IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 24-0298
LINN COUNTY CASE NO. EQCV100043

MARTIN ROBINSON, THOMAS ROBINSON, LAURA ROBINSON AND PAULA ROBINSON, Plaintiffs/Appellants

v.

CENTRAL IOWA POWER COOPERATIVE, COGGON SOLAR, LLC, AND KENNETH M. LUDOLPH AND DEANICE R. LUDOLPH, Defendants

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Appeal from the Iowa District Court for Linn County
The Honorable Ian Thornhill, Judge

APPELLANTS' REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 13th day of July, 2024 I electronically filed this document with the Clerk of the Supreme Court of Iowa. I certify that all participants in this appeal are registered electronic filing users and that service will be accomplished by this electronic filing.

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Iowa Code Sections

Restatements

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Robinsons Have a Dominant Easement Right to Drain Their Property Through Existing Tile Over Their Servient Neighbor's Property and This Servient Tenant Cannot Unilaterally Cut or Divert This Tile.

II. The Robinsons Have a Right to Enter a Servient Neighbor's Property to Repair the Tile Which Drains Their Properties.

III. CIPCO Has Created a Nuisance on Its Property.

IV. The Trial Court Erred When It Ruled that The Robinsons Have Not Adequately Proven Their Damages.

V. CIPCO Cannot Escape Responsibility for the Damage It Caused to The Robinsons' Tile and Drainage by Blaming its Contractors.

VI. The Fee Award Should be Reversed.

REPLY ARGUMENT

Both Central Iowa Power Cooperative ("CIPCO") and Kenneth and Deanice Ludolph ("The Ludolphs") concede that properties owned by Martin Robinson, Thomas Robinson, Laura Robinson, and Paula Robinson ("The Robinsons") are at a higher elevation than are their properties. (CIPCO Brief at p. 11; Ludolph Brief at p. 8) Accordingly, the resolution of this appeal involves a determination of what the drainage rights of an uphill landowner are. Further, since the trial court resolved this dispute by summary judgment also involved is a determination as to whether record facts exist which create an inference that The Robinsons' drainage rights have been violated.

The Trial Court's ruling in this appeal allowed a downhill servient tenant to cut, divert, and injure an underground drainage tile used by an uphill neighbor to drain his property, thereby impairing this uphill owners' drainage. If allowed to stand, this decision will reverse over a century's worth of statutes and case law which provide that an uphill landowner has an easement over his downhill neighbor's property and that this downhill neighbor cannot divert or otherwise impair his uphill neighbor's drainage.

Finally, under the record facts of this case The Robinsons have the right to drain their properties in a particular path. Under common law they have the right to drain in the natural course of drainage, which they have done. Further, they are

entitled to an injunction since the tile they use has been altered and obstructed in a manner which interferes with their drainage. Further, a particular path for underground drainage tile is statutorily provided by Code §648.149 which bars CIPCO from diverting the tile used by The Robinsons.

I. The Robinsons Have a Dominant Easement Right to Drain Their Property Through Existing Tile Over Their Servient Neighbor's Property and This Servient Tenant Cannot Unilaterally Cut or Divert This Tile.

A. Standard of Review.

Central Iowa Power Cooperative ("CIPCO") agrees that the standard of review on this issue is for errors at law. (CIPCO Brief at p. 16)

Kenneth and Deanice Ludolph ("The Ludolphs") have only briefed the issues of (1) whether a prescriptive easement exists and (2) whether the owner of a dominant drainage easement has the right to enter the servient estate to repair his drain. The Ludolphs agree the standard of review on these issues is for errors at law. (Ludolphs' Brief at p. 12)

B. Error Preservation.

CIPCO agrees that error has been preserved on this issue. (CIPCO Brief at p. 16)

The Ludolphs also agree that error has been preserved on the issues which they have briefed. (Ludolphs' Brief at p. 11)

C. **Reply Argument.**

As detailed in The Robinsons' initial brief the rights of an uphill landowner are clearly established by both Iowa common law and statutes. An uphill landowner is considered to be the owner of a dominant drainage easement located in the natural course of drainage over a downhill servient property. Ditch v. Hess, 212 N.W.2d 442, 448 (Iowa 1973). The uphill owner may use buried tile across his downhill neighbor to drain his property. Cundiff v. Kopseiker, 61 N.W.2d 443, 445 (Iowa 1953). It is not necessary to prove by adverse possession that this easement exists. Instead, it is provided for as a matter of law. Ditch, 212 N.W.2d at 448.

