IN THE COURT OF APPEALS OF IOWA

No. 0-692 / 10-0523
Filed December 8, 2010

ROBERT HAFFNER and
CAROL HAFFNER,
Plaintiffs-Appellants,

vs.

TROY CLARK, SHARYN CLARK,
BETH NELSON, KORY NELSON and
CLARK'S TREE SERVICE,
Defendants-Appellees.

Appeal from the Iowa District Court for Page County, James S. Heckerman, Judge.

Robert and Carol Haffner appeal from the district court ruling denying their claims against the defendants, Troy and Sharyn Clark, Beth and Kory Nelson, and Clark's Tree Service. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Brenda L. Myers-Maas, West Des Moines, for appellants.

Patrick A. Sondag, Council Bluffs, for appellees Beth and Kory Nelson.

Jon J. Puk of Walentine, O'Toole, McQuillan & Gordon, Omaha, Nebraska, for appellees Troy and Sharyn Clark and Clark Tree Service.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

EISENHAUER, P.J.

Robert and Carol Haffner appeal from the district court ruling dismissing their claims against the defendants, Troy and Sharyn Clark, Beth and Kory Nelson, and Clark's Tree Service. They contend the court erred in concluding they failed to establish a nuisance claim and in denying their request for an injunction against the defendants for their use of wood-burning furnaces. They also contend the court erred in considering and weighing certain evidence; in concluding their claims were barred by the doctrines of laches and estoppel; in dismissing their law claims for negligence, trespass, and assault; and in denying their motion for new trial. Because the Haffners failed to establish the existence of a nuisance, we affirm the dismissal of their claim for a permanent injunction against the defendants. We reverse the dismissal of their law claims and remand for further proceedings.

I. Background Facts and Proceedings. The Haffners own a home in Yorkstown, where they have resided since 1977. The Clarks' home is located approximately forty or fifty feet to the west of the Haffners. Approximately 125 feet to the east of the Haffners is a home owned by the Nelsons.[1]

The issue in this case concerns the Clarks' and the Nelsons' use of wood-burning furnaces. The Clarks installed a wood-burning furnace in their home in 1984 and have been operating it as their sole heat source since. In 1998, the Clarks installed a second wood-burning furnace in their detached garage; this furnace was disconnected in March 2008 following complaints made by the

[1] Beth Nelson is the adult daughter of Troy and Sharyn Clark.

Haffners. The Nelsons also operate a wood-burning furnace in their home. Their furnace was installed on January 1, 2008.

On December 24, 2008, the Haffners filed a petition alleging the Nelsons, the Clarks', and Clark's Tree Service's use of wood-burning furnaces generated smoke, soot, noxious fumes, and fly ash, which damaged their property, caused them physical injury, and reduced the value of their property, as well as infringing on their use and enjoyment of the land. They sought recovery under the theories of nuisance, negligence, assault, takings, and trespass to land. They requested an award of compensatory and punitive damages, as well as temporary and permanent injunctions to enjoin the defendants from using the furnaces.

In their answer, the defendants denied the Haffners' claims and raised the affirmative defenses of failure to state a claim upon which relief may be granted, the statute of limitations, comparative fault, the doctrines of laches and estoppel, misjoinder of claims, failure to mitigate damages, and unclean hands.

On February 24, 2009, the Haffners' request for a temporary injunction was heard. The defendants agreed to extend their smokestacks two feet above the highest peak of their rooflines and to burn only clean, seasoned wood. Although the defendants complied with the agreement, in April 2009 the Haffners informed the court the adjustments had not alleviated the problem.

A trial was commenced in November 2009 on the Haffners' claims of nuisance, negligence, assault, and trespass, as well as their claim for permanent injunction. A jury was impaneled to hear the legal claims while the court was to consider the request for injunction. After two jurors were dismissed for personal

or family illnesses, the trial court declared a mistrial on the Haffners' law claims. Their request for a permanent injunction was tried to the court sitting in equity, with the law claims to be tried at a later date. At the close of the Haffners' evidence, the defendants moved for directed verdict. The trial court withheld ruling on the motion and proceeded to hear the defendants' evidence.

On December 21, 2009, the court entered its order directing a verdict in favor of the defendants on the Haffners' nuisance claim and their request for permanent injunction. The court found in the alternative the evidence did not establish a nuisance. It further found the Haffners' delay in complaining about the alleged nuisance was unreasonable and concluded "the Defendants' affirmative defenses of estoppel and laches should apply and be enforced."

