IN THE COURT OF APPEALS OF IOWA

No. 2-668 / 11-1634
Filed January 9, 2013

MARVIN SOBOTKA and JOSEPH WAIGAND,
Plaintiffs-Appellees/Cross-Appellants,

vs.

RAMEZ A. SALAMAH, LESLIE J. SALAMAH, and GARY KLEJCH,
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Ringgold County, Sherman W. Phipps, Judge.

Landowners challenge the sufficiency of the evidence supporting the district court's finding of liability for the obstruction of the flow of water onto the plaintiffs' land, as well as the court's award of punitive damages and injunctive relief. In a cross-appeal, the prevailing parties contend they were entitled to an additional damage award. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellants/cross-appellees.

Robert W. Reynoldson and James W. Brown of Reynoldson & VanWerden, L.L.P., Osceola, for appellees/cross-appellants.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

Landowners and their farm tenant were found to have obstructed the natural flow of water from an adjacent farm. The landowners challenge the sufficiency of the evidence supporting the district court's finding of liability as well as the court's award of punitive damages and injunctive relief. In a cross-appeal, the prevailing parties contend they were entitled to an additional damage award.

I. Background Facts and Proceedings

Plaintiff Marvin Sobotka was a long-time owner of farmland in Ringgold County. He rented his land to plaintiff Joe Waigand. Defendants Ramez and Leslie Salamah owned farmland to the south of Sobotka's property. They rented their land to defendant Gary Klejch.[1]

A fence divided Sobotka's property from the Salamahs' land to the south. The Grand River bordered both properties to the west. Sobotka drained water from his property through small ditches known as "dead furrows" that bisected the fence in several areas. The water flowed into what he contended was an east-west waterway that merged with the Grand River on the Salamah's side of the fence.

In the spring following the 2008 floods, Sobotka cleaned and expanded the dead furrows. The Salamahs responded by plowing dirt against the furrows.

Sobotka sued the Salamahs, alleging they "blocked and impeded the established drainage from plaintiffs' land, causing water to remain standing on plaintiffs' land." He raised negligence and nuisance causes of action and prayed

[1] For simplicity, the plaintiffs will be referred to as "Sobotka," and the defendants will be referred to as "the Salamahs."

for compensatory and punitive damages, as well as double damages under a statutory provision governing levee or drainage improvements. *See* Iowa Code § 468.148 (2009). The Salamahs counterclaimed for trespass.

Following a bench trial, the district court concluded the Salamahs "had a duty to not interfere with the established drainage rights of the plaintiffs," they breached that duty by destroying a waterway and blocking drainage openings, they created a "private nuisance" by obstructing Sobotka's free use of his farm, and they were liable for compensatory damages of $13,260.46 and punitive damages of $15,000 but not statutory double-damages as requested by Sobotka. The court ordered the Salamahs to abate the nuisance and enjoined them from creating any obstacle that would impede the natural flow of water from Sobotka's farm onto their property. Finally, the court dismissed the Salamahs' trespass counterclaim. The Salamahs appealed and Sobotka cross-appealed from the denial of statutory damages.

II. Salamahs' Appeal

A. The Merits

As a preliminary matter, the Salamahs contend the district court applied an incorrect standard on the negligence count. They claim the duty/breach standard the court invoked has been superseded by what they characterize as a "scope of liability" standard articulated in *Thompson v*. *Kaczinski*, 774 N.W.2d 829 (Iowa 2009). In their view, the district court erred in failing to apply this standard. We disagree.

In *Thompson*, the Iowa Supreme Court focused on the duty element of a negligence claim in a personal injury action. The court held that foreseeability of

risk was no longer a consideration in determining whether a duty was owed to another. *Thompson*, 774 N.W.2d at 835–36; *see also Pitts v*. *Farm Bureau Life Ins*. *Co*., 818 N.W.2d 91, 98 (Iowa 2012) (characterizing *Thompson* as generally rejecting "the use of foreseeability when determining, as a matter of law, that one party did not owe a duty to another").

