

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAVIER QUEREGUAN and)
AUREA QUEREGUAN,)
)
Plaintiffs,)
)
v.) C.A. No. 20298-MG
)
NEW CASTLE COUNTY, a political)
subdivision of the State of Delaware,)
)
Defendant/Third-Party)
Plaintiff,)
)
STATE OF DELAWARE,)
)
Third-Party Defendant.)

MASTER’S REPORT
(Decision After Trial)

Date Submitted: May 20, 2008
Supplemental Submissions: September 24, 2008
Draft Report: January 2, 2009
Final Report: October 8, 2009

Javier Quereguan and Joanne A. Quereguan, Pro Se, Plaintiffs.

James A. Robb, Esquire, and Julie M. Sebring, Esquire, of New Castle County Law Department, Attorneys for New Castle County.

Laura L. Gerard, Esquire, and Philip Johnson, Esquire, of Department of Justice, Attorney for State of Delaware.

GLASSCOCK, Master

This matter involves a claim of nuisance or trespass brought by the plaintiffs, Javier and Joanne Quereguan (the “Quereguans”) against New Castle County (the “County”). The Quereguans own a home and lot at 320 Maple Avenue, Wilmington. The lot is adjacent to a ball field (the “ball field”) which was a playing field for the former Absalom Jones School (“Absalom Jones”). The Absalom Jones property was owned by Red Clay Consolidated School District (“Red Clay”) until 2002; it is now owned by third-party defendant the State of Delaware (the “State”). Between 1975 and 2002 the Absalom Jones property was leased by the County.¹ The Quereguans contend that, during the time of the lease, water drained from the ball field onto the Quereguan property in a way that renders the County liable for resulting damages.

FACTS

The Quereguan lot is adjacent to the southwest corner of the Absalom Jones property. The former Absalom Jones School building (now the Absalom Jones Community Center) is at the northern end of that property; the ball field occupies the southern portion of the property. Its original topography, the city block in which both the Absalom Jones property and the Quereguan lot are located drained from the north and northeast portions towards the south and southwestern portions of the block. Therefore,

¹In written closing argument, while conceding that this Court has stated in prior opinions that the County leased the property until 2002, the County argues that because the lease itself is not in evidence, the plaintiffs have failed to show that the County in fact leased the property. I find this argument unpersuasive, but I need not address it given the nature of my decision here; I assume for purposes of this report that the County leased the Absalom Jones property prior to 2002.

in its original topography, the Absalom Jones School building site sat atop a low hill at the bottom of which was the lot which became the Quereguan property. At some point prior to 1975, the southern part of the Absalom Jones property was filled to make a level playing field at approximately the elevation of the ground at the school building itself. To keep this fill in place, a retaining wall was built around the southwestern, southern and southeastern portions of the Absalom Jones property. At the southwest corner of the property, adjacent the Quereguan property, the wall and the field behind it are approximately ten feet higher than the Quereguan lot. An area between the retaining wall and the street on all three sides of the ball field² is divided into small housing lots, one of which is the Quereguan property.

The Quereguan lot has a number of qualities which tend to create drainage problems. The lot is small, and a large portion of it is occupied with impervious surfaces including the house, a driveway, swimming pool, shed, etc. The soil has a high clay content, meaning that water percolates down through it only slowly. Moreover, the Quereguan lot is virtually flat, having a slope toward the street of only one degree. In some areas of the lot, the slope away from the foundation of the house is actually negative, causing surface water to run towards the foundation. Because the ground along Maple Avenue slopes from north to south, surface water from the lots of the Quereguans' neighbors to the north drain onto the Quereguan property. A fence between the

²The block is bounded by Maple Avenue to the west, Walnut Street to the south, and Cedar Avenue to the east.

Quereguan lot and the property to the south, combined with a raised garden plot on the latter lot, tend to keep surface water from running south from the Quereguan lot. For all these reasons, the Quereguan lot tends to retain standing surface water during rainy weather, surface water that drains or percolates away very slowly.

