CLIFFORD F. BROWN, Justice, dissenting.

In my view the evidence demonstrates that the township zoning inspector repeatedly visually surveyed the plaintiffs' premises with binoculars to observe a dog kennel operated by plaintiffs thereon. He refused to stop the practice despite being offered the same information he required, knowing his surveillance was causing the plaintiffs and their family great discomfort and anxiety. Since he had available much less obtrusive means of determining the actual use of the premises, the reasonableness, bad faith or corrupt motive of the zoning inspector's investigation was at issue, questions of fact requiring determination by a jury. *Alabama Electric Co-operative, Inc., v. Partridge* (1969), 284 Ala. 442, 225 So.2d 848, 851 (whether insurer's investigation of a person asserting a claim was conducted within reasonable bounds was a question for the jury in an invasion of privacy action).

It is the duty of a trial court to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue. *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896. That reasonable minds could reach different conclusions on the factual issues requiring jury determination is evinced by the eight jurors who rendered a verdict for plaintiffs, by the trial judge who submitted the case to the jury for its determination, and by the dissenting appellate judge who correctly observed "whether the conduct of appellant [defendant] was unreasonable or obtrusive was a jury question." These ten reasonable minds reached a conclusion different from the two appellate judges concurring in the rendition of final judgment for defendant. This differing of reasonable minds establishes jury issues.

The appellate court, in reversing the jury verdict for plaintiffs in this case, usurps the jury function. Accordingly, I dissent.

FRANK D. CELEBREZZE, C. J., concurs in the foregoing dissenting opinion.

69 Ohio St.2d 149

DOWNING, Appellant,

v.

COOK, Chief of Police, Appellee.

No. 81-535.

Supreme Court of Ohio.

Feb. 10, 1982.

Property owner brought suit seeking an order declaring dog ordinance unconstitutional and restraining city police chief from enforcing the ordinance. The Court of Common Pleas, Cuyahoga County, granted judgment for defendant, and plaintiff appealed. The Court of Appeals affirmed, and a motion to certify the record was allowed. The Supreme Court held that ordinance which, in essence, prohibited the housing of more than three fully grown dogs in residential lots of comparatively small size was a valid exercise of city's police power; plaintiff failed to prove that the ordinance was unreasonable, arbitrary and unrelated to the public health, safety, morals or general welfare.

Judgment affirmed.

1. Municipal Corporations ⇐595, 597, 598, 625

Ordinance which, in essence, prohibited the housing of more than three fully grown dogs in residential lots of comparatively small size was a valid exercise of city's police power; plaintiff failed to prove that the ordinance was unreasonable, arbitrary or unrelated to the public health, safety, morals or general welfare. Const.Art. 18, § 3.

2. Municipal Corporations ⇐595, 597, 598, 625

A legislative body may enact legislation declaring that previously lawful activity will thereafter be deemed a nuisance,

and such legislation will be upheld against constitutional challenge if it comes within the police power, i.e., if it has a real and substantial relation to the public health, safety, morals or general welfare of the public and is neither unreasonable nor arbitrary.

3. Municipal Corporations ⇐594(1)

Regulation of dogs does not exceed the legitimate range of police power.

4. Municipal Corporations ⇐122(2)

An ordinance benefits from a presumption of validity.

5. Constitutional Law ⇐48(5)

When legislation is enacted pursuant to the police power, the party opposing such action must demonstrate a clear and palpable abuse of that power in order for a reviewing court to substitute its own judgment for legislative discretion.

6. Municipal Corporations ⇐122(2)

Local authorities, in respect to the enactment of ordinances, are presumed to be familiar with local conditions and to know the needs of the community.

7. Municipal Corporations ⇐594(1)

Ordinance which, in essence, prohibited the housing of more than three fully grown dogs in residential lots of comparatively small size was not invalidated by the fact that plaintiff could conceivably keep more dogs on her premises without creating undue noise, odor, filth, danger or other conditions traditionally characterized as nuisance conditions.

Plaintiff-appellant, Mariann H. Downing, brought suit in the Court of Common Pleas seeking an order declaring Section 905.04(H)(1) of the Codified Ordinances of the city of Berea * unconstitutional and restraining the Berea Chief of Police, defendant-appellee John Cook, from enforcing it.

