

1959

N. M. Long & Co. et al v. Cannon-Papanikolas Construction Co. et al : Brief of Respondents

Utah Supreme Court

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AUG 1959

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In the
Supreme Court of the State of Utah

N. M. LONG & COMPANY, a corporation,
and MAGGIE J. SMITH,
Plaintiffs and Appellants,

R. KAY MOWER and MRS. M. H.
MOWER,
*Plaintiffs in Intervention
and Appellants,*
vs.

CANNON - PAPANIKOLAS CON-
STRUCTION COMPANY, a partner-
ship, EDWARD HOLMES, and
GRANT JENSEN,
Defendants and Respondents.

FILED

APR 15 1959

Clerk, Supreme Court, Utah

Case No.
8999

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

This is an action to recover damages which are alleged to have resulted from Respondents' installation of drains in their lands for the purpose of rendering the same suitable for subdividing and building homes thereon, the Appellants

claiming that the drains reduced the "static pressure" of the water seeping through the ground, thereby decreasing the amount of water of and flowing from a pond, to which water Appellants claim the right to use.

Hereinafter, for convenience, Appellants will be referred to as plaintiffs and Respondents as defendants.

In addition to demanding judgment for damages, the complaint of N. M. Long & Company and Maggie J. Smith prays that defendants be enjoined from continuing the operation of the drains (R. 5). But, this relief was eliminated as an issue under the pretrial order (R. 24) and properly so because if defendants were liable, plaintiffs' remedy at law for damages, if any were sustained, would have been adequate and, furthermore, the county which became vested with the ownership and control of the drains through the dedication of the subdivision (R. 22, 248, Sec. 57-5-4, Utah Code Annotated 1953) and the persons who had purchased and owned homes within the subdivisions at the commencement of the action would be indispensable parties to any suit which sought by a mandatory injunction to destroy their properties by requiring defendants to discontinue the operation of said drains (R. 257, 304-305). Hence, the facts found by the court, if sustained by any substantial evidence in the record, are conclusive on this appeal. In this respect, it should be noted that the trial court, in addition to hearing the evidence and observing the witnesses, pursuant to stipulation of counsel, visited the area and examined the premises involved in this action (R. 308-309, 344).

The land owned and subdivided by defendants (herein sometimes referred to as the Subdivision) consists of approximately ninety-two acres (R. 50, Ex. 5, 6 & 7) lying north of a street running east and west, known as Spring Lane (about 5100 South, Salt Lake County, Utah) and between Hyland Drive and 1300 East Street of said county. The land owned by the plaintiffs, R. K. Mower and Mrs. Mower (herein sometimes referred to as the Mower Property) consists of approximately seven acres (R. 100-101) and is located south of said Spring Lane and southeasterly from the southeast corner of the Subdivision. The land owned by the plaintiff, Maggie J. Smith, approximately six acres (R. 282) (herein sometimes referred to as the Smith Property) lies north of said lane and some distance west of the Subdivision. The land owned by the plaintiff, N. M. Long Company (herein sometimes referred to as the Long Property) consists of approximately nineteen acres (R. 227) and likewise lies north of said lane and west of the Smith Property, being at the northeast corner of Spring Lane and 1300 East Street (Ex. 12 and 35).

A pond is located on the Mower Property, herein and in the evidence referred to as the "Mower Pond", (R. 70, Ex. 8). The Mower Pond is supplied and sustained by water which escapes through seepage from Cottonwood Creek and the seepage water resulting from the irrigation of lands of a higher elevation and lying to the east of the Mower Pond (R. 51, 108).

The Mower Pond was created by digging, excavating and draining in the sloughs on or near the Mower Property (R. 51, 117-118). It is apparent that the excavations on

the Mower Property not only created the pond, but served to drain the remaining Mower premises in order to render them suitable for the construction of the dwelling and other improvements now located on said premises (R. 117-118). At the west end of the Mower Pond is a headgate which controls the flow of water from the pond into a ditch, herein and in the evidence referred to as the "Long Ditch" (R. 173, Ex. 12, 34). This ditch runs some distance west along the south side of Spring Lane, then crosses said lane and runs westerly to the Smith and Long Properties (R. 102, 173, Ex. 8, 12).

For illustration and as a convenient reference for the court, there is contained in an appendix hereto a map showing the location of the properties involved herein, the Mower Pond, the Long Ditch and Spring Run.

