IN THE COURT OF APPEALS OF IOWA

No. 3-114 / 12-1019
Filed April 10, 2013

JEFF W. SOJKA and
RHONDA V. SOJKA,
Plaintiffs-Appellants,

vs.

VICKI BRECK and
WILLIAM BRECK,
Defendants-Appellees.

Appeal from the Iowa District Court for Benton County, Robert E. Sosalla, Judge.

Jeff and Rhonda Sojka appeal the dismissal of their nuisance claim. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

James W. Affeldt and Nicholas J. Kilburg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellees.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Jeff and Rhonda Sojka filed a nuisance action against their neighbors, Vicki and William Breck, claiming the Brecks' home reconstruction altered the drainage between their properties. The district court dismissed their action, finding any water damage to the Sojkas' property would have occurred regardless of the Brecks' alterations. The Sojkas argue the court erred by disregarding expert testimony and additional evidence showing the Brecks' construction caused the Sojkas' property to flood.

In our de novo review, we agree with the district court's finding that, aside from one unusually hard rainfall, water accumulation did not harm the Sojkas' property. The court was entitled to reject any portion of the expert's opinion—especially if it was based on incomplete information. Because the Brecks' building did not cause the Sojkas' claimed damages, the Brecks did not unreasonably interfere with the Sojkas' reasonable use and enjoyment of their property. Accordingly, we affirm.

I. Background Facts and Proceedings

In 1990, Jeff and Rhonda Sojka purchased Lots 5 and 6 of the Yerkes addition in Vinton, Iowa. Both lots abut Riverside Drive, a road that follows the southwestern bank of the Cedar River. For the next decade, the Sojkas lived in a home that straddled the two lots and sat partially in the Cedar River 100-year flood plain. In 2000, the couple demolished the home, elevated the foundation by five feet to bring it above the flood plain, and built a new house.

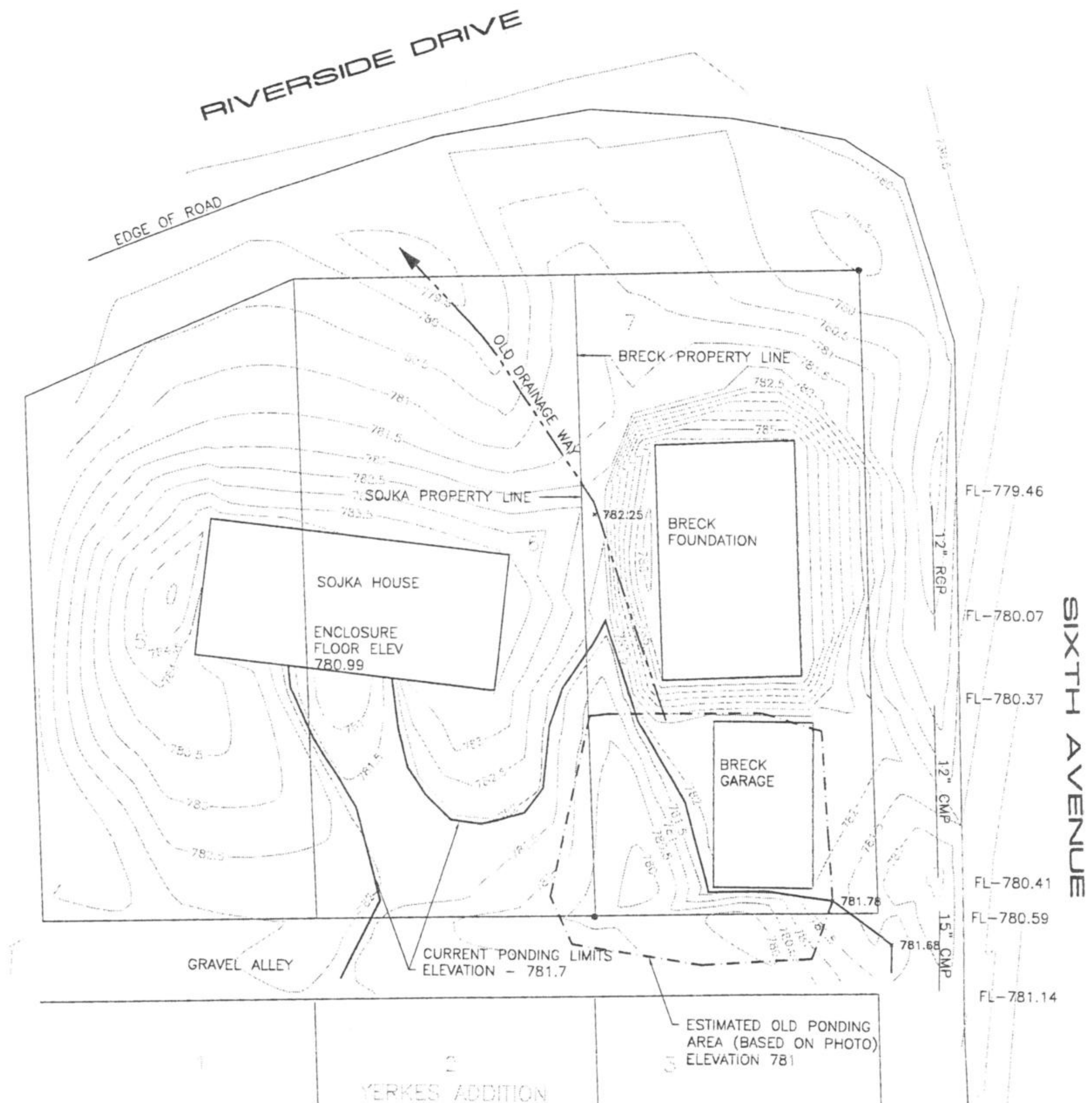
In 2006, Vicki Breck bought Lot 7, located directly east of the Sojkas, and move into the home on the property. Her son, William Breck, who was attending college at the time, used part of the house as storage and visited on weekends.

