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IN THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT
GREENE COUNTY, OHIO

RAY AND MARIE POWERS,	:	CA No. 2001 CA 22
Plaintiffs-Appellants,	:	Trial No. 99 CV 181
vs.	:	
WESLEY AND MARY TINCHER,	:	
Defendants-Appellees.	:	

BRIEF OF THE APPELLEE

Charles M. Rowland II, 0065603
Cox, Keller & Rowland
Attorney for Defendants-Appellees
85 West Main St.
Xenia, Ohio 45385
(937) 372-6921

Lanny R. Holbrook, 0031899
Stephen M. Meiser, 0037244
Holbrook and Associates, Ltd.
Attorney for Plaintiffs-Appellants
1400 Fourth and Race Tower
105 West Fourth St.
Cincinnati, Ohio 45402
(513) 721-4505

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I. STATEMENT OF FACTS

Defendant-Appellees, Wesley and Mary Tincher, object to Plaintiff-Appellants assertions that the chickens kept by Ray Powers are used for any other purpose than the illegal purpose of game fighting. (Appellants' Brief at 1). Wesley and Mary Tincher also disagree with the assertion that the keeping of game chickens only became a problem when the chickens were moved close to their property. (Appellants' Brief at 2). Defendant-Appellees find the keeping, breeding, and sale of chickens for the purpose of blood sport repugnant and illegal.

Defendant-Appellees object to the contention that these roosters were moved close to their property in an effort to stem disease in the birds. (Appellants' Brief at 2). Defendant-Appellees contend that the chickens were moved for the specific purpose of causing annoyance and discomfort and to interfere with their property and activities. In addition to moving over twenty (20) chickens within feet of their home, the Plaintiff-Appellant set up a 24-hour video surveillance of their home.

No other objections are raised as to the Statement of Facts contained in the Brief of the Appellant.

II. STANDARD OF REVIEW

Plaintiff-Appellants First and Second Assignment of Error allege that the trial court abused its discretion. The Supreme Court of Ohio has held that the sole standard of review in a civil appeal is abuse of discretion, which does not include a weight-of-the-evidence standard. **State v. Birkel** (1981), 65 Ohio St.2d 10, 11, 19 O.O.3d 191, 191-192, 417 N.E.2d 1249, 1249-1250; **State v. Gibbs** (1991), 60 Ohio St.3d 69, 74, 573

N.E.2d 62, 67-68; **Rootstown Twp. v. Drennen** (Sept. 29, 2000), Portage App. No. 99-P0096, unreported, 2000 WL 1473914; contra **Wellman Eng. v. Calderon Automation** (1965), 2 Ohio App.2d 385, 31 O.O.2d 591, 209 N.E.2d 172 (civil appeal not limited to issue of abuse of discretion; appeal as in any other civil case). See 24 A.L.R.3d 650 and 33 A.L.R.3d 448.

The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. **Id** An appellate court shall affirm if there is a reasonable basis for the common pleas courts decision. **Columbus v. Liebhart** (1993), 86 Ohio App.3d 469, 621 N.E.2d 554; **Cleveland Civ. Serv. Comm. v. Ohio Civ. Rights Comm**, 57 Ohio St.3d at 65, 565 N.E.2d at 582-583. The definition of "abuse of discretion" is in the disjunctive ("or"). Most abuses of discretion are simply unreasonable rather than arbitrary or unconscionable, and a decision is "unreasonable" where there is "no sound reasoning process" supporting it. **AAAA Ent., Inc. v.. River Place Community Urban Redev. Corp**. (1990) 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 600-601. Here, the record is replete with evidence upon which the trial Court relied in basing its decision.

III. RESPONSE TO ASSIGNMENT OF ERROR ONE

A. PLAINTIFF-APPELLANTS' ACTIVITIES ARE "INHERENTLY INJURIOUS" AND INCAPABLE OF BEING CONDUCTED WITHOUT DAMAGING SOMEONE ELSE'S PROPERTY OR RIGHTS AND STRICT LIABILITY SHOULD ATTACH TO THE ACTIVITY OF RAISING FIGHTING ROOSTERS.

A private nuisance refers to an invasion of an individual's use and enjoyment of his land. **Brown v. Scioto Cty. Bd. of Commrs**. (1993), 87 Ohio App.3d 704, 712, 622

N.E.2d 1153, 1158-1159. In order for a private nuisance to be actionable, the invasion must be either (a) intentional and unreasonable, or (b) unintentional but caused by negligent, reckless, or abnormally dangerous conduct. If the conduct is abnormally dangerous, the court must balance the utility and the benefit of the alleged nuisance against the invasion and harm caused.

