

## **GOOD FENCES MAKE GOOD NEIGHBORS (MAYBE)**

**By James R. Keller**

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Missouri's Western District Court of Appeals recently decided that the trial court should have allowed a jury to consider whether to award punitive damages against an adjacent homeowner who constructed a berm to divert water onto his neighbor's property. The case is Atkinson v. Corson, 2009 WL 1851135 (Mo. App. W.D.), decided June 30. A series of disputes between adjacent neighbors over water diversion escalated into a possible punitive damage award against one of them.

This case reinforces a jury's wide latitude to believe or reject sworn trial testimony, especially when the question is what is reasonable use of property. In this case, another jury will be asked whether to award punitive damages.

The dispute began over a fence that Tim Atkinson started to construct on the property line of his twenty acres in Cass County. He enjoyed a cordial relationship with his neighbor Greg Corson in the early 2000s and they even discussed the possibility of jointly building a fence along their mutual property line. Atkinson subsequently began to build this fence on his own.

Thereafter, their relationship deteriorated. One day Atkinson saw Corson and his son walking on Atkinson's side of the property line. He then posted no trespassing signs and later found one of them to be "riddled with shotgun splatter and bullet holes."

The parties shared a ditch, which became the center piece of their dispute. It was eighteen inches deep on Atkinson's side and two to three feet across. In 2005, Atkinson began building a second pond on his property. Atkinson's contractor removed trees and "smoothed out" the ditch, but left a low spot six inches deep for water to continue to flow through Atkinson's property.

Corson then constructed a berm on his property line. He argued the berm was necessary to direct water back onto Atkinson's property. The berm was 380 feet long, or seven times the length of the smoothed-out ditch.

Atkinson claimed this caused water to pool on his property, creating a marshy area of 1.5 acres that did not previously exist. He also testified at trial that he could not complete his fence due to the ponding water.

Atkinson sued for actual and punitive damages under Missouri's doctrine of "reasonable use of surface water." The jury awarded \$7,500 in actual damages on this claim and one dollar in actual damages and \$500 in punitive damages on the claim of trespass for

shooting Atkinson's "No Trespassing" sign. The trial court would not let the jury consider whether to award punitive damages on the reasonable use claim. Both sides appealed the jury verdict and the trial court decisions.

The doctrine of reasonable use imposes a duty on any landowner not to "needlessly or negligently injure by surface water adjoining lands owned by others." The doctrine has no precise definition and allows for equities to be considered in whether a landowner reasonably used the land in relation to surface water or intentionally diverted it onto a neighbor's property.

The trial evidence showed that Atkinson's contractors smoothed the ditch in a way that did not disrupt the flow of surface water. Evidence also suggested that Corson constructed the berm even though he experienced no actual water problems.

While Corson contended that his construction of the berm was not unreasonable, the appellate court noted that the jury was "free to disbelieve all of Mr. Corson's testimony." The trial court erred by not allowing the jury to assess punitive damages for this.

To make a submissible case for punitive damages, Atkinson had to show by clear and convincing evidence (a very high standard) that Corson's conduct was "wanton, willful or outrageous" or there was "reckless disregard" for its consequences.

The appellate court determined there was enough for a jury to consider punitive damages. The "jury could have found that there was no legitimate need for Mr. Corson to construct the berm, and that his decision to do so was spawned by vindictiveness toward his neighbor, and to interfere with Atkinson's ongoing efforts to improve and fence his property." A jury will be deciding this issue in the next trial.

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