IN THE COURT OF APPEALS 10/29/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00111 COA

C. EDMONSON JONES, III, GUS A. PRIMOS, DANIEL C. HUGHES, JAMES W. ELLIOT, JR., WALTER MICHAEL DENNIS, AND GRINNEL RUN HUNTING CLUB, INC.

APPELLANTS

v.

DAVID M. HALBROOK, ANN H. PEDEN, DAVID MCCALL HALBROOK, JR., LYNN H. DONAHOO, ANDREW LEE HALBROOK, HENRY P. WILLIAMS, JR., EVA W. WILLIAMS, BOB BEARDEN, MITCHELL PEARSON, SHELBY PINKERTON, AND JAMES W. DONAHOO

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. NATHAN P. ADAMS JR.

COURT FROM WHICH APPEALED: HUMPHREYS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

F. EWIN HENSON III

ATTORNEY FOR APPELLEES:

J. ROBERTSHAW

NATURE OF THE CASE: SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR DEFENDANTS

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

MCMILLIN, J., FOR THE COURT:

This case comes before the Court on an appeal from a grant of summary judgment in favor of the defendants rendered in the Chancery Court of Humphreys County. Believing that it will aid in the understanding of our discussion, we will continue to refer to the appellants as "plaintiffs" and the appellees as "defendants." Without expressing any opinion as to the proper outcome of this case on the merits, we determine that there are unresolved issues of fact in this case that make summary judgment inappropriate, and that the case must be reversed and remanded for trial on the merits.

I.

The Facts

The plaintiffs are a group of landowners who own certain unimproved property in Humphreys County. The property is in a low-lying area and is purposely flooded by the plaintiffs during parts of the winter to be used as recreational hunting property. Plaintiffs claim a dual purpose in ownership of the property, also using it for investment purposes to grow marketable timber. The defendants are all owners of lands lying adjacent to the plaintiffs' property. The defendants' land was being used for various agricultural pursuits including rice-growing and commercial fish farming.

The plaintiffs commenced this action alleging that the defendants, through their various agricultural activities, had made changes in the surface condition of their properties, which altered the natural drainage in the area during the critical timber-growth season. Plaintiffs claim that their own winter flooding does not affect the growth of their timber, and that, were the natural drainage systems left unaltered, their land would be sufficiently dry during the timber-growing season to permit normal timber growth. They charge that the defendants, in pursuit of their agricultural activities, however, have entered upon a practice of storing up surface water and then, from time to time, discharging it during the otherwise drier growing season in such quantities that the existing drainage systems are unable to accommodate the volume, causing flooding of their timber land. They claim the resulting standing water has severely retarded the growth of their timber and, in some instances, has caused the death of some trees. Plaintiffs sought both an injunction to prevent future flooding and damages for loss of timber. The defendants, in response, denied that they discharge any more water than would normally occur were they not engaged in such activities, and seek to lay the blame for the flooding on the plaintiffs' own activities.

The defendants moved for summary judgment, supporting their motion with lengthy affidavits detailing their activities upon their lands. The plaintiffs opposed the motion with affidavits of their own, indicating the history of their ever-increasing drainage problems that, they maintain, run parallel with the changes in activities of their neighbors, the defendants in this action.

The chancellor granted partial summary judgment, essentially retaining only a damage claim concerning the improper destruction of a levee on the plaintiffs' property by one of the defendants. The chancellor made the necessary certifications under Mississippi Rule of Civil Procedure 54(b) to

permit this appeal, and the plaintiffs promptly perfected their appeal.

II.

Discussion

The defendants' argument is based essentially on the proposition that the plaintiffs' claim for relief stands on nothing more than unfounded and unsupported allegations. The defendants affirmatively support their claim of entitlement to summary judgment by affidavits from among themselves that their activities in the area have done nothing to alter the natural flow of surface water. The defendants do not deny the fact of the standing water on plaintiffs' land during the growing season for timber. Rather, they assert that there is no probative evidence that their activities have caused the accumulation of the water. They go so far as to suggest that the accumulation of water is the result of poor land management by the plaintiffs, including poorly-thought-out dams and levees and their failure to remove beaver dams that block the natural drainage.

The record, however, contains ample evidence that each of the defendants have embarked upon activities on their respective lands that have at least the potential to alter the otherwise existing drainage of surface water. No one denies the construction and alteration of various levees, ponds, drainage canals, culvert placement, and related activities by these defendants or others in possession of the land under their authority. It does not appear subject to reasonable dispute that such activities have the possibility of affecting the natural drainage, either by rerouting surface flow or by artificially collecting and discharging surface waters in quantities beyond the capacity of existing drainage facilities.

