Legal Definitions

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Shooting Sports Versus Suburban Sprawl

Is Peaceful Coexistence Possible?

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Amicus Curiae

Definition: Latin term meaning "friend of the court". The name for a brief filed with the court by someone who is not a party to the case.

"... a phrase that literally means "friend of the court" -- someone who is not a party to the litigation, but who believes that the court's decision may affect its interest." William H. Rehnquist, The Supreme Court, page 89.

Amicus Curiae briefs are filed in many Supreme Court matters, both at the Petition for Writ of Certiorari stage, and when the Court is deciding a case on its merits. Some studies have shown a positive correlation between number of amicus briefs filed in support of granting certiorari, and the Court's decision to grant certiorari. Some friend of the court briefs provide valuable information about legal arguments, or how a case might affect people other than the parties to the case. Some organizations file friend of the court briefs in an attempt to "lobby" the Supreme Court, obtain media attention, or impress members.

"An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." Rule 37(1), Rules of the Supreme Court of the U.S.

"FRAP 29. BRIEF OF AN AMICUS CURIAE A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for a later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons." **Rule 29. Federal Rules of Appellate Procedure.**

SUBPOENA DUCES TECUM - A command to a witness to produce documents.

A writ or process of the same kind as the subpoena ad testificandum, including a clause requiring the witness to bring with him and produce to the court, books, papers, etc., in his hands, tending to elucidate the matter in issue.

SHOOTING SPORTS VERSUS SUBURBAN SPRAWL – IS PEACEFUL COEXISTENCE POSSIBLE?

By David G. Cotter

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"Competition in marksmanship-whether with stones, spears, arrows, or bullets-has a history probably almost as old as the human race."

I. Introduction

"Unrestrained suburban growth will lead to higher local taxes and continued loss of farmland, more groundwater contamination and further deterioration of urban areas…" It may also lead to the destruction of many rural traditions. One such tradition that is being threatened nationally is target shooting at established outdoor shooting ranges. Those seeking the tranquility and solitude of country living have been attracted to areas where shooting ranges have existed for many years and in many cases, for many decades. These newcomers seem to dislike the sound of shooting emanating from shooting ranges. Depending upon the physical orientation of the ranges in relation to neighboring properties, these newcomers, who may have no knowledge of guns or shooting sports, may feel that shooting ranges pose a safety hazard.

As might be expected, suburban sprawl has led to increased lawsuits between those seeking stereotypical country living and those whose rural shooting activities have involuntarily become more suburban. These lawsuits fall into four primary categories: noise nuisance; safety hazard nuisance; lead contamination; and zoning violations.

Noise nuisance is by far the most common attach leveled at shooting ranges. However, to say that the sound of shooting is a nuisance is a gross oversimplification. The obvious concern is decibel level. However, many other features may factor into allegations of nuisance. Such factors include the time of day, the day of the week or year, the amount of gunfire, and the duration of the gunfire.

Before analyzing the variations of noise, two features of nuisance must be considered. First, an activity that was not a nuisance may become a nuisance as the community changes. Thus, a shooting range that was not a nuisance in an isolated rural area may become a nuisance when the area becomes suburban and residential in nature. Stated another way, the shooters' contention that "we were here first!" may not provide a legally cognizable defense.

Second, in order for noise to be a nuisance, "it must be of such a character as to be of actual physical discomfort to persons of ordinary sensibilities." However, later cases suggest that mere annoyance, rather than physical discomfort, may constitute an enjoinable nuisance.

Part II of this Article will discuss what constitutes noise and how humans react to noise. Part III reviews specific case holdings over a thirty-five year period involving allegations that shooting ranges constitute a nuisance. The primary focus will be on the allegations that shooting ranges give rise to noise and safety nuisances. Case authorities have been chosen to demonstrate the chronological evolution of nuisance law as applied to shooting ranges. Thereafter, Part IV isolates and discusses the factors that are given the greatest consideration in a nuisance analysis. Michigan authorities predominate this Article because of the significant amount of shooting range activity in Michigan. Authorities from other states are discussed in Part V to show variations in nuisance law analysis but no attempt has been made to thoroughly cover shooting range litigation from all the states or

those cases involving theories other than nuisance. Part VI of this Article discusses attempts by the Michigan Legislature to provide statutory protection for shooting ranges from suits alleging nuisance. Finally, this Article concludes that the best way for a shooting range to avoid a nuisance cause of action is to provide a safe and predictable shooting environment.

