

DISTRICT COURT, DELTA COUNTY, COLORADO 501 Palmer Street, Suite 338 Delta, Colorado, 81416	FILED Document CO Delta County District Court 7th JD Filing Date: Jul 5 2012 2:00PM MDT Filing ID: 45173566 Review Clerk: Gabriella Tickner
GORDON MACALPINE and ROSEMARY BILCHAK, Plaintiffs, v. JAMES HOPPER and GEORGIA HOPPER, Defendants.	<p style="text-align: center;">COURT USE ONLY</p> Case Number: 10CV220 Division: 1
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PERMANENT INJUNCTION	

STATEMENT OF THE CASE

This matter comes on for a bench trial on Plaintiffs’ claim for a permanent injunction. Plaintiffs appeared in person and were represented by Randall Weiner. Defendants appeared in person and were represented by Laura Tighe and Matthew Weeber. The Court has considered the evidence and statements presented by the parties, including the transcripts of the August 31 and September 1, 2011, preliminary injunction hearing, and now enters the following findings of fact, conclusions of law, and permanent injunction.

PROCEDURAL BACKGROUND

Plaintiffs filed numerous claims against the Hoppers arising from Mr. Hopper’s application of Fyfanon, a pesticide containing malathion used to kill mosquitoes, on July 6, 2010. The Fyfanon was applied with a London Fogger.

On July 18, 2011, the Court entered a temporary restraining order prohibiting the Hoppers from using their London Fogger. On September 2, 2011, the Court denied Plaintiffs' request for a preliminary injunction and vacated the temporary restraining order.

On December 1, 2011, the Court granted Plaintiffs' motion for summary judgment on their trespass claim, reserving the issue of damages for determination by a jury. Thereafter, Plaintiffs dismissed all of their remaining substantive claims and request for money damages, leaving only their claim for a permanent injunction.

FINDINGS OF FACT

The Court makes the following findings of fact by a preponderance of the evidence.

Plaintiffs and Defendants own adjacent small farms in a rural area known as Duke Hill near Hotchkiss, Colorado. Defendants' property adjoins the west boundary of Plaintiffs' property near Plaintiffs' home, and the southerly portion of Plaintiffs' property partially surrounds a portion of Defendants' property.

Mr. Macalpine has hairy cell leukemia. Because of the disease and its treatment, Mr. Macalpine suffers from a significantly impaired immune system and is particularly susceptible to infection. Mr. Macalpine's physician has advised him to avoid pesticides because pesticides will further suppress his

immune system. As a result, Plaintiffs have made certain dietary and behavioral changes in an effort to avoid pesticides. They grow much of their food organically, and they have taken steps to have their farm organically certified. Organic certification requires that no pesticides be used on the property, and the use of pesticides will result in withdrawal of organic certification for three years. Mr. Macalpine has also registered as a pesticide-sensitive person with the Colorado Department of Agriculture (CDA) and posted Plaintiffs' property with standardized notification signs of acceptance for the registry. See § 35-10-112, C.R.S. (2011).

West Nile virus is a disease transmitted by Culex mosquitoes from corvine birds, such as crows, magpies, and ravens, to humans. Eighty percent of humans infected by West Nile have no symptoms, but a small percentage become very ill or die. In 2006 there were more cases of West Nile virus in the Northfork of Delta County, an area that includes Hotchkiss, than elsewhere in the United States. The number of cases has declined since 2006, and West Nile virus is no longer an epidemic in Delta County.

The Hoppers have had a bad experience with West Nile virus. Georgia Hopper was infected with West Nile virus in 2006. She became seriously ill and was hospitalized for six days. She has residual effects which include fatigue and impaired memory. The fact that Ms. Hopper was infected with West Nile virus makes it less likely that she will be infected in the future, but

her immunity will decline over time. Because of her reaction to West Nile virus, Ms. Hopper should avoid further exposure to West Nile virus.

