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CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

VENCIL C. and MARY MILDRED BLANKENSHIP, Husband and Wife; KENNETH H. and RUTH N. HOWELL, Husband and Wife; and ELIZABETH H. MOSLEY,

Plaintiffs-Appellees-Cross-Appellants,

vs.

RONALD B. and DOROTHY A. SAAR, Husband and Wife; and RONALD B. SAAR d/b/a LEE COUNTY RACEWAY PARK; CAROL PETERS; GAIL E. and BILLIE K. PETERS, Husband and Wife; CHARLES V. and DOLLY M. PETERS, Husband and Wife; FAYE E. PETERS BUNCH and HAROLD G. BUNCH, Wife and Husband; and THE STATE CENTRAL SAVINGS BANK, An Iowa Banking Corporation,

Defendants-Appellants-Cross-Appellees.

Filed October 21, 1980

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2-63491

Appeal from Lee District Court at Keokuk - Harlan W. Bainter, Judge.

Defendants appeal and plaintiffs cross-appeal from judgment in a nuisance action.

AFFIRMED AS MODIFIED.

James P. Hoffman, Keokuk, Iowa; and Gordon Liles, Fort Madison, Iowa; attorneys for defendants-appellants-cross-appellees.

Barry M. Anderson of Anderson & McMurray, Keokuk, Iowa, attorney for plaintiffs-appellees-cross-appellants.

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

CARTER, J.

Defendants appeal and plaintiffs cross-appeal from judgment in this nuisance action. Defendants appeal trial court's order awarding damages to plaintiffs and enjoining certain activities at defendants' racetrack. They claim plaintiffs are barred from recovery by estoppel and waiver, that there was insufficient evidence to support the extent of the injunction and that there was insufficient evidence to support the award of damages. Plaintiffs urge on cross-appeal that the injunction should have prohibited all future racing operations at defendants' track and that special damages should have been awarded.

This is an action at law brought by plaintiffs in 1977 to enjoin defendants from operating the racetrack at the Lee County Raceway Park in Keokuk, Iowa. Plaintiffs Vencil and Mary Blankenship own and live on the property adjacent to the track on the west side. They have lived there since 1968. Plaintiffs Kenneth and Ruth Howell have lived across the street from the track since 1961. Plaintiff Elizabeth Mosley lives across the street from where the track is now being operated. She purchased her property in 1939. Defendant Ronald Saar owns and operates the racetrack. Other defendants include the legal owners of the land upon which the track is located and a bank (holder of a security interest in certain property and fixtures in the racetrack area).

Plaintiffs allege Saar has operated the racetrack so as to constitute a nuisance, thus being injurious to their health and offensive to their senses and interfering with the enjoyment of their property. Specific problems include excessive noise created by the racing of motorcycles, stock cars and dragsters; excess smoke, dust, fumes and odors resulting from operation of the track; and traffic congestion around the track making it difficult at times for plaintiffs to leave or approach their residences. Defendants pleaded waiver and estoppel as affirmative defenses, alleging that the property in question had been used as a racetrack for more than twenty years and that plaintiffs had remained silent and uncomplaining during that time.

After a non-jury trial, the trial court concluded that defendant's operation of the racetrack constituted a nuisance as to plaintiffs and that they were entitled to damages in the amount of $50 per month for five years (representing diminution in rental value of plaintiffs' property), or $3,000 for the Blankenships, $3,000 for the Howells and $3,000 for Elizabeth Mosley. Trial court also enjoined defendants from operating the racetrack other than as follows:

1. Only one race event of any kind may be conducted per week with the first day of the week being Sunday and the last day of the week being Saturday.

2. All racing events shall be conducted so as to conclude by 10:00 p.m. with the grounds to be vacated and the lights off by 11:00 p.m.

3. There will be no overnight camping or other overnight activities of any kind.

4. Prior to all racing events the entranceways and all returns from the track used by participants shall be watered to the extent necessary to keep down dust.

5. The Raceway Park shall be open sufficient hours preceding any racing event to accommodate contestants, their crews, and spectators in order to free Johnson Street Road from congestion and make it available to residents of the area, as well as the traveling public. This latter provision simply means the raceway shall be responsible for providing parking off of the public ways for all early arriving contestants.

Defendants' motion for a new trial and plaintiffs' motion to amend or enlarge findings and conclusions were both overruled by the trial court. Defendants' appeal and plaintiffs' cross-appeal followed.

This is an action at law. Our review is on errors assigned and not de novo. We do not weigh the evidence or the credibility of witnesses, and we construe the evidence in the light most favorable to the judgment of the trial court. Bates v. Quality Ready-Mix Co., 261 Iowa 696, 699, 154 N.W.2d 852, 854 (1968).

