(3)

213.70

IN THE COURT OF APPEALS

SECOND APPELLATE DISTRICT

GREENE COUNTY, OHIO

FILED
2001 MAY 11 PM 1:12
COURT OF APPEALS
CLERK OF COURTS

RAY POWERS and MARIE POWERS	:	COURT OF APPEALS CASE NO. 2001CA22
PLAINTIFFS-APPELLANTS,	:	
v.	:	TRIAL COURT CASE NO. 99-CV-181
WESLEY TINCHER and MARY TINCHER	:	
DEFENDANTS-APPELLEES.	:	

BRIEF ON BEHALF

OF

APPELLANTS

ON APPEAL FROM

THE COURT OF COMMON PLEAS

GREENE COUNTY, OHIO

LANNY R. HOLBROOK (0031899)
STEPHEN M. MEISER (0037244)
Attorneys for Plaintiffs-Appellants
Holbrook and Associates Ltd.
1400 Fourth and Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202
(513) 721-4305

CHARLES M. ROWLAND, ESQ. (0065603)
Counsel for Defendants-Appellees
85 W. Main Street
Xenia, Ohio 45385
(937) 372-6921

TABLE OF CONTENTS

Page

PROCEDURAL POSTURE

STATEMENT OF FACTS

FIRST ASSIGNMENT OF ERROR 1

A. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT PLAINTIFFS' ROOSTERS CONSTITUTE A PRIVATE NUISANCE 1

Issue Presented for Review and Argument

WHERE THE TRIAL COURT'S FACTUAL FINDINGS DO NOT DEMONSTRATE THAT APPELLEE SUFFERED AN APPRECIABLE, SUBSTANTIAL, TANGIBLE INJURY AND WHERE THE COURT'S FACTUAL FINDINGS DO NOT REPRESENT THE EVIDENCE SUBMITTED AT THE INJUNCTION HEARING, THE COURT ABUSED ITS DISCRETION IN ENJOINING APPELLANTS 1

AUTHORITIES

Rautsaw v. Clark, 22 Ohio App. 3d 20, 21 (1985) 2, 3

Antonik v. Chamberlin, 81 Ohio App. 465 (1947) 2, 3

Forrester v. Webb, W.L. 74543 (Ohio App. 12 Dist. 1999) 5, 7, 13

Enterprise Roofing & Sheet Metal Company, Inc. v. Howard Investment Corp., 105 Ohio App. 502, 505 (Court of Appeals for Montgomery County 1957) 2

SECOND ASSIGNMENT OF ERROR

3. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT TO ABATE THE NUISANCE AND ENJOINING APPELLANT FROM KEEPING MORE THAN SIX ROOSTERS ON HIS PROPERTY

Issue Presented for Review and Argument

WHERE APPELLANT OWNED 29.8 ACRES ON WHICH HE RAISED GAME CHICKENS AND ROOSTERS, WHERE APPELLANT DERIVED SUBSTANTIAL INCOME FROM RAISING FOWL, AND WHERE THE TRIAL COURT HAD A MUCH LESS RESTRICTIVE MEANS TO REMEDY THE SITUATION, THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT TO DIVEST HIMSELF OF ALL BUT SIX ROOSTERS 5

AUTHORITIES

Gerono v. State, 37 Ohio St. 3d 171, 524 N.E. 2d 496 (1988) 6

State Ex. Rel. Fogle v. Steiner, 74 Ohio St. 3d 158, 656 N.E. 2d 1288, 1292 (1995) 6

McNeil v. McNeil, 46 Ohio L. Abs. 244, 68 N.E. 2d 338 (Ct. App. 2d Dist. Clark County, 1946) 7, 9

Miller v. Horn, W.L. 354756 (Ohio 2d Dist. 1996) 7, 13

State Ex. Rel. Pizza v. Rezcallah, 84 Ohio St. 3d 116, 702 N.E. 2d 81 (1998) 8

Rautsaw v. Clark, 22 Ohio App. 3d 20 (1985) 2, 8

Antonik v. Chamberlin, 81 Ohio App. 465 (1947) 2, 8

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT'S NUISANCE ABATEMENT JUDGMENT ENTRY IS AN ABUSE OF DISCRETION WHERE CIRCUMSTANCES HAVE CHANGED SINCE THE JUDGMENT ENTRY WAS PLACED OF RECORD

