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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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VIR-JO FARMS, INC., **An Iowa Corporation,** Plaintiff-Appellee, vs. **DAVID G. KUNDEL,** Defendant-Appellant.	)	Filed March 31, 1987 7-35 86-822

Appeal from the Iowa District Court for Muscatine County (C3384-485) - Max R. Werling, Judge.

Defendant has appealed from an injunction contending the injunctive relief was unwarranted because the plaintiff presented insufficient evidence of damages. **AFFIRMED.**

William F. Creasey of Goedken & Creasey, Muscatine, Iowa, for defendant-appellant.

Eric M. Knoernschild of Hintermeiser & Knoernschild, Muscatine, Iowa, for plaintiff-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

The plaintiff and the defendant own adjoining tracts of farmland. Defendant's tract is landlocked, except for a private lane passing through plaintiff's land. Another adjoining landowner has a written easement for use of this lane; defendant has no written agreement, but his right to use the lane is not contested by plaintiff. The lane and the appurtenant easement are twenty feet wide and approximately five hundred feet long. In the past the easement had been maintained as a ground level sand lane and was left in its natural state with no additional surfacing added. Maintenance consisted of either blading it with a tractor blade, or using a drag to smooth down the ruts. A shallow ditch was maintained on the west side of the lane to facilitate drainage.

In March 1985 defendant's hired hand, at defendant's instruction, began to push blow sand onto the lane in order to raise the grade. Defendant asserts the standing water on the lane had created an impassable situation. Prior to commencing this work defendant did not inform plaintiff of his intention to alter the lane. On the first day of construction plaintiff's employee complained to defendant's employee about the effects the raising of the lane would have. Specifically he pointed out the lane would create water problems and the sand would spill into plaintiff's fields. Defendant's employee stopped work for two or three days but eventually came back and completed the job. Originally the sand fill was twelve to eighteen inches but since 1985 it has compacted down to approximately one foot.

The lane runs north from the county road, intersecting the plaintiff's property, which lies east and west of the lane. On plaintiff's property water flows to the northeast and, because of this factor, an increase in the level of the lane could interfere with the natural flow of water from plaintiff's west field to his east field. The area surrounding the lane is essentially flat. Plaintiff's

expert from the soil conservation service testified that on flat topography, one foot of fill would back up water one hundred feet.

On April 15, 1985, plaintiff filed its petition, alleging defendant had caused large quantities of sand to be deposited on the lane blocking the natural flow of surface water and thereby damaging plaintiff's crops and property. In this petition plaintiff requested an injunction requiring defendant to remove the sand which had been deposited on the lane and restore it to its former condition. On April 30, 1985, defendant answered by denying the allegation of the petition and affirmatively stating the repair of the easement had not changed the natural flow of surface water, and his actions were reasonable and necessary for use of the easement.

After the suit was filed, defendant employed a surveyor to make a water flow chart of the area. He concluded the elevated lane was blocking the flow of water from plaintiff's west field to the east field. The surveyor recommended defendant open a section of the lane in a low area in order to allow the surface water to flow through the natural water course. Defendant accepted this recommendation and proceeded to excavate approximately twenty-five feet of the lane below ground level and then refill with crushed rock up to ground level. Upon personal inspection the trial court found the only result of this corrective excavation was to allow water in great quantities to pond in this excavated area.

This case was tried to the court on April 29, 1986, and on May 12, 1986, the trial court issued a mandatory injunction. The injunction required defendant to either remove from the lane the blow sand, returning the lane to its former grade level, or to raise the lane by removing the fill to allow for coverage with a stable material and construct waterways which will allow for the flow of

surface water through the natural water course and provide road ditches. From this injunction defendant has appealed.

Defendant contends: (1) injunctive relief was unwarranted since no evidence was presented that plaintiff had or would sustain any substantial damages, and (2) the requirements imposed upon him to improve the lane are overly burdensome and not supported by the evidence.

The scope of review in this equity case is de novo. Blink v. McNabb, 287 N.W.2d 596, 601 (Iowa 1980). When considering the credibility of witnesses, we give weight to the trial court findings, but we are not bound by them. Iowa R. App. P. 14(f)(7).

I.

Defendant argues the trial court erred in granting plaintiff an injunction since there was no evidence plaintiff had or would sustain any substantial damages as a result of the construction of the lane by defendant. We disagree.

