Jurisdictionary®

- Presents -

The Pig Case

Sample Summary Judgment Motion

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NOTE:

The following is taken from an actual summary judgment motion that succeeded in closing a recent case by demonstrating to the Court that "as a matter of law" there remained no justiciable issues of material fact for the jury to decide.

The names are changed, of course.

Whenever a litigant can demonstrate conclusively to the court (as was done with this particular motion) that pleadings and discovery already filed eliminate all issues of material fact so that there remain no "facts" for the jury to decide that could affect the outcome of the case if it were to go to trial, the litigant can move the Court for an Order granting summary judgment by filing papers similar to what you are about to read.

If the litigant moving for summary judgment successfully argues the motion at a subsequent hearing (after proper notice to all parties, of course) the court may enter an Order granting summary judgment, thus dispensing with the costs and delays that would otherwise be required to put the case before a jury at trial.

Please note, however, that summary judgment is seldom granted where there's even a scintilla of issue of material fact and, if granted, appellate courts routinely scrutinize the case carefully to determine if the lower court overlooked any issue of material fact whatever that *should* have gone to the jury. If the lower court missed anything and the other side appeals, the appellate courts will in all such cases reverse the summary judgment order. In fact, the largest single category of appeals in civil cases results from summary judgment motions, and possibly half (or more) of such appeals result in reversal of summary judgment.

This motion succeeded, however, and there was no appeal. In the pig case, the lower court decided there were no material fact issues for the jury to decide, summary judgement was granted, and the golf course development company folded their tents.

I hope this will demonstrate what's needed to win by summary judgment motion.

Attorney Frederick Graves

THIRTY-NINTH JUDICIAL CIRCUIT COURT
HAPPINESS COUNTY, FLORIDA
CIVIL DIVISION

Case No. 1234567
Judge B. Just

THE GOURMET GOLF CLUB,
a Florida corporation,
Plaintiff,
v.
WILL B. PIGFARMER and
LOVE A. PIGFARMER,
Defendants.
_____/

VERIFIED MOTION FOR SUMMARY JUDGMENT

COME NOW Will B. Pigfarmer and Love A. Pigfarmer, by and through their undersigned attorney, and move this Honorable Court for entry of an Order of Summary Judgment in their favor with regard to each count of the plaintiff's complaint and state:

GENERAL SUMMARY JUDGMENT ARGUMENT

1. There are no material issues of fact that need to be determined by a jury in this cause.
2. The law of the case (controlling case law and statutory authority cited herein) is such that no fact issues remain that can affect the outcome as a matter of law.
3. Though there remain disputed issues of fact, none of the issues of fact is material to the outcome (i.e., a jury determination of the remaining issues of fact cannot alter the conclusions of law that control the outcome regardless of how the jury might rule on the remaining issues of fact).
4. Where no issues of *material* fact alleged by the complaint remain for the jury to decide, summary judgment is proper to conserve valuable judicial energies and to spare litigants unnecessary costs and further delays.

5. Issues of fact not alleged by the complaint cannot be material as a matter of law.
6. Defendants have met their burden of demonstrating the nonexistence of any genuine issue of material fact alleged by the complaint by tendering competent evidence and providing controlling case law and statutory authority to demonstrate that no facts remaining in dispute are material. Landers v. Milton, 370 So.2d 368 (Fla. 1979).
7. Well established Florida law clearly favorable to the defendants controls this case.
8. Arguments over non-material facts or facts outside the four corners of the complaint cannot alter an outcome regulated by controlling law.
9. Courts ruling on summary judgment motions are not called upon to weigh evidence but rather to conclude only if there remain competing issues of material fact. State of Florida Department of Highway Safety and Motor Vehicles v. Fraser, 673 So.2d 570 (Fla. 4th DCA, 1996).
10. Where the law of a case, as here, is so compellingly controlling that the material facts already established dictate a result that cannot be altered by the jury's making any finding of immaterial fact (*however fascinating for the media the interesting process of trying this controversial case might become*) the trial court should grant summary judgment as a just and economical use of its limited judicial resources.
11. Neither politics nor popular opinion should be permitted to influence the outcome of a case dictated by statutory authority and controlling case law.
12. The *material* facts in this case have been sufficiently developed to enable the court to determine as a matter of law that based on statutory authority and controlling case law no issue of *material* fact remains to preclude entry of summary judgment. Epstein v.