The court then went on to address the defense of election of remedies. It stated:

> Since this Court has concluded that no nuisance was proven, the Haffners cannot pursue that claim as an action at law to another fact finder. In deciding if any such nuisance was shown, the evidence offered by the Haffners also encompassed their separate causes of action at law for trespass (intentionally causing an object of thing to enter and do harm to their property) and for assault (doing an act intended to put another in fear of physical pain or contact). As such, the Haffners likewise cannot bring those claims again. On the Haffners' remaining cause of action at law for negligence, it is stated in *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 661 (Iowa 2002) that, "[w]here a nuisance is based on negligence, however, liability for nuisance may depend upon the existence of negligence." The Court reasonably also finds that the Haffners did not prove any negligence and that claim too cannot be relitigated.

The Haffners sought enlargement of the ruling and filed a motion for new trial. In its March 1, 2010 ruling, the court denied both. The Haffners appeal.

II. Scope and Standard of Review. This case was brought and tried as an equity action. Therefore, on appeal, this court will review the case de novo. *See Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 267 (Iowa 2000). We give weight to the district court's findings of fact, but we are not bound by these findings. *Id.* This court is especially deferential to the district court's assessment of witness credibility. *Id*.

III. Permanent Injunctive Relief. The Haffners first contend the court erred in concluding the evidence did not establish a nuisance and in refusing to grant permanent injunctive relief.

It is incumbent upon parties to use their own property in a manner that will not unreasonably interfere with or disturb their neighbor's reasonable use and enjoyment of the neighbor's property. *Id.* at 271. A private nuisance is "an actionable interference with a person's interest in the private use and enjoyment of the person's land." *Id.* (citing *Wienhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996)). The legislature defines a nuisance as:

> Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Iowa Code § 657.1 (2007). The Iowa Code further defines "[t]he emission of dense smoke, noxious fumes, or fly ash in cities is a nuisance and cities may provide the necessary rules for inspection, regulation and control" as a nuisance. Iowa Code § 657.2.

In determining whether a property owner's use of his land is a nuisance, we use an objective, normal-person standard. *Perkins*, 613 N.W.2d at 271. Thus, if "normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable" then the invasion is significant enough to constitute a nuisance. *Id.*

The Haffners note our supreme court has held smoke may constitute a nuisance. *Claude v. Weaver Const. Co.*, 261 Iowa 1225, 1235, 158 N.W.2d 139, 146 (1968) ("What is termed reasonable use of one's property cannot be so extended as to include emission of noxious smoke and dust resulting in material damage to a neighboring property owner."). They also cite to a Nebraska case wherein the Nebraska Court of Appeals held the plaintiffs were entitled to an award of monetary damages and injunctive relief where smoke from wood-burning furnaces caused the plaintiffs to complain of a "rotten" creosote odor and to suffer from scratchy throats, burning and watering eyes, and coughing. *Thomsen v. Greve*, 550 N.W.2d 49, 53-56 (Neb. App. 1996). In its analysis, the court wrote:

> We have no trouble concluding that, at least in our society, to have the use and enjoyment of one's home interfered with by smoke, odor, and similar attacks upon one's senses is a serious harm. The social value of allowing people to enjoy their homes is great, and persons subjected to odor or smoke from a neighbor cannot avoid such harm except by moving. One should not be required to close windows to avoid such harm.
>
> On the other hand, aside from the simple right to use their property as they wish, it is difficult to assign any particular social value to the Greves' wood-burning stove. This method of heating does save on fossil fuels, but assuming that the stove used by the Greves emits foul-smelling smoke, society is certainly blessed if only a few people avail themselves of the opportunity to save fuel

> by using such stoves. The Greves could avoid invading the Thomsens' property by using other means of heating.

Id. at 751.

In *Thomsen*, the court acknowledged the facts cited by the parties were in direct conflict on the issue of whether the defendants had created a nuisance. *Id.* at 752. The district court found the plaintiffs' version of the facts more credible and the court of appeals relied heavily on that determination in affirming the nuisance finding. *Id.*

Here, the district court clearly found the Haffners to be less credible. Unlike the plaintiffs in *Thomsen* who complained of exposure to smoke two years after moving into their home, the Haffners waited for over twenty years before taking action. Although the Haffners allege they complained to the Clarks during that time period, the court notes, "[T]he evidence is undisputed that the Haffners made no complaints to any authority, physician or other agency until 2008." The evidence also shows that in 2008 after the Haffners made a complaint about the smoke, the Clarks and the Nelsons took swift action in an attempt to remedy the situation. For instance, Troy Clark trimmed trees, raised the height of the smokestack, moved the location of the furnace to the home's west side, and disconnected the wood-burning furnace located in the shop. It is also notable the Haffners used a wood-burning furnace in their own home for over twenty years as a supplemental heat source.

