

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES LePAGE

Plaintiff-Appellant

-vs-

BOARD OF TOWNSHIP TRUSTEES
OF THORN TOWNSHIP, PERRY
COUNTY, OHIO

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. John W. Wise, J.

Hon. John F. Boggins, J.

Case No. 03 CA 4

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common
Pleas, Case No. 02 CV 00044

JUDGMENT: Affirmed in Part; Reversed in Part

DATE OF JUDGMENT ENTRY: JANUARY 29, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Boggins, J.

{¶1} This is an appeal from a non-jury decision of the Court of Common Pleas, Perry County, Ohio, granting Appellee a permanent injunction. The court viewed Appellant's premises, received Affidavits and written closing arguments rather than oral testimony of witnesses, pursuant to agreement of the parties.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee, in its action, asserted that Appellant, the owner of slightly over five acres in Thorn Township, maintained numerous inoperable vehicles, trucks and trailers and was operating an unlicensed junkyard, among other matters. Appellee claimed a violation of Section 26.03(D) and (E) of the Thorn Township Zoning Code and that a nuisance existed under common law and the Revised Code and that a danger to health, safety and welfare existed.

{¶3} Appellant, in his Affidavit, asserted that all vehicles except two were licensed and that only two were inoperable, one of which could be made operable by a recently purchased engine.

{¶4} Appellee submitted two extensive affidavits, that of Dale Factor, Zoning Inspector, and Jeffrey Spangler. The latter incorporated twenty-five pictures of the vehicles, accumulated trash and general conditions existing.

{¶5} The affidavits generally were not confronted by additional affidavits but by unsworn conclusions in response asserting undocumented facts.

{¶6} The trial court found the following facts:

{¶7} “(a). Defendant has ownership of and has and exercises control over the property known as 12395 Lonesome Road, Thornville, Ohio 43076, and further described in Exhibit ‘A’, and has responsibility for the condition thereof;

{¶8} “(b). The conditions on Defendant’s Property constitute a violation of Section 26.03(D) of Article XXVI of the Thorn Township Zoning Resolution;

{¶9} “(c). The conditions on Defendant’s Property constitute a violation of Section 26.03(E) of Article XXVI of the Thorn Township Zoning Resolution;

{¶10} “(d). The conditions on the Defendant’s Property constitute a nuisance at common law and the Township Trustees have standing to seek remedy for the same;

{¶11} “(e). The conditions on the Defendant’s Property constitute a nuisance under Ohio Revised Code Section 505.87 and O.R.C. Sec. 3767.02(A) and the Township Trustees have standing to seek remedy for the same.

{¶12} “(f). Defendant is operating a junk yard without the license required by the Ohio Revised Code, Section 4737.07.

{¶13} “(g). The provisions for drinking water and sanitation at the Defendant’s Property violate the County Health Code and thereby are a nuisance.”

{¶14} The following orders were issued:

{¶15} “2. Defendant is hereby ORDERED to cause the Defendant’s Property, by not later than on May 31, 2003, to no longer be in violation of Article XXVI, Sections 26.03 (D) and 26.03 (E) of the Thorn Township Resolution.

{¶16} “3. Defendant is hereby ORDERED to cause the Defendant’s Property, by not later than on May 31, 2003, to no longer be in such a condition that the

same constitutes a nuisance (a) at common law, and (b) under Revised Code Sections 505.87 and 3767.02(A).

{¶17} “4. Defendant is hereby ORDERED to cause the Defendant’s Property, by not later than on May 31, 2003, to no longer be in such a condition that it is an unlicensed junkyard under Revised Code Section 4737.07.

{¶18} “DEFENDANT is hereby ORDERED to produce to the Court, on or before May 31, 2003 a certificate from the County Health Department or from a qualified private inspector satisfactory to Plaintiffs, that the systems for the provision and consumption of drinking and household water and the disposal of sewage, waste water, trash, and human and animal waste at and on the Defendant’s Property comply with all applicable State and local laws and regulations relating to the safety of drinking water and the property disposal of septic and other wastes and trash.

{¶19} “DEFENDANT is hereby ORDERED to file with the Court and Plaintiffs’ counsel on or within three days after the tenth (10th) day of the months of March, April and May, 2003, reports describing in detail Defendant’s progress through the date of the report.

{¶20} “DEFENDANT is hereby ORDERED to allow Plaintiffs, or their counsel, employees of their counsel and/or the Thorn Township Zoning Inspector to come onto and inspect the Defendant’s Property not more than once per calendar week between 9:00 a.m. and 4:30 p.m., to evaluate Defendant’s progress in complying with this Order.

