2016 WL 6496593 (Or.Cir.) (Trial Order)
Circuit Court of Oregon.
Jackson County

Dale and Debra KREIN, individuals, Plaintiffs,
v.
Karen M. SZEWZ and John Updegraff, individuals, Defendants.

No. 12-0553L2.
May 26, 2016.

**General Judgment**

Michael W. Franell, Attorney at Law, 724 S. Central Ave Ste 1, Medford, OR 97501-7808, P: (541) 646-4111 • F: (541) 646-4112, Mike@FranellLaw.com.

J. Ryan Kirchoff, of James Holmbeck Kirchoff LLC.

Timothy Gerking, Judge.

***1** This case came on regularly for trial on March 31, 2015, before the undersigned judge and a jury. Plaintiffs, Dale Krein and Debra Krein, appeared by and through Michael W. Franell, their attorney. Defendants, Jon Updegraff ad Karen Szewc, appeared by and through J. Ryan Kirchoff, of James Holmbeck Kirchoff LLC, attorneys. Additionally, this case came before Judge Timothy Gerking for an injunction hearing on Thursday, April 9, 2015.

The attorneys made opening statements on behalf of their respective clients, introduced testimony and other evidence in support of their respective cases, and rested. Arguments were made to the jury on behalf of the respective parties, and the jury, having been instructed on all matters of law, and having retired to deliberate on its verdict, returned into court a verdict in favor of plaintiffs on April 2, 2015, which, omitting the title of the court and cause, was in the following form: 1) Did the defendants maintain a public nuisance on their property through their negligent conduct between 2002 and March 22, 2006?

YES.

2) Was defendants' negligence a cause of damages to plaintiffs? YES

3) Did defendants maintain a public nuisance on their property through intentional conduct after March 22, 2006? YES

4) Was defendants' intentional conduct a cause of damages to plaintiffs? YES

5) What are plaintiff's damages? $238,942.00

*/s/*

Presiding Juror

  

The matter then came before Judge Timothy Gerking on Thursday morning, April 9, for the injunction hearing. Both parties were permitted to introduce additional evidence and make arguments. After considering the arguments and the additional evidence, Judge Gerking determined the Plaintiffs had no adequate remedy at law to prevent the future barking of the dogs and that they would suffer irreparable damage if the dogs were permitted to continue barking. Therefore, Judge Gerking granted an injunction in the following form:

> Within 60 days from the date of this judgment, Defendants shall either debark all adult Mastiffs by use of a certified veterinarian, or remove all such Mastiffs from the properties located at 14314 E. Evans Creek Road or 14326 E. Evans Creek Road, collectively hereinafter referred to as the properties. If any of the dogs having been debarked thereafter regain their ability to bark, such dogs shall be debarked again by a certified veterinarian. Additionally, thereafter, any new adult Mastiffs brought onto the properties shall be debarked.

IT IS ORDERED AND ADJUDGED that plaintiffs, Dale Krein and Debra Krein, have judgment against defendants, Jon Updegraff and Karen Szewc, in the sum of $238,942, together with postjudgment interest at the judgment rate from May 20, 201,5 attorney fees, if the court finds they are so entitled under ORCP 68 to be decided on a subsequent motion and costs and disbursements in an amount to be determined by supplemental judgment in accordance with ORCP 68, on plaintiff's claim number 1.

Additionally, Plaintiff's are granted an injunction in which, within 60 days from the date of this judgment, Defendants shall either debark all adult Mastiffs by use of a certified veterinarian, or remove all such Mastiffs from the properties located at 14314 E. Evans Creek Road or 14326 E. Evans Creek Road, collectively hereinafter referred to as the properties. If any of the dogs having been debarked thereafter regain their ability to bark, such dogs shall be debarked again by a certified veterinarian. Additionally, any new adult Mastiffs brought onto the properties thereafter shall be debarked.

**MONEY AWARD**

***2** 1. The name and address of the judgment creditor are:

Dale Krein and Debra Krein

14316 E. Evans Creek Road

Rogue River, OR 97537

2. The name, address, and telephone number of the judgment creditor's attorney are:

Michael W. Franell, Attorney at Law

724 S. Central Avenue, Suite 113

Medford, Oregon 97501

Phone: (541)646-4111

3. The name of the judgment debtors and their address, date of birth, Social Security number, and driver license number, as well as the state that issued the driver license, are:

  

| | |
|---|---|
| Jon Updegraff | Karen Szewc |
| 14314 E. Evans Creek Road | 14314 E. Evans Creek Road |
| Rogue River, OR 97537 | Rogue River, OR 97537 |
| Date of birth: unknown | Date of Birth: unknown |
| Social Security no.: ***-**-XXXX | Social Security no.: ***-**XXXX |
| Driver license number: unknown | Driver's License number: unknown |
| State of issue: Oregon | State of issue: Oregon |

4. The name of the judgment debtor's attorney is J. Ryan Kirchoff.

5. The name(s) of any person or public body, other than the judgment creditor's attorney, who is entitled to a portion of a payment on the judgment is: none.

6. The amount of the money award is $238,942.00.

7. Post judgment interest is at the rate of 9% per annum on the balance of item 6 plus item 7 plus item 9 plus item 10, said interest running from the date of entry of the judgment.

9. Costs and disbursements are to be determined by supplemental judgment in accordance with ORCP 68.

10. Attorney fees are to be determined by supplemental judgment in accordance with ORCP 68.

Signed: 5/26/2015 12:01 PM

/s/ <<signature>>

Timothy Gerking

Circuit Court Judge

2013 WL 12126292 (Or.Cir.) (Trial Order)
Circuit Court of Oregon.
Jackson County

Dale and Debra KREIN, Cheryl June and Anne Damota, individuals, Plaintiffs,
v.
Karen M. SZEWZ and John Updegraff, Defendants.

