complaint is the defendant's failure to prescribe a home cardio-respiratory monitor. Section 311 does not provide liability for such an omission. Second, the rule requires reasonable reliance by the plaintiff. In this case, the plaintiffs have not alleged such reliance in their complaint. Therefore, the plaintiffs have failed to state a claim under Section 311.

ORDER OF COURT

NOW, this 31st day of December, 1985, the preliminary objection in the nature of a demurrer of defendant, Owen W. Hartman, is sustained. The plaintiffs are granted twenty (20) days from date hereof to file an amended complaint.

Exceptions are granted the plaintiffs.

RIDGE, ET AL. VS. GIBBLE C.P. Franklin County Branch, Civil Action, Vol 7, Page 360

Equity - Flow of Stream - Change - Damages

1. A landowner has the right to have surface water that flows on or over his land discharged onto another's land in furtherance of the proper use of the land.

2. An upper landowner may be liable to a lower landowner where water is diverted from its natural channel, there is an unreasonable change in the quantity of water, there is negligence causing unnecessary damage or an artificial channel collects or discharges water in greatly increased quantity.

3. A property owner may recover both remedial and permanent damages where the property's fair market value is reduced even with repairs.

Eugene E. Dice, Esq., Attorney for Plaintiffs
Denis M. DiLoreto, Esq., Attorney for Defendants

OPINION AND ORDER

WALKER, J. April 2, 1986

Plaintiffs John Ridge and Roger Tosten bought their properties, respectively, in 1978 and 1973. For approximately 30 years prior to this, water would flow across their properties for a maximum period of two weeks in the spring and for a day or two after heavy rains. The owners of the lots directly above plaintiffs' properties are from north to south: Darrel Gibble, Gerald Thrush, Ray Gibble, Elwood Wingert, Merle Beam, and Helen Barr.

Until 1977, a stream flowed part way through Darrel Gibble's land and was swallowed in its entirety by a sinkhole. In 1977, Ray Gibble (Darrel's father) went on to Darrel's property and cleaned the stream. This included widening its channel and plugging up the sinkhole by the dead tree; the stream would then occasionally extend down, emptying into two sinkholes on Thrush's property. The stream flowed beyond the Thrush sinkholes only once during that period.

In May or June of 1982, Ray Gibble dug a 10 inch by 3 foot channel through his yard. Around that same time, he approached Gerald Thrush and offered to run the stream across the Thrush property if Thrush would help pay him to work on the stream on Darrel's farm. Though Thrush declined, he allowed Ray to dig a trench to divert the stream around the Thrush sinkholes.

Ray also approached Elwood Wingerd and asked him if he, Wingerd, would mind having water on his land. When Wingert told Ray that the neighbors below him had gardens and might not appreciate it, Ray responded, "Well, we'll see about that."

On June 10, 1982, the stream coursed down onto plaintiffs' properties, flooding their land and washing out their gardens. The flooding continued for two weeks, after which time the Ridges, the Tostens, Merle Beam, and other meighbors, met with Ray Gibble on the Thrush property. When confronted, Ray Gibble admitted to diverting the stream by digging a trench around the Thrush sinkholes, as well as working on Darrel's sinkholes. Shortly thereafter, in late June, Ray Gibble rerouted the stream back into the Thrush sinkholes.

Though there was no continuous flow on plaintiffs' lands in July, 1982, plaintiffs' property remained submerged under a stagnant pool for the remainder of the summer.

On October 28, 1982, Ridge found the Thrush sinkhole blocked up and Ridge reopened it. By December, 1982, the holes had blocked up again, causing water to flow through Ray Gibble's channel and on to plaintiffs' properties until April, 1983.

From April, 1983 until December, 1983, plaintiffs' lands were flooded three or four times, in spite of a dry summer. Again, the back of their lots remained a marshland throughout the summer.

In the fall of 1983, Joseph Shearer reopened the clogged Thrush sinkhole. By December, 1983, the hole was closed again and the stream flowed down onto plaintiffs' properties until May, 1984.

