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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| WILMA REYNOLDS, MEARL            | ) |                         |
| REYNOLDS, HERMAN MAIRE,          | ) | Filed December 28, 1977 |
| RUTH MAIRE and RACHEL MILLER,    | ) |                         |
| Appellants,                      | ) |                         |
| vs.                              | ) |                         |
| TOWN OF LISBON, IOWA, and LISBON | ) | 295                     |
| COMMUNITY SCHOOL DISTRICT,       | ) | <u>2-50170</u>          |
| Appellees.                       | ) |                         |

Appeal from Linn District Court - Clinton E. Shaeffer, Judge.

Appeal from district court's refusal to order a reversion of property, award damages, and declare defendants' baseball diamond a nuisance and grant appropriate equitable relief. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Timothy S. White and James A. Piersall, of Cedar Rapids, counsel for appellants.

R. B. Wolfe, of Mt. Vernon, and William M. Dallas, of Cedar Rapids, counsel for appellees.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

This appeal is the culmination of a three-year dispute that has created substantial animosity between the plaintiffs and the Town of Lisbon, the primary defendant. During the course of this conflict both sides have engaged in unnecessary, unproductive behavior coupled with remarkably few attempts to resolve the underlying problem on an amicable basis.

Although the facts of this case are not complex, a great deal of conflicting evidence exists. In 1972 the Town of Lisbon evaluated the feasibility of developing a baseball diamond in the southeast corner of a town park located north of U. S. Highway 30. The town was the beneficiary of a trust which provided funds for grading, lighting and other expenses necessary for the construction of a regulation baseball diamond. At that time, plaintiffs-Maires owned a motel situated on property bordering the southern edge of the park, although they have since sold that property. Plaintiffs-Reynoldses own property which abuts the southeast corner of the park and upon which is located their businesses, a service station and cafe, and their mobile home. This entire area was zoned for commercial use.

The park board was so vehemently opposed to the development of the southeast corner of the park that four of its five members resigned when the city council overruled their recommendations and decided to use the southeast corner. At that point, the plaintiffs sought equitable relief in Linn District Court in order to enjoin the construction of the lighted diamond. The court found that the erection of a baseball field in the southeast corner of the park did not constitute a nuisance per se at that time, but should a nuisance arise in the future, an action for its abatement would lie. The court did specify that a proposed lease allowing Lisbon Community High School to use the new diamond must comply with statutory directives.

Serious problems arose when the construction was completed. At that time, the measured distances from homeplate to the nearest portion of the Reynoldses' property, their mobile home, and the service station were 76, 173, and 199 feet, respectively. The Reynoldses introduced evidence that since the first organized game was played on May 3, 1974, foul balls broke windows and dented their mobile home, their buildings were subject to vandalism, they were threatened and insulted, their property became a depository for

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empty bottles and beer cans, spectators and players urinated on their property, and trees and bushes were damaged when youngsters retrieved balls for which they were paid a nickel per ball.

In the instant action, the Reynoldses allege interference with the use and enjoyment of their property, and business damage in that spectators use the service station for parking and customers complain of foul balls, some of which apparently strike cars in the station. Mr. Reynolds stated that even he was struck by one of the stray balls. Games are scheduled several times a week, and the Reynoldses testified that they may no longer leave their property unattended during a game.

The town attempts to justify its position by noting that the area is zoned commercial and the plaintiffs have no reason to expect a "serene, park-life atmosphere in which to live." The trial court found, and logically so, that the plaintiffs purchased the commercial property on Highway 30 to secure an advantageous business location for their service station. It was only later that they moved a mobile home to a location a few feet from the primary highway. During the decade or so that they occupied the site, the Reynoldses did little to the vacant portion of their property which borders the southeast corner of the park. They neither fenced nor cultivated the land, thereby allowing bromegrass to abound. However, since the installation of the diamond, they have put up many "no trespassing" signs, but to no avail.

In addition to offering testimony that not over three to six balls fall on the Reynoldses' property during any one game, the town argues that the games are played without any undue disturbance or commotion by either the players or spectators, unless they are agitated by the Reynoldses when chased off their land while retrieving balls. The town further asserts that games are supervised, the use of the baseball facilities is regulated, and the premises are cleaned up and the lights turned off no later than 10:00 p.m. after each game. Although the town denies responsibility for the trespassing of children on plaintiffs' property to retrieve stray balls inasmuch as it does not pay for their return, it is apparent that the sponsored baseball activity constitutes the source of such conduct. Finally, the town contends that it cannot move the diamond back to the northeast corner of the park since it would then be in close proximity to a residential area. According to the city's theory, a transplantation of the diamond to any other

section of the park would effectively prevent the park from being used for other activities, such as picnicking.

In the instant action, plaintiff-Miller seeks a reversion of a section of the park land, plaintiffs-Maires ask recovery due to a decline in market value and physical damages to their motel, and plaintiffs-Reynolds request both damages and an injunction on the theory that the baseball diamond constitutes a nuisance.

Although not fully represented in appellants' brief, Rachel Miller seeks to have part of the park revert to her family. In 1952 the Albright family deeded certain land to the Town of Lisbon. The deed contained a restrictive covenant which limited the use of the donated land to public recreational park purposes. The land was to revert to the Albright family, of which Rachel Miller is a member, if the use was other than as stipulated. Miller sought a declaratory judgment on the grounds that the park was leasing its baseball facilities to the school district for consideration. We agree with the trial court finding that the land is still being used as a public park in full compliance with the restrictive covenant, and therefore, affirm the dismissal of the complaint.