In July 2008 the Cedar River swelled beyond the 100-year flood plain and reached both homes, causing damage so substantial that neither could be salvaged. The Sojkas were the first to rebuild, again elevating the foundation by nearly five feet and altering the grading in their yard. They equipped their new home with flood vents along the foundation and a crawl space beneath to allow future flood water to enter without causing harm. The crawl space, which in some areas reaches a nearly nine-foot clearance, opens to an alleyway behind the Sojkas' house.

The aftermath of the 2008 flood eroded what was once a cordial relationship between neighbors. Vicki discussed selling Lot 7 to the Sojkas, but opted against the sale because she believed the Sojkas' offering price was too low. When the city declined to purchase Vicki's lot, the Brecks decided to demolish and rebuild the home. The Sojkas did not take the news well, and advised the Brecks that they would sue if the Brecks rebuilt.

Despite the Sojkas' threat, the Brecks launched their building plans in fall 2009. The Brecks proposed constructing a new home, one foot higher than the previous house, with a detached garage in back. In October 2009, the city issued the Brecks a building permit, and they demolished the existing house. The Brecks contracted with workers to compact sand, dirt, and rock to bring the basement filling to grade.

The Brecks' contractor poured twelve-foot foundational walls and placed dirt fill against them to prevent shifting until workers constructed the house atop the foundation. The contractor repeated the process with the garage foundation and walls. The Brecks planned to remove the dirt after building was completed. The following topographical image, prepared by the Sojkas' expert, depicts the location of the Sojkas' current home and Vicki's construction project.



The Sojkas remained displeased throughout construction. At a Vinton city council meeting on February 25, 2010, they attempted to stop the Brecks' progress by voicing concerns the home was not being built safely. The council responded that because the Brecks' project had passed city scrutiny, any cause of action would be between the neighbors.

On March 17, 2010, the Sojkas filed suit against the Brecks, alleging the new home created an unlawful alteration of the natural flow of water constituting a nuisance.[1] The Brecks answered with affirmative defenses on April 9, 2010.