Part II: Noise: How Humans React to Sound

In 1981, Professor Sheldon Cohen discussed human reaction to sound and noise. He concluded that "[d]istracting, unwanted sound is part of our every day experience," and "that noise can affect human beings in unexpected ways."

Professor Cohen necessarily distinguishes between sound and noise stating that:

> Sound results from changes in air pressure that are detected by the ear. Noise is a psychological term referring to unpleasant, unwanted, or intolerable sound. It follows that noise is in the ear of the beholder. Thus, even loud sounds may sometimes be judged desirable, while soft sounds may be considered noisy.

In order to determine how noise affects people, it is suggested that merely counting complaints might work as a reasonable methodology. However, Professor Cohen notes that counting complaints is "not an accurate measure of reaction to noise" because "[I] in general, better-educated, higher-income, higher social status people complain most often. It is not that they are more annoyed than other people but that they understand the complaint procedure better and more often expect someone to listen to them." On the other hand, this might make it fair to conclude that many "better-educated, higher-income [and] higher social status" persons trading the annoyance of city life for the hoped-for tranquility of rural life are more than likely to complain at the first sound of gunfire.

The specific features of noise causing annoyance that might lead to the noise being deemed a nuisance is of great importance to shooting range owners, operators, and users. On this point, Professor Cohen states the obvious-loudness affects a person's reaction to sound: "[a]nnoyance mounts with the decibels." From a shooting range perspective, two other conclusions drawn by Professor Cohen may be profound.

First, the predictability of the noise will impact on the degree of irritation it may cause. Thus, unexpected gunshots of a low-decibel nature may cause greater annoyance than predictable gunshots at a higher decibel level. For example, the weekly skeet shoot that starts and ends consistently, week after week, may create less annoyance than the lower decibel level of an unexpected small-bore rifle discharge.

Secondly, "there is considerable evidence that psychological factors-attitudes and beliefs about a noise and its source-are of equal or even greater importance than the intensity of a sound." Thus, a person who fears firearms or has an inherent dislike for them may find the sound of gunfire far more annoying than those who do not fear firearms or who themselves actually enjoy shooting as a recreational activity. It appears that people moving from cities to rural areas are particularly prone to anti-gun animus. On a daily basis, metropolitan media sources report criminal use of firearms which results in injury and death, while the sporting and recreational use of firearms is either not covered or covered in a negative light.

III. It's Not a Nuisance; It is a Nuisance – The Broad Spectrum Over Time

In May, 1962, the Cortland New York school district sought to enjoin Westchester County from building a sport shooting range on a 1500 acre tract of county-owned land because it was near the future site of an elementary school. The school board claimed that "the dangers inherent in and the noises emanating from the shooting

center would constitute a nuisance." After finding that the plaintiff failed to establish that shots fired from the ranges would land on plaintiff's property so as to constitute any danger, the court went on to discuss the noise nuisance aspect of the case." Because the school had not been constructed, the alleged noise nuisance was, at best, based on mere speculation. The injunction sought by the plaintiff was therefore denied. However, twenty-three years later, a Colorado shooting facility was not as successful.

Subdivision residents in Colorado brought an action based on noise and dust pollution from a shooting range located on the property of the local chapter of the Izaak Walton League of America. "The shooting range [was] oriented in a direction that focuse[d] all gunfire away from plaintiffs' property." The "range was open daily for shooting from 8:00 a.m. to 10:00 p.m.…[and occasionally] shooting started as early as 6:00 a.m. and lasted as late as 2:00 a.m." During shotgun (trap) shoots, 125 discharges of firearms occurred every twelve minutes.

The defendants had constructed a dirt road leading to the range. At peak times, the dirt access road carried more than 200 cars each day, resulting in dust settling onto the plaintiffs' property. "the trial court found that the noise emitted by guns fired at defendant's range [was] of a periodic or impulsive nature." Sound measuring devices set for impulse "mode recorded a sound pressure differential from 55 to 80 decibels" (which was higher than the Colorado statutes permitted), when the members engaged in discharging firearms on the defendants' property.

The trial court found that the plaintiffs had failed to prove that the use of defendants' property as a shooting facility was a private nuisance. Nevertheless, the trial court held that the fugitive dust problem from the access road and the sound of gunfire constituted a public nuisance. On these findings, the trial "court enjoined [the] defendants' further use of its property as a shooting range until it remedie[d] the fugitive dust problem and [brought] the noise from the discharging firearms within statutory limits." Furthermore, as for the fugitive dust problem from the access road, the trial court held that because the subdivision was in a "residential zone" it constituted a public nuisance.