Surface water falling onto the ball field is directed to the east and to the west by a slight ridge in the center of the field. On the western side, toward the Quereguan lot, surface run-off is gathered by a swale which directs it to the west almost to the retaining wall, then to the north and into a drainage system from which it discharges into the gutters of Maple Avenue. Water that soaks into the soil of the ball field percolates down and out until it passes under or meets the retaining wall. The retaining wall, which is made of poured concrete, acts as a barrier to water percolating laterally through the soil. Some of this water finds its way through expansion joints and cracks, and weeps (and during wetter times, jets) onto the Quereguan property. It is the Quereguans' contention that the construction of the filled ball field and retaining wall is such that it causes an excess distribution of water onto their property from the Absalom Jones property, and that this

excess water has caused them property damage.³ The Qeureguans seek money damages and injunctive relief.⁴

In 2003, the State obtained title to the Absalom Jones property from Red Clay. Since that time, the County has continued to lease portions of the interior of the former Absalom Jones School building, but the State controls the ball field and retaining wall. The State was originally a party to this action. In a decision issued on November 24, 2004, this Court dismissed the claims against the State based on sovereign immunity. The County has brought a third-party claim against the State for indemnification for any liability arising from defects in the retaining wall, pursuant to its lease.

DISCUSSION

I will not recite here the procedural history of this matter, which unfortunately has been extensive. The matter was referred to me for consideration of the limited issue of liability. Should I find that the County is liable to the Quereguans because of an actionable discharge of water which has resulted in some quantum of damage, the issue of damages would remain for the Vice Chancellor.

³ The amended complaint in this matter contained an allegation that the plaintiffs and an additional plaintiff, Aurea Quereguan, had suffered physical injuries as well as property damage as a result of the discharge. In an earlier report, I recommended that this personal injury claim be dismissed: the Quereguans' took exception to that recommendation and the matter is under consideration by the Court.

⁴The Queregons allege that the excess quantity of surface water which their lot receives has caused them to lose use of their yard during wet periods and has caused mold growth on and structural damage to their house.

The law of this case is that the “reasonable use” doctrine of drainage obtains, that is, that a defendant is not liable for damage caused by the natural flow of water from his property onto the property of a neighbor, and that any artificial use of the defendant’s property that causes an increased flow of water onto the property of a neighbor makes the defendant liable only where the artificial use is unreasonable in light of the circumstances. Quereguan v. New Castle County, Del. Ch., No. 20298, Parsons, V.C. (September 28, 2004)(Mem. Op.). Because the Quereguans have failed to demonstrate either that the artificial condition—placement of fill and a retaining wall on the ball field area of the Absalom Jones property—has resulted in an increased flow onto the Quereguan lot, or that the artificial use is unreasonable, the County is entitled to a judgment, and the third-party suit against the State is moot.

The reasonable use doctrine of drainage is elucidated in detail in Weldin Farms, Inc. v. Glassman, Del. Supr., 414 A.2d 500 (1980). An owner of land may permit the natural flow of water onto his neighbor of lower elevation without liability. Where a landowner creates an artificial condition on his property which increases the flow onto his neighbor’s land, beyond the natural flow, he is liable only where, considering the circumstances of the case, the artificial use is unreasonable. Weldin, 414 A.2d at 502, 505. In other words, the owner of property does not have an absolute property right to redress for artificially-enhanced drainage from his neighbor’s property on to his own, as traditional notions of trespass might imply. The court must employ a balancing test

considering the nature of the artificial use by the defendant and the harm caused to the plaintiff before finding that an actionable wrong has occurred. *Id.* See Staats v. Hubbard, Del. Ch., 63 A. 2d 856 (1949) (holding that doctrine of “reasonable user” applies to change in flow of surface water caused through artificial increase in elevation of land).

The artificial condition created on the Absalom Jones property involves the maintenance of a filled area at the southern end of the property which creates a level playing field adjacent to the school building. This ball field is surrounded by a poured-concrete retaining wall which varies in height according to the difference in elevation between the natural landscape at any particular spot below the wall and the ground level of the school buildings themselves. The lowest natural portion of the block in question occurs in the general area occupied by the Quereguan lot;⁵ the Quereguan property is approximately ten feet lower than the natural elevation of the school building. Therefore the fill behind the retaining wall is approximately ten feet high at the back of the Quereguan lot.

