

IN THE COURT OF APPEALS OF IOWA

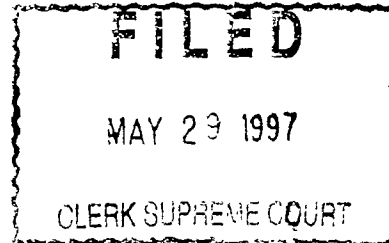
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No. 7-126 / 96-0095

PERRY M. TOLL and MARY A. TOLL,
Plaintiffs-Appellees,

vs.

DONALD G. LENTZ,
Defendant-Appellant.



Appeal from the Iowa District Court for Butler County, Jon Stuart Scoles,
Judge.

Donald Lentz appeals from a district court order granting the Tolls' request for a permanent injunction prohibiting him from allowing water to encroach on the Tolls' property beyond the extent granted in an easement. **AFFIRMED.**

David W. Stamp of Ball, Kirk, Holm & Nardini, P.C., Waterloo, for appellant.

David J. Mansheim of Klinkenborg, Hansmann & Mansheim, Parkersburg, for appellees.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

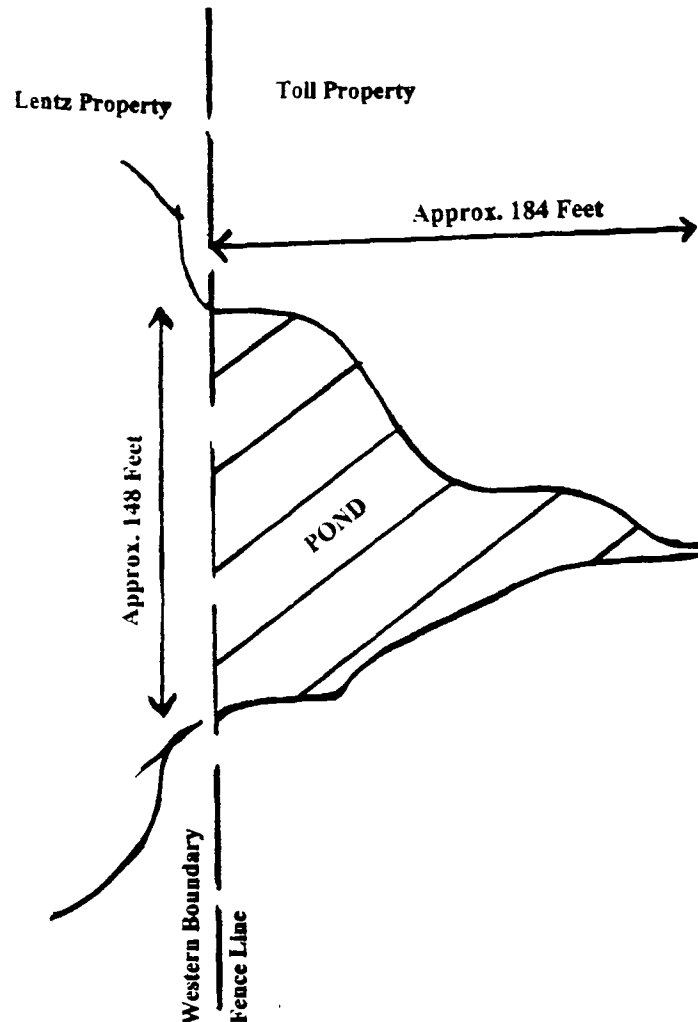
STREIT, J.

Donald Lentz appeals the district court order prohibiting him from allowing his pond to encroach on his neighbor's property beyond the bounds granted in an express easement. He claims he is not responsible for the water exceeding the easement and he may not be able to cause the water to recede into the dimensions of the original easement.

The plaintiffs, Perry and Mary Toll own 145 acres of farmland in Butler County. The defendant, Donald Lentz, owns an adjacent acreage with a farm pond. The pond on the Lentz acreage was built by Chris Ridder in 1974. Ridder obtained an easement from the Kramers, who owned the Toll farm at that time, for an area of 75 feet by 8 feet.

The Millers bought the Kramers' property in 1981. Paul Jungling and his brother purchased the Ridder property in 1982. The Junglings raised the water level of the pond in 1983 by installing an elbow and an extender pipe on the outlet. The flow line on the outlet was raised 30 inches which raised the pond's water level also by 30 inches. Dan Miller complained because of the increase. Jungling prepared a written amendment to expand the easement, but the Millers refused to sign it. Jungling responded to the Millers' complaints by drilling holes in the outlet pipe to decrease the pond's water level.

Lentz purchased the acreage in 1991. He installed a valve and cut a larger hole on the outlet pipe in order to control the water level. A survey of the Toll property in October 1994 revealed the water from the pond extended onto the Toll property by 200 feet. The size of the encroachment varied over a number of measurements. Instead of being 8 feet wide, as permitted by the easement, the water was 200 feet wide at its widest area on the the Toll property. The Tolls bought the farm from the Millers in February 1993 along with any cause of action the Millers might have against Lentz for the encroaching waters.



