STATE OF MICHIGAN

COURT OF APPEALS

JUDITH A. BECHTOL, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED October 31, 2013
v	No. 307716 Washtenaw Circuit Court
SAMUEL ALLEN and DARLENE ALLEN, Defendants/Counter-Plaintiffs-Appellees.	LC No. 09-000617-CZ

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Plaintiff/counter-defendant Judith A. Bechtol appeals by right trial court's order, after a bench trial, granting injunctive relief to defendants/counter-plaintiffs Samuel and Darlene Allen.[1] This neighbor dispute arises out of flooding that occurred on both parties' properties in 2008, and the parties' immediately prior and subsequent modifications to their land. Each accuses the other of causing the flooding on the others' property. The trial court concluded that the Allens did not cause significant additional water to flow onto Bechtol's property, but that Bechtol installed culverts that were causing flooding to the Allens and ordered them removed. Bechtol contends that the injunction is impermissible or, alternatively, overbroad and excessive. We agree in principle with what the trial court seemingly intended to accomplish with the injunction, but as it is written, we agree with Bechtol that it is overbroad and impermissible as written. We therefore vacate it and remand for further proceedings.

The parties own adjacent parcels of property, Bechtol's to the north and the Allens' to the south. Their parcels are both bounded to the east by Tower Road and to the west by a large field owned by Mark Hamilton. It is not disputed that water has always run off the field onto both parcels and otherwise generally to the north, ultimately to the Johnson Drain. Consequently,

[1] Bechtol initially sued the Allens, but the parties settled Bechtol's claims against the Allens. The Allens also dismissed the monetary damages portion of their counterclaim. Only the portion of their counterclaim for injunctive relief remains at issue in the instant appeal. For convenience, we refer to the parties by their names.

water has, inter alia, run from the Allens' parcel across Bechtol's parcel.[2] Darlene Allen, who owned her parcel since the 1970's, indicated that the amount of water coming onto her parcel began to change in the mid-eighties. The Allens began to experience flooding in their front yard in either 2005 or 2007, and in their back yard in 2007 or 2008. The area experienced a massive flood in January or the spring of 2008. In the summer of 2008, Bechtol performed some earthworks projects on her property; contemporaneously, the Allens began to be increasingly concerned about water failing to drain from the back corner of their property. The Allens asked Bechtol to be mindful of the need to keep water flowing, and Bechtol indicated that her projects would enhance the flow of water.

On September 13, 2008, the lower level of the Allens' house flooded. Darlene testified that the water came up through their sump pit, but there was a dispute whether the sump pump was running and unable to cope with the water flow or whether it was not running due to a power failure. The Allens' theory of the case is that the water should have been able to drain through Bechtol's property, but because it could not, it backed up to their basement. The Allens' basement had never flooded previously, and as of the date of trial, had not flooded since. Bechtol was unaware of the Allens' flood until 2010. However, in December of 2008, she experienced her own massive flooding, which was high enough to enter her barn and cause considerable destruction on her property. Water backed up on the Allens' property at that time, but not to the extent of their basement.

From 2008 through 2009, both parties engaged in significant alterations to their properties. In relevant part, the Allens improved their drainage, raised part of the grade of their front yard, and cleared out the "creek" at the back of their property where, apparently, the old clay tile drainage system used to run. Bechtol raised the grade of her property significantly, installed numerous culverts, and also cleared out the portion of the "creek" on her property where the old clay tile drainage system seemingly ran. Bechtol presented an expert witness who testified that her clearing of the creek would have improved the water flow and that the raising of her property would not have affected the water flow. Bechtol's expert also opined that the Allens' modifications to their property would result in more water running to Bechtol's property.

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[2] However, the details of this historical flow are not completely ascertainable, because the evidence showed that before any of the parties or witnesses were even born, farmers in the area had collectively installed and maintained a clay tile drainage system that ran across the Allens' and Bechtol's properties, near the boundary line they share with Hamilton's field. The drainage system was severed in 1979, when a neighbor to the Allens' south built a house. The remnants were apparently abandoned and unmaintained thereafter, and they eventually came to be referred to as a "creek." (Confusingly, testimony suggests that there is also apparently a "creek" to Bechtol's north, on the route the water takes to the Johnson Drain.) Both parties' contractors discovered old remnants of the clay tile system when performing work on the parties' properties. Apparently, the possibility that both parties' flooding was at least partly caused by the eventual occlusion of this old drain system due to decades of neglect was not considered at trial. Hamilton testified that prior to the abandonment of the drain tile system, nobody was "too concerned about where the water went, 'cuz the water went."