The plaintiffs burden of proof in this matter is made difficult because the artificial condition about which they complain was created before the earliest evidence of record in this case, from 1975. The Quereguans have experienced the drainage problems about which they complain since they purchased the property a decade ago. The Quereguans survived a summary judgment motion in this matter by providing the report of their

⁵The exception is the extreme southeast corner of the block, see n. 6

expert, Mr. Robert Seeberger, a professional engineer. In that report, Mr. Seeberger opined that, as water fell upon the ball field and percolated down into its soil, its lateral flow was interrupted by the cement retaining wall, which acted as a dam. The wall itself was built without weep holes to allow discharge of water. Hydrostatic pressure caused the water contained by the retaining wall to weep or jet through expansion joints and cracks in the wall and onto the Quereguan property. This phenomenon is amply demonstrated by videos and photographs submitted into evidence which show water running out of cracks in the retaining wall onto the Quereguan property. I recommended the denial of summary judgment against the plaintiffs based on the theory that the cracks and joints in the wall adjacent to the Quereguan property allowed an unnatural amount of the discharge from the ball field to be concentrated onto the Quereguan property, thus increasing the discharge beyond that which would be natural absent the construction of the raised field and wall. Assuming that such an increased flow were shown at trial, and assuming the artificial use and resulting increased discharge were shown to be unreasonable, the defendant might be liable for resulting damage.

At trial, however, this theory was not demonstrated by the testimony of the expert witnesses. Seeberger testified that, in his opinion, the Quereguan property was receiving a larger volume of water than it would naturally, absent construction of the ball field, resulting in an increase in the drainage problems otherwise existing on the Quereguan lot. He based this opinion on the fact that the ball field is approximately ten times the size of

the Quereguan lot, that one half to two-thirds of the ball field drained to the west, and that water soaking into this portion of the ball field was thus “funneled” to cracks and onto the Quereguan lot. However, Seeberger testified that he had no knowledge of the topography of the ball field area *before* it was filled and bounded by the retaining wall. Seeberger did not testify concerning the amount of water that drained onto other lots adjacent to the retaining wall, although he acknowledged that the wall had cracks opening on to properties other than the Quereguans’. Indeed, the only witness who testified with respect to drainage onto other properties was Dwayne Williams. Mr. Williams owns a property between the southern boundary of the retaining wall and Walnut Street, to the east of the Quereguan property. Mr. Williams testified that water also drains through cracks in the retaining wall and contributes to drainage problems on his property. There is simply nothing in the record to indicate that the discharge of water from the Absalom Jones property is disproportionally directed onto the Quereguan property, as opposed to flowing generally onto the properties down hill from the Absalom Jones School, other than the assertion of Mr. Seeberger which is unpersuasive on this point for the reasons above. Since Seeberger was unfamiliar with the natural topography of the area or the amount of discharge on other properties adjacent to the retaining wall, his testimony on this issue must be afforded little weight.

The experts for the State and the County, on the other hand, were able to testify persuasively that the discharge from the Absalom Jones property has not increased due to

the placement of fill and the retaining wall, and that it may in fact have decreased. The County's expert, Dr. Lucjan Zlotnick, a professional engineer, testified that the natural topography of the area was such that the Absalom Jones property would have originally drained from the north and northeast to the south and southwest. Even had the field never been filled, the natural flow would have been onto the Quereguan property and adjacent lots, because they are downhill from the Absalom Jones property. He opined that construction of the ball field did not increase the flow of water onto the Quereguan lot. In fact, the artificial higher elevation of the ball field would tend to redistribute water into directions other than south and southwest, and may have reduced the flow onto the Quereguan property. Zlotnick also testified that if the cracks in the wall did not exist, water now running through the cracks would percolate down the ball field and enter the property of the Quereguans and their neighbors beneath the wall, in any event.

The testimony of the State's expert, Terrance Haskins, also a professional engineer, was consistent with that of Dr. Zlotnick. Mr. Haskins' firm performed a survey of the elevation of the Absalom Jones property and the surrounding properties. That block in its natural state drained from the northeast to the southwest, toward the Quereguan lot.⁶ He based his opinion on the natural slope of the unfilled portion of the Absalom Jones property, and on the elevations of Maple and Cedar Avenues and Walnut Street, construction of which antedated the filling of the ball field. This natural drainage

⁶ Haskins testified that the southeastern corner of the block drops off at an increased slope, compared to the rest of the block; consequently, it drains to the southeast.

towards the Quereguan lot would result in a surface flow onto that property, absent the construction of the ball field and wall, greater than that which currently flows through the cracks, according to Haskins. This is because much of the water falling into the ball field is directed underground, rather than overland, by the retaining wall itself.

