable aesthetic nuisance would seem to raise an implication of spite when the defendant, without good cause, refuses to remedy an unsightly condition offensive to his neighbors. Indeed, unless he is slovenly by nature or painfully poor, what other factor than spite might motivate one to refuse to maintain his property in a residential area so that it is not an eyesore?

Reasons and Rebuttals

In objecting to the pro-aesthetic majority viewpoint in the pre-

25. *E.g.*, Bush v. Mockett, 95 Neb. 552, 145 N.W. 1001 (1914); Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909).

26. *E.g.*, Holbrook v. Morrison, 214 Mass. 209, 100 N.E. 1111 (1913); Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889).

27. Noel, *Unaesthetic Sights As Nuisances*, 25 Cornell L.Q. 1, 11 (1939).

28. 85 So. 2d 731 (Fla. 1956).

viously cited West Virginia case, one judge complained:[29]

> "The rules that govern the law of nuisances are uncertain enough without engrafting upon them a doctrine as essentially speculative as this dictum. With that doctrine as a part of our equity jurisprudence, our courts are likely to be called upon in a large degree to embark in the business of city planning with little to guide them except the infinite variations of taste and preferences."

Without dwelling on the fact that courts, in their deliberation of zoning cases,[30] now frequently embark on the business of city planning based on variations of taste and preference, it is noted that the quoted statement is strikingly similar to the conservative "open floodgate" dicta of status quo advocates. It has been pointed out that the difficulties of setting an objective standard as to what degree of noise or odor is sufficient to substantially annoy the ordinary person are hardly greater than in the case of an eyesore.[31] These difficulties have not kept courts from declaring offenses to the nose or ears to be nuisances.[32] Perhaps protection from noises and odors is actually protection of aesthetic interests, inasmuch as "that which is beautiful can attract man by appealing to his senses, not only the sense of sight but also those of hearing and smell."[33]

Taste variations are a lesser barrier to enjoining eyesores as nuisances when it is considered that the "reasonable man" test is as applicable to aesthetic cases as to any other legal problem of normality. The Alabama court has ruled that to constitute a nuisance a smell must be more than merely disagreeable to ordinary persons; it must materially interfere with the ordinary comfort of home existence, though not necessarily causing actual injury.[34] In ruling on a noise nuisance, the Florida Court said: "The test to be applied is the effect of the condition complained of on ordinary persons with a reasonable disposition in ordinary health and possessing the average and normal sensibilities."[35] The law cannot indulge the tastes of extra-sensitive individuals in aesthetic matters any more than it can in

29. Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 612, 192 S.E. 291, 293 (1937).

30. *E.g.*, Welch v. Swasey, 214 U.S. 91 (1908); Speroni v. Board of App. of City of Sterling, 368 Ill. 568, 15 N.E.2d 302 (1938); Appeal of Dunlap, 370 Pa. 31, 87 A.2d 299 (1952).

31. Noel, *supra* note 27, at 5.

32. *E.g.*, Glogger v. Bell, 146 Fla. 1, 200 So. 100 (1941); Bartlett v. Moats, 120 Fla. 61, 162 So. 477 (1937).

33. See Note, 2 U. PITT. L. REV. 191, 193 (1935).

34. Jones v. Adler, 183 Ala. 435, 62 So. 777 (1913).

35. Beckman v. Marshall, 85 So. 2d 552, 555 (Fla. 1956).

cases of odors or noises, but it seems unreasonable to say that particularly flagrant and unreasonable sights that deprive persons of ordinary sensibilities of the rightful use and enjoyment of their property should be permitted.

The speculative nature of pecuniary damages inherent in aesthetic nuisance is immaterial, because pecuniary damages need not be proved to warrant injunctive relief,[36] and injunctive relief would seem to be a more effective remedy than monetary reimbursement in aesthetic cases.

CONCLUSION

The authors of an article on judicial zoning by nuisance decisions concluded that the cases do not reveal "a satisfying rationale showing that the funeral home cases are completely consistent with the oft-repeated dictum that 'mere' violations of aesthetic sensibilities do not constitute nuisances."[37] In Florida, where the funeral home rule has been extended to cemeteries,[38] riparian owners can get injunctive relief from view obstructions,[39] and unsightly fences may be enjoined without a finding of malicious intent,[40] the inconsistency between the actual decisions and the traditional attitude toward aesthetic nuisances seems even more unreasonable. Perhaps there is no real inconsistency in this state. The Florida Court has apparently not specifically ruled out aesthetic nuisance; and with *Jones v. Trawick* and *Larkin v. Tsavaris* on the record, it may be more accurate to say that things that can be seen, though not heard, smelled, or felt, may be enjoined as private nuisances. The sights enjoined in funeral home and cemetery cases may be distinguishable as morbidly depressing reminders of death. But unless one believes in supernatural manifestations of places housing corpses, it is difficult to draw a distinction between sights that are depressing for this reason and sights that are depressing because they needlessly offend the aesthetic tastes of an ordinary reasonable man. Any such distinction would seem to be invalidated by the rule favoring unobstructed view of riparian owners[41] and the decision that forced Mr. Tsavaris to reduce the height of his log fence.[42]

Perhaps the term *aesthetic* is to some degree self-defeating because there is a tendency to think of it as connoting "that which is beau-

36. Jones v. Trawick, 75 So. 2d 785 (Fla. 1954).

37. Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440, 451.

38. Jones v. Trawick, 75 So. 2d 785 (Fla. 1954).

39. Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918).

40. Larkin v. Tsavaris, 85 So. 2d 731 (Fla. 1956).

41. Thiesen v. Gulf, F. & A. Ry., *supra* note 39.

42. Larkin v. Tsavaris, 85 So. 2d 731 (Fla. 1956).