

DISTRICT OF COLUMBIA COURT OF APPEALS

Ortberg v. Goldman Sachs Group

64 A.3d 158 (D.C. 2013) · Decided April 11, 2013

SUMMARY

The District of Columbia Court of Appeals reversed a preliminary injunction restricting protests outside Goldman Sachs’s office and the home of a Goldman Sachs employee. The court held that the record did not establish a substantial likelihood of success on the employee’s intentional-infliction-of-emotional-distress claim or the plaintiffs’ private-nuisance claim. The court remanded the case for further proceedings.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | District of Columbia Court of Appeals                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| WRITING FOR THE COURT | Senior Judge Reid; Judge Blackburne; Judge McLeese; Judge Rigsby                                                                                                                                                                                                                                                                                                                                                                                                         |
| JURISDICTION          | District of Columbia                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| DECIDED               | April 11, 2013                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| PROCEDURAL POSTURE    | Adam Ortberg and Michael Weber appealed the Superior Court's grant of a preliminary injunction obtained by Goldman Sachs and Michael Paese restricting protests at Goldman Sachs's office and Paese's residence.                                                                                                                                                                                                                                                         |
| STANDARD OF REVIEW    | The grant or denial of a preliminary injunction is reviewed for abuse of discretion. The appellate court examines whether the trial court's findings and conclusions are supported by the record, whether the analysis resolves issues necessary to issuance of the injunction, and whether other abuse-of-discretion grounds exist. Legal questions and statutory-interpretation issues are reviewed independently to the extent the injunction decision turns on them. |
| PRECEDENTIAL VALUE    | Published opinion; binding District of Columbia Court of Appeals precedent, subject to the opinion's express reservation of the independent-private-nuisance question for en banc resolution.                                                                                                                                                                                                                                                                            |
| PARTIES               | Adam Ortberg, Michael Weber v. Goldman Sachs Group, Michael Paese                                                                                                                                                                                                                                                                                                                                                                                                        |

## TOPICS

nuisance intentional infliction of emotional distress equitable relief standard of review  
appellate procedure

## PRACTICE AREAS

torts equitable relief appellate procedure

## QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by finding a substantial likelihood that Michael Paese would prevail on his intentional-infliction-of-emotional-distress claim.
2. Whether the trial court abused its discretion by finding a substantial likelihood that Goldman Sachs and Michael Paese would prevail on their private-nuisance claims.
3. Whether the preliminary injunction should be reversed without reaching the injunction's scope or potential conflict with the appellants' First Amendment rights.

## HOLDINGS

1. On this record, Paese did not clearly demonstrate a substantial likelihood of success because the protestors' conduct was not extreme and outrageous and the evidence did not establish severe emotional distress.
2. The plaintiffs did not demonstrate a substantial likelihood of success on the private-nuisance claims because the protests did not result in substantial injury or continuous or constantly recurring acts constituting an unreasonable interference with use of the property. The court did not definitively resolve whether private nuisance is an independent tort in the District of Columbia.

## KEY QUOTATIONS

*“In order to prove the tort of intentional infliction of emotional distress, “a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff [to suffer] severe emotional distress.”” (163)*

*“we cannot say that the protestors’ behavior resulted in a substantial injury or continuous or constantly recurring acts that constituted “an unreasonable interference” with Mr. Paese’s or Goldman Sachs’ use of their property.” (169)*

## FACTUAL BACKGROUND

Between August and October 2010, animal-rights protestors affiliated with DARTT held thirteen demonstrations—eight outside Goldman Sachs's District of Columbia office and five outside Goldman Sachs Managing Director Michael Paese's home. Groups of approximately four to six protestors used bullhorns, airhorns, posters, chanting, and speeches, including a slogan stating, "we know where you sleep at night." The demonstrations generally lasted about thirty minutes, and the record showed only a few disturbances over several weeks, with no evidence of severe emotional-distress symptoms or substantial, continuous property harm.

## PROCEDURAL HISTORY

After a series of protests, Goldman Sachs and Michael Paese sued Ortberg, Weber, DARTT, and others for private nuisance, intentional infliction of emotional distress, negligent infliction of emotional distress, and conspiracy. Following a preliminary-injunction hearing, the Superior Court found a likelihood of success on the private-nuisance and conspiracy claims and on Paese's intentional-infliction claim, and issued an injunction. The Court of Appeals reversed the grant of the preliminary injunction and remanded for further proceedings.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

The case was remanded to the trial court for further proceedings after reversal of the preliminary injunction.