The Hoppers also care for their twenty-seven year old granddaughter, Amber Lynn Hopper. Amber Lynn is autistic and mentally retarded. She has an aggressive behavior disorder, Huntington's disease, and a seizure disorder. Her developmental age is three to four years. She benefits from having a routine. She does not like to be outside during the day because she has mild photophobia and is reactive to light. She stays in the house during the day and likes to be active outside in the evening, which calms her and reduces her seizure activity.

There are several weapons to combat mosquitoes. Larvacides kill mosquitoes in the larval stage. Larvacides consist of a bacteria injected into shredded corn cobs. The larvacide is applied to accumulations of water containing mosquito larvae. The larvae eat the larvacide, and the bacteria kills the mosquito larvae. Larvacides are highly effective. Adulticides kill mosquitoes in the adult phase by direct contact. Adulticides are fifty percent effective. Mosquitoes develop resistance to adulticides, making them less effective over time. There are also barrier sprays and individual protective measures such as DEET sprays and wearing long sleeve shirts and pants. The evidence in this case does not support a finding that one form of mosquito management is more effective than any other.

Culex mosquitoes are the only mosquito species that transmits West Nile virus. Culex mosquitoes are active from sunset to sunrise. Culex mosquitoes breed in permanent breeding sites. The evidence does not support a finding as to the degree of effectiveness of the various forms of mosquito control on the Culex mosquito. Pertinently, Ms. Hopper contracted West Nile virus when the Paonia Mosquito District was regularly spraying the Hopper property with an adulticide.

In order to combat mosquitoes, Mr. Hopper, with others, purchased a London Fogger. A London Fogger is powered by a small gasoline engine and transported in the back of a pickup truck. It is a nonthermal machine used to create an aerosol. Mr. Hopper also purchased Fyfanon ULV Mosquito Insecticide. Fyfanon is a liquid that contains a high volume of malathion. The London Fogger converts the liquid malathion into small particles, and the small particles of malathion kill adult mosquitoes on contact. The Fyfanon label, the document that governs the use of a pesticide, requires spray equipment to be adjusted so that the mass median diameter of particles is less than seventeen microns. Fyfanon applied with a London Fogger will treat mosquitoes over a 300-foot swath. However, under certain wind conditions, Fyfanon can drift as far as 1000 feet.

Mr. Hopper was not licensed to operate the London Fogger. The Fyfanon he purchased did not have a label so that he did not have the benefit of the label directions for applying Fyfanon. Moreover, the London Fogger had not

been calibrated annually as required by the label. Representatives from the Paonia Mosquito Control District briefed Mr. Hopper on the basic operation of the London Fogger, but they did not give him instruction about applying Fyfanon, such as the significance of wind speed and direction.

On July 6, 2010, Mr. Hopper used the London Fogger to spray his property. Because of his inexperience with wind speed and direction, the Fyfanon drifted onto Plaintiffs' property adjacent to their home. Additionally, Mr. Hopper, while driving on a road on his property, intentionally sprayed Fyfanon on Plaintiffs' property to the south of the Hopper property. Plaintiffs, who were at home at the time, saw the Fyfanon drift onto their property. They suffered throat and lung irritation, difficulty breathing, and a clutching feeling in the chest. They left their property in order to avoid further inconvenience. While the Fyfanon label notes numerous hazards to humans, domestic animals, and the environment, the evidence does not support a finding that Plaintiffs' health was endangered as a result of Mr. Hopper's application of Fyfanon on July 6, 2010.

Plaintiffs filed a complaint with the CDA. The CDA took samples from both Plaintiffs' property and the Hoppers' property. Tests of the samples disclosed the presence of malathion on Plaintiffs' property, including in their home. The CDA issued two cease and desist orders, the second superseding the first, ordering Mr. Hopper to cease applying Fyfanon until meeting certain requirements.

