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Davenport v. Johns

ALBERT AND MARY ANNE DAVENPORT, Plaintiffs,
v. JASON AND KAREN JOHNS, Defendants
Court of Common Pleas of the 39th Judicial District,
Franklin County Branch
Civil Action - Law, No. 2003-2038

Action in trespass; Water flowing downhill onto plaintiffs' land

1. An up-slope landowner may make proper and profitable use of his land, even though this causes some change in either the quantity or quality of water flowing from his land onto his down-slope neighbor's land.

2. An up-slope landowner may not alter the natural flow of surface water on his property by concentrating it in an artificial channel and discharging it down land, even if the amount of channeled water is the same as would have flowed naturally downward in a diffused condition.

3. The down-slope landowner receives a legally-recognizable injury only where the up-slope landowner diverts the water from its natural channel, or where the water is unreasonably or unnecessarily changed in quantity or quality.

4. Defendants were not liable in trespass where the natural contour of the land is such that plaintiffs' property lies down slope from defendants' property, and defendants constructed a drainage system utilizing a pre-existing gully which has been part of the landscape for hundreds of years.

5. Defendants were not liable in trespass where their drainage system did not markedly increase water accumulation on plaintiffs' property, and where the more credible evidence showed that defendants' work in fact reduced such accumulation.

Appearances:

Donald L. Kornfield, Esq., *Counsel for Plaintiffs*

Stephen D. Kulla, Esq., *Counsel for Defendants*

OPINION

Herman, J., February 10, 2005

Introduction

Plaintiffs live on Church Hill Ro ad, Mercersburg, Pennsylvania, and defendants live on the adjoining property. Plaintiffs allege in this trespass action that defendants' installation of a drainage system in April 2002 redirected the flow of water onto plaintiffs' land, impairing their ability to use the land for farming and decreasing its value. Plaintiffs seek injunctive relief, specifically that defendants remove the drainage system and be barred from installing such a system in the future, or be ordered to modify the existing system to redirect the water away from plaintiffs' land. Alternatively, plaintiffs seek money damages. Defendants filed a counterclaim for attorney fees and expenses.[1]

A bench trial was held on September 21 and 22, 2004. The court viewed the property on the morning of September 21st in the presence of both counsel, the parties, and defendants' two expert witnesses -- surveyor R. Lee Royer and civil engineer Merle Holsinger.[2] At the close of the proceedings, the court set a briefing schedule and counsel submitted written argument. The matter is ready for decision.

Background/Undisputed Facts

These properties are located in a rural area characterized by open fields, rolling hills, small copses of trees and the Conococheague creek. Mr. Royer prepared a topographical drawing of the vicinity. (Defendants' exhibit #1.) The court also personally observed all relevant topographical and drainage features in the area.

As to topographical features, Mr. Royer's drawing shows land in the northeast which stands at 570 feet above sea level north of Church Hill Road. Southwest and downhill from the road lies defendants' property. On the southern portion of defendants' property, the land slopes toward the southwest, forming a shallow gully.[3] This natural contour of the land continues in a southwesterly direction toward a lower area near the border of the properties. Along the boundary of the two properties lies a gravel lane located on plaintiffs' property running in a (roughly) north-south direction. The downward slope of the land continues onto plaintiffs' property into an area referred to as the "horse field." Beyond that and further down the slope is a group of trees. Still further down the slope lies the Conococheague creek. The downward contour of this entire landscape has existed for hundreds of years and is clearly visible on an aerial photograph taken in 1989. (Defendants' exhibit #2.)

Mr. Royer's drawing also shows several artificial drainage features. Again beginning northeast of Church Hill Road, an 18" diameter reinforced concrete pipe was placed under the road by the Township to prevent water from up slope from running onto the road. The emerging water drains northeast of defendants' property. Further to the west and down the road, a 15" diameter corrugated metal pipe runs beneath the road and then under part of defendants' front yard and around the side of their house. The part of this pipe which runs under defendants' front and side yards was installed by defendants to reduce the wetness and mud which collected there from up slope. Defendants, who purchased the land in 1996, installed this pipe in 1999 in what the parties refer to as "Phase One." (Defendants' exhibits #4-22.)

Toward the back portion of defendants' yard, the land slopes southwest through the pre-existing gully. The 15" diameter pipe was extended and laid in the gully by defendants in April 2002. In addition to that pipe, defendants installed two underground partially perforated PVC pipes, each 4" in diameter. The two pipes head down the gully and converge above ground a few feet apart at a flat spot on defendants' land near the fenced edge of defendants' property. The 2002 work is referred to as "Phase Two." (Defendants' exhibits #24-26.)

