leasing agreement would have had, if any, on the outcome in this case in the event ACT had made the required payments. Second, and perhaps more important, we note that the record shows that the election document signed by Nerison was never forwarded to AMS, let alone CNA, and that by the time of Nerison's accident, AMS was no longer remitting lists of its client companies to CNA. Clearly, from CNA's point of view, there had been no election or other document showing that Nerison was covered as a self-employed individual or as a coemployee of AMS.

[10] The record in this case contains sufficient evidence to support the trial judge's conclusion that Nerison was self-employed and that Nerison did not comply with § 48-115(10). Section 48-185 precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005). Accordingly, we find no error with respect to the trial judge's rulings as to Nerison's first theory of liability or with respect to the review panel's affirmance of that portion of the order of dismissal.

VI. CONCLUSION

The review panel did not err in affirming the order of dismissal.

AFFIRMED.

MARILYN M. BIHUNIAK ET AL., APPELLANTS, V. ROBERTA CORRIGAN FARM, A LIMITED PARTNERSHIP, ET AL., APPELLEES.

757 N.W.2d 725

Filed November 4, 2008. No. A-07-989.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.

2. **Waters: Negligence.** With regard to surface water, one may protect his land from surface water even to the damage of his neighbor and may only be held responsible in case of negligence.
3. ____: ____. The proprietor of lands may, by proper use and improvement thereon, deflect surface water, and will not be liable for consequent damage to his neighbor in the absence of negligence.
4. ____: ____. A landowner, in the absence of negligence, may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor.
5. ____: ____. If the flow of the water into a natural drain is increased over the lower estate, it must be done in a reasonable and careful manner and without negligence.
6. **Waters.** An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and by means of an artificial channel discharge it upon another's land contrary to the natural course of drainage to the latter's damage and detriment.
7. **Waters: Negligence.** The right of the upper proprietor to discharge water is not absolute. The discharge must be done in a reasonable and careful manner and without negligence.
8. **Injunction.** An injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
9. **Injunction: Damages: Proof.** In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Loralea L. Frank and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellants.

Larry W. Beucke and Amy L. Parker, of Parker, Grossart, Bahensky & Beucke, L.L.P., for appellees Roberta Corrigan Farm and Roberta Corrigan.

Jack W. Besse, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellee Menard, Inc.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Marilyn M. Bihuniak; Thomas J. Wilson; E. Ardelle Green, trustee of the Robert L. Green and E. Ardelle Green Family

Revocable Trust dated February 8, 1982; and Thomas H. Pratt, Jr. (collectively appellants), brought an action against Roberta Corrigan Farm, a limited partnership; Roberta Corrigan, trustee of the LeRoy Corrigan Trust; and Menard, Inc., also known as Menard Cashway Lumber, a Wisconsin corporation (collectively appellees), seeking money damages and injunctive relief. The appellants allege that the development of appellees' land has caused an increase in the amount of surface water flowing onto appellants' land from appellees' land, causing damage to appellants' land and crops. The district court for Buffalo County entered judgment in favor of appellees and dismissed appellants' amended complaint. Based on the reasons that follow, we affirm.

BACKGROUND

Bihuniak, Wilson, and the Robert L. Green and E. Ardelle Green Family Revocable Trust own a quarter section of farm ground in Buffalo County. Pratt farmed the quarter section under a crop-share arrangement for 15 years up to and including 2005. Roberta Corrigan Farm and the LeRoy Corrigan Trust (the Corrigans) own real estate immediately south of appellants' quarter section, which real estate they have been in the process of commercially developing. The appellants' property has historically been subservient to the drainage of surface waters from the appellees' property.

On July 16, 2003, Menard, Inc. (hereinafter Menards), purchased a portion of the Corrigans' property for the purpose of constructing a store. Subsequently, the Corrigans and Menards entered into a development agreement which required the Corrigans to make certain improvements to the land. As part of that agreement, the Corrigans hired an engineer to develop plans for the drainage of diffused surface water, which included a detention pond. The agreement also provided that the plans had to be approved by the city of Kearney. The detention pond was constructed in accordance with the plans designed by the engineer and approved by the city. Menards began construction of its store in 2004 and completed it sometime in 2005.

On January 10, 2005, appellants filed an amended complaint against appellees alleging that the "dirt work" performed in

developing appellees' land and the construction of the Menards store has caused greater amounts of diffused surface water to drain onto appellants' land, thereby causing damage to appellants' land and crops. The amended complaint requests an injunction against appellees ordering them to refrain from causing more diffused surface water to be drained onto their land than would have reached the land by natural drainage. The amended complaint also seeks damages for costs to repair appellants' land and damages for crop losses in 2004.

A bench trial was held on April 18 and 19, 2007. Pratt testified that he farmed the appellants' land for 15 years, up to and including 2005. Pratt testified that he was familiar with the flow of surface water across appellees' land and appellants' land before the Menards store was built. He testified that before the store was built, surface water would always flow from appellees' land across appellants' land along a natural drainage path. Pratt testified that the natural drainage path across appellants' property continues to be the same as it was before the store was built. Specifically, Pratt testified that when the water leaves the detention pond, it flows across a portion of appellees' property to the northeast, where it crosses the southeast corner of appellants' property in the same drainageway it always has, and then drains into a large settling pond constructed by the local natural resources district.

Pratt testified that although the surface water drains along the same path, the flow of water across appellants' land covers a wider area. He testified that before the Menards store was built, the drainage path across appellants' property was 2 to 3 feet wide after it rained and that the path is now 25 to 30 feet wide. Pratt testified that the increased waterflow affects approximately 1½ acres in the southeast corner of appellants' property. Photographs taken by Pratt after two rainfalls in May 2005 were entered into evidence showing the water flowing across appellants' land at various points downstream from the detention pond. Pratt did not know how long or how much it rained on either of the two occasions.

Pratt testified that as a result of the increased waterflow across appellants' property, he lost an estimated $618 in crops for 2004. Pratt was not sure whether he had planted corn or

soybeans that year. He testified that he was able to plant and harvest some crops on the southeast corner of the quarter section in 2004 and 2005, but could not always get to the area when he needed to because it was too wet, and that weeds took over the area.

Kent Cordes, a civil engineer, also testified for appellants. Cordes testified that he investigated the drainage system for the Menards store site and the surrounding area, specifically reviewing the design of the detention pond. Cordes testified that the Menards store has created an increase in the flow of surface water across appellants' property. Cordes testified that the increase in surface water was caused by the construction of the store and that the creation of impervious areas, whereby less water infiltrates into the ground and the water has to run off, increased the total amount and volume of water discharged.

Cordes testified that the purpose of a detention pond is to mitigate the increase in the flow of surface water by holding back the water after a rainfall and gradually releasing it to match the flow that existed predevelopment. He testified that in his opinion, appellees' detention pond does not serve that purpose. He testified that it is undersized and that as a result, the water is discharged at a greater rate than the flow of water that naturally occurred before the store was built. Cordes testified that the detention pond does reduce the rate at which the flow of water leaves the site and that the waterflow would be even greater without the detention pond. Cordes testified that the increased flow of water across appellants' property will continue if nothing further is done.

Cordes testified that the city of Kearney requires that the postdevelopment peak discharge from a detention pond not exceed the predevelopment peak discharge of water. Cordes testified that he did not know if this was a city code or a policy. Cordes testified that in his opinion, the detention pond does not meet this goal because of errors in appellees' engineer's calculations and plans. However, on cross-examination, Cordes agreed that the engineer's calculations and plans meet the city's requirements.

Cordes also agreed with Pratt that when the surface water leaves the detention pond, it flows along the same drainage

path across appellants' property as it did predevelopment of the land. He testified that the building of the store did not alter the natural flow of water.

The trial court found that appellants did not adequately prove damages to the land or to the crops and that appellants were not entitled to injunctive relief, because they did not show that appellees acted negligently in causing an increase in surface water across appellants' property. The trial court entered judgment in favor of appellees and against appellants.

ASSIGNMENT OF ERROR

Appellants assign that the trial court erred in rendering judgment in favor of the appellees because such judgment was contrary to the law and the evidence presented at trial.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

ANALYSIS

Appellants argue that they are entitled to an injunction against appellees because the construction of Menards has caused an increase in the flow of surface water over the southeast corner of appellants' property, resulting in damage to appellants' land and crops. Appellants contend that their land and crops will continue to be damaged unless appellees are refrained from causing more surface water to flow onto appellants' land than occurred before the construction of Menards. An examination of the law regarding surface waters is necessary to determine the rights and duties of appellees, as upper landowners, to appellants, as lower landowners.

[2-4] With regard to surface water, it has long been the rule that one may protect his land from surface water even to the damage of his neighbor and may only be held responsible in case of negligence. See *Jorgenson v. Stephens*, 143 Neb. 528, 10 N.W.2d 337 (1943). Also, it has long been the rule that the proprietor of lands may, by proper use and improvement

thereon, deflect surface water, and will not be liable for consequent damage to his neighbor in the absence of negligence. *Id.* It has also been held that a landowner, in the absence of negligence, may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor. *Id.*

[5] If the flow of the water into such natural drain is increased over the lower estate, it must be done in a reasonable and careful manner and without negligence. *Hickman v. Hunkins*, 1 Neb. App. 25, 509 N.W.2d 220 (1992), citing *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950).

[6] An owner's right to discharge surface water from his premises does not extend so far as to permit him to collect it in a volume, and by means of an artificial channel discharge it upon another's land contrary to the natural course of drainage to the latter's damage and detriment. *Hickman v. Hunkins, supra*, citing *Todd v. York County*, 72 Neb. 207, 100 N.W. 299 (1904).

