FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

C. N. SANDERS and SHERYL SANDERS,	)	
Plaintiffs-Appellants,	)	Filed April 23, 1986
vs.	)	
BETTY JEAN WELCHANS, ROBERT D. WELCHANS, and JOY LYNN HACKETT, Executors of the Estate of W. DALE WELCHANS, Deceased; and BETTY JEAN WELCHANS, Individually,	)	5-677 85-948
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Fremont County (21682) - J. C. Irvin, Judge.

Plaintiffs appeal the district court's granting of defendant's Motion for Summary Judgment. **AFFIRMED.**

Randy Ewing and Robert J. Laubenthal of Smith, Peterson, Beckman & Willson, Council Bluffs, Iowa, for plaintiffs-appellants.

John D. Sens of Stuart, Tinley, Peters, Thorn, Smits and Sens, Council Bluffs, Iowa, for defendants-appellees.

Heard by Donielson, P.J., Snell, and Schlegel, JJ.

SCHLEGEL, J.

Plaintiffs appeal the district court's granting of defendant's Motion for Summary Judgment. We affirm.

Defendants own a tract of land in Fremont County, Iowa, on the west side of the East Nishnabotna River. Plaintiffs are defendants' neighbors and their property is contiguous and adjacent to the property located next to the river. For years, the river has been flooding over defendants' riparian land and overflowing onto plaintiffs' fields, damaging the land or delaying the time that plaintiffs might get into the area and start their planting. Plaintiffs have asked defendants to prevent this overflow by repairing an alleged old levee located on defendants' tract but defendants have refused to do anything to prevent the flooding. Plaintiffs have even attempted to buy this land, but defendants have refused to sell.

In December 1984, plaintiffs filed a petition seeking injunctive relief that would require defendants to maintain the levee. Plaintiffs also claimed general and special damages for the loss sustained due to the overflow. Specifically, plaintiffs alleged that defendants' failure to properly maintain the alleged levee amounted to a permanent nuisance and also constituted a continuing trespass on their land. Plaintiffs attached to their petition, a copy of the real estate contract for their property and a copy of the warranty deed for defendants' property. These documents fail to mention anything about a levee that amounts to a burden on defendants' land or a benefit to plaintiffs' land.

Defendants answered by denying the existence of any alleged levee and also denying any duty on their part to maintain the levee, assuming arguendo, one existed in the first place.

The trial court granted defendants' motion for summary judgment, and plaintiffs appeal that ruling. In determining whether the district court properly

granted summary judgment, the task of this court "is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." Froning & Deppe v. South Story Bank & Trust, 327 N.W.2d 214, 215 (Iowa 1982). Where the only conflict concerns legal consequences of undisputed, underlying facts, entry of summary judgment is proper. Goodwin v. City of Bloomfield, 203 N.W.2d 582, 588 (Iowa 1973).

I. **Theories of Negligence, Trespass and Nuisance.** Plaintiffs have premised their action on the theory that defendants have been negligent by failing to maintain the levee that allegedly was erected for their benefit. Consequently, they assert the water that has damaged their land due to this negligence has amounted to a continuing trespass that should be enjoined. In response to such a theory, defendants moved for summary judgment. Due to plaintiffs' theory, the central legal issues that were to be resolved were whether (1) defendants owed a duty to plaintiffs to maintain the alleged levee, (2) they somehow breached this duty, (3) that this alleged breach caused damage to plaintiffs' land, and (4) plaintiffs indeed suffered damage to their land.

Clearly, the most difficult item of proof for plaintiffs in this action is the first legal issue: Did defendants owe a duty to plaintiffs to maintain this levee. In support of this theory and in resisting the motion for summary judgment, plaintiffs were required, by affidavit or otherwise, to set forth specific evidentiary facts showing that there was a genuine issue for trial. See Graham v. Kuker, 346 N.W.2d 290, 291 (Iowa 1976). Plaintiffs produced affidavits and depositions that essentially alleged only that the levee did exist at one time, that defendants had it torn down, and that defendants refused to repair or maintain the levee when asked to do so. In their brief supporting their resistance to the summary judgment motion, plaintiffs rely heavily upon authority that establishes a duty on the part of a defendant to exercise ordinary care in the

use of his property so as not to injure the rights of neighboring landowners. See Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 745 (Iowa 1977). We note, however, in Wilson, as in the remaining authorities cited by plaintiffs, that the defendant in some manner affirmatively changed the structure or use of his land to the detriment of the plaintiff. We cannot agree with plaintiffs that the facts before us amount to a use of land that results in damage to an adjoining property.