Guidance Corporation, Inc., 736 So.2d 137 (Fla. 4th DCA 1999) citing Singer v. Star, 510 So.2d 637,639 (Fla. 4th DCA 1987).

13. Defendants have been required to employ the services of the undersigned attorney to defend this matter and are obligated to compensate him reasonably for his services.
14. There are no justiciable issues of material fact or law to preclude entry of summary judgment on any of the plaintiff's multiple counts.
15. Defendants are entitled to an award of their reasonable attorney's fees and costs as a matter of law pursuant to §57.105 Florida Statutes and other provisions of equitable power within the broad discretion of this Honorable Court.

GENERAL FACTUAL BACKGROUND

16. For more than 15 years prior to plaintiff's election to build a golf course community on adjacent property Tom Pigfarmer continuously resided on his 2½acre farm raising pigs, geese, an occasional goat, and chickens.
17. As early as 1993 he began playing radio music to his pigs at substantially the same times of day and same sound level as at all times material to this action. There is no competent evidence on the record to controvert this fact.
18. Tom Pigfarmer has kept pigs on the premises since 1979, when he started the farm with three pigs. There is no competent evidence on the record to controvert this fact.
19. He has at various times had as many as 30 pigs on the premises.
20. There are now approximately 15 pigs on the premises.
21. Tom built a wood frame home on the property for his wife Love, who has resided with him on the premises since the couple were married in 1984.
22. The couple have four children who live with them on the farm.

ARGUMENT COMMON TO "NUISANCE" COUNTS
STATUTORY AUTHORITY

23. It cannot be reasonably argued (nor could a reasonable jury otherwise conclude) that the Pigfarmer's 2½acre homestead property is anything but pig farm.
24. The property is clearly being used in the agricultural activity of producing pork, an animal farm product distinguishable from manufactured products like golf balls.
25. The property is by law, therefore, a "farm" as that term is defined by §823.14(3)(a) of the Florida Right to Farm Act.
26. An example of one of the rights Florida farm owners enjoy is the right to construct nonresidential farm buildings on their property without regard to Florida Building Code or any county or municipal building code. §604.50 Florida Statutes.
27. Florida provides such special rights to persons engaged in the production of farm products (as contrasted with those engaged in manufacture of products like golf balls) because, among other things, the continuation of agricultural activities "furthers the economic self-sufficiency of the people of the state" and results in a "general benefit to the health and welfare of the people of the state." §823.14(2) Florida Statutes.
28. Moreover, Florida recognizes that agricultural activities such as the Pigfarmers' raising of pigs, geese, and chickens on their property, are threatened by urbanization and its foreseeable nuisance litigation that encourages premature removal of farm land from agricultural use. §823.14(2).
29. The Legislature enacted the Florida Right to Farm Act specifically for the purpose of protecting agricultural activities conducted on farm land from just such nuisance suits as this frivolous action brought by plaintiff golf course development company.
30. The Act became law 15 March 1982 and is still controlling.

