1968

Monroe City v. Charles L. Arnold, Norris K. Arnold and John R. Arnold D/B/A Arnold Hog Ranch : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MONROE CITY,

Plaintiff,

vs.

CHARLES L. ARNOLD, NORRIS K. ARNOLD and JOHN R. ARNOLD d/b/a Arnold Hog Ranch,

Defendants.

Case No. 11,300

APPELLANT'S BRIEF

Appeal from judgment of Sixth Judicial District Court for Sevier County
Honorable Allen B. Sorensen, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

MONROE CITY,
Plaintiff and Respondent,

vs.

CHARLES L. ARNOLD, NORRIS K. ARNOLD and JOHN R. ARNOLD d/b/a Arnold Hog Ranch,
Defendant and Appellant.

Case No. 11,300

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Suit by third-class city to restrain and abate operation of commercial piggery on outskirts of town as a public nuisance.

DISPOSITION IN LOWER COURT

District Court found operation of piggery to be a public nuisance and ordered operation abated and restrained further operation by Defendant of a commercial piggery in the City of Monroe.

RELIEF SOUGHT ON APPEAL

Defendant - Appellant seeks an order vacating the judgment and order of the District Court and dismissing this action, or for a new trial.

STATEMENT OF FACTS

This action is filed by the Plaintiff in its capacity as a third-class municipal corporation of 850 people (R. 163) alleging that it has a right and duty to take such action for the benefit of its inhabitants. (R. 1)

The pleadings named Charles L. Arnold, an individual, as the sole defendant. (R. 1) The answer filed by Charles L. Arnold denied that he had done the acts charged in the complaint (R. 5, fourth defense). The Defendant Charles L. Arnold was merely an employee of a partnership operated by his sons, Norris K. Arnold and John R. Arnold, known as Arnold Hog Ranch (R. 8, 10, 13, 17, 19, 21, 53, 54, 55, 56, 136).

Over the objections of the Defendant, Charles L. Arnold and during the course of the trial the Court ordered Norris K. Arnold and John R. Arnold added as defendants in their partnership capacity as Arnold Hog Ranch without service of summons, amendment of pleadings, etc. (R. 56, 57). The Court relied on Rule 21, URCP and the fact that said persons had received notice of the proceedings and had employed counsel to defend Charles L. Arnold. (R. 63, 175, 176).

The Court refused to receive evidence concerning similar agricultural use being made generally by many other residents in Monroe City (R. 134, 135, 151, 152, 197), claiming that existance of one nuisance does not create a license to establish another nuisace. (R. 134, 135, 151, 152, 197), and rejected argument that reasonableness of use should be measured by the use to which other persons similarly situated put their land (R. 138, 151, 152).

Defendant produced an aerial photograph of the City of Monroe (Exhibit "E") with colored slides (Ex. "F") keyed to the photograph which depicted 19 commercial livestock operations in Monroe and the probable source of much of the odor complained of by witnesses, which offer of proof was rejected by the Court (R. 151, 152, 197).

The hog ranch in question is situated one half block on the South of the last street on the South edge of Monroe City. (Item #20 on the overlay attached to the aerial photograph marked exhibit "E") There are a few houses scattered along the North side of that street, but no houses South of the hog ranch. It is suggested that the aerial photograph, overlay and slides be used to explain the physical setting.

The hog ranch is modern, with cement floors in most areas, sanitary farrowing sheds and facilities, automatic watering and feeding equipment, chemical controls are used to control flies and rodents, the pens are cleaned daily and only hay and dry commercial feed consisting primarily of grain, minerals, vitamins, antibiotics and supplements are fed. No garbage or waste is fed. The pens and sheds are kept clean and dry. The pigs are not permitted to accumulate or to wallow in mud or muck. (R. 49, 58-63, 139-143, 166).