Although not necessary an uphill landowner may also establish a drainage easement by adverse possession. For example, if an uphill landowner desires to establish a drain in a location outside the normal course of natural drainage he can do so by adverse possession. Hamilton, Neil, "Iowa Surface Drainage Law and Groundwater Protection: Is There Potential Landowner Liability for Plugging Agricultural Drainage Wells and Sinkholes," Drake Law Review, Volume 39, No. 4, Page 810, 817-818 (1989-90). (hereafter "Neil Hamilton")

CIPCO and The Ludolphs spend much time in their briefs arguing that The Robinsons do not have an easement by prescription. Because they concede that the Robinsons' properties naturally drain across their properties, they must also under

Ditch concede that The Robinsons have a legal and natural drainage easement across their properties regardless of whether adverse possession has been shown.

Remarkably, neither The Ludolphs nor CIPCO address the prescriptive easement rule established in Loughman v. Couchman, 47 N.W.2d 152 (Iowa 1951). Under Loughman, which has never been questioned or overruled, drainage use by an uphill owner becomes adverse as a matter of law when the ownership of the downhill property changes. Loughman, 47 N.W.2d at 154. There is no dispute that the properties acquired by CIPCO and The Ludolphs changed ownership far more than ten years ago. (Robinson Brief p. 46) Therefore, there is clear record evidence that the Robinsons' use is a hostile one. And, as explained in The Robinsons' initial brief, there is also ample record evidence that the topography of the landscape, the use of the property for tiling by The Ludolphs, etc. establish the "openness" requirement. (Robinson Brief p. 46-47) Therefore, record facts establish that the elements of hostility and openness have been satisfied and The Ludolphs' and CIPCO's contrary claim is incorrect.

The crux of this appeal involves a determination of whether CIPCO can order the cutting and relocation of the Robinsons' drainage tile. Under Code §468.148 and §468.149 it is forbidden, under penalty of double damages and criminal prosecution, to "obstruct," "divert" or "injure" any drain. CIPCO does not dispute that the

Robinsons' tile drain has been injured or obstructed. Instead, it claims that only its contractor is liable for this injury. (CIPCO Brief p. 50)

CIPCO does, however, contend that The Robinsons' tile has not been diverted. It claims that since this tile, after it was relocated to run approximately 100 feet uphill and outside the natural course of drainage, eventually ran back down the hill and rejoined its original course far downstream no diversion occurred (CIPCO Brief at p. 20)

There is an abundance of record facts which show that the cutting and uphill diversion of The Robinsons' tile impaired the Robinsons' drainage and that this impairment continues today. (Robinson Brief p. 23-30)

Further, CIPCO's argument flies in the face of what "divert" means. Specifically:

> **Divert – "to turn a person or thing aside from a course; to deflect; as to divert a river from its usual channel." Webster's New Twentieth Century Dictionary of the English Language, Unabridged, 2nd Ed.**

and

> **Diversion – "a deviation or alteration from the natural course of things; esp., the unauthorized alteration of a watercourse to the prejudice of a lower riparian owner…" Black's Law Dictionary, 10th Ed.**

Accordingly, the tile used by The Robinsons has been diverted. Indeed, to say otherwise would be to say that a hypothetical rerouting of the Mississippi River beginning near Minneapolis and then proceeding around the City of Des Moines

would not be a diversion so long as this river eventually rejoined its original channel near St. Louis. It therefore is not surprising that CIPCO is unable to cite any authority for its outlandish argument.

Further, the legislature has instructed us that we are to interpret the Code's drainage provisions liberally so as to facilitate proper drainage. Code §468.2. The facts of this case confirm that tiles are usually installed in lower lying channels and that any diversion will likely therefore take the tile in an uphill direction. Thus, because water naturally does not run uphill, the decision of the legislature to promote drainage by prohibiting the uphill and other diversions of buried tile makes prudent and good sense.

The Ludolphs and CIPCO also argue that The Robinsons do not have a right to use buried tile to drain their properties. Instead, they claim that the Robinsons only have the right to drain their water across the surface of the ground. (Ludolph Brief p. 24; CIPCO Brief p. 15) This argument is directly contrary to the plain language of Code §468.621 and has been rejected by the Iowa Supreme Court. Cundiff v. Kopseiker, 61 N.W.2d 443, 445 (Iowa 1953).

