COLORADO COURT OF APPEALS

DATE FILED: December 22, 2016
CASE NUMBER: 2015CA1159

Court of Appeals No. 15CA1159
Boulder County District Court No. 13CV31563
Honorable Judith L. LaBuda, Judge

Citizens for Quiet Skies, Kimberly Gibbs, Timothy Lim, Suzanne Webel, John Behrens, Carla Behrens, and Richard Dauer,

Plaintiffs-Appellants,

v.

Mile-Hi Skydiving Center, Inc.,

Defendant-Appellee.

JUDGMENT AFFIRMED, ORDERS AFFIRMED IN PART
AND VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE ROMÁN
Lichtenstein and Freyre, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 22, 2016

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¶ 1 Plaintiffs, Citizens for Quiet Skies (Citizens), Kimberly Gibbs, Timothy Lim, Suzanne Webel, John Behrens, Carla Behrens, and Richard Dauer, appeal the trial court's judgment in favor of defendant, Mile-Hi Skydiving Center, Inc. Plaintiffs also appeal an award of attorney fees. We affirm the judgment, affirm in part and vacate in part the orders awarding attorney fees, and remand for further proceedings.

I. Background

¶ 2 A dispute arose between defendant, a recreational skydiving company that operates multiple planes inside a geographical "flight box" near Longmont, Colorado, and plaintiffs, a citizens' advocacy group and six individuals. Alleging the noise and vibrations emitted by defendant's airplanes negatively impacted their quality of life and property values, plaintiffs initiated a civil suit for damages and injunctive relief.[1]

¶ 3 As pertinent here, the trial court granted summary judgment in favor of defendant on plaintiffs' trespass and unjust enrichment

[1] Although plaintiffs originally sought medical damages, they subsequently withdrew those claims. Plaintiffs' medical damages will be taken up later as it relates to the trial court's award of attorney fees.

claims. Then, following a five-day bench trial, the court also ruled against plaintiffs on their claims for negligence, negligence per se, and nuisance.[2] Defendant filed a motion for attorney fees on some of plaintiffs' claims. Based on section 13-17-102, C.R.S. (2011), the trial court awarded attorney fees on plaintiffs' claims for unjust enrichment, medical damages, and respondeat superior. When plaintiffs filed a motion to reconsider the award of attorney fees under C.R.C.P. 59, the trial court denied the motion and awarded defendant additional fees based on the failed motion for reconsideration.

II. Analysis

¶ 4 Plaintiffs appeal the bench rulings against their negligence per se and nuisance claims;[3] the entry of summary judgment on their trespass and unjust enrichment claims; and the award of attorney fees against them.

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[2] The parties dispute whether a respondeat superior claim was dropped prior to trial. This, too, will be taken up later as it relates to the trial court's award of attorney fees.

[3] Plaintiffs do not shore up their appeal of the trial court's ruling on their negligence claim with argument or support; therefore, we do not consider it. *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010).

A. Trial Court's Bench Trial Rulings

¶ 5 As noted, plaintiffs allege the trial court erred in ruling against them on their negligence per se and nuisance claims. We consider each in turn.

1. Negligence Per Se

¶ 6 Plaintiffs contend defendant should be held liable under a negligence per se theory for violating Longmont Municipal Code 10.20.110, which sets a maximum daytime sound level of fifty-five decibels for residential areas. Defendant counters that this general noise ordinance does not apply to aircrafts. We agree with defendant.

a. Standard of Review

¶ 7 Interpretation of a local ordinance is a question of law subject to de novo review. *Wells v. Lodge Props., Inc.*, 976 P.2d 321, 325 (Colo. App. 1998).

¶ 8 We interpret local government ordinances as we would any other form of legislation, seeking to ascertain and give effect to the intent of the legislative body. *City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1248 (Colo. 2000). To determine

legislative intent, we look first to the plain language of the ordinance. *Id.*

b. Discussion

¶ 9 Longmont Municipal Code 10.20.110 prohibits daytime noise over fifty-five decibels in residential areas. It does not explicitly list airport noise as included in its prohibitions. The ordinance specifically exempts a number of activities, including "[n]oises resulting from authorized public activities such as parades, fireworks displays, sports activities and events, musical productions, *and other activities to the extent they are approved and limited by the city*." Longmont Mun. Code 10.20.110(D)(5)(ii) (emphasis added).

