

NOTICE
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2015 IL App (5th) 140580-U

NO. 5-14-0580

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

ROBERT HESER and ANDREW HESER,)	Appeal from the
)	Circuit Court of
Plaintiffs and Counterdefendants-)	Marion County.
Appellants,)	
)	
v.)	No. 13-CH-25
)	
FRANK HUNT and DANA HUNT,)	
)	Honorable
Defendants and Counterplaintiffs-)	Wm. Robin Todd,
Appellees.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's decision denying a permanent injunction was not against the manifest weight of the evidence where evidence was presented that the berms constructed by the servient landowner did not impede the flow of water from the dominant to the servient estate.

¶ 2 The plaintiffs, Robert Hesper and Andrew Hesper, filed a complaint for a permanent injunction and damages against the defendants, Frank Hunt and Dana Hunt. They alleged that the Hunts breached a duty regarding interference with the natural drain of water from the Hesper's land across the Hunts' land by causing the natural drain to be dammed up,

blocked, and obstructed with soil, which resulted in their property retaining greater amounts of water damaging their crops and hindering their ability to cultivate the land.

¶ 3 The Hunts filed a counterclaim seeking a permanent injunction in count I and for a violation of the Wrongful Tree Cutting Act in count II. The Hunts alleged that the Hesers cleared the trees and vegetation from their land and dug a four-foot-deep ditch along the boundary line of the properties changing the prior and long-standing natural and diffuse drainage of water from the Hesers' land onto the Hunts' land damaging their pond and flooding their property. At trial, the Hunts moved to dismiss count II, and the court granted the motion.

¶ 4 Following a bench trial, the trial court entered judgment in favor of the Hunts and against the Hesers on the Hesers' complaint and on the Hunts' counterclaim. The trial court entered an injunction ordering the Hesers to fill the ditch that they dug along the boundary of their property with the Hunts. The Hesers appealed. We affirm.

¶ 5 **BACKGROUND**

¶ 6 Andrew Hesper, a farmer, testified that he and his brother, Robert, owned 65 acres of land with a western border along Lois Lane, a public roadway. The property sits directly north of the Hunts' property. When the Hesers purchased the property on February 2, 2011, the southern 10 to 12 acres of the property were wooded. The Hesers cleared the wooded acreage of trees, brush, and vegetation so they could farm it.

¶ 7 Andrew testified that, when he purchased the property, water would drain off his property to the south into the Hunts' pond. Frank Hunt concurred that the natural flow of

water went from the Hesers' property into the pond on his property. Both agreed that the drainage was diffuse with several different points of drainage.

¶ 8 Andrew testified that, in about September 2012, he dug a three- to four-foot-deep ditch along the southern border of his property. The ditch ends 100 to 200 feet from the western edge of the property. The water from the southern 10 to 15 acres of his property drained into the ditch and then discharged at a single point onto the Hunts' property. He testified that he constructed the ditch because the Hunts brought dirt onto their property that disturbed the natural flow of water, and, as a result, the ditch was the only way that the water would drain off his property.

¶ 9 Andrew stated that, before he dug the ditch, Frank informed him that he did not want the water from the Hesper property to run onto his property. Frank denied ever telling Andrew this. Andrew claimed that, because Frank did not want water from his property to run onto the Hunts' land, Frank constructed berms to raise certain areas of his property and to dam up the natural drains. He stated that the Hunts' berms hindered water draining off his property and caused the water to back up onto the south end of his property making it extremely wet and difficult to farm.

¶ 10 Frank testified that he has owned the property adjacent to the Hesers' property since 2004 and has lived there since 2008. When the Hesers dug the ditch, water, which he believed was seepage from his pond, started puddling in it. Before the ditch was dug, the water from the Hesers' field would run into his pond. Once the ditch was dug, water did not flow into the pond. Instead, it filled the ditch and when the ditch was full it discharged onto his property at a single point where the ditch ends. After the ditch was

dug, he spoke to Andrew and told him that the ditch was draining his pond. Frank said Andrew stated there was nothing he could do about it, and they had no further conversations. Andrew denied having any conversations with Frank about the effects of his digging the ditch.

¶ 11 Frank testified that, because of the problems caused by the ditch, he had to build berms around his pond. He built one on the east side of the pond to prevent water from flowing out of the pond into the Hesers' ditch. He opined that, without the berm, the pond would never hold water. He also built the land up a little along the midsection of the pond.

¶ 12 Frank testified that because the ditch changed the natural flow of water and caused it all to flow out into his yard at a single point, it caused flooding. Frank stated that after a "good rain, not a long rain" water flooded over his driveway, covered Lois Lane, and dumped into the pond across the street. It would take four to five days to clear the flooding.

¶ 13 Frank testified that he built a berm near where the water discharged from the ditch to prevent flooding damage. When the ditch was first dug, the water that ran out of it carved a ditch on his property to the culvert on Lois Lane. He built the berm to try to slow down and disperse the water. He stated that the berms did not help with flooding on his property. Water still dumped onto his property at the same rate, but the berm spread it out a little bit more. Frank testified that the berms do not block the flow of water onto his property and that the berms do not cause water to back up onto the Hesers' property.