## CASES CITED

- Feaster v. Vance, 832 A.2d 1277 (D.C. 2003)
- In re Estate of Reilly, 933 A.2d 830 (D.C. 2007)
- Baltimore v. District of Columbia, 10 A.3d 1141 (D.C. 2011)
- Bernstein v. Fernandez, 649 A.2d 1064 (D.C. 1991)
- Homan v. Goyal, 711 A.2d 812 (D.C. 1998)
- Wood v. Neuman, 979 A.2d 64 (D.C. 2009)
- Estate of Underwood v. National Credit Union Administration, 665 A.2d 621 (D.C. 1995)
- Drejza v. Vaccaro, 650 A.2d 1308 (D.C. 1994)
- District of Columbia v. Tulin, 994 A.2d 788 (D.C. 2010)
- Waldon v. Covington, 415 A.2d 1070 (D.C. 1980)
- Kotsch v. District of Columbia, 924 A.2d 1040 (D.C. 2007)
- Crowley v. North American Telecommunications Association, 691 A.2d 1169 (D.C. 1997)
- Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62 (D.C. Cir. 1939)
- Purcell v. Thomas, 928 A.2d 699 (D.C. 2007)
- B & W Management, Inc. v. Tasea Investment Co., 451 A.2d 879 (D.C. 1982)
- District of Columbia v. Beretta, 872 A.2d 633 (D.C. 2005) (en banc)
- District of Columbia v. Fowler, 497 A.2d 456 (D.C. 1985)
- Tucci v. District of Columbia, 956 A.2d 684 (D.C. 2008)
- Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. 1995)
- Akers v. Marsh, 19 App. D.C. 28 (1901)
- Baltimore & Potomac Railroad Co. v. Fifth Baptist Church, 108 U.S. 317 (1883)
- M.A.P. v. Ryan, 285 A.2d 310 (D.C. 1971)

## OPINION

REID, J.

REID, Senior Judge: This case arises out of a series of protests held by Adam Ortberg, Michael Weber, and others at the District of Columbia offices of Goldman Sachs and the District of Columbia home of a Goldman Sachs' employee, Michael Paese.

On January 11, 2011, after a hearing in Superior Court, Goldman Sachs and Mr. Paese obtained a preliminary injunction restricting the protests.<sup>1</sup> Mr. Ortberg and Mr. Weber now appeal the grant of that injunction and its scope.

On this record, and for the reasons set forth below, we are constrained to reverse the trial court's grant of a preliminary injunction. **FACTUAL SUMMARY** Beginning in late August 2010, protestors appeared on a regular basis outside the building that housed Goldman Sachs' District of Columbia office.

The demonstrators were affiliated with a group called Defenders of Animal Rights Today and Tomorrow ("DARTT"), a defendant in this case. The protest called attention to Goldman Sachs' business dealings with an investment group (Fortress) that did business with a third company: Huntingdon Life Sciences ("HLS"). HLS and the companies that do business with it have been targeted by animal-rights activists in the United States and Europe.

These activists have engaged in lengthy protest campaigns, which have occasionally included harassment and violence. After demonstrations at Goldman Sachs' office began, the protestors also appeared outside the home of Mr. Paese, a Managing Director at Goldman Sachs.

In all, the demonstrators held thirteen protests, eight at Goldman Sachs and five at Mr. Paese's residence, between August and October 2010. Generally, the protests followed a pattern. A group of demonstrators, usually between four and six in number, would arrive with bullhorns, airhorns, and posters. They would begin chanting slogans or making speeches accusing Goldman Sachs, and later Mr. Paese, of complicity in the deaths of animals.

These chants and speeches were often amplified through the use of a bullhorn. Occasionally, according to Goldman Sachs, the protestors would enter the lobby of the building that contained Goldman Sachs' office and use their bullhorns or airhorns there.

The shouting and the chanting usually lasted for roughly 30 minutes, at which point the protestors would move on. At Mr. Paese's home, and at Goldman Sachs' office, the protestors identified Mr. Paese by name and chanted a slogan that included the phrase "we know where you sleep at \*162night.". Following a tense encounter between neighbors and protestors outside of Mr. Paese's home on the night of October 31, 2010, Goldman Sachs and Mr. Paese filed a complaint against

Mr. Ortberg, Mr. Weber, DARTT, and others, alleging claims for private nuisance, intentional infliction of emotional distress, negligent infliction of emotional distress and conspiracy.