In the early evening of June 18, 2010, Vinton experienced an exceptionally heavy downpour. The record showed 1.2 inches of rain fell in a brief time span, including .44 inches in the last fifteen minutes of the storm. The town incurred widespread street and flash flooding, with water deep enough to strand two vehicles by stalling their engines. The Sojkas' house was not immune to the flooding. The Sojkas estimated between six and eight inches of water entered their crawl space, ravaging property stored there. They claimed damages exceeding $140,000, including $100,000 in mental and physical anguish. In response to the storm, they called the police and requested members of the city council—including the mayor—be arrested for allowing the Brecks to continue their construction project.

On August 5, 2010, the Brecks filed a counterclaim, alleging the Sojkas' most recent home reconstruction changed the water's natural flow onto Vicki's

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[1] The Sojkas also complained the Brecks are building a "spite fence" on their property. Because that claim is not the subject of this appeal, we need not further address the fence.

property constituting a nuisance and asserting the Sojkas breached their duty to prevent the runoff onto her property.

In the fall of 2010, city workers retrenched and repaired the ditches on Sixth Avenue between Second Street and Riverside Drive. The six-person crew cleaned out culverts and deepened the trench to help the neighborhood drainage. Meanwhile, in September 2010, the Sojkas retained civil engineer Steven Brain to survey the elevation of Lots 5, 6, and 7. In addition to testifying at trial, Brain created Exhibit 17, the topographical image of the three lots—inserted above.

The district court held a bench trial from July 5 to July 7, 2011. The Sojkas offered numerous photographs and video-recordings to show the flow of rainwater on the properties. The day after the trial, at the request of the Brecks, the judge traveled to the scene to view the properties.[2] On March 1, 2012, the court entered its findings of fact, conclusions of law, and ruling, dismissing the Sojkas' claims. The court also dismissed the Brecks' counterclaims. After the court denied the Sojkas' post-trial motions on May 2, 2012, they appealed.

II. Scope and Standard of Review

Because this nuisance action was tried in equity, our review is de novo. *See Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 267 (Iowa 2000); *see also* Iowa R. App. P. 6.907 ("Review in equity cases shall be de novo."). We are not bound by the district court's fact-findings, but we give them

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[2] The Sojkas did not resist the "Motion to View Premises."

weight, especially in deciding witness credibility. *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 60 (Iowa 2008).

III. Analysis

The Iowa legislature defined nuisance and provided remedies:

> Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of the life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance.

Iowa Code § 657.1(1) (2009); *see also* Iowa Code § 657.2 (listing specific conditions deemed to be nuisances). Because our nuisance statutes are skeletal, we rely on common law to put flesh on the bones. *Miller v. Rohling*, 720 N.W.2d 562, 567 (Iowa 2006).

We recognize two forms: a private nuisance is "'an actionable interference with a person's interest in the private use and enjoyment of the person's land,'" whereas a public nuisance interferes with "the rights of the community at large.'" *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 660 (Iowa 2002) (quoting *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996) definition of private nuisance and quoting *Guzman v. Des Moines Hotel Partners, L.P.*, 489 N.W.2d 7, 10 (Iowa 1992) definition of public nuisance).

The Sojkas' suit is an action for private nuisance. At its heart is the concept that property owners must not unreasonably disturb or interfere with their neighbor's reasonable enjoyment and use of their property. *Weinhold*, 555 N.W.2d at 459. Altering water flow from one parcel of land to another can prompt

a cause of action based on private nuisance theory. The action may seek relief by injunction against the wrongful obstruction of the water's natural flow. *Blink v. McNabb*, 287 N.W.2d 596, 601 (Iowa 1980); *see also Kriener v. Turkey Valley Cmty. Sch. Dist.*, 212 N.W.2d 526, 535 (Iowa 1973) (holding injunctive relief may be equitable regardless of nuisance intermittence).

The Sojkas contend surface water drainage from Vicki's land has interfered with their enjoyment of their property. Our court has described surface waters as:

> waters on the surface of the ground of a casual or vagrant character, following no definite course, of a more or less temporary existence that spread at random over the ground and are lost to percolation in the soil and by evaporation, and are distinguished from water of creeks, streams, rivers, ponds, and lakes having a substantial existence and a substantially definite location.

Gannon v. Rumbaugh, 772 N.W.2d 258, 263 (Iowa Ct. App. 2009). The common law regards surface water as "a common enemy, which every proprietor must fight for himself as long as it takes its natural course." *Koenigs v. Mitchell Cnty. Bd. of Supervisors*, 659 N.W.2d 589, 595 (Iowa 2003).

The rights and obligations of landowners fighting surface waters depend on whether they own the dominant or servient estate. The relative elevation of two parcels controls which is the dominant and servient estate, not the general movement of flood waters. *Moody v. Van Wechel*, 402 N.W.2d 752, 757 (Iowa 1987). The dominant estate owner has a legal and natural easement in the servient estate for surface water drainage. *Thome v. Retterath*, 433 N.W.2d 51, 53 (Iowa Ct. App. 1988). "Water from a dominant estate must be allowed to flow in its natural course onto a servient estate." *Gannon*, 772 N.W.2d at 263.

The dominant owner holds a right to drain water into a natural watercourse, even if in doing so the water cast upon the servient parcel is somewhat increased, so long as it does not damage the servient landowner. *Maisel v. Gelhaus*, 416 N.W.2d 81, 85 (Iowa Ct. App. 1987). The servient landowner may not interrupt or prevent the water's natural flow to the detriment of the dominant landowner. *Sloan v. Wallbaum*, 447 N.W.2d 148, 149 (Iowa Ct. App. 2003).

To prevail in this action, the Sojkas must prove, by a preponderance of the evidence, that they own the dominant estate, and Vicki owns the servient estate. *See Maisel*, 416 N.W.2d at 84. They also must show Vicki's alteration of a natural water course caused the damage they allege. *See Blink v. McNabb*, 287 N.W.2d 596, 602 (Iowa 1980). If they prevail, the proper relief is an "injunction against the wrongful obstruction of the natural flow of waters." *See id.* at 601.

The district court believed it was unclear which property was the dominant estate before the Sojkas twice elevated their foundation. The city's flood assessment map displayed most of the Sojkas' property within the 100-year flood plain of the Cedar River, indicating that it was lower lying than the Brecks' property which largely sat within the 500-year flood plain. Nevertheless, the court accepted evidence of water pooling as proof the southwest part of Vicki's lot had a lower elevation than the Sojkas' property. Because the relevant area of the Sojkas' property had a higher elevation, for purposes of the suit, the court concluded they showed by a preponderance of the evidence that they own the

dominant estate. We agree with the district court's reasoning and conclusion regarding the dominant estate.

The district court also found the Brecks' construction measures temporarily elevated their lot at the existing surface water route—referred to at trial as the "old drainage way"—which affected the natural drainage of both properties. Despite this finding, the court determined the Sojkas failed to show the construction obstructed their free use of their property in a manner that unreasonably interfered with the comfortable enjoyment of their life or property.

On appeal, the Sojkas argue the district court's determination is at odds with our supreme court's holdings in *Moody v. Van Wechel*, 402 N.W.2d 752, 757 (Iowa 1987) and *Jenkins v. Pedersen*, 212 N.W.2d 415, 419 (Iowa 1973). The Sojkas read those cases as labeling any change in drainage as unreasonable behavior. We do not share their absolutist interpretation of those precedents.

Like the instant case, *Moody* involved a Benton County surface water dispute. 402 N.W.2d at 753. In that case, the trial court devised a drainage plan to resolve a disagreement between the owners of adjoining farm land. *Id.* at 756–57. *Moody* is silent as to what alterations to the lay of the land by the farmers could be considered unreasonable. It merely holds, "[t]he flow may not be diverted by obstructions erected or caused by either estate holder," without considering what diversion is reasonable. *Id.* at 757.