31. The Act is a specific exception to Florida's nuisance law contained in Chapter 823.
32. The Act specifically exempts from nuisance suits the generation of "noise and odors", among other things predictably objectionable to urban-dwelling golfers unacquainted with the vicissitudes of raising livestock.
33. The gist of the Act is found in §823.14(4) providing that no farm operation in Florida, such as that of the Pigfarmers, shall be deemed either a public or private nuisance (i.e., no action for private nuisance such as that brought by the golf course development in this lawsuit shall be justiciable in the courts of this State) if the operation has been conducted for one (1) year or more since it was established and was not a nuisance at the time it was established.
34. The Act provides five (5) exceptions, however none of these exceptions applies to the case at bar. §823.14(4)(a)(1-4) and §823.14(5)
35. The Act protects just such persons as the Pigfarmers from private nuisance suits arising from "a change of conditions in or around the locality of the farm". §823.14(4)(b)
36. Plaintiff golf course development company brought this action *specifically* because the character of the farm does not comply in the aesthetic sensibilities of some golfers with the "change of conditions in or around the locality of the farm", i.e., this case is precisely the kind of case the Act was created to defuse.
37. The "change of conditions in or around the locality of the farm" resulted solely from the golf course development company's election to build its course and suburban community across the road from two pig farms that had been in continuous operation for considerably longer than the one (1) year that triggers the statute's protections.

38. The two counts sounding in nuisance must fail, therefore.

39. Defendants have already proffered evidence that the value of playing radio music for livestock, including pigs, is recognized by such esteemed agricultural authorities as the Livestock Conservation Institute and Colorado State University (among other authorities defendants proffered), resulting in better meat quality.

40. The Court may take judicial notice pursuant to Rule 90.202(11&12) Florida Evidence Code that pig manure stinks and that generally accepted agricultural practices at this time do not provide any reasonable means to attenuate the characteristic odor of pig manure nor prevent its ubiquitous production by healthy feeding pigs.

41. At the time of this motion only two appellate decisions in Florida cite the Act.

42. Kirk v. United States Sugar Corporation, 726 So.2d 822 (Fla. 4th DCA 1999) reversed and remanded the trial court's dismissal with prejudice not because the lower court improperly applied the Florida Right to Farm act but because Rule 1.190 Florida Rules of Civil Procedure required that plaintiff be given leave to amend. The lower court ruled plaintiffs lacked standing as individuals to bring a public nuisance suit and dismissed their claim with prejudice. The 4th DCA deemed this too harsh a result where individual plaintiffs could possibly amend to show special or peculiar injuries different in kind from injury to the public at large. Neither the trial court decision nor the appellate court decision turned on the Right to Farm Act.

43. The other appellate case to date citing the Right to Farm Act involved a giant chicken farm operation's decision to make a material change in the way it disposed of massive amounts of chicken manure, a change constituting "a more excessive farm operation" specifically excluded from the Act's protection. Tampa Farm operated a huge egg and

poultry business maintaining *nearly 2 million chickens* producing massive amounts of manure requiring constant disposal. Tampa Farm owned 849 acres of hay fields in Pasco County where, prior to this lawsuit, dry manure was disposed of by broadcast spreaders to enrich the soil. In 1983 (after the Act became law) Tampa Farm changed from broadcast spreading dry chicken manure to spraying a water suspension onto the hay fields, resulting in a substantial increase in offensive odor. The 2d DCA said this change from the existing farm operation was a "more excessive farm operation" within the Act's specific exception contained in §823.14(5). The court went on to say, however, that "we do not interpret a 'more excessive farm operation' to include minor odor changes or minimal degradation of the local environment." Pasco County v. Tampa Farm Service, Inc., 573 So.2d 909 (Fla. 2d DCA 1990). Thus, where a farm such as that of the Pigfarmers has not made a substantial change in its existing farm operation (no such change has been alleged by plaintiff in this lawsuit) that might constitute a "more excessive farm operation", the Act will protect the continued existing farm operation from nuisance lawsuits brought by plaintiffs seeking to urbanize the area.

44. Both counts one and two must fail by operation of the Florida Right to Farm Act.

45. Additional legal arguments further support summary judgment for the defendants on these first two counts as well.

ARGUMENT COMMON TO "NUISANCE" COUNTS
CONTROLLING CASE LAW

46. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all people and has been applied indiscriminately to everything from an alarming advertisement to a cockroach

baked in a pie." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1055 (U.S. 1992).

47. In the Court's determination of the equities in this case, i.e., the reasonableness of the parties' respective positions, it is the "all things to all people" problem that requires prudent, even-handed judicial discretion and unbiased examination.

