IN THE COURT OF APPEALS OF IOWA

No. 3-349 / 12-0843
Filed May 30, 2013

MADISON COUNTY, an Iowa County,
Plaintiff-Appellant/Cross-Appellee,

vs.

DAN PATTERSON, an Individual;
PHOENIX C & D RECYCLING, INC.,
a Corporation,
Defendants-Appellees/Cross-Appellants,

IOWA DEPARTMENT OF
NATURAL RESOURCES (DNR);
STATE OF IOWA; DIRECTOR OF
THE IOWA DEPARTMENT OF NATURAL
RESOURCES,
Defendants-Appellees.

Appeal from the Iowa District Court for Madison County, Brad McCall, Judge.

Appeal and cross appeal from the district court order dismissing Madison County's claims and counterclaims of Patterson and Phoenix. **AFFIRMED ON APPEAL AND CROSS APPEAL.**

James E. Brick, Billy J. Mallory, and Patrick T. Burk of Brick Gentry, P.C., West Des Moines, and Patrick D. Smith of Bradshaw, Fowler, Proctor & Fairgrave, P.C. for Madison County, Iowa.

Thomas D. Hanson and Michael D. Ensley of Hanson, Bjork & Russell, L.L.P., Des Moines, for Dan Patterson and Phoenix C & D Recycling.

Thomas J. Miller, Attorney General, and David L. Dorff and David R. Sheridan, Assistant Attorneys General, for State of Iowa and Iowa Department of Natural Resources (DNR).

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Madison County appeals from the trial court ruling dismissing its claims against a construction and demolition recycling company (Phoenix), a landowner (Patterson), and the department of natural resources (DNR). It claims the court erred in ruling (1) the court had jurisdiction to reverse the decision of the county zoning administrator, (2) Phoenix and Patterson were not required to obtain a conditional use permit, (3) the DNR had authority to make a "beneficial use determination" concerning the solid product from Phoenix, (4) the beneficial use determination met administrative code requirements, and (5) the material deposited on Patterson's land met the requirements of the beneficial use determination. On cross-appeal, Phoenix contends the court erred in denying its abuse of process claim. Patterson contends the court erred in dismissing its slander of title claim for failure to prove malice. We affirm on appeal and on cross appeal.

I. Background Facts and Proceedings

Phoenix recycles construction and demolition waste. One of its products, land abatement material (LAM), is composed of ground up, non-hazardous waste remaining after sorting and screening the construction and demolition debris it receives. In 2006 Phoenix applied for and received a beneficial use designation (BUD) from the DNR to use its product to fill a ravine on Patterson's agricultural land in Madison County and improve the condition of the site for grazing cattle. When Madison County learned of the plan, its zoning administrator notified Phoenix the project met the zoning definition of a dump and Phoenix needed to

obtain a conditional use permit to proceed. Phoenix disagreed, contending agricultural land was exempt from county zoning ordinances.

The county obtained an ex parte temporary injunction to prevent Phoenix from proceeding. Following a hearing, the court dissolved the injunction, finding the county was unlikely to prevail in its claim Madison County's zoning ordinance applied to the project.

Between the July 2006 ruling on the injunction and March 2008, both the fill operation and the county's lawsuit continued. The county's petition was amended numerous times, adding defendants including the DNR. By the time of trial in October 2011, the county's petition included claims the DNR violated administrative code provisions both in issuing and in enforcing the BUD, Phoenix and Patterson violated the county's zoning ordinances and the Iowa Code provisions concerning dumping solid waste, Phoenix and Patterson violated the terms of the BUD, and Phoenix and Patterson maintained a nuisance. Phoenix and Patterson's counterclaims included abuse of process and slander of title.

As the fill operation proceeded, the DNR inspected the site several times and responded to complaints the LAM contained materials not permitted by the BUD and the LAM was not being mixed with clean fill dirt as required. In May 2007 the DNR notified Phoenix it did not intend to renew the BUD when it expired in July. The notice stated, "based on the frequency of site visits that have resulted in further action on your part, it has become apparent that this project requires constant oversight from the Department. Beneficial use projects of this type should not warrant this level of attention."

Phoenix promptly filed a formal request for renewal of the BUD, which the DNR denied. Phoenix filed an administrative appeal, which started a contested case proceeding. By operation of law, Phoenix could continue its fill operation while the contested case was pending. In February 2008 Phoenix and the DNR stipulated to entry of an administrative consent order to terminate the BUD. The fill operation ended in March 2008, but Phoenix had ongoing responsibility to stabilize the fill site in compliance with the original BUD requirements.

In the period between March 2008, when the fill operation ended, and the trial in October 2011, the DNR inspected the site several times and sent notices to Phoenix and Patterson concerning failure to stabilize the site. Deficiencies included exposed LAM, lack of vegetative cover, erosion, problems with the water retention dams, and contaminated water flow.