By stipulation the case was submitted to the trial court on the basis of the pleadings, appellant's motion for summary judgment, the trial briefs and certain evidentiary material proffered by the appellant. Among that material is an affidavit executed by the appellant which asserts that she is co-owner of an 80 foot by 101 foot parcel of property located in the city of Berea upon which she resides; that she owns two Irish Setters and a mixed-breed dog which she keeps on the premises; that she displays one of her Irish Setters at dog show competitions; and that she desires to breed one of her Irish Setters and keep a puppy for show purposes.

Appellant also submitted the affidavit of Donald J. Kwiatkowski, who is president of an organization known as Purebred Dog Breeders and Fanciers Association Inc. of Northern Ohio, and is a member of the American Kennel Club, Cuyahoga County Animal Control Advisory Board, and the Ohio Dog Owners Association. His affidavit stated that both the Ohio Dog Owners Association and the Purebred Dog Breeders and Fanciers Association objected to Section 905.04(H)(1). In the opinion of Kwiatkowski, the ordinance constitutes an impermissible interference with the rights of property owners and will not solve problems of barking dogs, free-roaming dogs, or dog bites. The plaintiff also submitted a photograph of a well-groomed Irish Setter and a copy of the deed to her property.

The Court of Common Pleas granted judgment for the defendant, holding that "§ 905.04(H)(1) is a valid ordinance and enforceable by the police authority of the City of Berea."

The Court of Appeals affirmed.

* Section 905.04(H) of the Codified Ordinances of the city of Berea provides, in part:

"No person shall * * *

"(1) Own, keep or harbor more than three (3) dogs, excepting puppies under three (3) months old, in or on the premises of any dwelling unit within the City, unless the zoning lot upon which dogs are kept have a minimum area of 4,000 square feet for each dog kept on such zoning lot regardless of the number of persons keeping or harboring dogs on such lot."

Violation of Section 905.04(H)(1) is a minor misdemeanor and constitutes a nuisance subject to abatement in the manner provided by the Revised Code or Chapter 949 of the Berea Codified Ordinances. Section 905.04(I).

The cause is before this court pursuant to allowance of a motion to certify the record.

Eugene S. Bayer and Anthony O. Calabrese, Jr., Cleveland, for appellant.

James N. Walters, III, Director of Law, Cleveland, and K. Bigenho, for appellee.

PER CURIAM.

[1] The sole issue in this case is whether the enactment of Section 905.04(H)(1) was a valid exercise of the police power of the city of Berea.

Section 3 of Article XVIII of the Ohio Constitution confers upon municipalities, such as Berea, the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

[2] A legislative body may enact legislation declaring that previously lawful activity will thereafter be deemed a nuisance. Such legislation will be upheld against constitutional challenge if it comes within the police power, *i.e.*, if it has a real and substantial relation to the public health, safety, morals or general welfare of the public and is neither unreasonable nor arbitrary. *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138, 346 N.E.2d 666, *West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, 205 N.E.2d 382; *Porter v. Oberlin* (1965), 1 Ohio St.2d 143, 205 N.E.2d 363; *Ghaster Properties, Inc., v. Preston* (1964), 176 Ohio St. 425, 200 N.E.2d 328; *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 146 N.E.2d 854.

[3] Section 905.04(H)(1) is the result of a legislative determination that the housing of more than three fully-grown dogs in residential lots of comparatively small size is detrimental to the general welfare. The regulation of dogs does not exceed the legitimate range of police power. It cannot be disputed that too many dogs in too small a space may produce noise, odor and other conditions adverse to the best interests of the community as a whole.

[4–6] In determining whether the Berea ordinance is unreasonable or arbitrary we are mindful that the ordinance benefits from a presumption of validity. When legislation is enacted pursuant to the police power, a party opposing such action must demonstrate a clear and palpable abuse of that power in order for a reviewing court to substitute its own judgment for legislative discretion. *State v. Renalist, Inc.* (1978), 56 Ohio St.2d 276, 278, 383 N.E.2d 892. Local authorities are presumed to be familiar with local conditions and to know the needs of the community. *Allion v. Toledo* (1919), 99 Ohio St. 416, 124 N.E. 237, paragraph one of the syllabus; *Wilson v. Cincinnati, supra*, 46 Ohio St.2d at page 142, 346 N.E.2d 666.