No. 120553L2.
September 19, 2013.

**Order**

Michael Franell.

Amanda Thorpe.

Timothy C. Gerking, Judge.

***1** This matter coming before the Court on September 9, 2013 on Plaintiffs Motion for Partial or Complete Summary Judgment and Plaintiffs appearing by and through their lawyer Michael Franell and Defendants appearing by and through their lawyer Amanda Thorpe and the Court, having taken the matter under advisement and now being fully informed in the matter, rules as follows:

***Discussion***

Plaintiffs have filed a civil damage action against defendants based upon the sole theory of public nuisance alleging that Defendants, their neighbors, maintained dogs that barked to the extent that it interfered with the use and enjoyment of their property. Defendants answered the complaint by denying the liability allegations and by raising a number of affirmative defenses, including the defense that the dogs were maintained as guard dogs for their livestock farming operation, that this was a reasonable and acceptable farming practice and they were, thus, entitled to immunity from nuisance claims under ORS 30.935 and ORS 30.936.

Plaintiffs seek either partial or complete summary judgment primarily based upon a previous determination of a Jackson County Hearings Officer in a different, but similar dog barking complaint against defendant, Karen Szewz, that the farming practice immunity defense did not apply. Defendants maintain that issue preclusion does not apply, but regardless, that there are numerous issues of fact requiring the denial of Plaintiffs summary judgment motion.

Although I am satisfied, based on the summary judgment record, that there are outstanding issues of fact requiring the denial of Plaintiffs motion as it pertains to the general issue of liability (and certainly damages), I interpret Plaintiffs motion to be also directed against Defendants immunity affirmative defense which does require further analysis.

The summary judgment record includes a certified copy of the Hearings Officer's 22 page March 23, 2006 Order with Findings of Fact and Conclusions of Law, (Ex 2), and the October 11, 2006 Jackson County Circuit Court Judgment affirming the Hearings Officer's Order (Ex 1). That Judgment was eventually appealed and the Oregon Court of Appeals affirmed the judgment without opinion. *Szewz* v. *Jackson County,* 222 Or App 525 (2008).

As stated by the Oregon Supreme Court in *Nelson* v. *Emerald People's Utility District,* 318 Or 99 104 (1993):

  

"If one tribunal has decided an issue, the decision on that issue may preclude relitigation of the issue in another proceeding if five requirements are met:

1. The issue in the two proceeding is identical…

2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding…

3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue…

4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding…

5. The prior proceeding was the type of proceeding to which the court will give preclusive effect…

That same case identified four additional factors to be considered in determining whether a decision in an administrative proceeding should be given preclusive effect:

***2** 1. Whether the administrative forum maintains procedures that are "sufficiently formal and comprehensive";

2. Whether the proceedings are "trustworthy";

3. Whether the application of issue preclusion would "facilitate prompt, orderly and fair problem resolution; and

4. Whether the "same quality of proceedings and the opportunity to litigate is present in both proceedings". Id. atf.n 4.

Issue preclusion may be raised in a motion for summary judgment. *Lutterman* v. *Lutterman,* 195 Or App. 124 (2004). The applicability of issue preclusion is ordinarily determined through a burden-shifting analysis, with the proponent have the burden on the first, second and fourth *Nelson* factors and, if established, the burden then shifts to the opponent to establish that the third and fifth factors do not apply. *Barackman* v. *Anderson,* 214 Or App 660 (2007). The summary judgment record must address all five factors in order for the court to make a determination, *Id.*

The Court's determination in this case is hampered by Plaintiffs failure to adequately brief this issue and defendant's election not to brief the issue, except to point out that there is insufficient evidence in the record to make a determination whether issue preclusion applies. Nevertheless, the Court will make an effort to do so.

In considering the five *Nelson* factors, I am satisfied, based upon my review of the Administrative Hearings Officer's extraordinarily thorough ruling, that factors 1,2 and 4, at least with respect to defendant Szewz applies (application of issue preclusion to defendant Updegraff will be discussed further below).

Then evaluating factor 3, I am also convinced that defendant Szewz, through her counsel, had a full and fair opportunity to litigate the applicability of the farming practice immunity issue. That leaves factor 5 and also a consideration of the four additional factors that come into play when dealing with the issue preclusive effect of a decision made in an administrative proceeding. Although the record could be better with respect to the quality of the administrative proceeding, it does disclose that defendant Szewz was represented by counsel, exhibits were introduced, witnesses were called to testify, the application of the immunity defense was, as stated, thoroughly developed, the proceeding was subject to the Administrative Procedures Act, defendant Szewz, pursuant to the APA, was notified of her right to appeal the decision to the Circuit Court and she, in fact, did avail herself of that right and also ultimately appealed the matter to the Oregon Court of Appeals.

  

Again, based on the forgoing and the procedural rights and protections afforded by the APA, I conclude that the 5th factor, as well as the additional 4 administrative proceeding factors, are also satisfied.

Accordingly, the Administrative Hearings Officer's ruling shall have issue preclusive effect on defendant Szewz. Whether it has issue preclusive effect on defendant Updegraff, a nonparty in the administrative hearing, depends on whether he was in "privity" with defendant Szewz. As stated in *Sterns* v. *Horton,* 161 Or App 454 (1999);

***3** "The purpose of the "party or in privity with a party" requirement is to ensure that the party being estopped was "adequately protected in the first trial and therefore received due process" [Citations omitted]. Nonparties to prior adjudications whose rights can realistically be said to have been protected in those proceedings tend to fall into one of three categories: (1) those who control on action though not a party to it; (2) those whose interests are represented by a party to the action; and (3) successors in interests to those having derivative claims. Id. at p. 462.

