

IN THE CHANCERY COURT FOR THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

FILED
AUG 30 2016
EDDIE JEAN CARR, CHANCERY CLERK
BY *[Signature]* D.C.
PLAINTIFFS

CHARLES PORTER
CLIFTON T. SWITZER, JR.
ROBERT HENRY YARBER, JR.,
AND JOHN DOES 1-10

CAUSE NO: G2015-141 O/3

V.

MISSISSIPPI DEPARTMENT OF
WILDLIFE, FISHERIES AND SAM POLLES,
In His Official Capacity as
EXECUTIVE DIRECTOR OF MISSISSIPPI
DEPARTMENT OF WILDLIFE,
FISHERIES AND PARKS
AND ATTORNEY GENERAL JIM HOOD

DEFENDANTS

ORDER AND OPINION

THIS MATTER having been brought before the Court on Plaintiffs' *Complaint*. Having heard testimony on the matter and all premises considered, the Court finds that the *Complaint* is not well-taken and is hereby **DENIED**. The Court further finds the following to-wit:

PROCEDURAL FACTS

On February 02, 2015, Plaintiffs filed a Complaint in this Court wherein they alleged that individuals who hunt deer with free-running dogs on the Wildlife Management Areas (hereinafter "WMAs") abutting their private lands continually trespass on their lands and interfere with their free use, possession, and enjoyment of their property. As a result, the Plaintiffs contended that such adverse conditions have also diminished the value of the Plaintiffs' property. The Plaintiffs further asserted that the commission's failure to issue and enforce a permitting system for the free-running deer hunting dogs has created a nuisance on their private property. The Plaintiffs further

alleged that a per se taking occurred of their property, since the free running deer dogs constantly trespassed on their land and the owners of said dogs allegedly threatened, harassed, and bullied the Plaintiffs when they complained of the dogs entering their land. The Plaintiffs also cited civil trespass, private nuisance as cause of actions in their complaint and sought an injunction of the use of free running dogs to hunt deer. On April 13, 2015, the Defendant, Mississippi Department of Wildlife Fisheries and Parks (hereinafter "MDWFP") filed their Answers' and Affirmative Defenses wherein it denied liability for the damage to the Plaintiff's property since the damage was not the result of a state actor. On November 23, 2015, the Plaintiffs filed their Motion for Temporary Restraining Order and Preliminary Injunction wherein they asked the court to compel the Defendants to prohibit the use of free running deer dogs on their properties until the Court ruled on the matter. A hearing was subsequently had on the merits wherein both parties expounded on their respective positions. After careful consideration and all premises considered, this Court finds that the Complaint is not well-taken and is hereby **DENIED**. The Court further finds the following:

OPINION

A. Public Nuisance

A public nuisance is an unreasonable interference with a right common to the general public. Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or whether the conduct is proscribed by a statute, ordinance or administrative regulation; or whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

(quoting Restatement (Second) of Torts, § 821B). “To recover damages [for public nuisance] the plaintiff usually must have sustained harm different in kind, rather than in degree, than that suffered by the public at large.” *Leaf River Forest Prod., Inc. v. Ferguson*, 662 So. 2d 648, 664–65 (Miss. 1995). A cause of action for public nuisance is predicated on a showing that the defendant’s activities have injured a **public** right. See *Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So. 2d 857, 860 (1988) (emphasis added).

Plaintiffs assert that the failure of MDWFP to regulate the use of free-running deer dogs by issuing and enforcing permits that authorize individuals to hunt deer with free running dogs has unreasonably interfered with the Plaintiffs’ free use, possession, and enjoyment of their property. Though the use of free running dogs on property abutting Plaintiffs lands has resulted in numerous unfortunate injuries to the Plaintiffs land, we do not find that MDWFP’s decision to not create a permitting system for the use of said dogs created a public nuisance to the Plaintiffs. Though the Plaintiffs have experienced destruction to their property, harassment, and threats to their land and person, we do not find that their individual or collective experiences were a result of MDWFP’s alleged inaction when it did not create a permitting system for the use of free running dogs during a short period of deer hunting season. We find that the Plaintiffs have not shown a significant interference with the public health, public safety, public peace, the public comfort or convenience. As such, the inaction of creating a permitting system for the particular use of free-running dogs has not injured a public right of the Plaintiffs, as the power to regulate hunters is within the discretion of MDWFP.

B. Per Se Taking

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and

whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public. MS Const. Art. 3, § 17. [T]his constitutional provision is only applicable in cases involving property taken for public use. *McLemore v. Mississippi Transp. Com'n*, 992 So. 2d 1107, 1110 (2008).

In the instant case, property has not been taken by government action, as the individuals who have allegedly harassed and injured the Plaintiffs' property are not acting on behalf of the state nor in an official capacity for the state. They are citizens committing tortious acts towards another citizen's property. The mere decision to not regulate the use of free-running deer dog hunting through a licensing or permit process does not result in state action that deprives the Plaintiffs of their use, possession, and enjoyment of their private property over a significant period of time. Hunting season with dogs generally last less than four (4) weeks in each zone of the state. Therefore, the short amount of time that hunters are allowed to use deer dogs while hunting does not amount to a significant deprivation of the Plaintiffs' use and enjoyment of their land. As such, we find that a per se taking has not occurred.

C. Private Nuisance and Civil Trespass

A private nuisance is a non-trespassory invasion of another's interest in the use and enjoyment of his property. One landowner may not use his land so as to unreasonably annoy, inconvenience, or harm others." *Bowen v. Flaherty*, 601 So.2d 860, 862 (Miss.1992). The elements of private nuisance [were] outlined in *Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So.2d 857 (Miss.1988), wherein the Court found that one is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either intentional and unreasonable; or unintentional

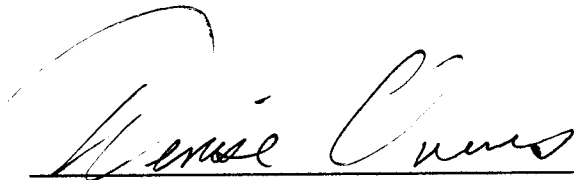
and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities. *Leaf River Forest Prod., Inc. v. Ferguson*, 662 So. 2d 648, 662 (Miss. 1995).

Plaintiffs assert that MDWFP's decision to not regulate the use of free-running deer dogs has resulted in a private nuisance to the Plaintiffs. Though the injury to the Plaintiffs land is reprehensible, the actors were not state officials and not acting in an official state capacity. Moreover, though the purported perpetrators intentionally invaded the Plaintiffs land and acted unreasonably, said actions were not sanctioned by a state official. As such, the Court finds that no private nuisance has occurred. We also find that the inaction of regulation does not result in a civil trespass on Plaintiffs land.

CONCLUSION

The Court therefore finds that the non-enforcement of a licensing system to regulate the use of free-running deer dogs during Mississippi deer hunting season did not violate the Plaintiffs constitutional rights. As such, the Plaintiffs Complaint is not well-taken and is hereby denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED this the 30th
day of August 2016.



CHANCELLOR DENISE OWENS