

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

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CAROL L. and BARBARA ANN HARVEY,)

Plaintiffs-Appellants,)

Filed February 26, 1985

vs.)

4-528

84-416

GENDLER STONE PRODUCTS CO., INC.,)

Defendant-Appellee.)

Appeal from the Iowa District Court for Page County, J. C. Irvin, Judge.

Plaintiffs appeal from judgment in nuisance and breach of contract action arising out of damage to land caused by defendant's mining operation. AFFIRMED.

Richard G. Davidson of Davidson & Bailey, P.C., Clarinda, for plaintiffs-appellants.

Gregory C. Barnsten and Curtis Hewett of Smith, Peterson, Beckman & Willson, Council Bluffs, for defendant-appellee.

Heard by Oxberger, C.J., Donielson, and Snell, JJ.

Plaintiffs Carol and Barbara Harvey brought this action against defendant Gendler Stone Products for alleged damage to their land from mining operations. The court awarded some damages, but denied abatement costs and an injunction request. Plaintiffs claim the court erred in this ruling. We affirm.

Three divisions were alleged in the Harveys' petition: one for breach of a lease agreement, and for nuisance, demanding damages; another declaring violation of Iowa Code Chapter 467A for failure to rehabilitate certain areas of the land and requesting damages; and a third division, citing Iowa Code Chapter 83A as evidence of nuisance and requesting the defendants be permanently enjoined from maintaining the nuisance. An amendment added a claim of negligence and requested damages be awarded.

The plaintiffs do not appeal from the decision of the trial court that certain provisions of the lease agreement were violated. Rather, they claim the court erred: (1) in not granting an injunction; (2) not allowing damages for abatement of the nuisance; (3) not requiring the defendant to reduce to slope of the spoilbank (defined at Iowa Code § 83A.2 as earth materials removed from its natural position and deposited elsewhere); (4) failure to find Chapter 467A as applicable to the case; (5) failure to find there was a substantial change in the natural water course.

The Harveys purchased the land from Dale Sipes November 3, 1970. At that time there was a ditch and sloughing of Sipes' land because of the adjacent mining operations by Gendler. The evidence presented at trial indicated that the Harveys leased a portion of their property to Gendler. The property was to be used as a limestone quarry and the lease called for Gendler to restore the land when the operation was finished. Gendler also mined a property known as the "Maxwell" property, which sat adjacent to the Harvey's property. From the time that the harveys purchased their land in 1970 until 1983, the overburden on the "Maxwell" property eroded or sloughed off onto the Harveys' land and fence. In 1979, Gendler

widened a drainage ditch which existed between the two properties. The ditch, slough, and erosion made .73 acres of Harveys' land unusable. However, no further encroachment was expected. When Gendler stopped mining in 1981, a 60-foot bank existed adjacent to the Harveys' land and was expected to cover up to .5 acres of the Harveys' land. In addition, several hundred feet of the Harvey's fence was either covered by the dirt, or removed by Gendler. Finally, Gendler failed to properly rehabilitate approximately .6 acres of farmland.

The court found the damages involved the .6 acres of farmland improperly rehabilitated, erosion of a highwall covering .5 acres, sloughing away of .73 acres, and expansion of the ditch. The court awarded damages of \$1000 per acre for 1.83 acres or \$1830. The fence was found to be in poor condition prior to the damage to it, and a total of \$350 was awarded for its damage.

In summary judgment prior to the final order, the court found Chapter 83A applied only in part to the action. This section of the Code provides for registration of mining operations, and for a bond to be posted which may be forfeited if the mining company does not properly rehabilitate the land. Iowa Code §§ 83A.13, .28. It also indicates that spoilbanks must be reduced in slope. Iowa Code § 83A.17 (1983). However, the court found that the land where the alleged nuisances were located now belongs to Page County, and that the court could not take action to control a third party not involved in the action. It therefore concluded that Chapter 83A could only be used as evidence of a duty on the part of Gendler to take action on the damages located on the Harvey property.

The court further found Chapter 467A did not apply to the case because it deals with actions of Soil Conservation Districts and Commissioners, and had no relation to the defendants.

The court also concluded the erosion of the highwall did not constitute a nuisance, but was negligence. The same finding was made in regard to the ditch since it had been in existence prior to 1970 and did not affect the other land of the plaintiffs. It found expansion of the ditch and the sloughing was negligence, not a nuisance.

Finally, the court concluded no injunction would be allowed because it would involve economic waste.

Our review here involves mixed questions of law and equity. The scope of review of plaintiff's claim that Chapter 467A should apply requires us to uphold the trial court decision if the facts are supported by substantial evidence. Iowa R. App. P. 4. Whether a nuisance requires abatement is a civil action and our scope of review is also limited to correcting errors of law. Iowa Code § 657.1 (1983). On the other hand, a request for an injunction is a demand for equitable action and our review is de novo. Iowa R. App. P. 4. We believe plaintiff's question regarding the change in the natural course of the water is involved in the issue of whether an injunction should have been granted.

We agree with the trial court that there is nothing in Chapter 467A that indicates it should apply to this case or this defendant.

Our code defines a nuisance as, "Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property. . . ." Iowa Code § 657.1 (1983). This invasion of another's property must be unreasonable and substantial. Bates v. Quality Ready-Mix Co., 261 Iowa 696, 703, 154 N.W.2d 852, 857 (1968). A factor to be considered in determining the "unreasonableness" is who was first located in the area and the nature of the area. Larsen v. McDonald, 212 N.W.2d 505, 508 (Iowa 1973). Since the ditch had been located on the property when the Harveys purchased it, did not affect other parts of their land and considering the small area of land involved with the various problems mentioned, we find the trial court's decision supported by substantial evidence that there was negligence, but no nuisance. Accordingly, abatement was not

warranted.

In its decision to deny an injunction, the court noted the proper amount of damages was the difference between the value of the land just before the damage occurred, and the value resulting. Collins v. Gleason Coal Co., 140 Iowa 114, 115 N.W. 497 (1908). In a widely recognized case of another jurisdiction, the court stated diminution in value should be the measure of damages where the cost of doing the remedial work involved unreasonable and economic waste disproportionate to the good to be obtained. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 112 (Okla. 1962). There, the cost of \$29,000 in repairing the damaged land would have increased the farm value only by \$300. Id. at 111, 114. In this case, it would cost \$140,000 to make the necessary repairs which would increase the value of plaintiff's farm by \$1830.

In reviewing the entire record, we agree with the trial court that it would involve economic waste to grant an injunction, and hold the court properly awarded the damages.

AFFIRMED.