If defendant Updegraff fits into any of these categories, it is the second one. Although at oral argument the Court heard that defendants were husband and wife, there is nothing in the summary judgment record confirming that. The First Amended Complaint alleged that defendants lived on the subject properties since 1997 and defendants partially admitted this allegation with respect to one of the properties. Updegraff's August 30, 2013 Declaration alleges that he wasn't a party to the prior administrative proceeding, that he did not testify in that proceeding, that he lives on the subject property, that since prior to 2002 he and Szewz raised sheep and goats and that he has Tibetan Mastiff dogs which he refers to as "my dogs". Without knowing more about the defendant's relationship, marital, business or otherwise, I can't make a determination on the issue of privity so plaintiff's motion at this time is denied with respect to defendant Updegraff. See Generally, Restatement (Second) of Judgments (1982).

SO ORDERED

Dated: September 18, 2013

<<signature>>

TIMOTHY C. GERKING

CIRCUIT COURT JUDGE

Cc: Michael Franell

Amanda Thorpe

**End of Document**

2015 WL 12712026 (Or.Cir.) (Trial Pleading)
Circuit Court of Oregon.
Jackson County

DALE and Debra Krein, individuals, Plaintiffs,
v.
Karen M. SZEWZ and John Updegraff, individuals, Defendants.

No. 12-0553L2.
March 30, 2015.

**Plaintiff's Second Amended Complaint**

Michael W. Franell, Attorney at Law, 724 S. Central Ave, Ste 113, Medford, or 97501-7808, P: 541-646-4111• F: 541-646-4112, Mike@FranellLaw.com, Michael W. Franell, Osb #902680, for the plaintiffs.

($500,000)

**1.**

Plaintiffs Dale and Debra Krein, at all times pertinent hereto, are individuals who own real property at the location of 14316 E. Evans Creek Rd., Rogue River, OR. The action occurred in the state of Oregon, county of Jackson.

**2.**

Defendants Karen Szewz and John Updegraff, at all times pertinent hereto, are individuals who reside at the real properties located at 14314 and they utilize the property located at 14326 E. Evans Creek Rd. Rogue River, OR.

**3.**

Plaintiffs Dale and Debra Krein bought their house, located at 14316 E. Evans Creek Rd, in 1988.

**4.**

Defendants Karen Szewz and John Updegraff occupied the residence located at 14314 E. Evans Creek Rd. starting in 1997.

**5.**

Sometime after 1999, Defendants began purchasing dogs. Around 2002, Defendants began breeding dogs. Defendants keep dogs on both of Defendants properties. Defendants are breeding Tibetan Mastiffs. The dogs bark uncontrollably for long periods of time while Defendants are away from the residence.

**6.**

  

Defendants, and each of them, are regularly gone from their residence starting early in the morning. On a regular occasion, the dogs will begin barking as early as 5 a.m and continuously bark throughout the day, only stopping for short times. The defendants' dogs barking have woken plaintiffs from sleep on many occasions.

**7.**

Plaintiffs have communicated with defendants regarding the disturbance the defendants' dogs are creating and have requested defendants remedy the situation. Plaintiffs have also made complaints regarding the dogs.

**8.**

Defendant Karen Szewz has been cited by Jackson County animal control on two prior occasions for violating public nuisance codes due to the barking of her dogs. The citations occurred on November 19, 2004 and August 8, 2005. At the time, defendant was only cited for the barking of a few particular dogs, not all of the dogs owned by defendant. Defendant was ordered to take necessary steps to prevent the particular dogs from barking and disturbing others and pay fines.

**9.**

Defendants have maliciously and intentionally not taken steps to prevent their dogs from disturbing their neighbors since their prior citations. Defendants' dogs continue to cause regular noise disturbances, causing Plaintiffs a great deal of anxiety and stress.

**10.**

As of this time, the Defendants still have not remedied the situation.

**11.**

The noise from defendants' dogs has substantially and unreasonably harmed the ordinary occupation of plaintiffs' property and caused an interference with the enjoyment of plaintiffs' land. Defendants have intentionally and maliciously caused the nuisance.

**12.**

The inconvenience plaintiffs have suffered as a proximate result of defendants' actions has resulted in damages of $20,000 per year/ per plaintiff. Plaintiffs have endured the inconvenience beginning in 2002 and continuing currently.

WHEREFORE, plaintiff prays for a judgment of this court as follows:
1. Granting judgment to plaintiffs against defendants in the amount of $20,000 per year, per plaintiff, beginning in 2002 and running currently, for damages caused by extreme nuisance of defendants dogs barking incessantly, or a total of $500,000.

2. Granting an injunction against Defendants from having any dogs on either property that bark so as to disturb their neighbors

3. Granting any other equitable or legal remedies the court determines are appropriate.

  

4. Awarding plaintiff reasonable attorney fees, costs and disbursements.

Dated this 2nd Day of March, 2015

/s/ Michael W. Franell

Michael W. Franell, OSB #902680

Attorney for the Plaintiffs

**CERTIFICATE OF FILING**

I certify that on March 30, 2015, I filed the foregoing PLAINTIFF'S SECOND AMENDED COMPLAINT by efile to:
Court Clerk

Jackson County Circuit Court

100 South Oakdale Avenue

Medford OR 97501

**End of Document**

2012 WL 12886623 (Or.Cir.) (Trial Order)
Circuit Court of Oregon.
Jackson County

Dale and Debra KREIN, et al., Plaintiffs,
v.
Karen M. SZEWZ and Jon Updegraff, Defendants.

No. 12-0553-L2(3).
May 3, 2012.

**Order on Defendants' Rule 21 Motions**

Daniel L. Harris, Judge.