Although sections 657.1 and 657.2, The Code, define "nuisance" and authorize actions to abate the same, those sections do not alter the common law. Id. at 703, 154 N.W.2d at 857. "A fair test of whether the operation of a lawful trade or industry constitutes a nuisance has been said to be the reasonableness of conducting it in the manner, at the place and under the circumstances in question." Id. The existence of a nuisance does not depend on the good or bad intentions on the part of its creator. Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 561 (Iowa 1972). A plaintiff may sue in either law or equity to enjoin a nuisance and recover damages. Kellerhals v. Kallenberger, 251 Iowa 974, 981, 103 N.W.2d 691, 695 (1960). Finally, "the question whether a nuisance has been created and maintained is ordinarily one of fact, and not of law, depending on all the attending or surrounding circumstances. Each case of this nature must depend on its own facts." Bates, 261 Iowa at 704, 154 N.W.2d at 857.

I. Defendants' first argument is that plaintiffs are barred from recovery by waiver and estoppel because they were aware of the improvements made to the racetrack long before any complaints were made about the racing operations. We do not agree.

"Knowledge or acquiescence in the erection fo a structure will not estop one from suing to abate it as a nuisance because of the manner of its operation." Amdor v. Cooney, 241 Iowa 777, 785, 43 N.W.2d 136, 141 (1950). See also Harley v. Merrill Brick Co., 83 Iowa 73, 83, 48 N.W. 1000, 1002 (1891) (one's silence during smokestack construction near his premises does not estop him from bringing later nuisance action if he did not induce such construction).

In this case the record indicates the track was not used from 1965 to 1969 at which time Saar leased the track and began to make improvements so as to allow the running of races which became the subject of this suit. The Blankenships bought their property adjacent to the track in 1968 and moved in later that year. Yencil got the impression from defendant Peters (owner of the land on which the track is situated) that the track area was going to be put into agricultural use. The Howells have lived in the area since 1960; thus, they were there when racing occurred under a prior lease running from 1955 to 1965 and during the four-year hiatus from 1965 to 1969. Mosley has lived in the area since 1939. The record also indicates plaintiffs began complaining to Saar shortly after he began construction of the improvements on the track in 1969. Mary Blankenship testified she talked with Saar about the dust problems. After complaints made in 1970, the neighbors signed a petition to which Saar responded there would be no more racing after 11:00 p.m. and no more overnight camping on the race grounds. The problems apparently continued, however, and the same complaints were made in 1971. There was also testimony that plaintiffs spoke with Saar at various times from 1971 to 1977 concerning the track problems.

Thus, it appears plaintiffs began complaining to Saar soon after the racetrack began operation under his direction and the noise, dust, fumes, smoke and traffic congestion began to create problems. Under Amdor and Cooney, it is immaterial whether plaintiffs observed Saar's construction and improvements on the racetrack. We agree with the trial court's conclusion that waiver and estoppel do not bar plaintiffs' action:

> . . . it is not the stock car track or the moto-cross track or the drag strip which creates the nuisance. It is, in fact, the operation of this facility by the Defendant Saar which creates the nuisance. Even if the plaintiffs knew the track was there at the time they acquired their homes, they had no way of knowing how the Defendant Saar would choose to operate the track.

The mere fact plaintiffs could have commenced this action at an earlier time does not necessarily indicate such acquiescence as to estop them from suing at this point since a

continuing nuisance is involved. Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 720, 82 N.W.2d 151, 157 (1957).

The trial court was correct in holding the defenses of waiver and estoppel are not available to defendants in this case.

II. Defendants next claim the determination that the operation of the racetrack constituted a nuisance is not supported by substantial evidence. We review this claim in accordance with the well-settled principle that to justify enjoining the operation of an alleged nuisance the annoyance must be such as to cause physical discomfort or injury to a person of normal sensibilities. Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 1108, 109 N.W.2d 695, 698 (1961). Absent any evidence to the contrary, we assume plaintiffs here are of normal sensibilities. Kriener v. Turkey Valley Community School District, 212 N.W.2d 526, 536 (Iowa 1973). "A perfectly lawful business, operated under some circumstances and in some locations, may so interfere with the comfortable use and enjoyment of private property as to constitute a private nuisance and, when this occurs, it is subject to abatement as such." Higgins v. Decorah Produce Co., 214 Iowa 276, 280, 242 N.W. 109, 111 (1932).

In the present case, plaintiffs testified to the high noise level present when the races are in progress, especially during motorcycle races (the noises are variously described as "continuous roar", "reminds you of a hoard of bumblebees, only ten thousand times louder" and "a loud bumblebee type"). It has been held that certain noises may be of such a character and intensity they may constitute a nuisance in themselves. Bates, 261 Iowa at 703, 154 N.W.2d at 857.

