FILED
APR 30 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DALE ASPEDON,

Plaintiff-Appellant,

vs.

CAROL LABBE and ARDITH K. JENSON, As Executors of the Estate of Lynn Jenson, Deceased, Substituted Parties for LYNN JENSON: LYNN E. JENSON CORPORATION, An Iowa Corporation and LARRY WHITEHEAD,

Defendants-Appellees.

Filed April 30, 1985

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84-159

Appeal from the Iowa District Court for Fremont County - Glen M. McGee, Judge.

In this action involving an easement dispute, plaintiff appeals the denial of his damage claim and request for injunctive relief. He also appeals an award of damages to the primary defendant on his counterclaim. JUDGMENT AFFIRMED.

Emil Trott, Jr., of Barrett & Trott, Des Moines, and Howard Wenger, Hamburg, for the plaintiff-appellant.

Phillip J. Willson, of Smith, Peterson, Beckman & Willson, Council Bluffs, and Peter J. Peters, Council Bluffs, for the defendants-appellees.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

Plaintiff Dale Aspedon and defendants Lynn Jenson[1] and Lynn Jenson Corporation are owners of adjoining parcels of land in Fremont County. Aspedon's land is bounded on the west by the Nishnabotna River and on the east by the Jenson property. Jenson's land is bounded on the south by Mill Creek. The Aspedon property is approximately 100 feet in width and was previously owned by the former Chicago, Burlington & Quincy Railroad as a right-of-way. To control flooding from the Nishnabotna, a River Dike was constructed between the tracks and the river. Mill Creek Dike prevents flooding from Mill Creek. Both of these streams are prone to overflowing and flooding the adjoining land. See Exhibit I attached.

In 1949, the railroad, Aspedon's predecessor in interest, granted to Murphy & Hays, Jenson's predecessor, an express grant of easement to maintain the dike. The agreement was binding on the successors and assigns of all the parties. Specific provisions provided that upon thirty day's notice by Murphy & Hays, they could enter the railroad land described:

> as are being used for dikes or borrow pits, to go upon the same to repair, widen, strengthen or increase the elevation of any dike or levee erected thereon, for the purpose of protecting the grantor's railroad, or their successors, or the lands of the grantees, or their successors, from overflow and damage from the waters of the East Nishna Botna River. For that purpose they shall be entitled to remove and use earth from the lands of the grantor situated between said dike and the channel of the said Nishna Botna River. They shall be entitled to go upon the lands between said right-of-way and the channel of the said Nishna Botna River and particularly above described, and construct dikes and levees thereon and maintain the same and keep the same in repair.
> ***
> This grant of easement is not exclusive and the grantors and their successors shall retain the right to maintain and repair the dike above referred to and to widen, strengthen or increase the elevation thereof, either in cooperation with the grantees or their successors or individually and they shall likewise retain the right to construct other dikes as they may see fit and to maintain the same in repair, either in cooperation with the grantees or individually.

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[1] Jenson died following trial and his executors have been substituted as parties.

The agreement also restricted the grantee from any entry which would interfere with the operation of the trains.

The railroad was subsequently abandoned, and the right-of-way conveyed to Aspedon. No problems seemed to arise from the easement until Jenson acquired the adjoining land. Their feud has involved other litigation and criminal charges, and has finally resulted in this action.

This case arose out of a flood in 1982, in which Jenson attempted to repair the dike and eventually suffered financial losses as a result of the flooding of his land. Jenson hired Defendant Larry Whitehead to work on the dike. Plaintiff Aspedon brought this action at law against Jenson and Whitehead to recover damages caused by entry on land not covered by the easement and injury to the cinder bed, trees and soil. His action at equity requested an injunction to prevent defendant from entering land allegedly not covered by the agreement and to restore all damage to its former condition. Defendant Jenson counterclaimed for his flood losses and intentional infliction of emotional distress.

A trial to the court and jury resulted in denial of plaintiff's claims, both legal and equitable, and an award to defendant of $26,000 actual and $34,000 exemplary damages. Recovery for defendant's emotional distress was denied.

On appeal plaintiff raises several issues of error. I. Failure to issue an injunction to prohibit defendant from entering the curved portion of the dike was error because that area was not covered by the easement. II. Admission of defendant's alleged losses listed on Exhibit 19 was error because the figures were irrelevant, misleading and unsupported by the evidence. III. The computations for damage to crops does not reflect the correct measure of damages. IV. Failure to give plaintiff's requested instruction regarding plaintiff's motives was error. V The jury verdict was contrary to the jury instruction because no substantial

evidence that Aspedon lowered the dike was submitted. VI. Plaintiff's production of new evidence following trial should have resulted in order of a new trial.

