

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 2 1985

WILLIAM H. TAYLOR and
DOROTHY J. TAYLOR,

560 CLERK SUPREME COURT

Plaintiffs-Appellees/
Cross-Appellants,

Filed June 25, 1985

vs.

LINDA A. BRACHT and
JAMES L. MEYER, A Partnership, d/b/a
KAR KLEANERS COMPANY,

5-211
84-1000

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Defendants-Appellants/
Cross-Appellees.

Appeal from the Iowa District Court for Woodbury County - Richard J.
Vipond, Judge.

Defendants appeal from the district court decree which enjoined them from
operating their car wash from 11:00 p.m. until 7:00 a.m., enjoined the use of
unshielded lights, and awarded plaintiffs damages. AFFIRMED IN PART; REVERSED
IN PART; INJUNCTION VACATED.

Jeffrey A. Sar and Gregory N. Lohr of Carter, Sar, Edmonds, and Green,
Sioux City, for defendants-appellants.

Robert R. Eidsmoe and Ann E. Brenden of Eidsmoe, Heidman, Redmond,
Fredregill, Patterson & Schatz, Sioux City, for plaintiffs-appellees.

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

SCHLEGEL, J.

Defendants appeal from the district court decree which enjoined defendants from operating their car wash from 11:00 p.m. until 7:00 a.m., enjoined the use of unshielded lights and awarded plaintiffs damages. Defendants assert that the plaintiffs did not prove by a preponderance of the evidence that the operation of the car wash from 11:00 p.m. until 7:00 a.m. was a nuisance. Defendants assert in the alternative that 1) issuance of a complete injunction as to the operation of the car wash from 11:00 p.m. until 7:00 a.m. was improper under the circumstances of the case, and 2) the award of damages to the plaintiffs was improper.

Plaintiffs assert on cross-appeal that the district court erred in failing to enjoin the defendants from operating the car wash in unenclosed quarters. We affirm in part and reverse in part.

Linda Bracht and James L. Meyer received a permit for a car wash to be built on land zoned for community business. The car wash was constructed across the street from an apartment house owned by the plaintiffs. The neighborhood in question consists of residences and commercial establishments.

William and Dorothy Taylor sought an injunction and damages from defendants' operation of the car wash. They filed their petition after defendants had arranged for the purchase of land and equipment but prior to the actual construction of the car wash. Plaintiffs' petition asserted that the car wash did not comply with city zoning laws and was offensive because of noise, glare, and garbage. The petition also asserted that the car wash would interfere with the comfort of their residence and depreciate its value.

In its decree, the trial court determined that the car wash complied with zoning requirements since it fell within the "drive-in establishment" exception to the requirement that business be conducted in completely enclosed buildings. It was further determined that any depreciation in value of the apartment house, loss of privacy, traffic increase, or debris resulting from the operation of the car

wash did not constitute a common law nuisance. However, it was found that the noise caused by the night time operation of the car wash and improperly shielded lighting constituted a nuisance. The court enjoined the operation of the car wash from 11:00 p.m. until 7:00 a.m., enjoined the use of unshielded lights, and awarded the plaintiffs damages of \$250. Defendants have appealed and plaintiff cross-appealed.

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Defendants claim on appeal that the trial court erred in enjoining the operation of the car wash between 11:00 p.m. and 7:00 a.m. We agree.

The injunction at issue was based on the following finding of the trial court:

The noise caused by nighttime operation of the car wash unreasonably interferes with the Plaintiffs' comfortable use and enjoyment of their apartment house. It constitutes a nuisance.

The noise referred to by the trial court allegedly comes from customers' loud talking, playing of stereos, and squealing of tires. We hold the trial court erred because: (1) on de novo review we find that plaintiffs have not proved such noise occurs at night; and (2) even if some noise exists, it has not created a sufficient interference with enjoyment of property to justify an order of an injunction.

This case was tried in equity, and our review is de novo. Iowa R. App. P. 4. We are not bound by the factfindings of the trial court. Iowa R. App. P. 14(f)(7). Based upon a de novo review of the record, we find that plaintiff has not proved by a preponderance of the evidence that the car wash's customers make the alleged noise late at night.

Laurie Streeter, testifying for the defendant, stated that she had not heard loud or offensive language coming from the car wash. Mary Kammerer, who testified for plaintiff, only complained of loud radios in the daytime, especially on weekends. Although she testified that when coming home at night she would see people at the car wash as late as 2:00 a.m. or 3:00 a.m., she did not complain that

those people used loud profanity, played their radios too loud, or squealed their tires.