CIPCO cites Logsden v. Anderson, 30 N.W.2d 787 (Iowa 1948), Sojka v. Breck, 832 N.W.2d 384 (Iowa App. 2013), Jenkins v. Pedersen, 212 N.W.2d 415 (Iowa 1973), and Doss v. Simonsen, 103 N.W.2d 806 (Iowa 1905) as support for their claim that they have the right to divert the tile used by The Robinsons. These

cases are neither factually nor on point of law applicable to this appeal for multiple reasons. None of these cases involved a situation where the uphill landowner's drainage was damaged by any water diversion. For example, in Sojka the trier of fact made the determination that no damage occurred. In contrast, in this appeal we are at the summary judgment stage and there is an abundance of record facts which show that damage has been done to The Robinsons' drainage. (Robinson Brief p. 23-30) Indeed, CIPCO does not dispute this but instead takes the position that only the contractors it hired and specifically instructed to cut and divert the tile are responsible for this damage. (CIPCO Brief at p. 50-51) Accordingly, these record facts showing the existence of damages preclude summary judgment because it is well-settled that a downhill neighbor cannot impair his uphill neighbor's drainage.

Further, none of the cases cited by CIPCO involve the diverting or injuring of a pre-existing tile or other manmade drainage improvement. Therefore, they do not involve a violation of Code §468.148 and §468.149 which protect manmade improvements against diversion or other interference and which the Iowa Supreme Court has determined apply to private tile lines. McKeon v. Brammer, 29 N.W.2d 518, 527 (Iowa 1947). One Iowa commentator has pointed out that Iowa's statutory drainage laws do not change the fundamental nature of a servient tenant's obligations or a dominant tenant's rights but do provide protection for man-made "artificial" drainage improvements such as the tile that was diverted and impaired by CIPCO.

Neil Hamilton at page 826 . Further, given the legislature's policy choice in Code Section 468.2 to prioritize the drainage rights of an uphill farmer over the development rights of his downhill neighbor it is not surprising that the legislature also chose to statutorily protect against diversion or obstruction the tile and other mechanisms used by uphill farmers to exercise their drainage rights.

CIPCO also argues that the Robinsons commenced this litigation to delay development of The Solar Project. (CIPCO Brief p. 16) Nothing could be further from the truth. The Robinsons merely want to make sure that their drainage rights are respected and repaired. There is ample record evidence that these rights have been damaged. Why should the Robinsons be required to stand silent regarding the same? Further, as explained in their initial brief , with an eye towards settlement The Robinsons agreed with CIPCO on the hiring of engineer Etler to investigate the design of a workable alternative drain system. CIPCO, however, rejected the resulting recommendations, causing a frustrated Etler to resign. If CIPCO had instead chosen to follow the recommendations of the engineer that it hired instead of cobbling together a cheap and ineffective "solution" this entire dispute could have been avoided. (Robinson Brief Pages 23-30)

Additionally, in apparent recognition of the weakness of their legal position CIPCO claims that The Robinsons are barred by laches from challenging CIPCO's actions. (CIPCO Brief p. 33) However, because CIPCO did not cross appeal it cannot

now challenge the district court's ruling on this issue. In re: Marriage of Sjulin, 431 NW2d 773, 777 (Iowa 1988) CIPCO also contends that the emails and report which it received from Donald Etler, the engineer it hired, are inadmissible hearsay. These documents inform CIPCO of what is needed to fix The Robinsons' drainage and warn it of the consequences if it does not do so. Accordingly, these documents are classic examples of documents which establish CIPCO's knowledge of what it should have done but unfortunately chose not to. Because they show this knowledge and are not intended to show the truth of any statement they are not hearsay. Iowa Rule of Evidence 5.801(c)(2).

Finally, CIPCO contends that not allowing it to relocate the tile historically used by The Robinsons will impair a servient landowner's "discretion over placement of silos, outbuildings, and a variety of other common structures." (CIPCO Brief at page 15) CIPCO is no doubt correct on this point. However, when a servient tenant buys property knowing that it is crossed by an uphill neighbor's tile line they knowingly take on the status of a servient tenant and the obligations associated with this status. Indeed, in this case CIPCO signed a document agreeing to "perpetually maintain" this tile and it cannot with a straight face now claim that it is somehow being unfairly burdened by a responsibility it specifically agreed to take on. Further, natural depressions such as the one where the tile used by The Robinsons was installed are the last place where practical Iowans choose to build. Prudent Iowans build on

higher ground to prevent their "silos, outbuildings, and a variety of other common structures" from being inundated with the water that invariably and naturally flows through these depressions. Therefore, preventing construction on the top of tile is beneficial to all involved and would not impair any reasonable development. No doubt the legislature was aware of this fact when it chose to prohibit the diversion of tile.

