

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MEINTS V. CITY OF BEATRICE

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DANIEL A. MEINTS, APPELLANT,
V.
CITY OF BEATRICE, APPELLEE.

Filed March 11, 2008. No. A-07-018.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Daniel A. Meints appeals from an order of the district court for Gage County which denied his amended complaint with prejudice. In Meints' amended complaint, he sought redress for alleged damage to his real and personal property after the property was flooded by two separate rains in 2001. Meints alleged that the flooding occurred due to the negligence of the City of Beatrice (Beatrice) in the design and maintenance of the drainage and storm sewer system near Meints' property. Pursuant to Neb. Ct. R. of Prac. 11E(6), the parties agreed to waive oral argument and submit the matter on their briefs. We find that the district court's findings of fact were not clearly erroneous, and therefore we affirm.

BACKGROUND

The property at issue in this case is located in Beatrice, Nebraska. The property has a residential-type building on it as well as one or two outbuildings. Meints last used the residential-type building as a residence in 1995 or 1996, and since that time, he has used it as a workshop and storage area for tools, motorcycles, and motorcycle parts. Meints alleged his real and personal property was damaged by flooding when the drainage system near his property could not handle the flow of water.

Several witnesses testified regarding the drainage system near Meints' property, and we summarize their testimony. Meints' property is located at the base of a large natural drainage basin. A 60-inch reinforced concrete pipe surfaces in an alley near Meints' property, and the purpose of the pipe is to drain the area basin above it. Water is routed into the pipe from streets

and storm sewer drainage. The alley is 20-feet wide, and the pipe is located in the center of the alley, about 10 feet from Meints' property. Flow from the pipe then drains into an open drainage channel which flows down and around a curve and into a 4-by-5 box culvert. The concrete pipe and box culvert are approximately 200 feet apart.

The box culvert is located underneath an abandoned railroad roadway and was constructed by a railroad company in the 1920's or 1930's to convey the flow of water underneath the railroad tracks. After the water flows through the box culvert, it then flows through a 5- or 6-foot ditch and into a second box culvert, located under a second railroad track. These two railroad roadways are located on two railroad right-of-ways south of Meints' property and they run parallel to one another, approximately 50 feet apart. Meints' property is located directly north of the first railroad roadway. The railroads abandoned this property at some point and pulled up the tracks. After water passes through the second box culvert, the water flows down to a river via an open channel.

On April 3, 2003, Meints filed his complaint, which was later amended. The operative complaint alleged that he owned the real property located at 718 South 9th Street in Beatrice. He further alleged that Beatrice was a political subdivision of Nebraska and was responsible for the sewer and storm drain system located within the city. Meints stated that he had filed a claim with the city clerk and city attorney on March 22, 2002, as required by the Political Subdivisions Tort Claims Act.

In Meints' first cause of action, he alleged that on or about May 19, 2001, his real and personal property was damaged by excess water that flowed from Beatrice's storm drain and/or sewer system onto his property. The water was the result of rain. Meints alleged that Beatrice's negligence permitted the excess water to damage the property in that there was (1) an improper design of the storm drain and/or sewer system, (2) improper maintenance of the storm drain and/or sewer system, (3) a failure to replace the storm drain and/or sewer system piping, (4) a failure to clean and remove brush and other debris from the storm drain and/or sewer system piping, (5) an improper design of the lift stations that transport sewage to Beatrice's sewage plant, and (6) improper maintenance of the lift stations that transport sewage to Beatrice's sewage plant. Meints alleged that as a result of Beatrice's negligence, he incurred damage to his real and personal property in the amount of \$35,000; loss of the use of his real and personal property; mental anguish, past and future; damage to his reputation, past and future; and humiliation, past and future. Meints requested \$35,000, general damages, and costs. In Meints' second cause of action, he made the same allegations with respect to rain that occurred on or about July 25. He alleged similar damages, in the amount of \$80,000.

On June 23, 2003, Beatrice filed an answer to Meints' amended complaint in which it admitted that it was a political subdivision of Nebraska located within Gage County and that it was responsible for the sewer and storm drain system located within Beatrice. Beatrice denied the remainder of the allegations and alleged numerous affirmative defenses.

