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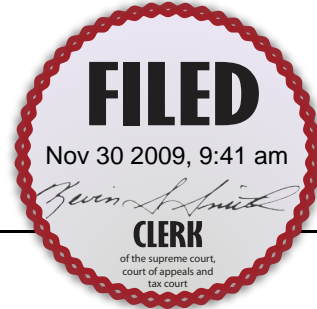
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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER CORNETT,)
)
)
Appellant-Plaintiff,)
)
vs.)
)
EVERETT BAMISH and MARY BAMISH,)
)
Appellees-Defendants.)
)
)

No. 54A04-0902-CV-91

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0505-PL-186

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Christopher Cornett appeals the trial court's findings of fact, conclusions thereon, and judgment entered in favor of Everett and Mary Bamish (collectively, "the Bamishes"). We affirm.

Issues

Cornett raises several issues for our review, which we restate as:

- I. Whether Indiana Code Chapter 36-9-27, precludes judgment in favor of the Bamishes;
- II. Whether the trial court erred when it denied Cornett's claim for damages on the basis of the common enemy doctrine;
- III. Whether the trial court erred when it found that Leland Cornett had authority to consent to the Bamishes drainage work on Cornett's property;
- IV. Whether the trial court erred when it concluded that the Bamishes may enter upon Cornett's land for the sole purpose of repairing damaged drain tiles.

Facts and Procedural History

The facts most favorable to the trial court's judgment reveal that Cornett, a California resident, is the owner of a 9.4-acre parcel of land in Montgomery County. His family purchased the parcel in the 1930s. Cornett and his siblings inherited the property in January 1990 upon their mother's death. Cornett currently owns the parcel as a tenant in common with three of his siblings. A fifth sibling, Leland Cornett ("Leland"), is no longer an owner of the parcel but, by way of a private family settlement agreement, was given a life estate in

the property.¹ Leland built a house on the property and, at all times relevant to this case, has resided on the property.

The Bamishes own real property which abuts the Cornett property. They have owned the property for more than fifty years. The abandoned Central Indiana Railway right-of-way serves as a boundary line between the Cornett and Bamish properties. The right-of-way consists of a raised berm. Cornett owns the northern half and the Bamishes own the southern half of the right-of-way. In 1997, the Bamishes installed a fourteen-inch-diameter pipe (“the pipe”) across the right-of-way to drain surface water that would occasionally accumulate on their property. Everett Bamish buried the pipe in the raised berm and placed it so that water would drain into the Harris ditch, an open waterway on the Cornett side of the right-of-way. The pipe is approximately twelve to fourteen feet in length. The pipe is only long enough to run from the Bamishes field, under the right-of-way, and into the Harris ditch. The pipe does not drain onto Cornett’s land but directly into the Harris ditch. In addition to the pipe, there are five other drain tiles that cross the Cornett property and drain into the Harris ditch that have been in place for more than twenty years and that were in place prior to the Bamishes’ purchase of their property.

Leland watched Everett Bamish the whole time he worked to install the pipe. Leland also helped Everett Bamish repair some additional damaged drain tile on both the Bamish property and the Cornett property. In late 1997, Cornett sent a letter to the Bamishes

¹ A sixth and now deceased sibling, Eileen Cornett, also had no ownership interest but was similarly permitted to live on the property during her lifetime.

explaining that the pipe trespassed over his property and asking them to remove the pipe and repair the property. The pipe was not removed.

On May 19, 2005, Cornett filed a complaint in the Montgomery Circuit Court seeking damages and equitable relief for flooding of his property and erosion damage he attributed to the actions of the Bamishes. On December 12, 2006, the Bamishes filed a motion for summary judgment arguing primarily that Cornett failed to commence the action within the applicable statute of limitations. On January 31, 2007, the trial court granted summary judgment in favor of the Bamishes. On appeal, another panel of this Court reversed and remanded, concluding in a memorandum decision that Cornett had satisfied the appropriate twenty-year statute of limitations to bring his equitable claim requesting removal of the pipe and the six-year statute of limitations to address his claim for damages for flooding and erosion. *Cornett v. Bamish*, No. 54A01-702-CV-109 (Ind. Ct. App. Nov. 30, 2007). We concluded, however, that Cornett had not satisfied the statute of limitations to bring a claim for damages to address the trespass of the pipe. *Id.*

