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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CLARENCE WEISS,	)	
Plaintiff-Appellant,	)	Filed April 8, 1983
vs.	)	
BUFORD MARTIN,	)	2-384 2-67887
Defendant-Appellee.	)	

Appeal from Johnson District Court - Robert Osmundson, Judge.

Plaintiff appeals the trial court's ruling denying his claim for damages and awarding only limited injunctive relief for defendant's alleged alterations in a water drainage system used by the parties' adjoining farms. AFFIRMED.

John C. Fishburn of Fishburn & Fishburn, Muscatine, and Patrick M. Ryan of Hintermeister & Ryan, Muscatine, for plaintiff-appellant.

Philip A. Leff of Leff, Leff, Leff, Haupert & Traw, Iowa City, for defendant-appellee.

Heard en banc.

DONIELSON, J.

Plaintiff appeals the trial court's ruling denying his claim for damages and awarding only limited injunctive relief for defendant's alleged alterations in a water drainage system used by the parties' adjoining farms. On appeal plaintiff contends: (1) that the court erred in not finding that the defendant's alleged alterations were the proximate cause of damages caused to plaintiff's farm; (2) that the trial court erred in finding that the natural water course was reestablished as result of a 1973 stipulation concerning a prior lawsuit between the parties; (3) that the defendant could not insist upon performance of the stipulation agreement when he was guilty of a material breach of that agreement; and (4) that the trial court erred in failing to require the defendant to restore the natural water course and in denying the plaintiff damages for erosion control repair work. We affirm.

This case was originally tried in equity and our review, therefore, is de novo. Iowa R. App. P. 4; Anderson v. Yearous, 249 N.W.2d 855, 858 (Iowa 1977). While we are not bound by the trial court's findings, we do give them weight, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); Recker v. Gustafson, 279 N.W.2d 744, 748 (Iowa 1979).

I.

The parties own adjoining farms. Their properties are separated by a north-south boundary fence. The defendant's farm property is west of the plaintiff's property. On the plaintiff's side of the boundary line, surface water flows in a southwesterly direction until it reaches a ditch running parallel to the north-south boundary fence. On the defendant's property water flows in an easterly direction toward the north-south boundary fence and reaches the north-south ditch located on plaintiff's land. The water in the ditch flows in a southerly direction until it empties in an east-west ditch.

The plaintiff claims that prior to the defendant's actions, water from defendant's property flowed into a shallow depression on defendant's property which ran parallel to the boundary line. The plaintiff contends that the defendant made certain alterations to the drainage system which caused the water flow in the north-south ditch located on plaintiff's property to double, resulting in the degradation of the ditch. Specifically, the plaintiff attempted to show that the defendant altered the drainage pattern in four different ways: (1) that defendant straightened the east-west ditch into which the water from the north-south ditch flowed, resulting in the plaintiff's property losing a buffer affecting the flow of water in the drainage system on this land; (2) that defendant used a plow on his property to move dirt to the east, causing more flood water to divert under the boundary fence; (3) that defendant constructed a "levee" along an east-west fence line on his property which raised the elevation in that area approximately two feet, causing additional water to be diverted into plaintiff's north-south ditch; and (4) that defendant allegedly moved dirt away from the north-south boundary area and placed it on the westerly edge of his property, causing more flood waters to be diverted into the ditch on plaintiff's property. In his lawsuit the plaintiff claimed that defendant's actions reduced the fair market value of his property. He sought damages for this reduced value and for an amount necessary to compensate for repairs necessary to correct the alleged damages to his property. Plaintiff also sought to enjoin defendant from continuing his present acts and that he be required to rework and restore the land to its condition prior to such wrongful acts.

The parties had been involved in a previous lawsuit concerning the construction of a "corncob dike" by plaintiff's tenant in a hole under the boundary line fence between the parties' properties. The named defendant in this suit brought the previous action to have the dike removed. The parties signed a stipulation

agreement in 1973 requiring plaintiff to remove the dike and maintain a flood gate at the boundary fence. In the stipulation the defendant agreed not to rework or change his property so as to change the flow of the water as it crosses the boundary fence, to fill in the eroded areas west and southwest of the dike which were located on their property, and to restore the area to its original level.

In the present action the plaintiff presented evidence indicating that the defendant did not honor the stipulation agreement while the defendant presented evidence indicating that he complied with the provisions of the agreement. The plaintiff admitted that he did not comply with his portions of the agreement because of the actions of the defendant. Defendant's evidence attempted to show that the alterations he made on his property did not affect the water flow into the ditch.

The trial court entered a judgment which required the defendant to lower the elevation along the east-west fence line to the elevation in existence at the time the stipulation agreement was signed. The court did not give the plaintiff any relief with respect to his requests for damages for the loss of fair market value to his farm and for the cost of making necessary repairs and construction of erosion control devices. Plaintiff then instituted this appeal.

