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IN THE COURT OF APPEALS OF IOWA  
CLERK SUPREME COURT

DALE WALROD; NADINE L. WALROD; )  
MARVIN THORNTON and MARGARET )  
A. THORNTON, )

Plaintiffs-Appellants, )

Filed November 26, 1980

vs. )

CITY OF ANKENY, IOWA; )  
DENNIS BALLARD; WILLIAM BOSWELL; )  
ANDY KASPER; OLLIE WEGAL; )  
JAMES BRADSHAW; LARRY CAIRNS; )  
THOMAS DART; RAY McDOWELL; )  
ROBERT SCHAFROTH; DAVID DIRKS, )

0-257  
2-63913

Defendants-Appellees.

Appeal from Polk District Court - Harry Perkins, Judge.

Plaintiffs appeal from judgment for defendants in action to enjoin operation of municipal baseball diamond as a nuisance. - AFFIRMED.

R. Jeffrey Lewis and Arthur E. Gamble, of Gamble, Riepe, Burt, Webster & Davis,  
Des Moines, for plaintiffs-appellants.

Dennis L. Ruben and Patrick W. Brick, of Scalise, Scism, Gentry, Brick & Brick,  
Des Moines, for defendants-appellees.

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

**PER CURIAM**

Plaintiffs appeal from judgment for defendants in action to enjoin the operation of a municipal baseball diamond as a nuisance. Plaintiffs claim that the trial court erred in concluding that the baseball diamond is not a nuisance at present; they also claim that the court should have found that plaintiffs' property had effectively been taken for public use without compensation. We affirm.

On April 15, 1977, plaintiffs filed a petition at law alleging that defendants, the city of Ankeny and various city officials, had refused to take any action to abate an alleged nuisance—the operation of a baseball diamond located in Sunrise Park which abuts plaintiffs' property on the south. The petition stated that baseballs, softballs and golfballs had been hit into plaintiffs' yards, players have climbed fences and trespassed on those yards to retrieve the balls (ruining shrubs and bushes in the process) and have directed obscene and abusive language toward plaintiffs, all resulting in plaintiffs having become annoyed, uncomfortable and distressed. Plaintiffs further alleged that defendants have refused to take any action to ameliorate the problems despite repeated requests. They subsequently amended their petition for damages and injunctive relief based on the claim that the use of the diamond and defendants' conduct constitutes a taking of their property for public use without just compensation. Defendants answered with a general denial of plaintiffs' allegations.

On July 26, 1977, the trial court found that the city proposed to take various actions in an attempt to solve the problem. These actions included: 1) adoption of an ordinance prohibiting anyone from climbing the fence between plaintiffs' property and the park, 2) affix signs to that fence giving notice that climbing the fence would constitute a violation of the ordinance punishable by fine or imprisonment, 3) adoption of an ordinance prohibiting public use of the diamond without express authorization by the director of the Parks and Recreation Department along with a prohibition on playing baseball or softball within 50 feet of the fence, and 4) planting trees on the north side of the park (near plaintiffs' fenceline) so as to make it more difficult to play ball in that area. The court allowed defendants sixty days to implement these proposals; if after a reasonable time the problems persist, plaintiffs would be allowed to resume this action.

Plaintiffs apparently thought the problem still existed for a hearing was held on

April 3, 1979. According to the testimony, the incidents previously complained of decreased in frequency after the 1977 order, but plaintiffs claimed that was the result of their own continuing surveillance of the diamond and calling the police if problems arose. The trial court concluded that plaintiffs failed to sustain their burden of proving by a preponderance that use of the diamond constituted a nuisance. Plaintiffs' petition was then dismissed as to the individual defendants; the city was ordered to maintain the conditions imposed by the 1977 order. This appeal followed.

I. The primary issue on this appeal is whether the operation of the ball diamond near plaintiffs' property is an enjoynable nuisance. We note initially that, in a nuisance case, granting or denying an injunction rests in the sound, judicial discretion of the trial court, and we should be reluctant to interfere with its decision. Amdar v. Cooney, 241 Iowa 777, 783, 43 N.W.2d 136, 140 (1950). 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), Casteel v. Town of Afton, 227 Iowa 61, 65, 287 N.W. 245, 247 (1939).

We agree with the trial court that plaintiffs did not prove the existence of an actionable nuisance. We note first that plaintiffs cannot realistically expect to be able to live in an absolutely annoyance-free neighborhood:

A person who lives in a city, town, or village must of necessity submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce, and also for the enjoyment of property and the benefit of the inhabitants of the place, and matters which, although in themselves annoying, are in the nature of ordinary incidents of city or village life cannot be complained of as nuisances. 46 C.J., p. 669, sec. 34.

Casteel, 227 Iowa at 64-65, 287 N.W. at 246. While plaintiffs arguably sustained substantial injuries prior to the 1977 order, the problems have been greatly reduced since then. Plaintiff Marvin Thornton testified that outside of one egg-throwing incident, he has suffered minimal property damage. He also said that only one ball has been hit over his fence since 1977. Plaintiff Nadine Walrod admitted that the problems have been less severe since the 1977 order although they still exist to some degree.

Plaintiffs' main complaint is that the defendants are not doing enough to ensure

that the requirements set forth in the 1977 order are being enforced. They claim that they are required to stay at home so they can report violations to the police as they occur. They further claim that defendants have an affirmative duty to enforce the various orders and ordinances.

We disagree. Similar arguments were proposed and rejected in Spiker v. Eikenberry, 135 Iowa 79, 110 N.W. 457 (1907). In that case, defendant was the owner of several vacant city lots. These lots came to be used for baseball games against which plaintiffs sought an injunction. The supreme court reversed a trial court decision for plaintiffs:

Here the premises are not, in themselves, the occasion of any injury to plaintiffs, nor is the defendant doing or threatening to do any act thereon which will be injurious to plaintiffs. If persons without authority of the defendant, and without his consent, go upon his vacant lots and engage in acts which threaten injury or annoyance to plaintiffs, it would seem that the persons causing or threatening to cause such injury or annoyance are the persons to be complained of, and not the defendant.

Spiker, 135 Iowa at 82-83, 110 N.W. at 458. The same considerations apply here, for defendants have acted in good faith and have taken a number of steps, including the enactment of the ordinances described above, which have been successful in mitigating the nuisance aspects of the ball diamond's use. It is unrealistic to expect the city to maintain a continuous vigil over Sunrise Park and the ball diamond in question, which is what plaintiffs appear to be asking. In Spiker, 135 Iowa at 84, 110 N.W. at 458, the court said "the [trial] court ought not to have charged him [defendant] with the responsibility of actively preventing the use of his uninclosed lots by those who may see fit to engage in ball games there without his affirmative consent." The trial court in this case avoided making this same mistake. We affirm its decision finding no nuisance on defendants' part.

II. Plaintiffs also claim that the trial court's judgment is erroneous because defendants' conduct amounted to a taking of private property for public use without just compensation which would constitute nuisance as a matter of law.

The trial court in its decree concluded the plaintiffs had failed to sustain their burden, but made no specific mention of the "taking" issue or grounds. We do not assume the trial court ignored or overlooked this issue. Rather, we assume the trial

court rejected that theory of recovery for the stated, general reason; namely, failure to sustain the burden of proof by a preponderance of the evidence. See Fort Dodge Country Club v. Iowa-Illinois Gas and Electric co., 231 N.W.2d 595, 597 (Iowa 1975). We come to the same conclusion as far as sufficient evidence to sustain the burden in this issue.

Since we find no reason to disturb the judgment of the trial court, we affirm.

AFFIRMED.