In *Jenkins*, the trial court ordered land owners to remove a dike which allegedly diverted surface water onto the plaintiffs' land; the supreme reversed, finding the grant of injunctive relief was an abuse of discretion in light of the jury's

determination that the dike did not cause the damages to the plaintiffs' land. 212 N.W.2d at 420. The supreme court recognized "where surface water has affixed in certain course, its flow cannot be interrupted to the injury of an adjoining proprietor . . . ." *Id.* at 419. But *Jenkins* authorized enjoining the obstruction only "when necessary to prevent irreparable harm." *Id.*

Moody and *Jenkins* do not stand for the proposition that any interruption in surface water's natural flow is unreasonable and actionable. Instead, the altered flow of water from a servient estate must harm the dominant estate. *See Ditch v. Hess*, 212 N.W.2d 442, 448 (Iowa 1973) ("the natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant proprietor"). Because a servient landowner could divert surface water without disrupting the adjoining property, the Sojkas had the burden to show the Brecks' change in the grading of their property during construction actually caused the damage alleged.

The Sojkas contend they satisfied that burden by calling civil engineer Steven Brain. They argue the district court erred by overlooking his expert testimony. We find that argument unconvincing. Expert opinion testimony, even if uncontroverted, does not bind the fact finder. *Tiemeyer v. McIntosh*, 176 N.W.2d 819, 823 (Iowa 1970). Here, the district court considered Brain's view, detailing his testimony in its findings of fact, but discounted its potency because his opinion rested on incomplete or unreliable information. For instance, Brain mapped the previous ponding area based only on the Sojkas' description and a

single photograph, and did not specify whether the image depicted the property before or after the Sojkas' 2008 grading and reconstruction.

The district court did not find the information supplied to the expert by the Sojkas to be wholly reliable; it recognized the couple's tendency to exaggerate:

> The Sojkas profess how the videos demonstrate water from the rains coming onto their lots, interfering with their free use of the property. I have reviewed the videos again. With one exception I disagree with the Sojkas' interpretation of what the videos show. Rather than showing water freely encroaching onto the Sojkas' property, the videos show the rain water staying almost entirely on the Brecks' property. Any encroachment onto the Sojkas' property appears to be minimal at best and certainly not to the extent that it would affect their free use of the property.

The district court found the June 2010 storm to be the exception, where the water affected the Sojkas' property. But the court found the flooding would have occurred regardless of the Brecks' project:

> The evidence showed that this was a torrential storm. The rainfall was intense enough to flood streets and basements throughout Vinton. In other words, the Sojkas were not the only ones adversely affected by the storm. . . . It is more reasonable to conclude from the evidence that, given the severity of the storm, the Sojkas would have experienced the same result regardless of anything the Brecks had done.

After an independent review of the record, and our own viewing of the video footage, we concur with the district court's assessment. Because the June 2010 flooding could not be attributed to the Brecks' alteration, their construction project did not unreasonably interfere with or disturb the Sojkas' reasonable use and enjoyment of their own property. *See Blink*, 287 N.W.2d at 602. Because the Brecks did not cause the basement to flood, the court properly denied the Sojkas' claim for damages arising from the flooding.

We also believe the district court's conclusions are strengthened by the judge's visit to the Vinton properties. *See Hampton v. Burrell*, 17 N.W.2d 110, 117 (Iowa 1945) (holding trial court has inherent right to view the scene to enable the judge to better apply the testimony, but trial court is not to consider its own observations as evidence). That firsthand perspective allowed the court more insight when comparing the witnesses' descriptions of various conditions and bolstered his credibility findings.[3]

The Sojkas ask us to accord injunctive relief by requiring Vicki to either demolish the partially built structures or sell her property to them. Because the Sojkas did not establish the construction caused harm to their property, they are not entitled to the requested remedies. Injunctive relief is an extraordinary remedy that we will grant only with caution and only when required to circumvent irreparable harm. *Skow v. Goforth*, 618 N.W.2d 275, 277–78 (Iowa 2000). Due to the gravity of the remedy, we carefully weigh the relative hardships suffered by the party to be enjoined. *Matter of Luloff*, 569 N.W.2d 118, 123 (Iowa 1997).

Civil engineer Brain acknowledged once the Brecks remove the temporary grading, the drainage would return to its previous course. William testified he intended to remove the dirt and install a tiling system in the yard. And the city's ditch repair may improve the neighborhood's drainage as well. The minor and temporary diversion of water—insufficient to constitute a nuisance—does not justify the injunctive relief requested.

AFFIRMED.

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[3] We disregard any references where the district court appears to rely on its own observations as independent evidence.