**HERMAN A. SABLAN, Plaintiff-Appellant**

**v.**

**DILLINGHAM CORPORATION OF MICRONESIA and ABEL M. ATALIG, Defendant-Appellees**

Civil Appeal No. 136

Appellate Division of the High Court

April 13, 1976

Action for damages occasioned by drainage of water from paved rental car lot upon plaintiff's residential property and for equitable relief. The Appellate Division of the High Court, Brown, Associate Justice, reversed Trial Court's finding in favor of defendant paving contractor and held that paving contractor had knowledge of danger, created by the grading of rental car lot by its owner and by its own paving, to adjoining residential property, and that since it was foreseeable that inevitable consequences of paving would increase, concentrate and intensify flow of drainage water upon plaintiff's adjoining residential property, which actually occurred, paving contractor was liable, jointly and severally, with rental car lot owner for water damages.

1. **Waters—Surface Waters—Natural Servitude**

   There is a natural servitude of natural drainage between adjoining lands, so that lower owner must accept surface water which naturally drains onto his land.

2. **Waters—Surface Waters—Increasing Servitude**

   There is no right to collect surface water into artificial channels and discharge it onto land of an adjoining owner to latter's damage.

3. **Negligence—Building Contractors—Standard of Care**

   Amount of caution required of a person in exercise of ordinary care depends upon danger which is apparent to him or should be apparent to a reasonably prudent person under similar circumstances.

4. **Negligence—Building Contractors—Standard of Care**

   Where building contractor had actual knowledge of slope of car rental lot towards appellant's adjoining residential property but nevertheless proceeded with paving the lot, and where contractor's resident manager had actual knowledge of dangerous condition, and his conversation with owner of rental car lot amply demonstrated his concern for consequences that would inevitably arise from paving the lot, thus increasing, concentrating and intensifying flow of drainage water upon appellants' premises, building contractor had duty to exercise ordinary care which a person of ordinary prudence would use in order to avoid injury or damage to others under similar circumstances.

5. **Negligence—Building Contractors—Liability**

   Paving contractor could not insulate itself from liability for damage from water draining upon adjoining lower residential property due to its

negligent paving of rental car lot, on ground that it had completed its contract to pave lot and lot owner had accepted its work.

6. **Negligence—Building Contractors—Liability**

When contractor turned over completed paving job to rental car lot owner and knew or in exercise of ordinary care should have known of danger that increased surface water drainage posed to adjoining lower residential property, it remained liable to residential property owner for damages proximately caused or contributed to by its actions in paving rental car lot.

7. **Negligence—Building Contractors—Liability**

Where paving contractor had knowledge of danger, created by grading of rental car lot by its owner and by its own paving, to adjoining lower residential property, and since it was foreseeable that inevitable consequences of paving would increase, concentrate and intensify flow of drainage water upon adjoining residential property, which actually occurred, paving contractor was liable, jointly and severally, with rental car lot owner for water damages.

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*Counsel for Appellant:* Micronesian Legal Services Corporation, by JOSE S. DELA CRUZ

*Counsel for Appellees:* No appearance

Before BROWN, *Associate Justice*, HEFNER, *Associate Justice*, and WILLIAMS, *Associate Justice*

BROWN, *Associate Justice*

Plaintiff-appellant appeals from that part of the judgment of the Trial Court which held in favor of defendant-appellee, Dillingham Corporation of Micronesia, sometimes called Dillingham.

Herman A. Sablan filed in the Trial Court an action for damages and for equitable relief naming as defendants Dillingham and Abel M. Atalig, hereinafter called Atalig, wherein he contended that Atalig had caused his rental car lot to be paved by Dillingham, that the paving was negligently performed, and as a proximate result of that negligence, water was diverted in an unnatural manner down and upon plaintiff's residential property causing damage thereto.

Atalig filed no answer or other responsive pleading, nor did he appear generally or specifically before the Trial Court. A default judgment was entered against him, the Trial Court awarding damages in the amount of One Thousand Five Hundred ($1,500.00) dollars, interest, costs, and a direction that Atalig "take any and all steps necessary to prevent the flooding of water into plaintiff's property." That judgment has long since become final, and it plays no part in the appeal now before us.

The case proceeded to trial against Dillingham, and the Trial Court found in favor of that defendant, stating only that "the Court finds no liability on the part of Dillingham Corporation of Micronesia, and the judgment requested as to such defendant is Denied (sic)." It is from that portion of the judgment of the Court below that this appeal is taken.

At this juncture, we note that at no time did either party request findings of fact and conclusions of law, to which any party is entitled under the provisions of Rule 16a, Rules of Civil Procedure, provided a request for the same is made. We note, too, that Dillingham ceased its participation after the proceedings before the Trial Court had been concluded. It filed no brief as appellee, nor did it otherwise participate in this appeal.

The pertinent facts established during the trial were neither complex nor disputed in any way whatsoever. In brief, the evidence was uncontradicted, and we now relate its pertinent portions.

Since 1960, appellant has owned and resided upon certain improved real property described as District No. 4, Chalan Kanoa, Saipan. This land fronts upon and is slightly lower than Beach Road, which runs north and south along the land's westerly boundary. The Atalig property, including the rental car lot, abuts the Sablan residential property, is higher than the latter, and is situated immediately to its

north. Over the years rainwater, following its natural course, flowed down upon the Sablan land, coming both from Beach Road and the Atalig land, but never did this water flood the Sablan house until after the rental car lot was paved during the early months of 1974. However, from the time of that paving up until the present, the surface water run-off has been so greatly increased that it has come into the Sablan home, sometimes reaching a depth of as much as four inches. Such flooding occurs whenever heavy rains fall upon the island, and some encroachment of water into the home takes place even after relatively light rains. The source of the increased volume of run-off was traced to the paved parking lot.