¶ 14 Frank testified that prior to the Hesers digging the ditch there was never any significant flooding. He stated that he would get "a little bit of water from runoff" but that it never flooded his driveway or the road. Prior to the clearing of the trees and the digging of the ditch, when there was a big rain, the water from the Hesers' property flowed onto his property and filled his pond.

¶ 15 Andrew testified that because his property is not draining onto the Hunts' land it retains water and is wet and muddy in areas. This delays the planting of crops, causes difficulty traversing the land with equipment, and drowns out or stunts the growth of crops. He estimated that the retained water reduced yield on the southern end of his acreage by 50% or more.

¶ 16 Robert Hesel testified that after the Hunts built the berms damming the drains where the water from the Hesers' property flowed onto the Hunts' property, the entire southern 10 to 15 acres of the Hesers' property became wetter than before. This made the area difficult to farm. He stated that, due to the excess water, the fall 2012 soybean crop produced only about one-half of what their other soybean crops yielded. In 2013, the southern 10 to 15 acres of the corn crop did not yield as much as the rest of the acreage because it was "water hurt." In 2012, their combine got stuck in the mud, and there were other instances when they had difficulty traveling across the property with the farm equipment. Frank testified that prior to the Hesers clearing the land and digging the ditch, the wooded area on their property was generally wet and marshy.

¶ 17 Andrew testified that because of the berms constructed by the Hunts, the ditch cannot drain properly and holds water all year. Andrew and Robert testified that they

believed that if the Hunts removed the berms it would restore the natural drainage pattern of the water.

¶ 18 Andrew testified that he was familiar with the property for many years before he purchased it because their family owned other property adjacent to and adjoining it. Neither Andrew nor Robert specifically remembered the Hunts' land flooding prior to 2011.

¶ 19 Bobby Kell testified that he is a civil engineer and that he was asked by the Hesers to examine the properties and provide an opinion. He was not paid for his services. He knows the Hunts because they farm land he owns. He stated that he looked at the properties involved in the suit twice and that he looked at various aerial photographs taken over the past 40 years to identify the drainage patterns. He did not go onto the Hunts' property to view the berms and merely observed them from the Hesers' property. He stated that the only part of the ditch that he viewed ran the length of the Hunts' pond.

¶ 20 Mr. Kell opined that the Hesper property drains to the south/southwest onto the Hunt ground and some ground slightly to the east of the Hunt property. He stated that the drainage was diffuse and identified four or five areas where water naturally drained from the Hesers' land onto the Hunts' land. He stated that the berms the Hunts built prevented the water from the Hesers' property from draining into the Hunts' pond and, depending on the amount of rainfall, caused water to back up onto the Hesper property. If the berms on the Hunt property were removed or lowered to the spillway elevation, it would allow the water to flow from the Hesers' property into the Hunts' pond. He stated that it appeared that the berm closest to the end of the ditch allowed water to flow over it because it was

lower than the spillway elevation from the Hesers' property. He admitted that prior to 2011, the forested area of the Hesper property flooded and was wet and marshy. He stated that the aerial photograph depicting when the pond first appeared on what is now the Hunts' property shows "that the pond was full, and it showed that it was flooding the ground to the north of it." He stated that, based on aerial photographs, he was not aware of any instances when the Hunt land flooded prior to 2011.

¶ 21 Three neighbors testified that prior to 2011, they never saw any significant flooding on the Hunts' property. Since the Hesers dug the ditch, any time there is a significant rain, the Hunts' property floods.

¶ 22 The trial court found that the case presented by the Hunts was far more convincing than the case presented by the Hesers. It found that the construction of the ditch altered the natural flow of drainage upon the Hunts' property and any action taken by the Hunts could not affect the drainage from the Hesers' property as the ditch was substantially below the elevation of the Hunts' property thereby channeling all the water to a single point of discharge on the Hunts' property. This caused substantial flooding. The court found that the Hunts' property was the subservient estate and the Hesers' property was the dominant estate. It found that the Hesers' actions altering the natural drainage were not reasonable. It held that the Hesers failed to carry the burden of proof on their complaint and that the Hunts proved the allegations of their counterclaim. The court entered judgment in favor of the Hunts and against the Hesers on the Hesers' complaint and on the Hunts' counterclaim. The court enjoined the Hesers from continuing the unnatural drainage they caused on the Hunts' property. The court issued a mandatory injunction

requiring the Hesers to fill the ditch they dug along the south boundary of their property to grade to prevent continued flooding of the Hunts' property by surface drainage from the Hesers' property.

¶ 23 The Hesers filed a timely notice of appeal.

¶ 24 ANALYSIS

¶ 25 The Hesers do not dispute the trial court's finding that they altered the natural flow of water by constructing the ditch and do not challenge the trial court's decision granting the Hunts' permanent injunction. Instead, they argue that the trial court erred by not granting their complaint for a permanent injunction directing the Hunts to remove the obstacles that prevent the natural flow of water from running from their property through the Hunt property. Generally, this court will not overturn a trial court's denial of a permanent injunction unless it is against the manifest weight of the evidence. *Lucas v. Peters*, 318 Ill. App. 3d 1, 15 (2000). A trial court's judgment is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Swigert v. Gillespie*, 2012 IL App (4th) 120043, ¶ 28.