In May, 1984, Tosten reopened the sinkhole. During the summer of 1984, however, the water flowed across plaintiffs' lots six or seven times.

From December, 1984 until April or May, 1985, the stream flowed continuously across plaintiffs' properties. When the constant flow began again in September, 1985, Ridge dug a channel across his property in an effort to contain the stream.

In October, 1985, Ridge again opened the clogged sinkhole on Thrush's farm. Shortly thereafter, the hole became blocked up again; a stream was still running through Ridge and Tosten's yards at the time of trial, January, 1986.

Under Pennsylvania law, a land owner has the right to use his land in a proper and profitable way. This includes the right to have surface water that flows on or over his land discharged onto another's land in furtherance of this proper use. *Leiper v. Heywood-Hall Construction Co.,* 381 Pa. 317, 113 A.2d 148 (1955).

This must be done, however, with due regard to the lower landowners' rights and interests. An upper landowner may be liable for damage to a lower landowner's property if he or she: 1. diverts water from its natural channel, or 2. unreasonably or unnecessarily changes the quantity or quality of water, or 3. is guilty of negligence causing unnecessary damage, or 4. by an artificial channel, collects and discharges surface waters in a body or precipitates them in greatly increased quantities upon his neighbor. *Piekarski v. Club Overlook Estates, Inc.,* 281 Pa. Super. 162, 421 A.2d 1198 (1980).

The applicable standard, as applied to the facts before the court, is whether the defendants unreasonably or unnecessarily discharged a greatly increased quantity of water on the plaintiffs' properties. The court will discuss individually the elements which would impose liability on Ray Gibble and demonstrate how they have been satisfied in the instant case.

Since Ray Gibble performed his actions with full knowledge of the consequences (i.e., flooding of the plaintiffs' land), the element of negligence is easily fulfilled. Prior to the flooding, Ray Gibble approached Elwood Wingerd and asked him if he would object to having wter on his land. When Wingerd pointed out that it might flood Ridge and Tosten's gardens, Ray Gibble responded, "We'll see what happens."

There was little doubt that circumventing the Thrush sinkholes and sending the water through Ray's channel would flood plaintiffs' lands. All doubt was dispelled when Ray Gibble diverted the stream and plaintiffs' lands were subsequently inundated. The court finds that, in spite of this, Ray Gibble continued to block the Thrush sinkholes with certain knowledge that it would flood plaintiffs' lands.

The next issue, that of causation, requires a two step analysis: (1) Did blockage of the sinkholes cause the flooding of plaintiffs' properties? (2) Did either, or both, of the defendants block the sinkholes?

Numerous witnesses testified that, with the exception of a two week period in the spring and a day or two after heavy rains, the Thrush and Gibble sinkholes consumed the entire stream prior to June of 1982. By his own admission, Ray Gibble diverted the stream around the Thrush sinkholes in June, 1982, at which time plaintiffs' lands flooded for two weeks non-stop. After the stream was rediverted back into the holes, the flooding discontinued.

Subsequently, whenever flooding occurred and plaintiffs investigated the cause, they found the sinkholes blocked with debris. Whenever they opened the holes, the flooding would stop until the holes were blocked up again.

The defendants' expert hydrologist offered the excuse that excessive rain in June of 1982 was the prime, if not the sole, cause of flooding. However, he also testified that the rainfall for that

area was even greater in five of the six previous years, when no flooding occurred. The court is not inclined to accept this witness's opinion on the matter.

The court finds that when the sinkholes were rendered inoperable, whether by diversion or blockage, the stream flowed down onto plaintiffs' properties. The corollary to this finding is that the blockage did, in fact, cause plaintiffs' properties to flood.

The second inquiry, regarding causation, is: did Ray Gibble continually block the Thrush sinkholes?

Based on the volume of circumstantial evidence presented, the court is compelled to answer this in the affirmative. One need only examine the sequence of events to realize that any other conclusion is untenable.

