IN THE
Supreme Court of the State of Montana

DA 22-0509

ROBERT WINKOWITSCH,

Plaintiff and Appellee,

v.

GLACIER ELECTRIC CO-OP, INC.,

Defendant and Appellant

On appeal from the Montana Ninth Judicial District Court, Glacier County
No. DV 18-37 (Olson, J.)

OPENING BRIEF OF APPELLANT

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ISSUE PRESENTED FOR REVIEW

Can a property owner recover damages under a nuisance theory against an adjoining landowner whose improvements to its own property impede rainwater and snowmelt from entering upon it from the former's property?

STATEMENT OF THE CASE

Robert Winkowitsch sued Glacier Electric Cooperative, Inc., in June, 2018, for damage to real property. See Doc. 1, Complaint and Jury Demand. Winkowitsch claimed that Glacier Electric was liable under theories of negligence, trespass and continuing nuisance for water which was unable to drain off of his property, onto the adjoining property of the cooperative.

The case was tried over two days, on June 15-16, 2022. At the time that instructions were settled, Winkowitsch asked that the jury be instructed on negligence and on nuisance, to both of which Glacier Electric objected. The court did so. The jury decided in favor of Winkowitsch solely on the basis that the cooperative had created a nuisance and awarded him $250,000.00 in damages.

Glacier Electric has timely appealed.

STATEMENT OF FACTS

Robert Winkowitsch and Glacier Electric Cooperative, Inc., are adjoining property owners along Hwy. 213, just north of Cut Bank. They both derive title to their respective parcels from the same common former owners, Bill and Thelma

Cheety. Winkowitsch owns the southern parcel, on which there were two storage unit buildings when he acquired that parcel in 1994. (Day 1 Tr., at pp. 163-4). He has since built additional storage unit buildings on his parcel. On the parcel to the north, Mr. and Mrs. Cheety had a service center building. Glacier Electric acquired it in 2002. (*Id*., at p. 165 and Exh. 1). Glacier Electric refers to that structure, not surprisingly, as the Cheety Building. The property line between the parties' respective parcels is only a foot and one half from the north end of the two storage unit buildings that were in existence back in 1994. (Day 1 Tr., at pp. 194 and 260 and Exh. 7-007).

Mr. Winkowitsch accurately described the general topography of the properties. They slope from south to north, with the natural flow of water to be towards Old Maid's Coulee, which is further north of Glacier Electric's property. (Day 1 Tr. at p. 169 and Exh. 3). There is also a significant hill to the south of the Winkowitsch parcel. *Id*. So snow melt and rainwater flows from the south of the Winkowitsch property, onto it and then onto the Glacier Electric property. (Day 1 Tr., at p. 241). There are no gutters on the two storage unit buildings at issue (Day 1 Tr. at p. 162), so snow melt and rainwater falling on or between them follows the same path, northward to the Glacier Electric property.

There is a dispute about the flow of water on the east end of the Glacier Electric and Winkowitsch properties. It is the latter's contention that water actually

flows southward by a Quonset hut structure on the cooperative's property, then westward on his property, around existing storage unit structures and finally northward towards the two original storage unit buildings at issue and then to the Glacier Electric property. (Day 2 Tr., at pp. 122-3 and 128-9). In other words, Robert Winkowitsch contends that snowmelt and rainwater from the parties' eastern properties follows the same path as the water coming from the hill to the south and from Winkowitsch' s own property. It all flowed from there, north towards the co-op's Cheety building.

Glacier Electric presented evidence that water on the east side of their respective properties flows in the same direction as all of the other water – northward toward Old Maid's Coulee (Day 2 Tr., at pp. 70-72). Regardless, Robert Winkowitsch conceded that the source of the water flow coming off of his property onto the cooperative's property covered an extensive area, including his own:

> It's coming from this whole hill – some from my property, some from this man's property here, some from Pete Halverson's shop; some from this property.

(Day 1 Tr., p. 253.) He could not quantify how much actually came off of the east end of co-op's property onto his own, even though the area to the south and uphill from his own storage unit buildings off of which rain and snowmelt would flow was "acres" in size. (*Id*., at pp. 128-30). The area at the east end of the co-op's property was comparatively tiny. (See Exhs. 119 and 130). Then, there was also

the rain and snowmelt coming off his own storage unit buildings. It all flowed to the co-op's property.

