STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1533

Teresa M. Hintze, et al.,
Appellants,

vs.

Karen A. Hoese, et al.,
Respondents,

Chad Harwood, et al.,
Respondents,

Dale W. Hoese, et al.,
Respondents.

Filed July 10, 2023
Affirmed
Wheelock, Judge

Carver County District Court
File No. 10-CV-20-972

Patrick B. Steinhoff, Thomas F. DeVincke, Malkerson Gunn Martin, LLP, Minneapolis, Minnesota (for appellants Teresa M. Hintze and John R. Rotter)

Joseph M. Bromeland, Bromeland Law LLC, Mankato, Minnesota; and

John C. Kolb, Rinke Noonan, St. Cloud, Minnesota (for respondents Karen A. Hoese, Ronald J. Hoese, Delores Hoese, Greg A. Hoese, Bruce W. Hoese, and Judy A. Hoese)

Valerie Sims, Brian W. Varland, Heley, Duncan & Melander, PLLP, Minneapolis, Minnesota (for respondents Chad Harwood and Heidi M. Harwood)

Michael J. Tomsche, Gabriel V. Wolski, Tomsche, Sonnesyn & Tomsche, PA, Minneapolis, Minnesota (for respondents Dale W. Hoese and Louise Ann Hoese)

Considered and decided by Cochran, Presiding Judge; Segal, Chief Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellants challenge the district court's summary judgment allowing respondents to continue to use and repair a drainage system located under appellants' land, applying the reasonable-use doctrine in favor of respondents. Appellants argue that (1) the reasonable-use doctrine does not allow respondents to continue to use the system as a matter of law and that even if it does, questions of material fact exist that preclude its application, (2) the district court erroneously employed principles of estoppel to reach its decision, and (3) the district court improperly granted an easement in favor of respondents that burdens appellants' land. Because the district court did not err by applying the reasonable-use doctrine and granting summary judgment in favor of respondents and its ordered relief was proper, we affirm.

FACTS

In 2010, appellants Teresa Hintze and John Rotter purchased real property that Hintze's parents had previously owned and maintained.[1] When appellants purchased the property, they did not know that it contains a portion of an underground drainage system that conveys water to an outlet on the edge of their property near the Crow River. The total

[1] At the time of the purchase, the property was held in Hintze's mother's trust.

drainage system traverses several other nearby properties, including properties owned by respondents.

Several neighboring landowners and the previous owner of appellants' property—Hintze's father Robert Morehouse—orally agreed to install an underground tile drainage system that would traverse the neighboring properties and discharge onto appellants' property, believing that the underground drainage system would benefit all of the land involved, including appellants' property. A contractor installed the drainage system in 1977 where open ditches had been located. Respondent Ronald Hoese, one of the original landowners who orally agreed to implement the drainage system, testified at his deposition that the landowners installed the system to transfer surface water underground and that no additional water was being added to the system. Hintze, who was familiar with the nature of the property prior to the system's installation in 1977 from when she was a child and young adult, did not recall water naturally flowing or pooling on the property. She also did not remember observing any ditches or swales on the property.

In December 2020, after water began to pool on their property due to believed issues with the drainage system, appellants filed a complaint against some of the neighboring landowners whose properties drain into the system.[2] Appellants alleged claims for trespass, ejectment, and nuisance and sought a declaratory judgment that they have the right to remove or cap the drainage system.

[2] For unknown reasons, appellants did not name as parties all of the landowners who benefit from the drainage system.

An engineer, respondents' expert witness, investigated the drainage system and the surrounding properties.[3] He concluded that "the Hoese tile system delivers a similar quantity of surface water in the same location, but through the underground tile system instead of over the surfaces of" the connected properties. He disagreed with Hintze's claim that the installation of the drainage system on the property in 1977 led to an increase in water discharging there, instead concluding that the tile system carries the historic water flow that existed before its installation. He also concluded that removing the underground tile on appellants' property would cause problems for all property owners who benefit from the drainage system because the ditches that previously allowed drainage had been removed. Finally, the engineer concluded that the drainage system had not caused any damage to appellants' property aside from one sinkhole caused by breach of a tile that he believed would be a simple and inexpensive repair. He recommended that all owners "collaborate on current and future management of the drainage system to continue its long-term viability and utility."