In *Jorgenson v. Stephens, supra*, a lower landowner sought injunctive relief and damages against an upper landowner, alleging that the upper landowner's development of his real estate increased the flow of surface water onto the lower landowner's property. The lower landowner argued that the upper landowner should be required to divert the water directly into the city streets and sewers or employ artificial structures to keep the additional water from flowing onto the lower landowner's land. The Nebraska Supreme Court found that the evidence failed to show that the upper landowner had been negligent in the dispersion of his surface waters upon the land of the lower landowner or that he acted unreasonably and, thus, that there was no liability on the part of the upper landowner. The court further found that "the [lower landowner] must be left to her own resources to, reasonably and without negligence, protect her property from the surface water coming from the property of the [upper landowner], if she would have protection therefrom." *Jorgenson v. Stephens*, 143 Neb. at 535, 10 N.W.2d at 340.

Similarly, in *LaPuzza v. Sedlacek*, 218 Neb. 285, 353 N.W.2d 17 (1984), a lower landowner sued an upper landowner because

of water draining from the upper landowner's residence to the lower landowner's residence. The lower landowner had rebuilt a retaining wall in his backyard twice, and after it collapsed a second time, he sued the upper landowner, arguing that the upper landowner had a duty to divert the surface water flowing down from his land. The Nebraska Supreme Court found that no duty to divert existed under Nebraska law and further explained:

> An owner may collect surface water, change its course, pond it, or cast it into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another, except in depressions, draws, swales, or other drainageways through which such water is wont to flow in a state of nature. . . . Once a landowner diverts surface water and upsets the natural flow, he has a duty to do so reasonably and avoid damage to his neighbor. However, there is no affirmative duty to divert the natural flow away from one's neighbor even if it is causing damage in its natural state.

Id. at 287, 353 N.W.2d at 18-19.

[7] Neb. Rev. Stat. § 31-201 (Reissue 2004) states:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

However, the right of the upper proprietor to discharge such water is not absolute. The discharge must be done in a reasonable and careful manner and without negligence. *Hickman v. Hunkins*, 1 Neb. App. 25, 489 N.W.2d 316 (1992).

Based on the law in Nebraska, appellees are not liable to appellants for damages caused by an increase in surface water unless appellees were negligent in discharging the surface water. We conclude that appellants not only failed to plead negligence in their amended complaint, but they also failed to prove any negligence. The evidence shows that there is an increase in the

amount of surface water that flows across appellants' property, but the evidence also shows that the water follows the same natural drainageway that it did before the construction of the Menards store. Both Pratt and Cordes testified that the surface water flows out of the detention pond and across appellants' property in the same natural drainageway that the water flowed before the store was built.

Appellants allege on appeal that appellees are negligent in the dispersion of surface water because the detention pond does not reduce the flow of water to preconstruction rates. Cordes testified that in his opinion, the detention cell is undersized and, accordingly, does not reduce the waterflow to preconstruction rates. However, Cordes also testified that the detention pond does function to slow the flow of water and that without the detention pond, the water would flow onto appellants' property much faster. Further, appellees hired an engineer to design the detention pond and, although Cordes testified that he did not agree with the appellees' expert's calculations, the evidence reflects that appellees' expert followed the city's requirements in developing the detention pond and the city approved the plans. Thus, as previously stated, the evidence does not reflect that appellees acted negligently or unreasonably in the dispersion of surface water upon the land of appellants. Without proof of negligence, there is no basis for an injunction.

[8] In addition to appellants' failure to prove negligence, appellants are not entitled to injunctive relief because they have failed to show irreparable harm. An injunction is an extraordinary remedy that ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[9] Appellants presented evidence to show that in 2004, they lost crops valued at $618 as a result of the increased surface water. However, there was no evidence of crop loss in 2005 or 2006, nor was there any evidence of damage to the land. Appellants do not challenge the trial court's finding that they failed to adequately prove damages to crops in 2004 or

damages to the land. Cordes testified that the increased flow would continue into the future, but there was no evidence as to whether that would cause damage to the land or crops in the future. Thus, there was no evidence of irreparable damage. In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief. *Muff v. Mahloch Farms Co., Inc.*, 184 Neb. 286, 167 N.W.2d 73 (1969). For this additional reason, an injunction would be inappropriate.

CONCLUSION

We conclude that appellants are not entitled to an injunction against appellees because the evidence does not show that appellees acted negligently or unreasonably in the dispersion of surface water upon the land of appellants, and the evidence does not show irreparable harm to appellants. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

JHK, INC., DOING BUSINESS AS FAST MONEY, ET AL., APPELLANTS, V. NEBRASKA DEPARTMENT OF BANKING AND FINANCE, APPELLEE.

757 N.W.2d 515

Filed November 4, 2008. No. A-07-1317.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Trial: Appeal and Error.** The disposition of procedural motions is left to the discretion of the trial court, and absent a showing of an abuse of that discretion, an appellate court will affirm the trial court's rulings regarding such motions.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.