II. The Robinsons Have a Right to Enter a Servient Neighbor's Property to Repair the Tile Which Drains Their Properties.

A. Standard of Review.

CIPCO and The Ludolphs agree that the standard of review on this issue is for errors at law. (CIPCO Brief at p. 35; Ludolph Brief at p. 20)

B. Error Preservation.

CIPCO and The Ludolphs agree that error has been preserved on this issue. (CIPCO Brief at p. 35; Ludolph Brief at p. 20)

C. Reply Argument.

Since they concede that their properties are downhill from The Robinsons' properties, CIPCO and The Ludolphs must also concede that their properties are servient to The Robinsons' dominant drainage easement. Ditch, 212 N.W.2d at p. 448. It is established by the legislature and well-settled by case law that the dominant

estate owner has the right to enter the servient estate to reconstruct and make repairs to his drain. Iowa Code §468.621; Nixon v. Welch, 24 N.W.2d 476, 480-81 (Iowa 1947); Taylor v. Frevert, 66 N.W. 474, 475 (Iowa 1918). This is especially true, when, as in the present case, the servient tenant intentionally ordered the original damage to the drain, deliberately failed to make necessary and adequate repairs, ignored the advice of its own engineer regarding how to make these repairs, and threated The Robinson's with trespass if they tried to exercise their repair rights. (Robinson Brief p. 23-30)

III. CIPCO Has Created a Nuisance on Its Property.

A. Standard of Review.

CIPCO agrees that the standard of review on this issue is for errors at law. (CIPCO Brief at p. 37) The Ludolphs have not briefed this issue.

B. Error Preservation.

CIPCO agrees that error has been preserved on this issue. (CIPCO Brief at p. 37) The Ludolphs have not briefed this issue.

C. Reply Argument.

CIPCO argues that because the cutting and diversion of The Robinsons' tile was done by its contractor that it is not responsible for the resulting damages. (CIPCO Brief p. 38) CIPCO also contends that it had a right to divert this tile and

that therefore it cannot be considered to have caused a nuisance. (CIPCO Brief p. 37)

Record facts clearly establish that the cutting and diversion of The Robinsons' drain resulted in injury to their drain and other facts which show the existence of both a common law and a statutory nuisance. (Robinson Brief p. 23-30) Under Iowa law a party is liable for nuisance if he engages in conduct which is likely to result in a nuisance. Shannon v. Missouri Valley Limestone, 122 N.W.2d 278, 280 (Iowa 1963). In the present case, CIPCO specifically directed its contractor to cut The Robinsons' tile and later hired a contractor to reroute this tile. (Robinson Brief p. 23) Accordingly, under Shannon CIPCO is responsible for this nuisance.

CIPCO's claim that §409 excuses it from liability is discussed in detail in The Robinsons' Brief. As explained therein, the numerous Restatement exceptions to §409 and Iowa law mandate that CIPCO be held responsible for the actions it chose to take. Accordingly, there are sufficient record facts to show the existence of a nuisance.

IV. The Trial Court Erred When It Ruled that The Robinsons Have Not Adequately Proven Their Damages.

A. Standard of Review.

CIPCO agrees that the standard of review on this issue is for errors at law. (CIPCO Brief at p. 39) The Ludolphs have not briefed this issue.

B. Error Preservation.

CIPCO agrees that error has been preserved on this issue. (CIPCO Brief at p. 39) The Ludolphs have not briefed this issue.

C. Reply Argument.

The Iowa rule is that damages do not need to be proven with precision. Instead, if it is shown that damages have occurred, compensation for the same is proper. In the present case there is an abundance of record facts showing that The Robinsons' drainage was damaged. These include standing water on cropland, loss in yields, stunted crop growth, sickly looking crops and other impacts to crop health and profits. These are obviously sufficient to establish that a financial loss has occurred. (Robinson Brief p. 24-25, 30) Accordingly, the amount of financial loss resulting from these impaired yields is for the jury to determine. Renze Hybrids v. Shell Oil Company, 418 N.W.2d 634, 639 (Iowa 1988).