"Nuisance" may be further divided into "absolute nuisance (or nuisance *per se*)" and "qualified nuisance." The distinction between the two categories is not the right or injury asserted, as is with public and private nuisances. Rather, the distinction between "absolute" and "qualified" nuisance depends upon the conduct of the defendant. "Absolute" nuisance is that for which strict liability will attach. An absolute nuisance consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault. **Metzger v. Pennsylvania, Ohio & Detroit RR. Co**. (1946), 146 Ohio St. 406, 66 N.E.2d 203, paragraph one of the syllabus.

Strict liability will arise where one does or allows anything to be done "without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights." **Taylor**, 143 Ohio St. 426, 55 N.E.2d 724, paragraph two of the syllabus. Strict liability will also attach where there is "the violation of law resulting in a civil wrong or harm." Id at 433. This is especially so when it is a safety statute which is violated. **Id**.

When the defendant commits an unlawful act that is deemed to be an absolute nuisance, the defendant becomes an "insurer" and will be liable for "loss resulting from

harm which may happen in consequence of it to persons exercising ordinary care, irrespective of the degree of skill and diligence exercised by himself ***to prevent such injury." Id at 434. Thus, a private individual may not interfere with a road or highway without permission from the proper authorities, and to so interfere with a roadway without permission is an absolute wrong for which the wrongdoer becomes an insurer, regardless of his prudence and care in preventing injury. **Id.**

In short, when one commits an unlawful act or is involved in an abnormally dangerous activity, the court considers such activities to be "inherently injurious" and incapable of being "conducted without damaging someone else's property or rights," and strict liability attaches to the activity. **Brown**, 87 Ohio App.3d 713. Conversely, where one has complied with applicable statutes and regulations, or where one has been given permission or authority to operate or erect the alleged nuisance, an absolute nuisance will not be found. **Id.**

Here, the Plaintiff was, by his own admission, raising "gaming chickens" whose sole economic use is derived from the participation in illegal cock fights. O.R.C. 959.15 ANIMAL FIGHTS, makes such activity illegal. It reads in pertinent part,

> No person shall knowingly engage in or be employed at cockfighting, bearbaiting, or pitting an animal against another; no person shall receive money for the admission of another to a place kept for such purpose; ***no person shall use, train, or possess any animal for seizing, detaining or maltreating a domestic animal.*** Any person who knowingly purchases a ticket of admission to such place, or is present thereat, or witnesses such spectacle is an aider and abettor. (Emphasis added)

By his own admission, the Plaintiff receives monies from the sale of game chickens that will ultimately be used in illegal activities. He receives $600.00 for breeding and $1200.00 to $2,500.00 for the sale of roosters and hens. (Transcript at 42). The sale of

fighting chickens comes within the purview of this statute because the Plaintiff "engages" in cockfighting by selling roosters to be used for that purpose. Plaintiff's illegal activities bring him within the definition of an "absolute nuisance" given above. An absolute nuisance consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm. Here, the raising of chickens for cock fighting is illegal and results in harm. The harm can be found in the testimony of the Defendants that the chickens crow constantly and that the crowing is "irritating and annoying." (Transcript at 9).

Plaintiff's brief would suggest that Mr. Powers is nothing more than an enthusiast who derives pleasure from showing his roosters at the Greene County Fair. (Transcript at 26-27). However, when asked on cross examination,

> Q. You don't make money off the ribbons and awards. You make the money off of selling the chickens for use of breeding or game fighting, isn't that correct?
>
> A. Yes. (Transcript at 43).

Based on the Plaintiff's own testimony, the primary economic benefit of these chickens is derived from breeding them for blood sport. The trier-of-fact, having heard this testimony determined that "Plaintiffs admit raising over one hundred roosters on their property for the primary purpose of cock fighting." (Judgment Entry at 2). The Court, however, went on to apply the analysis of a private nuisance instead of the absolute nuisance analysis. In doing so, it followed the analysis set forth in **Webb v. Forrester** (1999), 1999 Ohio App. LEXIS 474 (Twelfth App. Dist., Butler 2-16-99). The trial court permitted Mr. Powers to keep six (6) chickens for the purposes of breeding.

Defendants assert that the absolute nuisance analysis should be applied here due to the absolute repugnance of the activity. Not only are animals uselessly mutilated and killed for enjoyment, but engaging in this activity is illegal. The activity is "inherently injurious" because it demeans civil society to allow the practice to exist. Allowing law-abiding citizens the protection of strict liability would provide a valuable tool in stemming the tide against this abhorrent practice. For these reasons, the keeping of roosters for the purpose of fighting is "inherently injurious" and strict liability should attach.