The Colorado Court of Appeals affirmed the trial court's holdings. It found that the sound-level meter the plaintiffs' expert used was appropriate, and was used properly as a noise-level measuring device to establish that the defendants' shooting range constituted a public nuisance. Which mode to use in determining whether noise exceeded permissible noise levels so as to constitute a public nuisance was held to be a question of fact. This determination required employment of "scientific testimony concerning whether the sounds are impulsive, shrill, or periodic and concerning what mode of measurement is proper for that [particular] sound."

In affirming the trail court's holding that the evidence supported a determination that the subdivision was a "residential zone" and that the fugitive dust from the league's access road constituted a public nuisance, the court of appeals appears to have placed great weight on the fact that the area was residential. Although this idea was not discussed in depth, a reasonable inference may be drawn that as an area becomes more residential, less noise will be tolerated.

IV. The Factors That Make Up A Nuisance

The concept that the more urban an area becomes, the less noise will be tolerated, was a prominent factor in Smith v. Western Wayne County Conservation Ass'n. The Michigan Court of Appeals adopted the trial court's finding that a gun club, which was constructed in accordance with the standards of the National Rifle Association, was located in a swampy area zoned agricultural and not residential, and was therefore, not a nuisance.

Smith makes an excellent case study for several reasons. First, the club is relatively large and well-organized. Second, its shooting range facilities and shooting programs are rather extensive. Third, the agricultural area in which it was located has changed dramatically over the ensuing thirty years since the original litigation.

The range, when built in 1961 and early 1962, was located in an area made up of undeveloped, open agricultural land. About five years earlier, a residential trailer court consisting of 109 trailer sites was constructed. There had been no further development in the area at the time the suit was filed.

The Association's shooting facilities were described in detail:

The [defendant's] Range consists of three individual ranges, from north to south, described as a 200-, 100- and 50-yard range…Down range is eastward where targets are placed immediately in front of an earthen mound, or backstop, having a height of 35 feet, a based of 182 feet, a top level of 132 feet, and a slope of 60 degrees. In addition, each range has earthen side walls, 8 to 10 feet high. There are a number of firing positions, which vary for each range. The 100-yard range is under roof shelter, which has no side walls, having benches or tables for the convenience of the shooters. The 200-yard range was constructed with provisions for a 300-yard range accommodation at a future date, by increasing the size of the backstop and doing certain grading.

The Range was constructed in accordance with plans and specifications exceeding the requirements of the National Rifle Association. it is used by members and guests of the defendant association, as well as for competitive meets…[The Association's members were] limited to persons over eighteen years of age of good character.

The filing of the plaintiffs' complaint was prompted by the defendant conducting a high-power rifle match. The trail court calls this type of match a "big-bore" meet. This meet consists of forty to fifty shooters divided into teams of eight shooters with each team of shooters firing 336 rounds. A total of approximately 1,680 to 2,100 shots were thus fired during this "big-bore" meet which occurred over a two-day period.

The day after the meet, the plaintiffs asked the Association to reverse the set up of the ranges so that the target placements would not be in line with the trailer park. This would cause the bullets to travel away from the trailer park, eliminating a perceived safety hazard. However, because of both time and money invested to construct the range, the request was denied.

Two mock "big-bore" meets were staged for the benefit of the trial court. "[S]ound measurements were taken and tap recordings made by a qualified sound engineer at the homes of certain designated plaintiffs, including the closest and farthest from the range, the results of which were subsequently made a part of the [trial] record…"

The plaintiffs claimed that the noise emanating from the use of the defendant's range impaired their right to peaceful enjoyment of their homes, and that unless the noise was "silenced"- the nuisance abated – they would be forced to move from the trailer park. The court held that under certain circumstances, noise may be deemed a nuisance and thus enjoined.

The Michigan Supreme Court set forth the test for determining whether a noise constitutes a nuisance in Borsvold v. United Dairies. '"To render noise a nuisance, it must be of such a character as to be of actual physical discomfort to persons of

ordinary sensibilities.'" When applying this standard, a reviewing court should take into consideration the character of the activity complained of, 'the character, volume, time and duration of the noise, and 'all the facts and circumstances of the case.'"

Interestingly, it appears that of all the possible factors, time and locality are given the greatest weight in determining whether noise is a nuisance. As to the timing question, the court will look at whether the noise is depriving the plaintiffs' of sleep. If the answer is affirmative, a noise nuisance will likely be found. In the context of shooting ranges, a court must decide whether to enjoin any use of the range, or alternatively, enjoin the use of the range during the sleeping hours of the community. To appreciate the first option, one must keep in mind that shooting sounds during non-sleeping hours might well meet the test for a noise nuisance. As for the location question, the prevailing view is "the more residential the area, the less noise is tolerable."