48. The Florida Supreme Court established a reliable guide to adjudicating the equities of nuisance lawsuits in the frequently cited case of Beckman v. Marshall, 85 So.2d 552 (Fla. 1956). The Beckman "test" is not simply whether a disgruntled plaintiff is "annoyed or disturbed", but whether there is "an *appreciable, substantial, tangible injury resulting in actual, material, physical discomfort*" and not merely a tendency to injure. [emphasis added] Beckman at 555.

49. The Beckman test has been applied in numerous nuisance cases to discern between actual, material, and *physical* invasion of the "legal rights" of others (e.g., paint dust and rust flecks carried by wind from a boatyard onto an adjoining property owner's parking lot, poisonous effluent from a soap manufacturing plant polluting a stream, an infestation of rats swarming across property boundaries from adjacent loose garbage, bee stings suffered by neighbors adjacent to negligently operated apiaries, and even late night brawls between inebriated patrons of bars that cause "actual, material, and physical" invasion of the "legal rights" of others) as distinguished from some mere "annoyance" such as that caused by young children shouting and laughing on the playground of a daycare center.

50. Beckman clarifies its test requiring "*actual, material, physical*" discomfort, citing 66 C.J.S., Nuisances, §18(c), p.765, "The test is not what the effect of the matters

complained of would be on persons of delicate or dainty habits of living, or of fanciful or fastidious tastes" or on those "peculiarly sensitive to annoyance or disturbance of the character complained of" or "persons who use their land for purposes which require exceptional freedom from deleterious influences", such as golf courses where the duffer must focus all his concentration on getting a tiny white dimpled ball into a small hole in the ground without being disturbed by nearby music or the sound of his caddy's chewing gum!

51. The Beckman court declares as controlling law in this state that, "Members of society must submit to annoyances consequent upon the reasonable use of property," Beckman at 555, and though one can hardly think of a use that stretches the test more than a pig farm, nonetheless a farm that has been used to raise pigs for 20 consecutive years is a reasonable use of land in Florida for which class of users the Legislature specifically provided protections from nuisance claims by enacting the Florida Right to Farm Act, wisely foreseeing precisely the kind of controversial litigation that is now before this Honorable Court and the vastly unequal economic bargaining powers of the foreseeable litigants.
52. There is no "physical" discomfort complained of in this case, thus plaintiff's counts for nuisance fail the Beckman test in addition to being contrary to public policy and the clear proscription of Florida's Right to Farm Act.
53. This Court lacks jurisdictional authority to proclaim pig farms "nuisances *per se*".
54. The odor of pig manure and sound of music its owner plays for the pigs are the only aspects of the farm plaintiffs complain about, and neither is a nuisance *per se*.
55. The unusual odor is a widely known yet unavoidable characteristic of pig farming.

56. The playing of music for livestock is a generally accepted farming practice.

57. Indeed, even if the playing of music were not a generally accepted farming practice, the music could not be adjudged a nuisance *per se* when the music has been found by Happiness County Sheriff's Department to be below the lower limit of decibel intensity above which it could be deemed a nuisance as a matter of law, i.e., a nuisance *per se*.

58. The Florida Supreme Court said, "One who uses his property in a lawful manner is not guilty of a nuisance, merely because the particular use which he chooses to make of it may cause inconvenience or annoyance to a neighbor, and nothing which is legal in its erection can be a nuisance *per se*." City of Lakeland v. State, 143 Fla. 761, 764 (Fla. 1940), adding, "In order to obtain an injunction against or the abatement of an alleged nuisance, the complaining party must show a *clear and strong case* supporting his right to relief." City of Lakeland at 765. [emphasis added]

59. Coupled with the issue of whether a defendant's use of his property is reasonable lies the equally important issue of whether the plaintiff has a *legal right* to be free from the alleged injury. A&P Food Stores v. Kornstein, 121 So.2d 701 (Fla. 3rd DCA 1960)

60. Where the music is not sufficiently loud enough to violate Happiness County's newly enacted sound ordinance, plaintiff golf course has no "*legal right*" to be protected by this Court as a matter of law.

