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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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**JOSEPH VALASEK, MILDRED VALASEK, EUGENE ADAMS,** and **LAURA ADAMS,**

Plaintiffs-Appellants,

vs.

**RICHARD BAER,**

Defendant-Appellee.

Filed September 25, 1986

6-266
85-1785

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Appeal from the Iowa District Court for Mitchell County (No. 12494) - Ralph F. McCartney, Judge.

Plaintiffs appeal from judgment in a nuisance action denying their request for injunctive relief, asserting that the evidence was sufficient to establish their right to permanently enjoin defendant from spreading hog manure on a portion of his neighboring farm property. **AFFIRMED.**

Alfred A. Beardmore, Charles City, for plaintiffs-appellants.

James E. O'Donohoe of O'Donohoe, O'Connor & O'Donohoe, New Hampton, for defendant-appellee.

Considered en banc.

**DONIELSON, J.**

The defendant to this action, Richard Baer, is the owner of approximately 400 acres of farmland located in rural Mitchell County, Iowa. Richard's property is essentially bisected by a county road which runs north and south, and which leaves approximately 213 acres of his land to the east and approximately 170 acres to the west. The residences of plaintiffs Joseph and Mildred Valasek and of plaintiffs Eugene and Laura Adams front the county road opposite and south of Richard's residence on the west side. The Adamses' home is approximately one-fourth of a mile south of the Valaseks. Richard's property borders that of the Adamses on the north, west, and south and that of the Valaseks on the south and west. This property comes to within 120 feet of the Valasek home on the south. The closest point of the property to the Adams home is approximately 365 feet on the west. Richard's land to the east of the county road comes to approximately 150 feet of the plaintiffs' homes.

Richard maintains a hog confinement operation on his land east of the county road. He runs approximately 900 hogs through this operation each year with from 250 to 300 hogs being in confinement at any given time. The operation consists of farrowing houses, a nursery, and a finishing building. The nursery building is established over a pit which contains approximately 6,000 gallons of storage for manure and waste. The finishing building is a semiclosed building maintained over a concrete storage pit with approximately 40,000 gallons of storage for manure and waste. It is the disposition of this manure and waste which gives rise to the present controversy.

Richard began the nursery operation in 1976 with the finishing building and pit operation commencing in either 1979 or 1980. Richard has been engaged in farming at his present location since 1960 or 1961 and bought the land on the west side of the county road from the Adamses in 1967. The Adamses had

owned that land, part of which they retained for a homestead, since 1943. The Valaseks have lived at their present location since 1970. The Valaseks are engaged in farming; the Adamses are retired from that occupation.

As Richard's hog confinement is essentially a year-round operation, the manure and waste from these pits must be emptied from time to time. The smaller pit under the nursery is emptied at six to eight week intervals, whereas the larger finishing building pit is emptied two to four times a year. The pits are emptied by means of a vacuum wagon, and the waste is then deposited upon Richard's fields, including the property described above as being adjacent to the property of the plaintiffs in this case.

The area of land upon which the manure and waste are deposited vary from time to time, depending upon economics, soil conditions, weather, and crop rotations, plantings, and harvestings. The manure is applied to the land by the vacuum wagon, which spreads it in fifteen-foot-wide bands. After it is spread, the manure is incorporated into the fields by the use of a chisel plow which turns over the ground upon which the manure has been spread.

The present controversy concerns Richard's spreading of manure on that part of his property which is in relatively close proximity to the Adams and Valasek homes. The plaintiffs allege that the odors from the manure deposited on the land surrounding their homes is so offensive that it amounts to a private nuisance. As such, they seek both an injunction prohibiting the defendant from spreading the manure there and damages. The district court bifurcated the case with this appeal being from that court's denial of injunctive relief. Our review is de novo. Iowa R. App. P. 4. We give weight to the district court's findings of fact, particularly when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

In analyzing cases of this type, courts in this state follow a two-step procedure. The initial task is to determine whether plaintiffs are correct in their allegations that 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., 214 N.W.2d 126, 129 (Iowa 1974). It is important to recognize that these are distinct inquiries and an affirmative finding with respect to the initial question does not mandate the award of an injunction. Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151, 159 (Iowa 1957).