The northward flow of water from the storage unit buildings owned by Winkowitsch on to the co-op's own property had caused water damage to the co-op's Cheety Building, (Day 2 Tr. at 57). There had been water infiltration in the interior after a heavy rain or snow, from the direction of the storage units. (*Id*., at pp. 58-59). Sheetrock was damaged, and there were mold issues. (*Id.*, at p. 68.) The areas around the building were muddy, as well. (*Id*. at pp. 58-9))

In 2014, Glacier Electric decided to pave its property around the Cheety Building. The water damage to the building was a factor in that decision. (*Id*., at pp. 68-9) LMH of Kalispell was hired to pave the co-op's property. (*Id*., at p. 73) LMH laid down a three-inch lift of asphalt. (*Id*., at pp. 75) Co-op employee Doug Ray testified that LMH had to remove a corresponding amount of soil, so that the asphalt would be flushed to an existing concrete apron around the Cheety Building. (*Id*., at p. 77) Robert Winkowitsch and Doug Ray agreed that they discussed the paving project back in 2014. (*Id*., at pp. 74 and Day 1 tr., at pp. 183-5). Winkowitsch testified that he told Doug Ray that he did not want the asphalt to impede the floor of water off of his property — on then to the co-op's property. (*Id*.) Doug Ray's recollection was that Robert Winkowitsch simply wanted the height of the asphalt where it came up to the north end of his storage units to be no

higher than the door jams of those units. (Day 2 Tr., at pp.74-75) The photographs are inconclusive of the height differential between the asphalt and the storage units. See, for example, Day 1 Tr. at 188-9 and Exh. 7 at pp. GEC 002, 003 and 004, (copies attached as Appendix A-5 through A-7).

After Robert Winkowitsch further complained, Glacier Electric had its contractor install a shallow trench on its property, whereby some of the water running off his property could be directed across the co-op's property, away from the Cheety Building and towards the highway borrow pit. (Day 1 Tr. at p. 209 and Day 2 Tr., at pp. 80-81 and Exh. 7-024, attached hereto as Appendix A-8).

Robert Winkowitsch presented evidence that water had caused irreparable structural damage to the two original storage buildings, that most of the tenants using the individual units in those buildings had removed their stored contents and that he had sustained a loss of rental income which would be ongoing until he replaced those buildings.

At the conclusion of the trial, the court instructed the jury about both negligence and nuisance. (Day 2 Tr., at pp 137-39) Glacier Electric had objected to the giving of Plaintiff's proposed negligence and nuisance instructions and also to his Instruction No. 17, which was in effect an instruction for a directed verdict, in direct conflict with the co-op's rights under the common enemy doctrine. (See Doc. 33 – Defendant's Objections to Plaintiff's Proposed Instructions) Those

instructions were all given. Even so, the form of verdict (Doc. 39, attached as Appendix A-1) allowed the jury to simply answer whether Glacier Electric had created a nuisance and whether that nuisance was a cause of damage to Plaintiff. The jury answered both of those questions affirmatively and awarded $250,000.00 in damages. Judgment was entered accordingly (Doc. 43 and App. A-4), and Glacier Electric timely appealed. (Doc. 46).

STANDARD OF REVIEW

The jury instructions given by a district court are reviewed for an abuse of discretion. *Nolan vs. Billings Clinic*, 2020 MT 167, ¶ 3, 400 Mont. 326, 467 P.3d 545. In making that determination, it is important to look at the instructions in connection with the other instructions given. *Harding v. Deiss*, 2000 MT 169, ¶ 10, 300 Mont. 312, 3 P.3d 1286.

SUMMARY OF ARGUMENT

Montana has adopted the common enemy doctrine regarding surface water. That doctrine authorizes a property owner to protect its own property from surface water flowing onto it. The paving of Glacier Electric's own property was consistent with its rights under the common enemy doctrine and, as a matter of law, could not therefore be an actionable nuisance. The district court accordingly erred when it instructed the jury that it could find Glacier Electric liable to Robert Winkowitsch on the basis that its paving of its own property could in fact be a

nuisance, much less that Glacier Electric could be liable if it did *anything* to cause intermittent flooding of the Winkowitsch property. (Instr. No. 17). That instruction is particularly pernicious, given that it was wholly in conflict with the common enemy doctrine.

ARGUMENT

The District Court Erred By Instructing the Jury About Plaintiff's Nuisance Claims and In Derogation of the Common Enemy Doctrine

Glacier Electric concedes that Montana nuisance law is vague in its definition of conduct which can be actionable, being "[a]nything that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . ." Sec. 27-30-101(1), MCA. That does not mean that anything can be a nuisance. See generally *Martin vs. Artis*, 2012 MT 249, 366 Mont. 53, 290 P.3d 687.

