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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARCELLA A. LARSEN,

Appellant,

v.

CITY OF OSAGE, IOWA,

Appellee.

Filed September 21, 1978

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2-61397

Appeal from Mitchell District Court - J. W. Frye, Judge.

Plaintiff appeals from trial court decree dismissing her petition for damages against the City of Osage based on damage to her farm from accelerated flow of surface water as a result of the city's storm sewer construction project. Reversed and remanded.

Alfred A. Beardmore, of Charles City, for appellant.

Joseph B. Casey, of Osage, and Warren L. DeVries, of Mason City, for appellee.

Submitted to Donielson, Acting C.J., Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff Marcella Larsen appeals the trial court decree dismissing her petition against the defendant, City of Osage, Iowa, for damages as a result of a storm sewer construction project undertaken by the City which now causes surface water to run on plaintiff's property at an accelerated velocity thereby causing erosion and the division of plaintiff's property by a ditch four to four and one-half feet deep and in some areas five to six feet wide. The trial court found plaintiff failed to establish the City diverted water from its natural course of drainage or that it cast water upon her property from a different watershed or watercourse. It concluded plaintiff was without remedy without showing defendant substantially increased the volume of water or negligently discharged it to cause such damage.

Findings of fact in a law action tried to the court are binding upon the appellate court if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure. Our review is not de novo, but on errors assigned. However, this rule does not preclude inquiry into the question whether, conceding the truth of the facts found, a conclusion of law drawn therefrom is correct, nor are we bound by the trial court's determination of the law. *Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 811 (Iowa 1978).

The trial court found the rate of flow or the velocity of the subject drainage had been greatly increased. This is primarily by reason of the great change in capacity of the newly constructed culverts. The new culverts were constructed to accommodate more than six times the volume of water carried by the old culvert and accordingly, the water simply gets out faster. However, the approximate same acreage is drained after the construction as was formerly drained prior to the 1975 storm sewer project. The construction removed to a large extent the damming effect of the roadway adjacent to plaintiff's property. As a direct result, the trial found plaintiff had been substantially damaged by reason of the greatly accelerated rate of flow of drainage, but concluded she was without remedy.

In *Braverman v. Eicher*, 238 N.W.2d 331, 334 (Iowa 1976), Justice Rawlings speaking for the court stated:

There has been adopted and developed in this jurisdiction what may best be characterized as a modified civil law rule which recognizes a servitude of natural drainage as between adjoining lands. Under this concept a servient estate must accept surface waters which drain thereon from a dominant estate. On the other hand, no right exists to alter the natural system of drainage from a dominant estate in such manner as to substantially increase the servient estate burden.

Cf. Obe v. Pattat, 151 Iowa 723, 727-9, 130 N.W. 903 (1911) (under traditional civil law plaintiff required to show substantial increase in quantity discharged and substantial injury as well as acceleration of flow).

More recently, the supreme court in Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 745 (Iowa 1977), stated:

The general rule is that the dominant owner is entitled to drain surface water in a natural watercourse from his land over the servient owner's land and if any damage results the servient owner is without remedy. This rule, however, is subject to qualification. We have many times held that if the volume of water is substantially increased or if the manner or method of drainage is substantially changed and actual damage results, the servient owner is entitled to relief." (Emphasis supplied).

citing Rosendahl Levy v. Iowa State Highway Commission, 171 N.W.2d 530, 536 (Iowa 1969). The court went on to say:

Although we have never specially held a riparian owner may be liable for accelerating or hastening the flow of a water course to the injury of another, we believe permitting recovery for this type of damage is consistent with our prior decisions requiring a landowner to exercise due care for his neighbors when he avails himself of a watercourse. Several leading authorities on water rights indicate such a cause is actionable and whether liability attaches is determined by examination of the reasonableness of the changes effected under all the circumstances. 5 Powell on Real Property, section 717 at 389; Gould on Waters (3rd ed.), sections 208-213(a), at 401-403; Kinney on Irrigation and Water Rights (2d ed.), section 546 at 947-948; 2 Farnham, Waters and Water Rights, section 487 at 1631-1633. 78 Am.Jur.2d, Waters, section 13 at 548 states:

"According to many authorities, an upper riparian proprietor has no right, ordinarily, without permission, express or implied, to accelerate the flow or current of a natural watercourse or to increase the volume thereof, to the injury of a lower proprietor. This is true although there is no damage at the point where the stream enters the lower tract, but only further down. The rule has been applied where the acceleration is caused by deepening the channel or removing natural obstructions therefrom. * * *" (Emphasis supplied.)

Oak Leaf Country Club, supra.

In the instant case, when defendant undertook the storm sewer construction project, the damming effect caused by the small culvert and the highway adjacent to plaintiff's property was destroyed. Prior to the construction, the single culvert had a capacity of 9,000 gallons per minute; the new three-culvert design has a capacity of 57,500 gallons per minute. Accordingly, the velocity of the run-off has been greatly increased. As a result, the water no longer ponds on the east side of the roadway after a heavy rain and the water which would pond and sometimes take two or three days to

drain through the single culvert now drains through plaintiff's land in several hours. The ditch created by the increased velocity has effectively divided plaintiff's 24 acre parcel in two and is incapable of being crossed by modern farm machinery. Plaintiff's tenants are no longer able to plant row crops over the entire area as they once were.

We find plaintiff has been damaged by the acts of defendant in failing to exercise due care for plaintiff's property when the new storm sewer was constructed. Cf. Oak Leaf Country Club, supra. There has been a substantial increase in the servient estate's burden. Braverman, supra. We further find the instant case does not come under the general rule noted in Rosendahl where the owner is without remedy. Rather, this case comes under the recognized exception that the servient owner is entitled to relief where the "manner or method of drainage is substantially changed and actual damages results." Rosendahl, supra at 536. That change occurred, as the trial court found, when the rate of flow was substantially increased. The trial court erred in its determination of the applicable law and the conclusions to be determined from the facts as found. Briggs, supra.

This cause is reversed and remanded for a determination of plaintiff's damages in accordance with this opinion.