***1** Defendants' Rule 21 motions came on for oral argument before this court on April 23, 2012. Based upon the court's review of the submissions of the parties, applicable authority and points made in oral argument, this ORDER is entered as follows:

**ANALYSIS**

Defendants argue in this case that ORS 12.080(3) establishes a secure statute of limitations for claims involving public nuisance. Plaintiff asserts in response that, based upon the authority of the Supreme Court case of *Smejkal v. Empire Lite-Rock, Inc.*, 274 Or 571 (1976), that there is no statute of limitations for a public nuisance.

ORS 20.080(3) provides that "an action for waste or trespass upon or for interference with or injury to any interest of another in real property *** shall be commenced within six years."

The court's reading of the *Smejkal* case can be briefed as set forth below: The court held in that case that the emissions produced by the defendant's rock processing plant constituted a public nuisance. In that action, the plaintiff alleged that the defendant owned a rock processing plant which produced emissions that plaintiff claimed had damaged real property owned by the plaintiff and trees growing on that property. In that action, the defendant raised two defenses: first that the statute of limitations should limit any actions to six years; and second that defendant had acquired a prescriptive easement which allowed the defendant to produce the offending emissions. At the trial court level, the plaintiff admitted that there was a six-year statute of limitations and contested that a prescriptive easement had been established. On appeal the only issue before the Supreme Court was whether "a prescriptive right to pollute land can be acquired against a private land owner for activities complained of which also constitute a public nuisance." *Id.* at 573.

The court in *Smejkal* held that one cannot acquire a prescriptive right to maintain a public nuisance no matter how long it has continued. An easement by prescription can only be acquired by private nuisance. Found in the dicta from this decision are statements from the Torts 2d, §821c and a quote from the Supreme Court case of *Lawrence v. Tucker*, 160 Or 474, 479-480 (1939) which support the proposition that a statute of limitations does not run for a public nuisance. After performing additional research, the court found in the case of *Foster Auto Parts v. City of Portland* (171 Or App 278 (2000)), which involved an assertion of public nuisance. In that case, Judge Armstrong for the Court of Appeals stated that "the City is correct that a prescriptive right cannot be obtained for a public nuisance. The basis for that is

  

that the statute of limitations and, hence, the prescriptive period to acquire an interest in land does not run for a public nuisance. …" *Id.* at 282.

From three different sources, the courts have stated in dicta that the statute of limitations does not run for a public nuisance. While there is no appellate authority directly on point, this court interprets this statute (ORS 20.080(3)), in light of the dicta stated from the three sources, to not apply to actions for a public nuisance.

**ORDER**

***2** Based upon that finding, the court denies the Rule 21 motion to limit this public nuisance action with a six-year statute of limitations.

Dated this *2* day of May, 2012.

<<signature>>

Daniel L. Harris

Circuit Court Judge

cc: Michael Franell

Erik Glatte

**End of Document**

287 Or.App. 481
Court of Appeals of Oregon.

Dale KREIN, and Debra Krein, Plaintiffs-Respondents,
v.
Karen M. SZEWC, and Jon Updegraff, Defendants-Appellants.

A159610
|
Argued and submitted April 11, 2017.
|
August 30, 2017

**Synopsis**

**Background:** Neighbors brought nuisance action against dog owners. Following a jury trial, the Circuit Court, Jackson County, Timothy Gerking, J., 2016 WL 6496593, entered judgment in favor of neighbors in the amount of $238,942.00, and granted an injunction that required defendants to have their dogs undergo devocalization. Dog owners appealed.

**Holdings:** The Court of Appeals, DeVore, P.J., held that:

[1] neighbors' failure to plead that they lacked an adequate legal remedy did not preclude the trial court from issuing an injunction requiring dog owners to have their dogs undergo devocalization;

[2] evidence was sufficient to support a finding that neighbors had no adequate remedy of law, as required for the issuance of an injunction requiring dog owners to have their dogs undergo devocalization; and

[3] the Circuit Court's grant of partial summary judgment in favor of neighbors as it pertained to dog owner's use of the farm defense, and the preclusive effect of an administrative hearing officer's earlier ruling, did not preclude dog owner and his spouse from raising the defense at trial on neighbors' nuisance claim.

Affirmed.

West Headnotes (4)

**[1] Pleading**

Neighbors' failure to plead that they lacked an adequate legal remedy did not preclude the trial court from issuing an injunction requiring dog owners to have their dogs undergo devocalization, when the issue was tried by the implied consent of the parties; after the jury returned a verdict on neighbor's claims for damages, the court turned to the neighbor's prayer for equitable relief in the form of an injunction, explained that the parties had agreed to present additional evidence regarding an injunction,neighbors explained that they did not have an adequate remedy at law, made an offer of proof of tapes to show the dogs' barking had continued in spite of the pursuit of legal remedies, and dog owners stipulated to the admission of the tapes. Or. R. Civ. P. 23; B.

Cases that cite this headnote

**[2] Pleading**

A pleading for all practical and legal purposes is automatically amended whenever an issue not raised by the pleading is tried by consent. Or. R. Civ. P. 23; B.

Cases that cite this headnote

**[3] Injunction**

Evidence was sufficient to support a finding that neighbors had no adequate remedy of law, as required for the issuance of an injunction requiring dog owners to have their dogs undergo devocalization, because dog owners, even though they took measures to try and reduce barking, were unwilling to deal effectively with the problem by silencing the dogs' incessant barking; while neighbors obtained a sizeable money judgment, it related

  

only to the nuisance created by the dogs' barking up to the date of trial, and would have had no effect on any future nuisance.