A bench trial was held on August 19 and 20, 2008. Thereafter, on January 13, 2009, the trial court entered its findings of fact, conclusions thereon, and judgment. In relevant part, the trial court concluded as follows:

1. [Cornett], as a tenant in common, may maintain this action against [the Bamishes] in his individual name to protect his interest in the property.
2. The right of way, air, light, or other easement from, in, upon, or over land owned by a person may not be acquired by another person by adverse use unless the use is uninterrupted for at least twenty years. A prescriptive easement exists through the Cornett property for tiles two, three, four, five and six.

3. The doctrine of apparent authority is premised in equity, and is based upon the principle where one of two innocent parties must suffer from the conduct of an agent; the loss should fall on the principal and not the third party. Grosan v. Laborers' Intl U. Of N. Am., 489 N.E.2d. 656 (IN App 1986). The third party must reasonably believe the agent is acting within the scope of authority. Storm v. Marsischke, 304 N.E.2d. 840 (IN App 1073)[.]

4. Leland Cornett had the apparent authority in 1997 to give consent to or to acquiesce in Everett Bamish performing drainage work on the Cornett property. Based upon the apparent authority of Leland Cornett, Everett in 1997 did not commit trespass by performing drainage tile work on the Cornett property or installing the pipe of tile number one.

5. It is axiomatic that one who seeks equitable relief must come to the court with clean hands. The court finds that [Cornett's] actions in plugging the drains that were legally in place soils his hands such that equity is not available as a remedy to him. [Cornett's] claim in equity is denied on the basis.

6. Further, equity seeks to do justice. [The Bamishes'] action in installing the pipe of tile 1, while arguably wrong and a trespass, is de minimus [sic]. The intrusion is slight and underground. There is no erosion, washing or other harm to the Cornett property as a result of the installation. It is placed at the edge of the Cornett's [sic] property in a corner inaccessible except by crossing the Harris ditch. The benefit to [the Bamishes] is far, far greater than any inconvenience, damage or interference suffered by [Cornett]. The court finds no inconvenience, or interference or damage to [Cornett] by that installation other than what would be simply a technical trespass, absent the consent or acquiescence by reason of the apparent authority in Leland Cornett. Justice prohibits the court from requiring [the Bamishes] to remove the pipe in tile 1. [Cornett's] claim in equity is denied on this basis.

7. Equity regards that as done which ought to be done or should have been done. On this basis the court finds, as a matter of law, that [the Bamishes] should be permitted access to Cornett's property on both sides of the Harris ditch for the purposes, only, of unplugging, repairing and maintaining tiles one through six and the outlets of those drains emptying into the Harris ditch, which flow from and drain Defendant's land. That access is to be at reasonable times, and [the Bamishes] [are] responsible for repairing any damage to [Cornett's] land done during any such work, and restoring it to the condition it was prior to the work being done. Further [the Bamishes] should maintain such tiles and outlets in such a manner that there is no erosion,

washing or other loss of soil from [Cornett's] property or, if there is, the damaged areas are to be repaired as soon as is reasonably possible.

8. A land owner may protect himself against the flow of surface waters regardless of the effect it may have on the others' lands. Surface water is a common enemy which any owner may combat as best he can. It is not unlawful to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of land. Argyelan vs. Haviland 435 N.E.2d.173 (Ind. 1982). [Cornett's] claims regarding [the Bamishes'] placing surface water onto the Cornett property are denied on the basis of the Common Enemy Doctrine.

9. Based upon evidence that the Cornett property has one of the lowest points of elevation in the area and has regularly flooded or had standing water over the last 50 years, the court finds as a matter of law that the Cornett property naturally floods. [Cornett] has failed to introduce any credible evidence of probative value that [the Bamishes] either did or failed to do anything that caused or contributed to the flooding of [Cornett's] property.

10. [Cornett] has failed to prove any damage to the real estate due to [the Bamishes'] action or failure to act. [Cornett] has failed to establish any damages from loss of use, deprivation of use or interference with [Cornett's] peaceful enjoyment of his real estate due to [the Bamishes'] action or failure to act.