ARGUMENT

POINT I

MONROE CITY HAS NO POWER TO SUE TO ABATE OR ENJOIN A NUISANCE

Several reasons exist why Monroe City cannot prosecute this action in the manner attempted in this lawsuit,

which disabilities render the judgment entered herein void. Some of those reasons are as follows:

(a) *Monroe City is not the real party in interest*:

Rule 17(a), URCP, reads in part as follows:

> *"Every action shall be prosecuted in the name of the real party in interest; . . .* when a statute so provides, *an action for the use or benefit of another shall be brought in the name o fthe State of Utah."* (Emphasis added)

Monroe City claims to have the right and duty to bring this action for the use and benefit of its citizens (R. 1, Par. 1), however this action is not brought in the name of the State of Utah as required by Rule 17(a). Defendant is entitled to have a cause of action prosecuted by the real party in interest so that the judgment will preclude any action on the same demand by another, and so that the defendant will be permitted to assert all defenses available against the real owner of the cause. Shaw v. Jeppson, 121 U. 155, 239 P.2d 745.

This action is to abate and to enjoin an alleged nuisance. The right to maintain an action for nuisance is defined in 78-38-1, UCA, 1953, which reads as follows:

> "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. *Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by nuisance;* and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered." (Emphasis added)

The lawsuit is entirely for the benefit of the inhabitants of Monroe City (R. 1, Par. 1) and not for the benefit of Monroe City Corporation whose property is not claimed to have been "injuriously affected". The real party in interest and the only party who can bring this action is a property owner in Monroe City whose property is allegedly "injuriously affected, or whose personal enjoyment is lessened by . . . " the alleged nuisance, or by the city health department in the name of the State of Utah if the alleged nuisance is dangerous to health or life as provided in 26-5-5, UCA, 1953.

(b) *Powers granted to Monroe City can only be exercised by adopting and enforcing ordinances.*

Monroe City as a Municipal Corporation possesses only those powers conferred upon it by express legislative enactment. Tooele City v. Elkington, 100 U. 485, 116 P.2d 406; Stevenson v. Salt Lake City, 7 U. 2d 28, 317 P.2d 597. Those powers can only be exercised by the enactment and enforcement of municipal ordinances as provided by 10-5-6, and 10-7-2, UCA, 1953, which read in part as follows:

> "10-5-6. The . . . *city council* in cities of the third class . . . *are and shall be the legislative and governing bodies of such cities and towns, and as such shall have, exercise and discharge all of the rights, powers and privileges and authority conferred by law upon their respective cities, towns or bodies, . . .* " (Emphasis added)

and

> "10-7-2. When by this title power is conferred upon the . . . city council . . . to do and perform any act

> or thing and the manner of exercising the same is not specifically poiinted out, *the . . . city council . . . may provide by ordinance the manner and details necessary for the full exercise of such powers.*" (Emphasis added)

Plaintiff failed to sustain its burden of proof by failing to prove that it had exercised the powers which it claims were conferred upon it by 10-8-60 and 10-8-67 and which Plaintiff claims authorizes it to prosecute this action. Those statutes which confer powers upon cities read in part as follows:

> "10-8-60. *They may declare what shall be a nuisance, and abate the same,* and impose fines upon persons who create, continue or suffer nuisances to exist." (Emphasis added)
>
> "10-8-67. They may prohibit any offensive, unwholesome business or establishment in and within one mile of the limits of the corporation, *compel the owner of any pigsty,* privy, barn, corral, sewer or other place to *cleanse, abate or remove the same,* and may regulate the location thereof." (Emphasis added)

The statutes quoted above require that as a condition precedent to Monroe City exercising the powers therein mentioned the city council must adopt ordinances which "declare" Defendant's hog farm to be a nuisance. The court cannot take judicial notice of city ordinances. State v. Butcher, 74 U. 275, 279 P. 497. Enactment of an ordinance to take advantage of the delegated powers is a condition precedent to exercise of those powers. If no ordinance has been adopted or other appropriate action taken by the city council to implement the power conferred by statute, Monroe City has no more power than

if those statutes had never been enacted. The right to exercise those powers cannot be delegated to the City Attorney. Art. VI, Sec. 29, Utah Constitution.

