

STATE OF VERMONT
ORANGE COUNTY, SS.

HELEN THURSTON CARLETON, : ORANGE SUPERIOR COURT
Plaintiff :
 :
v. : DOCKET NO. S210-91 oec
 :
LEO D. KNAPP and DIANE DANFORTH, :
Defendants :

DECISION FOLLOWING REMAND

INTRODUCTION

This case concerns a claim for damages resulting from contamination of plaintiff's well. The Vermont Supreme Court has determined that defendants are liable for some portion of the damages, given this court's finding of a likelihood that defendants' septic system contributes to intermittent contamination of the plaintiff's shallow well. Following remand, the matter is now before this court for consideration of the amount of damages due from defendants to the plaintiff.

ORIGINAL FINDINGS

Following trial, this court delivered the following findings of fact from the bench, on September 1, 1994.¹

1. The plaintiff and defendants own adjacent property in Corinth, Vermont. Plaintiff owns a residence located right next to the defendants' property which has in it the post office and two rental units.

2. Helen Carleton lived on the property with her parents for many years, and from approximately 1950 to 1962, lived on the property with her husband, Charles Carleton.

3. A septic system on the Carleton property was installed in approximately 1954. In approximately 1962, the plaintiff dug a shallow well on her property at approximately the time she purchased the property from her parents.

¹These findings are taken from the Supplemental Printed Case which was filed with the Vermont Supreme Court on May 10, 1995. The paragraphs have been numbered for ease of reference.

4. The defendants' property was occupied at that time by Irene Ricker, who lived on the property for many years and operated the post office. She lived there with her husband and children.

5. At some time between 1962 and 1964, the Rickers installed a septic system on their property.

6. The Carletons moved to Connecticut and spent summers in the Corinth property. 1966 was the last year in which they stayed the entire summer but they continued to come up during the summertime for vacations.

7. In 1985, Irene Ricker's son replaced the dry well portion of her septic system, and in 1986, Irene Ricker's son replaced the tank portion of her septic system.

8. Helen Carleton brought a lawsuit against Irene Ricker in the late 1980s, involving a boundary dispute and related property issues. In 1989, she lost that case.

9. In the summer of 1990, the Carletons were at their property during the summer. At that time, there was a pipe leading from the Ricker septic system out to the surface of the land in which there was occasional dripping water. Also that summer, the Carletons noticed a strong unpleasant odor from their well. They obtained a sampling kit from the state and took samples and discovered contamination in their shallow well.

10. Following that, they also contacted many people including the state regional engineer, in order to determine whether the contamination was coming from the neighboring post office property, and whether the post office property might be shut down due to the contamination.

11. The defendants, Leo Knapp and Diane Danforth, were considering buying the post office property from Irene Ricker. Before they did so, Charles Carleton called them to notify them of the existence of the problem of contamination of the Carleton well.

12. In 1991, the defendants purchased their property from Irene Ricker. The same year, the [Vermont] Supreme Court affirmed the decision of the trial court in the case of Carleton v. Ricker.

13. In 1992, the plaintiff dug a ditch between the septic system located on the post office property and the Carleton shallow well. She also hired Eric Hanson to look into the problem of contamination of the well.

14. From 1992 to the present, the Carletons have made repeated efforts to keep people from trespassing on their property. They have put up up to 50 no trespassing signs which have been knocked down or removed. There is no evidence indicating who has knocked or removed these signs.

15. The defendants have a right in their deed to go on to the plaintiff's property for purposes of maintenance. There is a stairway and a bulkhead on the defendants' property located immediately adjacent to the plaintiff's property and requires walking on the plaintiff's property in order to get to it; to get to both of them.

16. After the defendants purchased their property, they did some renovation work. In connection with that renovation work, it was occasionally necessary for building materials and other items needed for the renovation to be carried across the Carleton property to get on to the defendants' property.

17. In 1992, Eric Hanson took samples of water from the Carleton well. The sample taken in April of 1992 indicated no contamination. The sample taken on May 11, 1992, indicated no contamination. It did show elevated presence of nitrates.

18. On May 26, 1992, the plaintiff's sister Doris Lezer took a sample from water in the ditch that had been dug. This did show evidence of contamination.

19. In June of 1992, Eric Hanson tested the ditch. He determined that the water in the ditch was ground water, and that it was not contaminated. Eric Hanson is a hydrologist and qualified as an expert in this case.