B. THE COURT CORRECTLY FOUND THE KEEPING OF FIGHTING ROOSTERS TO BE A PRIVATE NUISANCE.

The law of private nuisance is a law of degree; it generally turns on the factual question whether the use of the property is put is a reasonable use under the circumstances, and whether there is an appreciable, substantial, tangible injury resulting in actual, material and physical discomfort." **Rautsaw v. Clark** (1985), 22 Ohio App. 3d 20,21 (quoting **Antonik v. Chamberlin** (1947), 81 Ohio App. 465, 476). Therefore, whether a particular fact pattern constitutes a private nuisance "can not be precisely defined, and must be left to the good sense and sound discretion of the tribunal called upon to act." **Rautsaw, Id**. at 21 quoting **Columbus Light & Coke Co. v. Freedland** (1861), 12 Ohio St. 392, 399.

In **Webb v. Forrester** (1999), 1999 Ohio App. LEXIS 474 (Twelfth App. Dist., Butler 2-16-99), the Butler County Court of Appeals considered whether the keeping of fighting chickens constituted a private nuisance. The facts of that case were as follows:

> Plaintiff-Appellees David and Amy Forrester, John and Ann Kogge, and John and Leslye Simak sued Bobby Wayne and Kathleen Webb for nuisance. The Simak's property was two houses away, four hundred yards up a hill, while the Forrester's property was three houses away, 700 yards up the hill. The Kogges lived on the opposite side of the property. The Defendants raised roosters for the purpose of cockfighting in Kentucky. The roosters crowed constantly, except from sunset until approximately 4:30 a.m. On a night with a clear moon, the crowing may not cease at all.

The Court found that the "evidence at trial strongly indicates that the noise at issue is not the normal sound of a farm or the country." "The noise is nearly continuous and overwhelming." The court heard testimony from the Appellees that the nose was "annoying, irritating, unpleasant, gut-wrenching or simply indescribable." The Court applied Ohio's traditional rule regarding nuisance evaluation. It weighed the nuisance caused by the use of the property against whether the use of the property was reasonable. The Court concluded that the use of rooster for cockfighting "demonstrates that they are not used for any legitimate business purpose and therefore have no economic value to appellants." Therefore, when the reasonableness of appellant's use of the property is balanced against the consistent and overwhelming noise originating from appellant's property, the finding of a private nuisance was within the trial court's discretion."

Counsel's attempts to distinguish this case from the facts above fall short. Here, the testimony is essentially identical to the testimony given above. The Defendants testified that the roosters crow almost constantly throughout the day. (Transcript at 7,8,9). Mr. Tincher testified that the noise was "irritating, annoying and unpleasant." (Transcript at 9). Counsel for the Plaintiff attempts to distinguish **Webb** by stating that the parties owned more acreage here than above. This, however, should be balanced against the testimony that Mr. Powers moved the chickens in direct proximity to the Defendants house. This proximity should be considered an aggravating factor and logic dictates that

the noise would be amplified at that distance. If, as in **Webb**, the noise was "annoying, irritating, unpleasant, gut-wrenching or simply indescribable" over three houses away, imagine the discomfort suffered by the Defendants when the chickens were only yards away from their home. The fact that the Defendants failed to mention that they shut their windows is not a distinguishing fact. Here, if they had shut their windows, it would have done little to help.

In **Webb**, the Court concluded that in order to abate the nuisance, appellants could keep less than six roosters, which it felt sufficient solely for the purpose of propagation. The Court considered the testimony of appellant who testified that he often showed his roosters at the county fair. In **Webb**, the trial court concluded that the "roosters were used for cockfighting and did not believe Bobby Wayne's testimony" regarding the use of chickens for use in county fairs. The conclusion of the trial court was, "when the reasonableness of appellant's use of the property is balanced against the consistent and overwhelming noise originating from appellant's property, the finding of a private nuisance was within the trial court's discretion."

Plaintiff attempts to distinguish **Webb** by asserting that in **Webb**, the owner of the roosters derived no income from the chickens and therefore they had no economic value to him. This is a blatant misstatement of the decision. In Webb, as here, the chickens were used for no "legitimate" business purpose. The fact that Mr. Powers derives illegal proceeds from the sale of these animals brings the case into conformity with the facts of **Webb**.

Here, the Court followed the Webb decision and abated the nuisance, limiting the number of chickens to a number that was "reasonable" for Mr. Powers hobby interests.

The Defendants submit that limiting the Plaintiff to less than six chickens. The facts supporting this decision are discussed below.