The Smith court also held that: "[w]hether noise is sufficient to constitute a nuisance depends upon its effect upon…a normal person or ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff. To be workable, relief must be based upon an objective standard of reasonableness."

Applying the reasonable person standard to the Western Wayne County Conservation Association, the court found that the noise that emanated from the range could be heard at homes ranging from a quarter of a mile away, to homes located three quarters of a mile from the range. However, the court held that the noise was not of a degree that would shock the senses of a reasonable person. Therefore, the shooting at the defendant's range did not render it a nuisance. This decision was based on the fact that the use of the range was compatible with the makeup of the area considering the location of the plaintiffs' homes in relation to the ranges, and the limited use of the ranges.

The plaintiffs in this case also claimed "that the Range [was] unsafe; that is use endanger[ed] the lives and property of persons living in the area; and that even if found safe, the fears in the minds of the residents resulting from its operation and use render[ed] it a nuisance.

The Smith trial court held that the use and operation of the defendant's range was safe. The court relied on the fact that the range "was constructed according to plans and specifications of the National Rifle Association, incorporating every possible safety feature." The court specifically noted the U-bar on the 200-yard range which prevented bullets from leaving defendants' property; that competent and responsible shooters used the range; and that the 200-yard range was closed during the week and was supervised by a competent range officer on the weekends.

The Smith court was convinced that no safety hazards were present. The court's decision was based largely on the fact that the area was not a strictly residential area. Instead, the land was undeveloped and zoned agricultural. Furthermore, the zoning law expressly permitted land use for gun clubs. This is rare today. As agricultural areas have evolved into residential areas, far more restrictive zoning laws have been adopted. Where agricultural uses have been retained, shooting clubs are either no longer permitted to operate, or special use permits are required that are nearly impossible to obtain. It is a constant battle for shooting clubs to avoid being deemed nuisances when the rural area in which they were established becomes suburban in nature.

The court also placed great weight on the fact that "hunting in season [was] allowed and [had] been allowed for many years in [this] area." Legalized hunting in

an area where a shooting range is alleged to be a nuisance because of safety concerns, makes a strong argument in favor of the shooting club. The structured nature of shooting on established ranges designed and built with safety in mind compared to shooting at an animal without accurate knowledge of what is behind the animal almost always makes shooting ranges safer. Unfortunately, if such a shooting range is deemed to be a nuisance for safety reasons, a ban on hunting in the area is almost sure to follow.

Further, the court held that relief cannot "be granted on the supposition that there exists a fear in the plaintiffs' minds." Moreover, the court held that mere apprehension will not justify the granting of an injunction against a claimed nuisance. This holding is of paramount importance when keeping in mind Professor Cohen's findings that sound becomes noise to the listener when its source is disliked or feared. If a mere fear of guns and shooting could deem a shooting range a nuisance, the shooting sports would exist only in books and memories.

Because of these findings, the court ordered that the plaintiffs' prayer be denied. However, there were some restrictions placed on the defendants' use of the range.

Although the Smith court placed a great deal of weight on the location of the range, the fact that there had been no physical injuries caused to the plaintiffs as a result of shooting range use should not be discounted. Physical injuries may be personal injuries or injuries to property. Personal injuries will almost assuredly cause immediate closure of the range facility until the shooting club can demonstrate the range is safe. After an injury to a person is caused, such a showing may be impossible to make because, arguably, the injury would not have occurred if the range was safe.

Injury to property may be as serious. Bullet holes in occupied buildings near a range facility will again most likely cause immediate range closure when the bullets can be traced to shooters at the range. The demonstrated risk to human well being is too great to allow continued shooting until the range operators make a convincing showing of safety. Unfortunately, unfounded allegations of bullets leaving a range facility may just as swiftly cause closure of a range facility. In areas where personal hunting is heavy and a neighboring shooting range is present, it is not unusual for the shooting range to be blamed for any stray bullets. Therefore, tight control of range usage may be absolutely necessary to avoid superior lawsuits alleging safety nuisance.

V. **The Factors in Combination**

Rural location was the major factor in the outcome of Smith. However, rural location alone is almost never determinative.