Other facts undermine the credibility of the reports made by the Haffners. The medical conditions allegedly caused by the exposure to smoke were also present in the summer months when the furnaces were not in use. Although the

Haffners' treating physician testified wood smoke is an irritant that can cause bronchitis and sinusitis as seen in the Haffners, he also testified there are many irritants that can trigger these conditions. One such irritant is cigarette smoke; Carol Haffner has smoked cigarettes for over thirty years and Robert Haffner, who had smoked for over twenty-five years, has recently resumed smoking after a period of cessation. The Haffners had not complained to their physician about smoke-related bronchitis or sinusitis prior to 2008.

Witnesses testified the smell of smoke was strongest on the Haffners' three-season enclosed porch. Carol Haffner smoked on this porch, as did guests. The Haffners also used this area to use a gas grill in the winter months.

The district court's ruling noted there was also evidence of animosity between the parties not relating to the subject matter of this suit. Beth Nelson testified to an incident in which she awoke to find the Haffners' son, Kevin, in her bedroom at 1 a.m. when she was still living with her parents. The authorities were notified. Kevin Haffner later took his own life.

Additionally, the record lacks evidence to support the Haffners' claim the wood-burning furnaces met the threshold to be considered a nuisance. Other neighbors testified they did not have any smoke infiltration in their homes, had never experienced noxious smells or fumes when outside in the winter month, and had never observed dense smoke or fly ash from the Clarks' or Nelsons' furnaces.

The Haffners were unable to present any proof the Clarks' or Nelsons' furnaces were responsible for any damage to their home or health. While

several acquaintances of the Haffners testified to the presence of an unpleasant smoky odor in the home and especially the enclosed porch, there was no proof the odor was a product of the Clarks' or Nelsons' wood-burning furnaces. We conclude the evidence is insufficient to support a finding the furnaces present a nuisance to the Haffners. Accordingly, the district court properly denied their request for a permanent injunction.

III. Evidentiary Issues. The Haffners contend the district court improperly considered evidence in reaching its determination the defendants' wood-burning furnaces did not constitute a nuisance. Specifically, they claim the court erred in considering the fact the furnaces complied with DNR and EPA regulations, in considering their comparative fault, and in considering evidence regarding their son's suicide.

In their statement of preservation of error, the Haffners state error was preserved

> by pleading separate counts of nuisance and negligence and by raising the issue at trial, particularly at the time the jury was dismissed and the court, sitting in equity, proceeded to try the sole issue of Plaintiffs' claim for injunctive relief under their nuisance cause of action. Plaintiffs' counsel again raised the issue at hearing on Plaintiffs' Motion for New Trial.

We conclude the Haffners have failed to preserve error on the arguments outlined in the second section of their appellate brief. In determining the sufficiency of an objection to preserve error, "the test is whether the exception taken alerted the trial court to the error which is urged on appeal." *Dutcher v. Lewis*, 221 N.W.2d 755, 759 (Iowa 1974). The purpose is "to afford the trial judge an opportunity to catch exactly what is in counsel's mind and thereby

determine whether the objection possesses merit." *State v. Baskin*, 220 N.W.2d 882, 886 (Iowa 1974). The Haffners fail to refer to anywhere in the record where these issues were raised. Accordingly, we will not consider these claims for the first time on appeal.

IV. The Doctrines of Laches and Estoppel. As an alternative basis for its ruling, the trial court found the defendants' affirmative defenses of estoppel and laches should apply and be enforced to defeat the Haffners' claim for a permanent injunction. The Haffners appeal from this determination. Because we find the evidence does not support the underlying nuisance action on which the request for an injunction is based, we need not consider whether the defendants have proved the affirmative defenses of estoppel and laches apply to the facts at bar.

V. Election of Remedies and Issue Preclusion. The Haffners next claim the district court erred in dismissing their law claims of negligence, trespass, and assault on the basis of election of the remedies and issue preclusion.