Assuming without deciding that *Thompson* is applicable here,[2] there is no indication that the district court considered foreseeability of risk in concluding the Salamahs owed Sobotka a duty to refrain from interfering with established drainage rights. Accordingly, *Thompson* was not violated.

We turn to the district court's analysis of duty. The court examined the Salamahs' duty under common law riparian principles. *See Koenigs v*. *Mitchell Cnty*. *Bd*. *of Supervisors*, 659 N.W.2d 589, 593–94 (Iowa 2003) (discussing riparian rights); *Braverman v*. *Eicher*, 238 N.W.2d 331, 334 (Iowa 1976) ("There has been adopted and developed in this jurisdiction what may best be characterized as a modified civil law rule which recognizes a servitude of natural drainage as between adjoining lands."). These principles address the rights and obligations of dominant and servient landowners vis-à-vis the drainage of surface water. *See*, *e*.*g*., *Moody v*. *Van Wechel*, 402 N.W.2d 752, 757 (Iowa 1987) (setting forth law on surface water drainage); *Witthauer v*. *City of Council Bluffs*,

[2] In *Langwith v. American National General Insurance Co.,* 793 N.W.2d 215, 221 n.3 (Iowa 2010), *overruled on other grounds by* Iowa Code § 522B.11(7), the Iowa Supreme Court stated when duty "is based on agency principles and involves economic loss, the duty analysis adopted by this court in [*Thompson*], based on Restatement (Third) of Torts: Liability for Physical and Emotional Harm, is not dispositive." "The economic loss rule is based on '[t]he well established general rule . . . that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.'" *Pitts*, 818 N.W.2d at 98 n.4 (citation omitted). The Salamahs do not argue that the economic loss rule bars recovery. Instead, as noted, they advocate for application of the *Thompson* framework.

133 N.W.2d 71, 74–75 (Iowa 1965) (same). The salient principles are as follows. "The disposition of ordinary surface water . . . is determined by the relative elevations of adjacent tracts." *Witthauer*, 133 N.W.2d at 74. "[T]he owner of the upper or dominant estate has a legal and natural easement in the lower or servient estate for the drainage of surface waters." *Id.* at 74–75.

> In determining which of adjacent tracts is dominant, relative elevation and not general movement of floodwaters is controlling. Water from a dominant estate must be allowed to flow in its natural course onto a servient estate. The flow may not be diverted by obstructions erected or caused by either estate holder. These corresponding rights and obligations do not mean that low parts on land must retain water in ponds until it percolates into the soil. A landowner may divert water by surface drainage constructed upon his or her own land even though some different or additional water may thereby enter the servient estate.
>
> This right to employ modern drainage practices, sometimes called lip surface drainage, is not without limits. Plainly, the holder of the dominant estate clearly may not go so far as to collect and discharge water upon the servient estate in such a manner as to cut a stream bed. The servient estate is obligated to receive water from higher land, but not in such a way as to cut channels which did not previously exist.

Moody, 402 N.W.2d at 757.

The district court found and determined that "the natural flow of water in the area of the fence row is north to south" and the Salamahs had the servient estate. The Salamahs take issue with the court's finding and determination. They contend "[t]he natural flow of precipitation from Sobotka's parcel was east-to-west, not north-to-south; therefore, [their] parcel is not servient to Sobotka's." Both parties state our review is for errors of law. Under that standard, the district court's fact findings bind us if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a).

As *Moody* instructs, we begin with the relative elevations of the properties. 402 N.W.2d at 757. On this point, a licensed land surveyor testified that the elevation was higher to the north and lower to the south. In a half-mile range, he stated the elevation difference was about three feet. While the Salamahs faulted him for failing to also take east-west readings, they did not controvert his north-south readings. His uncontradicted elevation testimony amounts to substantial evidence in support of a finding that Sobotka held the dominant estate and the Salamahs held the servient estate.

It follows that surface water flowed from Sobotka's dominant northern estate to the Salamahs' servient southern estate. Several witnesses confirmed this fact.