A trial was held on September 12 and November 27, 2006. The trial was bifurcated so that only the issue of damages was presented on September 12. Meints testified regarding the property damage he allegedly suffered, but we do not detail this evidence because it is not relevant, given our disposition of the case. The trial continued on November 27. Meints called Pamela Dingman to testify. Dingman, a licensed professional civil engineer specializing in

hydrology, hydraulics, and hydraulic engineering, testified that she was retained by Meints to conduct a drainage study of the drainage system around Meints' property. Dingman performed an onsite visit of Meints' property a couple of months before trial. Dingman's final report of the drainage study, dated September 11, 2006, was admitted into evidence.

Dingman testified that the drainage channel located between the concrete pipe and the box culvert had not been maintained very well and had some trees and a lot of "junk" in it, such as a pickup truck tool box, tires, and wood. Three photographs were identified and described by Dingman as reflecting the property when she made the onsite visit, and these photographs were admitted into evidence. No photographs of the drainage channel as it appeared in May or July 2001 were offered.

Dingman examined the entire drainage system during her onsite visit to determine the total acreage that discharged into Meints' backyard. Dingman determined that the drainage basin acreage was 450 acres, meaning that 450 acres worth of area diverts its waterflow through Meints' property. Because Dingman determined that the drainage basin was in excess of 200 acres, she used the "Soil Conservation Service" method to calculate drainage quantities. She also examined the characteristics of the drainage basin, such as its soil types, slope, and impervious areas to calculate a number and generate a hydrograph to determine the peak storm flows. She explained that impervious areas are things that do not drain, such as rooftops and concrete.

Dingman testified that the storm occurring on May 20, 2001, resulted in 2.03 inches of rainfall and the storm on July 28, 2001, resulted in 2.66 inches of rainfall. She received this rainfall data from the National Weather Service but she did not know the exact location of the rain gauge in Beatrice. She stated that if it was located approximately 2 miles away from Meints' property, there was a possibility that Meints' property could have experienced a storm which was different in intensity or duration, which would alter her conclusions as to whether Meints' property would have flooded that day.

Dingman determined that on May 20, 2001, 252 cubic feet per second of water would have passed through the area as runoff flow that would have gone through the drainage system by Meints' property. The July 28, 2001, storm would have produced 518 cubic feet per second of flow. She explained that both of these flows were greater than the capacity of a 4-by-5 box culvert and would cause the surrounding areas to flood.

Dingman explained that when water flows from a pipe to an open channel and back into a box culvert, a lot of energy is lost which can cause water to backflow and cause low-level flooding. Dingman stated that she was not sure if the 60-inch concrete pipe could handle a normal flow of water on a 2-, 5- or 10-year event. She explained that a "2-year event" is a chance every other year of having that sort of event, or a 50 percent chance on any given year for having a 2-year event. Dingman concluded that the box culvert immediately downstream from Meints' property was hydrologically undersized for a drainage basin and could not convey the runoff from a 2-year storm.

Dingman testified that typically, the industry standard is that all minor storm flows, which are 10-year or less events, would be conveyed in the right-of-way or within drainage systems. She did not believe the drainage system around Meints' property was adequate to convey a 10-year event and thought that it was adequate to convey something less than a 2-year event. She stated a typical problem in a number of growing cities is that drainage systems

installed in the past become inadequate as the cities grow. Dingman stated that if a drainage channel sized adequately to convey the storm was in place instead of the box culvert, Meints' property would not have been damaged. She suggested that the drainage system could be helped by replacing the box culvert with a larger one and by improving the drainage channel from the 60-inch pipe to the box culvert. She stated that though she did not study the channel between the 60-inch pipe and the box culvert, she did not believe it to be capable of conveying the flow.

Meints testified that he was on his property on July 28, 2001, and saw water in his backyard which reached to the house. The next morning, he returned to find most of the water in the backyard drained, but water marks on his building indicated that the water was maybe 1 foot to 1½ feet below the ceiling floor joists of the first floor. There was about 6 feet of water in the basement. Meints stated there was more debris in the drainage system area now than there was in 2001. No photographs were offered to show the alleged flooding contemporaneous with the May and July 2001 events.

