NUISANCE MUST BE MORE THAN VISUAL

Posted on February 8, 2020 by **Trey Wilson -- San Antonio Real Estate Attorney**

Beauty, like supreme dominion
Is but supported by opinion
–Benjamin Franklin, *Poor Richard's Almanack*, 1741

[T]he law will not declare a thing a nuisance because it is unpleasant to the eye.
—*Schamburger v. Scheurrer*, 198 S.W. 1069 (Tex.Civ.App.–Fort Worth 1917, no writ).

It has been said that "Beauty is in the eye of the beholder." Stated differently, what one finds attractive may be an abomination to another.

We all have different tastes, and styles in architecture, paint colors, vegetation yard art and other improvements. Naturally, our aesthetic preferences clash daily in urban and suburban neighborhoods, where proxemics require us to view our neighbors' properties. Many property owners fear the adverse effects of an "ugly" neighboring property.

Sometimes, the view of a neighboring property can be considered aesthetic blight, or be perceived so negatively as to be considered a threat to property value, marketability, or enjoyment of a neighboring tract. When this occurs, consideration must be given to whether this aesthetic harm or visual interference can form the basis for a claim under Texas law. The Texas cause of action that seems to best "fit" a non-invasive interference with land is Nuisance.

Texas law generally defines nuisance as the unreasonable interference in the use or enjoyment of a neighboring property without a physical invasion.

Due in large part to the inherently subjective nature of aesthetic preference, an unattractive sight– without more — is not an a substantial interference. Thus, no nuisance claim exists where the only interference is the aesthetic unattractiveness of a neighbor's property.

NO TEXAS OPINION SUPPORTS A PURELY VISIUAL NUISANCE

No Texas case has ever allowed a claim for nuisance based on purely aesthetic harm. *See, e.g., Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 509 (Tex. App.–Eastland 2008, pet. denied)("courts have not found a nuisance merely because of aesthetical-based complaints"); *Scharlack v. Gulf Oil Corp*., 368 S.W.2d 707 (Tex.Civ.App.–San Antonio 1963, no writ)(plaintiffs' claims must fail because they have alleged nothing more than an interference with their view").

Indeed, for the 102 years following the decision in *Schamburger*, a multitude of courts have weighed in on whether a nuisance complaint based on aesthetic harm is legally actionable, providing an extensive body of law that consistently and unanimously refuses to allow such claims.

NUISANCE IS NO LONGER AN INDEPENDENT CAUSE OF ACTION

In 2017, the Texas Supreme Court unequivocally eliminated "nuisance" as an independent cause of action. "Nuisance is not a cause of action, but a type of legal injury." *Town of Dish v. Atmos Energy Corp.,* 519 S.W.3d 605, 607 n.2 (Tex. 2017) (citing *Crosstex N. Tex. Pipeline, L.P. v. Gardiner,* 505 S.W.3d 580, 594-95 (Tex. 2016)); *see also Crosstex,* 505 S.W.3d at 594-95 ("the term `nuisance' does not refer to the `wrongful act' or to the `resulting damages,' but only to the legal injury—the interference with the use and enjoyment of property—that may result from the wrongful act and result in the compensable damages"); *Dealer Comput. Servs., Inc. v. DCT Hollister Rd, LLC,* 574 S.W.3d 610, 621-22 (Tex. App.-Houston [14th Dist.] 2019, no pet.) ("nuisance does not itself constitute wrongful conduct or cause of injury; rather, nuisance is a type of injury," and plaintiffs should thus allege "intentional conduct or negligence with respect to" alleged nuisance injuries); *St. Anthony's Minor Emergency Ctr., L.L.C. v. Ross Nicholson 2000 Separate Prop. Tr.,* 567 S.W.3d 792, 799 & n.8 (Tex. App.-Houston [14th Dist.] 2018, pet. denied) ("A defendant can be liable for creating a nuisance based on negligence or other culpable conduct."); *Bolton v. Fisher,* 528 S.W.3d 770, 778 (Tex. App.-Texarkana 2017, pet. denied) (plaintiff sued for nuisance, but "[b]ecause nuisance is not a cause of action, these separate claims cannot stand"; although "the nuisance, or legal injury, alleged in Bolton's petition could have given rise to a cause of action, such a cause of action was not" pled). Thus, because appellees did not plead an actual cause of action, their claim for "private nuisance" cannot stand. *See Bolton,*528 S.W.3d at 778.

Thus, to show an actionable nuisance it is incumbent upon Plaintiffs to plead and prove facts demonstrating both a substantial interference and an unreasonable annoyance or discomfort caused by that interference. *Id.; Gulledge v. Wester*, 562 S.W.3d 809, 821(Tex. App.–Ft. Worth 2018, "[O]nly if the interference is 'substantial' and causes 'discomfort or annoyance' that is 'unreasonable'" will a legal injury rise to the level of an actionable nuisance. Moreover, the Supreme Court emphasized that whether one's discomfort or annoyance is unreasonable is determined from the effect of the interference.