{¶21} “**COMPLIANCE METHODS**. Unless the parties submit – and the Court approves – an entry stating otherwise how the Defendant shall cause the

Defendant's Property to come into compliance with the orders stated in the preceding paragraphs 1-4, the compliance measures to be carried out on or before May 31, 2003, shall at a minimum include:

{¶22} "a. Removal from the Defendant's Property of all motor vehicles, other than two operable and licensed cars, SUV's or pickup trucks registered to the Defendant, Mr. LePage, and another two operable and licensed cars, SUV's or pickup trucks licensed to Ms. Paula Nicodemus, a member of the household. Removal from the Defendant's Property of all house trailers, mobile homes, and campers, other than the one observed on August 12, 2002, to be occupied by the Defendant's household. Removal and disposal of the house trailers, mobile homes, and campers shall be via a licensed junk yard, licensed scrap metal dealer, or other lawful means of disposal, and evidence of lawful disposal shall be required.

{¶23} "b. Removal from the Defendant's Property of all piles or accumulations of trash, automotive parts, scrap metal, scrap wood, tires, dead trees, animal dung, pools of water, or other refuse, debris or conditions which the Thorn Township Zoning Inspector identifies to Defendant in writing as contributing to the nuisance situation on Defendants' Property.

{¶24} "c. Installation on the Defendant's Property through licensed personnel of a septic tank and leach field approved by the Department of Health in writing, connected by adequate lines (installed by a licensed plumber or qualified licensed person) to all sources of waste water on the Defendant's Property.

{¶25} "d. Installation on Defendant's Property of a well drilled by a licensed well driller, with an adequate pump and casing, connected by adequate lines

(installed by a licensed plumber or qualified licensed person) to all domestic water intakes in the Defendant's dwelling.

{¶26} “e. Installation of new (or substantial remodeling and refurbishing of existing) pens, corrals, sheds, barns or other animal enclosures on the Defendant's Property, all work and materials to be of a good and workmanlike appearance and composition, for the housing and keeping of all livestock, poultry, goats, llamas, horses, and other animals ¹ Defendant keeps on the Defendant's Property.

{¶27} “f. Removal and disposal of the vehicles, campers, mobile homes, trailers and similar goods shall be via a licensed junk yard, licensed scrap metal dealer, auction by a licensed auctioneer, or other lawful means of disposal, and evidence of lawful disposal shall be required. If Defendant proposes to remove and relocate any vehicles campers, mobile homes, trailers and similar goods other than by and to a licensed junkyard, he must apply first to the Court for an order allowing removal and relocation in such manner and without limitation, Defendant must demonstrate that such removal and relocation will not violate any applicable state, federal or local laws, regulations or ordinances.

{¶28} “g. All other items disposed of must be disposed of at a licensed junkyard or licensed waste disposal facility and in a manner compliant with any applicable state, federal or local laws, regulations or ordinances.”

¹ Except only dogs or cats reasonable in number and customarily allowed by the Defendant on or prior to the date this Order is filed to sleep in Defendant's dwelling.

{¶29} Appellant, in his pretrial statement, motion for reconsideration and motion for new trial, raised the defense of agricultural exemption under R.C. 3767.13 (A), (B) and (D).

{¶30} The four Assignments of Error are:

ASSIGNMENTS OF ERROR

{¶31} “ASSIGNMENT OF ERROR NO. 1 – TO ATTEMPT TO REGULATE A FARM OF OVER FIVE ACRES AS A NUISANCE IS IN CONTRAVENTION OF THE EXEMPTION PROVISIONS OF OHIO REVISED CODE SECTION 3763.13(D) AND IS UNLAWFUL.

{¶32} “ASSIGNMENT OF ERROR NO. 2 – THE COURT’S DECISION IS NOT SUSTAINED BY THE GREATER WEIGHT OF THE EVIDENCE.

{¶33} “ASSIGNMENT OF ERROR NO. 3 – THE EVIDENCE SUBMITTED BY THE TOWNSHIP DOES NOT MEET THE STANDARD SET FOR JUNK VEHICLES BY STATE STATUTE AND THUS THE DECISION IS UNLAWFUL.

{¶34} “ASSIGNMENT OF ERROR NO. 4 – THE COURT’S DECISION REGARDING THE ALLOWANCE OF FOUR VEHICLES TO REMAIN HAS NO BASIS IN FACT OR IN LAW.”

{¶35} The applicable Zoning Regulations and Revised Code Section are as follows:

{¶36} Sections 26.03(d) and (e) of the zoning resolution provide:

{¶37} Subsection (d) states:

{¶38} “The exterior parking or storage of inoperable or disabled pieces of equipment or vehicles for a period of time exceeding thirty (30) consecutive days, outside of an approved junk yard licensed and regulated...shall be prohibited.”

{¶39} Subsection (e) states:

{¶40} “Not more than three (3) pieces of such equipment or vehicles, shall be permitted to be stored outside on a lot or parcel containing a single family or two-family dwelling.”

{¶41} R.C. 505.87(A) states:

{¶42} “A board of township trustees may provide for the abatement, control, or removal of vegetation, garbage, refuse, and other debris from land in the township, if the board determines that the owner's maintenance of such vegetation, garbage, refuse, and other debris constitutes a nuisance.”

{¶43} R.C. 3767.13 (A), (B) and (D) provide:

{¶44} “(A) No person shall erect, continue, use, or maintain a building, structure, or place for the exercise of a trade, employment, or business, or for the keeping or feeding of an animal which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals or of the public.

{¶45} “(B) No person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public.

{¶46} “(D) Persons who are engaged in agriculture-related activities, as "agriculture" is defined in section 519.01 of the Revised Code, and who are conducting

those activities outside a municipal corporation, in accordance with generally accepted agricultural practices, and in such a manner so as not to have a substantial, adverse effect on the public health, safety, or welfare are exempt from divisions (A) and (B) of this section, from any similar ordinances, resolutions, rules, or other enactments of a state agency or political subdivision, and from any ordinances, resolutions, rules, or other enactments of a state agency or political subdivision that prohibit excessive noise.”

{¶47} The following Revised Code Sections have been referenced:

{¶48} Revised Code 505.87(A):

{¶49} “(A) A board of township trustees may provide for the abatement, control, or removal of vegetation, garbage, refuse, and other debris from land in the township, if the board determines that the owner's maintenance of such vegetation, garbage, refuse, and other debris constitutes a nuisance.”

{¶50} Revised Code 3767.02(A):

{¶51} “Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets in the use, occupancy, establishment, or conduct of a nuisance; the owner, agent, or lessee of an interest in any such nuisance; any person who is employed in that nuisance by that owner, agent, or lessee; and any person who is in control of that nuisance is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.11 of the Revised Code.”

{¶52} Revised Code 4737.07:

{¶53} “No person shall operate and maintain a junk yard outside of a municipality, except in zoned or unzoned industrial areas adjacent to the interstate or

primary systems, without first obtaining a license to do so from the county auditor of the county in which such junk yard is located or in which such junk yard is to be established. A person who was operating or maintaining a junk yard prior to January 1, 1964 is entitled to be issued a license or renewal thereof upon payment of the fee provided for in this section. Any person operating or maintaining a junk yard within one thousand feet of the nearest edge of the right of way of a state or county road or within three hundred feet of the nearest edge of the right of way of a township road, prior to January 1, 1964, shall within one year thereafter erect the required fence or make suitable plantings if such junk yard is not obscured by natural objects or a fence. If, after January 1, 1964, a junk yard is established within one thousand feet of the nearest edge of the right of way of a state or county highway or within three hundred feet of the nearest edge of the right of way of a township road, it shall be so located that the view thereof from such road is obscured by natural objects or a fence. If the yard is so obscured, the person operating or maintaining it shall be issued a license.”

I.

{¶54} The First Assignment of Error asserts that, as Appellant’s property exceeds five acres, it is exempt from township zoning regulations. In this instance, we disagree even though Appellee’s contention is to the effect that this argument was not timely raised. The pretrial statement of Appellant indicated this conclusion in addition to the later Motions.

{¶55} While Section 519.01 describes various types of farming operations and R.C. 3767.13(D) does exempt farms from zoning regulations such as those considered herein, the affidavits before the court which included photos of Appellant’s

property indicated a total lack of generally accepted agriculture utilization. In addition, subsection (D) of R.C. 3767.13 excludes practices which have a substantial , adverse effect on public health. Appellant's affidavit that an inspection was made by the County Health Department, without violations found, does not adequately respond to zoning inspection factor's affidavit as to no septic inspection nor permit for such.

{¶56} We determine that the court, as trier of the facts, was well within its authority to determine a county health code violation and that the exemption of R.C. 3767.13(D) was inapplicable. The First Assignment is rejected.

II.

{¶57} The Second Assignment questions the greater weight of the evidence to support the court's factual findings which in effect is stating that the preponderance as to the evidence was lacking. Such evidence is that which is more probable, persuasive, and possess greater probative value. *State V. Williams*, 5th Dist. App. No. 01CA24, 2002-Ohio-4267 at Paragraph 13.

{¶58} In examining the materials and photographs before the court, we find that the evidence clearly supported the conclusions reached.

{¶59} This Second Assignment is denied.