Plaintiffs brought this action based upon the factual allegation that defendants failed to maintain the existing levee. It is from this factual allegation that defendants' duty to plaintiffs must arise. We cannot equate a "failure to maintain" the levee, in this instance, with a "use" of land that would give rise to a negligence claim. Indeed the relationship alleged by plaintiffs appears to be more in the nature of an affirmative covenant.[1]

An additional theory used by plaintiffs is that defendants' failure to maintain the levee amounted to a nuisance and a continuing trespass which should be enjoined by the district court. The determination of a private nuisance rests

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[1] In Sexauer v. Wilson, 136 Iowa 357, 362-63, 1113 N.W. 941, 943 (1907), the supreme court stated the principles of an affirmative covenant that runs with the land. "In determining whether a covenant will run with the land, the material inquiries always are (1) whether the parties meant to charge the land; and (2) whether the burden is one that can be imposed consistently with policy and principle . . . .

"We think the real question must be, the covenant being one which may be annexed to the estate and run with the land, whether such was the intention of the parties as expressed in the deed."

In the case before us today, plaintiffs have attached copies of their real estate contract and defendants' warranty deed to the petition. Nowhere in either of the documents is there language purporting to demonstrate any intent to establish a covenant regarding maintenance of a levee on defendants' property.

upon whether there has been "actionable interference with a person's interest in the private use and enjoyment of his land." Pottawattamie County v. Iowa Dept., Etc., 272 N.W.2d 448, 453 (Iowa 1978). In determining whether a nuisance exists, we consider priority of location, the nature of the neighborhood, and the wrong complained of. As to the first of these factors — "who was there first" — the court has said, "Priority of occupation is a circumstance of considerable weight." Helmkamp v. Clark Ready Mix Company, 214 N.W.2d 126, 129 (Iowa 1974). Once again the facts alleged in the accompanying affidavits and other material demonstrate that first, there is no activity or use of land in this case by defendants, and second, it appears from the record defendants were owners and occupiers of their land before plaintiffs bought their property. Therefore, a granting of summary judgment based upon a nuisance theory must also be upheld.

II. **Chapter 455 Remedy.** The trial court noted in its order granting summary judgment that chapter 455 of the Iowa Code provided "a comprehensive procedure for the construction and maintenance of levees," and as such, offered the proper remedy in this case. Plaintiffs argue, however, that chapter 455 is applicable only to construction and repair of new levees and only provides relief where the levee has been constructed according to statutory authority.

We are convinced, after examining the relevant statutory authority and the decisions interpreting this language, that the trial court was correct.

Whether or not the levee ever existed; whether or not the land is within an existing draining district; and whether or not the alleged levee was constructed by private parties, the provisions of Iowa Code chapter 455 provide the appropriate steps and procedures to abate the problems afflicting the plaintiffs in this case. See Iowa Code §§ 455.128, .129, .133-.135 (1985); Farley Dr. Dist.

v. Big Four Joint Dr. Dist., 207 Iowa 970, 221 N.W. 589 (1928); Bird v. Board of Supervisors, 154 Iowa 692, 135 N.W. 581 (1912).

Our standard of review in this case does not require a complete and in-depth review of the authorities cited above. However, we take this opportunity to point out perhaps the most pertinent passages of the statutory authority. In relevant part, Iowa Code section 455.128 (1985), states:

> After the establishment of a levee or drainage district, if the board becomes convinced that additional lands contiguous to the district, and without regard to county boundaries, are benefited by the improvement or that the same are then receiving benefit or will be benefited by a repair or improvement to said district as contemplated in section 455.135, it may adopt, with or without a petition from owners of the proposed annexed lands, a resolution of necessity for the annexation of such additional land and appoint an engineer with the qualifications provided in this chapter to examine such additional lands, to make a survey and plat thereof showing their relation, elevation, and condition of drainage with reference to such established district, and to make and file with the auditor a report as in this chapter provided for the original establishment of such district, said report to specify the character of the benefits received. (Emphasis ours.)

Section 455.133 states:

> If any levee or drainage district or improvement established either by legal proceedings or by private parties shall be insufficient to properly drain all of the lands tributary thereto, the board upon petition as for the establishment of an original levee or drainage district, shall have power to establish a new district covering and including such old district or improvement together with any additional lands deemed necessary. All outstanding indebtedness of the old levee or drainage district shall be assessed only against the lands included therein. (Emphasis ours.)

It is clear, therefore, that plaintiffs' appropriate remedy was under chapter 455 of the Iowa Code.

For purposes of review, we assume, as did the trial court, that a levee did, at one time, exist. The mere fact that the levee existed at one time, however, does not impose a duty upon defendants to maintain it. Without proof

or at least factual allegations of an intent by the parties to maintain the levee to protect plaintiffs' land, no private cause of action exists in this case. Plaintiffs' alternative is to seek a remedy through the sections of chapter 455 of the Iowa Code. The trial court correctly analyzed the facts and the law in this matter and, therefore, we affirm its grant of summary judgment to defendants.

AFFIRMED.