IN THE COURT OF APPEALS OF IOWA

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FILED
DEC 26 1984
CLERK SUPREME COURT

GARY LARSON, SANDRA LARSON, RONALD LARSON, CAROLYN LARSON, ROBERT L. RING, JUDITH K. RING, VERNON E. LARSON, THELMA LARSON, PHILLIP L. SHERBONDY, EVELYN D. SHERBONDY, JOHN SHERBONDY, KATHERINE L. SHERBONDY, MICHAEL R. HENRY, JO ANNE HENRY, DONALD G. LARSEN, RUBY P. LARSEN, DUANE A. LARSEN, NEIL LARSEN, and ROBERT M. HOUGH,

Plaintiffs-Appellants,

vs.

COUNCIL BLUFFS RIFLE AND PISTOL CLUB, INC., A Non-Profit Corporation,

Defendant-Appellee.

Filed December 26, 1984

4-412
83-1444

Appeal from the Iowa District Court for Pottawattamie County - J. C. Irvin, Judge.

Plaintiffs appeal from the trial court's ruling that defendant's use of its property as a shooting range did not constitute such a nuisance as to justify an injunction. REVERSED AND REMANDED.

Robert Schell and Richard W. Peterson of Peterson Law Offices, Council Bluffs, for plaintiffs-appellants.

Lyle A. Rodenburg, Council Bluffs, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

Plaintiffs appeal from the trial court's determination that defendant's use of property as a shooting range did not constitute such a nuisance as to justify a permanent injunction. Plaintiffs assert that (1) the trial court erred in dismissing their claim that the use of the property as a shooting range violated a county zoning ordinance; (2) the court should have enjoined defendant from using its property as a shooting range rather than merely ordering defendant to regulate the hours of the shooting range and install noise-baffling devices; (3) the court erred in allowing defendant to present testimony on certain matters after it failed to supplement its answers to interrogatories regarding the matters; and (4) the court erred in allowing submission of testimony of a defense witness who had no personal knowledge of the situation. We reverse and remand.

In 1976, the Council Bluffs Rifle and Pistol Club purchased a twenty-acre tract of land in Pottawattamie County for a shooting range. In 1982, nineteen property owners near the club's tract of land brought the present action to enjoin the shooting range as a common law and statutory nuisance, and as a violation of a county zoning ordinance.

At trial, defendant moved to dismiss inter alia Division III of the plaintiffs' petition, which set forth two alleged violations of the zoning ordinance. The trial court granted the motion. Following the trial, the court found that (1) the club had invested $25,000 for the land and "a considerable amount" in labor and materials for improvements to the land; (2) it had attempted to regulate the hours of use of the shooting range and had begun installing noise-baffling devices; and (3) the property owners and club members had not had any conflicts other than the noise problem and were thus able to co-exist. The trial court also ruled that the club's use of its property as a shooting range did not constitute such a nuisance as to justify an injunction. The trial court did, however, order the club to submit, within sixty days, plans for regulating the hours of the shooting range and for

installation of noise-baffling devices. The trial court retained jurisdiction to enter a supplementary order regarding these plans. The property owners have appealed.

I.

Before addressing the merits of the plaintiffs' claims, we find it necessary to discuss our subject matter jurisdiction over this action. Generally, an order must be final when an appeal is taken pursuant to Iowa R. App. P. 1. The standards for determining finality of a judgment were set forth in In re Marriage of McCreary, 276 N.W.2d 399, 400 (Iowa 1979):

> A ruling is not final when the trial court intends to do something further to signify its final adjudication of the case. Flynn v. Lucas County Memorial Hospital, 203 N.W.2d 613, 614-15 (Iowa 1973). When a ruling specifically provides for subsequent entry of a final judgment or decision, the ruling itself is not a final judgment or decision. Crowe v. DeSoto Consolidated School District, 246 Iowa 38, 40, 66 N.W.2d 859, 860 (1954).

Applying these standards, we conclude that the trial court's order was not final for purposes of appeal. It is clear from the order that the court intended to "do something further to signify its final adjudication of the case." The court ordered the rifle club to "take certain reasonable precautions and measures to minimize the sound or noise emanating from the firearms" and also "to submit a plan for a sound and noise baffling system." Jurisdiction was retained for the purpose of entering a supplemental order following a full and fair hearing on the plans submitted.

We recognize, however, that for purposes of appeal a case may have more than one final judgment. Green v. Advance Homes, Inc., 293 N.W.2d 204, 207 (Iowa 1980). In order to be considered a final order, the initial order must establish "the substantial rights of the parties and place beyond the issuing court the power to return the parties to their original positions." Id.

Plaintiffs characterize the lower court's order as concluding that a nuisance

exists and that injunctive relief is inappropriate. Were this the case, it is likely the initial order would be considered final even though the lower court had retained jurisdiction. However, we do not believe this characterization is proper. In its conclusions of law, the court stated:

> The [Plaintiffs] have failed to produce sufficient and competent evidence that the use of the land by [Defendant] as a firing range constitutes a nuisance or a danger to the health, safety and comfortable enjoyment of life and property to such an extent as to require an unconditional prohibition of the firing range on [Defendant's] property. This Court should exercise its equitable powers to cause the noise disruption by the [Defendant] to be minimized to an acceptable level. (emphasis added)

No actual finding was made that the plaintiffs had established the existence of a nuisance. Nor was any relief fashioned which conclusively established the relative rights of the parties. Rather, it was apparently the intention of the court to make a judgment in this respect after the rifle club had submitted the requested plans.