Beatrice called Selma Kessler to testify. Kessler, a registered professional civil engineer specializing in open channel hydraulics, stated that she was hired by Beatrice in 2000 to conduct a study of the city's drainage system. Kessler examined the drainage system with respect to 5-, 10-, and 100-year events. The city was divided into seven areas for purposes of the study, and Kessler concluded that the area Meints' property was located in could not handle a 5-year event because the box culvert was not large enough. Kessler's report was admitted into evidence.

Kessler discussed the standards for city drainage systems. She explained that the general standard for cities developing new growth areas was to design sewer systems to accommodate a 10-year event. She stated that in some instances where a city has been heavily developed there are downstream limitations which would make a city accept a 5-year capacity. When asked about already-developed areas, she stated that the general guideline for updating drainage areas varied from city to city. She stated that often if there is a lot of development or a restrictive system on the downstream side, like a downtown area, cities will allow 5-year improvements because it is costly to upgrade. She stated that there was no specific standard that required updating drainage systems, but each city adopts its own standard that could typically be found in its engineering guidelines.

Kessler provided cost estimates in her report for improving Beatrice's drainage system, and she discussed these findings. The cost estimate in 2000 for improving Meints' area was \$74,800, and she stated this cost would be higher in 2006. This estimate did not include any acquisition fees, if Beatrice was required to acquire any property to complete the project, such as acquiring the box culvert or adjacent right-of-way area. She stated that if Beatrice made improvements to the area, it would have to remove all the box culverts in the back alignment because fixing just one of them would only move the bottleneck further downstream. She stated that Beatrice was aware in 2000 from her report that the box culvert was undersized and that since that time, to her knowledge, no changes had been made to the drainage system in that area.

Kessler testified that it was a common problem for cities to be aware of drainage problems but not be able to correct them because of budgetary limitations. She stated that drainage systems built in 1932 did not have the forethought to deal with the flow of water in 2001 or 2006. She stated that it would not be feasible for a city to update its drainage plan every time a new development went in unless the city had a lot of really generous taxpayers.

Rex Behrends, the city engineer for Beatrice, testified that he was familiar with Meints' property and had received complaints from Meints in the past regarding flooding on the property. Behrends stated that Beatrice cleaned out shrubs and trees in major drainage areas, which included the drainage system near Meints' property, every 5 years, though Behrends added that it could have been more than 5 years since Meints' particular area was cleaned out. He testified that the drainage plan for Meints' area developed piecemeal, as individual landowners acquired property and improved it.

Behrends testified that if Beatrice expanded the second box culvert, it would not affect the waterflow because the first one was the problem blocking the flow and creating a bottleneck. Behrends did a "quick calculation" a year prior to trial to determine the cost of removing the two box culverts and replacing them with corrugated pipe, and determined this would cost \$25,000 to \$30,000, but Behrends stated this estimate did not address the next structure to the south. He did not factor in land acquisition and replacement costs in this estimate. He stated that the number could now be two or three times that amount.

Behrends stated that an approximately 3-inch rain occurred in Beatrice on June 12, 2003. Behrends checked Meints' property that day around noon, shortly after the rain. He stated that the 60-inch pipe was running three-quarters full. The 3-inch reading came from a rain gauge about 2 miles from Meints' property, and Behrends did not know how much rain fell at Meints' property that day.

Behrends stated that Beatrice did not have a standard for its drainage system regarding a 2-, 5-, or 10-year event. He thought that the railroad roadway closest to Meints' property, including the first box culvert, was owned by Casper Construction. He did not know if Beatrice could acquire the land owned by Casper Construction on a "voluntary basis," and he stated that to his knowledge, Casper Construction had not offered to sell the land to Beatrice. The property with the second box culvert had been purchased by Beatrice from Union Pacific 4 or 5 years previously to make hike-bike trails. He stated that Beatrice owned all of the property containing the drainage system near Meints' property except the box culvert owned by Casper Construction.