Issue Presented For Review and Argument

WHERE THE APPELLEE WHO OBTAINED AN INJUNCTION IS SELLING HIS REAL ESTATE AND MOVING THE INJUNCTION IS NO LONGER NECESSARY AND SHOULD BE VACATED

AUTHORITIES

Antol v. Dayton Malleable Iron Company, 34 Ohio L. Abs. 295, 38 N.E. 2d 130 (Ct. App. 2d Dist. 1941) . . . 8

McNeil v. McNeil, 46 Ohio L. Abs. 244, 68 N.E. 2D 338 (Ct. App. 2d Dist. Clark County, 1946) . . . 7, 9

CONCLUSION . . . 10

REQUEST FOR ORAL HEARING . . . 11

CERTIFICATE OF SERVICE . . . 12

APPENDIX . . . 13

Forrester v. Webb, W.L. 74543 (Ohio App. 12 Dist. 1999)
Miller v. Horn, W.L. 354756 (Ohio 2d Dist. 1996)
Judgment Entry - Final Appealable Order

PROCEDURAL POSTURE

[illegible] Ray and Maria Powers filed their Complaint against Wesley and Mary Tincher. (T. d. at 3). Defendants filed an Answer on May 2[illegible] 2000. (T. d. at 8). Defendants filed an Amended Answer and Counterclaim on July 29, 2000. (T. d. at 12). This matter went to arbitration, where an award was rendered for Plaintiffs in the amount of $5,500 on October 18, 2000. (T. d. at 15). Plaintiffs appealed from the arbitration award to the Court of Common Pleas on November [illegible], 2000. (T. d. at 20). On the day scheduled for jury trial the trial judge dismissed the jury and allowed Defendants to proceed on the request for injunctive relief that was contained in the Counterclaim Defendants had filed. (T. p. at 3). The trial court entered a Judgment Entry on February 20, 2001 in which it found that Appellants' roosters constituted a private nuisance and the Court ordered Appellants to abate the nuisance and enjoined Appellants from keeping more than six roosters on Appellants' property. (T. d. at 4, Appendix). Plaintiff filed a Notice of Appeal on March 9, 2001. (T. d. at 5).

STATEMENT OF FACTS

Appellants Ray and Maria Powers are adjoining land owners with Appellees Wesley and Mary Tincher. (T. p. at 6). The Powers owned 29.8 acres. (T. p. at 38). The Appellees own 50 acres. (T. p. at 22). Appellant Powers began raising chickens in the 1970s. (T. p. at 37). Powers testified that he sells chickens for breeding purposes and receives $600 for a rooster and between $1,200 to $2,500 for two hens and a rooster. (T. p. at 42). Appellee Tincher testified that he filed this injunction action against the Powers after Powers moved approximately twenty of his roosters which had been kept on the other side of the Powers' farm, within ten feet of Tinchers' property line. (T. p. at 6). Tincher testified that the sound from the roosters was irritating and annoying. (T. p. at 9).

When asked whether the wind from the roosters interfered [illegible] reply was simply "yes, to a certain degree." T. p. at [illegible]. Tincher testified that Appellants' roosters only became a problem when Appellant moved approximately twenty of those roosters against the Tincher property line. T. p. at 21, 22. Appellant testified that he moved the roosters closer to the Tincher property when germs and diseases began to kill his younger birds. T. p. at 30. Powers testified, "you rotate crops, you rotate animals." T. p. at 39.

FIRST ASSIGNMENT OF ERROR

A. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT PLAINTIFFS' ROOSTERS CONSTITUTE A PRIVATE NUISANCE.