The plaintiffs also sought a temporary restraining order and a preliminary injunction. On December 10, 2010, the parties appeared in the trial court for a hearing on a preliminary injunction. After hearing testimony from Mr. Paese, Mr. Ortberg and Mr. Weber, the court determined that the plaintiffs were likely to succeed on their claims of private nuisance and conspiracy, and that Mr. Paese was likely to succeed on his claim of intentional infliction of emotional distress.

The court then issued a preliminary injunction, and Mr. Ortberg and Mr. Weber appealed. ANALYSIS We begin our analysis with the trial court's decision to grant the preliminary injunction. Mr. Ortberg and Mr. Weber's main argument is that the trial court abused its discretion when it concluded that Goldman Sachs and Mr. Paese were likely to succeed on the merits of their claims for intentional infliction of emotional distress and private nuisance.<sup>2</sup> The decision to grant or deny a preliminary injunction is a discretionary one.

*Feaster v. Vance*, 832 A.2d 1277, 1287 (D.C.2003). To grant an injunction, the trial court must find, among other things, that "the moving party has clearly demonstrated" a "substantial likelihood" of success on the merits. *Id.* at 1287 (quotation marks and citation omitted).

We review a trial court's decision to grant a preliminary injunction "not to resolve the merits of the underlying dispute between the litigants, except insofar as the action of the trial court turns on a question of law or statutory interpretation." *Id.* at 1288 (internal quotation marks and citation omitted).

Therefore, "our role is confined to (1) examining the trial court's findings and conclusions to see if they are sufficiently supported by the record; (2) assuring that the trial court's analysis reflects a resolution of all the issues which necessarily underlie the issuance of an injunction; and (3) inquiring into any other claims of an abuse of discretion by the trial court." *Id.* (internal quotation marks and citations omitted).

When reviewing challenges to a trial court's determination that a party is likely to succeed on the merits, we have said that "[a] party seeking temporary equitable relief need not show a mathematical probability of success on the merits\_Nevertheless, if the appellees' claims are barred by law, we must reach the merits of the decision" on appeal.

In *re Estate of Reilly*, 933 A.2d 830, 837 (D.C.2007) (internal quotation marks and citations omitted). Substantial Likelihood of Success on Mr. Paese's Intentional Infliction of Emotional Distress Claim Mr. Ortberg and Mr. Weber argue that the trial court erred when it concluded Mr. Paese would be able to prove that the defendants' conduct was "extreme and outrageous" and that Mr. Paese had "suffer[ed] severe emotional distress." For the reasons set forth below, we hold that

on this record Mr. Paese has not “clearly \*163demonstrated” a “substantial likelihood” of success on the merits of his intentional infliction of emotional distress claim.

Feaster, *supra*, 832 A.2d at 1287. Hence, the trial court should not have granted Mr. Paese’s motion with respect to that claim. At the hearing on the preliminary injunction, the trial court ruled that “to the extent that the conduct [of the defendants] is outrageous, over the top, extreme, beyond the bounds of decency... the [c]ourt finds that on balance Mr. Paese would prevail.” The court did not explain what it meant by the language “to the extent that,” and did not explicitly indicate what specific action it considered to be “extreme and outrageous.” However, the trial court also made clear that it regarded the protestors’ chant “we know where you sleep at night” to be a threat of “future injury or disturbance.” In addition, the trial court did not make a specific ruling regarding the severity of Mr. Paese’s distress, noting only that “the [c]ourt heard from Mr. Paese regarding his emotional distress.” Mr. Paese had explained in his testimony and a written declaration that he felt “afraid” that the protests would lead to violence and that he found the protests “humiliating, embarrassing and intimidating.” Mr. Paese also recounted that his family felt “targeted and terrorized in our own home because of the actions of these people.” In order to prove the tort of intentional infliction of emotional distress, “a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff [to suffer] severe emotional distress.” *Baltimore v. District of Columbia*, 10 A.3d 1141, 1155 (D.C.2011) (internal quotation marks and citations omitted).

Our case law establishes strict tests for the elements of intentional infliction of emotional distress. *Bernstein v. Fernandez*, 649 A.2d 1064, 1075 n. 17 (D.C.1991). “Liability will only be imposed for conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” *Homan v. Goyal*, 711 A.2d 812, 818 (D.C.1998); accord *Wood v. Neuman*, 979 A.2d 64, 77 (D.C.2009).