Behrends agreed that the 2000 study by Kessler indicated that the most upstream box culvert could not support the flow from a 2- or 5-year event, and he stated that Beatrice was aware that this was a problem. Beatrice had made some efforts since 2000 to fix undersized drainage flow systems in the city, but it had to prioritize which areas to fix first by getting the "[b]est bang for the buck." Beatrice recognized that the box culvert in question was undersized, but had not made it a priority to fix, partly because the city did not own the box culvert and also because it affected only one person. Beatrice had received complaints from other people about property flooding because of the problems with the drainage systems, but none from Meints' neighbors.

James Bauer, the Beatrice city administrator and general manager of the board of public works, testified that he was familiar with Meints' property. He became involved with the alleged flooding of the property in both of his capacities, since the board of public works is in charge of the electric, water, sanitary, and city street system, including the storm sewer system, and the city administrator is involved with preparing all budgets to go to the mayor and city council for approval.

Bauer stated that to the best of his knowledge, the more upstream railroad right-of-way was owned by Casper Construction. The southern railroad right-of-way was formerly owned by Union Pacific and was now owned by Beatrice, though it was not at the time of the flooding. Bauer was not aware of a set drainage plan in existence for Beatrice. Bauer stated the 2000 drainage system study was commissioned after complaints were received about flooding in different parts of Beatrice. He agreed that the 2000 study showed that the sizing of the two railroad culverts was a problem, but at the time, neither was owned by Beatrice. Bauer explained that potential revenue sources to pay for modification to the city's drainage systems included a street fund supported by tax allocations and gas taxes from the state. He also stated that a portion of sales revenues is available for street department operations, together with the general tax levy. He stated that with budgetary constraints, Beatrice did not have money to implement all of the recommendations in the 2000 study. Beatrice had explored grant funding and found none available for this type of project. In his opinion, Beatrice had pursued all reasonable and prudent possibilities to remedy the situation. Bauer stated that Meints' area was not one of the higher priority areas based in part on the lack of people affected in the area. He said that Meints' neighbors had not complained about flooding. He acknowledged that Beatrice had allowed building upstream from Meints' property which would impact the flow of water, but he stated that Beatrice had created larger easement areas for the water to accumulate and used different streets as temporary-type dams to only allow so much water to come through at certain times. He stated that if Beatrice had extra money, it would be easier, cheaper, and wiser for the taxpayers of the community to buy Meints' property rather than fix the box culvert.

On December 5, 2006, the district court entered its order which dismissed Meints' amended complaint, with prejudice. The court acknowledged that Beatrice had a duty to use ordinary care to keep its sewers and drains in proper condition and repair, and may be held liable for damages to property resulting from its failure to do so, citing *Young v. Scribner*, 171 Neb. 544, 106 N.W.2d 864 (1960). The court further stated that a city has a right to provide for the drainage of its streets, but is liable if in doing so it causes an increased flow of surface water upon private property and fails to provide a sufficient outlet for the escape of the water, citing *Cattin v. Omaha*, 149 Neb. 434, 149 Neb. 434 (1948). The court found that Beatrice had pursued all reasonable possibilities in considering the flooding on Meints' property and had considered various revenue sources and made reasonable cost-benefit analyses. The court found that Beatrice could only take reasonable steps to control the flow of water as best it could and that the evidence showed Beatrice had done so. The court found no evidence of any negligence or violation of a standard of care by Beatrice.

Meints timely appeals.

ASSIGNMENT OF ERROR

On appeal, Meints claims that the district court was clearly erroneous in finding that there was no evidence of any negligence or violation of standard of care by Beatrice in the design and maintenance of the city's drainage and storm sewer system.

STANDARD OF REVIEW

In an action brought pursuant to the Political Subdivisions Tort Claims Act, or in a bench trial of an action at law, the factual findings by the trial court will not be disturbed on appeal unless they are clearly wrong. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

ANALYSIS

Meints claims the district court erred in finding no evidence of any negligence or violation of a standard of care by Beatrice. Meints claims that Beatrice had a duty to design and maintain an adequate and sufficient drainage and storm sewer system sufficient to convey a 5- to 10-year event, which Meints claims is consistent with industry standards. Meints argues that Beatrice breached this duty because it was aware the box culvert was unable to convey runoff from a 2-year event, yet Beatrice did nothing to address the problem. Meints argues that this breach caused the flooding and subsequent damage to his property.