A prior owner of the Salamah property testified the natural flow of water "went south" into a waterway on the south side of the fence dividing the Sobotka property from the Salamah property. He stated the waterway had "always been there as long as I can remember." While he also stated some of the water might travel "[w]est and south, I suppose," he later clarified that the water flowed south and, upon entering the waterway, headed "[t]o the west."

As expected, plaintiff Marvin Sobotka and his son also confirmed that the water drained south to the waterway. While the Salamahs pounce on Marvin's testimony that the water "would flow south and it would flow west," we discern no inconsistency in this assertion because, as noted, the waterway receiving the southerly flow traveled to the west.

An excavator who was familiar with both properties similarly testified that the waterway to the south of the fence line drained water flowing from Sobotka's

property. While the Salamahs and their witnesses disputed this testimony, going so far as to deny the existence of a waterway, the district court essentially found their testimony not credible, a determination that was uniquely within that court's purview. *See State v*. *Lane*, 726 N.W.2d 371, 377 (Iowa 2007).

In sum, substantial evidence supports the district court's finding that surface water flowed from Sobotka's northerly property to the Salamahs' southerly property and its determination that the Salamah property was the servient estate.

This brings us to the actions that precipitated this lawsuit. Sobotka testified that, in the spring of 2009, he used a tractor with an eighteen- to twenty-four-inch-wide scraper to clean and expand the six or seven spade-created dead furrows along the southern fence line. The Salamahs responded to this action by pushing dirt against the fence line and effectively creating a berm that blocked the flow of water into the waterway. They now argue that their conceded actions in "plugging the openings" were "not within [their] scope of liability."

The Salamahs overlook the established common law principle that "[t]he flow [of water] may not be diverted by obstructions." *Moody*, 402 N.W.2d at 757. The district court found that this is precisely what the Salamahs did. The court's essentially-undisputed finding is supported by substantial evidence.

Also supported by substantial evidence is the district court's finding that Sobotka's mechanical expansion of the furrows did not justify the Salamahs' response. The court specifically stated, "Marvin's use of mechanical equipment, rather than a hand spade, to clean the drainage system in the fence row in 2009 was necessary and justified due to the unusual accumulation of debris and

foreign material in the fence row caused by heavy flooding in 2008." Marvin testified as much, stating the furrows "were full of cornstalks."

Based on the district court's fact-findings for which we have found substantial evidentiary support, we conclude the district court did not err in holding the Salamahs liable for obstructing the natural flow of water from the Sobotka's property.[3]

B. Punitive Damage Award

As mentioned at the outset, the district court awarded $15,000 in punitive damages. The court premised its award on the nuisance cause of action and, specifically, a finding that the Salamahs failed "to alleviate the nuisance or to remedy the situation . . . in spite of Marvin's notice to the defendants and without just cause." The court characterized their actions as "a reckless disregard for the rights of the plaintiffs."

An award of punitive damages requires a showing of malice. *Braverman*, 238 N.W.2d at 339. "[T]he malice essential to a recovery of punitive damages require[s] an adequate showing of wrongful or illegal conduct committed or continued with the willful or reckless disregard of plaintiffs' rights." *Earl v*. *Clark*, 219 N.W.2d 487, 491 (Iowa 1974).

The record does not contain substantial evidence of the Salamahs' reckless disregard of Sobotka's rights. Sobotka admitted that, from the time the

[3] As noted at the outset, Sobotka also raised a nuisance claim and the district court found the blockage constituted a private nuisance. The Salamahs' did not challenge this aspect of the court's ruling in their original brief, although they mentioned it in their reply brief without citation to separate nuisance law. The Salamahs have not properly presented the nuisance issue to the court, and we conclude it is waived. *See* Iowa R. App. P. 6.903(2)(g)(3).

Salamahs purchased the southern property in 2003 until early 2009, they left the waterway alone. The Salamahs did not block the waterway until Sobotka expanded the dead furrows.[4]

Notably, Sobotka admitted that, in cleaning the furrows, he crossed the fence line onto the Salamahs' property. He also admitted that he did not provide the Salamahs with advance notice of his actions. No speculation is required to find that the Salamahs were angered by these actions.