Based upon its findings and conclusions, the trial court entered judgment in favor of the Bamishes. Cornett now appeals.

Discussion and Decision

The trial court entered special findings of fact and conclusions thereon. We apply a two-tiered standard of review to special findings of fact and conclusions thereon. *Harlan Bakeries, Inc. v. Muncy*, 835 N.E.2d 1018, 1029 (Ind. Ct. App. 2005). First, we determine whether the evidence supports the trial court's findings, and then we determine whether the findings support the judgment. *Id.* This Court will not disturb the trial court's findings or judgment unless they are clearly erroneous. *Id.* "Findings of fact are clearly erroneous when

the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and conclusions which relied upon those findings." *Infinity Prods., Inc. v. Quandt*, 810 N.E.2d 1028, 1031 (Ind. 2004). "In determining whether the findings and judgment are clearly erroneous, we consider only the evidence favorable to the judgment and the reasonable inferences to be drawn therefrom." *Id.*

Additionally, Cornett appeals from a negative judgment. Therefore, he must demonstrate that the trial court's judgment is contrary to law. *Id.* at 1032. Specifically,

[a] judgment is contrary to law only if the evidence in the record, along with all reasonable inferences, is without conflict and leads unerringly to a conclusion opposite that reached by the trial court. In conducting our review, we cannot reweigh the evidence or judge the credibility of any witness, and must affirm the trial court's decision if the record contains any supporting evidence or inferences.

Id. "To the extent that the judgment is based on erroneous findings, those findings are superfluous and are not fatal to the judgment if the remaining valid findings and conclusions support the judgment." *Harlan Bakeries*, 835 N.E.2d at 1029 (quoting *Lasater v. Lasater*, 809 N.E.2d 380, 397 (Ind. Ct. App. 2004)).

I. Indiana Drainage Act

We first address Cornett's contention that the Bamishes' installation of the pipe is unlawful pursuant to the Indiana Drainage Act, Indiana Code Chapter 36-9-27 ("Drainage Act") and, thus, the trial court erred when it entered judgment in favor of the Bamishes. We note that Cornett neither mentioned the Drainage Act in his pleadings nor argued to the trial court at any time that its provisions should apply to his claim for damages and equitable relief

against the Bamishes. As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court. *GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC.*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). This rule of waiver in part protects the integrity of the trial court so it cannot be found to have erred as to an issue or argument that it never had the opportunity to consider. *Id.*

In an attempt to avoid waiver, Cornett raises issues and arguments pursuant to the Drainage Act for the first time on appeal and contends that the trial court was without subject matter jurisdiction to issue its judgment in this case.² It is well established that when the legislature has provided a statutory scheme with an exclusive administrative remedy, our courts lack jurisdiction to hear the matter until the administrative procedures have been exhausted or request for relief has been denied. *State v. Sproles*, 672 N.E.2d 1353, 1358 (Ind. 1996). Generally, the expression of exclusivity will come in one of two forms. Some statutes will affirmatively state that its provisions constitute the exclusive remedy for such actions, and others provide that judicial review is available only after the remedies provided by statute are exhausted. *Romine v. Gagle*, 782 N.E.2d 369, 379 (Ind. Ct. App. 2003), *trans. denied*. The Drainage Act does neither.

There is no language in the Drainage Act to indicate that the Act is intended to serve as the only recourse for parties pursuing claims such as those brought by Cornett in this case.

The only provisions of the Drainage Act relevant to judicial review discuss the rights of land

² Essentially, Cornett argues that the lawsuit he filed should have been dismissed sua sponte by the trial court for lack of subject matter jurisdiction because he had not exhausted his administrative remedies by contesting the Bamishes' actions to the Montgomery County Drainage Board pursuant to the Drainage Act.

owners affected by a final order or determination of the drainage board, to appeal the drainage board's determination to the circuit or superior court in the county in which the board is located. *See* Ind. Code §§ 36-9-27-106 through -109. Rather than seek intervention by the Montgomery County Drainage Board, Cornett chose to seek damages and equitable relief in the Montgomery Circuit Court. He has directed us to no language in the Drainage Act that would preclude him from doing so.

