IN THE COURT OF APPEALS OF IOWA

No. 1-221 / 10-1604
Filed May 25, 2011

STEVEN M. MULLEN,
Plaintiff-Appellant,

vs.

NATURAL GAS LINE COMPANY OF AMERICA L.L.C., ADAMS COUNTY and ADAMS COUNTY ENGINEER ELDON RIKE,
Defendants-Appellees.

Appeal from the Iowa District Court for Adams County, Gary K. Kimes, Judge.

A landowner appeals from a district court ruling denying him injunctive relief and damages. **AFFIRMED.**

Richard Wilson of Richard L. Wilson, P.C., Lenox, and Patrick W. O'Bryan, Des Moines, for appellant.

David C. Shinkle of Shinkle & Lynch, Des Moines, for appellee Natural Gas Line Company of America.

Raymond R. Aranza, Omaha, Nebraska, for appellee Adams County Engineer Rike.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

A landowner appeals from a district court ruling denying him injunctive relief and damages he alleges he suffered from the diversion of excess surface water by the Natural Gas Pipeline Company, his neighbor to the north. Because the record does not show that the company's repairs to its terracing violated Iowa Code section 468.621 (2009), we affirm the district court.

I. Background Facts and Procedures

Defendant Natural Gas Pipeline Company owns approximately twenty acres of land in Adams County where it operates a valve station. Plaintiff Steven Mullen owns farm land directly south of the valve station. Leland Inman, who is not party to this lawsuit, owns property east of the valve station and north of Mullen's land.

About thirty years ago, Natural Gas Pipeline built terraces and installed a tile line to drain water south and east underground, across Mullen's property—for which the company held an easement—and into a drainage trench known as the Johnston-Roberts ditch. The Johnston-Roberts ditch allows water to flow west to east across Mullen's land. Mullen is responsible for maintenance of that ditch.

For several years leading up to 2008, a breach in the pipeline's terrace allowed water to flow east onto Inman's property. Inman hired attorney Jeffrey Millholin[1] to represent him concerning this drainage issue. Working on Inman's behalf, Millholin contacted Natural Gas Pipeline to urge the company to make repairs. The pipeline company eventually agreed to fix the breach and replace the tiling; the repairs would deepen a retention pond on the pipeline company's

[1] Millholin also serves as the Adams County Attorney.

property while raising the level of the berm. Instead of the water flowing east onto Inman's land, the plan was to direct the excess water westward over the company's own property and into the grader ditch along Kale Avenue Road, which was county property. The water would move south in the Kale Avenue ditch and then turn east, flowing into the Johnston-Roberts ditch.

Before the company made the modification requested by Inman, attorney Millholin contacted county engineer Eldon Rike to ask his approval to channel the water into the Kale Avenue grader ditch. Rike understood Millholin to be asking the question in his role as the county attorney, while Millholin believed that he told Rike he was representing Inman. After Millholin informed him of the proposed construction, Rike gave the project his blessing. He testified:

> I looked at the site and I thought that, well, if the dike wasn't there, the natural water flow would be to the farm on the south and so I thought that it would be all right to go ahead and divert the water to the ditch because it is going to end up down on the Johnston ditch.

Rike did not consult with Mullen before giving Natural Gas Pipeline permission to go ahead with the proposed modifications.

Natural Gas Pipeline fixed the terrace in early July 2008. On July 24, 2008, Adams County experienced a heavy summer rain, estimated at between five and twelve inches. Because the pipeline's holding basin was full, the excess water flowed down the Kale Avenue ditch and into the Johnston-Roberts ditch, which in turn overflowed onto Mullen's land. The overflow flooded five to six acres of crops being raised by Mullen's tenant. A similar downpour occurred on June 5, 2010, resulting in similar flooding to Mullen's property.

Mullen filed a petition in equity on January 12, 2009, claiming Natural Gas Pipeline impermissibly diverted rain water from its natural drainage direction, which he alleged to be to the east, and instead channeled the water south onto Mullen's property. The petition sought an injunction and damages. Natural Gas Pipeline filed an answer, admitting the work done on its holding pond, berm, terrace, and tiling system, but asserting that it was approved by Adams County. The company also denied causing damage to Mullen's property, asserting that its terrace work provided for proper, reasonable drainage that was permitted by law.