In order to establish “extreme and outrageous conduct,” a plaintiff must show that “the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’ ” *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d). Further, “in determining whether the conduct complained of is ‘extreme and outrageous,’ the court must consider ‘the specific context in which the conduct took place.’ ” *Estate of Underwood v. National Credit Union Admin.*, 665 A.2d 621, 641 (D.C.1995) (citation omitted).

When evaluating “context,” a court should examine “not only... the nature of the activity at issue but also... the relationship between the parties, and the particular environment in which the conduct took place.” *Id.* (internal quotation marks and citation omitted).

In any context, no liability can be “imposed for ‘mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ ” *Homan, supra*, 711 A.2d at 818 (internal citations

omitted). As a result, “[t]he requirement of outrageousness is not an easy one to meet.” *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 (D.C.1994). When viewed in context, the conduct in this case was not extreme and outrageous.

The parties had no relationship before the protests began. The conduct took place on public streets, and consisted mostly of chanting slogans and some vague threats. In general, the conduct complained of is part and parcel “of the \*164frictions and irritations and clashing of temperaments incident to participation in a community life,” especially life in a society that recognizes a right to public political protest.

*Homan*, supra, 711 A.2d at 818 (internal quotation marks and citation omitted). While serious threats would be grounds for the imposition of liability, the oblique threats of “future injury or disturbance” in this case do not rise to that level. See *id.* at 820 (liability imposed where defendant had reason to believe plaintiffs life would be threatened, and it was).

In addition, the record shows that Mr. Paese was only disturbed on a few occasions over a period that spanned several weeks. As we have said before, “[i]n some, indeed most, instances, a few unwelcome visits,” accompanied by “some harassing” conduct, “would not be cognizable in an action for a tort which requires proof of extreme or outrageous conduct.” *Id.* Other hallmarks of extreme and outrageous conduct that we have identified previously, like abusing a position of authority over another, *District of Columbia v. Tulin*, 994 A.2d 788, 801 (D.C.2010) (police officer’s swearing and insults not outrageous, but causing plaintiff to be arrested and prosecuted “without legal justification” sufficiently outrageous), or callously disregarding another’s known weakness, *Drejza*, supra, 650 A.2d at 1312-13 (plaintiff was a rape victim who accused the defendant detective of derogatory and belittling comments during her interview), are also not present in this case.

To be sure, the protests were loud and disturbing. However, our case law requires more to support a claim of “extreme and outrageous conduct.” Because the threshold finding of “extreme and outrageous conduct” is a question of law, *Waldon v. Covington*, 415 A.2d 1070, 1078 (D.C.1980), we are constrained to conclude that the trial court abused its discretion when it concluded that Mr. Paese was likely to succeed in establishing, on this record, “extreme and outrageous conduct” by the defendants.

We reach the same conclusion with respect to the element of “severe emotional distress.” Again, our case law sets a high standard, requiring “emotional distress of so acute a nature that harmful physical consequences might be not unlikely to result.” *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C.2007) (internal quotation marks and citation omitted). “Recovery is not allowed merely because conduct causes mental distress.” *Crowley v. North Am.*

Telecomms. Ass'n, 691 A.2d 1169, 1172 (D.C.1997). Likewise, “‘Embarrassment and difficulty do not approach the level of foreseeable harm essential to establish [appellants’] intentional tort liability.” Waldon, *supra*, 415 A.2d at 1078. A person may “intentionally inflict some worry and concern,” so long as he or she “refrain[s] from conduct intended or likely to cause physical illness.” *Clark v. Associated Retail Credit Men of Washington D.C.*, 70 App. D.C. 183, 187-88, 105 F.2d 62, 66-67 (1939). In his declarations and testimony, Mr. Paese clearly alleged some mental distress. However, we are unable to discern any indication that his distress was “of so acute a nature that harmful physical consequences might be not unlikely to result.” *Kotsch*, *supra*, 924 A.2d at 1046 (internal quotation marks and citation omitted).

Unlike other intentional infliction of emotional distress plaintiffs, Mr. Paese did not complain of any symptoms of emotional distress, like a loss of sleep or an inability to concentrate. See *Purcell v. Thomas*, 928 A.2d 699, 713-14 (D.C.2007); *Homan*, *supra*, 711 A.2d at 821; *Clark*, *supra*, 105 F.2d at 65 (collecting cases, where plaintiffs variously were “nervous and could not work,” or suffered “worry, humiliation, and \*165loss of sleep”).

