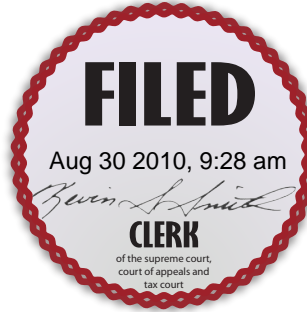


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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LAKE HELLENE, INC., a subsidiary of )  
AHEPA 232, Inc., )  
 )  
Appellant-Defendant, )

vs. )

No. 49A04-0910-CV-557

THE CHARTER OAK FIRE INSURANCE )  
COMPANY, as subrogee of LA/Shadeland )  
Station, Inc., and PERFORMANCE )  
STRATEGIES, INC., )  
 )  
Appellees-Plaintiffs. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Robyn L. Moberly, Judge  
Cause No. 49D05-0508-CT-32148

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**August 30, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

**Case Summary**

Appellant-Defendant Lake Hellene, Inc., a subsidiary of AHEPA 232, Inc., (“Lake Hellene”) appeals an interlocutory order granting partial summary judgment in favor of Appellees-Plaintiffs The Charter Oak Fire Insurance Company, as subrogee of LA/Shadeland Station, Inc., and Performance Strategies, Inc. (collectively, “Charter Oak”), regarding the availability of the “common enemy” defense to Charter Oak’s negligence and nuisance claims, and denying partial summary judgment to Lake Hellene as to the applicability of a drainage ordinance. We affirm in part, reverse in part, and remand for further proceedings.

**Issues**

Lake Hellene articulates five issues, which we consolidate and restate as the following two issues:

- I. Whether partial summary judgment was properly granted on the availability of the “common enemy” defense; and
- II. Whether partial summary judgment was properly denied as to the applicability of a drainage ordinance.

## **Facts and Procedural History**

On September 1, 2003, rain gauge data collected at the Indianapolis International Airport indicated a rainfall of 7.2 inches. During the flood event, a 3.8 acre pond located next to an apartment complex at 7355 Shadeland Station Way in Indianapolis overflowed along its western boundary. The waters flowed into a building in the nearby Shadeland Station commercial development, causing property damage.

On August 16, 2005, Charter Oak, the insurer of La/Shadeland Station, Inc. and Urdang & Associates Real Estate Advisors, Inc. (two commercial establishments in that development), filed suit for subrogation damages and alleged that Lake Hellene, the owner of the pond, had been negligent in its repair and maintenance.<sup>1</sup> Charter Oak also alleged that the pond constituted a nuisance.

Charter Oak and Lake Hellene filed cross-motions for summary judgment as to whether Lake Hellene could assert a defense based upon the “common enemy” doctrine. Additionally, the parties sought a determination from the trial court regarding the applicability of a Marion County drainage systems ordinance first adopted in 1979.

Following oral argument, the trial court concluded that the “common enemy” doctrine did not provide a defense to the claims against Lake Hellene, and thus granted partial summary judgment in favor of Charter Oak on that issue. The trial court further concluded that there existed a genuine issue of material fact as to when the pond was constructed,

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<sup>1</sup> Performance Strategies, Inc. filed suit separately but later joined in Charter Oak’s motion for partial summary judgment. Other entities (HBA, Inc., HBA Service, Inc., and Engineered Control Systems, Inc.) filed suit separately or joined in Charter Oak’s complaint or amended complaint. However, the trial court subsequently dismissed these parties.

precluding summary judgment in favor of Lake Hellene as to the applicability of the municipal ordinance. The trial court certified its order of July 8, 2009 for interlocutory review and this Court accepted jurisdiction.

## **Discussion and Decision**

### I. Standard of Review

We review a grant of summary judgment to determine whether there are genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law. Yates v. Johnson County Bd. of Comm’rs, 888 N.E.2d 842, 846 (Ind. Ct. App. 2008). We must construe all evidence in favor of the party opposing summary judgment, and all doubts as to the existence of a material issue must be resolved against the moving party. Id. at 847. We carefully review a grant of summary judgment in order to ensure that a party was not improperly denied his or her day in court. Reeder v. Harper, 788 N.E.2d 1236, 1240 (Ind. 2003). The fact that the parties made cross motions for summary judgment does not alter this standard of review. Decker v. Zengler, 883 N.E.2d 839, 842 (Ind. Ct. App. 2008), trans. denied.

### II. Analysis

#### A. Common Enemy Doctrine

Lake Helene has asserted that it has a complete defense to the common law actions of negligence and nuisance in the “common enemy” doctrine, so called because of the common plight of landowners to combat surface waters. “Surface water” has been defined as the water from falling rains or melting snows diffused over the surface of the ground or

temporarily flowing upon or over the surface as the natural elevations and depressions of the land guide it, but which has no definite banks or channel. Capes v. Barger, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953). The applicability of the “common enemy” doctrine is not dependent upon the form of action brought by the plaintiff. Bulldog Battery Corp. v. Pica Investm’ts, Inc., 736 N.E.2d 333, 339 (Ind. Ct. App. 2000).

In Argyelan v. Haviland, 435 N.E.2d 973, 976-77 (Ind. 1982), our Indiana Supreme Court reaffirmed its 1878 statement in Taylor v. Fickas, 64 Ind. 167, 173 (1878), regarding diversion of surface water:

The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that ... it will cause water, which may accumulate thereon by rains ... to stand in unusual quantities on other adjacent lands, or pass into or over the same[.]

