

IN THE COURT OF APPEALS OF IOWA

No. 2-208 / 90-1851

VINCENT MASUEN and MARY C. MASUEN,

Plaintiffs-Appellants/Cross-Appellees,

vs.

RAYMOND LOOTSCH, JOAN F. LOOTSCH, CHARLES LOOTSCH, and
KIM LOOTSCH,

Defendants-Appellees/Cross-Appellants.

FILED

OCT 27 1992

CLERK SUPREME COURT

Appeal from the Iowa District Court for Plymouth
County, Gary E. Wenell, Judge.

Plaintiffs appeal, and defendants cross-appeal, from a
district court judgment concerning the alleged drainage of
manure from defendants' feedlot onto plaintiffs' farm.
AFFIRMED.

John R. Mugan and Alice S. Horneber of Margolin,
Gildemeister, Willia, Mugan & Keane, Sioux City, for
appellants.

Maurice B. Nieland and Sam S. Killinger of Rawlings,
Nieland, Probasco, Killinger, Ellwanger, Jacobs &
Mohrhauser, Sioux City, for appellees.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

OXBERGER, C.J.

This case arises between two neighbors in Plymouth County, Iowa. Plaintiffs brought this action in nuisance, trespass, and negligence seeking damages and an injunction against defendants. Plaintiffs claimed that manure and excess water have run off defendant's property causing damage to their property. The district court awarded plaintiffs \$1,000 and enjoined defendants from certain actions. All parties have appealed. We affirm.

Plaintiffs Vincent and Mary Masuen live on a farm near Oyens in Plymouth County, Iowa. The will of Vincent's mother, filed on November 1, 1971, gave him the right to purchase the farm. Vincent received a court officer's deed to the property on March 2, 1973.

The Masuen farm contains about 115 acres. About eighty acres of the property are north of a county road. The Masuen residence is near the road and about 165 feet west of their eastern boundary. The Masuens also own about thirty-five acres south of the county road. This south field is used for crops.

In 1968 Joan Loutsch purchased the farm immediately to the east of the Masuen property and north of the county road. This farm contains about 160 acres. Joan is married to Raymond Loutsch. Raymond and Joan began a feedlot operation near their western boundary and just north of the county road in 1971. Raymond and Joan's son, Charles,

works with them and has an interest in the land. Charles is married to Kim Loutsch.

Raymond installed terraces on his farm so that water above the farmstead is controlled by the terraces. Surface water from the Loutsch feedlot, however, drains generally to the south and west, through a culvert under the county road and then onto the Masuen south field, where eventually it runs into Deep Creek, on the western side of the Masuen south field. The Loutsches also keep a cattle lane near their western boundary which allows the cattle to reach a north pasture. The cattle lane drains westward onto the Masuen farmstead.

Beginning at the time the feedlot opened, the Masuens have complained about odor, additional dust, and manure run-off. Because of the complaints the Loutsches moved the west fence of the feedlot east about 100 feet and planted trees and shrubs in the vacated area. The Masuens continued to complain, particularly about excess water and manure running off the feedlot and coming onto their south field.

In February 1983 Raymond shoveled out some snow on his cattle lane because he did not want the accumulated moisture and manure to settle on his trees and shrubs. The liquid then ran down the hill and onto the Masuens' farmstead. There was evidence that run-off from the Loutsch cattle lane came onto the Masuen farmstead on other occasions as well.

After consulting with various government agencies, Raymond put tile under the feedlot in 1983. He also moved the west fence of the feedlot even further to the east. Furthermore, he built a cement retaining wall in the south fence line of the feedlot, near the county road ditch. This created a settling basin for the feedlot run-off. The retaining wall had an open space in which boards were placed. The function of this system was to allow the surface water to accumulate behind the boards when it rained or snow melted. The boards would allow water to seep out slowly between the cracks, and settleable solids would settle behind the boards.

The evidence showed that on at least two occasions Raymond blocked up the opening so that no water could pass through. After quite a bit of water had backed up, Raymond would remove or rearrange the boards so that the water left his farm with greater velocity. This caused some erosion to the Masuen south field and also resulted in a large area of the field being covered with feedlot run-off. The velocity of the water carried some settleable solids with it. Raymond's actions were contrary to the design of the retention basin.

The evidence also showed that in 1985, Raymond dug three long trenches in his feedlot and buried some of the accumulated manure.

The Masuens brought the present action under theories of nuisance, trespass, and negligence. They claimed the feedlot caused excess odor, flies, and dust. They also claimed contamination to their well, which is to the east of their farmstead. The Masuens claimed damages due to the run-off from the cattle lane toward their farmstead. In addition, they claimed the continued feedlot run-off had caused a diminution in value to the south field.