In an attempt to divert the water away from his house, appellant constructed a trench in its vicinity; but the trench proved to be ineffective, and the waters continued regularly to invade his dwelling. Anxious to obtain relief, Mr. Sablan lodged a complaint with Atalig, but was told by the latter that the fault lay with Dillingham in that it had paved the parking area; but when appellant sought relief from Mr. Juan Salas, Dillingham's Resident Manager, he was advised that the fault lay with Atalig, who had graded the area prior to its being paved.

The paved area itself abuts Beach Road which lies to its west and, like Beach Road, runs in a generally north-south direction. Both the west side and the east side of the paved parking lot slope towards its center, forming a channel or gutter. The entire parking lot slopes down from the north to the south. The effect of this configuration is that water flows to the center of the parking lot where it concentrates and then, following the slope of the lot, moves to the south where it leaves the Atalig property and pours down upon appellant's residential lot. Dillingham's only agreement with Atalig was to pave the already graded area, and it did so.

Before the paving was commenced, however, Mr. Juan Salas went upon the job site and met with Atalig pointing out to him that the area to be paved sloped to the south. Atalig merely instructed Mr. Salas to proceed with the paving, saying that there was no problem. While the paving was being done, Mr. Salas, having actual knowledge of the area's southward slope, again discussed the matter with Atalig who insisted that the work proceed as scheduled. Mr. Salas did follow Atalig's instructions and did proceed with the paving, testifying that he had no other choice since Atalig was paying him.

No evidence produced by either side during the trial disputed or tended to dispute any of the facts we have related, and we now turn to the law that applies to those uncontradicted facts.

[1] It is elementary that the lower, or servient property must accept the natural flow of surface water from the higher, or dominant property. In essence, there is a natural servitude of natural drainage between adjoining lands so that the lower owner must accept the surface water which *naturally* drains onto his land. (Emphasis added) *Dayley v. City of Burley*, 524 P.2d 1073 (Ida.). In the case at bench, though, we are not faced with a question of damage caused by the natural flow of surface water, and a review of the evidence reveals that as long as the flow of surface waters was a natural one, appellant was not damaged.

[2] The lower property is not required to accept surface water that first was gathered upon the upper property, concentrated into a channel, and then precipitated in an unnatural flow down and upon the lower property, thereby proximately causing damage which would not have occurred had the waters flowed naturally. There is no right to collect surface water into artificial channels and discharge it onto the land of an adjoining owner to the latter's

damage. *San Gabriel Valley Country Club v. Los Angeles County*, 188 P. 554 (Cal.); *Rix v. Alamagordo*, 77 P.2d 765 (N.M.); *Kirkpatrick v. Butler*, 483 P.2d 790 (Ariz. App.)

[3, 4] As a contractor, Dillingham had a duty towards appellant. Its duty was to exercise ordinary care which persons of ordinary prudence would use in order to avoid injury or damage to others under circumstances similar to those shown by the evidence. The amount of caution required of a person in the exercise of ordinary care depends upon the danger which is apparent to him or should be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence. Here, Dillingham had actual knowledge of the slope towards appellant's property but nevertheless proceeded with the paving. The care required of Dillingham must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated. *Hilyar v. Union Ice Co.*, 286 P.2d 21. Dillingham's Resident Manager had actual knowledge of the dangerous condition, and his conversation with Atalig amply demonstrated his concern for the consequences that would inevitably arise from paving the lot and thus increasing, concentrating, and intensifying the flow of water upon appellant's premises.

[5, 6] Dillingham cannot insulate itself from liability upon the theory that it had completed its contract to pave the lot and Atalig had accepted its work. The law once was in accordance with that theory. It no longer is. When Dillingham turned over the completed job to Atalig and knew, or in the exercise of ordinary care should have known of the danger then posed to the Sablan property, it remained liable for damages proximately caused or contributed to by its actions in paving the lot. *Tally v. Skelly Oil Co.*, 433 P.2d 425 (Kan.); *Johnston v. Long*, 133 P.2d 409

(Cal. App.); *Schlender v. Andy Jansen Co.*, 380 P.2d 523 (Okla.)

[7] Since Dillingham had knowledge of the danger created both by the grading by Atalig and by its own paving, and since damage to the Sablan property was foreseeable and actually occurred, it is liable, jointly and severally, with Atalig. Similar conduct is discussed in *Groff v. Circle K Corporation*, 525 P.2d 891 (N.M. App.) The undisputed evidence, totally without conflict, permits no other conclusion in the case before us.

In his brief, appellant contends that Dillingham is "big business" and as a consequence of that fact alone, Micronesians are not equipped to bargain fairly and justly with it. While this contention was not touched upon in oral argument, we reject it as wholly without merit. It can have no possible bearing upon the case before us nor upon our decision which must be and is based solely upon the record before us and the law that applies to that record.

By virtue of the foregoing, that portion of the judgment of the Trial Court that applies to defendant-appellee Dillingham Corporation of Micronesia, and only that portion of the judgment is REVERSED.