The Argyelan decision described and explained the common enemy doctrine to which it adhered:

In its most simplistic and pure form the rule known as the “common enemy doctrine,” declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever. . . . Although Indiana doubtlessly would not permit a malicious or wanton employment of one’s drainage rights under the common enemy doctrine, it appears that the only limitation upon such rights that we have thus far judicially recognized is that one may not collect or concentrate surface water and cast it, in a body, upon his neighbor. ... Under the common enemy doctrine, it is not unlawful to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land.

435 N.E.2d at 975-76. The “common enemy” doctrine deals with surface water drainage problems; however, water flowing in a channel or watercourse is not surface water and the

“common enemy” rule is not applicable. Birdwell v. Moore, 439 N.E.2d 718, 721 (Ind. Ct. App. 1982). A natural watercourse is a channel through which water flows and has flowed ordinarily and permanently for a substantial period each year. Id. The size of the watercourse is immaterial; likewise, there is no necessity of constant flow. Id.

Here, the parties argue over the character of the water discharged onto Shadeland Station in the flood event. Lake Hellene claims that inordinate amounts of rain caused the pond to overflow and thus any water spilling from the pond retained its identity as surface water. Charter Oak claims that pond water cannot be considered surface water because the pond has a defined bank or, alternatively, that the overflowing water was surface water collected and “cast” onto property of adjoining landowners.

Surface waters generally originate in rain and snow and, according to Argyelan, such waters may be “walled out” or “walled in.” Argyelan, 435 N.E.2d at 976. However, it has been said that, in the context of a riparian rights case, if water “is a pond or a natural watercourse, then the common enemy doctrine would not apply.” Trowbridge v. Torabi, 693 N.E.2d 622, 627 (Ind. Ct. App. 1998), trans. denied. A “pond” has been defined as “[a] body of stagnant water without an outlet, larger than a puddle and smaller than a lake; or a like body of water with a small outlet.” Id. (quoting Black’s Law Dictionary 1044 (5<sup>th</sup> ed. 1979)). Despite Charter Oak’s contention that the existence of the pond conclusively forecloses the availability of the “common enemy” doctrine, the designated record reveals that the water at issue here did not consist solely of that confined in a pond. The now-stagnant pond waters (which may have originated in falling rain and melting snow) reached

the neighboring property only when combined with a great quantity of surface water in a flood event. The surface water (arriving in a downpour) commingled with stagnant water to spill over the bank of the pond.

We view the determination of whether the flow of water is a “watercourse” or mere “surface water” as an issue of fact. Long v. IVC Indus. Coatings, Inc., 908 N.E.2d 697, 703 (Ind. Ct. App. 2009). See also Davidson v. Mathis, 180 Ind. App. 524, 526, 389 N.E.2d 364, 366 (1979) (observing that, where one party has submitted that the flow of water is a “watercourse” and the other party argues that the flow is mere “surface water,” an issue of fact has been presented).

Based upon the designated record, there has been no determination of the character of the water at issue. Accordingly, a genuine issue of material fact remains and we reverse the grant of partial summary judgment as to the inapplicability of the common enemy doctrine.

#### Drainage Ordinance

Lake Hellene claims that its designated materials conclusively show that the pond was constructed before the effective date of Marion County drainage ordinances and thus Lake Hellene was entitled to partial summary judgment. In particular, Lake Hellene relies upon the deposition testimony of Donna Price, a City of Indianapolis employee, who testified in relevant part:

Question: Okay. Were you able to determine when the lake was originally constructed?

Price: It was constructed between 1972 and 1979 because the lake was not there in the '72 aerials but was there in the '79 aerials. And taking into

consideration that aerals have to be flown when there are no leaves on the trees, I would say that it was constructed prior to the spring of 1979. . . .

Question: All right. Is there anything at the City that you could look at to narrow down this window of when the lake was constructed farther than a seven-year window between '72 and '79?

Price: No, not to the best of my knowledge. . . .

Question: Would the construction of Lake Hellene some time between '72 and '79 have required permitting by the City?

Price: There was no drainage ordinance requiring drainage permits until 1979.

Question: Okay. So this lake was built before, to the best of your knowledge, before any ordinance governing drainage?

Price: Yes, sir. . . .

Question: Is that the original ordinance?

Price: Yes.

Question: That's one that was passed in '79 some time?

Price: Yes.

(App. 474-76.) (emphasis added.) Essentially, Price testified that she had reviewed Marion County documents and aerial photographs and had surmised that construction was pre-spring because of the absence of leaves on the trees. Price's testimony was couched in terms of logical deduction; she did not purport to have first-hand knowledge or definitive knowledge of the construction date. As for the effective date of the ordinance, Price acknowledged that it was enacted "some time" in 1979. We cannot agree with Lake Hellene's assertion that Price's deposition testimony conclusively established that the pond construction pre-dated the



enactment of a drainage ordinance. Lake Hellene has not demonstrated its entitlement to partial summary judgment.

### **Conclusion**

The trial court improperly entered partial summary judgment foreclosing the litigation of the “common enemy” defense. However, the trial court properly refused to grant partial summary judgment to Lake Hellene as to the applicability of a municipal drainage ordinance.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and KIRSCH, J., concur.