Cases that cite this headnote

**[4] Judgment**

Trial court's grant of partial summary judgment in favor of neighbors as it pertained to dog owner's use of the farm defense, and the preclusive effect of an administrative hearing officer's earlier ruling, did not preclude dog owner and his spouse from raising the defense at trial on neighbors' nuisance claim; the summary judgment ruling was limited to one dog owner's use of the defense, did not apply to his spouse, and only applied to that owner's conduct through the date of the administrative order. Or. Rev. Stat. § 30.930.

Cases that cite this headnote

Jackson County Circuit Court, 120553L2, Timothy C. Gerking, Judge.

**Attorneys and Law Firms**

Clayton C. Patrick, Clatskanie, argued the cause and filed the briefs for appellants.

Michael W. Franell, Medford, argued the cause and filed the brief for respondents.

Before DeVore, Presiding Judge, and Garrett, Judge, and James, Judge. *

**Opinion**

DeVORE, P. J.

****1** ***483** In this nuisance action, defendants appeal from a judgment awarding damages and entering an injunction. The injunction requires defendants to have their dogs undergo devocalization ("debarking"). Defendants assign error to the injunction, contending that plaintiffs failed to plead that they had no adequate remedy at law and that, in any event, damages suffice as an adequate remedy. Defendants also assign error to an order that granted plaintiffs' motion for partial summary judgment, contending that issues of fact precluded summary judgment. In particular, defendants contend that the court should not have given preclusive effect to Jackson County's prior administrative ruling rejecting defendant's farm use defense under ORS 30.935 and ORS 30.936. [1] The parties dispute whether the trial court gave preclusive effect only as to one of the defendants, Szewc, or both defendants, and only as to circumstances extant at the time of that proceeding, or also as to the current circumstances at the time of trial. We conclude that the trial court did not err in granting the injunction nor in granting partial summary judgment with a limited effect. Accordingly, we affirm.

## I. BACKGROUND

Plaintiffs are neighbors of defendants Szewc and Updegraff. Around 2002, defendants began breeding Tibetan Mastiff dogs. According to plaintiffs, the "dogs bark[ed] uncontrollably for long periods of time while defendants [were] away from the residence."

In 2004 and 2005, Jackson County issued a citation to defendant Szewc for violating a county code provision by allowing two of her dogs to bark frequently and at length. In 2006, a hearings officer determined that Szewc had violated the code provision on public nuisance. *See* Jackson County Code § 612.09 (c)(2) (unreasonably causing noise disturbance). In a 22-page opinion, the hearings officer rejected ***484** Szewc's farm use defense under ORS 30.935 and ORS 30.936, concluding that the defense was "not available to the defendant for the events that gave rise to [the citation]." Among other things, the opinion determined that Szewc did not have a "farm," that her activities were not a "farm use," that the use exceeded the level of agricultural activity allowed in the property's zoning, and that the manner in which Szewc employed the dogs was not reasonable. Szewc was fined $400, and she was ordered to prevent the two dogs from barking by debarking them or moving them to a different property. The decision was challenged on appeal and affirmed without opinion. *Szewc v. Jackson County*, 222 Or.App. 525, 195 P.3d 492 (2008).

In 2012, plaintiffs brought this action alleging that defendants, Szewc and Updegraff, had not taken the

  

necessary steps to prevent the dogs from barking and disturbing their neighbors. Plaintiffs alleged that "[t]he noise from defendants' dogs has substantially and unreasonably harmed the ordinary occupation of plaintiffs' property and caused an interference with the enjoyment of plaintiffs' land. Defendants have intentionally and maliciously caused the nuisance." In the prayer for relief, plaintiffs requested "damages caused by extreme nuisance of defendants' dogs barking incessantly" from 2002 to the present and "an injunction against defendants from having any dogs * * * that bark so as to disturb their neighbors."

**2 Defendants answered by asserting the farm use immunity defense as an affirmative defense. Defendants alleged that they owned and operated a farm as defined in ORS 30.930 and that their Tibetan Mastiffs were trained as guard dogs for their livestock operation. Defendants asserted that the use of guard dogs is an acceptable method to protect livestock from predators and that the use constitutes a "farming practice" under the statute.

Plaintiffs filed a motion for summary judgment that asked that the court grant either partial summary judgment against Szewc for nuisance between 2002 and the date of the 2006 administrative decision or grant complete summary judgment against both defendants for the entire nuisance claim. Defendants responded that there *485 were issues of fact on the nuisance claim and the farm use defense. Defendants argued there was "insufficient evidence in the record for the court to determine whether or not issue preclusion would apply" so as to use the county's determination against Szewc. After a hearing, the trial court denied plaintiffs' broader motion as it pertained to issues of liability and damages, granted a narrowed motion as to issue preclusion on Szewc's use of the farm use defense for events up to 2006, but denied the motion as to preclusion regarding Updegraff's farm use defense.

Before trial, plaintiffs filed a second amended complaint that again alleged substantial and unreasonable harm from the dogs' barking, and, in the prayer for relief, requested an injunction. Defendants' answer included a counterclaim and affirmative defenses, but, this time, did not include the farm use defense.

At the end of trial, the jury returned a verdict in favor of plaintiffs, finding liability for negligence and nuisance both between 2002 and 2006 and in the time thereafter. The jury found damages of $238,942. The trial court entertained additional evidence on the request for an injunction. Granting the injunction, the court entered judgment, providing:

> "Within 60 days of the date of this judgment, defendants will make sure that all mastiffs on either property have undergone total devocalization by board certified veterinarian surgeons. Additionally, any new mastiffs brought to the property must have undergone total devocalization by a board certified veterinarian surgeon prior to the time they are brought to the property. If any of the dogs having undergone total devocalization regain their ability to bark, the defendants must have the procedure redone."

This appeal followed.