Instead, Mr. Paese only labeled the emotions he was feeling, without indicating “the intensity and the duration of the distress,” which are factors “to be considered in determining its severity.” Restatement (SeCOND) of ToRts § 46 cmt. j. We have also previously found a list of emotions similar to the one presented by Mr. Paese to be insufficient to establish “severe emotional distress.” See *Wood*, *supra*, 979 A.2d at 78 (plaintiff who was “horrified” at the “destruction of her garden”; “constantly crying and almost sleepless”; “shaken”; and “embarrassed at having been made out to be a ‘pariah’ in the neighborhood” denied recovery because the distress was insufficiently severe).

Therefore, we conclude that the trial court’s finding of a likelihood of success on this prong of the intentional infliction of emotional distress claim was not supported by the record. In short, Mr. Paese is not entitled to an injunction on his intentional infliction of emotional distress claim because he has not “clearly demonstrated” a “substantial likelihood” of success on two of the three elements of the tort.

Feaster, *supra*, 832 A.2d at 1287. Substantial Likelihood of Success on the Appellees’ Claim of Private Nuisance Before the trial court, Mr. Ort-berg and Mr. Weber argued that the District of Columbia does not recognize “private nuisance” as a stand-alone tort, but rather as a theory of damages requiring the commission of a predicate tort.

The trial court rejected their argument, relying on this court’s opinion in *B & W Management, Inc. v. Tasea Inv. Co.*, 451 A.2d 879 (D.C.1982), and determined that private nuisance was a tort which required proof of “a substantial and unreasonable interference [with the] private use and enjoyment of one’s land.” On appeal, Mr. Ort-berg and Mr. Weber contend that the trial court

committed legal error, and assessed the claim brought by Goldman Sachs and Mr. Paese under the improper standard.

Our past nuisance cases have involved different time periods and factual contexts, and varying legal principles. Consequently some, including our trial judges, may perceive our decisions as perhaps conflicting or hard to decipher.<sup>3</sup> Our more recent \*166 case law has been unambiguous in its embrace of the Restatement's definition of "private nuisance," see *B & W Management*, supra, 451 A.2d at 881-82.

But, we have also partially adopted the Restatement's "theory of tort liability" approach. That is, we have often written that "[n]uisance is a field of tort liability, rather than a type of tortious conduct." *Fowler*, supra, 497 A.2d at 461 (internal quotation marks and citation omitted).

In our en banc decision in *Beretta*, supra, we did not disavow or abandon "the field of tort liability" theory, or precedents which articulated that theory, including *Woodner*, supra, and *Bernstein*, supra. Indeed, we said that to establish a claim of "nuisance," we have required plaintiffs to show an "invasion" of one of "two kinds of interests[, public and private] — by conduct that is tortious only if it falls into the usual categories of tort liability." *Beretta*, supra, 872 A.2d at 646 (quoting Restatement (SeCOnd) of Torts § 821A cmt. c (1979)) \*167 (quotation marks omitted, emphasis in original).

We observed that "[t]he defendants [in *Beretta* ] do not dispute... that a separate tort of public nuisance is cognizable in the District." *Id.* We did not make a similar explicit statement with respect to private nuisance.

Moreover, even in the case of the public nuisance claim in *Beretta*, we declared that: "The question, nevertheless, is whether the District has sufficiently pleaded that cause of action, and the answer depends critically on how prepared we are to loosen the tort from the traditional moorings of duty, proximate causation, foreseeability, and remoteness that have made us reject the plaintiffs' claim of negligence." *Id.* We were "not convinced that the public nuisance cause of action the District allege[d][was] sufficiently distinguishable from its negligence claim to justify a different result." *Id.* To reiterate, our en banc decision in *Beretta* did not disturb our nuisance precedents decided in the period 1982 to 1995.

Under those precedents, "[l]iability for nuisance may rest upon intentional invasion of the plaintiffs interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability"; and "[w]ith very rare exceptions, there is no liability unless the case can be fitted into one of these familiar categories." *Fowler*, supra, 497 A.2d at 461 (internal quotation and citations omitted, emphasis in original).

As a result, when a plaintiff has claimed that unintentional conduct resulted in a nuisance, we have required proof of negligence. See *Tucci*, supra, 956 A.2d at 697 ("We therefore must look past the

label ‘nuisance’ to determine whether the neglect which the Tuccis allege provides a basis for finding the District liable for tortious conduct.”) Furthermore, an intentional interference only gives rise to nuisance damages if it is otherwise tortious.