Issue Presented For Review and Argument

WHERE THE TRIAL COURT'S FACTUAL FINDINGS DO NOT DEMONSTRATE THAT APPELLEE SUFFERED AN APPRECIABLE, SUBSTANTIAL, TANGIBLE INJURY AND WHERE THE COURT'S FACTUAL FINDINGS DO NOT REPRESENT THE EVIDENCE SUBMITTED AT THE INJUNCTION HEARING, THE COURT ABUSED ITS DISCRETION IN ENJOINING APPELLANTS.

The trial court's Judgment Entry, a true and correct copy of which is included in the Appendix, correctly noted "The law of private nuisance is a law 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, 22 Ohio App. 3d 20, 21 (1985) (quoting Antonik v. Chamberlin, 81 Ohio App. 465, 476 (1947)).

[illegible] the evidence that was presented at the hearing for the permanent injunction. For example, the Judge stated that: "Plaintiffs admit raising their hundred roosters on their property for the primary purpose of cock fighting." Judgment Entry at 2. However at the hearing Appellant was asked:

> Q. "And your primary purpose in raising those roosters is to sell them to engage in cock fighting. Is that right?"
>
> A. "No, sir, that's not right." Tr. p. at 13 and 14.

When asked again whether Appellant's primary purpose in raising roosters was to sell them to engage in cock fighting, Appellant replied:

> A. "[...]no, that is not the primary reason that I raised those game chickens. The primary reason I raised those game chickens is I have in Greene County been in the game chicken shows for probably the last eight years at the Greene County fair grounds. At Greene County fair grounds we show game chickens. We show other chickens and even the 4-H kids show with us on Saturday. . . . Those chickens, like I said, are raised as show chickens and I do sell the chickens."

(Tr. p. at 26 and 27).

Later on cross examination, Appellant was asked:

> Q. "Your money that you make off these chickens is not in winning awards, it's in selling them for game fighting, isn't that correct?"
>
> A. "It is selling chickens for breeding purposes, that is the biggest thing I sell these game chickens for. I usually get $600 for a rooster for breeding. I'll ask $1,200 to $2,500

[illegible] most people [illegible] roosters [illegible] they need, so they buy roosters

T. p. at 7.

In contrast to the overwhelming testimony from Appellant that his purpose in raising the roosters was for breeding purposes, there was only one response to a compound question that suggested the roosters were raised for cock fighting:

Q. "You don't make money off the ribbons and awards. You make the money off of selling the chickens for the use of breeding or game fighting, isn't that correct?"

A. "Yes."

T. p. at 35.

The trial court next found that "Plaintiffs do not dispute that their roosters crow from early morning until sunset." (Judgment Entry at 2). However, once again the evidence does not support this finding. Appellant was asked:

Q. "So you agree with me by your own testimony that the roosters may crow from 7:00 in the morning until 5:00 at night?"

A. "Somewhere, but most of the time during the day they are busy eating and they do not crow."

(T. p. at 30).

The Court also found that "The crowing of the roosters is irritating and annoying." (Judgment Entry at 2). It is true, that in response to leading questions from his counsel, Appellee testified that the sound of the chickens was irritating and annoying. (T. p. at 9). However, when Appellee's counsel asked Appellee whether the sound from the chickens caused any interference with

[illegible] certain degree. [illegible]

[illegible]

Appellant believes that the trial court's factual findings were erroneous and that it improperly applied those facts to the case of Forrester v. Webb, [illegible] (Ohio App. 12 Dist. [illegible]) (Slip op. included in Appendix), which it relied upon in finding a nuisance in this matter. The Forrester case was markedly different from the case at bar. In Forrester, each of the parties owned only 5 acres each. Forrester, at [illegible]. In marked contrast, the parties in this case own 50 and 29.3 acres respectively. (T. p. at 22, 38). In the Forrester case there were three adjoining land owners who testified against the rooster's owner. Forrester, at 2. In this case, the only person testifying against Appellant is the Appellee Wesley Tincher. (T. p. at 5). In the Forrester case the three neighbors testified that the roosters' noise was "annoying, irritating, unpleasant, gut-wrenching, or simply indescribable". Id. In this case, Mr. Tincher stated that the noise from Mr. Powers' roosters was irritating and annoying, however, Tincher did not elaborate on how that noise interfered with his living or his activities. (T. p. at 8, 9). In Forrester, the complaining witnesses testified that they were forced to close their windows due to the noise. Id. In the instant case, there was no comparable testimony. (T. p. at 8). Finally, in Forrester the owner of the roosters derived no income from the roosters and therefore they had no economic value to him. Id. In sharp contrast, Mr. Powers testified that he sells the chickens for breeding purposes and receives $600 for a rooster for breeding and $1,200 to $2,500 for two hens and a rooster. (T. p. at 42).