The district court determined the Masuens did not show a nuisance due to excess odor, flies, or dust. The court found the Masuens did not adequately show the contamination of their well was caused by the burial of manure. The court did find that Raymond Loutsch negligently operated the retention basin on two occasions. The court also found the run-off from the cattle lane onto the Masuen farmstead constituted a nuisance. The court awarded damages of \$1,000. The court issued an injunction requiring the Loutsches to properly operate the retention basin. Furthermore, the court also ordered the Loutsches to cease allowing manure to run onto the Masuen farmstead from the cattle lane. The court recommended that the Loutsches either move their cattle lane or build a terrace to keep run-off on their own property.

The Masuens appealed and the Loutsches filed a cross appeal.

I. SCOPE OF REVIEW

The first issue in this case is the correct standard of review. It is permissible in Iowa to bring an action to enjoin a nuisance and for damages either in equity or at law. Woody v. Machin, 380 N.W.2d 727, 731 (Iowa 1986). The present case was filed in equity. Although the Loutsches filed a demand for a jury, they later withdrew the demand. We determine this action is in equity. Therefore, our review is de novo. See Iowa R. App. P. 4.

II. NUISANCE

We first address the nuisance issue. The Masuens claim the Loutsches created a nuisance by the establishment and operation of their feedlot and cattle lane. In their cross appeal, the Loutsches contend the Masuens' nuisance claims are barred by Iowa Code chapter 172D. We will address these issues together.

A. Section 172D.2 provides:

In any nuisance action or proceeding against a feedlot brought by or on behalf of a person whose date of ownership of realty is subsequent to the established date of operation of that feedlot, proof of compliance with sections 172D.3 and 172D.4 shall be an absolute defense, provided that the conditions or circumstances alleged to constitute a nuisance are subject to regulatory jurisdiction in accordance with either section 172D.3 or 172D.4.

Section 172D.3(1) provides in part, "A person complies with this section as a matter of law where no rule of the department exists." Section 172D.4(1) also provides, "A person complies with this section as a matter of law where

no zoning requirement exists." Thus, a feedlot, as defined by section 172D.1(6), has an absolute defense against nuisance claims unless the conditions or circumstances in question are subject to regulation and the feedlot has violated the applicable regulation. Where there is no applicable regulation, the feedlot is deemed to be in compliance for purposes of establishing a defense to a nuisance action under section 172D.2.

B. In this case, the Masuens' date of ownership is subsequent to the established date of operation of the feedlot. The feedlot commenced operation in 1971. Although the will of Vincent's mother was filed in November 1971, the Masuens did not obtain title to the land directly through the will. The will only gave them the option to purchase the land. The Masuens obtained a court officer's deed to the property in May 1973.

C. The district court determined the Loutsches had violated Iowa Administrative Code rule 900-65.2(1) (now 567-65.2(1)) and 900-65.2(6) (now rule 567-65.2(7)). Rule 567-65.2(1) provides:

The minimum level of waste control for any animal-feeding operation shall be the removal of settleable solids from the wastes prior to discharge into a water of the state.

Rule 567-65.2(7) provides:

All wastes removed from an animal-feeding operation or its waste-control facilities shall be disposed of by land application in a manner which will not cause surface or ground water pollution.

We agree that the evidence shows the Loutsches were not in compliance with these regulatory provisions. Therefore, under section 172D.2, the Loutsches' violations may be the subject of a nuisance action. A nuisance may be considered an actionable interference with a person's interest in the private use and enjoyment of his or her land. Mel Foster Company Properties, Inc. v. American Oil Co., 427 N.W.2d 171, 173 (Iowa 1988). We conclude that the appearance of settleable manure solids from the Loutsch feedlot on the Masuen south field constituted a nuisance.

D. The district court also found run-off from the Loutsches' cattle lane constituted a nuisance. The court stated there was no evidence on whether the effluent from the cattle lane contained settleable solids. The Masuens have not shown that any other regulations apply to the cattle lane.

The court stated that even if the claim was barred by section 172D.2, common law nuisance was not abrogated by any Iowa statutes. We note, however, that "nuisance", as defined by section 172D.1(11), means "public or private nuisance as defined either by statute or by the common law." Thus, section 172D.2 establishes a defense against both statutory and common law nuisance actions. We determine the Masuens have failed to show the Loutsches were not in compliance with any regulations applicable to the cattle lane. We conclude the Masuens' nuisance claims concerning the cattle lane are barred by section 172D.2.

E. The Masuens claim the district court should have found the Loutsches burial of manure constituted a nuisance because it caused contamination of their well. While the district court found the Loutsches' action violated rule 567-65.2(7), the court found there was insufficient evidence the burial of the manure caused the well to become contaminated. The court noted that 50% of the wells in Plymouth County were considered unsafe. We agree with the district court's finding that the Masuens failed to show the burial of manure caused them harm.

F. The Masuens also claim the district court should have found the Loutsch feedlot created a nuisance due to increased odors, flies, and dust. Again, the Masuens cite no applicable regulations. Due to section 172D.2, we are unable to find the Loutsches' operation of the feedlot constituted a nuisance due to odors, flies, or dust.