Ray Gibble repeatedly asserted, on various occasions and to numerous witnesses, his desire to have a stream run through his yard. To that end, he extended the stream through Darrel's property by clearing the channel and blocking the sinkhole. In June, 1982, Ray dug a 10 inch by 3 foot channel through his yard and diverted the stream around Thrush's holes. Ray had a stream through his yard for only two weeks at which time the neighbors complained of the flooding, and he rediverted the stream into the holes.

Then, conveniently enough, the sinkholes which had consumed the entire stream for 30 years prior to Ray's channel, continued to block up again and again. This occurred in spite of plaintiffs' repeated efforts over four years to reopen them.

Besides the suspicious sequence of events, the nature of the debris that blocked the holes also strongly points to human intervention. The sinkholes were plugged up by brick and softball sized limestone rocks. The defendants' hydrologist theorized that the brick and rocks tumbled down the stream, carried by the current, and eventually blocked the sinkhole.

Having viewed the size of the stream and the strength of its current, the court does not accept this explanation. The court is even less likely to believe that this happened within a month or so after each time the holes were reopened, over a four year period.

Though this case rests heavily on circumstantial evidence, such evidence may be relied upon to establish an entire case. *Peugeot Motors of America, Inc. v. Stout,* 310 Pa. Super. 412, 456 A.2d 1002 (1983). For one offering only circumstantial evidence to prevail, the evidence must preponderate in favor of the offeror's conclusion so that it outweighs any other evidence and reasonable inferences therefrom which are inconsistent therewith. *Houston v. Canon Bowl, Inc.,* 443 Pa. 383, 272 A.2d 908 (1971). To reiterate, here, the only reasonable conclusion to be drawn from the evidence is that Ray Gibble knowingly and continually blocked the Thrush sinkholes, with full knowledge of the detriment to the plaintiffs.

The next inquiry is a determination of whether or not Ray Gibble "unreasonably changed the quantity" of water flowing onto plaintiffs' properties. *See Piekarski,* supra. This is because a landowner's riparian rights include not only the right to an undiminished flow of the stream, but also the right to be free of unreasonable fluctuations in the flow. *Elwood v. City of New York,* 450 F. Supp. 846 (S.D.N.Y. 1978). *Rev'd on other grounds sub. nom. Badgley v. City of New York,* 606 F.2d 358 (2d. Cir. 1979), *cert. denied,* 447 U.S. 906, 100 S. ct. 2989 (1980).

Under a general nuisance theory, an actor's conduct in invading another's interest in the private use and enjoyment of their land is unreasonable unless the utility of the actor's conduct outweighs the harm it causes. *Folmar v. Elliot Coal Mining Co.,* 441 Pa. 592, 272 A.2d 910 (1971). A similar balance of competing interests must be employed in determining respective landowners' riparian rights. *Lancaster Milling v. Media Heights Golf Club,* 59 Lanc. L.R. 159 (1964) (diversion of water running through one's land must be reasonable with regard to the conditions and circumstances of the lower property.)

Here, Ray Gibble has the burden of justifying the harm that he has inflicted on the plaintiffs' properties since, under Pennsylvania law:

> " . . . the defendant's right to injure another's land if at all, to any extent, is an exception, and the burden is always upon him to bring himself within it. And his exception is founded on necessity and because otherwise he would himself be deprived of the beneficial use and emjoyment of his own land." *Pfeiffer v. Brown,* 165 Pa. 267, 274 (1985).

LEGAL NOTICES, cont.

Trust Company, Waynesboro, Pennsylvania, Executor of the Estate of H. Louise Thomas, a/k/a Helen Louise Thomas, late of Hamilton Townlate of Washington Township, Franklin County, Pennsylvania, deceased.

