

IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 23-0958
Franklin County Case No: CVCV501944

MARABELLE ANN 'LE' ABBAS, MARABELLE ABBAS TRUST,
MATTHEW ABBAS, HARLAND DUANE ABBAS TRUST,
PATRICIA F. HANSON, PATRICIA HANSON, TEN-K FARMS,
INC., BRUCE D. REID and LYNETTE MEYER, ROY AND
NEVA STOVER TRUST,
Plaintiffs-Appellants,

vs.

FRANKLIN COUNTY BOARD OF SUPERVISORS, MIKE
NOLTE, GARY McVICKER, CHRIS VANNESS, as Trustees of
Drainage District Number 48, and FRANKLIN COUNTY
DRAINAGE DISTRICT NUMBER 48,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR
FRANKLIN COUNTY
THE HONORABLE RUSTIN DAVENPORT
DISTRICT COURT JUDGE, PRESIDING

APPLICATION FOR FURTHER REVIEW

George A. Cady III,
No. AT0001386
Cady & Rosenberg Law
Firm, P.L.C.
9 First Street SW
PO Box 456
Hampton, IA 50441
acady@cadylaw.net
Phone: 641-456-2555
Fax: 641-456-3315

Attorney for Appellees

Question Presented for Review:

That the Iowa Court of Appeals erred in allowing the award of severance damages to the Plaintiffs as a result of 2017 Drainage District repair when severance damages had been previously awarded to the Plaintiff's predecessors in title at the time the original drainage ditch was constructed in 1906, contrary to *Hicks v. Franklin County* 514 NW2^d 431 (Iowa 1994), *Hammer v. Ida County* 231 NW2^d 896 (Iowa 1975) and *Hileman v. Chicago G.W.R.Y. Co.* 113 Iowa 591, 85 NW 800 (1901).

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STATEMENT SUPPORTING FURTHER REVIEW

Since at least 1901 the Iowa law has been clear that once damages are sustained by a landowner as a result of eminent domain/condemnation such damages are conclusively presumed to be payment for all damages due, including potential future damages, due to the eminent domain/condemnation. *Hicks v. Franklin County* 514 NW^{2d} 431 (Iowa 1994); *Hammer v. Ida County* 231 NW^{2d} 896 (Iowa 1975); *Hileman v. Chicago G.W.R.Y. Co.* 113 Iowa 591, 85 NW 800 (1901); *Wheatley v. City of Fairfield* 213 Iowa 1187, 240 NW 628 (1931).

The Court of Appeals in this case ruled that damages are currently recoverable for severance of land where those severance damages were previously paid in 1906. This is contrary to existing law.

Since there are few Drainage District law cases decided by this Court, a decision on this issue would clarify the existing law eliminating the possibility that the Court of Appeals decision in this case could be used to erode this long-standing doctrine.

STATEMENT OF FACTS

Franklin County Drainage District 1 was created October 3, 1905, by the Franklin County Board of Supervisors serving as Trustees. The district was created to address the wetlands and create a drainage ditch (A. 174, 137).

At that time the district created a 5-mile-long ditch which included land now owned by the Plaintiffs.

Subsequently in 1917 the district determined that the drainage ditch which had been constructed through the Plaintiffs' land, was not operating as originally intended. As a remedy the district installed a drainage tile at the bottom of the ditch and partially filled in the ditch so that the area would have the benefit of the drainage tile at the bottom and a shallow waterway at the top.

Over the years commencing in 1917 the farmers owning land adjacent to the original easement area gradually on their own filled in the waterway on top of the ditch which allowed them then to farm across the ditch in the same manner that they had prior to the construction of the original ditch in 1906.

In 2017, the land continued to have drainage issues and the Trustees requested an engineer's report to address those issues. The engineer's report recommended that the original easement area be re-excavated back to a drainage ditch and that the tile line installed in 1917 be removed along with the dirt above it. It also recommended that the ditch be widened and re-excavated. This report was approved, and the work was then completed.

The Plaintiffs then filed a request for damages claiming that because they could not have access across the drainage ditch as they had before the 2017 project that their land had been severed and that they were entitled to severance damages.

At the trial the District Court determined that the Plaintiffs were entitled to damages in a much lesser amount than the Plaintiffs were claiming but awarded damages to the Plaintiffs for their inability to farm the land on both sides of the ditch as they had before the 2017 project. In awarding these damages the Trial Court said:

“The compensation for taking of land paid in 1990 and the appraisers' recommendation for compensation on February 7, 2022, was done despite prior compensation being paid in 1906

for the same land. This suggests that payment of damages under Iowa Code chapter 468 may be considered under the circumstances at the current time, even if prior damages were paid at some time in the past...