VISUAL DISPLEASURE OR UNDESIRABLE VIEW DOES NOT

CONSTITUTE AN ACTIONABLE NUISANCE

Visually displeasing effects do not constitute the substantial interference unreasonably affecting the use and enjoyment of property that gives rise to actionable nuisance. *E.g., see, Gulledge v. Wester, supra*, 562 S.W.3d at 816 & 821; *Rankin, supra*, at 510-511; *see, also, Dealer Computer Services, Inc. v. DCT Hollister RD, LLC*, 574 S.W.3d 610, 621-22 (Tex. App.–Houston [14th] 2019 no pet.). Aesthetic complaints include those that concern the loss of a desirable view on or across another land-owner's property. *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 509 (Tex. App.—Eastland 2008, pet. denied). The loss or alteration of one's view may result from the construction of a structure considered to be ugly or by blocking a view one considers to be pretty or appealing. *See Gulledge v. Wester, supra*, 562 S.W.3d at 821(Higley, J., concurring).

NUMEROUS TEXAS COURTS HAVE REFUSED TO FIND A NUISANCE BASED ON AESTHETIC HARM

Texas courts have historically and consistently refused to recognize an actionable nuisance based on aesthetical complaints about neighboring properties. *See Gulledge*, 562 S.W.3d at 816 (loss of view not actionable as nuisance); *Severs v. Mira Vista Homeowners Assn., Inc*., 559 S.W.3d 684, 704-05 (Tex.App.–Fort Worth 2018, pet. denied)(interference with view not actionable nuisance because of aesthetic-based complaints"); *Ladd v. Silver Star I Power Partners, LLC*, 2013 WL 3377290, at *3 (Tex. App.—Eastland 2013, pet. denied) ("as a matter of law aesthetic impact will not support a claim for nuisance"); *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 509 (Tex. App.—Eastland 2008, pet. denied) ("Texas courts have not found a nuisance merely because of aesthetically based complaints."); *Scharlack v. Gulf Oil Corp*., 368 S.W.2d 705, 707 (Tex. Civ. App.—San Antonio 1963, no writ) ("It is our opinion that the appellants have alleged nothing more than an interference with their view"); *Jones v. Highland Memorial Park*, 242 S.W.2d 250, 253 (Tex. Civ. App.—San Antonio 1951, no writ) (rejecting aesthetical complaints of cemetery in neighborhood); *Iford v. Nickel*, 1 S.W.2d 751, 753 (Tex. Civ. App.—San Antonio 1928, no writ)("[A]n injunction will not lie to prevent the erection of business houses that may be distasteful to [the] aesthetic [of] individuals. . ."); *Shamburger v. Scheurrer*, 198 S.W. 1069, 1071 (Tex. Civ. App.—Fort Worth 1917, no writ) (rejecting aesthetical complaints of lumber yard in neighborhood); *Serafine v.Blunt*,

2017 WL 2224528, at *5 (Tex. App.—Austin May 19, 2017, pet. denied) (" 'aesthetic' nuisance claims are not recognized in Texas"); *Jeansonne v. T–Mobile W. Corp*., 2014 WL 4374118, at *8 (Tex. App.—Houston [1st Dist.] Sept. 4, 2014, no pet.).

TYPES OF INTERFERENCES THAT HAVE BEEN FOUND "SUBSTANTIAL" ENOUGH TO CREATE A NUISANCE

The 3rd Court of Appeals recently surveyed Texas nuisance cases, and found that this body of law "reflects situations in which a defendant is found to have caused a nuisance by":

- *causing flooding on the plaintiff's property, see, e.g., Barnes v. Mathis, 353 S.W.3d 760, 763-64 (Tex. 2011);*
- *emitting noxious odors, see, e.g., Natural Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 154 (Tex. 2012);*
- *discharging water onto the plaintiff's land, see, e.g., Tennessee Gas Transmission Co. v. Fromme, 269 S.W.2d 336, 338 (Tex. 1954); or*
- *invading the plaintiff's land with dust, noise, or bright lights, see, e.g., Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269-70 (Tex. 2004).*

Essentially, the common thread through Texas nuisance jurisprudence is that the defendant has invaded the plaintiff's property by some physical means or by causing a sensory interference which creates a "condition" that substantially interferes with the plaintiff's use and enjoyment of its land. *See Crosstex*, 505 S.W.3d at 593, 595-600; *Schneider Nat'l,* 147 S.W.3d at 273-77 (discussing various types of nuisances in discussing temporary and permanent nuisances); *Serafine v. Blunt,* No. 03-16-00131-CV, 2017 WL 2224528, at *5 (Tex. App.-Austin May 19, 2017, pet. denied) (mem. op.) ("private-nuisance claims typically involve an invasion of the plaintiff's property by light, sound, odor, or a foreign substance," and "aesthetic" nuisance claims are not recognized).

THE TAKEAWAY

We live in a diverse and populous society. Naturally, some of our activities will cause our neighbors aesthetic discomfort or annoyance, however major or minor. Visual offense may be taken to all manner of conditions or activities ranging from where we leave our trash cans to structures built in rear yards. The possibilities for inflicting annoyance and visual displeasure upon our neighbors is boundless.

If property owners could prevent their neighbors from hanging decorations or undertaking construction deemed unattractive, tremendous potential for abuse and infringement of

property rights would exist. Courts would be cast into the role of perpetual arbiters of style, design, and taste.
For these reasons, lack of aesthetic virtue (alone) does not rise to the level of “substantial interference” or serve as proper grounds for a nuisance claim in Texas.

Reference Note: The Vermont Supreme Court issued a wonderfully insightful opinion on the topic of aesthetic nuisance in 2017. In writing this post, I have borrowed heavily from the logic in that opinion.