Finally, we find significant the fact that the Salamahs' farm tenant did not ignore Sobotka's request to discuss the matter but stopped at his home for a conversation. When Sobotka asked him why the dirt was pushed into the furrows, the farm tenant simply stated, "I was plowing the field, and I just kept on plowing . . . I don't know." Malice is absent from this statement.

We recognize that Sobotka also testified that he showed the farm tenant a letter his attorneys intended to send the Salamahs concerning the damage to the waterway. However, there is no evidence the farm tenant disclosed the contents of the letter to the Salamahs or that the farm tenant or the Salamahs pushed more dirt against the furrows in response to the letter.

We are left with Sobotka's testimony that the Salamahs plowed dirt into the fence not once, but twice, in a two- to three-week interval. Without evidence that the Salamahs were apprised of Sobotka's legal objections to the first plowing, we cannot conclude they acted in reckless disregard of his rights in proceeding with the second plowing. At worst, their actions revealed a lack of

[4] Sobotka did not specifically recall when he plowed the furrows relative to the Salamahs' actions, but Mrs. Salamah's father testified he plugged the holes after Sobotka plowed the furrows.

open communication and, as one court put it, "some degree of apathy as to the rights of the other." *Braverman*, 238 N.W.2d at 339. Their actions did not evince malice. *See Moody*, 402 N.W.2d at 755 ("There is no showing of malice on the part of the Van Wechels, a requisite for a punitive damage award."); *Earl*, 219 N.W.2d at 491–92 (finding absence of malice in face of argument that the defendant did not take prompt remedial action). For that reason, we reverse the punitive damage award.

C. Injunctive Relief

Finally, the Salamahs contend injunctive relief was inappropriate. A portion of their argument is duplicative of their argument concerning the flow of water. We stand by our analysis of that issue.

The Salamahs also contend that Sobotka failed to establish "substantial injury or damages" warranting injunctive relief. *See Skow v. Goforth*, 618 N.W.2d 275, 277–78 (Iowa 2000) (setting forth the standard for being entitled to injunctive relief). The record does not support this assertion. Sobotka's farm tenant testified he was unable to harvest crops on eighteen acres of waterlogged fields. The court found this testimony credible. In light of this evidence, we conclude injunctive relief was appropriate.

III. Cross Appeal

On cross appeal, Sobotka contends the waterway between the two properties was part of an established drainage district that, when obstructed, entitled him to statutory double damages. *See* Iowa Code § 468.148.

Section 468.148 states:

> Any person who shall willfully break down or through or injure any levee or bank of a settling basin, or who shall dam up, divert, obstruct, or willfully injure any ditch, drain, or other drainage improvement authorized by law shall be liable to the person or persons owning or possessing the lands for which such improvements were constructed in double the amount of damages sustained by such owner or person in possession; and in case of a subsequent offense by the same person, the person shall be liable in treble the amount of such damages.

On this point, the district court concluded, "The plaintiffs failed to prove by a preponderance of the evidence their allegations that portions of both the Salamah farm and Marvin's farm were included in part of an active drainage district." We discern no error in this conclusion.

"Cases concerning the legal status of drainage districts have consistently noted the limited nature of their existence." *Gannon v*. *Rumbaugh*, 772 N.W.2d 258, 266 (Iowa Ct. App. 2009). Here, the county engineer testified that, while both properties were part of a drainage district established in 1928, he found no specific reference to a lateral waterway. Although Sobotka testified that a prior owner of the Salamah property was compensated for the portion of land that ultimately became the east-west waterway, the district court reasonably could have given more credence to the testimony of the county engineer. For that reason, we affirm the court's denial of statutory double damages.

IV. Disposition

We affirm the district court's liability conclusion, award of injunctive relief and compensatory damages, and its refusal to award double damages. We reverse the court's award of punitive damages. We remand for entry of judgment

in the reduced amount. Costs of the appeal shall be divided equally between the plaintiffs and defendants.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.