



IN THE COURT OF APPEALS OF IOWA

NORTHERN NATURAL GAS CO.,)

Plaintiff-Appellant,)

Filed March 31, 1980

vs.)

KENNETH C. GROSSMAN and)

KATHLEEN I. GROSSMAN,)

341

2-63472

Defendants-Appellees.

Appeal from Mills District Court - Harold L. Martin, Judge.

Plaintiff appeals adverse judgment on defendants' counterclaim for nuisance damages. Defendants cross-appeal on issue of appurtenance to existing pipeline easement and on further damages for personal injury, breach of easement, and trespass. Affirmed.

Philip Willson of Smith, Peterson, Beckman & Willson, Council Bluffs, for plaintiff-appellant.

Frank Meares of Omaha, Nebraska, and David Richter of Council Bluffs for defendants-appellees.

Heard by Oxberger, C.J., Doniclson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Plaintiff appeals adverse judgment on defendants' counterclaim for damages in action enjoining defendants from interfering with plaintiff's installation of an underground cable and valve operator for remote control of a valve on a natural gas pipeline crossing defendants' property. For reversal, plaintiff asserts the evidence fails to support the trial court's finding a nuisance existed or defendants suffered any damage as a result of the alleged nuisance. On cross-appeal, defendants assert the control cable was not appurtenant to the existing pipeline easement and additional damages should have been awarded for personal injury, breach of easement, and trespass. We affirm the trial court's judgment.

Our scope of review is de novo. Iowa R. App. P. 4; see Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 127-28 (Iowa 1974). We give weight to the trial court's fact-findings, especially when considering witnesses' credibility, but are not bound by them. Iowa R. App. P. 14(f)(6).

I.

A 1931 agreement granted plaintiff an easement for a pipeline and its appurtenances to cross property now owned by defendants. The agreement provided any telephone or telegraph lines were to be constructed outside fence lines or along highways. Plaintiff proposed to install a buried cable along the route of the existing pipeline to allow remote control of above-ground regulation valves located on defendants' property. On May 4, 1978, plaintiff filed a petition seeking to enjoin defendants from interfering with installation of the cable system. Defendants' counterclaimed for damages, on grounds of nuisance, personal injury, breach of easement, and trespass. Following trial, the trial court entered judgment granting the injunction and awarding defendants damages of \$17,600 on nuisance grounds.

II.

The trial court found noise from plaintiff's regulation and measurement facilities located across a road from defendant's property created a nuisance entitling defendants to damages. Determination of a private nuisance rests on whether there has been an actionable interference with a person's interest in the reasonable private use and enjoyment of his or her land. Pottawattamie County v. Iowa Department of

Environmental Quality, 272 N.W.2d 448, 453 (Iowa 1978) (quoting Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 560 (Iowa 1972)). Noise may be of such a character and intensity as to interfere unreasonably with the comfort and enjoyment of private property and thus constitute a nuisance. Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 129 (Iowa 1974) (quoting Bates v. Quality Ready-Mix Co., 261 Iowa 696, 703, 154 N.W.2d 853, 857 (1968)). A fair test of whether the noise originating from an industrial or commercial operation constitutes a nuisance is the reasonableness of conducting it in the manner, at the place, and under the circumstances in question. Id; see Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 722, 82 N.W.2d 151, 158 (1957). This is ordinarily a question of fact, not law. Bates, 261 Iowa at 704, 154 N.W.2d at 857. After considering the evidence in the light of these principles, we hold defendants established the noise emanating from plaintiff's control station was a nuisance.

Defendant Kenneth Grossman testified he first became aware in September 1976 of a loud, high-frequency sound, similar to a jet engine, coming from plaintiff's control station. This noise continued intermittently until the spring of 1977. Kenneth complained this noise caused him loss of sleep, severe anxiety, nervousness, and pain in his ears. In testimony by deposition, a doctor stated Kenneth had suffered a permanent high-frequency hearing loss. His opinion that the loss resulted from noise exposure or acoustical trauma was based on Kenneth's statement he was exposed continuously to a noise level of eighty to ninety decibels.

An engineer's report prepared in September 1978 shows decibel measurements at various locations with varying gas flows through the pipes. The maximum measurement of sixty-three decibels, approximately equivalent to conversational speech from a distance of three feet, occurred next to the control facility and across the road from the defendant's property. Plaintiff obtained measurements of eighty to ninety decibels in November 1976, but also claimed to have subsequently insulated the pipes sufficiently to reduce the noise readings below fifty decibels. The weight of the evidence established the gas passing through plaintiff's control station and pipeline created a loud, annoying noise that would cause physical discomfort or injury to a person of ordinary sensibilities, Schlotfeldt v. Vinton Farmers Supply Co., 252 Iowa 1102, 1108, 109 N.W.2d 695, 698 (1961), even after plaintiff's attempted repairs and efforts to muffle the noise.