The powers conferred upon Monroe City by 10-5-6 and 10-7-2 UCA, 1953, quoted on page 5 are expressly limited by 10-8-84, UCA, 1953, to the enactment and enforcement by Monroe City of ordinances which carry those powers into effect, and does not confer upon Monroe City the power to bring this lawsuit as claimed by Plaintiff. That statute reads in part as follows:

> "10-8-84. *They* (cities) *may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter,* and such as are necessary and proper to provide for the safety and preserve the health, . . . improve . . . the comfort and convenience of the city and of the inhabitants thereof, and for the protection of property therein; *and may enforce obedience to such ordinance with such fines or penalties as they may deem proper;* . . . " (Emphasis added)

The above statute authorizes Monroe City to adopt "ordinances," "rules," and "regulations" "necessary" to "carry into effect" "all powers" conferred by Chapter 8 of Title 10, UCA, 1953. Both 10-8-60 and 10-8-67, UCA, 1053, relied upon by Plaintiff to authorize this lawsuit are part of Chapter 8 and accordingly can only be exercised by the adoption and enforcement of ordinances, rules and regulations as provided by 10-8-84, UCA, 1953, quoted above. A municipal corporation may exercise only the powers granted, and in the manner prescribed. Tooele City v. Elkington, 100 U. 485, 116 P.2d 406. Monroe

City has no power to ignore the legislative mandate and to elect to select another unauthorized method of enforcement of its power by bringing this action. 37 Am Jur. Mun. Corp. 731, Sec. 117.

(c) *Monroe City must bring action in manner prescribed by statute.*

The legislature has delegated certain police powers of the state to municipal corporations, however crime prevention, protections of health, etc. are functions of the state rather than of any subdivision thereof, and the officers appointed are public officers whose duties are defined by law, and they serve the people of the whole state rather than the municipality which appoints them. 37 Am. Jur. 745, Sec. 131;

The legislature has by 10-7-3, UCA, 1953, required all cities to establish by ordinance a board of health for their city, which has power granted by 26-5-1, UCA, 1953, to:

> " . . . supervise all matters pertaining to the sanitary condition of its . . . city, and *shall have power and authority to order nuisances . . . to be abated or removed.*"

and is required by 26-5-5, UCA, 1953, to abate nuisances in the manner prescribed by that statute which reads in part as follows:

> "26-5-5. ABATEMENT OF NUISANCE.—Each local board of health shall cause every nuisance dangerous to health or human life to be abated. When complaint of such nuisance is made it shall forthwith cause the matter to be investigated and shall determine whether or not the alleged nuisance is detrimental to the public health or the cause of any disease or mortality.

> *Whenever a* local board of health shall determine that a *nuisance detrimental to health exists* it shall in writing notify the occupant of the premises where the same may be found or, if unoccupied, the owner or agent thereof of such finding and shall order the abatement or removal of such nuisance within two days. *If such nuisance is not abated or removed pursuant to such order, the board may summarily proceed to abate or remove the same, or it may cause an action to be brought in the name of the state by the county attorney for the abatement of such nuisance."* (Emphasis added)

The evidence in this case shows that Monroe failed to make a determination that Defendant was creating a health hazard, that it failed to give written notice to the owner or occupant of the premises, failed to order an abatement or removal of the alleged nuisance, (R. 57) all of which are conditions precedent to the right of the Monroe City Health Department to abate the alleged nuisance. *Such an action also must be brought in the name of the State of Utah* as required by that statute, *and must be prosecuted by the County Attorney, not the City Attorney.* Regulation of health is a function of the State, not of a municipal corporation, and 26-5-5, UCA, 1953, quoted above, prohibits the City of Monroe from maintaining any such action except through the properly designated Board of Health officials who are responsible to the state, not to the Municipal corporation. (See discussion on page 8 of this brief). The findings of the Court (R. 29, par. 7 & 8) purport to find that the alleged nuisance is detrimental to health, which if true establishes that the court lacks jurisdiction to grant a judgment in this matter since the power to sue to abate nuisances of that type has been reserved to the State of

Utah and has not been delegated to Monroe City, except to the extent that the Monroe City Board of Health (who are officers of the state) can bring an action in the name of the State of Utah. Where the statute prescribes a mode by which a particular act is to be done the prescribed mode must be followed if the act is to be valid. 37 Am Jur. Mun. Corp. 731, Sec. 117; Tooele City v. Elkington, 116 P. 2d 406, 100 U. 485; Smith v. City of Bozeman, 398 P. 2d 462, 144 Mont. 528; Stevenson v. Salt Lake City Corp., 317 P. 2d 597, 7 U. 2d 28.

