SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2000-006090 12/10/2002

HONORABLE CATHY M. HOLT

CLERK OF THE COURT
E. Schneider
Deputy

FILED: 12/12/2002

DENNIS CHAPMAN, et al. DEEAN GILLESPIE

v.

ROBIN DEWITT WILLIAM D HOLM

MINUTE ENTRY

This matter was taken under advisement after trial to the Court. Plaintiffs Dennis and Elizabeth Chapman ("Plaintiffs" or "Chapmans") seek damages against their former neighbor, Defendant Robin DeWitt ("Defendant" or "DeWitt") for private nuisance and intentional infliction of emotional distress. The Chapmans contend that Ms. DeWitt's dogs were a nuisance, that Ms. DeWitt is liable for intentional infliction of emotional distress, and that, as a result, the Chapmans had to move out of their home of twenty-eight years.

Plaintiffs lived at 4518 W. Paradise Lane, Glendale, Arizona for twenty-eight years with no serious disputes with neighbors. But in February 1999 Ms. Dewitt moved into the house just behind the Chapmans with her two daughters and three dogs. The Chapman residence and the DeWitt residence directly abutted each other and were separated by a six-foot cement section fence. The first night the dogs were at the house they barked for most of the night disrupting the Chapmans' sleep and enjoyment of their home. The next day Mr. Chapman went to talk to Ms. DeWitt about the disturbance and left a note on the door because no one answered the door. Mr. Chapman subsequently went back to the DeWitt residence, found Ms. DeWitt at home and they amiably discussed the problem.

But instead of the situation getting better it got worse. The barking continued sometimes unabated for hours at a time at different times of the day and night. Sometimes Mr.Chapman would have to leave the master bedroom, located on the backside of the house, and relocate to another bedroom away from the backside of the house in order to get sleep. Ms. Chapman testified that at times she had to put the pillow over head in order to get sleep. The Chapmans

went to Home Depot and installed triple-pane windows to help alleviate the disturbing and annoying barking but it was to no avail.

The Chapmans grown children and the Chapman grandchildren would periodically come to visit. Their activities together centered around the backyard barbecue and swimming pool. The Chapmans children testified that, after Ms. DeWitt moved in, when they visited and tried to use the swimming pool the dogs barked incessantly as soon as the Chapman patio door to the back yard was opened. The dogs barked so loud that the Chapmans and their guests could not carry on a conversation. The Chapmans and their guests either had to endure the incessant, annoying barking or discontinue their use of the backyard. During this time period the Chapman children noticed that their parents were stressed and upset by the noise.

Additionally, one of the dogs, "Jake", jumped or scaled the fence between the properties and entered the Chapmans yard on at least two occasions. On the first occasion observed by the Chapmans, Mr. Chapman heard loud barking in his yard. When he went outside to investigate Jake came around the West side of the Chapman house growling and running toward Mr.Chapman. Mr. Chapman jumped back inside his security door to avoid injury. Another time Mr. Chapman saw Jake enter the Chapman back yard, urinate on the rose bushes and jump back over the wall as if the dog considered the Chapman backyard its own. At another time there was evidence that a dog had been in the Chapmans' back- yard because there was paw prints where the sprinkler had been on and a dog had defecated in the yard. The dogs would jump at the fence when the Chapmans tried to get fruit from their trees. Ms. Chapman was afraid to go out in the back yard.

All during this time the Chapmans tried to work with Ms. DeWitt to find a solution for the problem. Mr. Chapman sent numerous letters and notes to Ms. DeWitt but she refused to address the problem. Mr. Chapman took tape recordings of the dogs barking but Ms. DeWitt refused to listen to the tapes. Mr. Chapman requested that Ms. DeWitt participate in mediation with him but she refused. Ultimately, Ms. DeWitt was convicted in the Phoenix City Court of disturbing the peace as a result of barking or howling dogs. The Chapmans were listed as the victims and the judge ordered that Ms. DeWitt keep her dogs quiet. Although at some point in the fall of 1999 Ms. DeWitt gave Jake to a friend in Maricopa the other dogs continued to bark.

In early November 1999 after a night of the dogs barking into the early morning hours Mr. Chapman left a note for Ms. DeWitt. On November 10,1999 Ms. DeWitt asked Mr. Chapman to come over. Because she seemed hostile he took a tape recorder with him. In the taped conversation Ms. DeWitt refused to listen to the tapes of the dogs barking and denied that they barked. And then she went further. In the presence of her young daughter, she threatened to press charges against Mr. Chapman for a lewd act that she alleged she observed him engage in on the deck of his second-story home. Ms. DeWitt presented no credible evidence at trial that she had a basis for the threat and admitted that she "said an awful thing". She didn't follow through with that threat but instead she called the police alleging that Mr. Chapman had been trespassing,

even though she had asked him to come over to her house. Mr. Chapman never approached her again about the dogs or anything else after the November 1999 incident.