WHITE: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Mary Grace white, late of Hamilton Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk Orphans' Court

2-6, 2-13, 2-20, 2-27

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, the intention to file, with the Department of State of the Commonwealth of Pennsylvania, on January 12, 1987, an application for a certificate for the conducting of a business under the assumed or fictitious name of Oak Tree Formica Shop, with its principal place of business at 12163 Scott Road, Waynesboro, Pa. 17268. The names and addresses or the persons owning or interested in said business are Norman E. Dunbar, P.O. Box 88, Zullinger, Pa. 17272 and Teddy Lee Williams, Sr., Rt. 1, Box 376, Big Spring, Md. 21722.

Stephen E. Patterson, Esquire
239 East Main Street
Waynesboro, PA 17268

2-13-87

The benefit to Ray Gibble is that his lawn is now visually enhanced by a 10 inch by 3 foot channel. There was no testimony that this channel serves any other purpose.

Ray Gibble also testified that he tampered with the stream to provide more water for his son's cattle. It is questionable whether this subsidiary reason may, in any way, justify his actions because: (1) Providing water for Darrel's cattle is not Ray's interest; (2) There is no indication that, prior to the tampering, the stream was insufficient for providing water for the cattle; (3) Darrel's cattle were upstream from the Thrush sinkholes and Ray's channel; (4) There was testimony that a well was installed on Darrel Gibble's farm to satisfy this purpose. The overwhelming evidence shows that Ray Gibble insisted on having a channel of water through his yard and that he acted to effectuate this desire.

On the other hand, the harm that the plaintiffs have suffered as a result of Ray Gibble's actions is formidable. A 25 foot by 80 foot area of Ridge's lot and a 20 foot by 100 foot area of Tosten's lot are now swampland and, as such, have been rendered useless. The plaintiffs and their families can no longer play ball or engage in any other recreational activities in these areas. That which was once the object of such pleasant respites as gardening and landscaping has been transformed into a burdensome morass, a breeding ground for black flies, Tubifex worms and the like.

The court finds that Ray Gibble's desire to watch a 10 inch by 3 foot channel of water run through his yard is unreasonable in relation to the degree of damage it has inflicted on the plaintiffs. Also, the water he discharges on plaintiffs' properties is a "great increase in quantity" over the amount that existed prior to Ray Gibble's actions. Before June, 1982, plaintiffs' lands were subject to intermittent run off; after Ray's actions, plaintiffs had either a stream or stagnant pools on their properties for months at a time. This constitutes an "unreasonable increase" in quantity.

In summation, Ray Gibble tampered with the stream, including filling sinkholes on Darrel Gibble's and Gerald Thrush's properties. Ray Gibble did this to accomodate a 10 inch by 3 foot artificial channel that he dug through his yard, knowing full well that it would flood plaintiffs' properties. These actions did, in fact, cause a great increase in the quantity of water flowing onto their properties and flooding of the back of their lots. Ray Gibble's interest in doing this is unreasonable when weighed against the

harm it has caused the plaintiffs. Under Pennsylvania law on riparian rights, he is liable for the damage he has caused.

Plaintiffs have failed to show, by a preponderance of evidence, any nexus between their injuries and any actions on the party of Darrel Gibble As such, Darrel Gibble is found to be not liable.

The plaintiffs have also suffered the following losses:

John Ridge

$ 369.50 loss of garden in 1982:

$ 30.00 - 5 bushels of potatoes at $6 a bushel
22.50 - 180 ears of sweet corn at $1.25 a dozen
60.00 - 60 heads of broccoli at $1 a head
20.00 - 20 heads of cauliflower at $1 a head
80.00 - 100 pounds of zucchini at 80¢ a pound
80.00 - 80 pounds of sweet peas at $1 a pound
35.00 - 5 bushels of red beets at $7 a bushel
10.00 - 30 pounds of onions at $1 per 3 pounds
32.00 - 4 bushels of tomatoes at $8 a bushel

$369.50

$ 810.00 value of plaintiffs' services:

10 hours - digging channel
21 hours - transplanting fruit trees
30 hours - moving stone
20 hours - building rock channel

81 hours @ $10 per hour = $810.00

$ 618.00 cost to repair

$300.00 - 30 hours labor @ $10 per hour
300.00 - 3 loads of topsoil
13.50 - 10 pounds of grass seed
4.50 - 50 pounds of fertilizer

$618.00

$1,693.00 permanent devaluation

$ 500.00 loss of enjoyment

$3,990.50 TOTAL DAMAGES TO RIDGE

LEGAL NOTICES, cont.