The retaining wall, which extends from above ground level on the ball field side down to some distance below the lot grade on the Quereguan side, although not intended to act as a dam, in effect prevents the natural flow of water across the Absalom Jones property onto the Quereguan lot. Once the ground becomes saturated with water, instead of additional water running overland onto the Quereguan property, it accumulates behind the retaining wall. Some of this water drains below the retaining wall as ground water and other portions weep or jet through the wall onto the lots of adjoining property owners, including the Quereguans and Mr. Williams. This is the water so graphically illustrated in the Quereguan photographs and videos. There is nothing in the record, other than the unpersuasive opinion of Mr. Seeberger, which indicates that *more* water discharges onto the Quereguan lot from the Absalom Jones property than would be the case if the natural topography remained, although the leaking from the wall may be more dramatic than surface run-off would appear.⁷ In fact, the testimony of Dr. Zlotnick and Mr. Haskins

⁷There has been no allegation in this case that the *manner* of discharge of water onto the plaintiffs' lot—weeping or running from cracks above grade, rather than flowing overland at grade level as would be the case if the natural topography remained—is *itself* an artificial condition causing damage. The allegations of the plaintiffs here involved only the quantum of water discharged, the supposed increase in which has caused water to pond on the property. I note that in a proper case, an unreasonable change in the manner of discharge, resulting in damage, may

indicates that the surface flow has more likely been reduced than increased by the artificial condition. I note that the ball field is slightly crowned and drains to the east as well as the south and west, while the natural drainage was to the south and west. In addition, some surface water is carried to the north and discharged into the Maple Avenue gutter by the maintenance of the swale upon the property. The swale was installed by the County to address Mr. Quereguan's complaints. There is no evidence that the construction of the swale has increased the flow of water onto the Quereguan lot. To the contrary, the swale creates a discharge of water which is unnatural and which *avoids* the Quereguan property. Because the Quereguans had the burden of proving that the artificial condition—here, the filled ball field bounded by the retaining wall—increased the flow of water onto the Quereguan property in an unreasonable way, and because the Quereguans have failed to meet that burden, the County is entitled to a judgment.⁸

CONCLUSION

It is undisputed that the Quereguan lot has a drainage problem. It receives water from its neighbors to the north and by discharges from the Absalom Jones property to the

support liability even absent a change in the total volume of discharge. *See Chorman v. Queen Anne's R. Co.*, Del. Super., 54 A. 687 (1901).

⁸ At trial, Mr. Quereguan sought to elicit testimony in support of an alternate theory: that the construction of the Absalom Jones School building and parking lot caused an unnatural discharge of water *onto* the ball field, which resulted in an increase in the ultimate discharge of water onto his property. This theory was not articulated in the pre-trial order and is thus not properly considered here. More fundamentally, there was no expert opinion which tended to support that the discharge of water from the improved portion of the Absalom Jones property was unreasonable or that it ultimately increased the discharge of water onto the Quereguan lot.

east. Water runs from cracks in the retaining wall in wet weather. The Quereguan lot itself is poorly drained and retains ponded water. Mr. Quereguan, acting pro se, put an enormous amount of energy into the prosecution of this matter. There is no doubt that he sincerely believes that his property is being damaged by the discharge from the Absalom Jones property. It was his burden, however, to demonstrate not merely that that discharge exists, but that it is was increased by an artificial condition on the Absalom Jones property, and that the maintenance of that artificial condition is unreasonable.⁹ The Quereguans were unable to demonstrate that this proposition was, in fact, so. Absent such a showing they are not entitled to relief. Therefore, judgment should be entered in favor of the County, and the counter-claim against the State should be dismissed as moot.

/s/ Sam Glasscock, III
Master in Chancery

⁹ Even had Mr. Quereguan been able to demonstrate an unreasonable and unnatural discharge of water onto his property, causing damage, there would remain serious legal issues with his case, including whether Red Clay, the leaseholder, should have liability for an improvement which existed prior to its assuming the lease, and to what extent the injunctive relief sought could be granted given that the property is now owned by an entity that is immune under principles of sovereign immunity.