FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GEORGE A. KRANOVICH and MARY A. KRANOVICH,

Plaintiffs-Appellants,

vs.

JOHN R. SHATTUCK and DONALD A. ANDERSON,

Defendants-Appellees.

Filed March 24, 1981

0-329
2-64401

Appeal from Polk District Court - Ray Hanrahan, Judge.

Plaintiffs appeal trial court's denial of injunction against and damages caused by defendants' channeling the flow of surface waters across plaintiffs' land. - REVERSED AND REMANDED.

Rick L. Olson, of Baird, Bowers & Oliver, Des Moines, for plaintiffs-appellants.

Roger J. Hudson, of Stewart, Wimer, Hudson & Flynn, Des Moines, for defendants-appellees.

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

PER CURIAM

Plaintiffs appeal the trial court's denial of an injunction against and damages caused by defendants' channeling the flow of surface waters across plaintiffs' land. We reverse and remand.

Plaintiffs are owners of a seven acre tract of land in Pleasant Hill, Iowa. Adjoining the tract on its western border is defendants' land. Defendants' development of their land between 1972 and 1974 included the construction of Lexington Drive, which is perpendicular to and abuts plaintiffs' land. Prior to defendants' development work surface waters[1] flowed from defendants' land across plaintiffs' land over the entire borderline between them. Defendants' development work increased the speed of the flow of the surface water and concentrated the flow into a smaller area, so that now most of the water flows from the end of Lexington Drive across plaintiffs' land. The newly accelerated and concentrated flow of water cut a ditch through plaintiffs' land over 300 feet long, four to six feet deep and 10 to 15 feet wide. Additionally, the erosion caused by the new flow of water filled in a natural drainage ditch on plaintiffs' land with silt. Before plaintiffs can develop their own land, which is zoned residential, they must fill the artificial ditch caused by the new water flow. The cost of doing so will be between $2500 and $3500. Plaintiffs paid $6090 to have the natural drainage ditch cleared of silt deposited by the new water flow.

Plaintiffs pray for damages and a permanent injunction compelling defendants to take measures to prevent further damage to plaintiffs' land. After a full hearing the trial court dismissed plaintiffs' petition for failure to establish a claim on which relief can be granted.

Our review is de novo. Iowa R. App. P. 4. See Braverman v. Eicher, 238 N.W.2d 331, 333-34 (Iowa 1976). We are not bound by the trial court's findings of fact, but we

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[1] In Woods v. Incorporated Town of State Center, 249 Iowa 38, 44, 85 N.W.2d 519, 523 (1957), the Iowa Supreme Court defines "surface waters."

> 'Surface Waters' have been described, as the term indicates, as water on the surface of the ground of a casual or vagrant character following no definite course, of a more or less temporary existence, which spread at random over the ground and are lost by percolation into the soil and by evaporation. They are to be distinguished from the water of creeks, streams, rivers, ponds, and lakes, having a substantial existence and a substantially definite location.

give weight to them, especially regarding the credibility of witnesses. Iowa R. App. P. 14(f)(7).

Iowa law concerning adjoining landowners' rights and liabilities in regard to surface water has been described as "confused and difficult to ascertain." Note, Surface Water Drainage in Iowa, 50 Iowa L. Rev. 818, 823 (1965). In general, where there is a servitude of natural drainage between adjoining lands, the dominant owner is entitled to drain surface water in a natural watercourse from his land over the servient owner's land, [2] and if any damage results, the servient owner is without remedy. Oakleaf County Club, Inc. v. Wilson, 257 N.W.2d 739, 745 (Iowa 1977); Braverman v. Eicher, 238 N.W.2d 331, 335 (Iowa 1976); Rosendahl Levy v. Iowa State Highway Commission, 171 N.W.2d 530, 536 (Iowa 1969). However, if the dominant owner substantially changes the manner or method of drainage and actual damage to the servient estate results, the servient owner is entitled to relief. Oak Leaf Country Club, 257 N.W.2d at 745; Braverman, 238 N.W.2d at 334; Rosendahl Levy, 171 N.W.2d at 536; see Owens v. Fayette County, 241 Iowa 740, 744, 40 N.W.2d 602, 605 (1950); Wheatley v. Cass County, 239 Iowa 932, 936, 31 N.W.2d 871, 873-74 (1948); Jacobson v. Camden, 236 Iowa 977, 984, 20 N.W.2d 407, 408 (1946): Board of Supervisors of Pottawattamie County v. Board of Supervisors of Harrison County, 214 Iowa 655, 672, 241 N.W.2d 14, 20, 22 (1932); Schwartz v. Wapello County, 208 Iowa 1229, 1230, 227 N.W. 91, 92 (1929).

Prior to defendants' construction work surface waters naturally flowed in a broad expanse from defendants' to plaintiffs' estate all along the border separating the estates. Defendants' construction work artificially narrowed the path and increased the speed of the water flow, substantially altering the method of draining, causing actual damage to plaintiffs' property.

Most of the damage occurred from water flowing down Lexington Drive onto plaintiff's land at an acceletated rate. The grade and location of Lexington Drive was established by the town of Pleasant Hill over defendant's objections at the time

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[2] Where there are two adjoining tracts of land of different height and the higher tract naturally empties water on the lower tract, the higher tract is called the "dominant estate" and the lower tract is called the "servient estate." See Schwartz v. Wapello County, 208 Iowa 1229, 1230, 227 N.W. 91, 92 (1929). The owner of the dominant estate is called "the dominant owner," and the owner of the servient estate is called "the servient owner."

defendants' developed their property. In anticipation that damages might occur the town insisted that defendants post a $6,000 bond for construction of a storm sewer. The bond was posted but the storm sewer was never constructed and the bond period expired.

Defendants point out that plaintiffs did not grant an easement over their property for the construction of a storm sewer. However, we find no evidence that an easement was requested of plaintiffs. In any event no condemnation procedures appear to have occurred.

The trial court found that the natural ditch which assisted in handling the flow of surface water became heavily silted and willow trees began growing in it due to the increased flow of surface water and poor maintenance of the ditch on the part of plaintiffs. It further found that plaintiffs employed George DeMoss Construction Company to clear the ditch in October, 1976 and May 1977, which cost $1,040 and $3,950. Our review of the record also discloses that plaintiffs paid Harry Bullington $1,100 for operating an endloader to do the work in 1977. Nevertheless, the court denied plaintiffs damages, concluding that the real cause of the problem is the lack of a storm sewer and plaintiffs have not given an easemant for its construction.

We find no disagreement with the court's analysis that a storm sewer is needed, but conclude plaintiffs are entitled to damages caused by the accelerated flow of water onto their property. We are, however, unable to determine what part of the expenses incurred to clean the ditch should be borne by plaintiffs for a failure to properly maintain it. We also find insufficient evidence to award damages for repair of a new ditch that formed as a result of a changed flow pattern or to grant an injuction. Accordingly, we remand this cause to the district court for determination of these matters and for such other relief as is equitable.

Cost assessed to defendants.

REVERSED AND REMANDED.