

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**FREDERICK C. STOECKER and
MADELINE STOECKER, husband and
wife,**

Plaintiffs,

vs.

**WILLIAM D. SAMMONS and NADINE
SAMMONS, husband and wife, ANDREW
ROBAK SR., ANDY ROBAK JR., FRANK
ROBAK, LEE ROBAK, WILLIAM
ROBAK, JEFF ROBAK, LIZABETH
CARPENTER, AND ALL PERSONS
HAVING OR CLAIMING ANY INTEREST
IN the Southwest Quarter of the Southwest
Quarter and the East Half of the Southwest
Quarter of Section 34, Township 27 North,
Range 14 West, in Holt County, Nebraska,
REAL NAMES UNKNOWN,**

Defendants.

Case No. CI98-47

DECREE

DATE OF TRIAL: October 25, 30, and 31, 2001.

DATE OF RENDITION: January 23, 2002.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiffs: Richard E. Gee with plaintiffs.

For defendants:

Sammons: Donald R. Witt, of Baylor, Evnen, Curtiss, Gruit & Witt, with
defendants.

Others: No appearances.

SUBJECT OF DECREE: Decision on the merits following trial to the court in equity.

PROCEEDINGS: See journal entry rendered contemporaneously with conclusion of trial.

FINDINGS: The court finds and concludes that:

1. The court previously entered interlocutory summary judgment in favor of the defendant William E. Robak and against the plaintiffs dismissing the plaintiffs' second amended petition with prejudice as to any claim of money damages. That summary judgment also dismissed any claim for injunctive relief against such defendant personally, but did not preclude or affect any relief ultimately granted or denied as against the ownership interest in said real estate formerly held by said defendant William E. Robak and quitclaimed to defendant William D. Sammons. The plaintiffs' subsequent filing of a third amended petition does not change that situation.

2. At the final pretrial conference, the plaintiffs confessed the renewed summary judgment motions of the other defendants Robak and Carpenter on the same basis and for the same reasons.

3. The court adheres to the interlocutory determinations regarding defendants Robak and Carpenter, and incorporates such determinations by reference herein. Because the defendants Sammons remain the only defendants having any interest in the litigation, references hereafter to the "defendants" will refer only to the defendants Sammons unless the context otherwise requires.

4. The plaintiffs base their claims upon NEB. REV. STAT. § 31-224 and 31-226 (Reissue 1998), seeking both injunctive relief and damages. The leading case regarding these statutes is *Barthel v. Liermann*, 2 Neb. App. 347, 509 N.W.2d 660 (1993), *review denied*, 245 Neb. xxii, ___ N.W.2d ___ (1994) (*Barthel*).

5. A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. *Id.*

6. The focus of the present case is a flowing stream described as a tributary to Dry Creek, which is itself a tributary of and ultimately empties into the Elkhorn River. As such, the tributary is clearly a "watercourse" within the meaning of § 31-224, as defined by § 31-202. NEB. REV. STAT. § 31-202 (Reissue 1998).

7. The plaintiffs must next prove that this watercourse "lies, runs or has its course" through the defendants' property. This fact is undisputed by the parties.

8. The plaintiffs must next show that “rubbish, weeds or other substance[s]” are “blocking or otherwise obstructing the flow of the water” in the stream. NEB. REV. STAT. § 31-224 (Reissue 1998). The parties vigorously contested this element.

9. Inherent in that element is a causal relationship between the blockage or obstruction and the claimed resulting damage. Prior to a large precipitation event in early May of 1999, the evidence persuades this court that rubbish, weeds or other substances, including beaver dams, in the stream channel on the defendant’s property did obstruct the flow of the water in the channel.

10. The defendant William D. Sammons (the defendant) admitted in his testimony that he did not clean or remove vegetation or material from the channel over the last 20 years except for tearing down several beaver dams. He also admitted the vegetation slows down the water in the channel. Moreover, the circumstantial evidence of obstruction was overwhelming. The unusual accumulations of water began at a discrete point in time and continued for several years. The unusual flooding essentially stopped after the large precipitation event, which effectively cleaned out the stream bed by the volume and speed of waters moving through the obstructed area. The plaintiffs’ expert witness persuasively demonstrated how the aerial photographs show the area of obstruction. The inferences of rebuilt beaver dams from the plaintiff Frederick Stoecker’s (the plaintiff) previous observations and the defendant’s admissions support the conclusion.

11. Exhibit 179, a videotape prepared by the defendants but offered by the plaintiffs, reinforces those conclusions. The tape shows the dramatic effect on local flow and accumulation of water in the channel from a beaver dam and the transformation following after removal. The court received the tape over defendants’ objection concerning statements regarding settlement or similar matters. Having now heard the tape, this court determines that none of the statements pertains to any settlement discussions or negotiations. No privilege has been asserted nor could this court conceive of any applicable privilege. There is nothing which the court’s ruling would require the court to disregard. During the latter part, starting approximately 51 minutes into the tape, the defendant discusses the prior events with other family members present. He expressly admitted that an obstruction in that area did raise the level of the water, even motioning to show the height of the obstruction. He attributed the obstruction to materials flowing down the channel from the plaintiffs’ property and resulting from the plaintiffs’ dredging or cleaning activities.

However, the plaintiffs' experts testified persuasively that the plaintiffs' dredging or cleaning would have no effect on the flooding, and if anything, might have reduced the flooding effect. The expert witness' attribution to vegetation and rubbish is more consistent with the photographic evidence and more persuasive than the defendant's explanation.

12. The defendants' expert witness failed to persuade this court that the problem was directly attributable to precipitation variation. The conclusions attempting to draw comparisons between aerial photographs from different years and attempting to correlate annual rainfall variation to the differences between photographs utterly disregard the differences in the time of year in which the photographs were taken from year to year, the obviously varying altitudes from which photographs were taken, and differences in the lighting conditions between photographs. This court considers that testimony of little, if any, value.

13. To the contrary, the plaintiffs' expert witness impressed the court with his expertise. He testified persuasively regarding the high ground water table and the characteristic of the flat gradient of the stream, which is typical of Sandhills streams. Both expert witnesses agreed upon the existence of a direct connection between the ground water and surface water in the area. The plaintiffs' expert witness concluded that the level of the water downstream in an accumulation area, resulting from an obstruction, was the direct cause of higher than normal water accumulations on the plaintiffs' upstream land.

14. From the defendant's testimony, the court concludes that the defendant desired to retain the character of the stream in a "natural" state including incidental obstruction from vegetation or rubbish notwithstanding the requirement of § 31-224. He disregarded his duty under that statute to clean the watercourse. Ultimately, nature accomplished that which the defendant neglected.

15. The evidence does not persuade the court that the defendant directly or personally caused the obstructions. However, the evidence does conclusively demonstrate his knowledge of the obstructions and his effective consent or approval. The testimony overwhelmingly demonstrates that the plaintiffs notified the defendant of the problem. Indeed, the term "notified" fails to effectively convey the vigorous nature of the plaintiffs' protestations.

16. The plaintiffs also asserted claims that the "man-made ditch" in the defendants' pasture south of the tributary contributed to the flooding problem. The evidence fails to demonstrate to this court

that the “man-made ditch” meets the definition of a watercourse in § 31-202. The evidence further fails to persuade the court that the condition of that feature caused or contributed to the problems suffered by the plaintiffs.

17. However, returning to the issue of obstructions in the tributary, the evidence overwhelmingly demonstrates that the large precipitation event in early May of 1999 significantly changed the situation, effectively eliminating the obstructions. The plaintiffs’ request for injunctive relief was thereby mooted. *State ex rel. Douglas v. Wiener*, 220 Neb. 502, 370 N.W.2d 720 (1985). In *Barthel v. Liermann, supra*, although the Court of Appeals mandated entry of a mandatory injunction to clean the ditch, the court stated that injunction “need not be perpetual because the interpretation of § 31-224 by this court notifies the [defendants] that they are required, by law, to clean the ditch of *all* weeds or other substances obstructing the flow of water, provided they *know* about the substances.” *Id.* at 357, 509 N.W.2d at ___ (emphasis in original). This court should not grant injunctive relief at this time because this court’s decision notifies the defendants in the same fashion that the Court of Appeals’ decision notified the defendants in *Barthel*.