Trust Company, Waynesboro, Pennsylvania, Executor of the Estate of H. Louise Thomas, a/k/a Helen Louise Thomas, late of Hamilton Township, late of Washington Township, Franklin County, Pennsylvania, deceased.

WHITE: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Mary Grace white, late of Hamilton Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk Orphans' Court

2-6, 2-13, 2-20, 2-27

LEGAL NOTICE

Mercersburg Financial Corporation hereby gives notice of the organization of a Pennsylvania Business Corporation under the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania (Act of May 5, 1933, P.L. 364, as amended). The purpose or purposes for which this corporation is organized are: to engage in the business of a bank holding company; and without in any way being limited by the foregoing specifically enumerated purpose, to have unlimited power to engage in and do any lawful act concerning any or all lawful business for which corporations may be incorporated under the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania. Further notice is given that the Articles of Incorporation were filed in the Department of State on January 20, 1987.

2-20-87

Roger Tosten

$ 121.50 loss of garden 1982:

$ 60.00 - 10 bushels of potatoes at $6 a bushel
16.00 - 4 bushels of tomatoes at $4 a bushel
21.00 - 3 bushels of lima beans at $7 a bushel
3.00 - 5 pounds of onions at 60¢ a pound
14.00 - 2 bushels of red beets at $7 a bushel
7.50 - 6 heads of cauliflower at $1.25 a head

$121.50

$ 360.00 value of plaintiff's services:

10 hours - placing concrete
26 hours - spreading topsoil

36 hours @ $10 per hour = $360.00

$ 718.00

$400.00 - landscaping by B & B Landscapers
300.00 - 3 loads of topsoil @ $100 each
13.50 - 10 pounds of seed @ $13.50
4.50 - fertilizer

$718.00

$3,446.00 permanent devaluation

$ 360.00 cost to repair:

$180.00 - 18 hours labor @ $10 per hour
180.00 - equipment rental

$360.00

$ 500.00 loss of enjoyment

$5,505.50 TOTAL DAMAGES TO TOSTEN

The court believes that it would be useful to distinguish the authorities that counsel for defendant cites as being dispositive of the present controversy.

In *Chamberlin v. Ciaffoni,* 373 Pa. 430, 96 A.2d 140 (1953), the decedent's car stalled in a flooded intersection. She was returning from calling for help when she fell into a ditch and drowned.

Though her estate successfully brought suit against the township, the Superior Court found that the increase in the water's flow through a natural channel was due to the gradual development of the city. As such, the city did not perform any "unreasonable or unnecessary act" that contributed to the decedent's death.

Strauss v. Allentown, 215 Pa. 96, 63 A. 1073 (1906) also stands for the proposition that gradual urbanization is not an "unreasonable act" which would render the city liable for increased water on an individual's property.

In *Leiper v. Heywood Hall Construction Co.,* 381 Pa. 317, 113 A.2d 148 (1955), the defendant, by regrading his land for housing construction, caused some increase of water on plaintiff's land. The court held that the defendant's use of his land was reasonable and that some increase of water was not, in itself, a legal injury.

These cases reflect the court's recognition of urban development as a reasonable and proper use of land. No such policy would be furthered by allowing the wanton destruction of plaintiffs' properties solely for the sake of one person's private aesthetic satisfaction.

Pursuant to its equitable powers, the court will grant the plaintiffs the relief necessary to compensate them for the harm they have sustained, as well as return them to the position they enjoyed prior to the defendant's wrongful acts. The court has determined that plaintiffs Ridge and Tosten have suffered pecuniary losses, respectively, in the amount of $3,990.50 and $5,505.50 as a direct result of Ray Gibble's actions.