The 2017-19 repair decreased the value of the plaintiffs' land by taking additional acres in excess of the 1990 repair and by creating a severance in their land." Emphasis supplied.

This is a misstatement of the facts and of the existing law by the Trial Court. As stated previously the Plaintiffs' land was severed as a result of the 1906 drainage ditch being constructed even though it was allowed to be filled in afterwards and then re-excavated as a result of the 2017 project. The original severance occurred in 1906 and those damages paid at that time paid the Plaintiffs for all severance damages. There was not a "re-severance" of the land in 2017. The only work done in 2017 that would entitle the Plaintiffs to some additional damages would be for any additional right-of-way taken over and above the previous right-of-way. Treatment in this way would be identical to the manner in which the *Hicks* Court treated the damage claims of the Plaintiff as a result of the 1990 repair. In *Hicks* this Court refused to allow Plaintiffs additional severance damages and limited the Plaintiffs damages to the additional land taken for the 1990 project.

The Court of Appeals in affirming the Trial Court on this issue erred. Both the Trial Court decision and the Court of Appeals decision affirming the Trial Court on this issue is in conflict with the previous case law preventing an award of damages in an Eminent Domain case when damages had been previously awarded for the same claim and is in direct conflict with the decision in *Hicks*.

Plaintiffs then appealed to the Iowa Court of Appeals claiming that the damages should have been increased because the district had abandoned the original ditch easement. The Drainage District cross-appealed asserting that the Plaintiffs were entitled to no damages for the re-excavation of the ditch for the reason that the ditch easement area was never abandoned and that the Plaintiffs predecessors in interest had been paid for damages including severance damages at the time the original ditch was excavated in 1906.

The Iowa Court of Appeals affirmed the District Court in finding that the district had not abandoned its easement area but also affirmed the District Court in awarding damages to the Plaintiffs.

The Drainage District Trustees seek further review on the issue as to whether Plaintiffs are entitled to additional severance damages as a result of the 2017 project when the record clearly shows severance damages were paid at the time of the acquisition and construction of the original ditch easement in 1906. This award to the Plaintiffs constitutes double compensation for the same damage.

ISSUE I

That the Iowa Court of Appeals entered a decision in conflict with the longstanding, previous case law by allowing double recovery for the severance damages claimed by the Plaintiffs.

Preservation of Error

The issue was preserved for Appellate review. The Drainage District Trustees submitted argument on this issue in their post-trial brief and the matter was presented to the Iowa Court of Appeals and ruled upon.

Standard of Review

The Standard of Review is for corrections of errors at law.
§468.81 Code of Iowa, §468.91 Code of Iowa, Chi. Cent. Pac.

RR. v. Calhoun County Board of Supervisors 816 NW2^d 367, 370 (Iowa 2012). The matter was tried as an ordinary proceeding. §468.91 *Code of Iowa.*

ARGUMENT

The Iowa Court of Appeals in its decision correctly determined that Drainage District 48 had an easement for a ditch right-of-way which it had since 1905 (pg. 7). The Court then went on and concluded that “...the Plaintiffs were owed damages beyond any compensation previously received for the easement...” and then went on to affirm the District Court’s determination of damages on cross-appeal of the Drainage District. The damages paid in 1906 at the time of the original taking of the easement and construction of the open ditch resulted in the landowners being paid in full for all severance damages suffered at that time and in the future and that the Plaintiffs are not entitled to any new severance damages payable as a result of the 2017 re-excavation.

Severance damages are a form of consequential damages that arise from the partial taking of a property. *Freshwater v. Wildman 254 Iowa 404, 117 NW2^d 910 (1962).*

In 1905 there was a partial taking of the land in the form of an easement for an open ditch.

The damages paid in 1906 at the time of the original taking of the easement and the construction of the open ditch are conclusively presumed to include all damage present and future which were sustained by the owners due to the proper use of the condemned portion of the property so long as the easement was used for the purpose for which it was taken.

Hammer v. Ida County 231 NW^{2d} 896 (Iowa 1975). This is consistent with the law in effect at the time of the taking in this case. *Hileman v. Chicago G.W.R.Y. Co.* 113 Iowa 591, 85 NW 800 (1901). See also *Wheatley v. City of Fairfield* 213 Iowa 1187, 240 NW 628 (1931). The Plaintiffs were paid severance damages in 1906 and are not entitled to additional severance damages today.