Mr. Hopper has made several changes since July 6, 2010. First, he is now licensed by the CDA to spray Fyfanon. Second, he has had the London Fogger calibrated. Third, he has made several operational changes. Mr. Hopper will send written notice to the Plaintiffs before fogging. He has installed an agricultural wind sock and a flag on his truck antenna to gauge wind direction and speed and markers in his north field 150 feet from Plaintiffs' property line. He always fogs with a third person in the truck to observe the direction of the fog. He no longer fogs in the lane between the two properties, and he fogs at least 150 feet from Plaintiffs' property except in one location in his front yard that is 116 feet from Plaintiffs' property. Mr. Hopper will not begin fogging if the wind direction will cause the fog to travel onto Plaintiffs' property, and he will cease fogging if the wind shifts so that the fog will travel onto Plaintiffs' property.

The Hoppers intend to spray Fyfanon in the future to control mosquitoes. Moreover, Mr. Hopper intends to spray on his property even if spraying poses a serious threat to Mr. Macalpine's health. The Court also finds that Mr. Hopper applied Fyfanon in 2010 without regard for the Plaintiffs' health or property rights.

CONCLUSIONS OF LAW

In order to obtain a permanent injunction, a party must show:

- (1) the party has achieved actual success on the merits;
- (2) irreparable harm will result unless the injunction is issued;

- (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and
- (4) the injunction, if issued, will not adversely affect the public interest.

Langlois v. Board of County Commissioners, 78 P.3d 1154, 1158 (Colo. App. 2003).

“A trial court has broad discretion to formulate the terms of injunctive relief when equity so requires.” Colorado Springs Board of Realtors, Inc. v. State, 780 P.2d 494, 498 (Colo. 1989).

Plaintiffs have met the first requirement for permanent injunctive relief: they have prevailed on the merits of their trespass claim.

Irreparable harm will result to Plaintiffs if the permanent injunction entered herein is not issued. The purpose of the law of trespass is to prevent the intrusion by a person onto land of another. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582, 603 (Colo. App. 2007). An intrusion can occur when an actor causes something to enter the land of another. Hoery v. United States, 64 P.3d 214, 217 (Colo. 2003).

The Hoppers intend to spray Fyfanon on their property. This they have a right to do. What they do not have a right to do is to allow the Fyfanon, and the malathion contained in that product, to intrude onto Plaintiffs’ property. Because the application of Fyfanon is likely to drift onto Plaintiffs’ property unless it is applied properly, Plaintiffs will be irreparably harmed if the Hoppers do not comply with certain restrictions.

The threatened injury to Plaintiffs outweighs any harm that an injunction will cause to the Hoppers. Plaintiffs have an interest, shared by the public in general, in not having their property invaded by third persons or things. Plaintiffs also have a specific interest in not having pesticides invade their property because such invasions will delay or negate their efforts to have their property certified for the production of organic crops. The Hoppers will suffer no injury because they can continue to apply Fyfanon to their property.

Finally, issuing the injunction is in the public interest. The public has a strong interest in protecting and preserving property rights from invasions by others. The public also has an interest in insuring that pesticides are applied safely and in accordance with legal requirements.

PERMANENT INJUNCTION

For the foregoing reasons, Defendants and their agents, servants, and employees shall not apply Fyfanon or similar pesticides to their property except under the following conditions:

1. All persons applying Fyfanon shall have a proper license issued by the Colorado Department of Agriculture;
2. Fyfanon shall be applied in accordance with the label directions;
3. All equipment used to apply Fyfanon shall be properly calibrated;

4. Fyfanon shall not be applied within 150 feet from Plaintiffs' property, and Defendants shall maintain the existing markers on their property to delineate a distance of 150 feet from Plaintiffs' property;

5. Fyfanon shall be applied only when the wind direction and speed will not cause the Fyfanon to drift onto Plaintiffs' property, and Defendants shall maintain their existing devices to gauge wind speed and direction; and

6. Defendants shall keep and maintain records of all Fyfanon applications.

Plaintiffs are awarded their costs and shall file a bill of costs in accordance with C.R.C.P. 121, section 1-22.

SO ORDERED this 5th day of July, 2012.

BY THE COURT:



Charles R. Greenacre
District Court Judge

xc: Counsel of record.