The right of a party to accuse a neighbor of engaging in conduct that constitutes a nuisance on the latter's own property is not unlimited, particularly when the charge flies in the face of the latter taking steps to protect its own property. As far as the flow of water at issue here, that protection invokes the common enemy doctrine. That doctrine has long been recognized in Montana:

> "The lower landowner owes no duty to the upper landowner; each may appropriate all the surface water which falls upon his premises, and the *one is under no obligation to receive from the other the flow of any surface water, but may in the ordinary prosecution of his business and the improvement of his premises, by embankments or*

> *otherwise, prevent any portion of the surface water coming from such upper premises*. Walker v. New Mexico & S. P. R. Co., 165 U.S. 593, 17 S. Ct. 421, 41 L. Ed. 837. Under the common law, surface water is the enemy of all mankind, and each landowner has the right to protect his own land therefrom.

Tillinger v. Frisbie, 138 Mont. 60, 62, 353 P.2d 645, 646 (1960) [Emphasis by the court; underlining by Appellant]. If the lower landowner owes no duty to the upper landowner to allow surface water to flow from the latter's property onto the former's and can barricade its own property, common sense and logic dictate that the absence of such a duty cannot give rise to liability for the very same conduct, on the basis of it being a nuisance. Glacier Electric respectfully submits that "no duty" means "no duty." If water is barricaded from flowing downhill, it is going to do precisely what Robert Winkowitsch complained about here. It is going to stay behind that barricade, on the uphill owner's property. He in turn could then attempt to channel the water somewhere else, i.e., into the borrow pit along Hwy. 213, but he had no right to compel that adjoining property owner to remove such a barricade and allow surface water to flow onto that neighbor Glacier Electric's property.

There was a dispute between Robert Winkowitsch and Doug Ray about the direction in which water ran by the Quonset hut on the east end of Glacier Electric's property. But that dispute is a red herring. Even if Robert Winkowitsch was 100% correct, such that water from near the Quonset flowed onto and across

his property, where it was then blocked from flowing off of his property and back onto Glacier Electric's property between or around the two original storage buildings. In that regard, any such water is no different from the water flowing onto Winko's Storage Units from the hill and the multiple parcels to the south and from snowmelt and rainwater coming off the roofs of his own storage units. The issue is where does Glacier Electric need to let any of that water flow and whether the cooperative's impeding that flow of water onto its own property could ever be considered a nuisance.

In stating as much, Glacier Electric acknowledges that there is a split of authority amongst the states, whether to follow the common enemy doctrine or what is characterized as the civil-law rule, to the effect that the adjoining landowners are entitled to have the natural course of surface water drainage maintained, with the lower property owner bound under a servitude operating as a matter of law, to accept and dispose of the water coming from above. See generally *Modern Status of Rules Governing Interference with Drainage of Surface Waters*, 93 A.L.R.3d 1193.

These competing doctrines cannot be reconciled. The author of the last-cited A.L.R. article characterized them as "almost diametrically opposed." *Id*., at § 2. The common enemy rule allows the lower property owner to protect his property from surface waters. The civil-law rule does not. Application of either doctrine

would appear to place the risk of surface water damage on one or the other. It is a policy choice which the law requires be made.

That choice has been made in Montana. As noted above, this state is definitely on the common enemy side of the divide. *Tillinger vs. Frisbie, supra*; see also *Formicove, Inc. vs. Burlington Northern, Inc*., 207 Mont. 189, 673 P.2d 469 (1983); *O'Hare vs. Johnson*, 116 Mont. 410, 153 P.2d 888 (1944). Other states also continue to adhere to the common enemy doctrine. See, for example, *N.G. Hatton Trust vs. Young*, 97 N.E.3d 282 (Ind. App. 2018), and *Cowell vs. Etzell*, 81 P.3d 895 (Wash. App. 2003), in which the Washington Court of Appeals spoke directly to the situation about which Robert Winkowitsch has complained:

> If one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is *damnum absque injuria.*" *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). The Washington Supreme Court recognizes three exceptions to the common enemy doctrine. One provides that even though a downhill landowner can lawfully repel surface water from his or her land, it must be done without blocking a natural watercourse or drainway. *Currens v. Sleek*, 138 Wn.2d 858, 862, 983 P.2d 626, 993 P.2d 900 (1999). A second exception provides that an uphill landowner cannot lawfully collect water in an artificial channel, then discharge it on adjoining lands. *Id.* A third exception, and the only one that arguably applies here, is referred to as a "due care exception,"and requires that the landowner act in good faith and with due care to avoid unnecessary damage to the property of others. *Id.* at 864-65.
>
> In practical terms, the court in *Currens* held that a landowner may improve his or her land with impunity (subject to local land use and permitting requirements) without liability for damages to another's

> land as long as the landowner acts in good faith and any damage is not in excess of that called for by the particular project. *Id.* at 864. The record provides no evidence that Mr. Etzell undertook repair of the road in bad faith, and any damage that occurred to the easement was temporary. Consequently, he was entitled to protect his property by ditching and installing culverts to the easement road.

