

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

Fountain Hills Townhomes Association,

File No. 70-CV-13-19167

Plaintiff,

vs.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Vierling Family Limited Partnership,

Defendant.

The above-entitled matter came before the Honorable Ann M. Offermann, Judge of District Court, on September 2, 2015, at the Scott County Courthouse, Shakopee, Minnesota, upon Plaintiff's motion for partial summary judgment.

Finn Jacobsen, Attorney at Law, appeared on behalf of Plaintiff.

Patrick Kelly, Attorney at Law, appeared on behalf of Defendant.

Plaintiff now moves the Court for an order that 1) establishes Defendant's liability for nuisance and trespass; 2) orders Defendant to remove the erosion runoff and debris from Plaintiff's property; and 3) issues a permanent injunction that Defendant maintain its property in a manner that prevents further erosion and runoff from entering Plaintiff's property.

Based upon the file, records, and proceedings herein, together with the arguments and submissions of counsel, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff (also referred to herein as the "Association") is a townhome association and fee title owner of real property located in the City of Prior Lake, County

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of Scott, State of Minnesota.

2. Plaintiff's property is comprised of townhomes owned by residents of the Association and common property owned by the Association.

3. Defendant Vierling Family Limited Partnership is the fee title owner of real property located in the City of Prior Lake, County of Scott, State of Minnesota.

Defendant's property ("Property") is located adjacent to and uphill from Plaintiff's property.

4. Michael Vierling is the Chief Manager of Defendant Vierling Family Limited Partnership. He has been farming the Property for 35 years.

5. The Vierling family has owned and farmed Defendant's property for more than 150 years.

6. While maintaining and farming the Property, Mr. Vierling employed a number of erosion control measures including maintaining a grass waterway, allowing the steeper slopes on the Property and the Property's boundaries to become overgrown, and following the contour of the land while cultivating crops.

7. There has been no change in the contours or elevations on the Property. No drain tile, ditch, or anything else that might significantly alter the flow of water has been installed on the Property while Mr. Vierling has been farming the Defendant property.

8. In 2012, soil, sediment, water, and debris eroded from Defendant's property and onto Plaintiff's property.

9. Based on this erosion, the City of Prior Lake notified Mr. Vierling that the property was in violation of a local nuisance ordinance for failure to prevent soil and debris erosion. The City of Prior Lake directed Mr. Vierling to install erosion control

measures.

10. Following the 2012 occurrence, Larry Poppler, Prior Lake's City Engineer and Inspections Director, inspected both Defendant's and Plaintiff's respective properties.

11. As the result of his inspection, Mr. Poppler concluded that Defendant violated Local Nuisance Ordinance 605.200(5) for allowing soil or other debris to wash or erode from Defendant's property onto an adjacent property or properties. Mr. Poppler told Mr. Vierling this by letter dated July 2, 2012. No hearing was held regarding the alleged violation and no citation was ever issued.

12. In the July 2, 2012, letter Mr. Poppler asked for Defendant's cooperation in correcting the violation by providing erosion control measures for the property and cleaning up the silt from both Plaintiff's property and adjacent roadways.

13. On September 18, 2012, Plaintiff and Defendant resolved the dispute related to the cleanup from the 2012 occurrence via a release ("Release"). The Release, in exchange for \$4,818.75, released Defendant from damages resulting from top soil erosion. The Release, however, specifically excluded any future damages resulting from Defendant's failure to correct the condition that lead to the 2012 damages.

14. In late spring, 2013, another rainstorm caused soil, sediment, water, and debris to enter Plaintiff's property from Defendant's property, causing damages to Plaintiff.

15. On May 29, 2015, Plaintiff's attorney informed Defendant (and Defendant's insurance company) via letter of the 2013 erosion occurrence and the resulting damage to Plaintiff's property.

16. Shortly following the 2013 erosion occurrence, Dale Stefanisko, Code Enforcement Officer with the City of Prior Lake, made contact with Defendant informing him of the new nuisance violation. Again, no hearing was ever held regarding the alleged violation and no citation was issued.

17. Mr. Stefanisko again directed Defendant to clean up the soil, sediment, water, and debris from the erosion and take preventative measures to prevent further instances of erosion and runoff.

18. In his affidavit filed with the Court on August 24, 2015, Michael Vierling states that, as a result of the 2012 discussions with the City of Prior Lake, in 2013 he built a 42" berm on Defendant's property. Mr. Vierling's affidavit does not say when in 2013 he built the berm, only that he inspected the berm on August 17, 2013, following the 2013 erosion, noting that it was still in place and in good condition.