All parties moved for summary judgment. Based on its application of the reasonable-use doctrine, the district court granted summary judgment in favor of respondents, denied Hintze's motion, and ruled that respondents had the right to continue to use the drainage system on appellants' property and "the right, upon notice, to reasonably enter [appellants' property] . . . for the limited purposes of inspecting, maintaining, and repairing the tile drainage system and correcting damages" if it caused

[3] Appellants did not provide any engineering reports or other expert evidence to the district court.

any to appellants' land. It also ordered that appellants and their successors in interest are estopped from interfering with or obstructing the free discharge of the waters carried by the drainage system.

Appellants appeal.

DECISION

Appellants challenge the district court's summary judgment in favor of respondents and its associated relief. Summary judgment is appropriate if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76-77 (Minn. 2002). We review de novo the district court's application of the law. *Id.* at 77.

I. The district court properly applied the reasonable-use doctrine, and no disputes of material fact preclude summary judgment.

Minnesota law has long recognized the reasonable-use doctrine, which "permits a property owner to drain surface waters onto another's land" if the elements of the doctrine are met. *Goerke Fam. P'ship v. Lac Qui Parle-Yellow Bank Watershed Dist.*, 857 N.W.2d 50, 54 (Minn. App. 2014); *see Sheehan v. Flynn*, 61 N.W. 462, 466 (Minn. 1894) (recognizing principles of the doctrine as early as 1894). Under the reasonable-use doctrine, a landowner may divert surface water to another's land, even if some of the water would not naturally have gone to the other's land, if

> (a) there is a reasonable necessity for such drainage;
> (b) reasonable care be taken to avoid unnecessary injury to the land receiving the burden;
> (c) the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden;
> (d) where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.

Kral v. Boesch, 557 N.W.2d 597, 599 (Minn. App. 1996) (quotation omitted). "The reasonable use rule cannot be reduced to a cut-and-dried formula. What is reasonable use is a fact question to be resolved according to the peculiar facts of each case." *Duevel v. Jennissen*, 352 N.W.2d 93, 96 (Minn. App. 1984).

Appellants argue that the reasonable-use doctrine cannot apply in this case because appellants' property does not adjoin respondents' property and the water discharged from respondents' property is no longer surface water once it reaches appellants' land because it is conveyed by underground pipes that comprise the drainage system. As to appellants' first argument, our caselaw does not require that benefited property be adjacent to the burdened property for the doctrine to apply. Instead, we have held that the doctrine allows surface water to be drained "onto another's land." *Goerke*, 857 N.W.2d at 54; *see also Wilson v. Ramacher*, 352 N.W.2d 389, 393 (Minn. 1984) ("A landowner has the right to make a reasonable disposition of surface water. This may include diverting water off his land onto the land of another, as long as the diversion is a reasonable use."). And as to appellants' second argument, they cite no authority holding that water that initially

qualifies as surface water[4] when it enters a drainage system transforms into something else when it is conveyed onto a burdened property using an underground-pipe system. We have instead held that surface water retains its character even if it drains underground. *Enderson*, 32 N.W.2d at 289 (citing *Hartle v. Neighbauer*, 172 N.W. 498, 499 (Minn. 1919)).

Caselaw confirms that the application of the reasonable-use doctrine is not as narrow as appellants assert. For example, in *Evers v. Willaby*, 444 N.W.2d 856, 859 (Minn. App. 1989), we applied the reasonable-use doctrine in a case involving a landowner connecting his drainage system to an existing tile drainage system near his property, an act that caused water to drain onto the property of a landowner not adjacent to him. We did not observe any barrier to applying the doctrine in that case despite the diversion of water occurring between nonadjacent lands. *Id.* at 860. The fact that this case involves the construction of a communal underground drainage system, consented to by appellants' and respondents' predecessors in interest, rather than a landowner connecting to an existing system does not render the doctrine inapplicable. *See Kral*, 557 N.W.2d at 599-600 (stating that the reasonable-use doctrine applies to any "feasible artificial drainage system"); *Kallevig v. Holmgren*, 197 N.W.2d 714, 718 (Minn. 1972) ("The diversion of surface water by tile does not alone take this case out of the [reasonable-use] rule.").

[4] Surface water includes "waters from rain, springs, or melting snow which lie or flow on the surface of the earth, but which do not form part of a well-defined body of water or natural watercourse." *Enderson v. Kelehan*, 32 N.W.2d 286, 288-89 (Minn. 1948).