After a nine-day trial, the district court issued its ruling and judgment. The court found the county failed to establish any of its claims. The court determined the DNR did not violate the administrative code in issuing or enforcing the BUD. It concluded the DNR correctly determined the LAM was a beneficial resource, not a solid waste; therefore, Iowa Code provisions concerning solid waste dumping were not violated. The court concluded Patterson's land was agricultural; therefore, the county's zoning ordinances did not apply. It found Phoenix and Patterson did not create or maintain a nuisance. The court also found Phoenix and Patterson failed to prove their claims of abuse of process or slander of title.

The county filed an Iowa Rule of Civil Procedure 1.904(2) motion, raising two primary contentions. First, because the defendants did not seek

administrative review of the county zoning administrator's determination the property was subject to county zoning ordinances, the defendants had not exhausted their administrative remedies and, therefore, the trial court was without authority to issue any ruling. Second, because the BUD did not provide for any amount of contamination in the LAM, the presence of non-conforming materials meant the LAM did not meet the BUD requirements and, therefore, was solid waste.

The court denied the motion. It determined the county had waived its claim the court lacked authority because (1) it did not raise the issue until over four years after the defendants' claimed inaction, even though the county had amended its petition at least six times during that period, and (2) the county itself brought the issue to court by filing the lawsuit before the twenty-day period for administrative appeal had expired. The court, based largely on its finding the defendants' expert was more credible than the county's expert, determined any presence of non-conforming material in the LAM was "well within industry standards," and the LAM conformed to the BUD requirements.

II. Scope and Standards of Review

The parties disagree on our scope of review. Madison County, the State, and the DNR all assert this is an equitable action and our review is de novo. Phoenix and Patterson contend our review is for correction of errors at law because what started out as an equitable action for an injunction quickly became a law action with claims and counterclaims for money damages and jury demands. They argue Madison County's suit against the State and DNR was filed as a law action, and the recast petition Madison County filed in June 2010,

bringing together all of its claims against all the defendants, was captioned as a law case and involved a jury demand. "If . . . both legal relief and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue." *Mosebach v. Blythe*, 282 N.W.2d 755, 758 (Iowa Ct. App. 1979). The trial scheduling form shows the action as a law action. The court ruled on objections and issued a "ruling and judgment" instead of a "decree," indicating the court viewed it as a law action. *See Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 179 (Iowa 2010). We conclude our review is for correction of errors at law. *See id.*

Under this scope of review, the trial court's findings carry the force of a special verdict and are binding on us if supported by substantial evidence. *Business Consulting Servs., Inc. v. Wicks*, 703 N.W.2d 427, 429 (Iowa 2005). Evidence is substantial if reasonable minds would accept it as adequate to reach a conclusion. *Hansen v. Seabee Corp.*, 688 N.W.2d 234, 237-38 (Iowa 2004). "Evidence is not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding." *Postell v. American Fam. Mut. Ins. Co.*, 823 N.W.2d 35, 41 (Iowa 2012). We view the evidence in the light most favorable to the judgment. *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33 (Iowa 2005).

III. Merits

The following claims have the potential to dispose of much or all of the appeal: Phoenix and Patterson's claim we lack jurisdiction to hear the county's appeal because it was not timely filed, and their claim "every important issue" on

appeal is moot, Madison County's claim the court lacked jurisdiction, the county's claim the DNR lacked authority to issue the BUD, and the DNR's claim the county lacked standing to challenge its actions. We address these claims first.

A. Our Jurisdiction to Hear the Appeal. Phoenix and Patterson contend Madison County's appeal was untimely. Iowa Rule of Appellate Procedure 6.101(1)(b) provides appeals must be filed within thirty days after the trial court's final ruling. However, rule 6.101(5) allows the supreme court to extend the time "if it determines the clerk of the district court failed to notify the prospective appellant" of the final ruling. Madison County filed a motion for an extension of time pursuant to this rule, with an affidavit from the district court clerk stating the clerk's office failed to notify Madison County of the ruling. After considering the papers filed, the supreme court granted the motion on May 30, 2012, giving the county fourteen days to file a notice of appeal. The county filed its notice of appeal on June 6, 2012. The appeal was timely and is properly before our court.

B. Mootness. Phoenix and Patterson contend "every important issue" is moot. Their primary argument is the fill operation was completed in 2008, so any county claims concerning the applicability of its zoning ordinances to the land or the land's status as agricultural are moot. Their arguments concerning the county's claims the court lacked jurisdiction, the county's lack of standing to bring suit against the DNR, and Phoenix and Patterson's failure to acquire a special use permit and maintenance of a nuisance, essentially are that the claims were previously resolved adversely to the county and, therefore, are moot.