III.

{¶60} As to the Third Assignment of Error as Appellant's brief indicates, R.C. 505.173 states the following:

{¶61} "(A) Notwithstanding sections 4513.60 to 4513.65 of the Revised Code, the board of township trustees may adopt resolutions as the board considers necessary to regulate the storage of junk motor vehicles on private or public property

within the unincorporated area of the township. No resolution shall restrict the operation of a scrap metal processing facility licensed under authority of sections 4737.05 to 4737.12 of the Revised Code; the operation as a motor vehicle salvage dealer, salvage motor vehicle auction, or salvage motor vehicle pool of a person licensed under Chapter 4738. of the Revised Code; or the provision of towing and recovery services conducted under sections 4513.60 to 4513.63 of the Revised Code, including the storage and disposal of junk motor vehicles removed from public or private property in accordance with those sections. Except for a case in which division (C) of this section applies, no resolution shall prevent a person from storing or keeping, or restrict a person in the method of storing or keeping, any collector's vehicle on private property with the permission of the person having the right to the possession of the property, except that a person having such permission may be required to conceal, by means of buildings, fences, vegetation, terrain, or other suitable screening, any unlicensed collector's vehicle stored in the open.

{¶62} “(B) In addition to other remedies provided by law, the board of township trustees may institute an action for injunction, mandamus, or abatement, or any other appropriate action or proceeding to prohibit the storage of junk motor vehicles in violation of this section.

{¶63} “(C) Regardless of whether it is licensed or unlicensed, a collector's vehicle is a "junk motor vehicle" for purposes of this section if the collector's vehicle meets all of the criteria contained in division (E) of this section. If a collector's vehicle meets all of the criteria contained in division (E) of this section, a board of township trustees, in accordance with division (A) of this section, may regulate the storage of that

motor vehicle on private or public property in the same manner that the board may regulate the storage of any other junk motor vehicle and, in case of a violation of this section, may pursue any remedy provided by law, including any remedy provided in division (B) of this section.

{¶64} “(D) Whoever violates any resolution adopted under this section is guilty of a minor misdemeanor. Each day that a violation of this section continues constitutes a separate offense. Fines levied and collected under this section shall be paid into the township general revenue fund.

{¶65} “(E) As used in this section, "junk motor vehicle" means a motor vehicle that meets all of the following criteria:

{¶66} “(1) Three model years old, or older;

{¶67} “(2) Apparently inoperable;

{¶68} “(3) Extensively damaged, including, but not limited to, any of the following: missing wheels, tires, engine, or transmission.”

{¶69} While the Appellee appears to place the burden of proof on Appellant as to the vehicles meeting the criteria of “junk vehicles” as defined in R.C. 505.173(e), we still must agree with Judge Lewis that the evidence before him was sufficient as such statute does not limit the damage to the listed items. In addition, Appellant’s affidavit as to the 1992 Dodge Dynasty references a defective engine and Mr. Spangler’s affidavit describes the immobility and poor condition of other vehicles.. Appellant’s Third Assignment of Error is denied.

IV.

{¶70} The Fourth Assignment of Error objects to the court's permitting four operable vehicles (paragraph "A" of "Compliance Methods") when subsection (e) of Section 26.03 of the Zoning Regulation permits three. While this argument appears puzzling in that it may be adverse to the interests of Appellant, the Court was permitting Appellant to maintain two operable vehicles and Ms. Meadows was permitted the same if titled to her.

{¶71} As Ms. Meadows was not a party to this action, we need not consider the validity of the order as it pertains to her.

{¶72} We must agree with this Fourth Assignment in that, as stated, Subsection (e) speaks in terms of three operable vehicles being permitted. Such regulation is not directed at separate individuals owning such but refers to operable vehicles being stored outside a single or two-family dwelling.

{¶73} Therefore, we sustain this Assignment and remand for a modification of the Judgment Entry to limit the total of permitted operable vehicles outside on Appellant's premises to three rather than four.

By: Boggins, J.

Wise, J., concurs

Hoffman, P.J., concurs in part
and dissents in part

Hoffman, P.J., concurring in part and dissenting in part.

{¶74} I concur in the majority's disposition of appellant's first, second and third assignments of error.

{¶75} However, I respectfully dissent from the majority's analysis of appellant's fourth assignment of error. I do not find Section 26.03(E) of the zoning resolution prohibits the storage of more than three operable vehicles outside on the premises. Like the majority, I would sustain this assigned error but disagree with the majority's conclusion no more than three operable vehicles are permitted to be stored outside on the premises. I find no limitation on the outside storage of operable vehicles within Section 2603(E).

JUDGE WILLIAM B. HOFFMAN