On August 26, 2009, Mullen filed a cross petition and sought leave to add Adams County as a defendant to the lawsuit. Adams County and its engineer Eldon Rike filed an answer to the cross petition claiming immunity under Iowa Code chapter 670, among other affirmative defenses. The county and Rike also moved for summary judgment, asserting that they submitted to depositions at Mullen's request and that no further relief was being requested. Mullen resisted the summary judgment motion and moved to amend the cross petition to allege Adams County and Rike were liable for his damages. The county and Rike answered and again moved for summary judgment. On June 28, 2010, the district court denied the county's motion for summary judgment, finding a genuine issue of material fact existed, namely whether engineer Rike acted in a discretionary function under section 670.4(3).

The parties tried the matter before the district court from July 7 through July 10, 2010. On September 21, 2010, the district court dismissed Mullen's petition, finding that he failed to prove that Natural Gas Pipeline violated the

provisions of section 468.621. The court also determined that Adams County and Rike were immune from suit under section 670.4(9). Mullen appeals.

II. Scope of Review

Our review in this case is de novo. *See Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000). Mullen filed a petition in equity and the district court tried the case in equity, accepting evidence subject to any objections. We generally hear a case in the same manner in which it was tried. *See Perkins v. Madison Cnty. Livestock & Fair Ass'n*, 613 N.W.2d 264, 267 (Iowa 2000). We give weight to the district court's findings of fact, but are not bound by them. *Id*. We exercise heightened deference on credibility issues. *Id.*

III. Analysis

Mullen staked his claim for injunctive relief and damages on Natural Gas Pipeline's alleged violation of the following statutory provision:

> Owners of land may drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse, and if the drainage is wholly upon the owner's land the owner is not liable in damages for the drainage unless it increases the quantity of water or changes the manner of discharge on the land of another.

Iowa Code § 468.621.

The district court determined that Mullen did not prove the pipeline company's July 2008 repairs violated section 468.621. To the contrary, the court found that the improvements "worked as planned" and "no water was directed either to the land owned by Mullen or Inman." The court ventured that the Kale

Avenue grader ditch was a "natural watercourse which directs the water away from the property of adjoining land owners."

Further, the court rejected Mullen's contention that he suffered damages from the overflow of water from the Kale Avenue or Johnston-Roberts ditches. The damages sought by Mullen included $23,873 for the repair of erosion damage in the Johnston-Roberts ditch and $3400 for the reduction in rental value of the farm land in 2009 and 2010. The district court found Mullen's proof insufficient to show erosion damage caused by the excess surface water flowing through the Kale Avenue ditch as a result of the modifications by Natural Gas Pipeline. The court resolved that any erosion damage resulted from Mullen's own failure to clear and repair the ditch over the years. The court also noted that Mullen had been renting the land to a tenant during the 2008 growing season and already collected cash rent before the July flooding. The court did not accept that the flooding hindered Mullen's ability to ask for a higher rent from the tenant in subsequent years.

On appeal, Mullen surveys a century of Iowa drainage law and emphasizes that a dominant estate may not drain water onto a servient estate by altering the natural and usual channels. Mullen also argues that the district court was mistaken in requiring proof that heavy rains lead to actual damages; he claims he is entitled to relief, even if no current economic damages have been incurred, if there is sufficient evidence of potential injury. *See Sloan v. Wallbaum*, 447 N.W.2d 148, 149–50 (Iowa Ct. App. 1989) ("The fact that no damage has occurred in the last three years means nothing due to the drought-

like conditions. It is inevitable that it will rain and that the appellees will be damaged.").

Our analysis is framed by the "modified civil law rule which recognizes a servitude of natural drainage as between adjoining lands." *See Braverman v. Eicher*, 238 N.W.2d 331, 334 (Iowa 1976). Our supreme court explained:

> Under this concept a servient estate must accept surface waters which drain thereon from a dominant estate. On the other hand, no right exists to alter the natural system of drainage from a dominant estate in such manner as to substantially increase the servient estate burden.

Id. at 334–35.

For Mullen's argument to prevail, he must show that Natural Gas Pipeline's modifications failed to "drain the land in the general course of natural drainage" as required by section 468.621. Moreover, for Natural Gas Pipeline to be liable for any damages suffered by Mullen, Mullen must show that the drainage of water, which was "wholly upon the owner's land," increased the "quantity of water" or changed "the manner of discharge" onto Mullen's land.