These amounts include recovery for the value of plaintiffs' labor (i.e. digging a channel, moving fruit trees, etc.) in trying to mitigate their losses. Though counsel for defendant contends that the value of these services are not recoverable, the cases he cites for this position have no bearing on the matter before us. Those cases denied compensation to family members who nursed an injured plaintiff back to health. Since these services were performed out of the "ordinary offices of affection", they were considered to be prima facie gratuitous. *See Woeckner v. Erie Electrical Motor Co.,* 182 Pa. 182, 37 A. 936 (1897). *Goodhart v. Pennsylvania R.R. Co.,* 177 Pa. 1, 35 A. 191 (1896).

Here, plaintiffs' actions to minimize the stream's damage was not performed out of familial affection. The court sees no reason why the plaintiffs should not be compensated for their labor, the value of which was assessed by expert testimony.

Defendant's counsel also asserts that, under Pennsylvania law, a property owner may not recover both remedial and permanent damages. This argument is, to say the least, disingenuous in light of *Wade v. S. J. Groves & Sons Co.,* 283 Pa. Super. 464, 424 A.2d 902 (1981). In that case, the court held that the injured landowner was entitled to damages for the reduction of his property's fair market value, in addition to damages for the cost of repairs. This was because, like the case before us, a real estate appraisal expert testified that a prospective buyer, when informed of the history of the property and of the possibility of future damages, would pay less for it.

Plaintiff Tosten petitions the court for compensation for damages to his septic system, in the event that it malfunctions or needs to be moved. There was no testimony, though, that his system has malfunctioned in any way as a result of either of defendants' actions. Also, while the sewage enforcement officer testified that he would not grant a new permit to a system situated where Tosten's is, he did not testify that Tosten's permit would be likely to be revoked. Any damages based on the possibility of future damages would be entirely speculative and unsupported by evidence on the record and, therefore, must be denied.

The court must also deny plaintiffs' claim for emotional distress. Under Pennsylvania law, a cause of action for infliction of mental distress is composed of: intentional and reckless conduct that is extreme and outrageous resulting in severe emotional distress. *Denenberg v. American Family Corp. of Columbus, Ga.,* 566 F. Supp. 1242 (E.D. Pa. 1983). Plaintiffs, here, have not proven by a preponderance of evidence that defendant's conduct was "outrageous", nor that the mental distress they suffered was "severe."

Ultimately, the plaintiffs wish to be restored to the position they enjoyed prior to the flooding. That is, they desire the return of the full use and enjoyment of the entire area of their properties. Obviously, the court cannot enjoin the stream itself from flowing.

Since Thrush was not made a party to the action, the court cannot order him to open his sinkholes. Even if the court were to make such an order, there is no guarantee that they would not mysteriously fill up again, forcing a relitigation of this issue.

There is only one way to assure the abatement of the flooding and to return the properties to their original state; Ray Gibble must fill in his channel and grade the area to the same contour that existed prior to the channel being dug. Such an order shall be entered. Furthermore, Ray Gibble shall pay to the plaintiff Ridge the amount of $3,990.50 and to plaintiff Tosten the amount of $5,505.50.

ORDER OF COURT

April 2, 1986, the court orders the defendant, Ray Gibble, to pay damages in the amount of $3,990.50 to plaintiff Ridge and damages in the amount of $5,505.50 to the plaintiff Tosten.

Further, the court orders the defendant, Ray Gibble, to fill the channel dug in his front yard in 1982 and to return the area to the contour which existed prior to 1982.

The defendants are given ninety (90) days to comply with this order.

GSELL, ET AL. V. DIEHL, ET AL. C.P. Franklin County Branch, E.D.Vol. 7, Page 392

Injunction - Attorney - Conflict of Interest

1. Whether a lawyer can fairly and adequately protect the interests of multiple clients depends on an analysis of each case.

2. Where plaintiffs claim one defendant used undue influence to induce another defendant to sign a deed, the same attorney may represent both defendants.

3. Before undertaking to represent multiple clients, an attorney must make all clients aware of the implications of common representation.