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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CITY OF ALBION, IOWA,)

Plaintiff-Appellee,) Filed December 26, 1984 357

vs.)

MELVIN A. SHIMEL and) 4-399
DORIS M. SHIMEL,) 83-838

Defendants-Appellants.

Appeal from the Iowa District Court for Marshall County - M. D. Seiser, Judge.

Defendants appeal from a judgment that the junk vehicles on their property constitute a nuisance at common law and under a city ordinance. Defendants assert that the junk vehicles do not constitute a nuisance. AFFIRMED.

William Hill, Marshalltown, for defendants-appellants.

Barry S. Kaplan of Fairall, Fairall, Kaplan & Condon, Marshalltown, for plaintiff-appellee.

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

DONIELSON, J.

Defendants appeal from a judgment that the junk vehicles on their property constitute a nuisance at common law and under a city ordinance. They assert that (1) the trial court erred in overruling their motion to dismiss, and (2) evidence was insufficient to support a finding that the junk vehicles constitute a nuisance. We affirm.

Defendants, Melvin and Doris Shimel, have for some time had twenty-five to thirty junk vehicles on their property in Albion, Iowa. In 1977, plaintiff, the City of Albion, enacted an ordinance which provided that the storage of junk vehicles on private property constituted a nuisance. In 1980, the city filed a petition asserting that the Shimels' storage of junk vehicles constituted a nuisance at common law and under the above city ordinance. The Shimels answered the petition, and trial was held.

The trial court ruled that the Shimels' storage of junk vehicles on their property constituted a nuisance at common law and under the city ordinance; it directed the Shimels to either license the vehicles and make them operable or remove them, within thirty days. The trial court also enjoined the Shimels from storing any junk vehicles on their property in the future. The Shimels have appealed.

The defendants' first assignment of error is that the trial court erred in overruling their motion to dismiss. The Shimels' motion attacked the constitutionality of the city ordinance. They claimed the ordinance exceeded authority delegated by the State and violated the due process clause of the state and federal constitutions.

The trial court overruled the motion reasoning that it was untimely. It further reasoned that even if the motion was timely the City was not limited to abating the specific nuisance described in section 657.2 of the Iowa Code; the City has a common law right to abate nuisances.

On appeal, the Shimels argue that the specific nuisance complained of by the City is not found in section 657.2 (Nuisances), and that the common law doctrine of nuisance does not apply to afford the City a remedy.

We agree with the trial court's determination that it is unnecessary to reach the merits of the defendants' claim. The motion was filed after the defendants' answer and was therefore untimely. Iowa R. Civ. P. 104(b); Riediger v. Marrland Development Corp., 253 N.W.2d 915, 916 (Iowa 1977).

Even if we were to consider the disputed ruling on the merits, we would reach the same conclusion. The city ordinance in question provides for the abatement of junk vehicles. Contrary to the defendants' assertions, this ordinance was not enacted pursuant to Chapter 657 of the Iowa Code. This chapter provides for abatement of certain enumerated nuisances. However, it does not operate to limit what constitutes a nuisance or what nuisances can be abated.

Iowa Code section 364.3(3) provides:

> A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless the state law provides otherwise. (emphasis added)

Since Chapter 657 does not provide otherwise, a city can properly determine that an existing condition constitutes a nuisance and requires abatement, even though it is not one of the enumerated conditions set forth in section 657.2.

We believe the city ordinance was properly enacted pursuant to section 364.1 which grants cities the right to enact laws to ". . . improve the peace, safety, health, welfare, comfort and convenience of its residents." It was designed to prevent the accumulation of junk and protect the health, safety and welfare of Albion residents. An ordinance with this purpose is entirely within the police powers statutorily granted to the City.

In City of Cedar Falls v. Flett, 330 N.W.2d 251 (Iowa 1983), the supreme court considered a similar junk vehicle ordinance and found it to be

constitutionally valid. In reaching this conclusion, the court stated:

> We agree that such vehicles could attract vermin and rats, or pose an attractive nuisance for children. We also find that the defects specified in the section are rationally related to the protection of the public health and safety.
>
> An additional purpose of the ordinance, although unexpressed, may be aesthetic improvement. Defendant urges that it is not reasonable to relate aesthetic considerations to an ordinance that is based on health and safety. We disagree. So long as the ordinance is rationally related to the expressed purpose of protecting the public health and safety, it shall not be invalidated because the governing body has weighed aesthetic considerations.

Id. at 255. For similar reasons, we would conclude that the Albion city ordinance is rationally related to the ends sought to be obtained. Accordingly, we would conclude that the City had the authority to abate the accumulation of junk vehicles on the defendants' property.

The defendants also claim there was insufficient evidence to support the judgment. The court determined that the city ordinance had been violated and that the junk vehicles constituted a public nuisance. We believe that the evidence supports both determinations.

The Albion ordinance defines junk motor vehicles to include unlicensed vehicles with any one of the following characteristics:

> (a) Any vehicle with a broken or cracked windshield, window, headlight or tail light, or any other cracked or broken glass.
>
> (b) Any vehicle with a broken or loose fender, door, bumper, hood, hood ornament, door handle, window handle, running board, steering wheel, trunk top, trunk handle, radio aerial, tail pipe or decorative piece.
>
> (c) Any vehicle which has become the habitat of rats, mice, or snakes, or any other vermin or insects.
>
> (d) Any vehicle which contains gasoline or any other flammable fuel.
>
> (e) Any other vehicle which, because of its defective or obsolete condition, in any other way constitutes a threat to the public health and safety.

The record reflects that the Shimels have had various unlicensed junk vehicles on their property since about 1957. They have sold vehicles and parts over the years. The vehicles are inoperable and in poor condition; the bodies are rusted or otherwise damaged, and most have broken glass. Children play on or around the vehicles and presumably were responsible for breaking the glass. Some of the vehicles contain small amounts of gas. The vehicles are not worth more than scrap metal value and are not a source of livelihood.

We believe this evidence more than supports a finding that the ordinance had been violated.

We also believe the evidence would support a finding that a public nuisance exists.

> The basic elements of common law public nuisances are (1) unlawful or antisocial conduct that (2) in some way injures (3) a substantial number of people. The public nuisance is thus unlike the private nuisance of tort law where specific injury to an individual must be shown.

State ex rel. Turner v. Younker Brothers, Inc., 210 N.W.2d 550, 564 (Iowa 1973). The storage of junk vehicles would have a tendency to pose an unhealthy or unsafe condition for a substantial number of people. This is sufficient to constitute a public nuisance.

Finding no error, we affirm the trial court's decision in all respects.

AFFIRMED.