

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**DARREL CARR and CECELIA CARR,  
husband and wife, and RONNIE DEXTER  
and DARLA DEXTER, husband and wife,**

Plaintiffs,

vs.

**HUGH GENE CARR,**

Defendant.

Case No. CI99-71

**ORDER DENYING MOTION**

**DATE OF HEARING:** July 27, 2000.  
**DATE OF RENDITION:** September 13, 2000.  
**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).  
**TYPE OF HEARING:** Telephonic (per Rule 8-4, no evidence or record).  
**APPEARANCES:**  
For plaintiffs: William G. Blake.  
For defendant: Todd B. Vetter and George H. Moyer, Jr.  
**SUBJECT OF ORDER:** Plaintiffs' motion to file amended reply.  
**PROCEEDINGS:** See order filed July 28, 2000.  
**FINDINGS:** The court finds and concludes that:

1. The plaintiffs sought leave to file a second amended reply (by motion entitled "motion to file amended reply"). The motion inaptly describes the relief sought, as the plaintiffs seek to file a second amended reply rather than an amended reply. The first amended reply was filed, pursuant to leave, on December 22, 1999. The defendant strenuously resists the motion, primarily arguing that the motion is untimely. The matter was first raised at the pretrial conference, after the close of discovery.

2. The motion addresses this court's discretion. *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993). The timeliness factor weighs against the granting of the motion. However, the motion also fails on its merits.

3. The proposed second amended petition does not state *facts* sufficient to state the claim of equitable estoppel.

4. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

5. The plaintiffs cite *Ricenbaw v. Kraus*, 157 Neb. 723, 61 N.W.2d 350 (1953), *Magnuson v. Coburn*, 154 Neb. 24, 46 N.W.2d 775 (1951), and *Arterburn v. Beard*, 86 Neb. 733, 126 N.W. 379 (1910), to support their proposed claim. All of these cases differ from the present situation, as those cases concerned expenditures to improve the servient estate, i.e., expenditures by the nonowner to change the character of the land being crossed. Here, the expenditures claimed were made to improve the plaintiffs' own land, not to change the character of the defendant's property. This court is persuaded that these cases do not support the plaintiffs' claim.

6. Moreover, the proposed second amended reply does not state facts, rather than legal conclusions, regarding several elements of equitable estoppel.

7. Particularly in view of the issue being first raised after the close of discovery, the court concludes that the motion should be denied.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The motion to file amended reply (filed July 7, 2000) is denied.

Signed in chambers at Ainsworth, Nebraska, on September 13, 2000.  
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.
- Note the decision on the trial docket as: [DATE OF FILING] Signed  
"Order Denying Motion" entered denying plaintiffs' motion for leave  
to file second amended reply.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge