CIVIL PROCEDURE

Nuisance and Trespass: Burdens of Proof, Expert Problems and the Statute of Limitations

by Andrew P.P. Dunk, III, Column Editor

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As a plaintiff lawyer, it kills me to read when a good case winds up lost because of some avoidable mistake. That is just what happened in *McCoy v. Gustafson* (December 15, 2009) 180 Cal.App.4th 56, 2009 WL 4803344. In fact, the plaintiff in the *McCoy* case made so many mistakes that the opinion is quite lengthy. The nice thing about this lengthy opinion is that the court went into great detail and provided updated and current law on a number of issues we often face.

One of the first mistakes the plaintiff attorney made in the *McCoy* case was that she sued everyone under the sun with every possible theory for recovery. Many of these theories were a far stretch and caused the plaintiff attorney two major problems. First, she allowed the defendants to make her life miserable by billing away and causing her to spend a lot of time and effort trying to keep these weak and unnecessary theories alive. She was always having to climb up the wrong trees that she had planted. Second, it likely caused the plaintiff to lose credibility with the judge.

The essence of the *McCoy* case was that the plaintiffs owned property downhill from the defendants. The defendants operated a laundry on their uphill property. The laundry had been built in 1914 and it used old boilers fueled by fuel oils. The basement of the laundry was made of unpaved soil which allowed oil leakage to seep into the ground and run downhill contaminating the McCoys' property. The plaintiffs sued the current landowners, the former landowners and subsequent landowners with every possible cause of action, but the case was really a case of negligence, nuisance per se, private and public nuisance and trespass as a result of contamination of the soil.

A significant issue in the case was the statute of limitations. California Code of Civil Procedure ("C.C.P.") §338(b) which allows suit for nuisance and trespass to be brought within three years of the accrual of the cause of action. Accrual of the cause of action depends on whether the nuisance is "permanent" or "continuing." If the nuisance is "permanent," the statute begins to run upon discovery of the nuisance and the plaintiff must sue within three years. If, on the other hand, the nuisance is "continuing," a plaintiff can sue every three years.

In *McCoy*, the plaintiffs sued more than three years after discovery, but alleged the oil leakage into the ground was a "continuing nuisance." At trial, the jury clearly wanted to rule for the plaintiffs and actually awarded $500,000 in punitive damages against the defendants, but it was all taken away because the plaintiffs made a critical, but avoidable mistake– they didn't prove the nuisance was a "continuing" nuisance and thus the statute of limitations barred the action.

Our Supreme Court in the case of *Mangini vs. Aerojet-General Corporation* (*"Mangini II")* (1996)

12 Cal.4th 1087 discusses the differences between a continuing nuisance and a permanent nuisance. Usually, because the statute of limitations is an affirmative defense, the defendant has the burden of proving the statute of limitations has run. Trying a continuing nuisance case, however, creates a trap for the unwary plaintiff who has the burden of proving that the nuisance was not a permanent nuisance. The key difference is whether or not "the condition can be repaired, or abated, by reasonable means and at a reasonable cost." This also applies to a continuing trespass in which a plaintiff must prove "that the unauthorized entry can be removed, repaired, or abated, by reasonable means and at a reasonable cost."

This is actually not as simple as it appears. Take, for example, a nuisance action against an airport. Arguably, an airport is the quintessential continuing nuisance case – simply stop flying the airplanes and abate the nuisance, right? But then again, federal laws preclude interfering in any way with flight patterns and schedules which thereby creates an element of permanency to an otherwise continuing problem. In such a case, a plaintiff can elect to treat the airport noise as either a continuing nuisance or a permanent nuisance.

If you find yourself having to plead a continuing nuisance or trespass in order to avoid the statute of limitations, make sure you don't make the same mistake the attorney in *McCoy* did. You need to prove that the nuisance can be abated or repaired by reasonable means and at a reasonable cost. The *McCoy* attorney had a soils expert who testified that determining exactly what needs to be done to fix the soil contamination is hard to do. For example, you might be able to fix the problem by simply removing three feet of soil, but on the other hand you might have to remove everything down to the bedrock. Because it was unclear how much work needed to be done and what the cost of that work would be, the plaintiffs failed to prove that the problem could be repaired or abated by reasonable means and at a reasonable cost.

