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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001271-MR

SANDRA K. CLIFTON; and
GEORGE LEE CLIFTON — APPELLANTS

v.

APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE STANLEY BILLINGSLY, SR., JUDGE
ACTION NO. 02-CI-00075

THE KENTUCKY SPEEDWAY, LLC;
and GALLATIN COUNTY, KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Sandra and George Clifton appeal orders from the Gallatin Circuit Court granting summary judgment and dismissing claims against appellees Gallatin County (county) and The Kentucky Speedway, LLC (Speedway). We must address whether the Cliftons were entitled to either a writ of mandamus against the County, or nuisance damages against the Speedway. For the reasons stated hereafter, we affirm.

The Cliftons own and reside at a small parcel of real estate that lies within 100 yards of real estate operated by the Speedway as a NASCAR racetrack. The commercial property itself is owned by the County and is leased to the Speedway under a twenty-three year lease as a part of a financing arrangement for industrial revenue bonds issued in connection with the construction of the racetrack.

Due to noise, lighting, trespass and litter issues arising as a result of the racetrack's proximity to their property, the Cliftons filed this action in 2002 in the Gallatin Circuit Court seeking to compel the County to comply with local ordinances governing abatement of nuisances. Specifically, they relied on the following ordinances:

> §96.01(A). It shall be unlawful for any person to permit, allow, suffer, or cause property, real or personal . . . which is occupied by his actual or constructive possession . . . to constitute a public or private nuisance or to come into the state of being a public or private nuisance, or to become the source of a public or private nuisance emanating therefrom, or to harbor thereon a public or private nuisance.
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> §96.05. . . . It shall not be essential that the nuisance be created or contributed to by the owner, occupant, or person having control or management of the premises, but merely that the nuisance be created or contributed to by the licensees, invitees, guests, or other persons for whose conduct the owner or operator are responsible, or by persons for whose conduct the owner or operator is not responsible, but by the

> exercise of reasonable care ought to have become aware of.

After the filing of the lawsuit, Speedway intervened as a party defendant. The Gallatin Circuit Court granted summary judgment in favor of both defendants, and this appeal followed.

With respect to their claim against the County, the Cliftons take great pains to point out that they are not seeking to compel the County to enforce the ordinances, but are instead seeking to compel the County, as the lessor of the property on which the racetrack is situated, to comply with the ordinance. The Cliftons' apparent theory is that the County, as the record owner of the real property, has either actual or constructive possession of the racetrack and therefore is obligated to comply with the terms of the ordinance.

While not couched in terms of requesting a writ of mandamus, the Cliftons' complaint essentially requests the court to require the County to take some action, either to enforce or to comply with the ordinance. In *County of Harlan v. Appalachian Regional Healthcare, Inc.*,[1] the court discussed the function and requirements of a writ of mandamus as being:

> to compel an official to perform duties of that official where an element of discretion does not occur. It does not usurp

[1] 85 S.W.3d 607 (Ky. 2002).

> legislative powers or invade the functions of an independent branch of government. *Kavanaugh v. Chandler,* 255 Ky. 182, 72 S.W.2d 1003 (1934). As noted in *Kavanaugh, supra,* "It is familiar law that courts may mandatorily require a public officer to perform his duty." For other examples of this general principle, reference is made to 52 Am.Jur.2d *Mandamus* §§ 49 to 54 (2000).
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> Without exception, the judicial opinions and other legal writings which treat mandamus observe that it is an extraordinary remedy which compels the performance of a ministerial act or mandatory duty where there is a clear legal right or no adequate remedy at law. Specific cases are driven by the application of these legal principles to the particular facts and naturally, the results vary. We recognize that mandamus should be cautiously employed. It is not a common means of redress and is certainly not a substitute for appeal. It is different from prohibition although it shares some common elements. The term "mandamus" comes from the Latin and means "we command." Mandamus is a legal remedy but its issuance is largely controlled by equitable principles with consideration given to rights of the public and of third persons. *See Keane v. St. Francis Hospital,* 186 Wis.2d 637, 522 N.W.2d 517 (Ct.App. 1994).[2]