A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, causation, and damages. *Doe v. Omaha Public School Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

In an action against a city of the metropolitan class to recover damages caused by surface water flooding plaintiff's premises, no recovery can be had unless it is shown that some negligent act or omission by the city caused the surface water to accumulate and be cast on plaintiff's premises. *Cattin v. Omaha*, 149 Neb. 434, 149 Neb. 434 (1948). While a city of the metropolitan class is under no obligation to construct a system of drainage for protection from surface water, however, having constructed a system of drainage, the city is not entirely absolved from liability for injury caused to private property when it fails to keep a sewer system in proper control after the same has been constructed. *Id.* While the grant of power to a city of the second class to construct sewers or drains does not require it to do so, yet if it does exercise the power conferred, it is bound to use ordinary care or exercise due diligence to keep such sewers or drains as it constructs in proper condition and repair and free from obstruction, and will be held liable for damages to property resulting from its failure to do so. *Young v. Scribner*, 171 Neb. 544, 106 N.W.2d 864 (1960). See, also, *Cattin, supra*. A municipal corporation has the right to improve and provide for the drainage of its streets; but if in so doing it causes an increased flow of surface water upon or against private property and negligently fails to provide a sufficient outlet for the escape of water thus brought upon such property, it will be liable to the owner thereof for any damage which may result from such negligence. *Cattin, supra*.

We begin our analysis by noting that Beatrice is a city of the first class. See Neb. Rev. Stat. § 16-101 (Reissue 1997). While cities of the first class are authorized and empowered to develop and implement a general plan or program of flood and storm water control, drainage and disposal for the city, see Neb. Rev. Stat. § 16-6,106 (Reissue 1997), they are not required to do so. However, according to the case law noted above, if the city does develop and implement such a plan or program, it must do so using ordinary care.

The evidence adduced at trial indicates that Beatrice did not have an official plan or program for its drainage system. Behrends testified that Beatrice did not have a standard for its

drainage system regarding a 2-, 5-, or 10-year event. Rather, Beatrice's drainage "plan" developed piecemeal as the city developed. Both Kessler and Dingman, Beatrice's and Meints' expert engineers, respectively, discussed general standards for designing new drainage systems in new growth areas. However, with regard to existing drainage systems in cities experiencing growth, both experts acknowledged that drainage systems may become inadequate, which is a common problem for cities. Kessler testified that with regard to existing drainage systems in previously developed areas, the general guideline for updating drainage areas varies from city to city. Kessler stated that there is no specific standard that requires updating drainage systems, but each city typically adopts its own standard. Kessler testified that it is a common problem for cities to be aware of drainage problems but not be able to correct them because of budgetary limitations.

The evidence is clear that the two box culverts, which were the primary structures causing the drainage problem in the area of Meints' property, were not designed, constructed, or maintained by Beatrice. The box culverts were constructed by the railroad company many years ago and were, by varying accounts, presently inadequate to carry water from a 2-year or 5-year event. Beatrice was aware after the 2000 study by Kessler that there were problems with the drainage system near Meints' property, particularly with the two box culverts. Albeit without an official plan or program, Beatrice apparently began using a priority-based system to address the drainage problems identified in the study, taking into consideration budgetary constraints. The area near Meints' property had not yet been addressed at the time of the alleged flooding, due in part to the fact that Beatrice did not own the box culverts and due in part to the fact that the drainage problem affected only one landowner. The evidence showed that Beatrice had taken some actions to alleviate waterflow problems in connection with development that had occurred upstream from Meints' property.

The district court found that Beatrice was not negligent, which essentially is a determination that Beatrice did not breach any duty in this case. Based upon our review of the record, we conclude that the district court was not clearly erroneous in making this finding. Likewise, the district court was not clearly erroneous in determining that there was no violation of any standard of care by Beatrice in the design and maintenance of its drainage and storm sewer system in connection with the alleged flooding near the Meints' property. Finally, the district court was not clearly erroneous in determining that Beatrice had pursued all reasonable possibility in considering the flooding on Meints' property, which we interpret to be a finding that Beatrice used ordinary care in addressing its drainage system. For these reasons, we affirm the decision of the district court.

CONCLUSION

The order of the district court dismissing Meints' amended complaint with prejudice is affirmed.

AFFIRMED.