"Granting or refusing an injunction rests largely in the sound judicial discretion of the trial court under the facts of the particular case and we are somewhat reluctant to interfere with its decision." State ex rel. Faches v. Wedelstedt, 250 N.W.2d 64, 65 (Iowa 1977) (quoting Gilbrech v. Koberdanz, 252 Iowa 509, 516, 107 N.W.2d 574, 578 (1961)).

Damages, past or present, are not required for an injunction to issue; the point of such relief is to prevent future damages. Buckwalter Motors Inc. v. General Motors Corp., 593 F.Supp. 628, 632 (S.D. Iowa 1984). Injunctive relief is an extraordinary remedy and is designed to afford relief when there is no adequate remedy at law. Denison v. Claybaugh, 306 N.W.2d 748, 755 (Iowa 1981). The court must balance the relative harm which would be incurred by the parties upon the allowance of injunctive relief. Green v. Advance Homes, Inc., 293 N.W.2d 204, 208 (Iowa 1980).

Plaintiff was damaged in three respects: the erosion of blow sand onto his land, the future crop damage to his westerly field, and the obstruction of the natural flow of water from one field to another. Substantial evidence was presented at trial, both in testimony and through photographs, that the sand used by defendant to elevate the lane was eroding into plaintiff's fields. Testimony was presented as to the possible crop damage as a result of the lane holding water. Plaintiff's witness testified crop damage was certain to occur if the lane remained as it was. Finally, along the same lines, all parties concerned agreed the lane was impeading the natural watercourse across plaintiff's land. Although defendant asserts he solved the problem through his correctional procedures, at trial no evidence was provided to support his argument.

The equities are in the favor of plaintiff. Defendant began the project without plaintiff's consent and once he learned of plaintiff's disapproval he continued filling the road. In defendant's favor, we note, he attempted to correct the drainage problem, but as the evidence clearly shows, he was less than successful. Due to the very speculative nature of the possible future damages in this case, we believe the effective remedy is injunctive. This finding considered with the discretion invested in the trial court, leads us to affirm the trial court.

II.

Defendant further contends the court erred in requiring him, if he wished to raise the lane, to meet requirements not warranted by the facts of this case and which are overly burdensome. Specifically defendant argues it is unreasonable to require him to apply a more stable surface, construct waterways, and provide road ditches. He also maintains the repair work which he had completed solved any water problem.

> It is not only the right but the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in

> the absence of an agreement therefor. The easement owner is not bound, however, to repair and maintain the easement for the benefit of the servient owner, but he may make it as usable as possible for the purpose of the right owned, so long as he does not increase the burden on the servient estate or unreasonably interfere with the rights of the owner thereof. The reasonableness of the improvements or repairs made by the owner of an easement of way is largely a question of fact, and depends on the extent and character of the lawful use of the easement.

25 Am. Jur.2d, Easements and Licenses, § 85 (1966).

The natural flow or passage of water cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominate proprietor. Witthauer v. Council Bluffs, 257 Iowa 493, 498, 133 N.W.2d 71, 75 (1965). Regarding a lane functioning as a dike; "[i]f its traveled surface is raised above the adjoining land, the lane must be ditched and must have transverse bridges, culverts, or pipes which will permit free passage of water from one side to the other." Ditch v. Hess, 212 N.W.2d 442, 448 (Iowa 1973). Where surface water has affixed in a certain course, its natural flow cannot be interrupted to the injury of an adjoining landowner and equity will enjoin the wrongful obstructing of the natural flow of water when necessary to prevent irreparable harm. Jenkins v. Pedersen, 212 N.W.2d 415, 419 (Iowa 1973), and Blink v. McNabb, 287 N.W.2d at 601.

Construing all of this language we find defendant had a right to reasonably repair and maintain the easement, but that his actions of filling with an improper substance and then attempting to build a waterway were done in an unreasonable manner. We also find through his attempt to repair the lane defendant created a dike, which backed up water onto plaintiff's land. With these conclusion in mind, we find the trial court's action was reasonable and warranted. Defendant also fails to consider the option provided by the trial court to restore the road to its original state. We do not consider the trial court's actions unreasonable

or burdensome; defendant substantially interfered with plaintiff's use of its property. Therefore, we affirm the trial court.

AFFIRMED.