Here the appellant has not shown the enactment of Section 905.04(H)(1) to be a clear and palpable abuse of power. Her evidence, largely consisting of opinions, is conclusory in nature or irrelevant, and does not rebut the presumption that the ordinance is valid.

While Section 905.04(H)(1) may limit appellant in the enjoyment and use of her property, appellant has failed to demonstrate that Section 905.04(H)(1) is not reasonably adapted to the legitimate purpose of avoiding the problems associated with a concentration of dogs in a small area in residential environs.

[7] Section 905.04(H)(1) is not invalidated by the fact that appellant could conceivably keep four dogs on her premises without creating undue noise, odor, filth, danger or other conditions traditionally characterized as nuisance conditions. Nor is appellant precluded by the ordinance from engaging in her hobby of breeding and showing dogs, but only from keeping more than three adult dogs in her home.

Because appellant failed to prove that Section 905.04(H)(1) is unreasonable, arbitrary or unrelated to the public health, safety, morals or general welfare of the public, the judgment of the Court of Appeals upholding the ordinance is affirmed.

Judgment affirmed.

CELEBREZZE, C. J., WILLIAM B. BROWN, SWEENEY, LOCHER, HOLMES, CLIFFORD F. BROWN and KRUPANSKY, JJ., concur.

69 Ohio St.2d 152

BONKOWSKY, Appellant,

v.

BONKOWSKY, Appellee.

No. 81-270.

Supreme Court of Ohio.

Feb. 10, 1982.

Wife sued husband for personal injuries sustained in automobile accident in Vermont. The Court of Common Pleas, Cuyahoga County, granted husband's motion for summary judgment on ground of interspousal immunity, and the Court of Appeals affirmed. Following allowance of motion to certify the record, the Supreme Court held that the doctrine of interspousal immunity would be adhered to and that fact that insurance policy was in existence was not a distinguishing factor.

Affirmed.

Locher, J., filed a concurring opinion in which Frank D. Celebrezze, C. J., concurred.

William B. Brown, J., filed a dissenting opinion in which Sweeney and Clifford F. Brown, JJ., concurred.

Clifford F. Brown, J., filed dissenting opinion in which William B. Brown and Sweeney, JJ., concurred.

1. Courts ⇐89

Legal precedent should not be a straitjacket to an appropriate change of legal policies, but where court has recently reviewed and spoken upon the viability of such policies, precedent of such pronouncements should be given a great deal of weight.

2. Husband and Wife ⇐205(2)

Doctrine of interspousal immunity is adhered to; fact that insurance policy was in existence, in case arising from an automobile accident, was not a distinguishing factor.

This matter brings into issue the viability of Ohio's existing principle of interspousal tort immunity. The facts giving rise to this question are not controverted. Appellant, Hanna L. Bonkowsky, and appellee, Otto R. Bonkowsky, are wife and husband, respectively. While on an automobile trip in the state of Vermont, appellee was driving and appellant was a passenger in the car when an accident occurred, and appellant was injured. Appellant filed an action in the Court of Common Pleas of Cuyahoga County against appellee, claiming negligence on the part of the latter. The parties stipulated to the existence of automobile liability insurance, and that the policy did not expressly bar such an action. The appellee moved for summary judgment, contending that interspousal immunity barred the claim despite the fact that the law of the state of Vermont would allow such an action. The Court of Common Pleas granted such motion, and the Court of Appeals affirmed upon the basis of Ohio's previously pronounced position on interspousal immunity.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Weisman, Goldberg & Weisman, Fred Weisman and Howard W. Mishkind, Cleveland, for appellant.

Kitchen, Messner & Deery and Charles W. Kitchen, Cleveland, for appellee.

PER CURIAM.

Appellant raises the previously reviewed issues that interspousal immunity policy discriminates against spouses without a valid or rational purpose, and deprives them of