Our review on the issue of the propriety of granting summary judgment is de novo. *Short v. Columbus Rubber & Gasket Co.,* 535 So. 2d 61, 63 (Miss. 1988) (citations omitted). Summary judgment is not a substitute for a trial on the merits. Neither the trial court nor this Court is permitted, in considering a summary judgment request, to weigh the relative merits of the evidence to support any particular facts necessary to the decision of the case. Rather, the court's initial consideration of a summary judgment motion must be to determine if there are unresolved issues of material fact, in which case summary judgment is inappropriate. M.R.C.P. 56 cmt.

The law is quite clear that a landowner possessing upper riparian rights may not alter the existing drainage over his land to the detriment of the lower riparian owner, by either altering the course of the drainage or by artificially collecting the water and discharging it onto the lower riparian owner in quantities beyond the existing drainage capacity. *Shattles v. Field, Brackett & Pitts, Inc.,* 261 So. 2d 795, 797 (Miss. 1972) (citations omitted).

This Court, upon a review of the discovery responses and affidavits filed both in support of and in opposition to the grant of summary judgment, is of the opinion that there are unresolved issues of fact concerning the effect of the activities of the defendants upon their lands on the drainage of surface water onto the plaintiffs' land. These activities, if improperly conducted, have the potential to cause plaintiffs the type of damage for which they would be entitled to redress under *Shattles*. *Shattles,* 261 So. 2d at 797. It is inappropriate to engage in a weighing of the evidence in favor and against summary judgment, since that is not at issue at this point. A party opposing summary judgment is not required to present all available evidence that supports that party's position or to

convince the court that he will ultimately prevail on the merits. The non movant must merely convince the Court that there are unresolved issues of fact vital to the decision on the merits.

The trial court based its decision to grant summary judgment on the proposition that the plaintiffs were unable to offer any concrete evidence of any particular time that any of the defendants actually discharged water improperly onto the plaintiffs' property. It must be remembered that much of this property is agricultural or forest land and that there is no indication that the plaintiffs are normally on or about their property on a continuous basis. In fact, it appears that the plaintiffs are essentially absentee owners who are on their property only on a limited basis when engaged in sporting activities. Thus, it can be understood that there may not have been actual observations of specific instances of discharge of water by any of the defendants. Nevertheless, we conclude that there are sufficient unsettled issues of fact that, if resolved favorably to the plaintiffs, would support an inference that the excess accumulation of standing water on the plaintiffs' land during the growing season was due to the activities of some or all of the defendants, and that this proof would be sufficient to entitle the plaintiffs to relief without proving specific instances of discharge. That being the case, we conclude that summary judgment was improper and that the decision of the chancellor must be reversed.

As to the issue that no relief may be granted as a matter of law against some of the landowners because they lease their property to others who are actually conducting the activities complained of, this Court concludes that, insofar as the plaintiffs seek injunctive relief that would directly affect the land itself, which relief could potentially include mandatory alterations in the surface condition of the property, these owners are proper parties in order to avoid a multiplicity of suits. Otherwise, even if the plaintiffs were successful in obtaining injunctive relief, they would be offered no protection from future similar alterations by non party owners who subsequently resumed possession of their property or by new tenants not parties to this litigation. This conclusion does not suggest the propriety of assessing damages against the owners for the activities of their tenants. It simply recognizes that, in the limited circumstance that injunctive relief might include more or less permanent alterations in the surface conditions of the defendants' property, the owners should be permitted to be heard on the issue, and the plaintiffs are entitled, under equitable considerations, to some reasonable degree of permanency in enjoying any such relief granted. By the same token, defendants who are former tenants on the property no longer having any present right of occupancy may, nevertheless, be subject to assessment damages should the proof ultimately establish their responsibility for prior damage to the plaintiffs' standing timber. It should go without saying; nevertheless, we emphasize that this conclusion in no way suggests this Court's opinion on the propriety of any grant of relief after a trial on the merits. We simply note, as we must, its legal possibility depending upon final resolution of the disputed issues of fact that must now be resolved.

THE JUDGMENT OF THE HUMPHREYS COUNTY CHANCERY COURT IN FAVOR OF APPELLEES IS REVERSED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., NOT PARTICIPATING.