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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DARYL CLIPPERTON and **BEVERLY CLIPPERTON,**	)	
Plaintiffs-Appellees/ Cross-Appellants,	)	Filed December 23, 1986 68
vs.	)	
IOWA FUEL & MINERALS, INC.,	)	6-228 / 85-1060
Defendant-Appellant/ Cross-Appellee.	)	

Appeal from the Iowa District Court for Marion County (No. 21509) Jack D. Levin, Judge.

Defendant appeals and cross-appeals and plaintiffs cross-appeal from a district court finding that defendant's coal-washing plant constituted a nuisance. **AFFIRMED AS MODIFIED.**

John R. Sandre and Pamela D. Griebel of Scalise, Scism, Sandre & Uhl, Des Moines, and Boyd W. Boehlje of Gaass, Klyn & Boehlje, Pella, for defendant-appellant/cross-appellee.

James Q. Blomgren of Clements, Blomgren & Pothoven, Oskaloosa, for plaintiffs-appellees/cross-appellants.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J. 63

Defendant appeals and cross-appeals and plaintiffs cross-appeal from a district court finding that defendant's coal-washing plant constituted a nuisance. The district court awarded monetary damages to the plaintiffs and also enjoined the operation of defendant's plant. Subsequent to defendant's filing of its notice of appeal, the district court stayed the injunctive relief, permitting defendant to continue operations pending appeal under certain delineated conditions. The defendant contends that the evidence did not support the court's finding that the operation of its plant constituted a nuisance and that the injunctive relief was excessive. The defendant also contends the district court erred by refusing to hold an additional hearing to let the defendant present evidence on whether the plant could be operated in a manner which would not constitute a nuisance. The plaintiffs also cross-appeal, contending that the district court should have awarded them damages on an additional theory of trespass and should have also awarded them special damages. We affirm as modified.

Plaintiffs Daryl and Beverly Clipperton have owned and occupied their house in rural Marion County since 1969. In 1980, Iowa Fuel & Minerals, Inc. built a coal-washing facility near the Clipperton house. The purpose of the coal-washing facility is to remove sulphur and other impurities from raw coal so that the coal will burn more efficiently and will meet federal pollution control regulations. Since the coal-washing facility began to operate in 1980, the Clippertons have complained repeatedly to Iowa Fuel and state and federal environmental protection agencies about coal dust, noise, and heavy truck traffic. The Clippertons complained that the cumulative effects of the plant's operations effectively prevented them from enjoying their home. On June 28, 1982, the Clippertons filed the present suit against Iowa Fuel; the Clippertons asserted theories of nuisance and trespass and sought injunctive relief and money damages.

After a hearing, the district court awarded the Clippertons money damages of $3,510, based on a finding that the facility's operation had reduced the fair rental value of the Clippertons' property by $65 per month. The district court based this money damage award on a nuisance theory; the court declined to award any damages on the trespass theory, stating that such an award would be duplicative. In addition, the district court's ruling enjoined the operation of the coal-washing facility in its present location. However, after Iowa Fuel's notice of appeal was filed, the district court stayed the injunction providing that Iowa Fuel met certain conditions relating to the operation of the facility. Specifically, the stay order permitted the defendant to remain in operation provided the following conditions were met:

> (1) There shall be a daily watering of the coal facility including the apron and the entrance to the coal facility and the same shall also be done on weekends and holidays.
>
> (2) No vehicular traffic of any type relating to the operation of the coal facility shall pass in front of the Clipperton residence at any time, including but not limited to tandem axle dump trucks, semi-trailer trucks, and "honey wagons" or "honey dippers."
>
> (3) No operation of the facility or any of its attendant activities shall occur when the wind blows from the east or northeast.
>
> (4) The coal facility shall be in operation, including the loading and/or unloading of trucks, only during the hours of 8:00 a.m. to 7:00 p.m., Monday through Friday.
>
> (5) There shall be no operation of the facility, including loading and/or unloading of trucks, on weekends or holidays.

Paragraph four was subsequently modified by providing that the plant's coal-washing and end-loader operations could occur only between the hours of 12:00 noon and 5:00 p.m., Monday through Friday, and that the loading and unloading

of trucks would be permitted during the hours of 8:00 a.m. to 7:00 p.m., Monday through Friday.