POINT II

THE COURT ERRED IN SUBSTITUTING PARTIES DURING THE TRIAL OVER OBJECTIONS AND WITHOUT AMENDING PLEADINGS, SERVING SUMMONS, PERMITTING ANSWER, ETC.

While the first witness was testifying it became apparent that Plaintiff had sued an employee of the Arnold Hog Ranch partnership but had not sued the partnership or any member thereof. The employee had delivered summons to a member of the partnership who had employed counsel to defend the employee in this action. Both partners were present in court as witnesses. The Court ordered the partnership added as a party and proceeded with the trial without service of summons, permitting them to answer the complaint, to engage in discovery proceedings or to otherwise prepare for trial defendant, allegedly under provisions of Rule 21, URCP, and over the objections of the defendant and the persons who were joined. (R. 8, 10, 13, 17, 19, 21, 53 - 56, 63, 175, 176). The judgment shows however that the employee was dropped as an individual party defendant, that the

partnership was added and that the name of the employee was improperly named as a member of the partnership.

The Court misconceived the intent of Rule 21 by attempting to use it to substitute a new party defendant. Rule 21 is intended to afford relief to a plaintiff who sues too many or too few defendants, rather than one who sues the wrong party, and it contemplates the retention of one or more parties against whom the action can proceed and cannot be resorted to as a method of substituting one party for another. Barron & Holtzoff, Vol. 2, P. 218;

The attention of the Court is invited to the designation of the Defendant in the findings and judgment (R. 28-31) and in the record on appeal as "CHARLES L. ARNOLD, NORRIS K. ARNOLD and JOHN R. ARNOLD d/b/a Arnold Hog Ranch." Charles L. Arnold has been dropped from the case as an individual and the judgment is against he and his sons in their joint capacity as alleged partners and binds their joint property of said alleged partnership only. The judgment as entered is not a judgment against Charles L. Arnold individually except so far as he has a property interest in the Arnold Hog Ranch Partnership. Rule 17(d), URCP; Hammer v. Ballantyne, 16 U. 436, 52 P. 770, 67 Am. St. Rep. 643; Blyth & Fargo Co. v. Swenson, 15 U. 345, 49 Pac. 1027; 39 Am Jur Parties 957-959. Rule 25 concerning substitution of parties is not applicable to our situation. The Court had no jurisdiction or power to proceed against the new defendant without the consent of that defendant and a stipulation by the existing, and without a complaint that requested relief against the new, defendant. 39 Am. Jur. Parties

958; Noonan v. Caledonia Gold Mining Co., 121 US 393, 39 L ed 1061, 7 S Ct 911. Rule 4(c), URCP, provides in part as follows:

> "The court shall have jurisdiction from the time of filing the complaint or service of summons."

The jurisdiction of the court has not been invoked against the new defendant since no summons has been served or complaint filed as required by Rule 4(c), URCP, which would give the court jurisdiction over that party. The court has no right to adjudicate property rights of persons who are not parties to the action and who are total strangers to the record. Houser v. Smith, 19 U. 150, 56 P. 683. Rule 19 (b), URCP, requires the service of summons when even a non-indispensable person ought to be joined in an action. Certainly the same rule should apply where the suit has been filed against the wrong party or where an indispensable party is to be joined.

POINT III

ABATEMENT OF HOG RANCH AND INJUNCTION AGAINST ITS OPERATION IS UNAUTHORIZED, UNECESSARY AND EXCESSIVE IN THIS CASE.

Injunctive relief is proper only to restrain inflicting of substantial, serious and irreparable damages to the party seeking injunctive relief and where there is no adequate remedy at law. Rule 65A(e) (2) and (3), URCP; McGregor v. Silver King Min. Co., 14 U. 47, 45 P. 1091; 29 Am. Jur. Injunctions 216, Sec. 23, et seq.