Id., at 441-2.

Glacier Electric further acknowledges that there are still other courts which have sought out a middle ground, between the common enemy doctrine and the civil rule, by grafting negligence and/or reasonableness concepts on to one doctrine or the other. See, for example, *Looney vs. Hindman*, 649 S.W.2d 207 (Mo. 1983). However, that is not the law in Montana. As far as the rights of the lower landowner are concerned, the doctrine as announced in *Tillinger* cannot be more explicit.

Even if a reasonableness standard were now to be imposed on the cooperative, it is submitted that the conduct about which Robert Winkowitsch has now complained – laying down a three-inch lift of asphalt on its own property should be deemed reasonable as a matter of law. See, in that regard, *Looney vs. Hindman*, *supra*.

Indeed, the approach of courts in New York is to be noted. It is not required to demonstrate that an improvement to one's own property be reasonable; it need only be established that such an improvement has been undertaken in good faith. In *Hanley vs. New York*, 193 A.D. 3d 1397, 147 N.Y.S. 3d 277 (2021), installation of

a curb was deemed to meet that requirement, resulting in dismissal of the case. Here, there can be no question that Glacier Electric's seeing to the installation of a three-inch lift of asphalt on its own property met any definition of good faith. As to simply requiring a showing of good faith -- see also *Cowell vs. Etzell, supra*. Here there is no evidence suggesting anything beyond the utmost good faith in the co-operative's decision to pave its own property in 2014. That should be the end of the matter.

Apart from the fact that conduct authorized by the common enemy doctrine cannot at the same time also be a nuisance, the district court compounded the problem for the co-op with its Instruction No. 17:

> You are instructed that if construction by the defendants has caused a condition which has or will produce intermittent but inevitable recurring flooding, then plaintiff should be justly compensated by said defendants, or defendants should pay for the depreciation, if any, to the fair market value of plaintiff's property resulting therefrom.

This instruction was tantamount to the imposition of strict liability on the co-op; it provided no exception for Glacier Electric's rights to protect its property under the common enemy doctrine, from water coming onto it from Robert Winkowitsch's property. Moreover, it did not suggest that there could be any escape from liability based on a defendant's good faith, much less the absence of any duty under the common enemy doctrine. Instruction No. 17 prejudiced the cooperative.

It should also be noted that just as the flow of water around the Quonset Hut

was a red herring, so too was Glacier Electric's decision to have a trough dug in the asphalt a year or so after the asphalt was originally laid down, when Robert Winkowitsch complained. The co-op's doing so is a perfect example of no good deed going unpunished. The fact that it did so cannot have served to abrogate its rights under the common enemy doctrine. Indeed, as shown by Exh.7-024, the trough served as an attempt to divert water away from the Cheaty Building, which diversion is just the sort of action a property owner ought to make under the common enemy doctrine.

CONCLUSION

Montana's adherence to the common enemy doctrine is neither obsolete nor out of step with a number of its sister states. If the concept retains the same viability as this court explained it in *Tillinger*, the jury here was wrongly instructed. The giving of the instructions noted above was a manifest abuse of discretion. One cannot be liable for a nuisance in taking steps to preserve and protect its own property when those steps are fully consistent with one's rights under that doctrine. The judgment of the district court should be reversed, with the direction that a judgment in favor of Glacier Electric be entered or – at a minimum – that this case should be remanded for a new trial limited solely to the question whether the acts of the cooperative were consistent with its rights under the common enemy doctrine.

DATED this 12th day of May, 2023.

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By /s/ Maxon R. Davis

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface, text style, and length requirements of M. R. App. P. 11(2) and 11(4)(a). Excluding the sections exempted by Rule 11(4)(D), the brief contains 3438 words, as calculated by Microsoft Word 2010 (Version 14). The brief is printed doubled-spaced, using 14-point Times New Roman, a proportionally spaced typeface.

May12, 2023. /s/ Maxon R. Davis

CERTIFICATE OF SERVICE

I, Maxon R. Davis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-12-2023:

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