Further, in addition to the loss of crops, Iowa recognizes that damages for impaired drainage includes a loss in land value. Valentine v. Wildman, 135 N.W.2d 599 (Iowa 1912). Martin Robinson testified as to the same and as a landowner is qualified to do so. (Robinson Brief at p. 55) Accordingly, the court's ruling that damages have not been shown should be reversed.

V. CIPCO Cannot Escape Responsibility for the Damage It Caused to The Robinsons' Tile and Drainage by Blaming Its Contractors.

A. Standard of Review.

CIPCO agrees that the standard of review on this issue is for errors at law. (CIPCO Brief p. 45) The Ludolphs have not briefed this issue.

B. Error Preservation.

CIPCO agrees that error on this issue has been preserved. (CIPCO Brief p. 45) The Ludolphs do not address this issue in their brief.

C. Reply Argument.

CIPCO contends that under Restatement of Torts (Second) §409 it has a "get out of jail free" card and is therefore not responsible for The Robinsons' damages. But as explained in The Robinsons' brief the numerous exceptions to §409's rule that an innocent property owner is not responsible for the acts of the independent contractor he hired largely eviscerate this rule. Perhaps the most blatant record fact which establishes CIPCO's culpability is the fact that the contractor CIPCO hired asked CIPCO what it wanted done with The Robinsons' tile and was specifically directed by CIPCO to cut it. (Robinson Brief p. 23) Thus began the ongoing ten year saga of CIPCO refusing to fix the damage that it ordered be done.

CIPCO also takes issue with The Robinsons' contention that this easement dispute should be resolved by the law of easements. However, it is established that

drainage easements under Iowa law are appurtenant. Maben v. Olson , 175 N.W. 512, 513 (Iowa 1919) It is also black letter law that the rights and responsibilities which accompany this appurtenant easement cannot be separated from ownership and are therefore non-delegable. C.J.S. Easements, Vol. 28A, p. 368; Rank v. Frame, 522 N.W.2d 848, 852 (Iowa App. 1994).

Accordingly, CIPCO remains responsible for the damage to The Robinsons' drainage.

VI. The Fee Award Should be Reversed.

A. Standard of Review.

CIPCO agrees that the standard of review on this issue is for abuse of discretion. (CIPCO Brief p. 52) The Ludolphs' do not address this issue in their brief.

B. Error Preservation.

CIPCO agrees that error has been preserved on this issue. (CIPCO Brief p. 52) The Ludolphs do not respond to this issue in their brief.

C. Reply Argument.

The necessary reversal of the Trial Court's decision also requires a reversal of the fee award. Further, as explained in The Robinsons' brief the purported partial quit claim deed sent by CIPCO does not satisfy Code §649.5 requirement of a true quit claim deed. Accordingly, the fee award must also be reversed.

CONCLUSION AND REQUESTED RELIEF

Throughout their briefs CIPCO and The Ludolphs conveniently overlook the fact that they are servient tenants. Therefore, they should be made to accept that The Robinsons' drainage rights, since they are dominant, take priority over their conflicting desire to install a solar farm on top of The Robinsons' tile route. Indeed, the central request of CIPCO and The Ludolphs is that this court should invalidate a century of precedent which holds that a downhill neighbor cannot interfere with an uphill landowner's drainage and that the diversion and obstruction of a drainage tile has been prohibited by the legislature. Finally, this appellate court should reject CIPCO's request that Iowa adopt the rule established in State ex Rel. Wasserman v. Fremont, 20 N.E.3d 664 (Ohio 2014) which authorizes under, limited circumstances, including the absence of any prejudice to the dominant tenant, the relocation of drainage tile. It would be a mistake for this court to do so, especially considering that the Iowa legislature has specifically prohibited the diversion of a drainage tile in this state and the record facts which show that the diversion now at issue has drastically impaired The Robinsons' drainage .

Accordingly, it is requested that Appellants have the following relief:

1. That the two summary judgment decisions and quiet title judgment entered by the trial court be reversed and vacated.
2. That the fee award entered below be reversed and vacated.

3. That this matter be remanded for further proceedings.

4. That other relief as appropriate be entered.

REQUEST FOR ORAL ARGUMENT

Appellants request to be heard at oral argument in this matter.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this brief contains 3,583 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(*g)*(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally space typeface using Microsoft Office Word 2013 in 14-point, Times New Roman Font.

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Gregg Geerdes

COST STATEMENT

The undersigned states that there were no costs associated with the preparation of this document.

Dated this 13th day of July, 2024

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