FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

140

JASPER COUNTY BOARD OF HEALTH,

Petitioner-Appellee,

vs.

DONALD RUTHERFORD and MARILYN RUTHERFORD,

Respondents-Appellants.

Filed August 27, 1986

6-141
85-223

Appeal from the Iowa District Court for Jasper County (No. 97-75) - Richard D. Mohr, Judge.

Respondent appeals the trial court's adverse ruling on petitioner's motion for summary judgment. **AFFIRMED.**

Frank M. Krohn, Prairie City, Iowa, for respondents-appellants.

James R. Wilson, Assistant County Attorney, for petitioner-appellee.

Considered by Oxberger, C.J., Schlegel and Sackett, JJ.

SCHLEGEL, J.

Respondent appeals the trial court's adverse ruling on petitioner's motion for summary judgment.

Petitioner Jasper County Board of Health revised its regulations regarding rabies control for dogs and domestic cats after it held the prescribed public hearings. The revision became effective December 1, 1982. Respondents appealed this decision but the appeal was denied.

Petitioner ordered respondents to vaccinate dogs in their possession by January 1, 1983, and respondents failed to do so as of January 4, 1984. Respondents were criminally charged with failure to comply with the order and were convicted at a jury trial on March 14, 1983. Respondents appealed the conviction but the supreme court denied their writ of certiorari in October 1983.

After continued violation by respondents, petitioner petitioned the district court for an order requiring compliance. After respondents' answer was filed, petitioner moved for summary judgment. Respondents resisted, but the district court granted petitioner's motion on January 3, 1985. Respondents appeal, alleging petitioner failed to state a cause of action in its original petition for an order requiring compliance; and that petitioner acted arbitrarily in revising the rules requiring the rabies vaccinations by a licensed veterinarian for dogs confined in a kennel.

I. Failure to State a Cause of Action. The record shows that respondent has failed to raise the defense of failure to state a claim on which relief can be granted either in his answer or his resistance to the motion for summary judgment. The issue cannot be raised for the first time on appeal. See, State v. Pardock, 215 N.W.2d 344, 347 (Iowa 1974).

II. Arbitrary and Capricious Acts. The burden to prove that the Board

acted arbitrarily, unreasonably, or capriciously in requiring the vaccinations as on respondents. See, Board of Supervisors v. Miller, 170 N.W.2d 358, 360 (Iowa 1969). Evidence of invalidity must be clear. Kasparek v. Johnson County Board of Health, 288 N.W.2d 511, 517 (Iowa 1980). We need not state additional rules of law on this issue because the record is completely lacking any evidence of invalidity regarding the revised regulations sought to be enforced in this matter.

The district court was correct in granting petitioner's motion for summary judgment and the order should be enforced. **AFFIRMED.**