On June 15, 1993, the Tolls filed a petition for permanent injunction against Lentz. On December 21, 1996, the district court entered its order for permanent injunction. The district court rejected Lentz's claims that the additional water encroachment was justified by an expanded easement, an easement by prescription, or an easement by implication. The court also ruled the Tolls' claim was not barred by waiver or estoppel. The court concluded the Tolls had proved their rights had been violated by the excessive encroachment, had shown irreparable harm because the water restricted their field tiles and exposed them to greater liability, and had demonstrated the lack of an adequate remedy at law. The court noted "there is some question as to whether or not the encroachment will fall within the easement limitations after the pond is lowered to its original level," but ordered Lentz to "take all necessary action to lower the level of water in his pond and bring the encroachment on the plaintiffs' property within the terms of the easement."

Lentz appeals. He contends the district court erred in granting the injunction because (1) there was insufficient evidence his conduct caused the water to exceed the easement, (2) it did not properly weigh the relative hardships of the parties, (3) the water on the Tolls's property was legally present due to an expanded easement by acquiescence or prescription, (4) the ruling should not have required Lentz both to lower the level of the pond and to bring the encroachment within terms of the easement, and (5) equitable principles favored a denial of the injunction.

The Tolls contend the removal of the extension and elbow added by Jungling should bring the water within the easement. They deny any action on their predecessors' part caused the increased encroachment. They suggest Miller's permission to allow Jungling to raise the water level "a bit" was at most a license which was not assignable to Lentz.

I. Standard of Review. This case was tried in equity. Review is de novo. Iowa R. App. P. 4. "Injunctions are never granted when they are against good conscience, or productive of hardship, oppression, injustice, or public or private mischief" 42 Am. Jur.2d Injunctions § 56, at 798 (1969). As stated in *Johnson v. Pattison*, 185 N.W.2d at 797:

Equity usually invokes its extraordinary injunctive power only when necessary to prevent irreparable harm or when the complaining party is otherwise without an effective remedy. If the injury is light and an injunction would result in serious hardship or loss to defendant, courts have refused to enjoin, leaving the plaintiff to his claim for damages.

Amana Soc. v. Colony Inn, Inc., 315 N.W.2d 101, 120 (Iowa 1982)

Lentz contends the district court erred in granting the injunction because there was an insufficient showing that the offending water on the Tolls's property was attributable to conduct over which he had control. He claims the excess water was caused by the Tolls's predecessors' failure to control erosion, leveling of a ravine, or tiling.

We recognize that generally a servient estate is not to be burdened to a greater extent than was contemplated at the time of the creation of the easement. *See Cline v. Richardson*, 526 N.W.2d 166, 169, (Iowa App. 1994); *C & M Property Management Co. v. Bluffs U.P. Employees Credit Union*, 486 N.W.2d 596, 597 (Iowa App. 1992). We focus on the purpose of the easement and what the parties had contemplated at the time of its creation. *C & M*, 486 N.W.2d at 597-98.

The easement between the Ridders and Kramers delineated the water could back up onto the Kramer's property within a specified naturally occurring ravine within the dimensions of 75 feet by 8 feet. It now appears Lentz has encroached upon the Tolls's property with its pond over a 200 feet by 200 feet area. The easement does not require the servient estate to practice bank protection to reduce soil erosion and expansion of the pond boundaries. The stronger evidence supports the conclusion the encroachment of the pond has been substantially caused by the actions of the owners of the Lentz property. Lentz argues that the Tolls caused the extra water by taking steps to drain their property through increased tiling. This ignores the simple fact that if the pond drain had been set at a certain level to allow only a 75 foot encroachment, it would only encroach 75 feet. There has not been any claim that the drain pipe itself is insufficient to handle the volume of water from the drainage area.¹

¹ Lentz installed a valve on a 4-inch outlet pipe so he could add chemicals to the pond and keep them from escaping for twenty-four hours. By keeping the valve open on the pipe it allows the water an outlet and keeps the pond water level at pipe level or lower. Lentz added this valve to the already existing elbow Paul Jungling added to raise the level of the pond. If Lentz removes the elbow, the pond level should lower.

We affirm the district court in ordering Lentz to “take all necessary action to lower the level of water in his pond and bring the encroachment on the plaintiffs’ property within the terms of the easement.”

Lentz asks that we consider the equities of the remedy being sought. Lentz claims that his pond will be substantially altered if he is required live within the original easement. Lentz asks that we balance the loss of the pond and its environmental and recreational benefits against the minor economic loss being borne by the Tolls by their being deprived of its use. This argument ignores the unique nature of real property. In Iowa, real property is assumed to be unique. *Berryhill v. Hatt*, 428 N.W.2d 647, 657 (Iowa 1988).

. . . [I]t is clear from our case law this court presumes real estate to possess a unique quality such that mere monetary damages may not always constitute adequate remedy for a breach of contract.(Citations omitted.)

Breitbach v. Christenson 541 N.W.2d 840,843 (Iowa 1995).

In this case, although the cost to Lentz may be high, it does not outweigh the loss of land being suffered by the Tolls. Money damages will not adequately compensate them for the taking that has occurred. Lentz should be required to live within the easement granted.

We have examined the record and all of the arguments advanced by Lentz and conclude an injunction is warranted. Because we conclude the trial court was correct

in granting the injunction on the grounds discussed, it is not necessary to address the remaining arguments of the defendant. Although the defendant invites this court to weigh the hardships and inequities between the parties, the record is devoid of any evidence supporting a claim of possession of the ground on which the water is encroaching through easement by acquiescence, prescription, or other legal interest. Without at least a blush of legal claim or right to possession of the land covered by the pond water, equity will not warrant a decision for the defendant. The trial court has dealt with each of the defendant's remaining issues on appeal and we affirm.

AFFIRMED.