III. WATER DRAINAGE

The Masuens also claimed damages under Iowa law concerning the drainage of surface waters. Water from a dominant estate must be allowed to flow in its natural course onto a servient estate. Moody v. Van Wechel, 402 N.W.2d 752, 757 (Iowa 1987). With regard to ordinary surface waters, the relative elevation of the respective tracts determines which is the dominant and which is the servient estate. Maisel v. Gelhaus, 416 N.W.2d 81, 84 (Iowa App. 1987). The parties have agreed that the Loutsches hold the dominant estate here.

Although the owner of dominant land has the right to drain his land into a natural watercourse, the dominant landowner may not discharge such an amount of additional surface water as to do substantial damage to the servient estate. Id. at 85. Stated another way, there is an overriding requirement that one must exercise ordinary care in the use of his property so as not to injure the rights of neighboring landowners. O'Tool v. Hathaway, 461 N.W.2d 161, 163 (Iowa 1990). Liability may be imposed against a dominant landowner if the manner or method of drainage is substantially changed and actual damage results. Id.

The evidence in this case shows that the area of the feedlot has always drained onto the area of the Masuen south field. There is no evidence that any increased amount of surface water is being drained from the feedlot. The installation of the retention basin has somewhat changed the method of drainage. We find that proper operation of the retention basin would not result in damage to the Masuen south field. However, improper operation of the retention basin, i.e. allowing water to build up and then suddenly releasing the water, would cause erosion damage to the Masuen south field.

We affirm the district court's finding that the Loutsches' negligent operation of the retention basin caused erosion damage to the Masuen south field.

IV. TRESPASS

The Masuens raised a claim based on trespass. Trespass may be considered an actionable invasion of interests in the exclusive possession of land. Ryan v. City of Emmetsburg, 232 Iowa 600, 603, 4 N.W.2d 435, 438 (1942). Trespass comprehends an actual physical invasion by tangible matter, while nuisance usually involves intangible substances, such as noise or odors. Id. Under certain circumstances, such as in cases involving the flooding of land, there may be both a trespass and a nuisance. Id. at 604, 4 N.W.2d at 439.

The district court ruled that the Masuens would not be granted any greater or different damages based on trespass than on nuisance, and so denied their claims based on trespass. However, in our discussion above, we found the Masuens' nuisance claims involving run-off from the cattle lane were barred by section 172D.2. Section 172D.2 does not apply to claims based on trespass.

The Masuens claimed the run-off which came on their property from the Loutsch cattle lane contained a mixture of water and manure. We find there was an actual physical invasion of the Masuens' property by tangible matter. We conclude the Masuens have adequately shown a claim of trespass based on run-off from the cattle lane.

V. DAMAGES

The Masuens claim they were awarded an inadequate amount of damages. They believe the diminution in value to the south field is \$11,500. The Masuens claimed crop damage of \$8,434. They also claimed the contamination to their well forced them to join a rural water association, which has cost them \$4,125. The Masuens sought additional damages for interference with the full enjoyment of their property and emotional distress. Furthermore, the Masuens sought punitive damages.

The district court awarded the Masuens \$1,000 in damages for the erosion to their south field caused by the Loutsches' negligent operation of the retention basin and for the interference with the full enjoyment of their property due to the run-off from the cattle lane.

The amount of damages awarded as judgment in a nonjury case is within the ambit of the discretionary powers of the district court and will be reversed only upon a finding that such award was clearly erroneous. Maisel v. Gelhaus, 416 N.W.2d 81, 89 (Iowa App. 1987).

We conclude the district court's award of damages here was not clearly erroneous. We find the evidence shows the erosion to the south field caused by the negligent operation of the retention basin may be remedied by grading the field. Thus, an award based on diminution in value is inappropriate. Also, the evidence shows that run-off from

the Loutsch cattle lane onto the Masuen farmstead was a very occasional occurrence. We affirm the award of damages.

VI. INJUNCTIONS

Finally, the Masuens contend the district court should have issued an injunction ordering the Loutsches to move the feedlot to the east side of their property, which would place it much further away from the Masuens' property.

In granting injunctive relief, Iowa courts are committed to the "relative hardship" or "balance of convenience" standard. Kreiner v. Turkey Valley Community School District, 212 N.W.2d 526, 536 (Iowa 1973). Injunctive relief is an extraordinary remedy to be accorded with caution and only where clearly required. Id. In determining the appropriateness of injunctive relief, the court must make a comparative appraisal of all the factors in the case. Woody v. Machin, 380 N.W.2d 727, 731 (Iowa 1986).

In balancing the relative conveniences and hardships to the parties, we conclude that ordering the Loutsches to move the feedlot would cause them undue hardship. We affirm the district court's refusal to issue an injunction ordering the Loutsches to move their feedlot.

VII. SUMMARY

After examining all of the issues raised by both parties, we affirm the decision of the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED.