

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000431-MR

BRYAN J. JORDAN AND
JEAN M. JORDAN

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN M. HORNE, SENIOR JUDGE
ACTION NO. 04-CI-01748

MARCIA P. MURRAY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Brian J. Jordan and Jean M. Jordan appeal the entry of summary judgment by the Boone Circuit Court in favor of their neighbor, Marcia P. Murray. At issue is liability for the excessive flow of drainage water from one piece of property onto another. The Jordans contend that Murray, owner of a servient estate, is not entitled to summary judgment since she is required to tolerate the drainage of diffused

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

surface water from their property. Having reviewed the arguments of counsel in light of the relevant case law, we vacate the summary judgment and remand for additional proceedings.

Murray and the Jordans purchased adjacent lots in Arborwood, a residential development in Burlington, Kentucky. They each contracted to build houses on the lots: the Jordans at 4563 Elderberry Court and Murray at 4559 Elderberry Court. The parties agree that the Jordans' property is generally situated at a higher elevation than Murray's property. Site maps prepared before the building lots were sold indicated that surface water flowed naturally from the Jordans' lot across Murray's property.

Before construction began, the parties submitted their building plans to the Boone County Planning Commission. Both plans showed diffused surface water being directed away from the homes toward the rear property lines and then downhill. The Jordans' plan included a walk-up basement. Their outdoor stairwell was to be surrounded by a substantial concrete retaining wall.

Both of the houses were under construction at the same time. The homebuilders prepared the adjoining sites by excavating and moving large amounts of topsoil around the building lots. During construction of the homes, a swale – or ditch – was created by the builders into which diffused surface water from the Jordans' property gathered and flowed efficiently over Murray's property. This swale was not depicted on the approved plan for either new home and did not exist prior to construction. It was essentially a by-product of the construction project.

During construction, the Jordans decided to change their *walk-up* basement to a *walk-out* basement. The Jordans' lot was graded to accommodate a large concrete

patio and a ground-level exterior door accessing the basement of their house. The retaining wall depicted in the originally approved building plan was not built. This change in the Jordans' building plan was not submitted to the planning commission for approval.

The Jordans moved into their new house in September 2003. Murray's house was completed later – in mid-winter of 2004. When Murray moved in to her house, her yard had not yet been graded or seeded for a lawn. Several months later, in October 2004, Murray's homebuilder graded her yard and prepared it for a lawn. The construction swale was not maintained.

Within a week, an extraordinarily heavy rain fell on the area and deposited four inches of water over the neighborhood in a matter of hours. The Jordans' basement flooded. Their basement flooded once again as the fall-out from Hurricane Katrina passed over Northern Kentucky a short time later.

On November 1, 2004, the Jordans filed a civil action against Murray. In the only allegation relevant to this appeal, the Jordans alleged that Murray had committed a trespass to land by obstructing the natural flow of diffused surface water from their property causing it to backup into their basement. They sought a permanent injunction and damages for the loss of personal property. Murray answered and denied that the Jordans were entitled to an injunction or damages.

On November 16, 2005, the Jordans and Cincinnati Insurance Company filed a second action against Murray alleging negligence. Murray answered and denied the allegations contained in the second action. The separate actions were consolidated upon Murray's motion before the trial court.

On June 13, 2006, the Boone Circuit Court issued a notice that the matter would be dismissed for lack of prosecution. On September 19, 2006, following some activity by the parties, the trial court set the matter for trial on January 29, 2007. The court's scheduling order provided that all dispositive motions were to be filed no later than sixty days before trial.

On December 7, 2006, Murray filed a motion for summary judgment. In the memorandum filed in support of her motion, Murray contended that the Jordans' decision to grade their lot to accommodate a walk-out basement and patio contributed to the accumulation of water at their basement. She noted that neither of the building lots was in its natural state following construction of the parties' homes. She argued that the Jordans had unreasonably altered the natural course of the surface water resulting in an excessive volume of water flowing upon her property. She contended that she was entitled to judgment as a matter of law.

The affidavit of James H. Viox III, a civil engineer, was attached to Murray's memorandum. According to Viox, "the basement elevation of the [Jordans' house] is below the yard catch basin" Affidavit at 2. In his opinion, the Jordans' basement would not have flooded had the yard been "graded as planned and the house constructed with a stairwell to the lower level as shown in the plot plan" *Id.*

On December 18, 2006, the Jordans and Cincinnati Insurance Company filed a motion to strike Murray's motion for summary judgment because it had been filed out of time. On January 5, 2007, the Jordans and Cincinnati Insurance Company filed a motion for an extension of time to file a response to the motion for summary judgment.

The Jordans and Cincinnati Insurance Company filed a memorandum in opposition to Murray's motion for summary judgment on January 12, 2007. They argued that Murray's property was subject to a servitude and that she had been negligent by refusing to accept the natural flow of diffused surface water from the Jordans' upper estate. The affidavit of Leonard Rudick, a structural engineer, was attached to the memorandum. It was Rudick's opinion that the grading of Murray's property in October 2004 had caused the Jordans' basement to flood. The Jordans and Cincinnati Insurance Company argued that Murray was not entitled to summary judgment.

After its review of the record, the trial court granted summary judgment to Murray. The court held that "the [Jordans'] failure to adhere to [their] building plan, which would have diverted water from [their] basement, is fatal to [their] cause of action." The trial court denied the motion to alter, amend, or vacate, and this appeal followed.

The Jordans contend that the trial court erred by granting summary judgment to Murray. We agree.

Summary judgment is proper only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

The parties agree that a landowner is bound to accept the natural drainage of diffused surface waters from an upper estate. However, the owner of the upper estate may not unreasonably change the natural flow of water causing it to collect and be cast upon the lower estate at a point where it had not previously flowed or to create an

increased volume or an accelerated rate of flow so as to cause substantial damage to the lower estate. *Klutey v. Commonwealth, Department of Highways*, 428 S.W.2d 766 (Ky. 1968). This rule weighs the reasonableness of the use of the land drained against the degree of the injury to the land receiving the burden of the drainage. *Id.* The question of the reasonableness of the use of the land by the owner of the upper estate against the burden imposed upon the owner of the lower estate is deemed to be a matter for a jury. *Commonwealth, Department of Highways v. S & M Land Co., Inc.*, 503 S.W.2d 495 (Ky. 1972).

Our review of the record indicates that numerous questions of material fact exist to preclude the entry of summary judgment in these proceedings. As an initial matter, the parties have presented conflicting evidence regarding the cause of the flooding at the Jordans' basement. The Jordans contend that Murray's failure to maintain the swale on her property prevented the flow of water away from their basement; however, Murray argues that the Jordans' own flawed design changes rather than the grading of her property caused the flooding and resulting damage to property. Next, questions remain with respect to whether the Jordans unreasonably altered the natural flow of surface water or caused a greater volume of water or an accelerated flow of water to drain onto Murray's property. If so, it must be decided whether the reasonableness of the use of their property outweighed the degree of the harm to Murray's property. These are questions properly addressed to the jury as fact-finder and are not properly susceptible of a summary resolution by the court.

Since we have decided that the entry of judgment was erroneous, we need not consider the Jordans' additional contention that the court abused its discretion by

reviewing and disposing of Murray's motion for summary judgment before it considered their motion to strike. The judgment of the Boone Circuit Court is vacated, and this matter is remanded for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

William G. Knoebel
Burlington, Kentucky

BRIEF FOR APPELLEE:

Thomas L. Rouse
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