Pursuant to Iowa Code section 657.1 (1985), a party may bring an action to enjoin a nuisance and for damages either in equity or at law. Woody v. Machin, 380 N.W.2d 727, 731 (Iowa 1986). The plaintiffs in the present case brought the present action at law. Our scope of review is therefore limited to the correction of errors at law and not de novo. Iowa R. App. P. 4. The trial court's findings are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We view the evidence in a light most consistent with the judgment. Menzel v. Morse, 362 N.W.2d 465, 470 (Iowa 1985). Our deference to the trial court's findings of fact does not, however, extend to its determination of law. Id.

We first examine defendant's argument that there was insufficient evidence to support the trial court's finding that defendant's coal-washing operation constituted a nuisance.

The principles governing our consideration of nuisance claims have long been established. It is axiomatic that one's use of property should not unreasonably interfere with or disturb another's comfortable and reasonable use and enjoyment of his or her estate. Page County Appliance Center v. Honeywell, 347 N.W.2d 171, 175 (Iowa 1984); Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 562 (Iowa 1972). In considering a claim that a given operation constitutes a nuisance and therefore interfere's with a person's use or enjoyment of his property, we must first determine whether a nuisance exists. If that question is determined in favor of the plaintiffs, it must then be ascertained whether injunctive relief is appropriate. Helmkamp v. Clark Ready Mix Co., 241 N.W.2d 126, 129 (Iowa 1974). These are distinct inquiries, and an affirmative finding with respect to the nuisance claim does not necessarily mandate the award

of an injunction. Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 723-24, 82 N.W.2d 151, 159 (1957).

The starting point of our examination must begin with Iowa Code section 657.1 (1985). Section 657.1 defines a nuisance as anything that "is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property . . . ." Section 657.2 is pertinent in declaring as a nuisance "[t]he erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals . . . ."

The above statutory enumerations, however, do not abrogate the common law application to nuisances. Bates v. Quality Ready Mix Co., 261 Iowa 696, 703, 154 N.W.2d 852, 857 (1968); Schlotfelt v. Vinton Farmer's Supply Co., 252 Iowa 1102, 1108, 109 N.W.2d 695, 698 (1961). The term "private" nuisance refers to an actionable interference with a person's interest in the private use and enjoyment of his land. Pottawattamie County v. Iowa Dep't of Environmental Quality, Air Quality Commission, 272 N.W.2d 448, 453 (Iowa 1978). The plaintiffs in the present case are alleging that defendant's coal-washing operation is a "private" nuisance. It therefore follows that if defendant's operation constitutes a nuisance, it is a "nuisance per accidens, or in fact"—in other words, a lawfully-conducted activity operated in such a manner as to be a nuisance. Honeywell, 347 N.W.2d at 175.

The fair test of whether the operation of a lawful trade or industry constitutes a nuisance is the reasonableness of conducting it in the manner, at the place, and under the circumstances shown by the evidence. Riter, 248 Iowa at 722, 82 N.W.2d at 158; Bates, 261 Iowa at 703-04, 154 N.W.2d at 857. Each

case must turn on its own facts, and ordinarily the ultimate issue is one of fact, not of law. Patz, 196 N.W.2d at 560-61; Bates, 261 Iowa at 704, 154 N.W.2d at 857. It is important to note, however, that priority of occupation and location are circumstances of considerable weight. Helmkamp, 214 N.W.2d at 129; Kriener v. Turkey Valley Community School Dist., 212 N.W.2d 526, 530 (Iowa 1973). In measuring the existence of a nuisance, the Iowa courts apply the standard of "normal persons in a particular locality." Patz, 196 N.W.2d at 561. The measure of monetary damages available to a plaintiff for a nuisance such as that alleged in the present case is the loss in the rental value of their property, together with any special damages shown. Earl v. Clark, 219 N.W.2d 487, 490 (Iowa 1974); Schlotfelt, 252 Iowa at 1115, 109 N.W.2d at 702.

Applying the aforementioned principles to the present case, we believe that the district court was correct in determining that defendant's coal-washing operation constituted a nuisance. The defendant, however, argues that they have taken many steps to alleviate the obnoxious noises, fugitive dust, sludge, and other unpleasant products emanating from their operation. Defendant points out that it has rerouted traffic away from the south entrance of the facility, which was directly opposite the plaintiff's residence. Defendant additionally points out that it has stepped up its sprinkling to alleviate the volume of coal dust and it has treated the road with calcium chloride. In support of its argument, defendant offered into evidence the testimony of Abie Davis, Marion County Engineer, and a neighbor, Raymond Slykhuis, both of whom testified that as a result of defendant's efforts, the gravel road in front of the plaintiff's residence has been greatly improved and that there is no longer a serious dust problem. Finally, the defendant points out that it is under a contract until 1990 to provide 100,000 tons of coal per year to Iowa State University and that if the plant operations are shut down, the defendant will be forced to forfeit a one-million-

dollar performance bond, will be forced to fire twenty employees, and would likely result in the forfeiture of $400,000 in reclamation bonds.

While we are cognizant of defendant's attempts in the five years prior to trial to remedy the numerous unpleasant and unhealthy emissions from its plant operations, defendant's arguments lose sight of the fact that from 1980, when the operations began, until the time of trial in 1985, the plaintiffs' use and enjoyment of their home was severely curtailed by defendant's operations. The record contains substantial evidence that throughout the time period in question the road dust and coal dust created by the trucks passing in front of plaintiff's property permeated their house and their surrounding land. Photographs introduced in evidence by the plaintiffs revealed that the dust settled on the plaintiffs' kitchen appliances, white house siding, and window sills. The garden maintained by the plaintiffs evidenced a black, greasy film on the vegetables and flowers. The sidewalk near their home was often so covered with dust that footprints were visible.

The plaintiffs have lived in their residence since 1969. Such priority of occupation militates strongly in favor of the plaintiffs. As the Iowa Supreme Court acknowledged in Higgins v. Decorah Produce Co., 214 Iowa 276, 281, 242 N.W. 109, 111 (1932), "[e]very property owner or person has a right to have the air diffused over his premises in its natural state and without being unduly impregnated with foreign substances, such as smoke, soot, noisome fumes and other offensive matters . . . ." While Iowa courts have recognized that urban and rural residents alike must endure those annoyances and discomforts ordinarily and necessarily incident to their particular environment, the coal dust, loud noises, and fumes emitted from defendant's operations are not ordinarily incident to the quiet, rural life in which plaintiffs live. The fact that the nuisance may exist only intermittently due to changes in wind direction does not prevent

a determination that the offending condition is, in fact, a nuisance, nor is it of importance that the defendant's operation was located in a tract zoned for such a purpose. See Kreiner, 212 N.W.2d at 535; Schlotfelt, 252 Iowa at 1108, 109 N.W.2d at 698. We therefore hold that there was substantial evidence in the record to support the trial court's determination that defendant's coal-washing plant constituted a nuisance.

Our inquiry, however, does not end with the finding of a nuisance. We must next determine whether the district court was correct in granting an injunction in the present case.

Under Iowa law, injunctions are considered to be an extraordinary remedy and are to be sparingly given and with great caution. Kreiner, 212 N.W.2d at 536. In cases involving a nuisance, an injunction will not be issued as a matter of course and should be decided on the facts of each particular case. Stockdale v. Agrico Chemical Co., Division of Continental Oil, 340 F. Supp. 244, 260 (S.D. Iowa 1972). An injunction against the maintenance of a nuisance is not mandated where adequate redress can be afforded by a monetary award, even where the fact of a nuisance is clearly established. Kreiner, 212 N.W.2d at 536.

In determining whether or not an injunction is appropriate to abate a nuisance, the Iowa courts have applied a "relative hardship" standard. Kreiner, 212 N.W.2d at 536. Pursuant to this standard, we must make a comparative appraisal of all factors in the case. Helmkamp, 214 N.W.2d at 130; Riter, 248 Iowa at 723-24, 82 N.W.2d at 159-60. The primary factors to be considered in appraising the appropriateness of an injunction are:

A. The nature of the interest to be protected;

B. The relative adequacy to the plaintiff in bringing suit;

C. Any reasonable delay by plaintiff in bringing suit;

D. Any unrelated misconduct on the part of the plaintiff;

E. The relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied;

F. The interests of third persons and of the public;

G. The practicability of framing and enforcing the order and judgment.

To justify the abatement of a claimed nuisance, the annoyance must be such as would cause physical discomfort or injury to an average person of ordinary sensibilities. Helmkamp, 214 N.W.2d at 130. In the final analysis, for each given case in which a nuisance is shown, the determination of whether injunctive relief should be granted or the objectors relegated to damages is ultimately a judgment call. Helmkamp, 214 N.W.2d at 130.

In the present case, the district court, upon careful consideration of the applicable principles of law and upon a comparative appraisal of all the attendant facts, determined that while the defendant had made attempts to alleviate the nuisance, especially road dust, the plaintiffs still were subjected to dust and noise from the coal-washing facility. The district court therefore granted an injunction prohibiting defendant from operating its coal processing plant in its present location. Subsequent to the granting of the injunction, on July 23, 1985, the defendant's attorney informed the district court, at a hearing to determine the conditions and amount of a supersedeas bond, that defendant had filed a notice of appeal. Because both parties and their attorneys were present, the court proceeded to hold a hearing on whether the district court had jurisdiction to stay the injunction. Upon a review of the parties' briefs, which discussed whether the court had jurisdiction to stay the injunction and what conditions could be prescribed, the district court on August 5, 1985, granted a stay of the injunction and set forth specific rules regarding the operations of defendant's

facility. On August 16, 1985, the district court modified the stay order providing stricter controls on the hours in which defendant could operate his facility.

The defendant argues that the injunctive relief granted by the district court was not supported by substantial evidence and that it was excessive under the facts and conditions of this case. Defendant also contends that the district court erred in denying defendant's request to hold a hearing before the granting of the injunction to determine alternative methods of remedying plaintiffs' complaints.

Addressing defendant's argument that the district court erred in refusing to hold a hearing before the injunction was granted, we initially note that it is proper, where a nuisance arises from the manner in which property is used, to afford defendant an opportunity before the issuance of an injunction to change such use so it will not amount to a nuisance. Amdor v. Cooney, 241 Iowa 777, 785, 43 N.W.2d 136, 138 (1950). The record in the present case reveals, however, that the defendant was aware of plaintiffs' complaints for five years. The plaintiffs diligently sought to settle the matter without resorting to legal action, but were met with frequent frustration along the way. The defendant was aware of the neighborhood conditions and the prevailing winds and weather conditions, and was obviously aware that its facility could pose problems for the plaintiffs. After five years of attempts to alleviate the noise and dust, such unpleasantries still remained. The defendant certainly had an opportunity to address the issue of what alternatives could be implemented to avoid an injunction at the July 23, 1985, stay hearing, which was even subsequent to the district court's earlier denial of such a hearing. The district court obviously believed, and we agree, that the defendant had been afforded ample opportunities to find alternative methods of operation which would have been effective. We therefore hold that

the district court was correct in denying defendant's application for a hearing on the merits of alternative methods of operation.

We do not believe, however, that defendant should be permanently enjoined from operating its coal-washing facility. The defendant has a ten-year contract to supply 100,000 tons of coal to Iowa State University. If the defendant were forced to close down its operation, it would be forced to forfeit a performance bond in the amount of $1,000,000 to Iowa State University. The testimony of Bryce Dahm, shareholder and officer of the defendant, reveals that due to the high sulphur content of Iowa coal, there is no market for such coal that has not been washed. According to Mr. Dahm, if the coal-washing facility is shut down, the defendant's entire mining operation would also close. Twenty employees would also be out of work, and defendant would likely lose $400,000 in reclamation bonds. Mr. Dahm also testified that finding a new coal-washing facility could take up to two years and cost $200,000.

The record also reveals that while the plaintiffs are still awakened by loud noises from defendant's trucks in the very early morning hours and that they still experience some dust on their property, the situation has improved. Because the defendant has attempted to alleviate the problems resulting from the coal-washing operations and because the plaintiffs testified that the situation has improved, we do not believe that at this time the gravity of the harm resulting from defendant's operation outweighs the utility of defendant's conduct so as to require the granting of a permanent injunction. It is, however, apparent from this opinion that consideration of the plaintiffs' problems would dictate that the defendant give them serious attention and consideration.

As the Iowa Supreme Court noted in Helmkamp v. Ready Mix, 214 N.W.2d 126, 130 (Iowa 1974), one of the remedies available to us is to grant an injunction relating to the manner of operating the plant, rather than granting an all-encom-

passing injunction or relegating the plaintiffs to mere damages. The district court order of August 5, 1985, apparently was cognizant of this remedy when fashioning a set of conditions upon which the defendant could continue operating pending appeal. We believe that those conditions set forth by the district court in its orders dated August 7, 1985, and August 16, 1985, are fair and practical under the circumstances of this case. We therefore vacate the stay order dated August 7, 1985, and modify the injunction granted by the district court in its ruling dated May 13, 1985, by permitting the defendant to maintain and operate its coal-washing facility and enjoining the defendant from operating its facility in any manner except as provided by the conditions set forth in the district court's rulings dated August 7 and 15, 1985. We caution the defendant, however, by noting that the conditions we have adopted today are by no means complete and that, should conditions worsen, further injunctive relief may be necessary.

The plaintiffs, in their cross-appeal, contend that the trial court erred in failing to award them special or compensatory damages and that the court erred in denying damages on the theory of trespass. We disagree.

The district court, in its ruling on May 10, 1986, found that it was unnecessary to consider the trespass claim because any award for trespass would be duplicative of an award for nuisance. The court also advised the parties in its response to the plaintiffs' motion for enlargement of findings that it had elected remedies in choosing to deny an award on the basis of trespass. The court stated that because an award on the basis of a nuisance could place the plaintiffs in the same position they were in prior to the nuisance and since the defendant would encounter costs and expenses in doing so, it would be unfair to award damages for trespass.

The general measure of damages for a trespass to real property depends upon whether the injuries sustained are subject to repair. White v. Citizens

Nat. Bank of Boone, 262 N.W.2d 812, 817 (Iowa 1978). If repair is possible, the measure of damages is the amount necessary to restore the property to its former condition. Id. If repair is not possible, the measure of damages is the difference in the value of the property before and after the trespass. Id. Thus, where evidence in the record discloses that property damaged in trespass could be prepared, the trial court could properly refuse to permit damages to be measured by the before and after test. Id. Where the alleged trespass is of a continuing nature, as in the present case, the measure of damages is the reduction in the rental value of the property, not the difference in market value before and after the trespass. Hagenson v. United Telephone Co. of Iowa, 209 N.W.2d 76, 80 (Iowa 1973); 87 C.J.S. § 119.

Therefore, in the present case, the measure of damages under either the nuisance or trespass theory would be the reduction in the rental value of the property during the time the alleged interference continued. The district court noted that the defendant's recent attempts to alleviate the problems had improved the amount of noise and dust settling on plaintiffs' property and the plaintiffs so testified. Plaintiffs' own witness, Tom Richards, the realtor who examined plaintiffs' property, testified that elimination of the truck traffic in front of plaintiffs' home would eliminate most of the rental loss. Based on these facts, we believe the district court was correct in denying duplicative damages based on trespass.

We also believe the district court was correct in denying special or punitive damages. Exemplary damages are not awarded as a matter of right, but rather are granted at the discretion of the finder of fact. Honeywell, 347 N.W.2d at 179 (citing Feeney v. Scott County, 290 N.W.2d 885, 892 (Iowa 1980)). Their award depends upon whether the facts of the particular case support the granting of exemplary damages to punish an offending party. Meyer v. Nottger, 241

N.W.2d 911, 912 (Iowa 1976). This determination depends upon the existence of malice—either actual or legal. Feeney, 290 N.W.2d at 892. To show legal malice, a party must show wrongful or illegal conduct committed or continued with a willful or reckless disregard of another's rights. Earl, 219 N.W.2d at 491. Upon a careful review of all the facts in the present case, we do not believe that defendant's conduct falls within the scope of either actual or legal malice, and we therefore hold that the district court was correct in denying special or punitive damages.

AFFIRMED AS MODIFIED.