Bradley v. American Smelting and Refining Co.

Supreme Court of Washington, 1985
104 Wash. 2d 677, 709 P.2d 782

This comes before us on a certification from the United States District Court for the Western District of Washington. [The parties had filed cross motions for summary judgment with the trial court judge.] Plaintiffs, landowners on Vashon Island, had sued for damages in trespass and nuisance from the deposit on their property of microscopic, airborne particles of heavy metals which came from the American Smelting and Refining Company (ASARCO) copper smelter at Ruston, Washington. * * * Plaintiffs' property is located some 4 miles north of defendant's smelter. Defendant's primary copper smelter (also referred to as the Tacoma smelter) has operated in its present location since 1890. * * * As a part of the industrial process of smelting copper at the Tacoma smelter, various gases such as sulfur dioxide and particulate matter, including arsenic, cadmium and other metals, are emitted. Particulate matter is composed of distinct particles of matter other than water, which cannot be detected by the human senses. * * *

The insistence that a trespass involve an invasion by a "thing" or "object" was repudiated in the well known (but not particularly influential) case of *Martin v. Reynolds Metals Co.* [221 Or. 86, 342 P.2d 790 (1959)], which held that gaseous and particulate fluorides from an aluminum smelter constituted a trespass for purposes of the statute of limitations:

> [L]iability on the theory of trespass has been recognized where the harm was produced by the vibration of the soil or by the concussion of the air which, of course, is nothing more than the movement of molecules one against the other. * * *
>
> The view recognizing a trespassory invasion where there is no 'thing' which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. [Citing the Restatement (First), Torts and Prosser]. It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a direct invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation E=MC<2> has taught us that mass and energy are equivalents and that our concept of 'things' must be reframed. If these observations on science in relation to the law of trespass should appear theoretical and unreal in the abstract, they become very practical and real to the possessor of land when the unseen force cracks the foundation of his house. The force is just as real if it is chemical in nature and must be awakened by the intervention of another agency before it does harm. * * *

[Martin] was an action in trespass brought against the defendant corporation for causing gases and

fluoride particulates to settle on the plaintiffs' land making it unfit for livestock. * * * [T]he court stated:

> Trespass and private nuisance are separate fields of tort liability relating to actionable interference with the possession of land. They may be distinguished by comparing the interest invaded; and actionable invasion of a possessor's interest in the exclusive possession of land is a trespass; an actionable invasion of a possessor's interest in the use and enjoyment of his land is a nuisance.

We hold that theories of trespass and nuisance are not inconsistent, that the theories may apply concurrently, and that the injured party may proceed under both theories when the elements of both actions are present. * * *

Having held that there was an intentional trespass, we adopt, in part, the rationale of *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979), which stated in part:

> Although we view this decision as an application, and not an extension, of our present law of trespass, we feel that a brief restatement and summary of the principles involved in this area would be appropriate. Whether an invasion of a property interest is a trespass or a nuisance does not depend upon whether the intruding agent is "tangible" or "intangible." Instead, an analysis must be made to determine the interest interfered with. If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies. As previously observed, however, remedies of trespass and nuisance are not necessarily mutually exclusive. * * *

We accept and approve the lements of trespass by airborne pollutants as set forth in the Borland case. * * *

When airborne particles are transitory or quickly dissipate, they do not interfere with a property owner's possessory rights and, therefore, are properly denominated as nuisances. *Born v. Exxon Corp.,* 388 So. 2d 933 (Ala. 1980); *Ryan v. Emmetsburg, supra*; *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 198 P.2d 847, 5 A.L.R.2d 690 (1948). When, however, the particles or substance accumulates on the land and does not pass away, then a trespass has occurred. *Borland v. Sanders Lead Co., supra; Martin v. Reynolds Metals Co., supra*. While at common law any trespass entitled a landowner to recover nominal or punitive damages for the invasion of his property, such a rule is not appropriate under the circumstances before us. No useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant. Manufacturers would be harassed and the litigious few would cause the escalation of costs to the detriment of the many. The elements that we have adopted for an action in trespass from *Borland* require that a plaintiff has suffered actual and substantial damages. Since this is an element of the action, the plaintiff who cannot show that actual and substantial damages have been suffered should be subject to dismissal of his cause upon a motion for summary judgment. * * *

The United States District Court for the Western District of Washington shall be notified for such further action as it deems appropriate.

[The trial court then granted ASARCO's motion for summary judgment on the trespass count, finding that the concentrations of cadmium and arsenic in plaintiffs' soil were not harmful and thus plaintiffs could not establish a necessary element of their environmental trespass claim, actual and substantial damage to the property itself. *Bradley v. American Smelting & Refining Co.*, 635 F.Supp. 1154 (W.D. Wash. 1986).]