¶ 10 Testimony at trial established that the airport used by defendant is subject to an Airport Master Plan approved by the City of Longmont. Specifically, defendant's real estate expert testified that the Airport Master Plan employed a sixty-five decibel day-night average sound level (DNL) as the noise standard that applies to airport activities. The former chairman of the Airport Advisory Board also testified that the master plan is periodically updated and approved by Longmont's city council.

¶ 11 By approving the Airport Master Plan and submitting it to the Federal Aviation Administration (FAA) for receipt of federal funds, we conclude that the City of Longmont approved airport activities that emit up to sixty-five decibels of noise. Therefore, based on its plain language, 10.20.110 exempted aircraft and airport activities.[4]

¶ 12 Accordingly, we affirm the trial court's dismissal of plaintiffs' negligence per se claim.

2. Nuisance

¶ 13 According to plaintiffs, the trial court applied the wrong legal standard to their private nuisance claim. Specifically, it applied federal noise regulatory standards when the test for private nuisance is defined by state common law. We conclude the trial court's ruling as to nuisance was based on the correct standard.

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[4] Plaintiffs argue in their reply brief that the Airport Master Plan should not be considered an adoption of the sixty-five decibel standard because it is a criterion for receipt of federal funds, not a noise limit. They argue further that because the master plan was not admitted as evidence, testimony regarding the City's adoption of federal noise standards was inadmissible hearsay. However, plaintiffs did not challenge the trial court's finding that the master plan adopted the sixty-five decibel standard in their opening brief. Thus, we do not consider this argument. *Flagstaff Enters. Constr. Inc. v. Snow*, 908 P.2d 1183, 1185 (Colo. App. 1995).

a. Standard of Review

¶ 14 "Where there is a mixed question of law and fact, the reviewing court will give deference to the trial court's factual findings, absent an abuse of discretion, but will independently review questions of law." *Sheridan Redevelopment Agency v. Knightsbridge Land Co.*, 166 P.3d 259, 262 (Colo. App. 2007) (citation omitted). Therefore, we review the factual question of whether defendant's conduct constituted a nuisance for abuse of discretion. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001). Whether the trial court applied the correct legal standard in ruling on plaintiffs' nuisance claim is a question of law that we review de novo. *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 897 (Colo. 2008).

¶ 15 Finally, the trial court is entitled to deference in assessing the evidence and determining the credibility of the witnesses. *Campbell v. Summit Plaza Assocs.*, 192 P.3d 465, 469 (Colo. App. 2008).

b. Discussion

¶ 16 The standard for determining a private nuisance claim in Colorado has been defined by our supreme court. "[A] plaintiff must establish that the defendant has unreasonably interfered with

the use and enjoyment of her property." *Van Wyk*, 27 P.3d at 391. The question of unreasonableness is an issue of fact, determined by "weigh[ing] the gravity of the harm and the utility of the conduct causing that harm." *Id.* "Generally, to be unreasonable, an interference must be significant enough that a normal person in the community would find it offensive, annoying, or inconvenient." *Id.*

¶ 17 The trial court properly cited this common law rule as the legal standard for a private nuisance claim. Based on that standard, the trial court found "the noise produced by [defendant's] operations is not offensive, annoying, or inconvenient to a degree significant enough that a normal person in the community would consider it unreasonable." It also made ample factual findings to support this determination.[5]

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[5] We reject plaintiffs' argument that the trial court's reasonableness findings must be reversed because they were based on improper evidence. Specifically, plaintiffs contend testimony as to statistical data on aircraft noise complaints and defendant's capacity to mitigate noise should have been excluded. We need not reach the propriety of admitting this testimony because even without it the trial court had sufficient grounds on which to find there was no unreasonable interference with plaintiffs' use and enjoyment of their property.

¶ 18 Specifically, the trial court found:

- defendant's activity contributed only a fraction of the overall noise in the area surrounding plaintiffs' homes;[6]
- defendant's noise contribution was negligible when compared to all aircraft noise in the area;
- defendant's operations created less noise than the limit set by the federal government for receipt of federal funds;[7]
- other individuals living in proximity to the airport did not experience disruption due to noise from defendant's operations;[8] and

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[6] Plaintiffs also contend the trial court erred in admitting an expert report, demonstrating that noise from defendant's planes was not significantly higher than other background noise sources, because no expert disclosure was done as to the authors. However, that evidence was cumulative of separate noise studies conducted by two other expert witnesses. Thus, any error in admitting the report was harmless. *Johnson v. Nat'l R.R. Passenger Corp.*, 989 P.2d 245, 250 (Colo. App. 1999).