¶ 26 The Hesers argue that if they are prohibited from changing the natural flow of water, the Hunts should be equally prohibited from constructing obstacles on their property that would impede the flow of water from the Hesers' property onto the Hunts' property. They assert that once they fill in their ditch they will face flooding due to the Hunts' berms and that the trial court should have ordered the Hunts to remove the berms.

¶ 27 Under the civil law rule, the owner of the dominant or higher land has a natural easement over the servient or lower land to allow surface water to flow naturally off the

dominant estate onto the servient estate. *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill. App. 3d 560, 573-74 (2004). However, the owner of the servient estate is not obligated to receive surface water in different quantities or at different times than would ordinarily come to his land. *Id.* at 574. Section 2-12 of the Illinois Drainage Code provides, in pertinent part, that a "landowner shall not wilfully and intentionally interfere with any ditches or natural drains which cross his land in such manner that such ditches or natural drains shall fill or become obstructed with any matter which shall materially impede or interfere with the flow of water." 70 ILCS 605/2-12 (West 2010).

¶ 28 The Hesers argue that the evidence regarding the Hunts' alterations to the natural flow of water was undisputed. However, conflicting evidence was presented as to whether the berms built by the Hunts altered the natural flow of water and caused it to back onto the Hesers' property.

¶ 29 In a bench trial, the court makes findings of fact and weighs all the evidence in reaching a conclusion. *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. Because the trial court is in the best position to evaluate the conduct and demeanor of witnesses, this court gives deference to its credibility determinations and will not substitute its judgment for that of the trial court. *Id.* Unless the trial court's findings of fact are against the manifest weight of the evidence, this court will not disturb the findings of fact even when there is conflicting testimony because the trial court is in a position superior to a reviewing court to observe the demeanor of witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive. *In re Estate of Lambrecht*, 375 Ill. App. 3d 865, 871 (2007).

¶ 30 In the instant case, conflicting testimony was presented. Andrew and Robert testified that the berms hindered water from draining from their property onto the Hunts' property and caused water to back up onto their property. They both stated that they believed if the Hunts removed the berms it would restore the natural drainage pattern of the water.

¶ 31 Mr. Kell also testified that, depending on the amount of rain, the Hunts' berms prevented the water from the Hesers' property from draining into the Hunts' pond and caused it to back up onto the Hesers' property. However, he stated that the berm where the water from the ditch flowed onto the Hunts' property was lower than the spillway elevation from the Hesers' property and did not block the drainage of water, but allowed water to flow over it. He also admitted that prior to the installation of the ditch, the aerial photographs from the prior 40 years showed that the forested area of the Hesper property flooded and was wet and marshy. He further testified that an aerial photograph, taken when the pond was first built on the land now belonging to the Hunts, showed the pond full with flooding to the north of it. The Hesers' property sits north of the Hunts' land and drains south to their pond.

¶ 32 Frank testified that he built the berms to keep water in his pond because the water leached from his pond into the Hesers' ditch. Frank testified that he built a berm at the point where the ditch drained water onto his property to slow down and disperse the water. He stated that the berms do not block the flow of water onto his property and do not cause water to back up onto the Hesers' property. Frank testified that prior to the

Hesers clearing the land and digging the ditch, the wooded area of their property flooded and was generally wet and marshy.

¶ 33 The trial court found that after observing the testimony of the witnesses and reviewing the exhibits, the case presented by the Hunts was "far more convincing than the [Hesers]." It is the trial court's prerogative to draw reasonable inferences and ultimate conclusions from the evidence, and its judgment will not be disturbed because another trier of fact could have reached a different conclusion. *Motorola Solutions, Inc. v. Zurich Insurance Co.*, 2015 IL App (1st) 131529, ¶ 118. A reviewing court will not disturb determinations of fact unless those determinations are against the manifest weight of the evidence. *Id.*

¶ 34 Frank testified that the berms he constructed did not block the flow of water from the Hesers' land to his land and that they did not cause water to back up onto the Hesers' property. Mr. Kell testified that the berms, in certain instances, could block the flow of water from the Hesers' property to the Hunts' land but that the berm closest to the ditch did not prevent water from flowing onto the Hunts' property. Andrew testified that he ended the ditch at a natural drain. Andrew and Robert testified that the berms blocked the flow of water and caused water to back up onto their property. There was evidence that the Hesers' property flooded before the construction of the berms. Frank and Mr. Kell testified that before the Hesers cleared the land and dug the ditch the wooded portion of their land flooded and remained wet and marshy. The trial court found the evidence presented by the Hunts to be more credible than that presented by the Hesers. It further found that the Hesers failed to carry their burden of proof that the Hunts blocked the

natural drain of water from the Hesers' property to their property. We cannot say that this conclusion was against the manifest weight of the evidence.

¶ 35

CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Marion County.

¶ 37 Affirmed.