## II. INJUNCTION

The parties have not asked that we exercise our discretion to review *de novo* plaintiffs' equitable claim for injunctive relief, and we decline to do so. *See* ORS 19.415(3)(b) (*de novo* review discretionary). Accordingly, we review the trial court's legal conclusions for legal error and are bound *486 by the trial court's findings of fact if supported by any evidence in the record. *Eagles Five, LLC v. Lawton*, 250 Or.App. 413, 415 n. 2, 280 P.3d 1017 (2012).

[1] On appeal, defendants argue that the trial court erred in granting the injunction for two reasons: (1) that plaintiffs did not plead in their complaint that they had "no adequate remedy at law" and (2) that, because plaintiffs received a money judgment for damages, they had an adequate legal remedy to date and they could seek the remedy again in the future.[2] *Knight v. Nyara*, 240 Or.App. 586, 597, 248 P.3d 36 (2011) ("An injunction is an extraordinary remedy, to be granted only on clear and convincing proof of irreparable harm when there is *no adequate legal remedy*." (Emphasis added.)) Plaintiffs respond that they pleaded ultimate facts that would allow a finder of fact to determine that plaintiffs had no

adequate remedy at law to stop the dog barking. Plaintiffs argue that the trial court found that plaintiffs had proven by clear and convincing evidence that, given the amount of time and the extent to which plaintiffs had gone to address the nuisance without success, they would suffer irreparable harm for which there was no adequate remedy at law.

**3 [2] Taking defendant's arguments in turn, we first address whether the trial court erred in granting the injunction, given plaintiffs' pleading. As it happens, we need not decide whether plaintiffs sufficiently alleged in the text of the complaint that plaintiff had no adequate remedy at law because that issue was tried by the consent of the parties. Because that is so, the issue is resolved by ORCP 23 B. The rule governs the amendment of pleadings when new issues or evidence are tried by consent of the parties. It provides:

> "*When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings*. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but *failure so to amend does not affect the result of the trial of these issues*. If evidence is objected to at *487 the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

ORCP 23 B (emphasis added). We have explained:

> "The first two sentences of ORCP 23 B govern situations in which, although issues do not appear in the pleadings, the parties nonetheless try them by express or implied consent. In those situations, the pleadings may be amended to reflect the new issues, but even if the pleadings are not so amended, the result of the trial of the unpleaded issues is not affected. In other words, when parties consent to trial of unpleaded issues, the issues are tried, even if the pleadings are *never* expressly amended to include them. In those circumstances, the consent of the adverse party is determinative, and the trial court is not called upon to consent or exercise its discretion."

*Fraker v. Benton County Sheriff's Office*, 214 Or.App. 473, 481, 166 P.3d 1137 (2007) (emphasis in original). Stated differently, "a pleading for all practical and legal purposes is automatically amended whenever an issue not raised by the pleading is tried by consent." *Id.* at 482, 166 P.3d 1137 (internal quotation marks omitted).

In this case, the first sentence of ORCP 23 B—trial of issues by consent—is implicated. After the jury returned a verdict on plaintiffs' claims for damages, the court turned to plaintiffs' prayer for equitable relief in the form of an injunction. The court explained that the parties had agreed to present additional evidence regarding the injunction:

> "I have spoken with counsel in chambers and as I understand it, in addition to legal arguments that the parties wish to make based on the facts and how the facts relate to the law, the parties wish to present additional evidence.
>
> " * * * * *
>
> "I think, you know, this is—I will, you know, reopen the record to consider any additional evidence relating to whether the Plaintiffs are entitled to an injunction."

*488 Plaintiffs' counsel responded that plaintiffs did not have an adequate remedy at law and that plaintiffs would like to put on some additional evidence. Plaintiffs' counsel made an offer of proof of tapes to show "that the barking

has continued in spite of the plaintiffs pursuing legal remedies." Initially, defendants' counsel was reluctant to stipulate to the admissibility of those tapes. The court reminded defendants' counsel:

> ****4** "As I said, you want to reopen the evidence so I'm going to allow it. And so this is actually just focusing on the issue of the injunctive relief which is a separate matter for the court to consider. So, I'm exercising my discretion to open the record."

Defendants' counsel then stipulated to the admission of the tapes. Plaintiffs' counsel reiterated the purpose of the tapes:

> "They are offered merely to prove that even though they have legal action against them and the Jackson County [hearings officer] found against them, the Court of Appeals found against them, it hasn't changed the fact that they have allowed the dogs to bark."

Notwithstanding defendants' stipulation, the court asked plaintiffs' counsel to "lay a foundation for those tapes." Plaintiffs' counsel called witnesses to lay a foundation for the tapes, and the court received them. Both parties presented argument on the issue of an adequate remedy at law. There was an opportunity for defense counsel to put on evidence. The court proceeded to find that plaintiffs were entitled to injunctive relief by clear and convincing evidence because plaintiffs "lack an adequate remedy at law in terms of future activities on defendants' property which constitute that nuisance primarily because of the length of time that it's existed." [3]

In light of the hearing on the injunction, we conclude that the parties agreed to try the issue of whether plaintiffs lacked an adequate legal remedy through additional ***489** evidence. Plaintiffs made an offer of proof of tapes to show that the dogs' barking has continued, despite legal remedies in prior proceedings. Defendants stipulated to the admission of the tapes. Even if the complaint did not sufficiently allege the lack of an adequate legal remedy, which we do not decide, the complaint was deemed amended to conform to the additional evidence on the issue that the parties consented to try. ORCP 23 B. Consequently, the trial court did not err in granting the injunction by reason of the allegations in the complaint. *See Smith v. Wallowa County*, 145 Or.App. 341, 345, 929 P.2d 1100 (1996) (nuisance claim tried by consent).