Plaintiff argues its priority of occupation negatives a finding of nuisance. While it is true "who was there first" is a circumstance of considerable weight, Helmkamp, 214 N.W.2d at 129 (quoting Schlotfeldt, 252 Iowa at 1109, 109 N.W.2d at 699), this doctrine can cut both ways and does not aid plaintiff here. See Schlotfeldt, 252 Iowa at 1109, 109 N.W.2d at 698-99. When defendants purchased this land in April 1976, plaintiff's exposed pipeline and regulation and measurement facilities were located across a road from defendant's property. However, at that time only two above-ground pipes existed. Subsequently, plaintiff caused four more lines to be brought out from the ground. Moreover, there is no evidence defendants knew of any noise coming from the pipeline when they purchased the property. Although defendants would have difficulty in claiming they were unaware of the pipeline's existence, there is no basis to infer they knew of any possible noise problem or an increase in the number of exposed pipes.

III.

Appealing the trial court's damages award, plaintiff contends defendants failed to establish substantial evidence of their damages. The trial court found defendants were entitled because of the nuisance to damages for relocation of their house 600 feet from the selected house site where they originally intended to build, including damages for installation of a new septic tank, additional electrical installations, landscaping, and constructing a road to the new building site, all totalling \$17,600. We find substantial evidence in the record to substantiate this award and that the damages were proximately caused by the nuisance found to exist here.

In a case of a continuing nuisance subject to abatement, the measure of actual damages is the diminution in rental value of the land involved, plus any resultant special damages. Earl v. Clark, 219 N.W.2d 487, 490 (Iowa 1974); Bates, 261 Iowa at 707, 154 N.W.2d at 859; Schlotfeldt, 252 Iowa at 1115, 109 N.W.2d at 702. Kenneth did not introduce any evidence of rental value, but did testify to the house relocation expenses. Installation of a new septic sewage system cost \$1,200 and the new electrical system installation cost approximately \$1,000. These expenses in addition to those required for landscaping and road building justify the trial court's award.

IV.

On cross-appeal, defendants challenge the trial court's finding the proposed cable installation was an appurtenance to the easement rather than a telephone or telegraph

line, which should be installed outside defendants' property lines. They also challenge trial court's dismissal of their counterclaim for personal injury, breach of easement, trespass, and punitive damages. We are unpersuaded by either argument.

On the appurtenance issue, the question is whether the control cable is an appurtenance within the meaning of the 1931 easement. Defendants deny any easement exists because of plaintiff's breach in failing to install a natural gas farm tap to serve their house. The easement provides gas service will be furnished to the easement grantor "upon written application." Due to a prior discontinuance of service, some problems and delay arose in providing defendants a farm tap. We find, however, no breach of the easement under these facts. Plaintiff proceeded in a timely and proper fashion under the constraints of federal regulations.

Returning to the primary issue, we find the cable is an appurtenance to the pipeline and not a telephone or telegraph line. The words of the easement should be given their common and ordinary meaning. The characteristics of the proposed control cable show that it does not come within the common and ordinary definition of a telephone or telegraph line, but is appurtenant to the pipeline.

The proposed cable, three to four feet underground, would not permanently affect the land or interfere with any current or proposed use of the property. In fact, the cable will result in less intrusion upon defendants' land because of plaintiff's decreased need to enter onto the land to make valve changes. Although the cable is linked to plaintiff's central control facility by telephone line, the cable itself is a separate entity unable to carry normal telephonic signals. The cable allows remote control of a valve on the pipeline. It does not enlarge or change the basic operation of the pipeline, but merely alters the method of valve operation. It thus comes within the common meaning of appurtenance as it is an accessory that adds to the more important thing. See Webster's New World Dictionary 68 (2d col. ed. 1976). We believe this holding is consistent with the original grantor's intent of seeking to prevent obstructions to farming operations from telephone or telegraph poles. There being no such danger with this underground cable, we affirm the trial court's holding that allowed plaintiff to install the cable along the pipeline.

V.

Our previous discussion eliminates the need to address defendants' appeal regarding trial court's failure to award damages for breach of easement or trespass. We find no breach, and, consequently, there was no trespass. Defendants' appeal concerning trial court's failure to allow personal injury or punitive damages is also without merit. Defendants failed to establish substantial evidence of any personal injury suffered. Dr. Whicker testified he based his opinion that the cause of defendant's hearing loss was from noise trauma on defendant's statement he was continuously exposed to a noise level of eighty to ninety decibels. This evidence, however, was disputed; we, therefore, affirm trial court's finding on this issue. Recovery of punitive damages requires a showing of willful or reckless disregard of another person's rights. White v. Citizens National Bank of Doone, 262 N.W.2d 812, 817 (Iowa 1978). No basis for such recovery was shown here. Plaintiff conscientiously sought to alleviate the noise problems and spent \$16,000 toward that end. Defendants' claim for punitive damages is without merit.

AFFIRMED.