Based upon the foregoing, Appellants submit that the trial court abused its discretion in making finding of fact that Appellant's roosters constituted a private nuisance. See generally, Enterprise Roofing & Sheet Metal Company, Inc. v. Howard Investment Corp., 95 Ohio App. 502, 505 (Court of Appeals for Montgomery County 1995) ("Because of the uncertainty and inaccuracy of the findings of fact, we cannot safely support this judgment. The judgment will be reversed and the cause remanded.").

SECOND ASSIGNMENT OF ERROR

B. THE TRIAL COURT ABUSED ITS DISCRETION BY ENJOINING APPELLANT FROM KEEPING MORE THAN SIX ROOSTERS ON HIS PROPERTY.

Issue Presented For Review and Argument

WHERE APPELLANT OWNED 29.8 ACRES ON WHICH HE RAISED GAME CHICKENS AND ROOSTERS. WHERE APPELLANT DERIVED SUBSTANTIAL INCOME FROM RAISING FOWL. AND WHERE THE TRIAL COURT HAD A MUCH LESS RESTRICTIVE MEANS TO REMEDY THE SITUATION. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT TO DIVEST HIMSELF OF ALL BUT SIX ROOSTERS.

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, 37 Ohio St. 3d 171, 173, 524 N.E. 2d 496, 498 (1988). "The term 'abuse of discretion' implies that the court's attitude is unreasonable, arbitrary, or unconscionable." State Ex. Rel. Foggie v. Steiner, 74 Ohio St. 3d 158, 161, 656 N.E. 2d 1288, 1292 (1995).

[illegible] McNeil, [illegible] 2d Dist. [illegible]

[illegible] this court stated:

> "It is difficult to define exactly what is meant by 'abuse of discretion' and practically impossible to lay down any general rule as to what it consists of, since it depends upon the facts in each particular case. As the term is ordinarily used, it has been said to imply not merely an error in judgment, but perversity of will, passion or moral delinquency. But whatever it may imply, one of its essentials is that it must plainly appear to effect an injustice to one of the parties."

Citations omitted, emphasis added.

In Miller v. Horn, W.L. 354756 (Ohio 2d Dist. 1996) (Slip op. included in Appendix) the court found an abuse of discretion where the trial court had ordered the owner of an animal shelter to dispose of all of her animals without giving her an appropriate time frame in which to do so and without allowing her to keep a reasonable number of animals. The Miller court stated: "The injunctive relief cannot be extended beyond what is reasonably necessary to end the nuisance." Miller at 5.

Similarly, in this case the court held: "In order to abate the nuisance, this court follows Forrester and enjoins plaintiffs from keeping more than six roosters on his property. . . . Furthermore, this court enjoins plaintiffs from keeping the roosters on the property directly adjacent to defendant's house." Judgment Entry at 3).

The trial court's abatement Entry works an injustice on Appellant in two ways. First, the court's Entry is overreaching. The trial court could have easily abated the nuisance and allowed Appellant the reasonable use of his property by ordering Appellant to move his chickens and roosters to the far side of his property away from the Tincher property. This would have been a much less restrictive remedy which would have satisfied both the Appellants and the Appellees.