Our review is on error and de novo for this action at law and equity.

I.

We first determine whether the curved portion of the dike, which connects the River Dike with the Mill Creek Dike, is covered by the easement. The written grant described the easement as extending:

> Southwesterly along said right-of-way line 10160.4 feet, thence Northwesterly at right angles with said right-of-way line 79 feet more or less to the channel of the Nishna Botna River, thence Northeasterly with the East line of the channel of the Nishna Botna River as the same is now located to the North line of Section twenty-nine (29), Township Sixty-eight (68), Range Forty-one (41), thence East along said section line to the place of beginning, in Fremont County, Iowa.

According to plaintiff, this places the easement boundary north of the curved portion and does not include it. However, an ambiguity seems to exist between the measured description and the direction of the lines. At the 10, 160.4 point, the line turns and runs northweasterly. If we accept plaintiff's argument, the description should state the line runs straight west. Instead, the line seems to follow the curved portion northwesterly to the river.

In easement grants, as in any contract, the intent of the parties controls and is determined by what the contract says. Wiegmann v. Baier, 203 N.W.2d 204, 208 (Iowa 1972). When an ambiguity exists in the terms, then the manner in which the parties have construed them is "persuasive evidence of their intention." Id.

At the time of the grant, a bridge had extended south from the curved portion. Trains crossed Mill Creek on this bridge and the abutment formed part of the dike. A permanent dike could not be built because it would have prevented the trains from running. During times of high water, sandbags would be placed on the curved portion to connect the two dikes and protect the railroad and farmland

Later when the water receded, these temporary measures could be removed. In 1961, when the railroad abandoned its system over this land and removed the tracks, the sandbagging continued but the bags were not removed after the water receded. This resulted in a buildup of the curved portion. Defendant's predecessors eventually constructed a more permanent earthen dike which raised the level of the curved portion to meet that of the adjoining dikes. Periodically because of settling, additional sandbagging was required.

It is clear to this court that the grantor and grantee of the original easement intended the curved portion of the dike to be included. The purpose of the easement was to allow the adjoining owner to protect his land from flood and to secure flood protection for the railroad as well. A grant to maintain all of the River Dike except the curved portion would be worthless. A dike is only as strong as its weakest link. Where Mill Creek flows into the Nishnabotna, flood control would be especially important.

We will not allow plaintiff to now contend that, based on a restrictive reading of an ambiguous grant, the curved portion is not included. This is in direct contradiction to the intent of the parties and their subsequent actions. Because this is an express easement, we need not address plaintiff's contentions in regard to implied and prescriptive easements and easements of necessity.

II.

Plaintiff also argues that admission of Exhibit 19 which contained an itemization of defendant's losses was error. The figures listed were presented in testimony by defendant's witnesses as shown by the record. Their relevancy is apparent and requires no discussion. Plaintiff contends the crop loss figures are misleading because no evidence was presented of costs saved by planting and harvesting less acreage.

Jury Instruction 10 stated in part:

> In this case, you are instructed that the measure of damages to crops is the difference in value of the crop immediately before and immediately after the injury. The question is what that crop would have produced that crop year but for the damage caused. Since the crop had only been partially planted, the damage is to be determined by taking the value of the crop which would have been planted at its maturity and deducting, (1) the value which the injured crop actually had at maturity, and (2) any reduction in the value and amount of labor and expense attributable to the reduced yield.

The jury was properly instructed as to the measure of damages. Exhibit 19 listed damages totaling $121,199.02, however, the jury awarded only $26,000 actual damages.

III.

Instruction 10, plaintiff also argues, was given in error because the measure of damages was improper. He contends because the flooding occurred before the crops were planted, damages should be for the loss of crops which a farmer is prevented from planting or loss of use of the land rather than loss of yield for growing crops. This reasoning is faulty for two reasons.

First, while Jenson suffered loss of the use of his land, he also suffered loss to growing crops. Because of flooding, some of the acres could not be planted at all, some were planted so late that yields were greatly decreased, and some were planted to another crop with a shorter growing period.

In Nizzi v. Laverty Sprayers, Inc., 143 N.W.2d 312, 317 (Iowa 1966), the measure of damages was loss of use after misdirected spray prevented the land from being used as pasture for ninety days. Alternatively, in Martin v. Jackel, 188 N W.2d 331, ___ (Iowa 1971), which involved herbicide damage to growing crops, the loss was the decrease in yield. Both of these cases are applicable. Defendant suffered loss of the use of his land during the time of the flood. When it receded, defendant's use of his land could not reach its full potential during that growing

season as the pasture in Nizzi could. Defendant's growing crops suffered loss during that whole season. Actually, the measure of damages is a combination of these two types.