Our reasoning is further supported by the supreme court's decision in *Will v. Boler*, 4 N.W.2d 345 (Minn. 1942). In *Will*, the defendants obstructed an open ditch that had been constructed on their land 35 years previously to help manage the flow of surface water inundating surrounding properties. 4 N.W.2d at 346-47. The supreme court, discussing the preexisting condition of the land that conveyed the surface waters, stated:

> From time immemorial, this draw or depression has been the means of carrying surface waters. Water undoubtedly created it. Nature's hand shaped it. By the aid of man's efforts it was improved. The court's finding cannot be disturbed, since it is apparent that the ditch constructed along and in the course of this depression was undertaken by those directly interested in the project.

Id. at 347. The court repeated the general rule that "[w]here neighboring landowners unite in the construction of a ditch to drain and improve their several holdings, each of them is thereafter estopped from closing the ditch in a way to deprive the others of the drainage provided." *Id.* at 348 (quotation omitted).

The same scenario that played out in *Will* is present here—neighboring landowners collectively engaged in efforts to improve the preexisting condition of the land that conveyed the surface waters by installing a system constructed along the course of a depression that existed from time immemorial, and a dispute has arisen years later due to an affected landowner's desire to obstruct and impede the modification to which they or their predecessors in interest consented. It makes no difference that the landowners in *Will* constructed an open ditch rather than installing an underground pipe system as the landowners in this case did. *See Kral*, 557 N.W.2d at 599 (applying reasonable-use doctrine to tile drainage system). The district court correctly applied the reasonable-use

doctrine to this case, and none of the cases appellants cite support an alternative conclusion.[5]

Appellants next argue that even if the reasonable-use doctrine applies to drainage through an underground drainage pipe conveying water from nonadjacent properties, material-fact questions exist that preclude summary judgment here. Appellants assert that fact questions exist regarding whether respondents' use of the drainage system is reasonable, specifically as to whether surface water would naturally flow across the property absent the pipe and whether the pipe benefits or harms appellants' property. Although this is a closer call, we do not observe any issues of material fact that would preclude summary judgment.

A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). "A fact is material if its resolution will affect the outcome of a case." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). Mere speculation, without concrete evidence, cannot create a fact issue to defeat summary judgment. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

The parties each presented their positions, along with exhibits attached to their motions for summary judgment that they filed with the district court, regarding the flow of

[5] Our holding should not be construed to imply that respondents' use of the drainage system on appellants' land is immutably reasonable. We can imagine facts, such as changes in use, that might lead to a finding that the overall use is not reasonable within the context of the reasonable-use doctrine.

water on the property prior to the pipe's construction in 1977. As noted above, Hintze asserts that, in the years preceding 1977, she did not observe any water on her parents' property near the area where the drainage system was installed, and she did not observe water pooling in other locations on the property. She also asserted that she did not observe a drainage ditch or swale on the property. The engineer's expert opinion was that the natural flow of the surface water of the surrounding properties would traverse appellants' property and deposit in an area near the current pipe's outlet next to the Crow River, and appellants provided no evidence directly contradicting this conclusion. Appellants' assertion that the natural topography would not have conveyed the surface water that now travels through the existing drainage system onto appellants' land is only speculation and therefore not sufficient to create a genuine issue of material fact. *See id.*

Although a jury could find that Hintze's failure to observe water flowing on the property prior to the pipe's installation undermines the engineer's conclusion, thus creating a question of disputed fact, it is not material because the reasonable-use doctrine applies even if "drainage carries with it some waters which would otherwise have never gone that way." *Kral*, 557 N.W.2d at 599. The engineer's expert report acknowledged that various factors could affect whether water is present or not present on appellants' property. And Hintze's claim that no natural ditch or swale existed on the property prior to the pipe's installation is not relevant to the question of reasonable use because the reasonable-use doctrine does not require that a ditch, swale, or depression be present on land receiving surface water prior to water being discharged there. *See id.* (noting that the reasonable-use doctrine focuses on whether the interference with the surface water is reasonable and no

one factor or circumstance is controlling). Because the reasonable-use doctrine does not require that *all* of the water drained onto the burdened property has followed its natural course so long as the use is reasonable overall, the discrepancy between Hintze's recollection of the property prior to the installation of the drainage system and the conclusions contained in the engineer's expert opinion about the natural flow of the surrounding surface water does not create a question of material fact. We are not persuaded that a genuine issue of material fact is present here that precluded summary judgment.