We have explained that “[a]s an independent tort, claims of nuisance have indeed not been viewed favorably by this court.” Beretta, *supra*, 872 A.2d at 646. Instead, a plaintiff may only recover “on the theory of negligence... or another theory such as intentional infliction of emotional distress.” *Id.* (citations omitted). Indeed, where a plaintiff alleges both nuisance and intentional infliction of emotional distress, we have explained that “nuisance is a type of damage and not a theory of recovery in and of itself,” so the elements of a theory of recovery must be established with reference to the elements of “the intentional infliction of emotional distress claim.” Jonathan Woodner Co., *supra*, 665 A.2d at 934.

See also Bernstein, *supra*, 649 A.2d at 1072-73 (“ ‘[Nuisance ordinarily is not a separate tort in itself but a type of damage,’ so that a plaintiff seeking to recover on a nuisance theory must allege and prove some sort of tortious conduct.”) (internal citation omitted). Consistent with this approach, we have not permitted the recovery of nuisance damages when a plaintiff’s loss is made whole under a different theory of liability.

See Jonathan Woodner Co., *supra*, 665 A.2d at 934; Bernstein, *supra*, 649 A.2d at 1073. Even assuming, without deciding, that our en banc decision in Beretta recognized the possibility of a private nuisance claim as an independent tort rather than as a type of damage, we are persuaded on the record in this case and on the basis of principles articulated in this jurisdiction’s earliest nuisance cases, there is a substantial likelihood that Mr. Paese and Goldman Sachs would be unable to prevail on such a claim.

In defense of the trial court’s approach, Mr. Paese and Goldman Sachs call our attention to one of our most recent cases, suggesting that we have “on occasion recognized an ‘actionable private nuisance.’ ” *Wood*, *supra*, 979 A.2d at 78.

We did note in *Wood* that “our jurisdiction has on occasion recognized an ‘actionable private nuisance.’ ” *Id.* at 78 (citing *Totten*, *supra*, *Reese*, *supra*). We further stated that: “To be actionable as a nuisance, the offending thing must be marked by ‘some degree of permanence’ such that the ‘continuousness or recurrence of the things, facts, or acts which constitute the nuisance,’ give rise to an ‘unreasonable use.’ ” *Id.* (citing *Reese*, *supra*, 73 A.2d at 902).

Thus, we actually invoked the “continuity” or “substantial harm” and the “continuousness or recurrence” factors articulated in *Reese*, and first appearing in *Fifth Baptist Church*, *supra*, 108 U.S. at 329, 2 S.Ct. 719. Application of the factors set forth above to the record in this case prompts us to conclude, as we indicated earlier in this opinion, that Mr. Paese was disturbed in the

enjoyment of his property on only a few occasions over several weeks; there were only five demonstrations at his home, none of which lasted more than thirty minutes.

The same is true with respect to Goldman Sachs' office where there were eight demonstrations. The most serious demonstration involved a tense encounter between the protestors and Mr. Paese's neighbors. Moreover, the record shows that neither Mr. Paese nor Goldman Sachs suffered "substantial harm" flowing from "some degree of permanence" with regard to the protestors' actions.

The court highlighted these factors in yet another early case, *Akers*, supra, where it said: "the complainant, before he can ask for relief by injunction, must prove that he has sustained such a substantial injury by the acts of the defendant, as would have entitled him to a verdict in an action at law." 19 App.D.C. at 43 (citations omitted).

We also declared in *Akers* "that even though the damage is small, indeed merely nominal, yet if the injury is of a continuous nature, so as to operate as a constantly recurring grievance, the court will restrain it, to avoid a multiplicity of actions." *Id.* On this record, then, even assuming that we recognize a private nuisance as an independent tort, we cannot conclude that there is a substantial likelihood that Mr. Paese and Goldman Sachs can prevail on their nuisance claim.<sup>5</sup> That is, we cannot say that the protestors' behavior resulted in a substantial injury or continuous or constantly recurring acts that constituted "an unreasonable interference" with Mr. Paese's or Goldman Sachs' use of their property.<sup>6</sup> Accordingly, for the foregoing reasons, we are constrained to reverse the trial court's grant of a preliminary injunction, and we remand the case to the trial court for further proceedings.

So ordered. Opinion for the court by Senior Judge REID. Opinion concurring in part and dissenting in part by Associate Judge McLEESE at page 169.. The trial court modified the preliminary injunction on June 1, 2011.. Should the plaintiffs be unable to demonstrate a likelihood of success on these claims, they would not be able to demonstrate success on their conspiracy claim, which requires an underlying tort..