(a) *Monroe City is not authorized to sue for injunction*

In a proper case an actionable nuisance may be enjoined in an action filed by a person " . . . *whose property*

is injuriously affected, or whose personal enjoyment is lessened by nuisance; . . . " 78-38-1, UCA, 1953. The powers granted to Monroe City by 10-8-60, UCA, 1953, to "*declare what shall be a nuisance and abate the same,*" and by 10-8-67, UCA, 1953, to " . . . *compel the owner of any pigsty . . . to cleanse, abate or remove the same . . .* " can only be exercised by the enactment and enforcement of city ordinances as provided by 10-5-6, 10-7-2, 10-8-60 and 10-8-84, UCA, 1953. See discussion on pages 4 - 7. Monroe City simply has no power to maintain an action for an injunction to enjoin the operation of a hog ranch except in the name of the State of Utah to abate an condition dangerous to human life. (See discussion on page No. 8 - 9)

(b) *The court erred in refusing to allow evidence concerning other commercial livestock operations in Monroe City.*

Monroe City is a country town of approximately 850 inhabitants, who are primarily engaged in agricultural activities, which has at least 20 commercial livestock operations located within its city limits. The Arnold Hog Ranch is located South of the populated section of Monroe City and ½ block South of the last street on the South edge of town. Defendant offered into evidence an aerial photograph of Monroe City (Exhibit "E") with an overlay which shows the location of each of the 20 commercial livestock operations, and various colored slide photographs (Exhibit "F") of each of those commercial livestock operations which depict the type of operation, including the muck, mire, manure, debris, area, livestock, etc. existing in each operation a few days before the trial. The numbers in the right-bottom corner of the slides are

referred to in the transcript, however for ease of correlation between the overlay and the slides, numbers on gummed labels have been added in the left-upper corner of each slide which correspond with the same number large for the area depicted on the overlay.

The overlay, slides and testimony pertaining thereto were offered to illustrate and explain that Monroe City has a large number of other commercial livestock operations located within the city limits (which extend beyond the area depicted on the aerial photograph), to show the reasonableness of the use complained of in the Monroe City locality and the probable other sources of the alleged unpleasant odors attributed by Plaintiff's witnesses to the Arnold Hog Ranch. (R. 151, 153, 194-196). The court rejected the slides (Exhibit "F") and the proffered testimony concerning the other commercial livestock operations in Monroe City on the theory that the alleged existence of one nuisance does not justify the establishment or continuance of another nuisance as stated by this Court in Ludlow v. Colorado Animal By-Products Co., where injunctive relief was denied. 104 U. 221, 229, 137 P. 2d 347, 352. (R. 151, 197). We agree with the rule of law stated in the Ludlow case, however that rule cannot be applied until the court first applies the *nuisance test of the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case* stated by this court in the case of Dahl v. Utah Oil Refining Co., 71 U. 1, 11, 262 P. 269. Cannon v. Neuberger, 1 U. (2d) 396, 298 P. 2d 425; Coon v. Utah Construction, 228 P. 2d 997.

In the Ludlow case odors from the rendering plant were obnoxious to such a degree that it was impossible

to enjoy a meal when the wind was in a certain direction, and owners of nearby properties were awakened at nights and rendered sleepless by noxious smells, however in balancing the equities the court awarded damages for reduction in value of property and refused an injunction.

Our case does not involve the obnoxious smell of cooking carcasses of dead animals such as was involved in the Ludlow case, but simply the usual barnyard smell of pigs. The overlay (Exhibit "E"), slides and proffered testimony, all of which were rejected by the court, show that commercial hog operations are conducted by other inhabitants of Monroe City at the following numbered locations on the overlay:

#1—450 So. Main—40 feeder hogs, 2 sows and couple of large feeder pigs, mucky condition. (R. 154, 155)

#3—40 head hogs—slaughter operation with entrails of animals lying on premises. Very dirty and mucky. Likely source of much odor. (R. 194)

#17—usually about 30 hogs (5 on date of trial) adjacent to Arnold Hog Ranch. Very dirty and mucky condition without cement floors or modern facilities. Probable source of strong odor. (R. 196)

#18—50 hogs. Very mucky condition. (R. 196)

In addition to the commercial hog operations a substantial number of Monroe City inhabitants maintain hog pens for domestic use, usually in confined quarters and in a mucky condition. Hogs, which are fed garbage, and milk cows, sheep and other domestic animals, which are generally in a mucky condition, all add to the odor.

It is extremely doubtful whether the smell of Monroe City would be substantially lessened by discontinuing the Arnold Hog Farm operation. The reasonableness of the Arnold operation is to be measured by whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it to be unreasonable. Hatch v. W. S. Hatch Co., 3 U. (2d) 295, 283 P. 2d 217, 220. The city's power to declare, prevent or abate a nuisance does not include the power to declare anything a nuisance which is not one in fact or per se. Cox v. City of Pocatello, 291 P. 2d 282, 77 Idaho 225.