**[3]** We next address whether plaintiffs failed to prove that they lacked an adequate legal remedy insofar as plaintiffs had received a money judgment for damages. At the injunction hearing, plaintiffs contended that the damages awarded were for the loss of enjoyment of their property in the past, but that such damages did not stop the dogs from barking—the relief that was their purpose in the lawsuit. Plaintiffs offered tapes, which the court received, demonstrating that the dogs have continued to bark since the county's administrative decision in 2006. Defendants countered that plaintiffs should be denied future injunctive relief because they have an adequate remedy at law for money damages. The court responded, making several findings and conclusions:

> "I find under the circumstances that the plaintiffs are, in fact, entitled to injunctive relief by clear and convincing evidence. I was persuaded by that higher standard that the defendants had maintained this nuisance for years and had not taken adequate measures to eliminate that activity which constituted the nuisance. I further find that the plaintiffs are entitled to that injunctive relief because they lack an adequate remedy at law in terms of future activities on defendants' property which constitute that nuisance primarily because of the length of time that it's existed.
>
> ****5** "It's true that the plaintiffs have recovered a substantial verdict but that only relates to injuries that they sustained as a result of that nuisance between the early 2000s up until the day of trial. There was evidence that the—that between that—the defendants had in the past undertaken efforts to eliminate or reduce the dog barking by using a ***490** citronella dog collar, dog collars by placing shock collars on the dogs, by covering portions of the fencing so that the dogs couldn't see what was going on, I guess, in plaintiffs'—on plaintiffs' property which they were thinking—I think they were thinking was inciting them to bark. By keeping the dogs indoors at night. Nothing, none of those measures turned out to be satisfactory.
>
> "And so that's another basis why I believe that the plaintiffs lack an adequate remedy of law because the defendants, even though they took measures to try and

  

reduce the barking, they were unwilling to deal with the —deal effectively with the problem by eliminating the barking."

In doing so, the trial court recognized that, while the damages were awarded for past nuisance, an injunction would be aimed prospectively at future nuisance. That is, damages could not suffice as an adequate legal remedy because damages would not necessarily eliminate future barking and a continued nuisance. The court's findings were supported by evidence that the barking continued since the earlier administrative proceeding through trial and evidence that defendants had not employed effective measures to eliminate the barking.

Defendants suggest that plaintiffs cannot receive damages *and* an injunction; and defendants distinguish cases where the court provided both remedies on the grounds that the damages and injunctive relief addressed different harms. *See, e.g.*, *Alsea Veneer, Inc. v. State of Oregon*, 318 Or. 33, 43, 862 P.2d 95 (1993) (illustrating contention). According to defendants, here, "past and future harm is of the same kind: annoyance and inconvenience arising from the barking of appellants' guard dogs." We are unpersuaded. It is appropriate to award injunctive relief, in addition to damages, when damages alone are not an adequate legal remedy because "damages—could not, as a practical matter, recompense plaintiffs for their losses." *Alsea Veneer*, 318 Or. at 43-44, 862 P.2d 95 (permitting both damages and equitable relief in action for unlawful transfer of funds because plaintiffs could only receive complete relief by ordering the return of funds). In addition, injunctive relief is appropriate to avoid requiring plaintiff to sue repeatedly for damages to obtain relief. *See* ***491** *Eldridge v. Johnston*, 195 Or. 379, 411, 245 P.2d 239 (1952) (Noting that, "in order to recover for his repeated wrongs, [the] plaintiffs would be compelled to bring a multiplicity of actions at law. Courts of equity will freely grant injunctions to prevent a multiplicity of actions."); *see, e.g.*, *Lloyd Corp., Ltd. v. Whiffen*, 307 Or. 674, 704, 773 P.2d 1294 (1989) ("the rationale for allowing an injunction stopping a repeated trespass is to prevent the plaintiff from pursuing a judicial merry-go-round in a court of law").

In this case, the award of damages addressed past harm from the barking. Even if plaintiffs later sought damages for barking after trial, damages could not provide plaintiffs with the complete relief they seek, silencing incessant barking. Based on defendants' persistent failure to remedy the barking, the prospect that plaintiffs would have to bring multiple actions for damages would offend equitable principles that seek to prevent a "judicial merry-go-round." Consequently, the trial court did not err in granting the injunction as to future conduct, in addition to the jury's award of damages for past harm.

## III. SUMMARY JUDGMENT

****6** **[4]** We turn to the trial court's grant of summary judgment. Because defendant assigns error to the grant of summary judgment in favor of plaintiffs, we consider the evidence in the light most favorable to defendants, the non-moving party, and affirm only if we determine that there are no genuine issues of material fact and that plaintiffs are entitled to judgment as a matter of law. *Jones v. General Motors Corp.*, 325 Or. 404, 939 P.2d 608 (1997).

To resolve defendants' argument, we must first clarify the trial court's summary judgment ruling. The court granted the summary judgment motion as it pertained to Szewc's farm use defense on the ground that "the Administrative Hearing Officer's ruling shall have issue preclusive effect on defendant Szewc." In so doing, the court employed the doctrine of issue preclusion. *See* *Johnson & Lechman-Su, PC v. Sternberg*, 272 Or.App. 243, 246, 355 P.3d 187 (2015) (explaining that "[a]t the summary judgment stage, issue preclusion applies as a matter of law only if it can be conclusively determined from the record" that all of the requirements for issue preclusion are satisfied).

***492** Defendants' assignment of error couples two statements, as if one followed from the other: "The trial court erred in granting summary judgment in favor of the plaintiffs on the question of defendant's assertion of the 'farm defense' of ORS 30.935 and ORS 30.936. The trial court thus erred in refusing to allow defendants to present that defense to the jury." As the latter statement reflects, defendants believe that the ruling meant that both Szewc and Updegraff were not allowed to assert the farm use defense and that the ruling related to nuisance, not only before the 2006 administrative decision, but to circumstances through trial. Defendants support their contentions by arguing in the general terms of summary judgment that the trial court erred because "whether or not the farm use immunity statute applied depended on factual issues which were disputed, namely when and

  

to what extent the defendants had a qualifying farm operation."