In the early time period between 1894 and 1912, and in cases involving different factual scenarios, this court established basic legal principles governing nuisance cases. We adhered to principles articulated in the Supreme Court's decision in *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 2 S.Ct. 719, 27 L.Ed. 739 (1883), a case concerning the negative impact of a railroad's engine house and machine repair shop on the church's ordinary use of its edifice.

Because "the cause of the annoyance and discomfort" to the congregation proved to be "continuous," the railroad's "nuisance" was restrained by the court. *Id.* at 329, 2 S.Ct. 719. Our court followed *Fifth Baptist Church in Baltimore & Potomac R.R. Co. v. Fitzgerald*, 2 App.D.C. 501 (1894), a case where the railroad company operated, loaded and unloaded, and stored freight

cars containing live animals and "noxious substances" on four separate railroad tracks located in front of appellant's family home.

The court concluded that the railroad could not use its property as a storage place or working area if its use "unreasonably interfere[d] with and disturbed] the peaceful and comfortable enjoyment of others in their property." *Id.* at 518.

The court required proof of "a substantial injury" in *Akers v. Marsh*, 19 App.D.C. 28 (1901) (a case where a homeowner complained about the use of land across the street at night as a croquet field), and the court said that in cases where "the damage is small, [the complainant must show that] the injury is of a continuous nature." *Id.* at 43 (emphasis in original).

Between 1912 and 1950, the court considered several issues relating to a private nuisance: (1) whether certain institutions constituted a nuisance per se or as operated, see *French v. The Association For Works of Mercy*, 39 App.D.C. 406 (1912) (hospital or asylum), *District of Columbia v. Totten*, 55 App.D.C. 312, 5 F.2d 374 (1925) (workhouse or place of detention for prisoners); (2) what constitutes \*166reasonable use of one's property in relation to a neighbor's property, see *Pearce v. Scott*, 58 App.D.C.

257, 29 F.2d 630 (1928) (construction of roadway or embankment to prevent runoff from a neighbor's property); and (3) whether nuisance principles apply to landlord and tenant cases, see *Levy v. Bryce*, 46 A.2d 765 (D.C.1946) (behavior of tenant in a rooming house), *Vaughn v. Neal*, 60 A.2d 234 (D.C.1948) (refusal of tenant to give landlord a key), and *Reese v. Wells*, 73 A.2d 899 (D.C.1950) (tenant departed home and left gas stove on).

In these cases, the court reaffirmed the definition of nuisance found in *Fifth Baptist Church*; and in *Reese*, we referred to nuisance as "a field of tort liability, and not a single type of tortuous conduct." 73 A.2d at 902 (internal quotation marks and citation omitted).

We also reiterated two factors or elements that help to determine the existence of an actionable nuisance: "continuity" or "substantial harm" (requiring "some degree of permanence"), and "continuousness or recurrence of the things, facts or acts which constitute the nuisance deriving from the notion of unreasonable use." *Id.* (internal quotation marks and citation omitted).

Apparently there was a hiatus in meaningful nuisance cases in this jurisdiction between 1950 and 1982, and only a few noteworthy cases were decided in the post 1981 period. *B & W Management*, *supra*, which involved enclosed garage and surface parking facilities, resorted to the Restatement (Second) of Torts and cases from other jurisdictions for definitions of public and private nuisance, rather than relying on historic precedents in this jurisdiction.

*Id.* 451 A.2d at 881-82. The other two cases in the decade of the 1980s followed *B & W Management*'s lead in citing the Restatement definitions of nuisance. See *Carrigan v. Purkhiser*,

466 A.2d 1243 (D.C. 1983) (homeowner complained that neighbor's dogs barked incessantly and emitted an unpleasant smell); *District of Columbia v. Fowler*, 497 A.2d 456 (D.C.1985) (District of Columbia liable for negligently failing to abate an alley nuisance after receiving notice of its existence; nuisance caused structural damage to residential property).

We decided two landlord and tenant cases in the 1990s, and looked to Maryland law for the proposition that "nuisance ordinarily is not a separate tort in itself but a type of damage," we also cited *Totten*, *supra*. *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C.1991) (internal quotation marks and citation omitted) (leaking and falling ceilings in a ground-floor apartment); *Woodner v. Breeden*, 665 A.2d 929, 934 n. 6 (D.C.1995) opinion amended on denial of reh'g, 681 A.2d 1097 (D.C.1996) (rental to condo conversion and tenant complaints about poor housing conditions) (citing *Bernstein* and *Reese*, *supra*).

