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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-573**

Joseph Charles Vokal, et al.,
Respondents,

vs.

John Vokal,
Appellant.

**Filed November 23, 2010
Affirmed
Klaphake, Judge**

McLeod County District Court
File No. 43-CX-06-000948

Gerald W. VonKorff, Rinke-Noonan, St. Cloud, Minnesota (for respondents)

Brian M. Olsen, Cokato, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant John Vokal challenges the district court's decision determining that he unreasonably interfered with the natural flow of surface water and damaged land belonging to respondents Joseph Charles Vokal and Audrey Kay Vokal. Appellant also

asserts that the district court erred by denying his claim of adverse possession to a narrow strip of respondents' land.

Because the district court's findings are not clearly erroneous and these findings support its decision, we affirm.

D E C I S I O N

In Minnesota, liability for the diversion of surface waters is governed by the reasonable use doctrine. *Enderson v. Kelehan*, 226 Minn. 163, 167, 32 N.W.2d 286, 289 (1948). Whether the diversion of surface waters is reasonable is a fact question to be resolved by the individual facts of each case. *Duevel v. Jennissen*, 352 N.W.2d 93, 96 (Minn. App. 1984). Here, the district court acted as the factfinder; we will not set its findings aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. Findings of fact are clearly erroneous if unsupported by evidence. *Roger v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). We also defer to the district court's credibility determinations. *Id.* On review, we view the record in the light most favorable to the district court's decision. *Id.* We will not reverse the district court merely because we view the evidence differently. *Id.*

A landowner has the right to divert surface waters onto another's land if the landowner acts in good faith and such action is reasonable. *Enderson*, 226 Minn. at 167-68, 32 N.W.2d at 289. *Enderson* set forth a four-part standard for determining whether diversion of surface waters is a reasonable use: (1) there must be a reasonable necessity for the drainage; (2) the landowner must take reasonable care to avoid unnecessary damage to another's property; (3) the benefit of the diversion must outweigh the harm to

another's property; and (4) where practicable, the improvement should aid the "normal and natural" system of drainage; when not practicable, a reasonable artificial drainage system may be adopted. *Id.* at 168, 32 N.W.2d at 289.

The district court found that before 2000, respondents' property had not been subject to flooding to the extent that crops were damaged. Respondents had not bermed or diked their property before 2000. Beginning in 2000, appellant filled a wetland basin and dug a trench from the wetland to direct water onto respondents' property. After filling the wetland, appellant planted row crops where there had never been row crops before. Based on these facts, the district court concluded that appellant's diversion of surface waters was unreasonable. The district court's findings are supported by record evidence and are not clearly erroneous. *See Kral v. Boesch*, 557 N.W.2d 597, 598 (Minn. App. 1996) (stating that a finding is clearly erroneous if "palpably and manifestly against the weight of the evidence").

The record evidence supports the court's conclusion that appellant's diversion of surface water was not reasonably necessary. Appellant caused the diversion by filling a wetland in violation of wetland conservation agreements to which he was a party. Appellant did not take reasonable care to avoid unnecessary injury to respondents, because he dug a trench to direct diverted water onto respondents' property in order to drain the wetland, and he changed the otherwise normal and natural system of drainage, which depended on the existence of the wetland. *See Enderson*, 226 Minn. at 289, 32 N.W.2d at 168. In theory, appellant may have shown some utility or benefit from the

water diversion because he was able to farm additional acreage, but this benefit did not outweigh the harm resulting to respondents. *See id.*

The district court's findings are further supported by other record evidence. Although appellant alleged that he sought to protect his land from surface water running from respondents' land, and that this direction of water flow was caused by respondents' actions, the natural flow of water actually runs from appellant's land to respondents' land. Water would not flow from respondents' land to appellant's land unless it ran uphill, making it improbable that appellant was responding to actions by respondents. Duane Hansel, a civil engineer testifying on behalf of appellant, affirmed that filling in the wetland would cause a greater amount of surface water to run off appellant's land.

A district court can also consider the landowner's motivation for diverting surface water. *Kral*, 557 N.W.2d at 599. Here, the evidence suggests that appellant filled in the wetland in order to add acreage to his fields; in doing so, he may have violated state or federal wetland rules. Further, Duane Jaskowiak, a neighbor of both appellant and respondents, testified that appellant constructed a dike at his property line in order to divert water onto the Jaskowiak property after Jaskowiak refused to testify to untrue facts. Jaskowiak testified, and appellant admitted, that appellant filled in the wetlands at night, suggesting that appellant was aware of the impropriety of his conduct. Finally, the district court's findings indicate that appellant lacked credibility, and we defer to the district court's credibility determinations. Minn. R. Civ. P. 52.01.

Appellant also challenges the district court's decision that he is not entitled to adverse possession of a strip of respondents' land. In order to establish adverse

possession, a claimant must show by clear and convincing evidence an actual, open, hostile, continuous, and exclusive possession of the claimed land for a period of 15 years. *Gandy Co. v. Freuer*, 313 N.W.2d 576, 578 (Minn. 1981); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003). Adverse possession is not established when a claimant uses the property with the permission of the owner. *Gandy*, 313 N.W.2d at 578-79. The evidence here supports the district court's finding that appellant used respondents' land with their permission.

We conclude that the district court did not err in determining that appellant's diversion of surface waters was unreasonable or in determining that appellant failed to prove his claim to adverse possession.

Affirmed.