A. Missouri Experience

In Racine v. Glendale Shooting Club, Inc., the owners of land adjacent to the club's property brought an action against the club alleging both nuisance and trespass. Both parties owned land located in a rural area. The plaintiffs' land was approximately seventy-eight acres, and included a home and outbuildings. The defendant was a shooting club with 200 members. Its property was approximately 107 acres. The plaintiffs sought injunctive relief, compensatory damages and punitive damages. The plaintiffs claimed "that the noise from the defendant's property 'on a daily basis at all hours of the day and night' could be 'plainly and loudly heard at plaintiffs' residence, even when the doors and windows…[were] fully closed.'" This claimed nuisance was due to the club "utiliz[ing] the land 'for target practice, local, regional and national shooting matches conducted with

automatic weapons, handguns, shotguns and high powered rifles.'" The trail court entered judgment in favor of the plaintiffs finding that a "technical trespass" occurred "from the 'stray bullets or ricochets.'" On the nuisance claim, the court permanently enjoined the club:

"[f]rom using its property in such a manner as described by the evidence to encourage or permit the frequent discharge of large caliber, high powered firearms. Continuous firing and the conducting of shooting matches or meets is prohibited as is any target shooting before nine o'clock of the morning and after dark or six o'clock of the evening. Occasional[] shooting is not prohibited."

Both the defendant and plaintiffs appealed.

The Racine court held that a property owner has a right to exclusively control his property and use it in any lawful manner. However, the appellate court also held this "use right" is not absolute, and can be enjoined if the use is deemed to be unreasonable. Unreasonable use was defined as "substantially impair[ing] the right of another to peacefully enjoy his property." Unlike the Michigan Supreme Court in Borsvld, the Missouri Court of Appeals did not require any actual physical discomfort before finding noise unreasonable.

The Racine court considered where the club was located in relation to the plaintiffs' property, the character of the neighborhood, the "nature of use, extent and frequency of injury, and the effect upon enjoyment of life, health, and property of the plaintiffs." After weighing these factors, the court then decided whether a nuisance existed – whether the use of the property although lawful was unreasonable. In this situation, the Missouri Court of Appeals agreed with the trail court, finding that the evidence supported a finding that the operation of the defendant gun club at its current level constituted a nuisance. Sounds of shooting "emanating from the [gun club's] property in character, intensity, volume, constancy, and frequency was thoroughly documented by both lay and expert testimony." The sounds of shooting "differed in all five respects from the occasional train traffic or random gun shots heard and expected in this rural area." Again, the observations of Professor Cohen surface in the shooting range context. What one expects to hear is considered mere sound while unexpected or unwanted sounds are often viewed as unreasonable noise. Thus, shooting clubs in areas that are in the process of becoming more suburban in nature are well advised to ensure that new neighbors expect the sounds of shooting during normal shooting hours. Also, steps should be taken to keep decibel levels reasonable in line with or below other rural sounds such as truck and train traffic and sounds emanating from farm implements.

Ultimately, the Racine court decided that the kind of noise emission coming from defendant's shooting range made the "use of plaintiffs' nearby residential property virtually impossible" and thus the noise in this case was a nuisance in spite of the rural nature of the area. By going beyond physical injury when determining what constitutes unreasonable use of property, Racine almost certainly signals future difficulties for shooting clubs everywhere.

B. Illinois Experience

In Kolstad v. Rankin, an Illinois Court of Appeals case with nearly identical facts to Smith regarding location-a rural area zoned for agricultural purposes-the court held that a nuisance was present. Here the neighboring landowners brought a nuisance suit against a defendant who used his property as a shooting ranges. Plaintiffs' claims of nuisance were based on noise and safety.

The defendant's property was located in a rural area of southern Illinois which was zoned

for agricultural use. The range was 100 yards wide and had a backstop berm thirty feet high. There was also a rectangular berm enclosing the entire range to allow 360 degree firing. The range was used only by the defendant, his friends, and on occasion law enforcement agencies. The "[d]efendant had[d] never charged a fee for the use of his range [and] there had never been an injury….or complaint" concerning the defendant's use of his range over the twenty-nine years of its use. Even so, defendant Bruce Rankin was sued by his neighbors.

The trail court issued a temporary restraining order (TRO) on the day the suite was filed and seven days later, after an evidentiary hearing, the TRO was replaced with a preliminary injunction. Stunningly, the trial court enjoined all discharge firearms anywhere on defendant's property.

Three plaintiffs actually filed this suit.Mary H. Hays had been a neighbor of the shooting range for about fifteen years. The second plaintiff, Mary L. Hays, had grown up on the family farm, but had moved away and returned about two years before suit was filed. The third plaintiff was Charles Kolstad who had moved into the area only two months before suit was filed. Kolstad and Mary L. Hays both had young children who regularly roamed on plaintiffs' property.