The Allens' expert, Ronald Cavallaro, Jr., testified that Bechtol's culverts were insufficient and consequently would have functioned as dams on her property. Cavallaro opined that the insufficiently-sized culverts that Bechtol had placed "definitely" were "the cause of flooding." Cavallaro was dismissive of the suggestion that Bechtol's raising of her property caused any flooding; he conceded that doing so could possibly have had some effect, but he was uncertain. Cavallaro emphasized that he believed the culverts "did" cause the water to back up onto Allen's property, rather than being a mere possibility.

The Allens rely on, and take out of context, Cavallaro's testimony that "if you fill part of the creek, or you fill the area that used to flood, with that given flow rate, if you put in a culvert, you put in a road, you put in any type of fill in an area that used to flood, then it's gonna increase the water surface upstream." The Allens appear to take this as a blanket condemnation of installing culverts at all. To the contrary, however, this was clearly in the context of a discussion about insufficiently-sized culverts, not culverts per se. Indeed, Cavallaro explained that in most cases, culverts functioned as cheap substitutes for bridges while still permitting water to flow through the area, but the situation he saw on Bechtol's land was "three sets of culverts that are all too small for that 50 acres that's draining there." Cavallaro opined that even if the Allens' property changes resulted in more water flowing to Bechtol's property, the amount would have been trivial in comparison to the amount already flowing to Bechtol's property from the field.

In a written opinion, the trial court found, in relevant part:

> On or around August 27, 2008, [Bechtol] made substantial changes to the topography of her real property. She had truckloads of sand and gravel brought in. She changed the size and placement of several culverts. As a result, the rate of flow and the location of the flow of surface water were materially changed on the parcel.
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> In September of 2008 the Allens sustained substantial monetary damage as a result of flooding in their home.
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> * * *
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> The evidence at trial showed that [Bechtol] raised the level of her land and made significant changes to the natural flow of surface water. By doing so she breached her duty to accept the natural flow of surface water. The alterations she made to the natural flow of surface water caused the water to back up and flood the [Allens'] home causing substantial damage. Her breach was, therefore, the proximate cause of harm to the [Allens].
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> [Bechtol] contends that it was in fact the [Allens] who first changed the natural flow of surface water and the work she did was in response thereto. The court finds this argument specious. The Allens, through their contractor, Russ Fischer, dug a retention pond and relocated their sump pump. These actions could not have caused any flooding to occur on [Bechtol's] property. If anything, these actions would have helped avoid flooding on both properties thus mitigating the Allens' damages.
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> * * *

> After considering all the evidence, including an on-site inspection of the premises, this court finds that defendant Bechtol breached her duty under *Emerald Valley* to accept the natural flow of surface water over her real property and that the breach was the legal cause of damage to the [Allens].
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> * * *
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> The court grants the following injunctive relief:
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> 1 . Bechtol and all future and current owners of her real property at 7545 Tower Rd. Salem Twp, shall .be required to remove the existing culverts on the Bechtol premises which cover, contain, control or in any manner, influence the surface water flow from the Allens' premises and shall desist from any future placement of such a culvert upon the Bechtol premises
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> 2. Now and in the future Bechtol and all current and future owners of her real property at 7545 Tower Rd. Salem Twp shall be required at Bechtol's cost to maintain a clear and unimpeded flow of the Allen surface flow from the Alien/Bechtol property line downward and across all of the Bechtol premises to its outflow from the Bechtol premises.
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> 3. No action shall ever be taken by Bechtol and all current and future owners of her .real property at 7545 Tower Rd. Salem Twp, which would cause or contribute to the surface water drainage upon the Aliens' premises rising to the topographic level of the existing base of the Allen's basement.

The trial court subsequently clarified that Bechtol could keep one of her culverts that had originally been placed in 1976 and replaced in 2005 with a larger-size culvert. The trial court stated that Bechtol would "have to fight [it] out with the future owners" whether she was responsible for any of their actions.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). A factual finding or equitable disposition is clearly erroneous if this Court is "definitely and firmly convinced" that the finding is mistaken or the disposition is inequitable, affording deference to the trial court's superior ability to evaluate witness credibility. *Woodington v Sohokoohi*, 288 Mich App 352, 357-358, 365; 792 NW2d 63 (2010).