20. On August 13, 1992, Eric Hanson tested a sample and discovered contamination by fecal coliform. When this test was made, the well was not purged prior to testing.

21. In September of 1992, the plaintiff's relatives noticed a car parked on the plaintiff's property adjacent to the defendants' property.

There is no evidence that the defendants were responsible for this use of the plaintiff's property.

22. During the winter of 1992 into 1993, snowplowing resulted in piles of snow on the plaintiff's property in a location that the Carletons use as a driveway. Leo Knapp probably contributed to this snowplowing as he informally did plowing himself in town occasionally, and he also plowed out the area near the post office and may have also plowed out on the plaintiff's property.

23. Leo Knapp acknowledges that he probably did contribute to the plowing of snow on the plaintiff's property.

24. At some point during the renovations, a Perry Oil truck was parked on the plaintiff's property. It was there for the purpose of installing a furnace in the cellar on the defendants' property which was accessible through the bulkhead and required crossing the plaintiff's property to get to it.

25. At some point in 1993, the plaintiff's relatives saw strangers on the porch of the plaintiff's property. These people immediately scurried away from the porch and off the plaintiff's property. The defendants were not these people.

26. In the fall of 1993, Eric Hanson placed testing wells - five testing wells - around the area of the plaintiff's shallow well in order to determine the flow of ground water and to attempt to determine whether or not the septic system on the post office property was the source of contamination on the plaintiff's property.

27. In September of 1993, he performed a test which showed the presence of contaminants. When these tests were performed, the well had not been purged.

28. In November of 1993, the well was tested again together with the water in the monitoring wells, as they had been in September of 1993. This was the first time that industry standards for testing were used together with the purging of the well prior to the testing.

29. The results did not show the presence of the contaminants.

30. It is the opinion of Eric Hanson that it is not possible to state

definitively that the septic system on the defendants' property is the source of contamination that occurs intermittently on the plaintiff's property, but it is also his conclusion that the septic system on the post office property is the most likely source.

31. It is the conclusion of Katherine White, defendants' expert, who is an engineer, that there are numerous sources of contamination possible in the area, and that there is no clear link between the septic system on the post office property and the plaintiff's shallow well.

32. There are other wells in the area, including those with elevations higher than the plaintiff's, that are also contaminated. There are other possible sources of contamination, given the flow of ground water in the area. These include the Peterson house, a farm a quarter of a mile away, and the plaintiff's own septic system.

33. The septic system on the defendants' property is an outdated system with insufficient filtration ability to filter out all the effluent. Some effluent from this system runs with the ground water. The ground water in the area flows in the general direction from the post office septic system toward the well. Ground water in the area also flows from some of the other possible sources toward the well.

34. The court finds that it is likely that the defendants' septic system contributes to intermittent contamination of the plaintiff's shallow well. However, because of the likelihood that the other sources may also contribute, the court concludes that the plaintiff has not proven by a preponderance of the evidence that the cause of contamination in plaintiff's septic system - in plaintiff's shallow well - is the defendants' septic system.

35. Therefore, on the issue of the well, the court enters judgment for the defendant.²

36. The court finds that the defendants have occasionally caused snow

²This paragraph states a conclusion that has been reversed by the Vermont Supreme Court.

to be plowed on the plaintiff's land. The court also finds that the defendants have not personally trespassed on the plaintiff's property, or caused their tenants to, and their use - the defendants' use of the plaintiff's property, except for the snowplowing - has been within the scope of the right created in the deed.

37. Because the plaintiff has proven her case with respect to the snowplowing, the court will issue an injunction enjoining the defendants from plowing snow on the plaintiff's property, or disposing of plowed snow on the plaintiff's property. Judgment is entered in favor of the plaintiff on that issue.

SUPPLEMENTAL FINDINGS

Based on the evidence presented at the 1994 trial, the court finds the following supplemental facts by a preponderance of the evidence:

38. Defendants' septic system is only one of numerous possible sources for the intermittent contamination that has appeared in the plaintiff's well. Other possible sources include a nearby dairy farm, additional nearby houses with septic systems, and feces from wild animals. As a reasonable estimate based on all the evidence, including a view of the site, defendants' septic system is responsible for approximately 25% of the total contamination found in the plaintiff's well.

39. The total contamination that appears intermittently in the plaintiff's well is sufficiently serious that the plaintiff cannot use water in the well for drinking or cooking.