Just over the boundary line is plaintiffs' gravel lane. Directly beneath the lane is a 12" diameter reinforced concrete pipe, often referred to by the parties as "the culvert." This pipe was in place long before defendants bought their land.[4]

The court walked most of the landscape depicted in Mr. Royer's drawing. In particular we noted the gully toward the rear of defendants' property, the point of discharge from the 4" diameter pipes, the culvert, plaintiffs' gravel lane, the horse field, and the group of trees. The gravel lane was dry and showed no signs of being undermined by water. The horse field and tree areas were ankle-deep in water and mud. We note for the record that Hurricane Ivan passed through this region during the two days preceding the view, dumping 3 1/4 inches of rain on Franklin County. We are also aware that 2003 and 2004 were years of record rainfall in this part of Pennsylvania.

Distillation of the Evidence

Plaintiffs' case

Between 1984 and 1990, plaintiff Albert Davenport lived on the land he now owns with his wife, having purchased it in 1990. He testified that his horses grazed regularly in the horse field between 1984 and the spring of 2002. The field did not contain standing water for any lengthy period of time and he was able to use it to produce two or three hay cuttings each year. Plaintiffs' exhibit #9 shows horses grazing in this relatively dry pasture area in late August/early September of 2001. Beginning in the summer of 2002, however, the horse field became increasingly wetter. Photographs from that summer show the horse field in a moist condition, with tracks from heavy equipment sunk into the high reeds which became too wet to cut. (Plaintiffs' exhibits #13 and #14). These latter two photographs date from a summer during which this general region experienced a drought.

Mr. Davenport also testified about the conditions during the winter of 2002-2003 and introduced photographs showing the mouth of one of the 4" diameter pipes lying at the bottom of the gully leading

down from defendants' property. The pipe lies in the midst of much water and muddy brush. (Plaintiffs' exhibits #10 and #11.) A similar photograph shows a substantial amount of water coming from that pipe after a snowfall. (Plaintiffs' exhibit #16.) During the winter of 2002-2003, the horse field became saturated as water wended its way down the slope toward the copse of trees. (Plaintiffs' exhibits #12 and #17.)[5] Mr. Davenport maintains that he can no longer use the horse field for grazing or hay-making because it is almost always very wet and swampy. He must use the gravel lane to move heavy equipment to avoid getting stuck in the mud and high grasses.

Dan Reeder, who grew up on the northern side of Church Hill Road, testified for plaintiffs. His family's land once encompassed both the Davenport and Johns properties and was farmed as a single field. What is now the front yard of defendant's property was sometimes wet for a few days, as was the culvert near the gravel lane and the cluster of trees further down the slope. However, he maintained that no portion of either property was ever swampy for two years in a row when his family owned the land. Mr. Reeder last lived and worked this land in 1978.

Van Shatzer, another witness for plaintiffs, is familiar with defendants' land because he is the prior owner, having bought the land in 1984 and sold it to defendants in 1996. He is also familiar with plaintiffs' land. He testified that the culvert on the border of the two properties was always there and that it drained water from defendants' land toward plaintiffs' gravel lane. However, there was never any permanent puddling or muddy swampiness in the horse field. After a heavy rain, the water would dry up; plaintiffs' land was never swamped for two years straight.

In sum, plaintiffs attempted to show that defendants by their Phase Two project acted unreasonably in ridding themselves of a water problem by passing it along to plaintiffs, who had no water problem before that work was done. Plaintiffs did not provide the court with any figures about the decrease in the property's market value, nor could Mr. Davenport quantify the affected area's hay yield compared to his total farming acreage.

Defendants' case

Defendant Jason Johns is very familiar with plaintiffs and their land, having worked for them over the years digging post holes and plowing snow. According to Mr. Johns, plaintiffs' horse field was always wet, even before Phase Two, with the exception of the summertime. He testified about 2003 and 2004 being unusually wet years in this region, with noticeable effects on all the surrounding properties, including other farmland which he himself owns.

Eddie Forrester testified for defendants. He has extensive experience in the business of installing drainage systems designed to enhance the agricultural productivity of land. He also has a working familiarity with the subject properties, including the Phase One work. Mr. Forrester helped to install the underground 4" diameter pipes in the gully during Phase Two. He testified that the horse field was already very wet even before Phase Two began because of the natural contour of the land and the pre-existing 12" diameter concrete pipe in the culvert. He testified that Phase Two did not change either the direction of the underground water flow, or the amount of the surface water discharging onto plaintiffs' land.

Merle Holsinger is a civil engineer whose expertise is in drainage and storm water management. (Report -- defendants' exhibit #34.) Although he did not see either property before Phase Two went in, after examining the site and Mr. Royer's topographical drawing, Mr. Holsinger concluded that the horse field must have always been wet to some extent because of the land's natural contour. Likewise, the tendency of water to collect at the group of trees is not a recent development because of the downward slope of the land.