Although use of the defendant's range had been casual for many years, use of the range by law enforcement agencies in the several years that preceded the suit had increased significantly. The Champaign Police Department Strategic Weapons and Tactics (SWAT) team had used the range ten or fifteen times during the year immediately preceding the suit and was using the range with fully automatic weapons, specifically machine guns, the day before the suit was filed. It is impossible to determine whether the SWAT team's use of the range precipitated the suit or whether it was inevitable. It seems rather telling that Kolstad's testimony about the machine gun fire was relied on heavily by the appellate court. In his testimony, Kolstad "described the noise as 'not faint…a clear sound…a clear annoyance.'" The court, alluding to this testimony, held that "[r]egardless of frequency or location, automatic weapon fire on a neighbor's land would cause discomfort or annoyance to an ordinary reasonable person."

Defendant Rankin did not fare any better on the safety issue. The court of appeals rejected the defendant's reliance on Smith. It found that there was "sufficient evidence in the record to support the ruling…as to possible injury." The court of appeals went so far as to say that "even a spent shell could cause some injury." Contrary to the court's holding, the defendant's reliance on Smith seems well founded because the plaintiffs conceded that they had never found any spent bullets on their property.

Thus, it appears that during the twenty years between Smith and Kolstad, courts have substantially lowered the standard for obtaining injunctive relief against a shooting-range owner/operator when noise or safety nuisance is alleged. The requirement that noise causes actual physical harm has given way to a requirement that the noise be an annoyance. The requirement that to be unsafe there must exist an actual present risk of physical harm has given way to a requirement simply that an injury is possible. The very remote possibility of injury in this case makes one wonder whether this case is unique or whether mere fear of injury will suffice to enjoin sport shooting in the future.

VI. **Ohio Takes The Lead**

A. Appellate Court Analysis

Compared to the relatively superficial reasoning found in Kolstad on the nuisance issue, the Court of Appeals of Ohio did a splendid job in Christensen v. Hilltop Sportsman Club. Four aspects of this case make it noteworthy. First, the club is located in a rural location. Second, the decibel level of the shooting noise was carefully analyzed in the context of both pure noise and relative noise. Third, the

law of nuisance was articulately stated, taking into account both absolute and qualified nuisance. And fourth, the appropriate use of injunctive relief in this context was well stated.

In Christensen, the defendant was the owner of approximately 120 acres of land upon which he conducted various shooting and recreational activities. The land was located in a sparsely populated rural area. The plaintiffs owned "property located in the vicinity of the club" and filed a complaint seeking permanent injunctive relief to stop all shooting at the club. "The complaint alleged that the noise created by the shooting constituted both a public and private nuisance." The trail court found that the club's shooting activities were both a public and private nuisance, "permanently enjoining the club from permitting *any* shooting on its grounds at any time."

The Ohio Court of Appeals held that there was sufficient evidence in the trial record to find that a nuisance existed, but reversed in part because the injunction was too broad. The court stated that '"[t]he law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which property is put is a reasonable use under the circumstances, and whether there is an appreciable, substantial, tangible injury resulting in actual, material and physical discomfort.'" The court's mention of physical discomfort is reassuring after the Kolstand court used only the term annoyance.

Reviewing the testimony of the experts in this case, the Christensen court discussed two forms of noise: pure noise, and relative noise. Each expert testified that eighty decibels of noise is too loud for any human to be comfortable with, regardless of the surrounding circumstances. This is pure noise that would give rise to an absolute private nuisance. However, the evidence revealed that only on some occasions did the sounds coming from the club reach a level of even seventy decibels. The nearest resident to the property line was more than 500 yards away. The sound decibel level recorded there was only between forty and sixty decibels.

On the other hand, "[r]elative noise is noise that is too loud relative to its time and location." It may give rise to a qualified nuisance. To determine whether a relative noise is a qualified nuisance, one must consider whether the use is reasonable under the existing circumstances. For example, while the use of a bull-horn is always loud, the noise it makes would not be deemed a nuisance if used to start a race. But, the use of the same bull-horn would be considered a nuisance if used during a classroom discussion. The plaintiffs in Christensen argued that they could hear the discharge of the firearms and that it was offensive to them. Thus, they contended it constituted a nuisance. However, there was not evidence that the sounds they complained of were pure noise. The plaintiffs' case was based entirely on relative noise. Therefore, the issue became: "Is target or trap shooting an unreasonable activity per se on property in a sparsely populated rural area?"