Once the Court found the district did not abandon the original drainage ditch easement created in 1906, that finding should also have eliminated the need to pay Plaintiffs any further compensation due to the 2017 repair.

The only damages to which the Plaintiffs are entitled, as a result of the 2017 re-excavation, were for any damages sustained as a result of additional land taken due to the 2017 expansion of the ditch and not for the ditch itself.

The Trial Court record reflected the original proceedings that took place in 1905 and 1906 when the original ditch was constructed. That record was clear and outlined the length of the ditch, the side slopes of the ditch, the width of the ditch, and the depth of the ditch. That record also showed the filing of damages claims by the various owners claiming damage on account of the construction of the ditch across the respective lands and payment for damages made (See Exhibit A, Appendix VII pg. 147-151).

The Court of Appeals in its decision determined that the Trial Court's original award of damages "...fell within the permissible range of evidence and were not overly speculative." and further concluded "...the District Court's factual findings established the Plaintiffs were owed damages beyond any compensation previously received for the easement." The District Court did not identify the nature of those damages,

however, they appear to be damagers due to severance of the Plaintiffs land by the drainage ditch.

The Court of Appeals, like the District Court, did not identify the type of damages it determined were compensable. The only type of damages Plaintiffs were claiming were severance damages, damages suffered when there has been a partial taking. *Freshwater v. Wildman* 254 Iowa 404, 117 NW^{2d} 910 (1962). In fact, the Plaintiffs own expert admitted on cross examination that his opinion on damages would change everything about his testimony if there was no abandonment from 1906 (T. 111). The severance would have occurred in 1906, not 2017 (T. 112). Severance damages would be payment to the Plaintiffs for not being able to cross the area of the old drainage ditch that had been filled in after 1917. These damages were identical to the damages paid to the landowner in 1906 when the ditch was originally constructed. The ditch was not crossable when constructed.

This determination by the Court of Appeals is not consistent with its conclusion that the district did not abandon its original easement that it received in 1906 when they

constructed the open ditch. Since there was no abandonment by the district of the open ditch easement originally acquired and since severance damages were paid at the time that the original open ditch was constructed, the Court of Appeal's decision now allowing severance damages is in conflict with the existing Iowa law regarding eminent domain damages.

This result is furthermore contrary to *Hicks v. Franklin County* 514 NW^{2d} 431 (Iowa 1994). *Hicks* dealt with the same Drainage District as the instant case and involved largely the same facts. The *Hicks* Plaintiffs claimed they had acquired rights over the drainage easement by being allowed to farm over the lowest area. The basis of the Plaintiff's claim at that time were equitable estoppel and adverse possession. The Court in *Hicks* denied these claims and only allowed Plaintiffs to recover for damages resulting from the additional land taken in a 1990 repair. *Hicks* denied Plaintiffs any additional compensation based on *Hammer v. Ida County* 231 NW^{2d} 896 (Iowa 1975).

This is not a situation where the Court of Appeals could affirm the District Court's decision based upon the substantial evidence test. This is not a fact question. The issue is squarely

one of law. That is that neither the District Court nor the Court of Appeals had the legal authority to award additional severance damages to the Plaintiffs when the Plaintiffs had previously been paid for those damages for the same easement area back in 1906.

Furthermore, if allowed to stand the Court of Appeals ruling causes conflict with those previous cases cited that stand for the proposition that precludes the award of additional damages to landowner, when those landowners or their predecessors in interest were paid damages for the same injury, that they now later again claim.

This Court needs to grant further review to provide Drainage Districts guidance on this important issue.

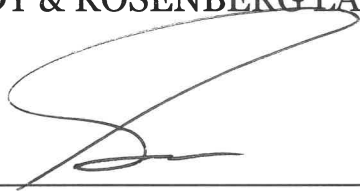
Drainage Districts are now generally having to deal with repair or replacing deteriorating drainage tile installed over 100 years ago and perhaps expand old easements to address current need. This issue is likely to arise again in other cases and this Court needs to reaffirm previous law and make a clean pronouncement that such additional damages are not allowable.

CONCLUSION

That the Defendant, Drainage District, requests that the Court grant further review.

Respectfully submitted,

CADY & ROSENBERG LAW FIRM, P.L.C.

By: 
G. A. Cady III, No. AT0001386
9 First Street SW
PO Box 456
Hampton, IA 50441
Phone: 641 456-2555
Fax: 641 456-3315
Email: acady@cadylaw.net

ATTORNEYS FOR APPELLEES