Defendants purchased the lands embraced within the Subdivision for the purpose of subdividing the same and constructing residential dwellings thereon (R. 52, 254). When acquired by defendants, said lands were swampy and mostly wet pasture (R. 52, 7, 246, 305). In order to render their lands suitable for subdividing and building thereon, defendants, under the supervision of a licensed engineer, installed drains in said lands (R. 53, 215). In this connection, the trial court found:

"Said drains were installed by said defendants, not to claim or destroy or decrease or interfere with plaintiffs' or intervening plaintiffs' water rights, but for the purpose of improving said defendants' own lands by increasing their value and making them productive, which otherwise would remain of little or no value as merely a slough" (R. 53).

The bottom of the Mower Pond is approximately 11 feet higher in elevation than the ground level of the Subdivision (R. 51, 105, Ex. 9). The nearest drain to the Mower Pond lies some 350 feet northwesterly from the pond (R. 51, 106). The drains collect and return to a creek lying northwesterly of the Subdivision the same water which prior to the installation of the drains had flowed or drained from the subdivision lands into said creek (R. 51, 109-110, 250, 256). This creek is known as "Spring Run" and also as "Spring Creek", but will be referred to herein only as Spring Run so as not to confuse it with a "Spring Creek", not involved in this case (R. 331-332). All the water deposited by the drains into Spring Run had been appropriated by persons who are not parties to this action and defendants could not lawfully have diverted the same (R. 204-205, Ex. 24-25).

The trial court found: "There has been a decrease in the amount of the seepage waters that came to the surface as springs and then flowed into the Long Ditch, or the other ditch bringing water a short distance to the pond, but not by any wrongful act of said defendants. There is no direct evidence in the record that said drains in any way shut off the waters from the plaintiffs, either in the Mower Pond or ditch" (R. 53).

It has been stipulated that defendants have never claimed any rights to the use of any waters involved or referred to in this case, and there are no competitive claims to such waters (R. 53, 258, 306, 308).

STATEMENT OF POINTS

1. Defendants, by draining their lands to improve and make a reasonable use thereof, are not liable to plaintiffs, even though as an incident to such drainage plaintiffs were damaged by a decrease in the amount of seepage waters to which they claimed a right of use.

2. The installation of the drains in defendants' subdivision was not the legal cause of plaintiffs' alleged damages.

ARGUMENT

POINT NO. 1

DEFENDANTS, BY DRAINING THEIR LANDS TO IMPROVE AND MAKE A REASONABLE USE THEREOF, ARE NOT LIABLE TO PLAINTIFFS, EVEN THOUGH AS AN INCIDENT TO SUCH DRAINAGE PLAINTIFFS WERE DAMAGED BY A DECREASE IN THE AMOUNT OF SEEPAGE WATERS TO WHICH THEY CLAIMED A RIGHT OF USE.

At the outset, it is important to point out that this case does not present a controversy involving the competitive use of water. In cases such as the instant case, it is the settled law of this state, under the common law, and as adopted by the Restatement, that a land owner is not liable for interference with subterranean waters to which another has the right of use, if such interference results as an incident to the land owner's reasonable use of his own land and without negligence or malice on his part. *Roberts vs.*

Gribble, 43 U. 411, 134 P. 1014; *Peterson vs. Cache County Drainage District*, 77 U. 256, 294 P. 289; 29 A. L. R. 2d 1356; 109 A. L. R. 395; 55 A. L. R. 1386; Restatement of the Law of Torts, Sec. 849.

In an early decision by this court, *Roberts vs. Gribble*, (supra), it was held that a land owner had a right to drain seepage and percolating waters from his land which rendered it swampy and marshy and unfit for cultivation, even though in so doing the land owner interfered with another's right to the use of underground waters.

The opinion states:

"We think the evidence both for appellants and respondent tends to show that the waters in dispute are seepage and percolating waters. These waters rose in such quantities on respondent's land that it became submerged and was rendered unfit for the raising of hay and other farm products. The respondent undoubtedly had a right to drain his land of the water and put it in a condition for raising crops. Whether he did this by sinking wells or by digging drain ditches was of no concern to appellants."

In the *Drainage District* case, the District had constructed drainage canals for the purpose of draining the lands within the district, one of which canals was constructed near plaintiff's land. As a result of the construction of the drains, the water table within plaintiff's land was lowered so that he could not subirrigate his land and produce crops thereon as he previously had done. The court held that the District was not liable to the plaintiff because the proprietors of the lands within the District had a right to improve their lands by draining them and if done so

without malice or negligence, they were not liable for the consequent lowering of the water table within plaintiff's land.