II.

Plaintiff's first contention is that the court erred in failing to find that the actions of defendant were the proximate cause of the damages alleged by plaintiff. The parties are not in dispute with regard to the legal principles which govern this case. Those principles were set forth in Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 745 (Iowa 1977), as follows:

> [R]ecently in Rosendahl Levy v. Iowa State Highway Commission, Iowa, 171 N.W.2d 530, 536, we said:
>
> > 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).

> A corollary of this rule 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. Tretter v. Chicago & G. W. Ry. Co., 147 Iowa 375, 380, 126 N.W. 339, 341.

> Of course cases of this type depend largely on the particular facts shown. Rosendahl Levy v. Iowa State Highway Commission, supra, 171 N.W.2d at page 536; Woods v. Incorporated Town of State Centre, 249 Iowa 38, 41, 85 N.W.2d 519, 521.

The conduct complained of must be the proximate cause of the alleged injury which means the conduct must be a "substantial factor in bringing about the harm." Wilson, 257 N.W.2d at 746.

Based on our de novo review of the record we agree with the trial court that plaintiff has failed to carry his burden to show that defendant's actions were a substantial factor in increasing the volume of water which flowed over plaintiff's property to the north-south ditch. From the record it appears that there is a significant amount of erosion occurring and there will be further erosion in the future. However, it is not clear that the erosion has been accelerated by any actions of defendant. In fact, Professor Kennedy testified that the drainage ditches located on the parties' properties were part of a larger drainage system which would continue to degradate despite the efforts of either party.

The effect of the 1973 stipulation agreement is significant in this case. Under this agreement, defendant was not to rework his property in a manner which would alter the flow of water across defendant's property. At the time of trial the land on the south side of defendant's east-west fence was approximately

two feet higher than the land on the north side. The testimony regarding the effect of this difference in elevation on the water flow is somewhat conflicting; while water from this area does flow into the north-south ditch on plaintiff's land during times of heavy rain, it is unclear whether there was an increase in the flow of water since the change in elevation. Moreover, plaintiff has not established that the change in elevation along the east-west fence was due to the defendant's actions and not due to natural causes. Plaintiff has failed to carry his burden to show that any increase in water flowing from defendant's land to plaintiff's land was proximately caused by the defendant's actions and, therefore, we affirm the trial court on this issue.

III.

The plaintiff's next contentions refer to the 1973 stipulation agreement. He contends that the natural watercourse was not reestablished as a result of the agreement and that defendant cannot insist upon performance of the stipulation when he was guilty of material breach of the agreement. In his argument he urges that this court set aside the stipulation because defendant failed to perform his obligations under it. We find no merit in this argument.

Stipulations are to be construed in an attempt to effectuate the intent of the parties. Hawkins/Korshoj v. State Board of Regents, 255 N.W.2d 124, 126 (Iowa 1977). To do so, the court interprets the stipulation "with reference to its subject matter and in light of the surrounding circumstances. . . ." Id. The stipulation here required plaintiff to remove the dike to allow for a smooth, uninterrupted flow of water during normal rainfall. Defendant was to restore eroded areas to their original level and was not to alter his land in any manner which would cause this water flow to be interrupted. We find nothing in the record to suggest that defendant was in breach of the stipulation agreement. As previously noted, we do not believe the defendant's actions substantially increased the flow of water onto

plaintiff's property. We believe the natural watercourse flows from defendant's property in a southeasterly direction over the plaintiff's property to the north-south ditch which empties into the east-west ditch. It appears that the watercourse will change somewhat over time with the natural elements and erosion. On the record before us, we find the defendant has not breached the stipulation agreement or in any way altered the natural flow of the water over his property.

IV.

Finally, plaintiff claims that the court erred in refusing to order defendant to pay any damages or to make any changes other than to lower the elevated portions of land along the east-west fence. Plaintiff contends that this relief is insufficient to remedy the erosion problem that has resulted from defendant's alleged wrongful actions which interfered with and injured plaintiff's property rights. An examination of the trial court's order in light of the record reveals that the court found only that the ground elevation along the east-west fence had changed since the time of the stipulation agreement and that defendant should return the ground to the elevation existing at the time of the stipulation. There is no proof that defendant, himself, caused the elevation to change. Indeed, it is clear under the record that the change would have been facilitated by numerous natural factors. Having found previously that plaintiff has failed to prove that defendant proximately caused any increased flow of water which caused damage to plaintiff's property, we refuse to hold defendant liable for additional restoration of the land or for damages. Defendant is still bound under the stipulation to refrain from causing any additional flow onto plaintiff's land. We only find he has not violated that agreement in the instant case.

Having found all of plaintiff's contentions to be without merit, we affirm the ruling of the trial court.

AFFIRMED.