19. In addition to speaking with the City of Prior Lake, on August 6, 2013, Mr. Vierling met with Andrew Porupsky of the Scott County Soil and Water Conservation District to discuss an erosion control plan for Defendant's property.

20. On August 7, 2013, Mr. Vierling received a written report from Mr. Porupsky outlining the erosion control plans for the property and referring to seven critical area plantings.

21. Any repairs made to the Defendant property based on the recommendations made by the Soil and Conservation District were made after the 2013 erosion occurrence.

Based on the above, the Court hereby makes the following:

CONCLUSIONS OF LAW AND ORDER

1. There are no genuine issues of material fact and Plaintiff is entitled to

partial summary judgment as a matter of law.

2. Plaintiff's Motion for Partial Summary Judgment is **GRANTED**.
3. Defendant is liable to Plaintiff for damages arising from nuisance.
4. Defendant is liable to Plaintiff for damages arising from trespass.
5. Defendant shall clean up the soil, sediment, water, and debris deposited onto Plaintiff's property.
6. Defendant shall maintain its property in a manner that does not allow ongoing erosion and runoff onto Plaintiff's property.
7. The attached memorandum constitutes further Findings of Fact and Conclusions of Law by the Court and is incorporated by reference into this Order.
8. This matter shall proceed to Court Trial on all remaining issues on January 26, 2016, at 9:00 a.m. before the undersigned Judge of District Court at the Scott County Justice Center, Shakopee, Minnesota.
9. That all other requests for relief not specifically addressed herein are **RESERVED**.

Dated: 12/1/15

BY THE COURT:


Ann M. Offermann
Judge of District Court

MEMORANDUM

Summary Judgment Standard

Minnesota Rule of Civil Procedure 56.03 requires the Court grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. When deciding a motion for summary judgment, the Court must view all facts in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A party opposing summary judgment must present specific facts showing there is a genuine issue for trial and cannot rely merely upon unsupported allegations of fact. Minn. R. Civ. P. 56.05; *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985). A genuine issue of material fact for trial must be established by substantial evidence. *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (1976).

Nuisance

A private nuisance is anything which is injurious to the health, or indecent or offensive to the senses or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. Minn. Stat. § 561.01. Those injured by the drainage of water onto their land can allege claims arising under nuisance. *Matter v. Nelson*, 478 N.W.2d 211, 214 (Minn. Ct. App. 1991). Nuisance is defined in terms of the harm and not in terms of the conduct that causes the harm. *Sletten v. Ramsey County*, 675 N.W.2d 291, 301 (Minn. 2004) (citing *Highview N. Apartments v. County of Ramsey*, 323 N.W.2d 65, 70 (Minn. 1982)). A plaintiff need not establish duty or breach. *Sletten* at 298. A plaintiff states an actionable claim in nuisance by

presenting evidence that the defendant has maintained a condition causing nuisance harm. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003).

Soil, sediment, water, and debris have eroded from Defendant's property onto Plaintiff's property since the parties' 2012 Release, which specifically excluded any future damages. This erosion has obstructed the Association residents' enjoyment of the property and has caused damages. Plaintiff is entitled to recover damages for the damages caused by the nuisance.

Trespass

Trespass is the unlawful interference with a person's property. It requires only two essential elements: 1) a rightful possession in the plaintiff and 2) unlawful entry upon such possession by the defendant. *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-93 (Minn. Ct. App. 1998). Trespass can occur when a person or a tangible object enters the plaintiff's land. *Victor v. Sell*, 301 Minn. 309, 313-14 n.1, 222 N.W.2d 337, 340 n. 1 (1974). Those injured by the drainage of water onto their land can allege claims arising under trespass. *Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984).

As with nuisance, soil, sediment, water, and debris have eroded from Defendant's property onto Plaintiff's property since the parties' 2012 Release. Plaintiff has the rightful possession of the property. The erosion and runoff from Defendant's property onto Plaintiff's property is an unlawful entry onto Plaintiff's property. Because of this, Plaintiff is entitled to recover damages caused by the trespass.

Reasonable Use Doctrine

Defendant relies on the Reasonable Use Doctrine in its defense. The Reasonable Use Doctrine holds that if certain conditions are met, a landowner acting in

good faith has the right to drain surface water onto a neighboring property. *Matter v. Nelson*, 478 N.W.2d 211, 214 (Minn. Ct. App. 1991). To invoke the Reasonable Use Doctrine Defendant must show that: 1) there is a reasonable necessity for the drainage; 2) care is taken to avoid unnecessary injury to the burdened land; 3) the benefit to the drained land outweighs the harm to the burdened land; and 4) the drainage is accomplished by either improving the natural system or making a reasonable artificial system. *Matter v. Nelson*, 478 N.W.2d 211, 214 (Minn. Ct. App. 1991). It is up to the party asserting Reasonable Use to show s/he is entitled to assert it as a defense. Reasonable Use is a flexible doctrine, presenting a question of fact to be resolved according to the circumstances of each case. *Sachs v. Chiat*, 281 Minn. 540, 546, 162 N.W.2d 243, 247 (1968).