18. Some content in the evidence might lead this court to doubt that the defendant Nadine Sammons was actually a record owner of the property in question. However, the plaintiffs alleged in paragraph 3 of the third amended petition that both of the defendants Sammons were at least partial owners and in possession of the subject property, referred to in that petition as the “Sammons’ property.” The defendants’ amended answer to the third amended petition expressly admits in paragraph 3 thereof that the defendants William D. Sammons and Nadine Sammons are at least partial owners and possessors of the Sammons’ property. The admission in the amended answer, which is the currently operative answer, that Nadine Sammons is at least a partial owner and possessor of the property constitutes a judicial admission binding upon the defendants. Although the pretrial order limits the issues and to that extent supersedes the pleadings, nothing in the *issues* contradicts the admission. Although a stipulated fact in the *stipulations* in the pretrial order recites possession without reference to ownership, that does not contradict the defendant’s judicial admission in their amended answer. Thus, the court concludes that Nadine Sammons must be considered for purposes of this litigation as one of the owners of the Sammons’ property. As an owner, the requirements of § 31-224 also applied to her.

19. Of course, the plaintiffs have the burden to prove her knowledge or consent to the obstruction to impose liability upon her for violation of § 31-224. The vigorous nature of the plaintiffs' complaint support an inference of knowledge of the situation on her part. Of course, where contrary inferences arise from the same facts, the burden of proof has not been met. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). Here, however, the court finds an inference of absence of knowledge utterly inconsistent with the deterioration in neighborly relations replete throughout this evidence. Although there is no direct evidence of her knowledge or consent, the circumstantial evidence meets the plaintiffs' burden on that issue.

20. Implicit in the above findings is the court's rejection of the defendants' contentions that the plaintiffs caused their own flooding by their actions in straightening or dredging the tributary or that the flooding was attributable mainly to unusually excessive precipitation.

21. The pretrial order preserved the pleaded defense of federal preemption. In this context, federal preemption is an affirmative defense. *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb. 758, 579 N.W.2d 518 (1998) (citing *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). The defendants have failed to present any persuasive evidence that § 31-224 is preempted by any federal statute or regulation, and have failed to meet their burden of production and their burden of persuasion on this issue.

22. The pretrial order preserved the pleaded defense of failure to mitigate damages. However, during trial, the defendants' counsel expressly waived the issuance of mitigation. This court need not address that issue further.

23. The pretrial order preserved the pleaded defense of the statute of limitations. The plaintiffs' original petition was filed on September 25, 1998. The essential nature of the plaintiffs' claims remains unchanged notwithstanding several amendments to the petition. The applicable statute of limitations would require that the action be commenced within four years after the action accrued. The plaintiffs claim, and the court has determined, that the damages result from obstructions occurring from early 1995 to mid-1999. Clearly, the original petition was filed within the applicable limitation period. The statute of limitations defense lacks merit.

24. Although the defendants' amended answer attacked the constitutionality of § 31-224 under Article I, §§ 1, 3, and 25 of the Nebraska Constitution, and the Fourteenth Amendment to the United States Constitution, the pretrial order does not preserve those issues. Accordingly, the court considers that those issues have been waived or abandoned.

25. Because the defendants' failure to comply with the requirements of § 31-224 and their subsequent failure to cure the problem upon notice, § 31-226 imposes upon the defendants statutory liability for damages to the plaintiffs. After carefully considering the issues concerning damages, the court concludes that the damages for partial loss of the perennial hay crops for 1995 through date of trial, loss of use of the pasture for 1995 through date of trial, cost of repairs to the meadow and pasture, and cost of repairs to the tributary channel, fish pond, and drainage connector were proximately caused by the defendants in the amount of \$18,529.00, and that judgment should be entered in favor of the plaintiffs and against the defendants in such amount.