The test of mootness is "whether a judgment, if rendered, would have any practical legal effect upon the existing controversy." *Stauffer v. Temperle*, 794 N.W.2d 317, 322 (Iowa Ct. App. 2010). Although the fill operation has ceased, the issues whether it was done properly and what the remedy is if it wasn't are not moot. Neither are claims decided adversely to the county. Our decision on these claims will have a legal effect and is not merely academic.

C. Trial Court Jurisdiction. Madison County contends the trial court erred in ruling Phoenix and Patterson were not required to obtain a conditional use permit under the county zoning ordinance. The trial court determined Patterson's property was agricultural and, therefore, exempt from county zoning ordinances. *See* Iowa Code § 335.2 (2005) (exempting from county zoning ordinances land "primarily adapted . . . for use for agricultural purposes, while so used"). The court also found the fill material was not "solid waste" under the county zoning ordinances because the beneficial use designation removed it from that category. *See* Iowa Admin. Code r. 567-108.1 (providing the DNR may determine solid by-products are a "resource" and not "solid waste" through a "beneficial use designation").

The county asserts the fill operation was not an "agricultural purpose" and the use of that portion of the property where the fill occurred was as a solid waste disposal site. It contests the court's finding the tenant who rented Patterson's land as pasture "testified that he had cattle grazing on portions of the area even during the time when the fill operation was occurring." When specifically asked if his cattle grazed on "the land that was being filled and on the area . . . where dirt was being borrowed from," he replied, "They weren't on there all the time. When

the pasture got short, I would move them to a different pasture, and then when it grew back I would move them back, so they were there off and on during that time." He also testified the area filled and the area from which topsoil was borrowed had "clover and grass growing on it." The trial court found "a preponderance of the evidence establishes that the primary use for the property was agricultural, before, during, and after the fill operation was completed." Substantial evidence supports the trial court's finding. The overall character and use of the land did not change during the fill operation. We affirm the trial court's determination the land was agricultural. Therefore, under Iowa Code section 335.2, it was exempt from Madison County's zoning ordinances. We affirm on this issue.

Because the trial court correctly determined Patterson's property was agricultural and, as a matter of law, exempt from the county's zoning ordinances, we need not address whether the DNR's beneficial use designation of the fill material as a resource, not solid waste, removed it from the purview of the county's requirements for disposing of solid waste. Because the property is exempt from the county zoning ordinances, we also need not address the county's claim the trial court lacked jurisdiction because Phoenix and Patterson did not exhaust their administrative remedies by appealing the zoning administrator's "decision" to the board of adjustment.

D. County Standing to Challenge DNR Action. The DNR asserts the trial court correctly determined the county did not have standing to challenge its actions under Iowa Code section 455B.111(3) because the county failed to show it had been adversely affected by any action by the DNR. The DNR also

contends the county has waived any challenge to the court's conclusion by failing to raise the issue in its brief on appeal. We agree. *See* Iowa R. App. P. 6.903(2)(c), (g)(3) (requiring a brief to include the issues presented for review and an argument section addressing each of those issues, with supporting authority). Because the trial court determined the county lacked standing to challenge the DNR's actions, and the county does not challenge this determination on appeal, we do not address the county's claims against the DNR.

E. The LAM Did Not Comply with the BUD Requirements. The county's remaining claim is the fill material failed to comply with the beneficial use designation requirements because it contained contaminants such as plastic, insulation, glass, shingles, and Styrofoam. The county argues the contaminants are solid waste, which should have been disposed of at a landfill. The county also argues, because the BUD did not expressly make allowance for any contamination and was not amended in writing to allow for the LAM to contain a percentage of contaminants, the trial court erred in disregarding the BUD provisions and determining the fill material met "industry standards" for contamination. The county further argues the contaminants "do not and cannot qualify as a 'resource' as defined" in the administrative code, so "it is not possible for a BUD for fill material to be issued on these materials."

The trial court considered alleged violations both of the BUD and Iowa Code section 455B.307, which prohibits dumping of "solid waste" except in a sanitary landfill. The court considered the testimony of the county's expert, the DNR witnesses, and Phoenix and Patterson's expert. The court expressly found

the county's expert less credible based in large part on how he conducted his tests. The court concluded the minimal contamination rate shown by the evidence did not make the LAM non-conforming. The court also made a specific finding "the LAM, both as approved in the BUD *and as applied at the Patterson property*, was a resource and did not constitute solid waste. Accordingly, neither Phoenix nor Patterson were depositing solid waste within the meaning of Iowa Code § 455B.307." (Emphasis added.)