The Court now finds that the Reasonable Use Doctrine is not applicable in the present case. The Reasonable Use Doctrine is applicable in water drainage situations. This is not the case here. In the matter now before the Court the main issue is the silt, soil, and other matter that has eroded onto Plaintiff's property creating a nuisance and trespass.

The Reasonable Use Doctrine is also not applicable because it applies to the actions a landowner takes to drain surface water from his/her land as opposed to inaction, as is the case in the matter now before the Court. In the *Matter* case cited above, for example, the question was whether the actions the defendant took in creating a water drainage culvert were reasonable. In another leading Minnesota case regarding Reasonable Use, *Highview North Apartments v. Ramsey County*, 323 N.W.2d 65 (Minn. 1982), the question was whether Ramsey County was reasonable when it actively

created a retention pond system that created water intrusion issues to nearby apartment buildings.

In the matter now before the Court, Defendant did not actively drain water onto Plaintiff's property. In fact, any actions that were taken were preventative measures attempting to prevent erosion onto Plaintiff's property. And it was not until after the 2013 erosion occurrence that is at issue in this matter that Mr. Vierling met with Andrew Porupsky of the Scott County Soil and Water Conservation District to discuss an erosion control plan for Defendant's property.

Even if the Reasonable Use Doctrine was applicable to this case, the Court now finds that Defendant has failed to meet its burden to show that it is entitled to protection under the Reasonable Use Doctrine. In its brief filed on August 24, 2015, Defendant does not sufficiently apply the Reasonable Use Doctrine factors to the circumstances now before the Court.

However, had the undisputed facts been analyzed under the Reasonable Use factors, the Court would still find that the Reasonable Use Doctrine does not protect Defendant in this case. Defendant has not shown that the drainage of water, silt, soil, and debris is reasonably necessary or that Defendant took significant care to avoid injury to Plaintiff's land.¹ Defendant presented no analysis with regard to the balancing of the benefit to Defendant's land and the harm to Plaintiff's land. While the Court recognizes that the operation of Defendant's farm is beneficial to the Vierlings and their customers, the residents of the Association have the right to enjoy their property without the burdens caused by Defendant's erosion runoff. Regarding the last factor, whether

¹ It was not until after the 2013 erosion event at issue here that Defendant met with Andrew Porupsky of the Scott County Soil and Water Conservation District to discuss an erosion control plan for Defendant's property.

the drainage is accomplished by reasonably improving the natural drainage system or creating a reasonable artificial drainage system, Defendant has not shown that any steps were taken after the signing of the 2012 Release and prior to the 2013 erosion occurrence.

Based on the above, the Court now finds that Defendant is not entitled to the protection of the Reasonable Use Doctrine.

Prescriptive Easement

A prescriptive easement is a legal right. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). The elements required to establish a prescriptive easement are the same as those required to establish adverse possession. *Id.* at 657. The elements are: open, adverse, continuous, exclusive, and hostile possession for at least 15 years. It is up to the party asserting a prescriptive easement to prove these elements by clear and convincing evidence. *Id.*

The right to maintain a private nuisance may be acquired by prescription. *Schmidt v. Village of Mapleview*, 293 Minn. 106, 196 N.W.2d 626 (1972). In order to establish a prescriptive easement in this matter, Defendant asserts that there have been no changes to the Defendant property for 35 years and thus the flow of water onto Plaintiff's property would have been obvious.

However, Defendant's statements supporting its assertion that it has a prescriptive easement are generalized statements. Defendant does not apply any other facts to its analysis with regard its Prescriptive Easement argument besides the fact that Mr. Vierling has farmed the Defendant property for 35 years and there has been no changes to the land during that time. Defendant does not show that the runoff onto Plaintiff's property is continuous or exclusive. No evidence was presented as to

whether the erosion of the type complained of in this matter occurs on a continuous basis or only when extremely heavy rainfalls occur, such as those in 2012 and 2013. Defendant does not support its assertion that its proposed prescriptive easement has been exclusive to Defendant. Because of this, Defendant has failed to support its assertion that the drainage and accompanying erosion onto Plaintiff's property is a prescriptive easement.

Based on the above, the Court now finds that Defendant is entitled to partial summary judgment as a matter of law regarding Plaintiff's claims for nuisance and trespass.

A.M.O.