In the instant case, the Cliftons have legal recourse against the party responsible for the alleged nuisance, i.e., the Speedway. Because (1) the Cliftons have another available

[2] *Id.* at 612-13. *See also Owensboro Metropolitan Bd. of Adjustments v. Midwest Outdoor Advertising, Inc.*, 729 S.W.2d 446, 448 (Ky.App. 1987) (holding that "[m]andamus should only be granted when the party seeking relief has no other adequate remedy, and great and irreparable injury will result if the writ is not granted[,]" citing *Glasson v. Tucker*, 477 S.W.2d 168, 169 (Ky. 1972), and *Farrow v. Downing*, 374 S.W.2d 480 (Ky. 1964)).

remedy, (2) the remedy of a writ of mandamus is an extraordinary remedy, "to be cautiously employed," (3) the County's interest in the property is nominal under the financial arrangements securing payments of the industrial revenue bonds and (4) the Speedway controls all activities on the property, a writ of mandamus is inappropriate herein. The circuit court did not err in granting summary judgment in favor of the County.

With respect to the Speedway, the trial court held that its activities, primarily the operation of a racetrack, were at best a permanent nuisance. Since the measure of damages for a permanent nuisance is the decrease in value of the affected property, the court dismissed the Cliftons' claim against the Speedway because the proof established that the fair market value of the Cliftons' property had actually increased. On appeal, the Cliftons argue that the circuit court mischaracterized the nuisance as permanent. Alternatively, they argue that even if the nuisance is permanent, the property is unmarketable and the purported increase in value is illusory.

In *Rockwell International Corp. v. Wilhite*,[3] the court noted that

> [a] private nuisance can be of a permanent or temporary nature, but may not be both.[4] A permanent nuisance is any private nuisance

[3] 143 S.W.3d 604, 625 (Ky.App. 2003).

[4] KRS 411.520(2) [n. 97 in original text].

> that cannot be corrected or abated at reasonable expense to the owner and is relatively enduring and not likely to be abated voluntarily or by court order.[5]

Further, a permanent nuisance is characterized by a material reduction in the fair market value of the plaintiff's property,[6] with the corresponding remedy being measured by that reduction.[7] A temporary nuisance, by contrast, is any private nuisance that is not a permanent nuisance.[8] In determining whether a nuisance is permanent or temporary, the focus is on the "offending" property. Based on the facts presented, including the substantial amount of construction on the Speedway property, the otherwise legal nature of the business, the economic benefits to the county, and the fact that only the total cessation of racing and other entertainment activities on the Speedway's property would fully abate the nuisance, the circuit court correctly found that any nuisance emanating from the Speedway's property was permanent.

After summarizing the differences between a common law nuisance and a statutorily-defined nuisance, the court in *Rockwell* noted that

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[5] KRS 411.530(1)(a) and (b) [n. 98 in original text].

[6] KRS 411.530(2).

[7] 143 S.W.3d at 625.

[8] *Id.*

> in Kentucky, nuisance is primarily concerned with some use of property by a defendant which causes sufficient annoyance to an adjacent property possessor that interferes with the use of the adjacent land to such a degree that its value is materially reduced. Borrowing from our analysis of negligent trespass, in a nuisance case the annoyance and interference with the use of property are the injury, and the reduced market value is the measure of damages.[9]

In the instant case, as the Cliftons admitted that the fair market value of their property has increased due to the location of the racetrack, it follows that the circuit court did not err in granting summary judgment in favor of the Speedway.

The judgment of the Gallatin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Marcus S. Carey
Erlanger, Kentucky

BRIEF FOR APPELLEE GALLATIN COUNTY, KENTUCKY:

Stephen P. Huddleston
Warsaw, Kentucky

BRIEF FOR APPELLEE KENTUCKY SPEEDWAY, LLC:

Ellen M. Houston
Patrick Hughes
Crestview Hills, Kentucky

[9] 143 S.W.3d at 627 (footnotes omitted).