The 2000 decade produced three cases with varying factual contexts: *District of Columbia v. Beretta*, 872 A.2d 633 (D.C.2005) (en banc) (lawsuit by the District against manufacturers of firearms), *Tucci v. District of Columbia*, 956 A.2d 684 (D.C.2008) (residential property owner's lawsuit against District of Columbia relating to trash and vermin); *Wood*, *supra*, 979 A.2d 64 (case involving residential property owners and the impact of a water proofing project).

We relied on nuisance definitions from the Restatement and generally followed our more recent decisions in *B & W Management*, *Woodner*, and *Bernstein* in *Beretta*, 872 A.2d at 646, and in *Tucci*, 956 A.2d at 696-97. In *Wood*, we cited both later and earlier nuisance decisions from this jurisdiction— *Beretta*, *Totten*, *Reese*, *Levy*, and *Fowler*. 979 A.2d at 78-79..

We are mindful that a host of tortious conduct was alleged in the *Wood* litigation, much of which could have served as the basis for a finding of nuisance damages under the field of liability theory. *Wood*, *supra*, 979 A.2d at 70 ("[T]he Neumans filed a civil suit seeking compensatory and punitive damages for assault and battery, breach of privacy, stalking and harassment, vandalism and trespass, libel, and nuisance.") We also recognize that the nuisance issue was essentially moot, because the jury had declined to award any damages on that claim.

*Id.* at 79.. In his concurring/dissenting opinion, Judge McLeese concludes "that the better reading [of this court's past nuisance] decisions is that private nuisance exists as an independent tort under District of Columbia law." [Page 170] His conclusion, contrasted with that of the majority, underscores our view that the issue, whether private nuisance is recognized as an independent tort in the District of Columbia, must be resolved by the en banc court, not by a three-judge panel's attempt to craft a coherent answer out of decisions dating from 1894 to 2009.

See *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C.1971). Judge McLeese acknowledges that, "[although the courts in this jurisdiction have... repeatedly held that private nuisance is an independent tort, language in some of our cases appears to have created confusion on the matter."

[Page 171] Moreover, his interpretation of our en banc decision in *Beretta*, supra, does not afford him a clear path to this court's definitive recognition of an independent private nuisance tort.

He asserts that, "[b]ecause *Beretta* did not overrule our prior cases holding that private nuisance is an independent tort, those cases are binding on us in deciding the present case." [p. 174] Nevertheless, Judge McLeese \*169states, as he must, that "[t]here is one post-*Beretta* case that arguably points in the opposite direction," *Tucci*, supra; and he attempts to clear the path or brush aside *Tucci* by trying to distinguish or explain that decision.

[Page 174] Significantly, in our view, both the majority and the concurring/dissenting opinions point the way to en banc resolution of the independent tort issue, rather than its resolution by a three-judge panel.. Because we are reversing the trial court's order issuing the preliminary injunction in this case, we do not address the parties' arguments regarding the scope of the injunction and the extent to which it may conflict with appellants' First Amendment rights.

Since any injunction must be tailored to suit the wrongs it seeks to redress, we decline to offer an opinion on the nature of an appropriate injunction that could be issued in the event that either Goldman Sachs or Mr. Paese prevails on a claim..

The court's opinion suggests that in assessing whether Goldman and Mr. Paese established a substantial likelihood of success on the merits, this court is obliged to determine de novo whether the underlying tort claims lack legal merit. Ante at 162-63. I do not view this court's cases as clear on that point. Compare, e.g., *In re Reilly*, 933 A.2d 830, 837 (D.C.2007), with, e.g., *Zirkle v. District of Columbia*, 830 A.2d 1250, 1256 n. 5 (D.C.2003) (general rule is that this court, when reviewing trial-court order respecting preliminary injunction, does not "resolve the overall merits"; under "narrow exception," when trial court's action turns on question of law, reviewing court "may reach the merits of the \*170controversy" (quoting *Don't Tear It Down, Inc. v. District of Columbia*, 395 A.2d 388, 391 (D.C.1978))) (emphasis added); cf. *Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929, 932-33 (D.C.2004) (in granting emergency stay, court finds legal question raised to be "serious," but otherwise "offer[ed] no opinion on its merits").

For current purposes, however, I assume that it is appropriate for this court to determine de novo the question whether the tort claims advanced by Goldman and Mr. Paese fail as a matter of law on the current record.