Iowa Code section 657 (1985) sets forth the definition of a nuisance and the criteria under which a nuisance may be established. 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 essentially to interfere with the comfortable enjoyment of life or property . . . ." Though section 657 aids in focusing our analysis, this and other sections of The Code do not modify the common law application to nuisances. Bates v. Quality Ready-Mix Co., 261 Iowa 696, 703, 154 N.W.2d 852, 857 (Iowa 1968). A "private nuisance," as alleged in the present case, is "an actionable interference with a person's interest in the private use and enjoyment of his land." Id. at 703, 154 N.W.2d at 857. The legal protection provided recognizes the fact that "[o]ne must use his own property so that his neighbor's comfortable and reasonable use and enjoyment of his estate will not be reasonably interfered with or disturbed." Id. The Iowa Supreme Court has stated that a fair test as to whether a given operation constitutes a nuisance is the reasonableness of conducting it in the manner, at the place, and under the circumstances in question. Schlotfelt v. Vinton Farmer's Supply Co., 252 Iowa 1102, 1108, 109 N.W.2d 695, 698 (Iowa 1961); Riter, 248 Iowa at 722, 82 N.W.2d at 158. Important considerations in determining whether a nuisance exists include priority of location, the nature of the neighborhood,

and the wrong complained of. Helmkamp, 214 N.W.2d at 129. Under some circumstances and in some locations, a lawfully-operated business may so interfere with comfortable use and enjoyment of private property as to constitute a nuisance. Kriener v. Turkey Valley Community School District, 212 N.W.2d 526, 530 (Iowa 1973); Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 561 (Iowa 1972). The existence of a nuisance is not affected by the intention of its creator, and a nuisance may be found even though its creator has used the highest possible degree of care to prevent or minimize the effect. Page County Appliance Center, Inc. v. Honeywell, Inc., 347 N.W.2d 171, 175 (Iowa 1984). Ultimately, the question of whether a nuisance exists is one of fact, not of law, and depends upon all the attendant circumstances of each individual case. Patz, 196 N.W.2d at 561.

In the present case, the trial court bifurcated the case into two proceedings, one for damages and one requesting injunctive relief, the denial of which we are now asked to review. For purposes of denying injunctive relief, the trial court apparently assumed the existence of a nuisance. In its order denying injunctive relief, the trial court decreed that "the application of these Plaintiffs for an injunction to abate a purported nuisance by prohibiting Defendant from distributing animal waste upon farmland owned by him . . . is hereby overruled and denied" (emphasis added). The question before us is therefore only whether the trial court erred in denying the injunctive relief requested by the plaintiffs. Even assuming, however, as did the trial court, that defendant's confinement operations constituted a nuisance, we find that the trial court was correct in denying injunctive relief.

Under Iowa law, injunctions are considered to be an extraordinary remedy and are to be sparingly given and with great caution. Kriener, 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 Co., 340 F. Supp. 244, 260 (S.D. Iowa 1972).

In determining whether or not an injunction is appropriate to abate a nuisance, the Iowa courts apply a "relative hardship" standard. Kriener, 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 following primary factors are to be considered in appraising the appropriateness of an injunction:

> A. The nature of the interest to be protected;
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> B. The relative adequacy to the plaintiff of injunction and other remedies;
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> C. Any unreasonable delay by plaintiff in bringing suit;
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> 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.

Restatement (Second) of Torts § 936 subsection 1 (1979).

An injunction is not mandated where adequate redress can be afforded by a monetary award even though the nuisance be clearly shown. Kriener, 212 N.W.2d at 536. Therefore, 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. The fact that a nuisance is intermittent due to changing seasons or wind direction variations will not alone prevent the granting of injunctive relief or damages. Kriener, 212 N.W.2d at 535. 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, we do not dispute the fact that the odors emitting from the spreading of hog manure are offensive. The record contains testimony referring to the odors as "awful," "putrid," "nauseating," and "very bad." We believe, however, that the thoroughly agricultural nature of the rural area militates against the granting of an injunction.