The Christensen court found that the activities of the defendant were noisy, but legal nonetheless. While the plaintiffs failed to prove an absolute nuisance existed, the court held there was enough evidence to establish a qualified nuisance. This was based on the court's finding that shooting sometimes occurred early in the morning and late at night. The court also found that those activities took place at random and unpredictable times.

Without discussion, the court recognized the problem noted by Professor Cohen. Sounds that are unexpected and unpredictable become noise to the listener. Using Professor Cohen's distinction between sound and noise – noise being a negative psychological reaction to sound – one concludes that noise causes annoyance. This of course leads to the conclusion that the court's reference to physical discomfort as a requirement of a noise nuisance has in reality given way to mere

annoyance constituting a nuisance as seen in Kolstad.

The redeeming part of Christensen for shooting sports was the court's holding that the trial court's injunction "was excessive and far out of proportion." The trial court had permanently enjoined all shooting on defendant's property at any time. This deprived defendant of the reasonable use of its property. "[A]n injunction…should restrict the activity 'no more than is required to eliminate the nuisance.'" Therefore, the court remanded the case to the trial court so that reasonable restrictions could be placed on defendant's shooting activities on its property.

B. Difficulty with Local Trial Courts

A final noteworthy feature of the Christensen opinion is its consistency with Smith. This contrasts markedly with the Illinois Court of Appeals rejection of defendant Rankin's reliance on Smith in Kolstad.

On remand, the Christensen trail court limited Hilltop Sportsman Club to shooting on "Wednesday evenings from six p.m. until ten p.m., on Sundays from twelve noon until seven p.m. and on the first Saturday of each month from nine a.m. until seven p.m." The defendant appealed claiming these limits were too restrictive while the plaintiffs cross-appealed claiming the limits were not restrictive enough.

The Ohio Court of Appeals restated much of its 1990 opinion in this case and then held in favor of the defendant finding "the decision of the trial court is unreasonable." In this later opinion, though, the court placed much greater emphasis on the need to balance the annoyance to the plaintiffs against the prohibition of defendant's legal activity. The court literally counted and divided amount the parties the hours in a month. On second remand, the court of appeals directed the trial court to substantially expand shooting hours to no less than thirty hours per week.

Contrasting the views of the Ohio Court of Appeals with those of the trial court in Christensen, a potentially alarming situation might arise in suits against rural shooting clubs. In counties having both significant urban populations and rural areas where shooting clubs are located, voter demographics may result in county trial court judges being more familiar with the values and desires of the urban population. Because the relief sought in these cases is usually equitable in nature – injunctions to abate the nuisance – what is reasonable will be determined by the judge without a jury. The trial court's initial ban on all shooting and subsequent unreasonable limitations on shooting hours demonstrates a refusal to recognize the legitimacy of recreational shooting sports and the need to require tolerance by those who choose to live in the vicinity of sport shooting clubs and ranges.

Urban voters electing judges who may be called on to determine the fate of rural, soon to be suburban shooting clubs is a significant threat to the future of the shooting sports. This threat is evidenced by both the increase in the number of suits filed against shooting clubs and the liberalization of the nuisance law being applied to these suits. One solution to this growing threat is state legislation to protect shooting clubs and range owners from suits based on nuisance theories.

VI. Michigan's Legislative Solution

Michigan responded by enacting the Sport Shooting Ranges Act (the Act). The Act was promulgated to provide civil and criminal immunity to persons who operate or own sport shooting ranges.

The statute specifically provides that sport shooting ranges are immune from criminal and civil suits based on noise nuisance theories provided the clubs' ranges were in compliance with any state or local noise regulations in effect at the

time the range was constructed or commenced operations. It appears that at least one court has relied on this statute to dismiss a suit brought against a shooting facility.

In 1989, James Klark, Richard Kempf and Juergen Schweizer sued the Ann Arbor (Michigan) Lodge No. 1253, Loyal Order of Moose, Inc., alleging that its operation of a skeet (shotgun) range violated local zoning and noise ordinances, and thus constituted a nuisance. The range had been in operation since 1958 and was not in violation of any ordinance when it was constructed in then rural Dexter Township. The trial court held that the range was protected under the Act. Upon also finding that the sound of shooting emanating from the Moose Lodge range did not exceed eighty-six decibels, the maximum allowed under the noise ordinance, the court dismissed the action because there existed no nuisance in fact. This dismissal was affirmed on appeal.