61. The A&P court ruled, "Mere disturbance and annoyance as such do not in themselves give rise to an invasion of a *legal right*." A&P at 703.

62. In Davis v. Levin, 138 So.2d 351 (Fla. 3rd DCA 1962), the court restated the A&P doctrine, saying, "Mere disturbance and annoyance as such do not in themselves necessarily give rise to an invasion of a *legal right*." [emphasis added]

63. Plaintiff golf course does not have a "*legal right*" to be free from the nuisance of pig odor or music that falls within the range that is *per se* acceptable pursuant to county ordinance, and without invasion of a *legal right* its counts for nuisance must fail, no matter how much the golfers' aesthetic sensibilities may be offended by pig farming.

64. In the Florida Supreme Court case of Jones v. Trawick, 75 So.2d 785 (Fla. 1954) the Court found that establishing a cemetery in a residential area may be enjoined as a private nuisance by adjacent home owners, but the cemetery was not already present when suit was brought. Surely if a contractor sought to build a residential subdivision adjacent to a cemetery established 20 years earlier, the Court would lack jurisdiction to order the graves moved to accommodate the fastidious sensitivities of the would-be homeowners. The point of law applies well to this case.

65. Florida courts consistently apply the doctrine that "It appears to be well settled that if one voluntarily elects to live in an industrial area [or, we can reasonably interject, if one elects to build a golf course across the road from two smelly pig farms] he cannot complain of noise, noxious odors, or any other unpleasant factors that may arise from the normal operation of business in the area *merely because they may interfere with his personal satisfaction or aesthetic enjoyment*." Lee v. Florida Public Utilities Company, 145 So.2d 299 (Fla. 1st DCA 1962). [emphasis added]

66. The pig odors and music (both lawful *per se*) are noxious to plaintiff merely because they tend to disturb the "personal satisfaction or aesthetic enjoyment" of persons who

voluntarily elected to locate their golf community in a rural farming district and now demand to be granted a benefit from this Court denied to other residents of Happiness County: the special privilege of being permitted to "use their land for purposes which require exceptional freedom from deleterious influences" so golfers can concentrate on their swing.

67. No part of plaintiff's complaint alleges a "clear and strong case" of "actual, material, and physical" invasion of any of plaintiff's "legal rights".

68. The Court should enter summary judgment for defendants on both nuisance counts.

COUNT ONE: THE MUSIC "NUISANCE"

69. The alleged music nuisance cannot constitute a nuisance where the music itself fails to be audible to persons occupying the plaintiff's property in any degree that exceeds permissible sound intensity permitted by public ordinance to other citizens of Happiness County similarly situated.

70. The golf course is not a hospital for which public policy can reasonably restrict sound that may interfere with convalescing patients; it is a public business subject to the same constraints of law that apply to other commercial enterprises with no claim whatever to any special privileges not afforded to others similarly situated.

71. Happiness County enacted a sound ordinance (possibly at the instigation of plaintiff or others lobbying on its behalf) during the period relevant to these proceedings.

72. When County officials tested the sound intensity level of the alleged musical nuisance measured from plaintiff's property at points adjoining defendants' property, however, the sound intensity was found to be within limits permitted by the county ordinance,

i.e., the sound intensity did not exceed the intensity of sound others within the county are permitted to create on private property.

73. Unless it can be shown the music invades a "legal right" of plaintiff (which cannot be found unless special "legal rights" unavailable to the general public are judicially created for this particular private enterprise) this count must fail.
74. No "actual, material, physical" invasion of plaintiff's "legal rights" can be shown.
75. Defendants were playing music for their livestock years before plaintiff voluntarily elected to build its golfing community across the road from their pig farm.
76. Defendants' playing of music is a legitimate, practical, well-known, accepted farming practice that is, pursuant to Happiness County's sound ordinance, lawful *per se*.
77. There are no justiciable issues of material fact in Count One to go to the jury.
78. The Court should enter summary judgment in defendants' favor as to Count One.