[7] Although defendant's compliance with FAA regulations is not dispositive of liability, it is a relevant part of the trial court's fact finding as to what constitutes an unreasonable interference. *Yampa Valley Elec. Ass'n, Inc. v. Telecky*, 862 P.2d 252, 257 (Colo. 1993); *see also Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001) (holding Federal Aviation Act could provide a defense to a state law claim).

- the gravity of harm to plaintiffs was not significant nor severe.

¶ 19 In addition, the trial court gave "considerable weight" to the testimony of defendant's noise expert, who concluded, based on a study the trial court found credible, that defendant's noise would not be unreasonable to the average person in the community.

¶ 20 Accordingly, the trial court applied the correct legal standard and made relevant factual findings to support its ruling that defendant did not unreasonably interfere with plaintiffs' use and enjoyment of their property.[9] Thus, we affirm.

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[8] The trial court also found plaintiffs were more sensitive to defendant's noise than normal members of the community. Although plaintiffs asserted at oral argument that this finding was clearly erroneous, they did not raise this issue in their briefs. "Issues raised for the first time at oral argument are considered waived." *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998).

[9] To the extent the trial court relied on defendant's compliance with federal regulatory standards in making its determination, such reliance was in error. Nevertheless, on review, we conclude the trial court also applied the correct standard and separate evidence exists in the record to support its conclusion. *See Bly v. Story*, 241 P.3d 529, 537-38 (Colo. 2010) (finding no abuse of discretion where the trial court's error did not result in substantial prejudice).

B. Summary Judgment

¶ 21 Plaintiffs also appeal the trial court's grant of summary judgment on their claims of trespass and unjust enrichment. We discern no error.

¶ 22 A trial court may enter summary judgment when there is no disputed issue of material fact and the moving party is entitled to judgment as a matter of law. *McIntyre v. Bd. of Cty. Comm'rs*, 86 P.3d 402, 406 (Colo. 2004). We review a grant of summary judgment de novo. *Id.*

1. Trespass

¶ 23 "The elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property." *Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003). "[A]n intangible intrusion may give rise to [a] claim for trespass, but only if an aggrieved party is able to prove physical damage to the property caused by such intangible intrusion." *Van Wyk*, 27 P.3d at 390. Noise is an intangible intrusion. *Id.* at 388.

¶ 24 Here, plaintiffs failed to point to any evidence of physical damage to their property and admitted in their depositions that no

physical damage occurred. Although they argue that noise from defendant's planes "pushed" on their eardrums and physically vibrated their homes, they cite to no authority, and we have found none, to support their contention that this constitutes physical damage. Moreover, the *Van Wyk* court rejected a similar argument that physical vibrations constitute a trespass. *Id.* at 391. Lacking any evidence of physical damage, as is required for intangible invasions, we agree with the trial court that there was no genuine disputed issue of material fact as to whether defendant's noise constituted a trespass.

2. Unjust Enrichment

¶ 25 Next, plaintiffs challenge the trial court's grant of summary judgment on their claim of unjust enrichment. Specifically, they contend there was a genuine disputed issue of material fact as to whether defendant received the benefit of exclusive use of the outdoors at plaintiffs' expense. Again we affirm the conclusion of the trial court.

¶ 26 "In Colorado, a plaintiff seeking recovery for unjust enrichment must prove: (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it

unjust for defendant to retain the benefit without paying." *Salzman v. Bachrach*, 996 P.2d 1263, 1265–66 (Colo. 2000). A party is unjustly enriched when she "benefits as a result of an unfair detriment to another." *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008). A benefit is any form of advantage. *Bachrach v. Salzman*, 981 P.2d 219, 222 (Colo. App. 1999), *aff'd*, 996 P.2d 1263.

¶ 27 According to plaintiffs, defendant received a benefit at their expense because defendant excluded plaintiffs from the outdoors. However, given that plaintiffs knowingly purchased homes in close proximity to an airport and defendant's conduct is not prohibited by local ordinance or federal regulations, we discern no "circumstances that would make it unjust for defendant to retain the benefit without paying." *Salzman*, 996 P.2d at 1265-66.

¶ 28 We turn now to the issue of attorney fees.