40. Because of (a) the inconclusive nature of the test results, (b) the presence of other sources of contamination, (c) the presence of other contaminated wells at higher elevations, and (d) the intermittent nature of the contamination in plaintiff's well despite the constant occupation of the defendants' property, the court cannot conclude that a preponderance of the evidence has shown that effluent from the defendants' septic system alone would contaminate the plaintiff's well and prevent her from using the water from that well. For the same reasons, the court also cannot conclude that a

to be plowed on the plaintiff's land. The court also finds that the defendants have not personally trespassed on the plaintiff's property, or caused their tenants to, and their use - the defendants' use of the plaintiff's property, except for the snowplowing - has been within the scope of the right created in the deed.

37. Because the plaintiff has proven her case with respect to the snowplowing, the court will issue an injunction enjoining the defendants from plowing snow on the plaintiff's property, or disposing of plowed snow on the plaintiff's property. Judgment is entered in favor of the plaintiff on that issue.

SUPPLEMENTAL FINDINGS

Based on the evidence presented at the 1994 trial, the court finds the following supplemental facts by a preponderance of the evidence:

38. Defendants' septic system is only one of numerous possible sources for the intermittent contamination that has appeared in the plaintiff's well. Other possible sources include a nearby dairy farm, additional nearby houses with septic systems, and feces from wild animals. As a reasonable estimate based on all the evidence, including a view of the site, defendants' septic system is responsible for approximately 25% of the total contamination found in the plaintiff's well.

39. The total contamination that appears intermittently in the plaintiff's well is sufficiently serious that the plaintiff cannot use water in the well for drinking or cooking.

40. Because of (a) the inconclusive nature of the test results, (b) the presence of other sources of contamination, (c) the presence of other contaminated wells at higher elevations, and (d) the intermittent nature of the contamination in plaintiff's well despite the constant occupation of the defendants' property, the court cannot conclude that a preponderance of the evidence has shown that effluent from the defendants' septic system alone would contaminate the plaintiff's well and prevent her from using the water from that well. For the same reasons, the court also cannot conclude that a

preponderance of the evidence has shown that the elimination of all contamination from the defendants' septic system would necessarily leave the plaintiff's well uncontaminated.

41. Based on testimony by plaintiff's expert Eric Hanson, the best and most reasonable method of curing the problem, *i.e.* providing an uncontaminated water supply for the plaintiff's house, is to dig an artesian well. An artesian well could provide clean water even in an area where the ground water is contaminated.

42. Installation of an artesian well would cost the plaintiff an estimated \$3100, based on an average of the high and low estimates provided in testimony by plaintiff's expert Eric Hanson.

CONCLUSIONS OF LAW

Remand

This case is before the trial court on remand from the Vermont Supreme Court. This court's consideration of the matter is limited to the scope of the remand, as interpreted in light of the opinion. Coty v. Ramsey Associates, 154 Vt. 168, 171 (1990). The Supreme Court's conclusions are contained in the following paragraph:

Plaintiff argues that the court erred in concluding in effect that in order for defendants to be liable for the contamination, they had to be found to be the sole proximate cause of the harm, and not just one of multiple causative agents. Plaintiff is correct that so long as defendants were the cause of tortious harm, the fact that the harm cannot be apportioned between defendants and other tortfeasors does not defeat liability. See Restatement (Second) Torts, § 879; Woodcock's Adm'r v. Hallock, 98 Vt. 284, 289, 127 A. 380, 382 (1925); see also Connecticut Bldg. Wrecking Co. v. Carothers, 590 A.2d 447, 461 (Conn. 1991) (judicial review of environmental cleanup should be conducted with reference to principles of joint and several responsibility).

Carleton v. Thurston, Vt. Sup. Ct. No. 94-586 (unpublished Entry Order dated September 28, 1995).³

The essential holding from the Vermont Supreme Court is that the

³A footnote provides the text of the Restatement (Second) of Torts § 879, which indicates the propriety of imposing joint and several liability in cases where the harm cannot be apportioned.

defendants may not escape liability altogether, merely because their contribution to the total contamination was small. The cumulative effect of all the contamination has caused harm to the plaintiff, and it would be unfair to leave her without a remedy. The Supreme Court has remanded the case to this court for (1) a determination of the total damages to the plaintiff, (2) a determination of whether or not the total damages may be apportioned among the contributors, and (3) a determination of defendants' liability to the plaintiff.