Election of the remedies is an equitable defense. *Bolinger v. Kiburz*, 270 N.W.2d 603, 605 (Iowa 1978). It is not favored and therefore is narrowly applied. *Id.* The purpose of the defense it to protect a person from the vexation of contradictory claims by a single party. *Id.* Whether the doctrine applies is a question of law for the court to decide. *Id.*

There are three elements a party must establish to rely on the doctrine: (1) existence of two or more remedies, (2) inconsistency between them, and (3) a

choice of one of them. *Id.* Here, there is no question the first element exists because there are more than two remedies sought. The district court resolved the second and third elements in favor of the defendants, finding there was an inconsistency between the remedies where the Haffners sought monetary damages for the defendants' use of wood-burning furnaces while simultaneously seeking to prevent the defendants from continued use of these furnaces. Because the Haffners decided to pursue the permanent injunction after the jury was dismissed, the court concluded the Haffners were choosing this equitable remedy over those provided at law.

We conclude the district court erred in determining there was a conflict between the remedies sought. The Haffners could seek to enjoin the defendants from further operation of their furnaces while simultaneously seeking damages for the harm already suffered by exposure to the smoke and soot they allege the furnaces generated. The doctrine of election of remedies was not available to the defendants under these facts.

In its ruling on the Haffners' motion to expand or amend findings, the district court stated with regard to its dismissal of the trespass, assault, and negligence claims:

> In its Order, this Court referenced that the evidence offered by the Haffners also encompassed those causes of actions such that those claims were also necessarily decided. To the extent not explicitly recited in that Order, issue preclusion prevents their further litigation of the Haffners' various claims.

The court found the four elements required to preclude those issues from being heard were satisfied.

On appeal, the Haffners argue issue preclusion was never raised by the defendants. They also assert the elements for issue preclusion have not been met.

> In general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981) (quoting Restatement (Second) of Judgments § 68 (Tentative Draft No. 4 1977)) (footnote omitted). There are four elements that must be satisfied before issue preclusion may be invoked: (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment. *Id.*

Generally, issue preclusion must be pled and proved by the party asserting it. *Fischer v. City of Sioux City*, 654 N.W.2d 544, 548 (Iowa 2002). The defendants did not plead this affirmative defense in their answer. However, at the time they answered the petition, there was no judgment entered upon which to preclude the issues raised in the Haffners' petition. The issue was never raised by the defendants because the "prior action" needed to preclude the Haffners' law claims occurred in the court's ruling on the defendants' motion for directed verdict and the plaintiffs' request for injunction—the same ruling that

applied the doctrine of issue preclusion. The only issue before the court at that time was the issue of the injunction. The Haffners' law claims were not properly before the court at the time of the ruling and the court was without authority to consider the preclusive effect of its ruling on those claims.

We conclude the court erred in dismissing the Haffners' law claims. Accordingly, we reverse this portion of the court's order.

***VI. Motion for New Trial*.** Finally, the Haffners contend the court erred in denying their motion for new trial. They allege new trial is warranted because of newly discovered evidence. Any other grounds urged on appeal for new trial are not properly before the court because they were not raised in the Haffners' motion for new trial. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Iowa Rule of Civil Procedure 1.1004(7) allows an aggrieved party a new trial where substantial rights are materially affected by the discovery of new, material evidence that could not have been discovered and produced at trial. On appeal, the Haffners cite the independent medical report prepared by Dr. Lon Keim. The Haffners requested the report from the defendants and were told no such report had ever been submitted. Following the ruling in this matter, the Haffners obtained a copy of the report from Dr. Keim's office. They allege the report meets the criteria for new trial.

A party seeking a new trial on such grounds must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if a new trial is granted. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995).

We conclude the discovery of Dr. Keim's report is not a basis for new trial. In the report, Dr. Keim opines "smoke in any form is an irritant" and, based on the information reported to him by the Haffners, states the defendants' use of the wood-burning furnaces "could be a reasonable source of ongoing irritation, and as such, potentially contribute to the recurrent re-exacerbation of rhinitis, sinusitis, and/or concomitant bronchitis reportedly concurred by either/or Mr. and Mrs. Haffner." Given the speculative nature of the report and Dr. Keim's reliance on the information provided by the Haffners, at best it is merely cumulative of the testimony of the Haffners' physician. It is unlikely the report would change the outcome if new trial were granted.

The Haffners also sought new trial based on newly discovered evidence regarding the existence of the nuisance after trial. Under Iowa law, "newly discovered evidence" sufficient to merit a new trial is evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time. *Id.* at 762-63. The evidence offered by the Haffners was not in existence at the time of trial and therefore cannot be the basis for granting new trial.

VII. Conclusion. The Haffners have failed to prove the existence of a nuisance to succeed on their claim for injunctive relief. We affirm the dismissal of their claim for a permanent injunction. We reverse the dismissal of the Haffners' law claims for nuisance, negligence, trespass, and assault.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.