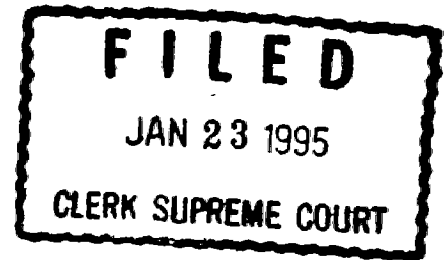


IN THE COURT OF APPEALS OF IOWA

No. 4-247 / 93-1106



JAMES R. SAYRE, PHYLLIS M. SAYRE,
DON GAUGER, and CHARLOTTE A.
CLEAVENGER, a/k/a MRS. DON GAUGER,

Appellants,

vs.

STATE OF IOWA, IOWA STATE UNIVERSITY
OF SCIENCE AND TECHNOLOGY and IOWA
STATE BOARD OF REGENTS,

Appellees.

Appeal from the Iowa District Court for Boone County,
Carl E. Peterson, Judge.

Plaintiffs appeal a district court order granting
defendants' motion for summary judgment. **AFFIRMED.**

James L. Sayre of James L. Sayre, P.C., Des Moines, for
appellant.

Bonnie J. Campbell, Attorney General, Gordon E. Allen,
Deputy Attorney General, and John M. Parmeter, Special
Assistant Attorney General, for appellee.

Heard by Donielson, C.J., Huitink, J., and Schlegel,
S.J.*, but decided en banc.

*Senior judge from the Iowa Court of Appeals serving
by order of the Iowa Supreme Court.

HUITINK, J.

Plaintiffs James and Phyllis Sayre, Don Gauger, and Charlotte Cleavenger appeal a district court order granting the defendants' motion for summary judgment. We affirm.

In Sayre v. Iowa State University, Boone County No. 32306, plaintiffs sought to enjoin the construction and operation of a hog confinement facility run by Iowa State University. The University planned to use stored waste from this facility as fertilizer. The Sayres were neighboring landowners with a residence approximately 1600 feet from an open waste slurry tank. Gauger and Cleavenger owned land approximately a quarter mile from the slurry tank.

The plaintiffs claimed the facility amounted to a permanent nuisance because of the impact from odors, increased traffic, increased fly populations, and unsafe drinking water. They argued that the facility would interfere with the right to maintain their homes and would reduce the fair market value of their real estate.

The trial court found the presence of the facility did not amount to a permanent nuisance. Instead it found the odors emanating from the slurry tank amounted to a temporary, abatable nuisance. The trial court found the odors could be abated by placing a cover on the slurry tank and ordered a cover be placed on it within 120 days. The court restricted the areas on which the University could use the waste as fertilizer. The court ordered the

University to distribute the waste from the tank by "knifing" it into the soil so as to avoid undue accumulation of waste on the surface. This could be done one time per year. The plaintiffs did not challenge the district court's factual findings with a rule 179(b) motion, nor did they appeal the decision; therefore, it is the law of the case as it relates to the parties. See Smith v. Air Feeds, Inc., 519 N.W.2d 827, 832 (Iowa App. 1994).

The plaintiffs then brought this action seeking damages associated with the nuisance. They sought damages for the reduction of the fair market value of their property, the loss of quiet enjoyment, emotional distress, and the costs incurred in the prior action. The defendants answered and filed a motion for summary judgment.

The trial court granted the defendants' motion for summary judgment. It determined the plaintiffs were barred from relitigating the nuisance issues decided in the prior action. It found the defendants had covered the slurry tank and thus abated the nuisance as required by the prior court order. Accordingly, the trial court determined the only issue before it was the amount of damages, if any, the plaintiffs were entitled to from the time the nuisance began to the time it was abated. The trial court awarded each of the plaintiffs \$5,000.

Our review is for the correction of errors at law. Iowa R. App. 4. On appeal from summary judgment, we view

the whole record in a light most favorable to the party opposing the motion. Farm & City Ins. v. Anderson, 509 N.W.2d 487, 489 (Iowa 1993). Our task on appeal is to determine whether a genuine issue of material fact exists and whether the law was correctly applied. Id. (citing Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979)).