Our case is almost identical to the Dahl v. Utah Oil Refining Co. case, 71 U. 1, 11, 262 P. 269 mentioned above where the grounds for complaint were that offensive and disagreeable fumes or odors eminated from the refinery which were carried through the air to plaintiff's house, which at times awakened persons sleeping in the house, required plaintiff to shut doors and windows, but were not constant, were not injurious to life or health, and caused no direct or physical injury to the property. The court in the Dahl v. Utah Oil Refining Co. case *supra* reversed a judgment for the property owner, held that a case of actionable nuisance was not made out, and that the trial court had erred in not directing a verdict for the defendant and in denying defendant's motion for a new trial. About the only difference between our case and the Dahl case is that the odor is caused by pigs in an agricultural community while the odor in the Dahl case was caused by refinery fumes in a refining area. If all of the pigs in Monroe City and/or all of the commercial livestock operations in Monroe City were to be removed because a few inhabitants of that agricultural community

object to barnyard and livestock smells the impact upon the economy of Monroe City would be serious. If Monroe City is permitted to single out the Arnold operation for abatement that action would constitute a denial of equal justice within the prohibition of the 14th amendment to the United States Constitution and Article I, Sec. 2 of the Constitution of the State of Utah. 37 Am. Jur. Mun. Corp. 782, Sec. 161.

(c) *An actionable nuisance must be proven by clear and convincing evidence.* Wade v. Fuller, 12 U. (2d) 299, 365 P. 2d 802. The findings (R. 28-30) fail to include a finding that plaintiff has carried its burden of proof by clear and convincing evidence as required. Accordingly the judgment herein is based on a mere preponderence of proof as cannot stand.

(d) *The judgment of abatement and injunction is excessive and should be reversed.*

The operation of a hog ranch in or near an agricultural community is not a nuisance per se. The legislature has by 26-6-7, UCA, 1953, denied the power to license a hog operation unless garbage or offal are fed, and has by 26-6-5, UCA, 1953, made it lawful to maintain a hog ranch or piggery so long as it is more than 50 feet from an inhabited house. Commercial feeds and haw are fed by Arnolds and the nearest residence is approximately 400 feet from the nearest pen. (R. 158) If the court in a proper case were to conclude that the Arnold operation is in fact a nuisance it should attempt to work out a method to abate the nuisance without enjoining the operation.

Defendant's operation used modern sanitary methods and equipment, cement floors in most of the pens, slatted floors for ease of washing and cleaning in areas where young pigs are born and kept and chemicals to control and kill flies and rodents. No garbage or offal is fed in the Arnold operation. Hay and commercially prepared dry feed is used with automatic feeders which keep the feed dry and clean. Pens and corrals are cleaned daily. (R. 46-49, 58-63, 139-143) Under the circumstances the Arnold operation should not be enjoined as a nuisance unless all piggeries from their very nature are found to be nuisances. Kalamazoo Twp. v. Lee, 228 Mich. 117, 199 NW 609, 2 ALR3d 947; Francisco v. Furry, 82 Neb 754, 118 NW 1102, 2 ALR3d 947; Vana v. Grain Belt Supply Co., 143 Neb 125, 10 NW2d 474, 2 ALR3d 948; see also cases annotated at 2 ALR3d 947-949.

Defendant indicated that it was about to invest in additional equipment and facilities which would improve sanitary conditions and reduce odor at the time that this action was commenced, but refrained from investing additional funds pending the outcome of this lawsuit. (R. 166, 167)

If an actionable nuisance is found to exist at the Arnold Hog Ranch the court should have limited its order to "cleanse" the pig operation as provided by 10-8-67, UCA, 1953, (quoted on page 13) by installation of cement floor on the entire corral, requiring more frequent or daily removal of accumulated manure, painting of pens, buildings and other areas to facilitate cleaning, and should have attempted other means of reducing the odor problem without ordering a complete abatement of the operation. The Court can retain jurisdiction to assure

that the problem is in fact reduced and can take appropriate action if the problem continues. Ludlow v. Colo. Animal By-Products Co., 104 U. 221, 137 P. 2d 347, headnote 9.