The trial court correctly stated the applicable law, as summarized by this Court:

> The trial court correctly stated the law. The owner of lowlands must accept surface water which naturally drains onto his land. *Village of Sand Lake v Allen* (1915), 185 Mich 1[, 151 NW 705]; *O'Connor v Hogan* (1905), 140 Mich 613[, 104 NW 29]; and *Boyd v Conklin* (1884), 54 Mich 583[, 20 NW 595]. The owner of the dominant estate has a right to fill up sag-holes and avoid the accumulation of water in the course of improving his land in good faith even if

> such water finds its way onto the land of the servient estate; but the owner of the dominant estate has no right to cast additional waters upon the servient estate in such a way as to cause damage. *Gregory v Bush* (1887), 64 Mich 37, 42[, 31 NW 90]; *Village of Sand Lake v Allen*, *supra*; *Bennett v County of Eaton* (1954), 340 Mich 330[, 65 NW2d 794]; and *Allen v Morris Building Company* (1960), 360 Mich 214[, 103 NW2d 491]. [*Emerald Valley Land Development Co v Diefenthaler*, 35 Mich App 346, 347-348; 192 NW2d 673 (1971).]

Bechtol contends that the trial court gave insufficient consideration to the principle that a servient estate owner may defend against waters wrongfully diverted onto the servient property even if doing so also blocked water that naturally ran to the property. *O'Connor*, 140 Mich at 622-624. *O'Connor* is inapplicable here; in that case, a significant amount of new water was involved, whereas here, the trial court implicitly agreed with the expert testimony that even if any additional water was diverted to her property, it was a nominal amount. We are simply not "definitely and firmly convinced" that the trial court was mistaken. If nothing else, the trial court is well within its proper role to conclude that the Allens' expert was more credible than Bechtol's expert, particularly in light of its direct observation of the property.

Bechtol argues that any modifications she performed to her property after the Allens' flood could not have caused that flood. We agree. More importantly, the Allens' own expert opined that the culverts were *the* cause of any flooding. Any regrading performed by Bechtol was merely a possible contributing factor. The primary argument the Allens make is simply a logical fallacy of concluding that correlation is causation: that because Bechtol made modifications to her property prior to the flood, those modifications must have caused the flood. While correlation may be suggested, the evidence also shows that the old drainage tile system, referred to as the "creek," had gone unmaintained for decades, the Allens were already beginning to have water problems before Bechtol started her modifications, the rainfall on the date of the flood was exceptional, the Allens may have lost power to the sump pump, and the Allens never again had experienced basement flooding. Again, the Allens' *own expert* opined that Bechtol's culverts were the problem, and Bechtol's earthworks were merely a possible contributor.

To the extent the trial court may have found Bechtol's topography changes to have caused the Allens' flooding, we would be definitely and firmly convinced that the trial court made a mistake.[3] There is simply no evidence to support such a conclusion, both experts opined that Bechtol's regrading would not have affected the water flow, and the evidence suggests that, in any event, most of her earthworks were performed after the relevant floods. It would be a clear error to find that Bechtol's changes to her property's topography resulted in a breach of her duty to accept the natural water flow from the Allens' property.

However, any such error is harmless, because the trial court did not order Bechtol to regrade her property back to an earlier topography. Rather, the trial court ordered Bechtol to remove her culverts and generally "maintain a clear and unimpeded flow" of water from the

[3] Because none of the injunctive relief ordered appears to pertain to the topography of Bechtol's property, it is unclear from the trial court's order to what extent the trial court did so find.

Allens' property. We are *not* convinced that the trial court definitely and firmly made a mistake in finding that Bechtol's culverts breached her duty to accept the natural water flow from the Allens' property. Some evidence indicated that Bechtol may have installed some culverts prior to the Allens' basement flooding or between the Allens' flood and the subsequent December flood. Allen's expert testified unequivocally that the culverts definitely caused flooding, and in light of the trial court's site visit, the trial court cannot be said to have clearly erred by giving credence to this testimony.

We ultimately conclude that the trial court did not err in principle by granting injunctive relief concerning the culverts on Bechtol's property. However, the injunction as it is written cannot be upheld.

