

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 SUPERVISOR, MIKE NOLTE, GARY
MCVICKER, CHRIS VANNESS AS TRUSTEES OF DRAINAGE
DISTRICT NUMBETR 48, AND FRANKLIN COUNTY DRAINAGE
DISTRICT NUMBER 48,
Defendants-Appellees.**

**APPEAL FROM THE DISTRICT COURT OF FRANKLIN COUNTY
HONORABLE JUDGE RUSTIN DAVENPORT**

**APPELLANTS’ RESISTANCE TO DEFENDANTS’-APPELLEES’
APPLICATION FOR FURTHER REVIEW**

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QUESTION PRESENTED FOR REVIEW

The question presented for review by Franklin County Board of Supervisors is awarding severance damages to landowners in Drainage District Number 48 (DD48) which is not in conflict with a decision of the supreme court or court of appeals. The Boards' application for further review should be denied.

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STATEMENT OPPOSING FURTHER REVIEW

Drainage District 1 (DD1) was formed in 1906 with a 4.8-mile open ditch that was abandoned in 1916 to Drainage District 48 (DD48) which was established in 1916 to reconstruct DD1. DD48 recreated a new drainage district which abandoned the upper 3.1 miles of open ditch and replaced it with a tile line covered with dirt. The area above the 3.1 miles of tile line became productive farm land.

The lower 1.7 miles of open ditch was cleaned out by DD48.

The engineer's survey and report for DD48 in 1916 established (a) the north 3.1-mile tile line, (b) 35 lateral tile lines connected to the 3.1-mile tile line, and (c) cleaned out the south 1.7-mile open ditch.

Section 468.27, Code of Iowa, did not come into existence until 1985. Section 468.27, Code of Iowa, states that a drainage district is presumed to have a permanent easement for the ditch and/or tile line, as shown in the engineer's survey and report, i.e., (a) 3.1-mile north tile line, (b) 35 lateral tiles, and (c) a 1.7-mile south open ditch.

DD48 did not have an easement for an open ditch for the north 3.1 miles, where the tile was installed in 1916, when it proceeded with its 2017 Open Ditch Project.

In the 1990's, DD48 had a repair project that put in a shallow waterway above the 3.1-mile tile line that specifically was to be farmable. DD48's repair project did not provide for an open ditch.

DD48's 2017 Open Ditch Project removed the 3.1-miles of tile line and replaced it with a new open ditch that severed the Hanson, Abbas, and Reid-Meyer lands. The Plaintiffs-Appellants are therefore entitled to receive severance damages.

The Defendants'-Appellees' application to the supreme court for further review should be denied.

BRIEF

In 1916, DD1 abandoned its 4.8-mile ditch to DD48. In 1916, DD48 abandoned the northern 3.1-miles of open ditch and replaced it with a 3.1-mile tile connected to 35 lateral tiles, all covered with dirt. The area above the 3.1-miles of tile became productive farm land.

“In order to prove abandonment, actual acts of relinquishment, accompanied by intention to abandon, must be shown.” Allamakee County v. Collins Trust, 599 N.W.2d 448, 451 (Iowa 1999).

“In order to establish an abandonment of property, actual acts of relinquishment accompanied by intention must be shown. The primary elements are the intention to abandon and the external act by which that intention is carried into effect...” Town of Marne v. Goeken, 147 N.W.2d 218, 224 (Iowa 1967).

In 1916, DD1 was under the supervision of the Franklin County Board of Supervisors (Board). Likewise, in 1916, DD48 was also under the supervision of the Franklin County Board of Supervisors. See Section 468.126(1), Code of Iowa, and its predecessor sections.

The Board, on behalf of DD1, intended to abandon DD1's 4.8-mile ditch to DD48 when it published Drainage District Notice District No. 48 for "the establishment of a tile drainage system (as opposed to the existing open ditch) comprising the lands described in said petition and establishing therein a system of drainage as shown on his (DD48's engineer) plat on file in the office of the county auditor of Franklin County, Iowa." (Emphasis added.) Exhibit 18, Exhibit 2 thereof.

The same Board of Supervisors, on behalf of DD48, approved the survey and plan of Engineer G. H. Mack dated November 2, 1916, which provides that:

- "This district (DD48) is a reconstruction of Drainage District Number One", i.e., the creation of a new drainage district, DD48.
- Recommending:
 - (1) Cleaning the old ditch from station 0 to station 92 (from south to north) 9,200 ft. = 1.7 mi.

(2) Laying tile from station 92 to station 255 ($255 - 92 = 163 \times 100 = 16,300 \div 5,280 \text{ ft.} = 3.1 \text{ mi.}$).

(3) Installing lateral tiles 1 through 35.

The Board of Supervisors intended to abandon the north 3.1-mile open ditch when it approved the abandonment of the 3.1-mile open ditch and replaced it with the 3.1-mile tile line covered with dirt, as recommended by Engineer G. H. Mack.

Section 468.27, Code of Iowa, did not exist until 1985 with the Laws of The Seventy First G. A. 1985 Session Chapter 163, Section 1.

Section 468.27 in pertinent part states:

“Following its establishment, the drainage district is deemed to have acquired by permanent easement all right-of-way for drainage district ditch, tile lines ... in the dimensions shown on the survey and report made ...”

The survey and report made by the engineer G. H. Mack in 1916, Exhibit 18 Exhibit 1 Sheet 1 shows:

- (1) 3.1-mile tile line to the north.
- (2) 1.7-mile open ditch to the south.
- (3) 35 lateral tile lines connected to the 3.1-mile tile line.

DD48, as of 1985 per Section 468.27, Code of Iowa, thereby had an easement for the 3.1-mile tile line. It did not have an easement for an open ditch where the 3.1-mile tile line existed. It had an easement for a 3.1-mile tile line.

DD48's 1990 repair project above the 3.1-mile tile line specifically provided for a shallow waterway above the tile line that was farmable. Again, it did not have an easement for an open ditch.

DD48 did not have an easement for an open ditch where the 3.1-mile tile line was when DD48's 2017 Open Ditch Project was constructed which severed the Hanson, Abbas, and Reid-Meyer lands with its new open ditch.

Hanson, Abbas, and Reid-Meyer are entitled to recover severance damages in this case.

Hanson, Abbas, and Reid-Meyer appealed the District Court's divergent award of severance damages of 4.5% for Abbas, 9.4% for Hanson, and 1.98% for Reid-Meyer, when it was the un rebutted testimony of their expert witness, Ted Frandson, that severance of land typically reduces the fair market value of the land by 10%.

The Court of Appeals affirmed the District Court's divergent percentage of awards for severance damages.

CONCLUSION

Defendants'-Appellees' Application For Further Review should be denied.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This Resistance To Defendants’-Appellees’ Application For Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Resistance To Defendants’-Appellees’ Application For Further Review contains 1,593 words, excluding the parts of the Appendix exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Resistance To Defendants’-Appellees’ Application For Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Resistance To Defendants’-Appellees’ Application For Further Review has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 12th day of June, 2024.

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CERTIFICATE OF FILING AND SERVICE

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Appellants' Resistance To Defendants'-Appellees' Application For Further Review with the Clerk of the Iowa Supreme Court, on June 12, 2024.

I, Robert W. Goodwin, hereby further certify that on June 12, 2024, I served the foregoing Appellants' Resistance To Defendants'-Appellees' Application For Further Review, by the electronic filing system, to the following attorneys of record:

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