COUNT TWO: THE ODOR "NUISANCE"

79. Though pig manure is not a pleasant substance to those unaccustomed to its odor, it is nonetheless an unavoidable consequence of keeping pigs, and any attempt to prevent its natural production must result in such harm to the pig that millions of bacon and pork eaters in America and throughout the world would soon be deprived of a favorite foodstuff.
80. The odor of pig manure is a lawful consequence to keeping pigs.
81. The odor may be objectionable to persons with "delicate or dainty habits of living" or "fanciful or fastidious tastes", however the odor in no way invades the "legal rights" of plaintiff.

82. This count fails the Beckman test for nuisance, since the odor has not been alleged to cause an appreciable, substantial, tangible injury resulting in actual, material, *physical* discomfort to plaintiff.

83. Moreover, protection from nuisance suits for "odor" is one of the specific provisions of Florida's Right to Farm Act, so the count fails on this basis as well.

84. No fact material to the outcome of this case in regard to odor needs be submitted to a jury, since case law and statutes preclude "odor" from being adjudged by this Court to be a nuisance.

85. There are no justiciable issues of material fact in Count Two to go to a jury.

86. The Court should enter summary judgment in defendants' favor as to Count Two.

COUNT THREE: TORTIOUS INTERFERENCE

87. Tortious interference with an advantageous business relationship is an intentional tort.

88. Judicial relief for intentional tort is predicated on a well-established principal of law that the alleged injured party must *prove* (or be able to *convince a jury*) by a preponderance of the admissible evidence that defendant engaged in the course of action *purposely* to cause plaintiff its alleged damages. Scott v. Otis Elevator Company, 572 So.2d 902 (Fla. 1990).

89. The Otis court, explaining that the torts complained of in that case were grounded on intent rather than negligence, quoted the definition of intent necessary to establish an intentional tort as set forth in Prosser and Keeton on Torts, § 130, at 1027 (5th ed. 1984), "The intent with which tort liability is concerned ... is an intent to bring about a result which will invade the interests of another in a way that the law forbids." Otis at 903.

90. To prevail on this count plaintiff must prove by a preponderance that defendants' acts complained of were intended "to bring about a result which will invade the interests of another in a way that the law forbids." Otis at 903.
91. Where the acts complained of ("daily playing of unreasonable levels of music" and "obnoxious and offensive smell") were acts engaged in by defendants for years before plaintiff voluntarily located its golf course across the road from two pig farms, the jury cannot conclude that these acts were intended "to bring about a result that will invade the interests of another in a way that the law forbids".
92. In the first instance, it has been established as a matter of law that the music level was not unreasonable, because levels fell within acceptable limits established by county ordinance.
93. That the music was unappealing to persons of delicate or dainty habits of living or of fanciful or fastidious tastes or those who demand utmost quiet when selecting which club to use for the next shot is beyond the reach of nuisance law in Florida. Beckman
94. The plaintiff has no "legal right" to demand quiet from others that exceeds the rights of citizens generally in this community to require sound disturbances to be attenuated.
95. As for the "offensive smell", while it cannot be argued that pig manure is an aroma of choice for many, it is nonetheless a necessary consequence of raising pigs and one the Florida Right to Farm Act protects.
96. Whether the music or odors have caused prospective patrons of Gourmet Golf Club to alter their business relationships with the Club, as the plaintiff alleges, is not the issue in a tortious interference claim.
97. The issue is intent.

98. In order for a tortious interference count to survive dismissal or summary judgment, plaintiff must establish four elements: (1) existence of a business relationship, (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of breach of the relationship. Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126, 1127 (Fla.1985).

99. The missing element in plaintiff's case is #3, for plaintiff cannot show (nor can the jury conclude as a matter of law) that *preexisting* acts of the defendant (keeping pigs and playing music), whether or not such acts interfere with plaintiff's business, were (a) intended to interfere with plaintiff's business relationships and (b) the acts lacked any separately identifiable justification.