The Restatement (Torts, Sec. 849) in setting forth the rules governing liability in such cases, points out an important distinction between the rules applicable to controversies involving a competitive use of water and those applicable to the instant case:

"b. *Conduct not involving a competing use of water.* The distinction between conduct which constitutes a 'use of water' and conduct which does not involve its utilization but merely affects its quality or quantity is explained in Sec. 847, Comment a. Interferences with one person's use of water by another's use of water involve a conflict over the same physical substance, and raise problems of proprietary competition over that substance. These interferences are dealt with in Secs. 850-864. Interferences with a person's use of water by another's use of land or other activity which affects water only incidentally, do not directly raise problems of proprietary competition over the water itself, and therefore, in substance, involve the same questions as other types of interference with the use and enjoyment of land. Consequently, the rules stated in Secs. 822-840, governing invasions of interests in the use and enjoyment of land, are equally applicable to such interferences with a use of water."

For illustration of the rule applicable to cases not involving a competing use of water, the Restatement, Torts, at page 338, cites the following:

"5. The A Mining Co. buys land and starts to mine for coal therein. In the process of excavation,

the flow of subterranean water is interfered with, and a spring on near-by land in the possession of B dries up as a result. A's operations do not involve a use of subterranean water, and its liability to B is governed by the rules stated in Secs. 822-840."

Under such circumstances, the land owner's liability depends on whether his conduct is "(i) intentional and unreasonable; or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct." Restatement, Torts, Sec. 822.

The rationale of the rule herein dealt with is rather well stated in the early case of *Wheatley vs. Baugh*, (1855) 25 Pa. 528, 64 Am. Dec. 721, 13 Mor. Min. Rep. 374 (cited in 55 A. L. R. at page 1426) wherein the court says:

"But percolations (of water) spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly the law has never gone so far as to recognize in one man a right to convert another's farm to his own use for the purposes of a filter. Such a claim, if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar, or a well, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest and clear his land for the purposes of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water which would otherwise filter through it. He could not even turn a furrow for agricultural purposes, because this would, partially, produce the same result."

The first cases dealing with the rule applicable to controversies not involving a competitive use of water arose in England and held that the land owner was absolutely absolved from liability, at least in the absence of negligence or malice. Apparently, this is the majority rule in the United States. 29 A. L. R. 2d 1358. However, many cases in this country follow a so-called American rule which qualifies the English rule by holding that the land owner's immunity from liability depends on whether his conduct causing an interference with subterranean waters is reasonably necessary in connection with the use and improvement of his land. The latter rule has been referred to by the text writers and some courts as the "doctrine of correlative rights" or the "doctrine of reasonable use". In 29 A. L. R. 2d at page 1364, the so-called American rule is stated as follows:

"Under the rule or doctrine of correlative rights, as applied in most jurisdictions, the owner or occupant of the containing land is not precluded from utilizing it for any lawful and proper purpose to which it is adapted, without liability for incidental interference with the waters, and is required only to so exercise his proprietary rights as not unreasonably or unnecessarily to obstruct or divert such waters to the injury of neighboring proprietors. *To state the proposition more concisely, immunity depends upon whether the interference was reasonably necessary in connection with the use or improvement of the land.*" (Emphasis added.)

To characterize the American rule as the "doctrine of correlative rights" or "doctrine of reasonable use", though perhaps not inapt, is unfortunate as the same terminology is

utilized by the courts with reference to the rules applicable to cases involving competitive claims to underground water. Hence, in considering the authorities applicable to the present case, it is necessary to bear in mind the distinction, as pointed out by the Restatement, between the rules applicable to the instant case, and those governing cases involving the competitive use of water. The judicial decisions, on their facts and holdings, clearly recognize the distinction irrespective of the language employed in the opinions. The Supreme Court of Florida took occasion in the case of *Labruzzo vs. Atlantic Dredging & Construction Co.*, (1951 Florida) 54 So. 2d 673, 29 A. L. R. 2d 1346, to point out that the so-called doctrine of correlative rights or reasonable use pertaining to cases involving competitive claims to underground water is not applicable to cases concerning the interference with water by another's use of land. The court states in this respect:

“In the instant case, however, we are concerned with an interference with plaintiffs' use of the spring on their land, caused by conduct of the defendant not involving a competing use of water and in which the effect on the subterranean water is only incidental to the defendant's use of its land. Obviously, then, the rule of ‘reasonable use’, as engrafted upon the old common-law rule of absolute and unqualified ownership of percolating waters, insofar as the proprietary beneficial use of the *water* is concerned, has no application here where we are concerned with the proprietary use of *land*, and in which the water is only incidentally affected.”