Turning to the question of whether appellants' land is benefited by the drainage system, we first note that the reasonable-use doctrine does not require a benefit to the burdened land as appellants seem to suggest. *See id.* Moreover, appellants again do not provide any evidence other than subjective speculation. They contend that the land is not benefited because the pipe has created large pools of standing water and sinkholes on their property.[6] In contrast, the engineer concluded that the land is benefited by the system because removing it would cause greater pooling due to the natural ditches on appellants' property being removed after the system's installation in 1977 and the natural course of water on the land. Appellants' subjective opinion about what constitutes a benefit to the land is not substantial evidence and cannot create a material issue of disputed fact to challenge the evidence provided by respondents that the system benefits all of the properties it traverses. *See Useldinger*, 505 N.W.2d at 328. We conclude that no

[6] The engineer concluded that respondents could easily resolve these issues if they were allowed access to the system to repair it.

material-fact issues exist as to the benefits and harms of the system as it relates to appellants' property that preclude summary judgment.

The district court's application of the reasonable-use doctrine to the facts of this case was not error. And because material-fact disputes do not exist, the district court properly entered summary judgment in favor of respondents.[7]

II. The district court properly estopped appellants from removing or interfering with the use or maintenance of the drainage system.

Appellants contend that the district court improperly applied principles of estoppel when it ordered that "[appellants] and their successors in land [were] estopped from interfering with or obstructing the free discharge of waters from the tile drainage system." Appellants argue that they "cannot be estopped by the actions of their predecessor about which they knew nothing." We read the district court's order "estopping" appellants from removing or otherwise interfering with the maintenance of the drainage system as the district court enjoining appellants from taking further action, which is within the district court's power. *See State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs*, 799 N.W.2d 619, 626 (Minn. App. 2011) (stating that a district court has the power to issue a "negative injunction" that restrains a party's ability to act). Caselaw also informs us that estopping a party from interfering with a drainage system permitted under the reasonable-use doctrine is appropriate.

[7] Because we affirm the district court's summary judgment on this basis, we decline to address respondents' argument that appellants' claims are barred by the statute of limitations.

In *Will*, after the defendants plowed over and obstructed a ditch that the plaintiffs had used to drain their lands, the district court ordered that the defendants were "estopped from obstructing, diverting or interfering with said ditch." 4 N.W.2d at 347. The supreme court applied the reasonable-use doctrine and affirmed the district court's relief, expressly holding that each of a group of neighboring landowners who had worked together to construct a drainage ditch was "thereafter estopped from closing the ditch in a way to deprive the others of the drainage provided." *Id.* at 348 (quotation omitted).

Here, the district court's order that appellants are estopped from removing or interfering with the drainage system is equivalent to enjoining appellants from doing the same. Under Minnesota law, the district court is permitted to order that relief to prevent appellants from interfering with the drainage system. Thus, the district court did not improperly apply estoppel principles in this case.

III. The district court did not create an easement in favor of respondents burdening appellants' land.

Appellants contend that the district court's order impermissibly granted respondents a prescriptive easement to access appellants' land to inspect, maintain, and repair the drainage system. We note initially that the district court's order does not affirmatively grant an easement in favor of respondents. And appellants cite no authority to support their argument that the language contained in the district court's order is sufficient to create a prescriptive easement, notwithstanding that they bear the burden on appeal to show that the district court erred. *See Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949).

Caselaw makes clear that application of the reasonable-use doctrine to allow drainage, whether by natural or artificial means, does not create an easement in favor of the benefited landowner. In *Duenow v. Lindeman*, the supreme court stated that

> A natural right to drainage of surface waters from upper land over and across lower land is not man-made in the sense that it is the result of any act of the landowners, but springs from the fact that the law has adopted as the rights and duties of the parties the natural easements and servitudes which nature itself has imposed upon the lands by placing them in their respective positions. We recognized the principle here involved in cases involving a natural right to lateral support as between adjoining landowners. It is sometimes said . . . that such a natural right has every essential quality of an easement. Generally speaking, that is true, but a natural right to flowage or drainage is not a true easement. The authorities generally agree that a natural right of the kind here involved is different from an easement. Such natural rights are not easements or appurtenances, but are part and parcel of the land itself.

27 N.W.2d 421, 427 (Minn. 1947) (citations omitted). Therefore, although the natural rights associated with drainage systems allowed under the reasonable-use doctrine are analogous to the rights normally associated with the creation of an easement, application of the doctrine does not create an easement in favor of the benefited landowner. The district court appropriately ordered appellants not to obstruct respondents' use of the drainage system on appellants' land, *see Will*, 4 N.W.2d at 346-47, and it necessarily follows that the district court can also order appellants to allow respondents the limited right, after giving proper notice, to enter appellants' land to inspect, maintain, and repair the drainage system to ensure its continued functionality. We observe no error in the district court's order in this regard.

Affirmed.