The defendants made a brilliant strategic move in how they phrased a key question on the special verdict form. The jury was asked whether the condition of plaintiffs' property "could have been repaired or abated by reasonable means and at a reasonable cost." Instead of the usual "yes" or "no" options, they were also given the third option of "unknown." Obviously, the plaintiffs would have to get the jury to answer "yes" to win the case. The defendants would need them to answer, "no." Because the jury heard from experts that the problem could be abated by removing *some* amount of soil at *some* cost, the plaintiffs might have been able to get the jury to check "yes." The defendants would have had a more difficult time to get them to check the "no" option. By giving the jury the "unknown" option, it made it much easier for the defendants to convince the jury to check the "unknown" box.

Because the jury checked "unknown," it showed they were unable to determine whether the nuisance could be abated or repaired and that plaintiffs had failed to prove the nuisance was continuing. As such, the appellate court held that the trial court should have granted a directed verdict based upon the statute of limitations.

The plaintiffs' attorney desperately tried to salvage her situation, citing *Starrh and Starrh Cotton Growers vs. Area Energy LLC* (2007) 153 Cal. App. 4th.583 to support her position that the oil contamination was a "continuing" nuisance. In *Starrh,* a jury awarded $3.8 million for a continuing subsurface trespass "resulting from the migration of wastewater produce from oil production

activities" into aquifers underlying farmland. On appeal, the defendants argued their trespass was permanent and the cause of action was time barred. The *Starrh* court distinguished *Mangini II* by stating that in *Mangini II*, "the harmful activity had stopped long ago and there was no evidence the impact of the toxic materials would vary over time." *Starrh* held that because there was evidence that the defendant continued disposing of contamination into the ground, and that its impact would vary over time ("the impact of the subsurface migration will worsen as time passes"), this was a continuing nuisance and continuing trespass.

Keep this in mind if you have a "continuing" nuisance or trespass case. Make sure you put on evidence that the defendants' acts are continuing to affect the property and the situation is getting worse with every day. Had *McCoy's* attorney done this, she might have been able to prove a continuing nuisance.

McCoy's attorney might also have been able to fix the problem caused by her expert's testimony at deposition that he could not quantify how much work would be needed or what the cost would be to repair or abate the problem. We've all found ourselves in situations in which our expert doesn't say exactly what we need the expert to say at trial. Inevitably, we get the motion *in limine* to exclude any expert opinions which were not given at the time of deposition. This motion is routinely granted.

If you ever find yourself in this situation, remember the case of *Easterby v. Clark* (2009) 171 Cal. App. 4th 772, which allowed an expert's opinion at trial **to differ from his deposition opinion** because the party had given his opponent reasonable notice of the expert's change in opinion and gave the opponent an opportunity to re-depose the expert before trial. In *Easterby*, the plaintiff's treating doctor was deposed and asked whether he had an opinion as to the cause of the plaintiff's injury. During his deposition he said he did not. Plaintiff obviously wanted the doctor to testify as to causation of injury.

After the deposition, plaintiff's attorney notified the defendant's attorney that the doctor had formed a new opinion on causation that was not given at deposition. Plaintiff's attorney gave the defense an opportunity to re-depose the expert before trial, but defendant's attorney refused or chose not to. They were probably thinking that they had the poor plaintiff right where they wanted and that they could bring a motion *in limine* under C.C.P. §2134.210 to keep out the treating doctor's post-deposition opinions.

At trial, however, plaintiff was allowed to put on the expert testimony that the injury was caused by malpractice. The *Easterby* decision allows an important exception to the normal rule of C.C.P. §2134.210. Just make sure you timely notify the defendant of the expert's anticipated trial testimony and offer an opportunity to re-depose the expert.

As I said earlier, the *McCoy* case is a lengthy read, but its lessons should be learned by all of us. Plaintiffs need to know exactly where they are going with the case from the outset. The sue-everybody-with-every-possible-cause-of-action tactic will surely cause problems down the road. Know what the burden of proof is on all causes of action, tell your experts in advance of their depositions what you need from them, use *Easterby* to fix any expert deposition testimony problems before trial and win your case!