[illegible] is also significant that Appellant testified that he [illegible] between [illegible] and $2,500 for two hens and a rooster. T. p. 42. The trial court's Judgment Entry stating this nuisance works an economic injustice to Appellant in this matter. In many respects, the Court's Abatement Entry is a "taking" without compensation which is a violation of both the Fifth and Fourteenth Amendments to the United States Constitution and a violation of Section 19 of Article I of the Ohio Constitution. See generally, State Ex. Rel. Pizza v. Rezcallah, 84 Ohio St. 3d [illegible], 124, 702 N. E. 2d [illegible] 1998) ("When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking").

Furthermore, as the trial court noted,

> "The law of private nuisance is a law 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." (Emphasis added)

Ramsaw v. Clark, 22 Ohio App. 3d 20, 21 (1985)(quoting Antonik v. Chamberlin, (1947) 81 Ohio App. 465, 476). The trial court, however, failed to determine and make a factual finding on whether the Appellant's use of their 29.8 acres for raising game chickens and roosters was a "reasonable use under the circumstances".

Given the fact that it is entirely reasonable for Appellant 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 Appellant, and given the fact that there was a less restrictive remedy available to the trial court, i.e. ordering Appellant to move the fowl to the opposite side of his farm, Appellant submits that it was an abuse of discretion by the trial court to order Appellant to divest himself of all but six of his roosters.

THIRD ASSIGNMENT OF ERROR

I. THE TRIAL COURT'S NUISANCE ABATEMENT JUDGMENT ENTRY IS AN ABUSE OF DISCRETION WHERE CIRCUMSTANCES HAVE CHANGED SINCE THE JUDGMENT ENTRY WAS PLACED OF RECORD.

Issue Presented For Review and Argument

WHERE THE APPELLEE WHO OBTAINED AN INJUNCTION IS SELLING HIS REAL ESTATE AND MOVING THE INJUNCTION IS NO LONGER NECESSARY AND SHOULD BE VACATED

Appellant's counsel was informed by counsel for the Appellee that Appellee has put his real estate up for sale and is in the process of moving. "If all the matters complained of in the Petition which was the basis for prayer for injunction have been eliminated so that the Plaintiff admits that there is no present trouble arising from any of the causes alleged in this petition, the Court is not justified in granting a permanent injunction on the theory that the Defendant might, at some future date, again offend in the matter complained of. Antol v. Dayton Malleable Iron Company, 34 Ohio L. Abs. 495, 498, 38 N.E. 2d 100 (Ct. App. 2d Dist. 1941).

If Appellee Tincher is indeed selling his real estate and moving, then there is no just reason that the permanent injunction ordered by the trial court should remain in effect. In fact, were the injunction to remain in effect, it would clearly work an injustice to Appellant Powers. McNeil v. McNeil, 46 Ohio L. Abs. 244, 245.

CONCLUSION

[illegible] abused its discretion in ordering Appellant to divest himself of all but six roosters. The trial court had less restrictive remedies available which would have solved the problem and would have allowed Appellant to retain ownership of his birds. Given the fact that the Tinchers, upon information and belief, have placed their property up for sale, the trial court's Judgment Entry may now be moot and should be vacated by this Court.

WHEREFORE, Appellants urge this Court to reverse the trial court's Judgment Entry, insofar that it enjoins Appellant from keeping more than six roosters on his property. This case should be remanded to the trial court for further proceedings.

Respectfully submitted,

Lanny K. Holbrook (0063399)
Stephen M. Meiser (0037244)
HOLBROOK AND ASSOCIATES LTD.
1400 Fourth and Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202
(513) 721-4505
COUNSEL FOR PLAINTIFFS-APPELLANTS
RAY POWERS AND MARIE POWERS

REQUEST FOR ORAL HEARING

Plaintiff-Appellants respectfully requests the opportunity to be heard on this matter

BY: _____

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by ordinary mail to Charles [illegible] DeVitale, Esq., 85 N. Main Street, Xenia, Ohio 45385 on this 2nd day of [illegible] 2001.

Stephen M. Meiser (0037[illegible])
Attorney for Plaintiffs-Appellants