The record evidence does not support Mullen's position that the terrace improvements violated section 468.621. In our estimation, Natural Gas Pipeline did nothing for which it should be held liable. *See Dorr v. Simmerson*, 127 Iowa 551, 553, 103 N.W. 806, 807 (1905) (finding that land owner had right to place drain in natural water course—even if "an artificial one"—where he did not cast more water on plaintiff's land than would have naturally gone there).

The natural flow of the water from the pipeline property is to the south and east. Both the plaintiff's expert Dale Smith and the defense expert Stewart

Melvin agreed to this fact. The existing terraces and tiling carried the water south under the pipeline property and under Mullen's land to the Johnston-Roberts ditch. For several years, a breach in a terrace had allowed the water to drain onto Inman's property to the east. To remedy this drainage problem, the pipeline company rebuilt the terrace with a deeper holding pond behind it and a spillway for that basin that channeled the excess water west across the pipeline property to the county-owned Kale Avenue ditch. From that point, the water flowed south until it met the Johnston-Roberts ditch, which then carried the runoff to the east. Under this scenario, the water ultimately flowed southeast in the "general course of natural drainage." The water's detour west to the Kale Avenue ditch was wholly on the pipeline's property. That detour to county property did not increase the quantity of water or change the manner of discharge onto Mullen's property. *See Braverman*, 238 N.W.2d at 336 (finding drainage pipe installed by defendants on their own property did not alter the natural drainage system so as to substantially increase the burden on the servient estate).

In fact, according to the defense expert, if it wasn't for the terrace repair and spillway, excess rainwater was likely to overflow south and east across the valve station and onto the Mullen and Inman properties. The *Braverman* decision discussed similar unacceptable consequences that would have resulted from the plaintiff's requested injunction in that case:

> [A]n order abating continued use of said drainage pipe would perforce result in a haphazard flow of water over the embankment from the dominant to the servient estate, thereby probably increasing deposits of silt on the latter. Alternatively, defendants could conceivably be required to retain all water on their land and

> impermissibly discharge same onto some other servient estate. It is self-evident neither such possible option is feasible.

Id.

Mullen has not sustained his burden to show an injunction was warranted. "'Injunctive relief is an extraordinary remedy that is granted with caution and only when required to avoid irreparable damage.'" *Nichols v. City of Evansdale*, 687 N.W.2d 562, 572 (Iowa 2004) (citations omitted). He did not offer proof that the pipeline company's diversion of water into the Kale Avenue grader ditch threatened to increase the volume of water discharged onto his land over and above the natural course of water from the pipeline's property south onto his acreage without the intervention of terraces and tiling. In the absence of such evidence, Mullen was not entitled to injunctive relief. *See Schmitt v. Kirkpatrick*, 245 Iowa 971, 978, 63 N.W.2d 228, 232 (1954) (denying injunctive relief because the plaintiff did not show "a material increase in the volume of water coming through an unnatural way" or that he was "substantially injured thereby").

On this record, we must reject Mullen's claims that the pipeline company was liable for violating the drainage provision and that an injunction forcing the company to dismantle its terrace repairs would be a feasible option.

Even if Natural Gas Pipeline could be found liable for altering the natural flow of water, Mullen's evidence did not support the damages claimed. *See Anderson v. Yearous*, 249 N.W.2d 855, 865 (Iowa 1977) (finding evidence on damages deficient in surface-water nuisance case). The district court was justified in rejecting Mullen's contention that the pipeline's modifications caused erosion damage to the Johnston-Roberts ditch. Witnesses testified that the

erosion started almost three-hundred feet from the juncture of the Kale Avenue and the Johnston-Roberts ditches, drawing into doubt that the damage could be attributed to the diversion of water into the Kale Avenue ditch. In addition, we defer to the district court's determination that Mullen's testimony fell short of proving that the July 2008 flooding reduced the rental value of his property.

Because we conclude that the pipeline company's repairs to its terracing did not violate section 468.621 and, accordingly, that neither an injunction nor a damage award was warranted, we have no cause to address the liability or immunity of Adams County and its engineer.

AFFIRMED.