Issue preclusion prevents litigation of previously-determined factual issues which were essential to an earlier judgment. Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981). The four prerequisites to its application include (1) the issue must be identical; (2) the issue must have been raised and litigated in a prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made must have been necessary and essential to the resulting judgment in the earlier case. Id.

In the earlier judgment the trial court made specific findings identifying the open slurry storage tank and the manner of distribution of waste as the nuisance conditions. Plaintiffs' claims that the presence of the facility and the presence of the hogs were a nuisance were expressly rejected by the district court. The district court also stated:

The character of the problems described by the plaintiffs and found to exist by the court in this case identify the nature of the nuisance as other than a permanent nuisance.

Plaintiffs' amended petition contains a series of allegations identifying the issues raised in this case. These include allegations that the defendant's facility constitutes a "permanent nuisance" and that plaintiffs' property values have declined as a result. Interestingly enough, plaintiffs claim the defendants are barred from relitigating the nuisance issue and the sole issue to be determined in this case is the amount of damages they have sustained.

A comparison of the issues raised by these allegations indicates that they are identical to those raised, litigated, and resolved in the earlier case. The failure to litigate the damages issue does not change the preclusive effect of the judgment on other issues. The district court lacked jurisdiction to hear the damage claim in Sayre v. Iowa State University, Boone County No. 32306, and this issue was properly preserved for litigation in this case. Plaintiffs' contrary assertions fail to acknowledge the significance of the earlier determination that the nuisance was temporary as opposed to permanent. This determination established the measure of damages plaintiffs were entitled to receive. Mel Foster Co. Prop. v. American Oil Co., 427 N.W.2d 171, 175 (Iowa 1988). Plaintiffs cannot recover for diminution of the market value of their property because of the district court's earlier determination that the nuisance was other than permanent. Id. at 175.

This determination also affects the preclusive nature of the judgment. Restatement (Second) of Judgments § 26 cmt. h (1982). Ordinarily, a determination that a nuisance is temporary does not preclude subsequent litigation if conditions have changed. See Helmkamp v. Clark Ready Mix, 249 N.W.2d 655, 656 (Iowa 1977). This is not, however, the circumstance presented in this case. Plaintiffs clearly seek to recover damages for a permanent nuisance in addition to those caused by the temporary nuisance identified in the earlier case. This is not a case involving a change in circumstances.

In its order granting summary judgment the district court stated:

The Petition in this case alleges compliance with Chapter 25, Code of Iowa, and asserts a claim for damages. The issue not resolved in the prior proceedings was the damages, if any, that occurred from the abatable nuisance before it was abated, i.e.: the damages from the open slurry tank before it was covered as required, or any damages that may have arisen from the spreading of manure in the manner different than directed by the Court.

We agree and therefore affirm on this issue.

Plaintiffs also contend the district court erred in its award of damages. Again, our review is for the correction of errors at law. Iowa R. App. P. 4.

The district court determined there was no permanent nuisance; therefore plaintiffs are not entitled to damages for the diminished value of their property. Mel Foster Co. Prop., 427 N.W.2d at 175. The district court found that objectionable odors would reach the plaintiffs' properties

between 1.8% and 2% of the year. It also determined plaintiffs were entitled to damages sustained from October 1990 through August 23, 1991, the date on which the cover was installed on the slurry tank. Over this ten-month period the court found plaintiffs were bothered by objectionable odors a total of five days. It awarded each plaintiff \$5000 in damages for the loss of peaceable enjoyment of their property during the periods the offensive odors drifted over their property and the physical and emotional suffering resulting from the odors.

Defendants do not challenge whether the damages actually awarded by the district court are compensable damages in a temporary nuisance action. In determining whether the award of damages is supported by substantial evidence we make no determination as to whether the types of damages awarded in this case are recoverable in a temporary nuisance action.

There is substantial evidence supporting the amount of damages awarded by the district court for the period up until the nuisance was abated. We will not disturb the award of damages on appeal. The decision of the district court is affirmed in its entirety. Costs of this appeal are assessed to plaintiffs.

AFFIRMED.