About a month after the threat the Chapmans decided that the only way to solve the problem was to move. Mr. Chapman could no longer try to work things out with Ms. DeWitt because she did not care to even listen to the tapes or discuss the matter. Mr. Chapman was fearful to complain any further because of the unfounded threat by Ms. DeWitt and the fear that she might make false accusations against him. He was concerned for his liberty and for the effect false accusations could have on his relationship with his grandchildren, a relationship that was very important to him. The Chapman home was listed for sale in January 2000. In February 2000 Mr.Chapman was showing the property to prospective buyers when Ms. DeWitt walked by the front of the house and said "I'm glad you're leaving." The Chapmans sold the home in March 2000 for $134,000.

At trial Ms. DeWitt testified that the dogs were kept in the house day and night even when she worked from 6 a.m. to 6 p. m. or sometimes later, and even though there was no doggie door in the house; she couldn't recall whether another neighbor, Ms. Petersen, came to see her about her barking dogs; and generally denied that her dogs barked. She also testified that she only got a couple of letters from Mr. Chapman and claimed that she didn't receive Mr. Chapman's letter dated March 24, 1999 (Exhibit 1) until June 1999. The Court finds Ms. DeWitt's testimony not credible. Additionally, the transcript of the tape recording of the November 10, 1999 conversation between Mr. Chapman and Ms. DeWitt supports the Chapmans' and their children's testimony. Ms. DeWitt simply did not care that her dogs were disturbing the Chapmans and refused to even listen to the tapes of her dogs disturbing and annoying the Chapmans. And although Ms. DeWitt claims the tape is altered, her insidious threat to Mr. Chapman is quite clear.

The Court also does not find that the testimony of Ms. DeWitt's other witnesses supports a finding that the dogs were not disturbing and annoying the Chapmans. Ms. DeWitt's witness, Mr. Jack Turner, lives two houses to the West, has a hearing problem and doesn't wear his hearing aid at night. Mr. Mackey testified in support of Ms. DeWitt's contention that Mr. Chapman let her dogs out. Mr. Mackey lives Northeast of Ms. DeWitt and testified that he saw Mr. Chapman near the DeWitt home and that later the dogs were out. But he also testified that he does not have a clear view of her gate from his house and that he never saw Mr. Chapman open the gate. He also admitted that Mr. Chapman might have been leaving a note for Ms. DeWitt. He also testified he didn't hear her dogs bark. But he was not similarly situated to the Chapmans and was considerably further from the DeWitt home than the Chapmans. Ms. Tripodi, the neighbor to the West of Ms. DeWitt also testified that Ms. DeWitt's dogs didn't bother her. But she was angry at Mr. Chapman for asking her children to turn down their music over ten years ago and because he had complained about her daughter's four dogs barking. She even threatened to sue him if he didn't get off her property. Interestingly, she also testified that Mr. Chapman never returned to complain about her daughter's dogs after their conversation about it but did speak to her about being kept awake by Ms. DeWitt's dogs.

Based on the testimony at trial the Court finds and concludes that Ms. DeWitt's dogs were a private nuisance to the Chapmans in that they disturbed and annoyed the Chapmans to the extent that they suffered a loss of the use and enjoyment of their property. Ms. DeWitt's actions or lack thereof caused the Chapmans to lose sleep on numerous occasions. Additionally, the Chapmans had to listen to sustained barking during the daylight hours. The Chapmans' efforts to resolve the problem were completely rebuffed by Ms. DeWitt. To top it all off, in an apparent effort to silence Mr. Chapman's complaints, Ms. DeWitt falsely accused Mr. Chapman of committing a lewd act and threatened to report him to the police. Thus, the Chapmans were faced with not only the loss and enjoyment of their home but also Mr. Chapman's liberty was threatened. The Chapmans could either endure the barking or they could move. The interference was substantial, intentional and unreasonable as to the Chapmans under the circumstances. *Armory Park Neighborhood Association v. Episcopal Community Services in Arizona*, 148 Ariz. 1, 712 P.2d 914, 920 (1985); *Adams v. Hamilton Carhartt* Overall *Co. et al*, 293 Ky. 443, 446, 169 S.W.2d 294, 295-96 (1943).