100. Both (a) intent to interfere and (b) lack of separate justification must be shown as a matter of law.

101. Plaintiff cannot prevail on this count because the acts complained of were acts of the defendants practiced routinely prior to the golf course's being built.

102. With regard to the pig odors, it is not reasonable to say that after twenty years of raising pigs that the Pigfarmer family suddenly and with invidious intent managed to waft the noxious vapors across the road with the unlawful purpose of interfering with Gourmet Golf Club's business relationships, thus the pig odor portion of this count must fail.

103. That leaves only the music to examine.

104. Whether or not the Court is willing to accept recommendations of Colorado State University or the Livestock Conservation Institute that playing radio music to pigs

makes pork more tender (a justification for playing music that certainly eviscerates plaintiff's contention the music is unjustified), the fact that music levels fall within the new county ordinance as acceptable nullifies that portion of the doctrine expressed in Otis that intent with which tort liability is concerned is intent to bring about a result which will invade the interests of another *in a way that the law forbids*.

105. The law does not forbid playing music on private property so long as the music levels do not exceed 60 dB as measured at the boundary of adjoining property.

106. One cannot be found to be *tortiously* (i.e., by acting in a way the law forbids) interfering with a business relationship when the act complained of is lawful *per se*.

107. So long as *unlawful or improper means* are not employed, the tort cannot lie. Perez v. Rivero, 534 So.2d 914 (Fla. 3rd DCA 1988)

108. Activities intended to safeguard or promote one's own interests are not actionable unless the activities are *unlawful or improper*. Perez

109. In the instant case neither the smell of pigs nor playing of music at levels below the maximum decibel level allowed by county ordinance is *unlawful or improper*.

110. Moreover, both the smell and the music are justifiable, so the count must fail as a matter of law for lack of the third element required for this cause of action.

111. Where a defendant is *justified* in the actions complained of, whether or not such actions adversely affect the business relationships of plaintiff, tortious interference will not lie. Wackenhut Corp. v. Maimone, 389 So.2d 656 (Fla. 4th DCA 1980)

112. The ultimate inquiry is whether acts of the defendant alleged to interfere with the plaintiff's business relationships are sanctioned by the "rules of the game". Insurance

Field Services, Inc. v. White & White Inspection and Audit Service, Inc., 384 So.2d 303 (Fla. 5th DCA 1980)

113. Surely the "rules of the game" permit a pig farmer and his wife (who both work full-time to support themselves and their four children) to continue their established practice of raising livestock in accordance with University-recommended procedures for production of high-quality pork without being required to submit to purely self-interested demands of a multi-million dollar privately-owned company that voluntarily decides for reasons solely beneficial to itself to acquire giant parcels of neighboring land for recreational purposes and then seek special privileges from the Court (at prohibitive financial costs to the defending litigants) that are not generally available to ordinary citizens of Happiness County.

114. Surely "rules of the game" do not require our courts to favor the private interests of persons of "delicate or dainty habits of living" or those "peculiarly sensitive to annoyance or disturbance" or those whose land use requires "exceptional freedom from deleterious influences" over the needs of hard-working parents who struggle with full-time jobs to feed large families and have insufficient financial resources to effectively fight for their common law, Constitutional, and statutory rights in court.

115. Surely "rules of the game" require the Court to follow controlling case law, statutory authority, and common sense to prevent the wealthy interloping plaintiff company from requiring the Pigfarmer family from pledging their life savings to argue facts at trial that cannot ultimately be found to be material to the outcome of this case or to surrender to the power of money their lawful right to farm in Florida.

116. There are no genuine issues of material fact with regard to whether the pig smell or playing of music are justified, since controlling case law and statutory authority (together with incontrovertible evidence that playing music to livestock is a generally accepted farming practice) compel a decision as a matter of law that they are justified.