In Jakuba v. Kingsley Sportsman's Club, the Act kept the lawsuit from progressing beyond the preliminary stages. Plaintiffs sued the Kingsley club alleging both noise and safety nuisance. The defendant moved for summary judgment with strong evidence that any alleged errant bullets could not have emanated from the defendant's range and further argued that the Act prohibited suit based on noise nuisance. The trial judge took the motion under advisement and admonished the plaintiffs to work out a settlement with the club. The case never went beyond this point.

The Act was also helpful when the Capitol City (Michigan) Rifle Club received complaints about noise lodged by new neighbors. The club maintains a shooting range in what was a rural area when constructed in the 1950s. The area became a popular country residential area by the 1980s. Township officials who received the complaints about the range convinced the residential complainants to meet with club officials. The discussions that ensued ended with the club simply adopting predictable uniform hours of operation. During these discussions, the residential complainants were made aware of the club's immunity from lawsuits based on noise nuisance. No lawsuit was ever filed.

Unfortunately, the Act was not panacea that shooting clubs and shooting range operators hoped it would be. While the Act prohibits nuisance lawsuits, it expressly provides that shooting ranges are subject to local governmental regulation. Ray Township in Macomb County, Michigan attempted to regulate the B. & B.S. Gun Club out of existence with restrictive ordinances requiring special permits to operate the club's shooting range. The application process for permits was inordinately burdensome. Also, the permits had to be renewed annually. The club informed the township that the ordinances were in conflict with Act and that the club would not comply with the ordinance. The township sued the club. The court held that, to the extent that the ordinances were intended to regulate noise, state law preempted them. However, provisions of the ordinance that were remotely relevant to safety were upheld. The court also held that the Act protected shooting facilities only to the extent that the shooting facilities existed in 1989 when the Act was adopted. The court suggested that governmental regulation could properly prohibit any new club members after 1989, if the shooting facilities existed as a nonconforming use under new zoning laws. Thus, as club members died or relinquished their memberships, the club would slowly cease to exist.

Because the Macomb County experience was so upsetting to the Michigan shooting community, in 1993, further legislative protection was requested. What emerged was a comprehensive revision of the Act. The revised Act contained three new provisions. First an assumption of risk defense for shooting ranges was created. Second, a provision allowing expansion of memberships, shooting facilities and shooting programs was added. And third, all protections of the Act were made contingent on ranges conforming to generally accepted operation

practices. The legislature did not define generally accepted operating practices, but instead delegated this task to the Department of Natural Resources (DNR). This was a natural choice because the DNR maintains many shooting ranges in Michigan at recreation areas, state game areas and on other public lands. The DNR adopted the National Rifle Association's Range Manual as the initial source of generally accepted operating practices.

At first blush, this new statutory scheme seems ideal for shooting clubs and range owners. This is because, upon conforming to generally accepted operating practices, shooting range operators are immune from lawsuits based on noise nuisance, free to expand club memberships, shooting activities, and facilities, and, if a range user sues for personal injury, assumption or risk may be interposed as a defense. The trap, however, lies in the term generally accepted operating practices. Adoption of the National Rifle Association (NRA) Range Manual is both an asset and a problem. To the extent that the manual sets specific range requirements, ranges in compliance have statutory protection while those not in compliance have no statutory protection. Unfortunately, even if the provision of the manual to which the range does not conform is in no way related to the statutory protections, these protections may still be lost. Also, many of the Range Manual provisions are often merely guidelines and may be varied depending on conditions in a particular locale. Needless to say, while a great market was created for NRA Range Manuals, the protections sought by shooters may have been rendered somewhat illusory.

On the other hand, the new statutory provisions have been immensely beneficial to some shooting clubs. The Lapeer County (Michigan) Sportsmen's Club had its shooting activities severely limited by an injunction obtained by its neighbors in 1964. After passage of the 1994 amendments to Michigan's Sport Shooting Ranges Act, the Michigan Court of Appeals ordered the Lapeer County Circuit Court to dissolve the old injunction so that the club could operate as contemplated by legislature.

VII. **Conclusion**

Thus the battle rages on. One can only conclude that any peace between urban sprawl and the shooting sports may be best attained by constant communication and mutual respect. Operating shooting ranges in a safe, predictable and reasonable manner may be the best ways to avoid a litigation war. Finally, as corporate American knows so well, image is everything. The positive image of the shooting sports must be vigorously promoted in the future if these new rural residents are expected to peacefully coexist with the users of sport shooting ranges.

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