IV. RESPONSE TO ASSIGNMENT OF ERROR TWO

Raising chickens for the purpose of game fighting is illegal. O.R.C. 959.15. Given that fact, the use of property for that purpose can serve no "legitimate" business purpose. When the trial court balanced the harms incurred by the Defendants against the legitimate business purpose, it came to the conclusion that Mr. Powers should abate this nuisance. The court gave considerable leeway to Mr. Power's contention that he derives pleasure from raising the chickens for show in the county fair. The Court allowed Mr. Powers to keep six (6) chickens for that purpose.

In his brief, Mr. Powers asserts "it is entirely reasonable for [him] to use his 29.8 acres for raising game chickens and roosters and that the raising of these fowl is an economically beneficial activity for [him]." Defendants assert that this statement is a misstatement of legislative enactment, O.R.C. 959.15, a misunderstanding of the Court's Judgment Entry and a fundamentally flawed reading of the decisions supporting the Court's ruling. **Webb v. Forrester, supra** stands for the proposition that raising game chickens cannot impart an economic benefit because the activity has no "legitimate business purpose." Therefore, the Plaintiff cannot have this weighed in the Court's private nuisance analysis. The trial court weighed the substantial injury suffered by the Defendants against the pleasure the Plaintiff derives from raising and showing his chickens. The ruling of the trial court demonstrated great deference to the Plaintiff and is supported by overwhelming evidence in the record.

Furthermore, Mr. Powers reliance on **Miller v. Horn** (slip opinion), Ohio 2d Dist. 1996, W.L 354756 is misplaced. Miller stands for the proposition that "injunctive relief cannot be extended beyond what is reasonably necessary to end the nuisance." Here, the trial court applied Ohio's traditional private nuisance analysis and gave great weight to Mr. Powers showing of game chickens in the county fair. No other evidence of the economic benefit, outside of illegal gaming activity, was presented. Given that the Court had found that the primary use of these chickens was for game fighting, the ruling was exceedingly lenient with Mr. Powers. The court could well have ordered Mr. Powers to remove all of the chickens.

The issuance of an injunction lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. **Gerono v. State** (1988), 37 Ohio St. 3d 171, 173, 524 N.E.2d 496, 498. The law of private nuisance is one of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is an appreciable, substantial, tangible injury resulting in actual, material and physical discomfort. **Rautsaw v. Clark** (1985), 22 Ohio App. 3d 20,21 (quoting **Antonik v. Chamberlin** (1947), 81 Ohio App. 465, 476). Here, the trial court applied Ohio's traditional private nuisance balancing test and found in favor of the Defendants. No abuse of discretion has been shown by Mr. Powers.

V. RESPONSE TO ASSIGNMENT OF ERROR THREE

As of the filing of this brief, counsel is unaware of the ultimate disposition of the property owned by the Defendants. Counsel is aware that the unusual stress created by the Plaintiff has lead to the disintegration of the couple's marriage. Plaintiff's reliance on

this misfortune is misguided for two reasons. First, if, as is common in divorce cases, one spouse were allowed to keep the property, then they would certainly maintain an interest in this matter. Secondly, the issues involved in this appeal remain ripe, as the nuisance maintained by the Powers may affect the ultimate sale of the property. Cases are not moot when an actual controversy exists between adverse litigants. **See Cullen v. State ex rel. Toledo** (1922), 105 Ohio St. 545, 138 N.E. 58.

Furthermore, Plaintiff fails to meet any requisite burden of proof in showing that this issue is not ripe for determination. Counsel raises this argument for the first time at the Court of Appeals level. No motion has been made with the trial court for determination of this issue. There is no indication that appellant raised this issue in the trial court and it cannot be raised for the first time on appeal. **Miller v. Wikel Mfg. Co.** (1989), 46 Ohio St.3d 76, 78, 545 N.E.2d 76, 78-79. If the property is sold, then the trial court is the proper venue for arguing that the nuisance action is moot. By raising this matter at the trial court, the new owners would be afforded the opportunity to intervene on the Defendants behalf, as they would most certainly have an interest in the outcome. Defendants assert that the mootness issue, if there is one, should be remanded to the trial court for determination and proper presentation of evidence on this issue.

VI. CONCLUSION

Based on the foregoing, Appellees pray that the decision of the trial court be upheld and that any issues relating to mootness be remanded to the trial court for proper determination.

Respectfully submitted,

Charles M. Rowland II, 0065603
Cox, Keller & Rowland
Attorney for Appellees
85 West Main St.
Xenia, Ohio 45385
(937) 372-6921

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon Lanny R. Holbrook, 1400 Fourth and Race Tower, 105 West Fourth St., Cincinnati, Ohio 45202, by regular mail, postage pre-paid this 30th day of July, 2001.

Charles M. Rowland II, 0065603
Cox, Keller & Rowland