Plaintiffs-Herman and Ruth Maire, former owners of a motel adjacent to the south side of the park, contend that the existence of the baseball park resulted in a decline in market value and physical damages to their motel. However, the Maires sold their property in 1975, after the trial date was set but prior to the district court proceedings. The Maires conceded at trial that their recovery is limited to the alleged diminution in market value of the motel. Mr. Maire testified that he estimated the decline in value to be \$20,000, inasmuch as he purchased the property for \$23,000 and sold it three and one-half years later for only \$40,000, despite an expenditure of substantial funds for improvements. The court found that the Maires had failed to produce sufficient evidence to support their estimate of a \$20,000 decline in value. We agree. Although the opinion of Mr. Maire as an owner must be considered as if it were that of an expert upon values, the trial court is not bound by such testimony and may use its own knowledge and judgment with respect thereto. *Kellerhals v. Kallenberger*, 251 Iowa 974, 982, 103 N.W.2d 691 (1960); *Tiemeyer v. McIntosh*, 176 N.W.2d 819, 823 (Iowa 1970). The trial court relied upon that knowledge in the instant case and concluded that the Maires' estimates as to the decline in value were too vague and that their damage claim was unsupported by the record. We find no error in either respect.

With regard to damages, the Town of Lisbon has effectively asserted lack of notice under § 613A.5, The Code, as a bar to recovery which is dispositive of this issue. Consequently, we must finally consider whether the baseball diamond constitutes a nuisance and, if so, what relief should be granted.

It is well settled that a baseball park is not a nuisance per se, but may be conducted in such a manner as to constitute a nuisance in fact. *Amdor v. Cooney*, 241 Iowa 777, 779, 43 N.W.2d 136 (1950); *Casteel v. Town of Afton*, 227 Iowa 61, 65, 287 N.W. 245 (1939). The law is clear that one must use his own property so as not to unreasonably interfere with his neighbor's comfortable and reasonable enjoyment of his property. In order for a court to order the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. In the absence of evidence to the contrary, an individual is presumed to have ordinary sensibilities. *Amdor*, supra, at 783; *Pauly v. Montgomery*, 209 Iowa 699, 704, 223 N.W. 648 (1930); *Kellerhals v. Kallenberger*, supra, at 980. Consequently, the burden is on the town to establish that the plaintiffs have extraordinary sensibilities.

While we agree with the trial court's finding that baseball is a healthy, wholesome recreational activity that can be a tremendous asset to the community, particularly in a town such as Lisbon where approximately one-third of its residents participate, we cannot overlook the Reynolds's right to the comfortable and reasonable enjoyment of their property. There is no doubt that the annoyance has been aggravated by personality conflicts in this contest which pitted the Reynolds's against the Town of Lisbon. However, there is ample evidence to support the plaintiffs' contention that activities connected with baseball in the park's southeast corner have greatly disturbed them to the point of being ill, nervous and distraught. The trespassing, destruction, threats, vandalism, litter, business interference and general harassment have a cumulative effect. Unfortunately, the city attempts to portray the Reynolds's as misanthropes.

Defendants have not been convincing in their evidence concerning plaintiffs' sensibilities. It is understandable that tempers have flared. However, it is also reasonable to assume that continued and frequent annoyances of the type involved in this case may provoke physical discomfort. The plaintiffs believed that they could not leave their property unattended during games for fear of vandalism or destruction to their

land. After looking at the list of interferences the plaintiffs endured, we conclude that a person of ordinary sensibilities would be provoked to physical discomfort. Virtually identical actions and disturbances were found to constitute a nuisance in *Amdor, supra*, and no different result should obtain here.

In refusing to grant injunctive relief, the lower court summarized the situation as follows:

"Mr. and Mrs. Reynolds have obviously failed to recognize that a person who lives in a town such as Lisbon must of necessity submit himself at times to annoyances that may result from the playing of baseball for the enjoyment and benefit of the inhabitants of the Town and the School District, and that the inconveniences and annoyances of which they complain must yield to the public good insofar as the interposition of a Court of Equity is concerned."

However, we disagree with such a conclusion and hold that plaintiffs need not be subjected to the types of unreasonable interference with the use and enjoyment of their property that have occurred in the instant case. This is particularly true here since it is obvious that the defendants have actually done remarkably little to abate the problems which seem to be quite solvable if the desire to do so were present.

In fashioning an appropriate remedy, we do not wish to go beyond the requirements of the particular case. Further, since the nuisance results from the manner in which property is used, we desire to afford defendants an opportunity to change such use so as to eliminate the nuisance aspects before issuing any injunction. *Amdor, supra*, at 785.

We conclude that the baseball field in the instant case can be altered so that it will not constitute a nuisance in much the same way as it was in *Amdor*. Two examples are suggested by the record: 1) moving the diamond back to the northeast corner or 2) hanging a protective net to prevent foul balls from leaving the park.<sup>1</sup> The net could be coupled with a noise, view and access barrier of trees or bushes and a chain link fence behind the backstop area and along the perimeters of the baselines.

<sup>1</sup> Although the trial court suggested that plaintiffs summarily rejected this proposal, a closer evaluation of the transcript reveals that the plaintiffs refused the netting on the understanding that the city demanded a release of the claim in return. It is understandable that the plaintiffs would hesitate to surrender their claim without any assurance of the abatement of the nuisance.

The local police could adequately handle illegal parking and trespassing. The foregoing are not intended to be the only acceptable means of remedying the situation.

We are disposed not to order issuance of an injunction unless defendants fail within a reasonable time to so change the use of the field that it will not amount to a nuisance. If such change is not made before the beginning of the next baseball season, defendants should be enjoined from using the field substantially in the manner and under the circumstances of its use which we have held to constitute a nuisance. The trial court shall retain jurisdiction for this purpose. The cause is affirmed in part, reversed in part, and remanded to the trial court for disposition pursuant to this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.