Our legislature created the Drainage Act in order to regulate the creation, maintenance and abandonment of drainage systems. *See generally* Ind. Code Chapter 36-9-27. As we read the Drainage Act, it is evident that the Act sets out the powers and duties of local drainage authorities, the procedure for creating and maintaining drainage systems, assessing the costs of drainage systems, and the rights of landowners whose property is affected by a drainage system. *See generally id.* It does not follow, however, that these drainage laws constrain the jurisdiction of the trial court to determine the issues presented as in this case.

Cornett clearly could have chosen to petition the Montgomery County Drainage Board concerning what he believes to be the overtaxing of the Harris ditch. Cornett also could have petitioned the Drainage Board to contest the Bamishes' installation of the pipe Cornett believes to be in contravention of Indiana Code Section 36-9-27-17(a).³ However, instead

³ For the first time on appeal, Cornett asserts that the installation of the pipe is unlawful because permission to place such a pipe must be granted by the county surveyor. Indiana Code Section 36-9-27-17 provides in pertinent part:

- (a) Whenever:
- (1) an owner wants to construct or extend a private or mutual drain, and outlet that drain into a regulated drain that is subject to this chapter: and
 - (2) the construction or extension will not go through land owned by other persons;

of requesting the Drainage Board or the county surveyor to resolve the flooding issues occurring on his property, Cornett chose to seek damages from his neighbor and equitable relief from the Montgomery Circuit Court. Moreover, he chose to proceed on wholly common-law theories and presented no evidence or argument to the trial court to advance his statutory theories pursuant to the Drainage Act. It is only now that he has been denied the relief requested that he attempts to hide behind our administrative procedures and deprive the trial court of its jurisdiction. Cornett's failure to raise the Drainage Act below has resulted in the waiver of its application in the instant case.

While we disagree with Cornett that the Drainage Act provides the exclusive remedy for private parties regarding all drainage issues, we do note that the Drainage Act provides local drainage boards with jurisdiction over the maintenance of each "regulated drain" in a county except as otherwise provided by the Act. *See* Ind. Code § 36-9-27-15; *Schrader v. Porter County Drainage Bd.*, 880 N.E.2d 304, 309 (Ind. Ct. App. 2008), *trans. denied*; *Luhnow v. Horn*, 760 N.E.2d 621, 630 (Ind. Ct. App. 2001). This jurisdiction extends over the maintenance and repair of such drains, including the ability to assess property owners for the costs, and the power to contract with an outside contractor for construction or maintenance of a drain. *Luhnow*, 760 N.E.2d at 630 (citing Ind. Code §§ 36-9-27-40, -50, -77). We have not been provided sufficient information in the record to determine the status

the owner shall file with the county surveyor having jurisdiction of the regulated drain for permission to connect his drain with the regulated drain.

Interestingly, Cornett does not argue that the Bamishes should have sought permission of the county surveyor. Instead, Cornett asserts that only he had legal authority to seek such permission as it is his property, and not the Bamishes', that adjoins the Harris ditch.

of the Harris ditch under the Drainage Act. The record indicates that the Harris ditch is one of many county ditches and has been in existence for more than 100 years. Tr. at 130. The record further indicates that the Harris ditch is currently unassessed and has not been maintained by the county since the mid-1960s. Tr. at 137. If Cornett wishes to petition the Montgomery County Drainage Board regarding the duties of Montgomery County regarding the maintenance and regulation of the Harris ditch, the Drainage Act provides the mechanism for him to do so. *See* Ind. Code §§ 36-9-27-18 and -19.⁴

II. Common Enemy Doctrine

In the event that he waived application of the Drainage Act, Cornett argues in the alternative that the trial court erred when it denied his claim for damages and entered judgment in favor of the Bamishes pursuant to the common enemy doctrine. Pursuant to the common enemy doctrine, surface water that does not flow in defined channels is classified as a common enemy and each landowner may deal with it in such manner that is most fitting under the circumstances. *Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982). It is not unlawful for a landowner to improve his land in such a way as to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land even where his land is so situated to the land of an adjoining landowner that the improvement will cause water either to stand in unusual quantities on the adjacent land or to