Plaintiffs rejoin that the trial court never fully precluded defendants from raising the farm use defense. Rather, they contend, the summary judgment ruling "only precluded [defendants] from raising the farm [use] defense as to defendant Szewc for the time period prior to [the date of the 2006 administrative hearing order]." Plaintiffs add that "[d]efendants chose not to raise the farm [use] defense in their amended answer and by choosing not to raise the defense, they waived the defense." Defendants insist that they did not pursue the defense at trial because they were precluded by the summary judgment order and by a purported clarification of that ruling by the court at trial.

In resolving the dispute, we find significant what defendants do not argue. Defendants have not challenged issue preclusion in terms of the familiar requirements for its application to a case. *See Nelson v. Emerald People's Utility Dist.*, 318 Or. 99, 104, 862 P.2d 1293 (1993) (explaining factors: identical issues; final decision; full and fair opportunity to be heard; same party or privity with party; and type of proceeding to be accorded preclusive effect). In contrast, the trial court reviewed those requirements in detail in rendering its ruling. Thus, a challenge to the applicability of issue preclusion, as a matter of legal principle, is not squarely presented or properly developed on appeal.

****7** ***493** To the extent defendants argue that it was improper for the trial court to use the 2006 administrative decision to entirely preclude defendants from raising the farm use defense at trial, defendants misunderstand the summary judgment order itself. In that order, the court did three things. Specifically, the court:

> (1) Denied plaintiffs' motion for summary judgment as it pertained to general issues of liability and damages due to disputed issues of fact;
>
> (2) Granted the motion for partial summary judgment as it pertained to Szewc's farm use defense insofar as "the Administrative Hearing Officer's ruling shall have issue preclusive effect on defendant Szewc"; and
>
> (3) Denied the motion with respect to the farm use defense as it pertained to Updegraff, a nonparty in the administrative hearing, because the court did not have enough information to determine whether Updegraff was in privity with Szewc.

Given those rulings, we conclude that the court's limited order did not sweep so broadly as to preclude *both* Szewc and Updegraff from presenting the farm use defense, nor did it preclude the defense as to either defendant for circumstances that occurred after the 2006 decision. Our reasons are twofold.

First, the court's ruling was limited to Szewc's use of the farm use defense. The court ordered that "the Administrative Hearing Officer's ruling shall have issue preclusive effect on defendant Szewc." That language meant that the administrative decision was preclusive only as to Szewc's reliance on the farm use defense. The particular issue before the hearings officer involved a 2005 violation of the county code involving two dogs. Szewc squarely raised the farm use defense in the administrative hearing. The hearings officer determined in a 2006 order that "[t]he defense against nuisance actions under ORS 30.930 *et seq* [farm use defense] is not available to the defendant for the events that gave rise to [the citation]." The hearings officer concluded that the farm use defense was unavailable to Szewc for conduct through the date of the 2006 order. The trial court specified that it was the hearing officer's ruling ***494** that had preclusion effect—a ruling that was itself limited to a certain point in time—and the court did not preclude Szewc from raising the farm use defense at trial as to circumstances after the 2006 administrative order. We agree with plaintiffs that the trial court's ruling did not have the effect that defendants assert. [4]

****8** Second, because the order was limited, the court did not limit the farm use defense as to Updegraff. Defendants recognize that, in its summary judgment order, the trial court did not preclude Updegraff from raising the defense. The court had declined to do so because Updegraff had not been a party to the administrative proceeding and there was nothing in the summary judgment record to confirm that Szewc and Updegraff were in privity. Nevertheless, defendants contend that, because trial established that defendants were married, they were in privity. Indeed, Updegraff testified that he was married to Szewc. However, the court did not make a finding of privity. Nor did the court make a further ruling at trial on the scope of the prior summary judgment order as it related to the farm defense. Again, we agree with

plaintiffs: The trial court did not grant summary judgment precluding the farm use defense as to Updegraff.

For those reasons, the trial court did not err in entering an injunction or in granting a limited order on summary judgment.

Affirmed.

**All Citations**

--- P.3d ----, 287 Or.App. 481, 2017 WL 3723319

Footnotes

* James, J., *vice* Duncan, J. pro tempore.

1 ORS 30.935 prohibits local laws that make a "farm practice," as defined in ORS 30.930, a nuisance or a trespass. ORS 30.936 provides, in part, that "[n]o farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass."

2 Defendants do not otherwise challenge the propriety of an injuction.

3 Defendants did not assert the pleading issue—that the complaint failed to make a requisite allegation of an inadequate remedy at law—until *after* having tried the issue by consent. Defendants raised the issue later at a hearing when objecting to the form of the judgment and after having already tried the substantive issue by consent.

4 Defendants contend that, at the beginning of trial, the court clarified its summary judgment ruling such that both defendants were precluded from raising the farm use defense. Based on our review of the record, we disagree. The trial court's discussion at trial of the prior summary judgment ruling primarily focused on liability for public nuisance, not the farm use defense. Moreover, earlier, at the hearing on summary judgment, plaintiffs were careful to specify the time frame for which they were asking issue preclusion as to the farm use defense. Plaintiffs asserted that "at least from March of 2006 prior we are asking that the judge rule that the farm defense is not available." The trial judge responded "Okay. I think I understand." To the extent that defendants refer to plaintiffs requesting elimination of the farm defense, we find that reference to be taken out of context. Plaintiffs' counsel requested a more limited application of issue preclusion numerous times throughout the hearing. In the end, the narrowed language of the court's order is dispositive.