C. Attorney Fees

¶ 29 Plaintiffs challenge the trial court's award of attorney fees on plaintiffs' unjust enrichment, medical damages, and respondeat superior claims.[10]

[10] Although plaintiffs also challenge the amount of fees awarded for several claims, they waived any objection to the reasonableness of

¶ 30 A trial court may award attorney fees against a party who brings an action "that the court determines lacked substantial justification." § 13-17-102(2), C.R.S. 2016. A claim lacks substantial justification if it is substantially frivolous, groundless, or vexatious. § 13-17-102(4). The determination of whether a claim meets these standards is within the trial court's discretion, and we will not disturb it if it is supported by the evidence. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 299 (Colo. App. 2009).

1. Unjust Enrichment

¶ 31 The trial court determined that no facts supported plaintiffs' unjust enrichment claim. Specifically, the court found that the argument for an expanded definition of unjust enrichment was "not meritorious nor within a reasonable interpretation" of the law. Upon our review of plaintiffs' evidence, we conclude the trial court did not abuse its discretion.

¶ 32 A claim is frivolous when it "appear[s] that the proponents are unable to present a rational argument *based on the evidence or law*

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the award amount by failing to raise it in response to defendant's motion. *McNaughton & Rodgers v. Besser*, 932 P.2d 819, 823 (Colo. App. 1996).

in support of their claim or defense." *SaBell's, Inc. v. City of Golden*, 832 P.2d 974, 978 (Colo. App. 1991) (emphasis added). Plaintiffs did not support their argument that they were deprived of use of the outdoors with any material evidence. Further, they cite no legal support for their contention that unjust enrichment liability attaches in this situation. Accordingly, the trial court did not abuse its discretion in determining that plaintiffs knew or should have known that such an argument lacked justification. *Hamon Contractors, Inc.*, 229 P.3d at 299.

2. Medical Damages

¶ 33 The trial court further concluded plaintiffs' claims for damages relating to physical and mental injuries were both frivolous and groundless. Significantly, the trial court found no evidence to support any allegation of mental or physical injury. The trial court noted that plaintiffs filed three complaints seeking medical damages before withdrawing these claims over a year later, despite having access to their own medical records in advance of filing their claims. *See* § 13-17-103(1)(c), C.R.S. 2016 (listing the "availability of facts to assist a party in determining the validity of a claim or defense" as a factor the court should consider in determining whether or not to

award attorney fees). Because there exists support for this award of attorney fees, we may not disturb it. *Hamon Contractors, Inc.*, 229 P.3d at 299.

3. Respondeat Superior

¶ 34 The trial court also awarded attorney fees for plaintiffs' claim of respondeat superior on the basis that plaintiffs abandoned this claim prior to trial. However, it did not substantively address the claim in its order, nor find that it was substantially frivolous, groundless, or vexatious.

¶ 35 Whether a claim lacks substantial justification is a question of fact for the trial court. *Mitchell v. Ryder*, 104 P.3d 316, 320 (Colo. App. 2004). The trial court must make sufficient findings to permit meaningful appellate review of an attorney fees award. *Yaekle v. Andrews*, 169 P.3d 196, 201 (Colo. App. 2007).

¶ 36 Because the trial court made no findings as to whether plaintiffs' respondeat superior claim lacked substantial justification, we are unable to review this award. *Carruthers v. Carrier Access Corp.*, 251 P.3d 1199, 1211 (Colo. App. 2010). Therefore, we vacate the award and remand the case for factual findings as to whether plaintiffs' respondeat superior claim lacked substantial justification.

4. C.R.C.P. 59 Motion

¶ 37 Finally, we affirm the portion of the attorney fees award pertaining to plaintiffs' motion for reconsideration. In their motion, plaintiffs sought clarification and reconsideration of the amount of fees awarded. They specifically requested the trial court reduce the amount of fees awarded. The trial court awarded additional fees based on its finding that plaintiffs had not previously contested or disputed the reasonableness of fees and thus their Rule 59 motion was groundless. Our review of plaintiffs' response to defendant's motion for attorney fees confirms plaintiffs did not address the amount of fees defendant requested, nor request a hearing on the reasonableness of fees, prior to filing a motion for reconsideration. We therefore cannot conclude the trial court abused its discretion.

III. Conclusion

¶ 38 The judgment is affirmed, and the orders awarding attorney fees are affirmed in part, vacated in part, and remanded for factual findings.

JUDGE LICHTENSTEIN and JUDGE FREYRE concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 22, 2016

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