Moreover, because of the proximity of their home to Ms. DeWitt's and the dogs apparent directing of their barking at the Chapmans, almost as though the dogs claimed the Chapman yard as their own, the Court finds that the Chapmans meet the reasonable person standard required to support a nuisance cause of action. *Armory Park Neighborhood Association v. Episcopal Community Services in Arizona*, 148 Ariz. 1, 712 P.2d 914, 920-21 (1985). Normal reasonable persons in that locality would find the sustained barking and invasion of the backyard seriously annoying or intolerable.

The question then becomes whether Ms. DeWitt's actions (or inactions) can be said to constitute intentional infliction with emotional distress. Arizona courts have recognized the elements of intentional infliction of emotional distress as set forth in Section 46 of the Restatement of Torts (2^{nd}) which provides in pertinent part:

> Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Thus, there are four elements which must coincide to impose liability for intentional infliction of emotional distress: (1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress must be severe. *Pankratz v. Willis*, 155 Ariz. 8, 13, 744 P.2d 1182, 1187 (1987). "Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation,

embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises." *Venerias v. Johnson,* 127 Ariz. 496, 500, 622 P.2d 55, 59 (1980).

The evidence at trial supports a conclusion that all four elements have been satisfied. At best Ms. DeWitt's refusal to address the problem shows reckless disregard for the Chapmans use and enjoyment of the property and their emotional well-being. Her threat to Mr. Chapman was an extreme, outrageous intentional attempt to inflict emotional distress severe enough that he would not complain about her dogs any further. There is a direct causal connection between the wrongful conduct and the emotional distress. As a result of Ms. DeWitt's actions, inactions, and threat, the Chapmans suffered stress, difficulty sleeping, and crying episodes. Mr. Chapman reported his stress and sleeping disturbances to his doctor twice in 1999 and ultimately was prescribed medication shortly after he moved from the residence. Moreover, the emotional distress in this case was severe. Not only were the Chapmans deprived of the use and enjoyment of their property, suffered sleep deprivation, and stress but they were also put in fear that if they complained any further about Ms. DeWitt's dogs she would falsely accuse Mr. Chapman of a lewd act which could result in the loss of his liberty. The stress was severe enough to prompt the Chapmans to move from their home of twenty-eight years, a home they had no desire to sell until Ms. DeWitt moved into the neighborhood. Under these circumstances, the Court finds and concludes that Ms. DeWitt is liable for intentional infliction of emotional distress.

The last issue to be addressed is the damages to which Plaintiffs are entitled. As to the private nuisance there are two aspects of damages. First, there are damages to the Chapmans property by loss of value. The second aspect of damages is personal and has "to do with the health and comfort of the plaintiffs by reason of the existence of the condition alleged…" *City of Phoenix v. Johnson,* 51 Ariz. 115, 131, 75 P.2d 30, 37 (1938).

Where the nuisance, or the injury arising from it, is not permanent and has been or can be abated the plaintiff usually recovers the depreciation in rental or use value of his property during the period in which the nuisance occurs, plus any special damages. D. Dobbs, *Handbook On The Law of Remedies,* §§5.3-5-4 at 332-334 (1973). But the Arizona courts have on occasion allowed the diminution measure for a continuing abatable nuisance. *See e.g. City of Phoenix v. Johnson.* But whether the nuisance is temporary or permanent the land occupant may recover special damages in addition to the decrease in market value or use. D. Dobbs, *Handbook On The Law of Remedies,* §5.3 at 333-334 (1973).

The Chapmans received the appraised value of the home when they sold it. But they nonetheless incurred moving costs of $400 and costs of sale in the amount of $12,443. Whether these costs are characterized as part of the diminution in value of the house as a result of a continuing abatable nuisance or whether they are characterized as part and parcel of the damages suffered by the Chapmans for the loss of use of their property, these costs were incurred as a direct result of the private nuisance. Based on the evidence the Court finds and concludes that the Chapmans are entitled to recover as special damages the moving costs of $400 and the costs of sale of the property in the amount of $12,443. The Chapmans are not entitled to the costs of

repair to the new home as the Court must presume that the Chapmans paid what the new home was worth in its as is condition and any improvements made thereto increased the value.

Moreover, based upon the evidence, and separate and apart from the award of costs of moving and sale of the property, the Court finds and concludes that the Chapmans are entitled to damages in the amount of $40,000 for the loss of use of their property and the discomfort and annoyance to them as a result of the nuisance.

Lastly, the Court finds and concludes that, based upon the evidence, the Chapmans are entitled to damages in the amount of $15,000 for intentional infliction of emotional distress.

Plaintiffs' counsel shall lodge and serve a formal judgment consistent with this decision within twenty days of the date this minute entry is filed by the Clerk of the Court.