SUMMARY

Under Utah Law a municipal corporation has the power to enact ordinances declaring what is a public nuisance (within limits of definition of a nuisance contained in state statutes), and to cause public nuisances to be abated and their continuance punished by fines and penalties. If the nuisance is detrimental the board of health of a municipal corporation, (who, like municipal police officers, exercise the police power of the state and are primarily responsible to the state rather than the municipality) may in writing order the abatement of the nuisance. If their order is not complied with they may summarily abate the nuisance or may bring an action for abatement and injunction in the name of the State of Utah, which action must be prosecuted by the county attorney. Any action to abate or enjoin a nuisance which is not detrimental to health must be brought by the owner of the property claimed to be injuriously affected by the nuisance. Monroe City is not a proper party plaintiff in this action since it is not authorized by any statute to maintain this action. Defendants are entitled to be sued by the real party in interest to avoid a multiplicity of actions.

Monroe City failed to allege or to sustain its burden of proof that it had adopted municipal ordinances to implement the powers granted to it by the legislature. If no ordinance has been adopted by Monroe City to implement

those powers it can no more exercise those powers than if they had not been delegated by the legislature.

The lawsuit was improperly filed against an employee of the Arnold Hog Ranch partnership who filed an answer denying the allegations in the complaint. During the trial it was established that the wrong party had been sued. Over the objections of the defendant and new party the court permitted a substitution of parties by dropping the individual defendant and adding the two partners who were present in court. No summons was served and the complaint was not amended. The court awarded judgment against the partnership abating and enjoining the Arnold Hog Ranch operations although no pleading was ever filed which asserted a claim for relief against that partnership. The court claimed to be entitled to do so under Rule 21, however that rule gives relief to a plaintiff who sues too many or too few parties, not one who sues the wrong party. The judgment against the Arnold Hog Ranch partnership is beyond the jurisdiction of the court and is void.

The court refused to admit testimony, colored slide photographs or other evidence proffered to establish that some 19 other commercial livestock operations were being conducted within the corporate limits of Monroe City, that several commercial pig operations were being operated under unsanitary conditions in the same area of the city and that many domestic animals including pigs were maintained by inhabitants of Monroe City, claiming that the existence of one nuisance does not justify the establishment or continuance of another nuisance. The proffered evidence is material and relevant as to the probable source of much of the odor com-

plained about, and to determine whether the Arnold Hog Ranch operation is reasonable under the circumstances and in that locality, and to thus determine if it is in fact a nuisance. This error by the court seriously affected defendant's rights and defendant should be granted a new trial where that evidence is admitted.

The court failed to make a finding that the evidence established a nuisance by "clear and convincing evidence" as required by law, accordingly the findings are insufficient to support the judgment and it should be reversed.

The judgment abating and enjoining the operation of the Arnold Hog Ranch constitutes a taking of their property for public use without compensation, is excessive and unnecessary. Defendants are willing to cement the floors of the few corrals that are not now cemented, to facilitate cleaning, to invest in equipment for daily removal of accumulated manure from the premises, and to do other appropriate things to reduce odor and improve sanitation. The court should make an order designed to improve the operation and reduce the odor or other offensive conditions. The court can retain jurisdiction and take appropriate further remedial action if a problem continues to exist. An injunction should be used only after other remedies have failed.

Defendant is entitled to equal rights with the other inhabitants of Monroe City. Appropriate ordinance should be adopted in the manner provided by law and should be applied equally toward the Defendant and all other inhabitants. This lawsuit attempts to single out this defendant for special treatment and denies it equal justice guaranteed by the Utah and U. S. Constitutions.

It is doubtful that abatement of the Arnold Hog Farm operation would substantially change the odor of Monroe City. Abatement of all commercial livestock operations in the city would seriously affect the local economy. Residents of an agricultural community should expect a reasonable amount of livestock and barnyard odor. Rights of the parties should be carefully considered and weighed.

It is respectfully requested that the judgment entered by the court be reversed and that the case be dismissed or remanded for a new trial with appropriate parties, pleadings and evidence.

Respectfully submitted,

RONALD C. BARKER
Attorney for Defendant-Appellant