It was Mr. Holsinger's opinion that defendants have actually improved the water situation on both properties by reducing the amount of surface water which reaches plaintiffs' land by means of both the 15" diameter metal pipe and the 4" diameter partially perforated PVC pipes. In particular, the 4" diameter pipes gather the underground water within the gully and carry it to the edge of defendants' property where it is discharged to a relatively shallow, flat area. Much of the water gradually infiltrates the soil and drains into the 12" diameter pipe in the culvert under the gravel lane. The result is that water which has always flowed from the lands north of Church Hill Road now flows in a less concentrated manner and is more dispersed beneath the surface by the time it reaches plaintiffs' property.

Discussion and Findings

To summarize the relevant well-established law in Pennsylvania: The owner of upper land may allow surface water which flows naturally over his land to be discharged through a natural water course onto another person's land. The up-slope owner does not have the responsibility to actively protect his down-slope neighbors. The upper landowner may make proper and profitable use of his land even though this causes **some** change in either the quantity or quality of the water flowing downward. Lucas v. Ford, 69 A.2d 114 (Pa. 1949).

An upper landowner may not alter the natural flow of surface water on his property by concentrating it in an artificial channel and discharging it down land. This is so even if the amount of water artificially channeled is the same as would have flowed naturally downward in a diffused condition. Rau v. Wilden Acres, Inc., 103 A.2d 422 (Pa. 1954). However, the lower landowner receives a legally-recognizable injury only where the upper landowner diverts the water from its natural channel, or where the water is unreasonably or unnecessarily changed in quantity or quality. Lucas, *supra*.

The credible evidence shows the following: The downward slope of this landscape has existed for hundreds of years. Defendants have not changed that basic topography. Because of the natural contour of the land, defendants' property receives water which flows from the lands up-slope and northeast of Church Hill Road, as well as from the road itself. Defendants have resolved the water problem on their land by utilizing the pre-existing natural gully to the rear of their property, placing drainage pipes beneath the soil. Those pipes allow surface water runoff to infiltrate the soil and be distributed into groundwater well below the surface or underground to a point of discharge which is located in a relatively flat and shallow area near the fence line. The water eventually drains into the culvert.

The credible evidence shows that plaintiffs' land, notably the horse field and the tree line, has always received a certain amount of water from defendants' property because of its relatively low-lying position. Although we do not dispute that the horse field and tree line have retained more water over the past two years than in prior years, plaintiffs have not proven by a preponderance of the evidence that defendants are responsible for this increase. As noted by the court and many of the witnesses, 2003 and 2004 were unusually wet years in this region. In addition, we accept as credible the testimony of Merle Holsinger, who concluded that Phase Two has in fact **reduced** the collection of surface water affecting both properties by dispersing the flow within the gully and then discharging it onto a relatively flat area near the fence line where it infiltrates the soil in a less concentrated manner.

In their post-trial brief, plaintiffs seek the following relief: (1) order defendants to either remove the drainage system (we take this to mean Phase Two) or redirect it so that it does not disperse water onto plaintiffs' property; (2) permanently enjoin defendants from artificially directing water onto plaintiffs' property; (3) as an alternative to injunctive relief, direct defendants to pay the reasonable cost of restoring plaintiffs' property to its original condition; (4) deny defendants' counterclaim for attorney fees. Even if plaintiffs had proven a causal link between Phase Two and the increased water on their property, plaintiffs have not shown they are entitled to either money damages or injunctive relief.

We have carefully examined the cases cited by plaintiffs, in addition to other cases, which address the rights of landowners in connection with natural and artificial water drainage in settings which are rural, suburban, and urban. Lucas, *supra*; Chamberlin v. Ciaffoni, 96 A.2d 140 (Pa. 1953); Rau, *supra*; Leiper v. Heywood-Hall Construction Co., 113 A.2d 148 (Pa. 1955); Pierkarski v. Club Overlook Estates, Inc., 421 A.2d 1198 (Pa.Super. 1980); Ridgeway Court, Inc. v. Landon Courts, Inc., 442 A.2d 246 (Pa.Super. 1981); LaForm v. Bethlehem Township, 499 A.2d 1373 (Pa.Super. 1985); Bower v. Hoefner, 545 A.2d 423 (Pa.Cmwlth. 1988); Shamnoski v. PG Energy, 858 A.2d 589 (Pa. 2004).