The only witness who mentioned abusive language and squealing tires was the plaintiff, William Taylor. This is the same person who sued, claiming the car wash was a nuisance, even before construction of the car wash had begun. We cannot find that his testimony establishes that the patrons of the car wash regularly use loud abusive language and squeal their tires when his testimony is unsupported by the testimony of disinterested witnesses.

We generally defer to the trial court's determinations of credibility. Iowa R. App. P. 14(f)(7). However, even if we were to defer to the trial court's implicit finding that the testimony of Taylor is credible, we still would not find that the noises identified by the trial court occur late at night. The record simply does not support such a finding. Taylor stated the noises occurred, "Evenings and weekends mostly." He did not say they occurred late at night. Moreover, Mary Kammerer, who would see people at the car wash when she came home late at night, did not complain that those people used loud abusive language, played their stereos loud, or squealed their tires. Nor does the testimony of the people living next door to the car wash mention loud noises late at night. Plaintiff failed to prove that the car wash customers caused loud noises between the hours of 11:00 p.m. and 7:00 a.m.

Even assuming that the trial court's finding of noise is correct, the injunction must be struck down because the noise has not created a sufficient interference with enjoyment of property to justify an injunction. The showing necessary to support an injunction was set forth in Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 1108, 109 N.W.2d 695, 698 (1961), in which the court stated:

[T]o justify the abatement of a claimed nuisance the annoyance must be such as would cause physical discomfort or injury to a person of ordinary sensibilities. Kellerhals v.

Kallenberger, supra, at page 980 of 251 Iowa, at page 694 of 103 N.W.2d, and citations.

(Emphasis added).

While loss of sleep would constitute physical discomfort, there is absolutely no evidence in the record that noise occurring late at night has caused any loss of sleep. Dean and Laurie Streeter live next door to the car wash, and they both testified that it has not caused them to lose sleep. Photographs admitted into evidence show that only a few feet separate the Streeter's home from the boundary with the car wash. Testimony establishes that the Streeter's bedroom is located on the side of the house adjacent to the car wash. If noise from the car wash patrons was loud enough to wake anybody, surely it would wake the Streeters. Yet they did not testify to being awakened at night.

If the Streeters were not awakened by noise late at night, it is not surprising that none of the residents of plaintiff's apartment were awakened. Photos in evidence show that the apartment building is not only across the street from the car wash, but is also set back from the curb a significant distance. Further, testimony established that the bedrooms were at the back of the apartment building, away from the street. In short, the residents of the apartment building sleep too far away from the car wash to be awakened by its noise, or the noise of its customers, late at night.

There is no evidence that noise from the car wash or its customers has caused physical discomfort or injury justifying abatement. The injunction preventing operation of the car wash between 11:00 p.m. and 7:00 a.m. is vacated.

II.

Defendants also contend the trial court erred in awarding the plaintiffs \$250 in damages. We affirm that award.

We note first that the lighting of the car wash was a nuisance. In determining a proper compensatory award, we are guided by the supreme court's

statements in Kriener v. Turkey Valley Community School District, 212 N.W.2d 526 (Iowa 1973). The court stated:

In the case of an action for an injury to the comfortable enjoyment of property by a person in possession, no precise rule for ascertaining the damage can be given, as, in the very nature of things, the subject-matter affected is not susceptible of exact measurement; therefore, the jury are left to say what, in their judgment, the plaintiff ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance; and whether the verdict is large or small, if, in view of the evidence, it has any reasonable foundation, it will not be disturbed because it is too small on the one hand, or too large on the other.

Id. at 536-37. Although we find the facts de novo on this appeal, and are thus not bound by the factfinding below, our review of the record indicates \$250 is an appropriate compensatory award for the nuisance created by the improper lighting.

III.

On cross-appeal, plaintiff claims the trial court should have issued a more restrictive injunction. It is claimed that that operation of a car wash in an unenclosed building violates section 25.54.060(1) of the Sioux City Municipal Code, thereby constituting a nuisance.

Initially, we point out that contrary to the defendants' assertion we believe the trial court had jurisdiction to consider this claim and it is properly before this court on appeal. The general authority for trial courts to issue injunctions is set forth in Iowa R. Civ. P. 320-330. The trial court in this action properly exercised its authority pursuant to these provisions. We find no basis for defendants' claim that plaintiffs should have sought relief through administrative channels before seeking equitable relief in the courts. As the trial court indicated, the building permit authorized the erection of a brick building with dimensions of 84.4' x 28', to be used for a four-bay car wash. This permit clearly complies with zoning requirements; any appeal to the Board of Adjustment from the granting of the

permit would have been unsuccessful. Furthermore, the general description set forth in the permit would not have been sufficient to alert plaintiffs to the alleged violations urged in this action. Thus we conclude that plaintiffs' failure to appeal the granting of the building permit does not bar their action for injunctive relief based on violations of the zoning ordinance.