The BUD did not specifically address what level of contamination was permissible. The trial court concluded the county's position *any* contamination made the LAM non-conforming was neither reasonable nor logical. Phoenix, Patterson, and the DNR all contend substantial compliance is sufficient. The DNR monitored the LAM as it was applied at the site and, when contaminants were found, ordered Phoenix to stop bringing the LAM to the site until the contaminants were removed. Subsequent inspections showed the contaminants were removed to a level where the DNR allowed the fill operation to continue. Inspections of the site after completion of the fill operation reveal a need for continued stabilization efforts, but otherwise found compliance with the BUD.

The trial court's findings are supported by substantial evidence. We agree with the trial court's conclusion the amount of contamination present in the LAM did not render it non-conforming. The LAM, as applied, substantially complied with the BUD requirements. "[S]ubstantial compliance" means the statute or rule "'has been followed sufficiently so as to carry out the intent for which it was adopted.'" *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988) (quoting *Smith v. State*, 364 So.2d 1, 9 (Ala. Crim. App. 1978)). In

this case, the administrative code and statutory provisions are designed to reduce the amount of solid waste entering landfills, to promote recycling or reuse, and to protect the public. *See, e.g.*, Iowa Admin. Code rs. 567-108.1, .3; Iowa Code §§ 455D.4, 455B.301A. We conclude the trial court did not err.

F. Abuse of Process. On cross-appeal, Phoenix and Patterson contend the trial court erred in denying their counterclaim for abuse of process. To prove their claim, Phoenix and Patterson had to demonstrate (1) use of a legal process, (2) in an improper or unauthorized manner, (3) causing damages as a result of the abuse. *Fuller v. Local Union No. 106 of United Bhd. of Carpenters & Joiners*, 567 N.W.2d 419, 421-22 (Iowa 1997).

> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

Grell v. Poulsen, 389 N.W.2d 661, 663 (Iowa 1986). Proof of an improper motive by the party filing the lawsuit, even a malicious purpose, does not satisfy this element. *Palmer v. Tandem Mgmt. Servs., Inc.*, 505 N.W.2d 813, 817 (Iowa 1993).

Phoenix and Patterson contend there was a conspiracy on the part of attorney Brick to force Phoenix to dispose of its products in Metro Waste's landfill at great cost to Phoenix. Brick represented the county, but also has represented the Metro Waste Authority in other matters, including a dispute with Phoenix. The trial court did not allow Phoenix and Patterson to call Brick as a witness, but accepted an offer of proof concerning his expected testimony. The court made

express findings concerning the weight given the testimony about the alleged conspiracy. The court also considered the allegations the county threatened the DNR with legal action in order to force the DNR not to renew the BUD. The court found the evidence established "at most" the county "with bad intentions, carried the litigation to its ultimate conclusion."

We agree with the trial court's conclusion the county's primary purpose in this litigation was to prevent Phoenix from applying what the county considered solid waste on Patterson's land in Madison County. The county's complaints to the DNR or threats of litigation were not the reasons the DNR failed to renew the BUD. The DNR determined not to renew the BUD because of the level of oversight required. None of the allegations concerning attorney Brick, even if proved, would establish the lawsuit was "to secure some collateral advantage not properly includable in the process itself" or was "a form of extortion in which a lawfully used process is perverted to an unlawful use." *See id.* The trial court did not err in dismissing this counterclaim.

G. Slander of Title. On cross appeal, Patterson contends the court erred in dismissing his counterclaim for slander of title for failure to prove malice. The elements of a slander of title action are: "(1) an uttering and publication of slanderous words; (2) falsity of those words; (3) malice; (4) special damages to the plaintiffs; and (5) an estate or interest of the plaintiff in the property slandered." *Brown v. Nevins*, 499 N.W.2d 736, 738 (Iowa Ct. App. 1993).

The trial court considered the newspaper articles, news stories, and statements by county officials and their experts concerning the fill operation on Patterson's land. It found "while not all of the statements attributed to the

[county's] agents were completely true, Patterson has failed to establish . . . any of the statements were made with malice."

The county correctly contends actions for slander of title must relate to the title, not merely to the condition or quality of the land. *See, e.g.*, *id.* at 737 (filing an affidavit in support of forfeiture of a real estate contract); *Hagan v. Liberty Loan Corp.*, 423 N.W.2d 886, 888 (Iowa Ct. App. 1988) (altering deed). While we may affirm a trial court on any ground raised at trial, even if it was not a basis for the court's decision, it does not appear to us this ground was raised at trial. *See Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 811-12 (Iowa 2000). Consequently, we do not consider it.

The trial court correctly concluded the statements complained of do not rise to the level of malice. They discuss the lawsuit, the county's position on the propriety of the fill operation and the material used, and the county's view of the detrimental effects on the environment. We affirm the trial court's dismissal of this claim.

Having found no error in the trial court's ruling, we affirm both on appeal and on cross appeal.

AFFIRMED ON APPEAL AND CROSS APPEAL.