So far as our research has disclosed, all courts follow either the so-called English rule or the American rule, with

the lone exception of California. Whether this court follows the English rule or the American rule, in either case the defendants are not liable under the facts established in this case: It is stipulated that the controversy herein does not involve a competing use of water. It is established by the evidence and findings of fact and conceded by the pleadings, that the installation of the drains was reasonably necessary in connection with the use and improvement of defendants' lands. It is not claimed that the defendants, in draining their lands to render them suitable for building homes thereon, acted negligently, with malice or intent to do harm to plaintiffs, defendants' sole intent and purpose being to improve and make a reasonable use of their own lands. As found by the court: "Said drains were installed by said defendants, not to claim or destroy or decrease or interfere with plaintiffs' or intervening plaintiffs' water rights, but for the purpose of improving said defendants' own lands by increasing their value and making them productive, which otherwise would remain of little or no value as merely a slough."

Under their point that "plaintiffs were entitled to injunctive relief", plaintiffs cite a recent decision of this court, *Kano vs. Arcon Corporation*, (June 10, 1958) 7 U. 2d 431, 326 P. 2d 719. While the question of plaintiffs' right to injunctive relief is not pertinent on this appeal, we desire to point out that the issues considered in the *Kano* case are clearly distinguishable from those presented in the present case: The *Kano* case, unlike the instant case, involved an intentional and unreasonable invasion of property rights, and the diversion of waters of a natural surface

stream to which plaintiffs had acquired a right of use, as a consequence of which plaintiffs were required to provide other facilities, including pumping equipment, to retake their water and, because of the time required to do so, plaintiffs lost their celery crop which they were about to plant. To provide adequate relief for such an intentional and unreasonable invasion of plaintiffs' rights, the plaintiffs were awarded damages for loss of their crop and defendants were required to deposit the water at the boundary of plaintiffs' land so that they could enjoy a gravity flow.

The facts in the instant case are different from the *Kano* case in every material respect: Plaintiffs' impounding and diversion facilities were not interfered with by defendants. The waters collected and deposited by the drains into Spring Run are the same waters that formerly had drained into said creek from the lands within the Subdivision. Neither plaintiffs nor defendants had any right to the use of the waters of said creek. It is plaintiffs' sole contention in this action that defendants (and for that matter anyone else in the neighborhood) must perpetually leave their property in a swampy condition so as not to disturb the "static pressure" necessary to sustain the waters of a pond previously created in connection with the drainage of the Mower premises. And to that end, plaintiffs now claim they are entitled to a mandatory injunction to restore the Subdivision to a slough.

POINT NO. 2

THE INSTALLATION OF THE DRAINS IN DEFENDANTS' SUBDIVISION WAS NOT THE

LEGAL CAUSE OF PLAINTIFFS' ALLEGED DAMAGES.

The trial court in its memorandum decision (R. 32, 33) and findings of fact (R. 53), found that: "There has been a decrease in the amount of the seepage waters that came to the surface as springs and then flowed into the Long Ditch, or the other ditch bringing water a short distance to the pond, but not by any wrongful act of said defendants. There is no direct evidence in the record that said drains in any way shut off the waters from the plaintiffs, either in the Mower Pond or ditch."

Since as an element in establishing defendants' liability, plaintiffs had the burden of proving by a preponderance of the evidence that defendants' installation of the drains was a proximate cause of the alleged interference with said subterranean seepage waters, the above findings are tantamount to a finding of fact that the decrease in the amount of said waters was not attributable to defendant's conduct. Plaintiffs' failure to prove such element necessary to defendants' liability, in and of itself, sustains the trial court's judgment. Restatement, Torts, Sec. 822.

The record indicates a number of factors which reasonably could account for the decrease in the amount of said seepage waters: The waters sustaining the Mower Pond have their source in seepage from Big Cottonwood Creek and irrigated lands lying at a higher elevation to the east of said pond. Such seepage water is perched over a tight layer of non-pervious material (R. 57, 106). A large sewer system had been constructed throughout the area coincident with the installation of the drains. The sewer lines lying

east and at a higher elevation than the Mower property were laid upon a gravel base which operated as drains and diverted part of said seepage waters before reaching the pond. Said sewer lines also collected within the pipes a substantial amount of water which formerly formed a part of the seepage waters (R. 258, 259, 260-262, 267-268, 333-344). It is common knowledge that farm acreage lying east of the pond which formerly had supplied part of the seepage water from the irrigation of said lands, has in recent years been utilized increasingly for building homes. Weather conditions could have been a factor in the diminished amount of seepage. And, as indicated by the trial judge (who visited the premises) in his memorandum decision, the failure to service the ditches and drains which collected and deposited the seepage water in the pond, in and of itself, could account for the diminished amount of water flowing into the pond (R. 33).

Hence, the trial court properly concluded that plaintiffs had not sustained their burden of proving that the drains interfered with the waters in question. To have found otherwise would have been pure speculation.

CONCLUSION

We respectfully submit that the trial court's findings of fact are sustained by substantial evidence and the judgment is in accordance with the law.

Respectfully submitted,

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