Plaintiffs focus on Rau and Bower in their post-trial brief. Those cases involved very different facts than the instant case, however. In Rau, the defendant-developer paved part of its land, dramatically altering the natural water course. Large amounts of rushing water uprooted trees and piled them, plus other debris, onto plaintiff-farmer's land, which rendered a large portion of plaintiff's land unusable. In Bower, the upland owner built a path across a natural gully and further redirected the flow by constructing a timber berm along the property line. These actions greatly restricted and concentrated the downward water flow and eroded plaintiff's land. The court ordered the defendant to remove both improvements and to restore the plaintiff's land to its original condition. The defendants in both Rau and Bower embarked on far more intensive alterations of the landscape, with equally more intensive negative impacts on their down-slope neighbors, than we see in the case at bar. Another instructive case, though not cited by plaintiffs, is Ridgeway Court. The defendant there removed a high natural knoll which had protected the lower landowner from the flow of water, thereby dramatically increasing the amount of downward flowing water and its speed. The court awarded the plaintiff repair costs. Again, the Ridgeway Court defendant severely altered the landscape and radically changed the natural water drainage profile of the area, to the measurable damage of the plaintiffs.

The case with facts closest to the instant case is Lucas v. Ford, *supra*, one of the seminal 20th

century cases on this kind of water issue. The defendant there installed an artificial drain system to prevent its property from erosion caused by water flowing from an up-land highway. The defendant utilized a pre-existing natural water course to direct the water flowing over its land down slope to its neighbors. The court found that the defendant's solution, which did not divert the natural water flow, was both reasonable and necessary for defendant's productive use of its own land.

Assuming plaintiffs had proved that defendants have unreasonably or unnecessarily changed the water regime, plaintiffs have failed to show how any additional water has in fact damaged them. Plaintiffs' argument appears to be that defendants have harmed them simply because there is now more water on plaintiffs' land than there was before defendants installed Phase Two. However, even if we agreed that there is a direct cause and effect relationship between Phase Two and any significant increased water in the horse field and tree line, plaintiffs cannot prevail. This is because they failed to quantify their damages or to present the court with a method of measuring their damages. The court has little if any information about the nature and scope of plaintiffs' farming operation. Do plaintiffs work the land full time, with their livelihood dependent upon what that land produces? What percentage of their household income comes from use of the horse field? Without such information, the court is unable to calculate plaintiffs' damages.

Finally, even if plaintiffs had proven causation and damages, injunctive relief in the nature of directing defendants to undo Phase Two would be far too severe a remedy in light of defendants' actions, which we have already concluded were reasonable and necessary in order to improve their land. Such a directive would be even more unduly severe in light of plaintiffs' failure to prove actual damages or to provide cost figures for repairing their land.

Defendants' counterclaim

Defendants filed a counterclaim for attorney fees and expenses. 42 Pa.C.S.A. §2503 allows certain parties to be awarded such fees under certain circumstances. Although defendants have not specified which part of this statutory provision they believe applies, we note the following subsections:

> ...(6) Any participant who is awarded counsel fees as a sanction against another participant for violation of any general rule which expressly prescribes the award of counsel fees as a sanction for dilatory, obdurate or vexatious conduct during the pendency of any matter;
>
> (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter;
>
> (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

Defendants presented no grounds for this court to award them counsel fees and expenses under any of these sections. Plaintiffs' action, though ultimately unsuccessful, was not filed and pursued in a dilatory, obdurate or vexatious manner, nor did plaintiffs act in bad faith at any time in connection with this litigation. Therefore we will deny defendants' counterclaim.

ORDER OF COURT

Now this 10th day of February 2005, having conducted a trial without jury on plaintiffs' trespass action for damages and/or injunctive relief, the court after reviewing the evidence and the law, finds that plaintiffs have failed to prove by a preponderance of the evidence that they are entitled to either legal or equitable relief, and therefore plaintiffs' cause of action is dismissed. The court further finds that defendants have failed to prove their counterclaim for counsel fees and expenses, and this claim is dismissed.

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[1] Plaintiffs also initially alleged a trespass due to defendants' erection of a storage building in such a manner so as to cause excess rain to fall onto plaintiffs' land. Also, plaintiffs sought removal of the building on the grounds that it allegedly violates the Peters Township Subdivision and Land Development Ordinance. We do not address the storage building for two reasons. First, plaintiff Mr. Davenport testified that the building was not the focus of his water complaints. Second, the court lacks subject matter jurisdiction to order the building's removal because plaintiffs had no standing to bring a private action to enforce the Ordinance. This latter point was discussed at trial.

[2] Plaintiffs did not present expert witnesses.

[3] A gully is "a trench worn in the earth by running water after it rains." A swale is "a low-lying or depressed and often wet stretch of land." Webster's. The parties used these terms interchangeably.

[4] A culvert is "(1) a transverse drain; (2) a conduit for a culvert; (3) a bridge over a culvert." Webster's. The parties used this word in conformity with the first two definitions.

It is unclear to the court when the 12" diameter pipe was installed and who installed it.

[5] Unfortunately, there was no testimony about when the photographs constituting plaintiffs' exhibits #15, #19 and #20 were taken, so we cannot use them in our analysis.