Our conclusion that the trial court's order was not final does not dispose of the jurisdictional issue. There remains a question of whether the plaintiffs' claims should be considered a proper appeal from an interlocutory order. Pursuant to Iowa R. App. P. 2, an appeal may be granted in advance of a final judgment upon a finding that the interlocutory ruling or decision "involves substantial rights and will materially affect the final decision and that a determination of its correctness before trial on the merits will better serve the interests of justice." We do not believe it would be in the interests of justice to consider the plaintiffs' claims at this juncture. Nor can it be said the substantial rights of the parties have been materially affected. Accordingly, we find that an appeal from the interlocutory order would be improper.

Our findings in this respect dispose of several of the plaintiffs' claims. Specifically, due to a lack of jurisdiction, we decline to consider the merits of the claim that the trial court erred in failing to issue an injunction. For similar reasons it would also be inappropriate to consider the plaintiffs' allegations of

error regarding admission of evidence at trial. However, we believe it would be proper to consider the plaintiffs' claim the trial court erred in directing a verdict on the issue of whether the use of the property as a shooting range violated a county zoning ordinance.

Ordinarily, in order for a decision of the lower court to be final it must conclusively adjudicate all the rights of the parties. Shoemaker v. City of Muscatine, 275 N.W.2d 206, 208 (Iowa 1979). Yet the supreme court has recognized:

> [I]t is possible for an order to put it beyond the power of the court to return the parties to their original positions even though it does not conclusively adjudicate all the rights of the parties.

Lyon v. Willie, 288 N.W.2d 884, 887 (Iowa 1980). In this situation, the requirement of full adjudication gives way.

> Two final orders are possible in a single case, one putting it beyond the power of the court to put the parties in their original positions in relation to a specific issue, and the other adjudicating remaining issues in the case.

Id. at 888.

We believe the plaintiffs' claim with respect to the county zoning ordinance falls within these principles. Due to the dismissal of plaintiffs' claim, it is beyond the power of the court to put the parties in their original positions. Accordingly, we reach the merits of this issue.

II.

In Division III of their pleadings, plaintiffs claimed the zoning ordinance was violated in two respects: (1) defendant operated and maintained a conditional use without proper authority, and (2) that the operation caused a sound in excess of prescribed limits.

With respect to the first allegation, the court stated that there was no violation in view of a March 2, 1979 ruling. The prior action involved a dispute between the rifle club and Pottawattamie County. Shortly after the club began

using its property as a rifle and pistol range, area residents complained to local authorities concerning the use of the property. The local zoning authorities informed the club that its use of the property must cease until proper zoning could be obtained. On March 14, 1978, defendant filed a Petition for Declaratory Judgment seeking to have the court declare the county's action illegal and invalid. On March 2, 1979, a default judgment was entered against the county granting injunctive relief. The court stated that use of the property for a firing range was not illegal and the zoning ordinance was "not applicable by way of its terms to bar the club's use of the premises."

In the present action, the court dismissed the plaintiffs' claim reasoning that it had previously determined "that the activities under the prior zoning ordinance [were] lawful" and, "therefore, [remain] lawful under the new amended ordinance according to its terms."

The court also dismissed the plaintiffs' claim that the rifle club's activities violated a section of the county ordinance which controls sound in excess of prescribed limits. However, this claim was not dismissed because of the prior ruling. Rather, the court reasoned:

> Although evidence has been offered by the Plaintiffs concerning the measurement of the sounds emitted by and from the Defendant's property there is no competent evidence in the record . . . to relate that to the provisions of the County Ordinance which effect and control those sounds.

On appeal, the plaintiffs claim that trial court erred in directing a verdict on "Division III" of plaintiffs' petition. This would suggest that plaintiffs dispute the court's treatment of <u>both</u> alleged violations of the Zoning Ordinance. However, the argument on appeal dealt solely with the court's reliance on its 1979 ruling. No arguments were raised regarding the sufficiency of evidence to support a claimed violation of the sound control portion of the ordinance. Since this was not raised on appeal, we decline to disturb the court's decision in this respect.

Rather, our discussion will be limited to a determination whether the trial court erred in relying on its 1979 ruling as a basis for dismissing the plaintiffs' claim that defendants did not have the proper authority to use the land as a shooting range.

In relying on its 1979 ruling, it is apparent that the court dismissed the plaintiffs' allegations of improper use pursuant to the doctrine of collateral estoppel or issue preclusion. We agree with plaintiffs' assertion on appeal that this was in error.

> Before issue preclusion may be employed in any case, four prerequisites must be established: "(1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment."

Aid Insurance Co. (Mutual) v. Chrest, 336 N.W.2d 437, 439 (Iowa 1983) (quoting Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981)) (emphasis added). The trial court's 1979 ruling that the use of the land was proper involved the same issue that was raised by the plaintiffs in this action. However, the prior judgment was entered by default. Collateral estoppel is usually not available in default cases because the issue has not actually been litigated. Lynch v. Lynch, 250 Iowa 407, 412, 94 N.W.2d 105, 109 (1959). In Jordon v. Stuart Creamery, Inc., 137 N.W.2d 259, 265 (Iowa 1965), the supreme court stated:

> For collateral estoppel to apply, the particular matter must have been considered and passed upon. It, therefore, cannot apply unless there is an actual trial.

In accordance with these principles, we conclude that the trial court erred in dismissing the claimed violations of the zoning ordinance.

Our holding in this action is two-fold. We reverse and remand for a new trial to determine whether the zoning ordinance provisions were violated. With respect to the nuisance claim, the defendant club should comply with the trial court order and submit plans for regulating the hours of the shooting range and for

installing noise-baffling devices. Upon submission of the plans, the trial court should enter a supplemental order following a hearing on the plans submitted. We do not mean to suggest nor imply what the solution should be nor are we deciding on the merits.

REVERSED AND REMANDED.