26. Following the amendment by interlineation in the course of the trial, although still phrased as three causes of action, the court concludes that the operative petition states a single cause of action arising under §§ 31-224 and 31-226, for which the plaintiffs seek both injunctive relief and damages. The relief is framed accordingly.

27. For essentially the same reasons set forth above regarding the analysis of the plaintiffs' claims, the court concludes that the defendants' claims set forth in their operative counterclaim lack merit and should be dismissed with prejudice.

28. The plaintiffs are entitled to recover their taxable costs. They have included in the submitted itemization of costs their claims for fees and charges of their expert witness appraiser, expert witness range consultant, expert nonwitness surveyor, and expert witness engineer. Those items cannot be included in the costs taxed to the defendants. Nothing can be taxed as costs in an action except such items as are prescribed by statutes or are expressly authorized by the consent or agreement of the parties. *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994). A witness who testifies as an expert on a subject requiring special knowledge and skill is generally entitled only to the statutory witness fee. *Id.* The taxable costs total \$1,510.20.

29. Although assertions that a claim or defense is frivolous or made in bad faith are ordinarily considered after trial, under the circumstances here and in the interests of bringing the matter to a final decree with no remaining issues, the court chooses to address those matters now.

30. The defendants included in their amended answer an allegation that the plaintiffs brought this action in bad faith and made frivolous claims. In view of the court's findings set forth above, there is no possibility of the defendants prevailing on this contention on post-trial hearing. Judicial economy demands that this allegation be dismissed.

31. The plaintiffs' claims include allegations that the statements of the defendants in earlier pleadings made the second amended petition (and third amended petition) necessary to include other defendants. This claim lacks merit because: (a) the operative petition shows on its face that the plaintiffs could have discovered at any time that there were other parties who might be necessary parties to the action, (b) as the court determined that a mandatory injunction is not appropriate under the circumstances, the other parties turned out not to be necessary parties, and (c) the claims against the other parties were determined adversely to plaintiffs on summary judgment.

32. All claims for attorneys' fees should be denied.

33. This decree is intended to constitute a final adjudication of all claims of all parties to this action. To the extent not otherwise expressly considered, all other claims of all parties should be denied.

DECREE: IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The plaintiffs' operative petition for injunctive relief is dismissed with prejudice as to events occurring or conditions existing as of the date of trial.

2. Judgment on the plaintiffs' operative petition for damages is granted in favor of the plaintiffs, Frederick C. Stoecker and Madeline Stoecker, and against the defendants, William D. Sammons and Nadine Sammons, jointly and severally, in the amount of \$18,529.00 and costs taxed in the amount of \$1,510.20. The judgment shall bear interest from the date of entry at the rate of 5.442% per annum until paid.

3. Judgment is granted in favor of the defendants, Andrew Robak Sr., Andy Robak Jr., Frank Robak, Lee Robak, William Robak, Jeff Robak, Lizabeth Carpenter, and all persons having or

claiming any interest in the property described in the caption, real names unknown, and against the plaintiffs, Frederick C. Stoecker and Madeline Stoecker, for dismissal of the plaintiffs' operative petition with prejudice to future action.

4. Judgment on the operative counterclaim of the defendants, William D. Sammons and Nadine Sammons, is granted in favor of the plaintiffs, Frederick C. Stoecker and Madeline Stoecker, and against the said defendants for dismissal of the said counterclaim with prejudice to future action.

5. All claims for attorneys' fees are denied.

6. This judgment constitutes a final adjudication of all claims of all parties to this action. To the extent not otherwise expressly determined above, all other claims of all parties are denied and dismissed with prejudice.

Signed in chambers at **Ainsworth**, Nebraska, on **January 23, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed "Decree" entered**.
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: