

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS R. WIRTH and JESSIE F. WIRTH,

Plaintiffs-Counter-Defendants-
Appellees,

v

FRANK D. PATRELLO and SUE PATRELLO,

Defendants-Counter-Plaintiffs-
Appellants.

UNPUBLISHED

November 19, 1996

Nos. 185666; 188227

LC No. 93-468018-CZ

Before: Bandstra, P.J., and Neff and M. E. Dodge,* JJ.

PER CURIAM.

In this consolidated action, defendants appeal as of right from the trial court's April 1995 order requiring them to remove a dam they built on their property. Defendants also appeal the propriety of the August 1995 order requiring them to remove the dam on or before July 21, 1995, and ordering defendants to pay \$450 in costs to plaintiffs. We affirm.

I

Plaintiffs and defendants own abutting parcels of land in Rose Township. Plaintiffs' property is the dominant drainage estate. Surface and sub-surface waters from plaintiffs' land naturally flow into a depression located on defendants' property, the servient drainage estate.

Beginning in April 1991, defendants constructed a dam, or berm, on their property which plaintiffs alleged blocked the natural drainage course between their properties, thus causing flooding on plaintiffs' land. Defendants countered that plaintiffs' prior construction activities had caused a lowering of the "natural crest" between the properties that had previously prevented large quantities of water from escaping plaintiffs' land, thus causing increased flooding of defendants' parcel.

* Circuit judge, sitting on the Court of Appeals by assignment.

After a bench trial, the trial court found that plaintiffs did nothing to alter the natural drainage course between the parties' land. The trial court also found that plaintiffs' construction activities did not lower the natural crest between the properties. In relation to this finding, the trial court stated that defendants failed to present accurate topographical evidence to support their assertion that plaintiffs lowered the crest and that, even if the evidence did show that the crest was lowered, there was no evidence to prove that plaintiffs caused the lowering. Additionally, the trial court found that defendants' act of building a dam on their property was responsible for the flooding of plaintiffs' land. Accordingly, the trial court ordered defendants to remove the dam within one month of the entry of its opinion and order.

II

Defendants first argue that the trial court's verdict in favor of plaintiffs on their claim for injunctive relief and against defendants' counter-claims for negligence, private nuisance, and trespass was against the great weight of the evidence.¹ Defendants have waived appellate review of this issue by failing to move for a new trial. *Buckeye Marketers, Inc v Finishing Servs, Inc*, 213 Mich App 615, 616-617; 540 NW2d 757 (1995).

Nevertheless, we will briefly address the merits of defendant's issue. The issue of who was responsible for interference with the natural flow of water from plaintiffs' to defendants' property was reduced to a credibility contest between the parties' expert witnesses and the trial court's ultimate determination of which party presented the most valid theory of the case. Plaintiffs, and their expert, advanced that they did nothing to increase the flow of water from the dominant to the servient drainage estate and averred that defendants' construction of a dam on their property stopped the natural flow. On the other hand, defendants, and their experts, claimed that plaintiffs' construction activities lowered the natural crest between their properties, thus causing increased flooding of defendants' property. Defendants claimed that the alleged dam was merely a restoration of the original crest between the properties. The trial court had the unique opportunity to hear the witnesses and was qualified to judge their credibility and weigh the merits of each parties' theory. See *id.* at 617. The trial court's ultimate decision was supported by the great weight of the evidence.

III

Next, defendants argue that the trial court violated MCR 7.208(A) when it held a show cause hearing on defendants' failure to remove the dam pursuant to the trial court's April 1995 order after defendants had filed their claim of appeal and entered an August 1995 order requiring removal of defendants' dam by July 21, 1995. We disagree.

MCR 7.208(A) provides that "[a]fter a claim of appeal is filed . . . the trial court . . . may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law." However, absent the filing of a stay pending the outcome of appeal, the circuit court remains free to enforce its orders. MCR 7.209(A); *Chrysler Corp v Home Ins Co*, 213 Mich App 610, 612; 540 NW2d 485 (1995). Since defendants

neglected to file a stay of appeal, the trial court properly held a show cause hearing on defendants' failure to take actions to "permit [their] property to be the servient drainage estate." In light of these considerations, we refuse to set aside the trial court's order mandating defendants to further remove the dam so that water could drain freely from plaintiffs' to defendants' land.

IV

Lastly, plaintiffs urge us to impose sanctions against defendants for filing a vexatious appeal. We may impose sanctions for vexatious appeal where the "appeal was taken for purposes of hindrance or delay and without any reasonable basis for belief that there was some meritorious issue to be determined on appeal." MCR 7.216(C)(1)(a). We find, however, that defendants had a reasonable basis for their belief that there was a meritorious issue to be determined on appeal. Although defendants' belief may have stemmed from a misunderstanding of the court rules, it is at least arguable that the trial court's act of holding a show cause hearing was violative of MCR 7.208(A). Therefore, we refuse plaintiffs' request for sanctions.

Affirmed.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Michael E. Dodge

¹ Although defendants couched this issue as a challenge to the trial court's factual findings, defendants' arguments are actually a challenge to the great weight of the evidence.