

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

TIM ATKINSON,

RESPONDENT-APPELLANT,

v.

GREG CORSON,

APPELLANT-RESPONDENT;

LISA CORSON,

APPELLANT.

DOCKET NUMBERS WD69035 & WD69080

DATE: June 30, 2009

Appeal From:

CASS COUNTY CIRCUIT COURT

THE HONORABLE JACQUELINE ANNETTE COOK, JUDGE

Appellate Judges:

Division One: Alok Ahuja, P.J., Thomas H. Newton, C.J., and Harold L. Lowenstein, J.

Attorneys:

Ronald L. Jurgeson, Esq., Lee's Summit, MO, **for appellant.**

Scott A. Hunter, Esq., Kansas City, MO., **for respondent.**

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS – WESTERN DISTRICT

TIM ATKINSON,

RESPONDENT-APPELLANT,

V.

GREG CORSON,

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Cass County

Before Division One Judges: Alok Ahuja, P.J., Thomas H. Newton, C.J., and Harold L. Lowenstein, J.

This dispute arose between adjoining landowners, Appellants Greg and Lisa Corson and Respondent Tim Atkinson. Following Atkinson's construction of a second pond on his property, which purportedly altered the surface water flow between the properties, Greg Corson constructed a berm along the property line, allegedly in an attempt to recreate the preexisting water flow. Atkinson claimed the berm caused water to collect on a portion of his property, rendering it unmowable and essentially useless.

Atkinson brought suit against the Corsons, seeking compensatory and punitive damages based on the allegation that the construction of the berm violated the rule of reasonable use of surface water, as well as for trespass, based on the allegation that Greg Corson shot a "No Trespassing" sign on Atkinson's property. The trial court refused to submit Atkinson's claim for punitive damages arising from his claim regarding the construction of the berm. The jury found in favor of Atkinson on his remaining claims. The Corsons appeal; Atkinson cross-appeals the trial court's refusal to submit his claim for punitive damages relating to construction of the berm.

AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.

Division One Holds:

The Corsons first argue that there was insufficient evidence to support the jury's verdict that construction of the berm violated the rule of reasonable use of surface water. More than sufficient evidence exists to support the jury's verdict, however. Atkinson's contractors were instructed to smooth a ditch straddling the parties' properties in a way that did not disrupt or change the manner in which the surface water naturally flowed, and testified that they had done so. And although the ditch that was smoothed out was only approximately fifty feet in length, the berm Mr. Corson constructed was over seven times as long. Evidence was presented that Mr. Corson constructed the berm even

though he was not actually experiencing any water problems. Mr. Corson also testified that he built the berm “to keep [Atkinson]’s water on [Atkinson].”

In their second Point, the Corsons argue that Mrs. Corson cannot be liable for violation of the rule of reasonable use of surface water because insufficient evidence existed that she “was involved with the planning or construction of the berm which was located on the Corson property,” or knew about Mr. Corson’s intention to construct the berm before it was built. The Corsons cite no authority to support the proposition that a property owner must be directly involved in the planning and/or construction of a surface-water diversion to be held liable for violation of the rule of reasonable use. We accordingly deny Point II without addressing its merits.

In Point III, the Corsons claim that the trial court committed plain error in instructing the jury on the reasonable use of surface water claim. We find no plain error, given that the challenged instruction captured the fundamental element of reasonableness, the touchstone of the reasonable use rule.

In Point IV, the Corsons contend that the trial court should not have allowed into evidence certain testimony of Atkinson relating to the value of, and resulting damages to, his property. Atkinson’s theory was that completely-fenced property would be worth more than property with an incomplete fence, because prospective purchasers who wanted to run cattle on the land – or rent it out to others to run cattle on the land – would likely pay more if the land was capable of being securely fenced on all four sides, rather than on only three. Given the trial court’s broad discretion in the admission of evidence, we cannot say that the trial court committed reversible error in failing to instruct the jury to disregard Atkinson’s comment that he was no longer able to farm or rent his property as a result of the drainage problems caused by the berm.

The Corsons’ fifth Point argues that the trial court erred in submitting the trespass count against Mr. Corson, because there was insufficient evidence to support a jury finding that he committed trespass by shooting at Atkinson’s “No Trespassing” sign. We disagree. While there was no direct evidence that Mr. Corson shot the sign, the jury was fully entitled to base its verdict on circumstantial evidence, including evidence of the parties’ prior acrimony; testimony that Mr. Corson owned and had fired guns on his property; the fact that the sign faced the Corsons’ property and presumably was shot from there; Mrs. Corson’s testimony that she was not aware of any unauthorized shooting on her property; and the evidence that Mrs. Corson purchased a replacement sign after Atkinson told her he believed Mr. Corson had damaged the existing one.

On the cross-appeal, to make a submissible case for punitive damages, Atkinson was required to show, by clear and convincing evidence, that Mr. Corson’s conduct constituted either a wanton, willful or outrageous act, or reckless disregard for an act’s consequences, from which evil motive is inferred. Here, the jury could have found that there was no legitimate need for Mr. Corson to construct the berm, and that his decision to do so was spawned by vindictiveness toward his neighbor, and to interfere with Atkinson’s ongoing efforts to improve and fence his property. The jury should have been

allowed to consider Atkinson's punitive damages claim, and the trial court erred in directing a verdict in Mr. Corson's favor on this issue.

Opinion by: Alok Ahuja, Judge

June 30, 2009

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