It is axiomatic that every property owner or person has an inherent right to have the air diffused over his premises in its natural state and without being unduly polluted with foreign substances such as smoke, soot, fumes, or other impurities. Higgins v. Decorah Produce Co., 214 Iowa 276, 281, 242 N.W. 109, 111 (1932). However, our courts have long held that the residents and property owners living in a rural setting must endure those annoyances and discomforts ordinarily and necessarily incident to rural life. Id. at 281-82, 242 N.W. at 112. As the Iowa Supreme Court stated in Schlotfelt v. Vinton Farmers' Supply Company, 252 Iowa 1102, 1109, 109 N.W.2d 695, 699 (1961), "the right of a person to pure air may be surrendered in part by his election to live in a location that is already occupied by business or industry which fouls the air with smoke, gas, soot or other impurities." The Valaseks and Adamses, however, point out that they resided in the area some years prior to Richard's commencement of his hog confinement operations. We, of course, have acknowledged that a person has a considerably greater right to protest against the conduct of a business or other operation in an area where he or she has established his or her home with no knowledge that such an invasion is contemplated or may be attempted in the future. Schlotfelt, 252 Iowa at 1109, 109 N.W.2d at 699. While we recognize that priority of occupation is to be given considerable weight, the hog confinement operation in the present case is not a radical departure from the

nature of the area in which the plaintiffs reside, unlike the situation where a factory is built within a strictly peaceful, residential area. The hog confinement operation is but a technological evolution of farming practices that have been used in this area for over a hundred years.

The testimony elicited from the plaintiffs at trial establishes that odors complained of were not continuous, but either occurred from two to five times a year and lasted from a few to ten days each time the manure was applied to Richard's farmland. The record also reveals that the odors, while initially quite strong, dissipated considerably during these periods in question. While such an intermittent nature of the odors does not per se bar the Valaseks' and Adamses' right to relief, such facts may be properly considered when balancing the relative hardships of the parties. Ray Crammond, a consulting engineer specializing in livestock waste management who had inspected Richard's operations, testified that Richard's operations appeared to be very well managed and that Richard's method of discing the liquid manure into the soil was the standard accepted procedure for such operations. Crammond also testified that the spreading of liquid manure is an innovative method of returning nutrients to poor farmland without increasing the possibility of water pollution due to chemical runoff.

Richard testified that his decision as to where to spread the manure is based upon such factors as economics, soil conditions, weather, crop rotations, and harvests. He further testified that all of his fields were used for spreading manure except for those farthest away, due to economic constraints and difficulty of access. Witness Crammond testified that 175 acres of farmland would be needed for the disposition of the waste from Richard's 300 to 400 head of swine he raises at any given time.

From an appraisal of all the attendant facts, and after considering the hardships of both parties, we conclude, as did the trial court, that an injunction in the present case would be an inappropriate remedy. Plaintiffs' petition would in effect enjoin Richard from spreading manure on approximately 170 acres, or 44% of his total acreage. To deny Richard the use of 44% of his land for the spreading of manure in an historically agricultural area would inject additional hardships on his confinement operations.

Though we are mindful of the unpleasantries the plaintiffs have experienced, we note that hog confinement operations have increasingly become a part of life in rural Iowa. There are nearly 60 hog confinement operations in Mitchell County alone and several are located within close proximity to the Valaseks' and Adamses' homes. While a different set of circumstances may require that an injunction be issued, we do not believe the granting of an injunction is appropriate in the present case.

**AFFIRMED.**

All judges concur except Snell and Schlegel, JJ., who dissent.

**SNELL, J.** (dissenting)

As I am of the opinion that the equities of the present case tip the balance in favor of the granting of an injunction, I respectfully dissent. There seems to be little dispute in this case that the odors emitted from manure are offensive, that they are carried onto plaintiffs' property and into their homes and that the odors severely interfere with the plaintiffs' life-styles and enjoyment of their homes. This court has been presented with no evidence rebutting the presumption that plaintiffs are of ordinary sensibilities.

The nature of the plaintiffs' interest, that being the comfort and enjoyment of their homes subject to the normal inconveniences of rural life, is, I think, of the highest import. To relegate these plaintiffs to a suit for damages is inappropriate in this situation. As the Supreme Court of Iowa stated in Kriener v. Turkey Valley Community School District, 212 N.W.2d 526, 537 (Iowa 1972):

> If plaintiffs were compelled to institute actions from time to time for odor-related damages the burden thus imposed would be so onerous as to deny them adequate relief.

The defendant argues on appeal that the injunction, if issued in this case, would prevent him from operating his confinement operation. I find no evidence in the record to support this claim. Baer testified he had land which, at the present time, was not being used for the spreading of manure because "of economic times" and because it would entail a trip approximately one-quarter of a mile longer than the haul to the land surrounding the Valaseks' home. I think that, on balance, this burden is less weighty than that which a denial of injunctive relief would impose upon the plaintiffs.

The majority determines today, however, that "the thoroughly agricultural nature of the rural area [involved here] militates against the granting of an injunction." In support of this conclusion, the majority advances several argu-

ments. First of all, the majority appears to hold that these plaintiffs waived their claim to an injunction here when they elected to live in their present rural location. The majority cites Higgins v. Decorah Produce Co., 214 Iowa 276, 281, 242 N.W. 109, 111 (1932), in support of the proposition that "our courts have long held that residents and property owners living in a rural setting must endure those annoyances and discomforts ordinarily and necessarily incident to rural life." The majority's reliance on this authority is misplaced in two respects. First, Higgins dealt with an urban, not rural, setting and at no point discusses the accommodations rural residents must make to their environment. In addition, the cited authority from Higgins dealt with the issue of whether a nuisance has been shown and not with the present issue of whether, assuming the existence of a nuisance, injunctive relief is appropriate. Apart from my disagreement with the majority's legal analysis on this point, I also part with the court on the facts. I think that the spreading of highly-offensive wastes to within 120 feet of the Valasek home and to within 365 feet of the Adams home, along with the consequential and undisputed injury to their life-styles, is not among the necessary incidents of rural life.

The majority attempts to bolster this argument by dismissing the plaintiffs' contention that they enjoyed priority of occupation. The majority appears to argue that since the rural nature of the area predated the plaintiffs' residence there and since "the hog confinement operation in the present case is not a radical departure" from that nature, the plaintiffs did not, in fact, enjoy priority of occupation. I disagree.

Plaintiff's expert witness, Dr. Oliver H. Peterson, a microbiologist, testified to the radical differences in the chemical processes associated with the break-down of animal wastes in a modern hog-confinement operation as opposed to those in a normal barnyard operation. Contrary to the normal barnyard, the

hog-confinement situation does not combine the wastes with an agent, such as straw, that stabilizes the chemical breakdown. As a result, the odor from confinement pit wastes is much worse than that from the normal barnyard. This difference was also testified to on deposition by Ray H. Crammond, a consulting engineer in agricultural engineering, who appeared at trial on behalf of Baer. That this distinction is not peculiar to the present fact pattern is evident from the expert testimony adduced at trial as well as from the literature. See, Note, "Ill Blows the Wind that Profits Nobody": Control of Odors From Livestock Confinement Facilities, 57 Iowa L. Rev. 451 (1971); Herrick, Man-Animal Relationship in Iowa's Environment, Environmental Health and Pollution Control—Proceedings of Six Public Forums 5 (Iowa State University Cooperative Extension Service No. PM-486, March, 1970) ("Iowa's biggest air pollution problem in the next decade may center around the control of odor from animal [confinement] units."). To dismiss plaintiffs' priority of occupation argument by calling the neighboring confinement operation merely "a technological evolution of farming practices that have been used in the area for over a hundred years" is simply to blink at reality.

The majority next notes that Baer's operations were found to be well managed and that they followed standard accepted procedures for such operations. Not only is this information irrelevant to the factors set forth by the majority and our prior cases to be considered in appraising the appropriateness of an injunction, it is also irrelevant to the nuisance inquiry in general. The cases clearly show that actions such as the present one are not predicated on negligence. Kriener, 212 N.W.2d at 531.

Finally, while I agree with the majority that granting the injunction here would inject additional complexities into Baer's confinement operation, I note that this is only one-half of the appropriate inquiry. The Restatement (Second)

of Torts analysis mandates an inquiry into the relative hardship resulting to Baer if an injunction is granted and to the plaintiffs if denied. This comparative inquiry convinces me that an injunction is appropriate. The record contains testimony referring to the odors emitted by the spread manure as "awful," "offensive," "very bad," "nauseating," and "putrid." Baer's expert witness, Crammond, testified that the odors would be offensive to an average person in the area. Likewise, the testimony establishes, and the district court found, the odors were significantly worse than normal animal waste odors. The plaintiffs testified that these odors permeated their automobiles, drapes, carpet, and clothing. The Valaseks were forced to cover their clothing and toiletries with plastic bags in an attempt to avoid this permeating effect. Mildred Valasek and Genevieve Walters, a witness for the plaintiffs, testified that the odors resulted in them becoming physically ill. Several witnesses testified that the odors prohibited their visitation to the Valasek home.

I think the equities of the situation call for an injunction. I would reverse the district court and allow the injunction to issue.

Schlegel, J., joins this dissent.