117. Plaintiff cannot prevail without being able to establish as an essential element of the cause of action that the smell and music were "unjustified".

118. There are no justiciable issues of material fact in Count Three to go to a jury.

119. The Court should enter summary judgment in defendants' favor as to Count Three.

CONCLUSION

120. None of the three counts of plaintiff's complaint (plaintiff voluntarily dismissed its Count Four) can be sustained by any jury determination of fact material to the outcome, since all three counts fail as a matter of law consequent upon analysis of the controlling case law and statutory authority.

121. There being no genuine issue of any material fact (i.e., a fact that could overcome the controlling case law and statutory authority that dictates an outcome favorable to defendants based on *uncontroverted facts already before the Court*) to be presented to the jury, entry of summary judgment is proper on all counts.

122. Because each count complains of an *intentional* tort (does not allege negligence) plaintiff bears the impossible burden of proving by a preponderance of admissible evidence that defendants' raising pigs and playing music is without any lawful justification but was *intended* to cause plaintiff the alleged harm complained of.

123. Since the record reflects no evidence whatever that any of the alleged intentional torts was *initiated* after the arrival of plaintiff on the scene, there are no justiciable issues of material fact as to intent for a jury to decide.

124. Proof of intent to bring about a result which would invade interests of another in a way the law forbids is not only required by the Florida Supreme Court's ruling in Otis and other controlling cases but requisite proof of intent is altogether impossible in this case where the activity complained of preexisted plaintiff's arrival on the scene.

125. Since proof of intentional tort requires establishing motive and state of mind of defendants (i.e., that the activity complained of was either initiated to injure plaintiff or purposely continued by defendants after it would otherwise have been curtailed but for defendants' intent to injure plaintiff and that such initiation by defendants or their purposeful continuation of the alleged intentionally tortious activity had no other legitimate purpose) it is not possible to find for plaintiff where it cannot be reasonably disputed that defendants continuously engaged in raising pigs and playing music to their pigs for many years prior to plaintiff's arriving on the scene.

126. Since the defendants engaged in all the activities complained of prior to plaintiff's arriving on the scene, there are no genuine issues of material fact to present to the jury on intent, no reasonable probability of plaintiff's success on the merits, and summary judgment should be granted forthwith.

127. None of the three counts of the complaint can be sustained as a matter of law and, in the interests of judicial economy, the defendants' motion for summary judgment should be granted with costs.

WHEREFORE the defendants pray this Honorable Court will enter summary judgment in their favor and grant such other and further relief as may be reasonable and just under the circumstances including, but not limited to an award of all their reasonable attorney's fees and costs.

I CERTIFY that a copy of the foregoing and the attached affidavits were provided by regular U.S. Mail to Gourmet Golf Club's lawyers Dick and Bob, addressed to them at Dewey, Fleecem, & Howe; 123 Bigshot Avenue; Smalltown; Florida this 31st day of February 2002.

_____

Frederick Graves, Esq.
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Stuart, Florida 34994
772-288-9880
Fax: 463-6715

VERIFICATIONS

STATE OF FLORIDA
COUNTY OF HAPPINESS

BEFORE ME personally appeared Will B. Pigfarmer who, being by me first duly sworn and identified in accordance with Florida law, deposes and says:

1. My name is Will B. Pigfarmer, one of the defendants herein.
2. I have carefully read the foregoing complaint, and each of the facts alleged therein is true and correct of my own personal knowledge.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____
Will B. Pigfarmer

SWORN TO and subscribed in my presence.

_____
Notary Public

STATE OF FLORIDA
COUNTY OF HAPPINESS

BEFORE ME personally appeared Love A. Pigfarmer who, being by me first duly sworn and identified in accordance with Florida law, deposes and says:

1. My name is Love A. Pigfarmer, one of the defendants herein.
2. I have carefully read the foregoing complaint, and each of the facts alleged therein is true and correct of my own personal knowledge.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____
Love A. Pigfarmer

SWORN TO and subscribed in my presence.

_____
Notary Public