Mary Blankenship testified she and Vencil, her husband, are forced to leave their home when the racetrack is in operation because of the noise, dirt and dust in the air and the smell of burned rubber. If they try to stay at home, they cannot carry on a normal conversation or hear the television, and are occasionally awakened from sleep. After race days they have to pick up a great deal of debris and litter left on their property by spectators and patrons. Their driveway is often blocked by spectators' and participants' cars. Vencil testified it is hard to sleep when the races are going on, especially if people are allowed to camp out at the raceway overnight. He said he has to shut all the windows to keep out the dirt, dust and fumes stirred up by the races which occasionally go on past midnight. Elizabeth Mosley said the walls of her house shake during the races. Kenneth Howell said the dust is sometimes so thick he cannot see his house when standing nearby on the outside. We have considered the entire

record and find the trial court's determination that the manner in which the racetrack is operated constitutes a nuisance is supported by substantial evidence.

III. We next consider together the claims of the respective parties that the extent of the injunctive relief awarded by the trial court was inappropriate. In this regard, plaintiffs urge on cross-appeal that all racing operations should be enjoined. Defendants, on the other hand, urge on their appeal that this court should liberalize that portion of the injunction limiting racing to one day a week. They suggest that racing on both Friday and Saturday nights and on holidays should be permitted.

We reject plaintiffs' contentions that no racing events should be permitted. The trial court found, and we agree, that a racetrack is not a nuisance per se. The trial court therefore sought to limit and control the operation of the track by its injunctive order so as to not unreasonably interfere with plaintiffs' enjoyment of their property. This contemplates some balancing of interests and a total cessation of racing activities would be tipping such balance too far in favor of the plaintiffs.

With respect to defendants' contention that more racing should be permitted, we are reluctant to permit racing events to be regularly held more frequently than once a week. We do believe, however, that defendants' request for some additional racing dates for holidays or other special events is reasonable under the circumstances. In order to accommodate this request, we modify that portion of the trial court's injunction which reads: "Only one race event of any kind may be conducted per week with the first day of the week being Sunday and the last day of the week being Saturday." Such modification shall consist of adding thereto the following language: "Provided, however, that during three weeks of each racing season, to be selected by defendants, two race events of any kind may be conducted." In all other respects the injunctive relief ordered by the trial court is affirmed.

IV. The final area of contention centers around the issue of damages. Defendants claim the evidence does not support the trial court's award which was based on diminution of rental value of plaintiffs' property. Plaintiffs claim they are entitled to special damages in addition to diminution of rental value. We reject both claims and affirm the trial court's award.

The proper measure of damages is set out in Miller v. Town of Ankeny, 253 Iowa 1055, 1062, 114 N.W.2d 910, 914 (1962):

> Where, as here, a nuisance is not permanent but subject to abatement, in the absence of injury to the property itself, the measure of damages is the diminution in

> rental value caused by the nuisance together with such special damages, as for discomfort and annoyance, as may result therefrom. This rule applies even though plaintiff is both owner and occupant of his premises.

See also Schlotfelt, 252 Iowa at 1115, 109 N.W.2d at 702.

Trial court based its damages award on plaintiffs' testimony that the racetrack operations have reduced the rental value of their properties by $50 per month. Defendant contests this figure as being arbitrarily and conspiratorially decided upon after plaintiffs discussed the effect of the track on their property values. We disagree. Vencil Blankenship, Elizabeth Mosley and the Howells all testified the track operations reduced the rental value of their land by $50 per month. The fact that none of the plaintiffs ever tried to rent out their land is immaterial since property ownership alone is sufficient to allow the owner to testify as to his opinion of the land's value. Beneficial Finance Co. of Blackhawk County v. Reed, 212 N.W.2d 454, 459 (Iowa 1973). Specifically relating to diminution of rental value resulting from a nuisance, the Kellerhas court said: "the opinion of plaintiff as an owner must be considered as if it were that of an expert upon values." 251 Iowa at 982, 103 N.W.2d at 696. We find no error in the trial court's award.

Nor do we find error in trial court's refusal to award special damages. Given the scope of the injunction and the damages for diminution of rental value, we do not feel the evidence would support an additional award of special damages. Trial court did not abuse its discretion in this respect.

The judgment of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

All judges concur except Donielson and Johnson, JJ., who dissent.

**JOHNSON, J.** (concurring in part, dissenting in part)

In division III of its opinion, the majority modifies the provisions of trial court's judgment granting injunctive relief. In balancing the parties' interests, I find trial court's determination to be fair and would affirm those provisions. I concur in the remainder of the majority's opinion.

Donielson, J., joins in this concurrence and dissent.