Injunctions are required to "be specific in terms" and "describe in reasonable detail, and not by reference to the complaint or other document, the acts restrained." MCR 3.310(C)(2) and (3). No published cases have addressed these Court Rule subrules. However, the identical predecessor Court Rule, GCR 1963, 718.9, "makes it clear that injunctions are to be specific and narrowly construed." *Walters v Norlin*, 123 Mich App 435, 440; 332 NW2d 569 (1983).

The first paragraph is specific: other than the one remaining culvert, Bechtol is required to remove any culverts that affect the flow of water from the Allens' premises. This is, however, overbroad: there is no sound basis for the word "influence," because there is no sound basis for precluding Bechtol, for example, from installing sufficiently large culverts to *improve* the flow of water. Furthermore, there is no basis in law or equity, given the evidence in this case, for precluding Bechtol from installing culverts in the abstract. Even Allen's own expert emphasized that culverts were not necessarily a problem; the problem was that Bechtol's culverts were insufficiently sized. It would be proper for the court to order Bechtol to remove insufficiently-sized culverts, but it would be inequitable to order her to refrain from installing *any* culverts.

The second paragraph is also overbroad. In general, this paragraph merely states the applicable law that property owners have a duty to maintain historic water flow onto and through their property. It is therefore ostensibly moot and meaningless. However, it additionally makes all *future* owners' activities at *Bechtol's* expense. We cannot conceive of any sound basis for such an extraordinary order. If the injunction runs with the land, any future owner's responsibilities would be reflected in the ultimate sale price. There is no basis for holding one person responsible for the acts of another person under circumstances where there is no possible way to control the other person's actions. This paragraph is blatantly improper.

The third paragraph, like the second, merely restates the applicable law, but distorts it in the process. For example, it technically omits the possibility of a land owner permitting, through inaction, drainways to become occluded with debris, resulting in flooding. Conversely, it requires owners of the Bechtol property to essentially be *guarantors* of the Allens' property, irrespective of the possibility of extraordinary weather conditions that would have caused flooding on the Allens' property under all historical land use scenarios. Thus, it actually imposes upon Bechtol responsibilities that go beyond those required by law, while at the same time seemingly granting her implied free rein to shirk other responsibilities required by law. This paragraph is also improper.

The second and third paragraphs must be stricken in their entirety. The Allens are entitled to injunctive relief that would have the effect of ensuring that the culverts on Bechtol's property are adequately sized to cope with historical water flow, but they are not entitled to absolute removal of any and all culverts altogether. Unfortunately, no determination has been made of exactly how large the culverts must be to be deemed "adequate," and it is clear from the record that leaving adequacy undefined or unspecified will inevitably result in further wasteful animosity and litigation.

We therefore vacate the trial court's injunctive order in its entirety and remand for further proceedings. The trial court shall conduct an evidentiary hearing to determine what size culverts, and if necessary any associated water drainage paths, would be adequate to permit water to flow across Bechtol's property from Allen's property consistent with historical drainage. The trial court shall then craft an injunction tailored specifically to require Bechtol to ensure that the culverts, and if necessary any associated water drainage paths, are at least those sizes. While the injunction may run with the land, Bechtol may not be held personally responsible for the acts of future owners at such time as she no longer has an interest in the property. We retain jurisdiction. No costs, neither party having prevailed in full.[4]

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

[4] Both parties raise a number of other arguments, including the significance of the parties' settlement, any distinction between "rocks" and "boulders," the relevance of insurance compensation, and alleged spoliation of evidence with no apparent relevance to the facts at issue or after the evidence had been reviewed by the trial court. However, we find none of these additional arguments pertinent. In the interests of brevity and clarity, we note only that we have given them careful consideration and determined that they do not affect our decision in any way.

Court of Appeals, State of Michigan

ORDER

Judith Bechtol v Samuel Allen

Docket No. 307716

LC No. 09-00617-CZ

Joel P. Hoekstra
Presiding Judge

Amy Ronayne Krause

Mark T. Boonstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court shall conduct an evidentiary hearing to determine what size culverts, and if necessary any associated water drainage paths, would be adequate to permit water to flow across Bechtol's property from Allen's property consistant with historical drainage. The trial court shall then craft an injuction tailored specifically to require Bechtol to ensure that the culverts, and if necessary any associated water drainage paths, are at least those sizes. While the injuction may run with the land, Bechtol may not be held personally responsible for the acts of future owners at such time as she no longer has an interest in the property. The proceedings on remand are limited to this issue and should be concluded within 90 days of the clerk's certification of this order.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

OCT 31 2013
Date

Chief Clerk