Second, approximately 20 acres of corn and 100 acres of beans were planted at the proper time on ground that did not flood. Yields from these acres were used in determining what the overall yield would have been had no flooding occurred. These earlier planted acres served as controls to minimize the effect of other variables. Resulting calculations were more accurate, making this the preferred measure of damages.

The instruction to base the damages on "what the crop would have produced that crop year but for the damage caused" did not prejudice plaintiff and was proper under these circumstances.

IV.

Plaintiff requested an instruction that began, "The law of the State of Iowa provides that the motive with which an act is done is not an element of a civil wrong." The motive element was only relevant to defendant's counterclaim for intentional infliction of emotional distress. Since the jury denied that claim, Aspedon suffered no error from this denial.

V.

Substantial evidence was presented, direct and circumstantial, that Aspedon lowered the dike. Submission of that issue to the jury was proper.

VI.

On the last day of trial, Jenson testified that he heard Aspedon threaten Jenson's previous tenants with "if you don't give me $4,500, I'm going to flood you out." Following trial, Aspedon produced affidavits from the tenants denying the threat had been made. Request for a new trial based on newly discovered evidence was denied.

Iowa R. Civ. P. 244 lists the causes upon which a new trial may be granted, including "(g) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial." Courts do not favor granting a new trial on newly discovered evidence. Wilkes v. Iowa State Highway Comm'n., 186 N.W.2d 604, 607 (Iowa 1971). Newly discovered evidence means facts which existed at the time of trial, but of which the aggrieved party was excusably ignorant. Id.

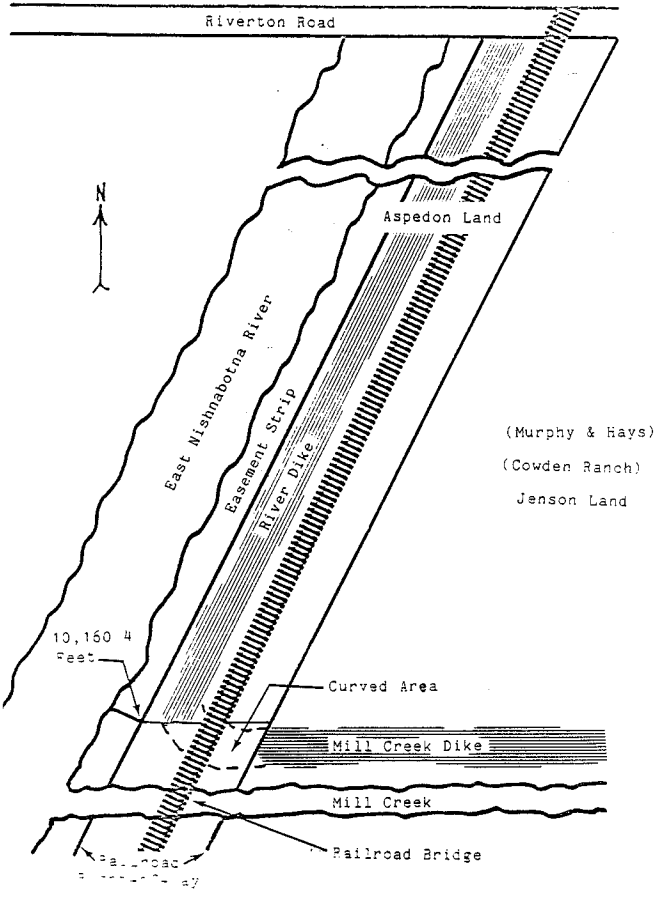
Aspedon contends the denial was error because the newly discovered evidence was material. He argues that he could not know that Jenson would perjure himself at trial and so no matter how diligent plaintiff was, he would not seek and discover the tenants. We disagree.

Many of the events relevant to these claims occurred during the time when these tenants were farming the Jenson property. They were involved as spectators and participants. Plaintiff could have called them as his witnesses. As to his inability to locate them, we note that plaintiff was able to produce their affidavits within a few days following the trial.

In Aspedon's rebuttal following the Jenson testimony, Aspedon denied the conversation occurred. The jury was aware of the feud between the two and could give as much weight to Aspedon's denial as it gave to Jenson's assertions. In any event, plaintiff failed to object to the testimony when it was presented. Aspedon was not "excusably ignorant" of the evidence and refusal to order a new trial was proper.

As to the other submissions of evidence made to the jury which plaintiff asserts were error, we find no merit in those claims.

JUDGMENT AFFIRMED.


Riverton Road
N
Aspedon Land
East Nishnabotna River
Easement Strip
River Dike
(Murphy & Hays)
(Cowden Ranch)
Jenson Land
10,160 4
Feet
Curved Area
Mill Creek Dike
Mill Creek
Railroad Bridge