In reaching the merits of the plaintiffs' claim, we are inclined to agree with the trial court's determination that the zoning ordinance was not violated. Section 25.54.060(1) of the ordinance requires that businesses be conducted in completely closed buildings. Yet, there is an exception for businesses which provide "service to customers in waiting vehicles at drive-in establishments." As the trial court indicated, city and agency officials charged with the administration and enforcement of the zoning ordinance have held that open bay car washes are within the "drive-in establishments" exception. We see no reason to dispute this determination.

AFFIRMED IN PART; REVERSED IN PART; INJUNCTION VACATED.

Oxberger, C.J., concurs; Donielson, J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent from the majority's determination that a nuisance did not exist and the operation of the car wash between 11:00 p.m. and 7:00 a.m. should not be enjoined. After reviewing the record, I am of the firm belief that sufficient evidence supports the trial court's decision.

A nuisance should be found to exist when there has been "an actionable interference with a person's interest in the private enjoyment of his land." Pottawattamie Cty. v. Iowa Dep't of Environmental Quality, Air Quality Commission, 272 N.W.2d 448, 453 (Iowa 1978). "If normal persons living in the locality would regard the particular situation as definitely offensive or annoying, then the invasion is substantial." Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 562 (Iowa 1972).

In the case at bar, the neighborhood in question is comprised of residences as well as commercial establishments. As the trial court indicated, the plaintiffs should not expect the same freedom from annoyance that they would have in a purely residential area. In the same respect, the defendants should not expect the same freedom of business activity that they would have in a purely commercial area.

William Taylor specifically testified that the operation of the car wash has resulted in loud talking, abusive language, playing of stereos, and the squealing of tires. He also stated that this occurred during the evening hours and weekends. Contrary to the majority's assertion, I do not believe it is significant that the plaintiff chose to use the word "evening" to describe the time he was annoyed rather than "late at night." I am not willing to discount Taylor's testimony on the basis of semantics, especially where the meaning of his statement is clear. I also do not believe it is proper for our court to determine that Taylor's testimony is not credible simply because he was the person who brought the action. Due to the nature of an appeal, we do not have an opportunity to observe the demeanor of

any witnesses; we should refrain from concluding a particular witness's testimony is not believable, absent some clear indication in the record. The mere fact that Taylor brought this action is not a clear indication that his testimony is anything less than accurate. Furthermore, Taylor was not the only witness to complain of interference with private enjoyment. Mary Kammerer testified as follows:

A. I've had to keep the windows closed, and I don't like doing that. I enjoy having the patio and using my deck. But I don't see how that's going to be possible. And the privacy is entirely gone now. Before it was private, very private. And you could drive in and out. And sometimes I work late at night, and when I come home late at night, there's all kinds of guys over there washing their cars.

Q. How late are we talking about? A. It's been as late as 2 or 3 o'clock in the morning there's people washing their cars.

Essentially, two witnesses that live in close proximity to the car wash testified that they were bothered by the operation of the car wash during the evening hours, one witness specifically pointing to the hours of 2:00 a.m. and 3:00 a.m.

The defendant in this action presented two witnesses, Laurie and Dean Streeter, who testified that they were not bothered by the operation of the car wash. Yet I think it is significant to note that the Streeters' place of residence faces a wall of the car wash which would likely serve to block some of the sound. In contrast, the plaintiff and his tenants live in an apartment complex facing the open bays of the car wash. Furthermore, I do not believe that the testimony of Laurie and Dean Streeter is probative of the absence of late night noise where it is clear from the record that they have never attempted to open their windows at night.

The plaintiffs and their witnesses are persons of ordinary sensibilities. These sensibilities have been reasonably offended by the twenty-four hour per day operation of a car wash within close proximity to their residential complex. Based

on the testimony in this case, I would conclude that the nighttime operation of the car wash constitutes a nuisance.

I would also conclude that an injunction is an appropriate remedy. As the trial court indicated, the hardship imposed on the plaintiffs due to the continuous operation of the car wash at night is substantially greater than that suffered by the defendants in closing during these hours. Furthermore, I cannot conceive of any alternative which would serve to abate the nuisance and still allow the car wash to operate twenty-four hours per day seven days a week. See Bates v. Quality Ready-Mix Co., 261 Iowa 696, 705, 154 N.W.2d 852, 858 (1968).