Damages

In the instant case, plaintiff proved by a preponderance of the evidence that she has been damaged by the contamination in her well. She is entitled to compensation for the proximate damages, based on her theories of negligence and nuisance. She has also pointed out that she might be entitled to a remedy under the statute found at 10 V.S.A. § 1410(c) (damages may be recoverable in tort for unreasonable harm caused by altering the quality of groundwater).

Because of the total contamination, the plaintiff cannot use the water from her well for drinking and other purposes. The most reasonable solution for this problem is for the plaintiff to install an artesian well. Plaintiff's evidence of damages focused on this remedy. The evidence does not show that ending the defendants' use of their septic system would solve the plaintiff's problem. Installation of an artesian well would provide the plaintiff with a source of uncontaminated water. Moreover, the cost of installing such a system may serve to approximate the diminution in the value of plaintiff's property, given the importance of having a reliable source for potable water. Cf. Albright v. Fish, 138 Vt. 585 (1980) (claimant bore burden of showing diminution in value, which was proper remedy for violation of restrictive covenant). The plaintiff's evidence showed that the cost of installing an artesian well can be estimated at approximately \$3100. See Lemnah v. American Breeders Service, Inc., 144 Vt. 568, 580 (1984) (factfinder may estimate the amount of damages based upon the evidence presented).

Under the circumstances of this case, no additional remedy is

appropriate, because the plaintiff could have mitigated her damages by installing an artesian well when she first learned of the problem. Injunctive relief is not appropriate in this instance, both because installation of an artesian well will provide an adequate remedy, and because the evidence fails to show that injunctive relief would solve the problem. Punitive damages are not appropriate because the plaintiff presented no evidence of malice.

Apportionment

This court must also consider the issue of whether or not the various contributions to the contamination of plaintiff's well can be apportioned.⁴ The appropriate analysis for this issue is suggested in one of the cases cited by the Vermont Supreme Court, Connecticut Bldg. Wrecking Co. v. Carothers, 590 A.2d 447 (Conn. 1991). The Connecticut Supreme Court noted that the common law principle of joint and several liability is tempered by exceptions that are described in the Restatement (Second) of Torts, §§ 433A, 433B, 879, and 881. Id. at 461. That court concluded: "Only in the event that there is no reasonable basis for apportionment of the damages caused to the environment among those whose illegal activities have contributed to such harm would joint and several liability be appropriate." Id. at 462.

The above approach is consistent with the discussion of apportionment found in Prosser and Keeton, Law of Torts (5th ed. 1984) § 52, Apportionment of Damages: "Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made." Id. at 345. Apportionment is appropriate where pollution from various sources is severable in terms of quantity, percentage, or degree. Id. at 349. The authors provide the following apt example: "If several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water entirely unfit for use." Id. at 354. Under those

⁴The court notes that on remand, neither party has requested an opportunity to present further evidence on the issue of apportionment.

circumstances, "liability need not necessarily be entire, for there is no reason why damages may not be apportioned here, to the same extent as in any other case." Id. at 355.

The evidence in the instant case showed that defendants' septic system is one of numerous sources for contamination in the plaintiff's shallow well. Although there is a cumulative effect on the quality of the plaintiff's water, the court may reasonably conclude that various portions of the contamination are attributable to separate sources. In this respect the instant case resembles Lorrain v. Ryan, 160 Vt. 202, 207 (1993) (jury was able to attribute portions of the harm to separate sources). In this respect the case differs from Woodcock's Adm'r v. Hallock, 98 Vt. 284, 289 (1925) (one defendant may be held fully liable in a case involving more than one proximate cause for the same harm), a case cited by the Vermont Supreme Court in its decision ordering the remand. Given the number of sources in this case, and the uncertainty of the test results, the court estimates the defendants' contribution at approximately 25% of the total contamination.

Conclusion

Defendants are liable for 25% of the total damages, or \$775.

ORDER

The two Defendants are jointly and severally liable to the Plaintiff in the amount \$775. Plaintiff is also entitled to costs of filing and service, plus interest at the legal rate from September 1, 1994.

Dated this 30 day of October, 1996.

Mary Miles Teachout
Mary Miles Teachout, Superior Court Judge

Patricia R. Davis
Patricia R. Davis, Assistant Judge

Donald Hisey
Donald Hisey, Assistant Judge