⁴ We note that the president of the Montgomery County Drainage Board testified at trial. His testimony favored the Bamishes, as he testified as to his knowledge of the natural flooding that had always occurred on the Cornett property. At no time did he suggest that the jurisdiction of the Board was implicated in this case or that the trial court lacked authority to enter judgment. Instead, his testimony suggested that it was up to the individual parties to avail themselves of the Board's jurisdiction. Tr. at 124-42.

pass into or over the adjacent land in greater quantities or in other directions than the waters were accustomed to flow. *Bulldog Battery Corp. v. Pica Investments, Inc.*, 736 N.E.2d 333, 339 (Ind. Ct. App. 2000). The only limitation upon the doctrine is that one may not collect or concentrate surface water and cast it, in a body, upon his neighbor. *Argyelan*, 435 N.E.2d at 976.

Here, the evidence presented supports a conclusion that the Bamishes merely protected themselves from the flow of surface water on their property. There is nothing in the record to suggest that the Bamishes collected or concentrated surface water and cast it upon Cornett's property. Instead, the record shows that the Cornett property has naturally flooded for over fifty years. The trial court determined that Cornett had presented no credible evidence that the Bamishes' installation of the pipe caused or contributed in any way to the flooding or erosion of Cornett's property. We cannot say the trial court erred when it denied Cornett's claim for damages based on the common enemy doctrine.

III. Authority to Consent

We next address Cornett's contention that the trial court misapplied the doctrine of apparent authority when it found that Leland had apparent authority to consent to the Bamishes' installation of the pipe on Cornett's property. While we agree with Cornett that the doctrine of apparent authority does not generally apply in the context of real property, we nevertheless conclude that the trial court's judgment in favor of the Bamishes is supported by the evidence and is not contrary to law.

Here, the record supports a finding that Leland was a life tenant of the Cornett property and, thus, he had actual authority rather than apparent authority to consent to the installation of the pipe. A life estate may be “created by act, contract, or convention of the parties.” 18 Indiana Law Encyclopedia *Life Estates* § 2 (2003). The scope of a specific life estate is determined by examining the language used to create the life estate. *Estate of Scholz*, 859 N.E.2d 731, 735 (Ind. Ct. App. 2007). Cornett and his siblings, including Leland, inherited the Cornett property upon their mother’s death. Thereafter, a family agreement was drafted which provided in relevant part as follows: “The four heirs who receive an interest in the real estate hereby agree to allow the remaining heirs to occupy the real estate as their home so long as they are able.” Plaintiff’s Exhibit 4. Pursuant to the agreement, Leland, and his now deceased sister Eileen, gave up their ownership interest in the property in exchange for cash and what is for all intents and purposes a life estate in the property. Tr. at 5-6.

With a life estate comes certain rights and authority with respect to the subject property. During the continuance of a life estate in real property, the life tenant is entitled to possession, control, and enjoyment of the property, and the right of possession, control, and enjoyment is exclusive. 31 C.J.S. *Estates* § 43 (2009). The right of possession, control, and enjoyment is to the exclusion of the remaindermen or reversioners unless the life tenant relinquishes or releases the right and permits such persons to take possession. *Id.*

At all times relevant to this case, Leland was a life tenant of the Cornett property and as such was entitled to exclusive possession, control, and enjoyment of the property.

Therefore, he had actual authority to consent to the drainage work performed on the property by the Bamishes which included the installation of the pipe. Accordingly, we conclude that the trial court's finding as to apparent authority to be superfluous and not fatal to its judgment, as the evidence presented supports a finding of actual authority on the part of Leland to consent to the installation of the pipe on the Cornett property.

We note that, in requesting removal of the pipe, Cornett sought equitable relief. In crafting an equitable remedy, the trial court has discretion to fashion a remedy that is complete and fair to all parties involved. *Roberts v. ALCOA, Inc.*, 811 N.E.2d 466, 473 (Ind. Ct. App. 2004). The trial court here concluded that, even absent consent, the installation of the pipe was at most a de minimis trespass to an inaccessible portion of the Cornett property resulting in no inconvenience, interference, or damage. Appellant's App. at 7. The trial court further concluded that the benefit to the Bamishes from leaving the pipe in place far outweighs any harm suffered by Cornett and, therefore, requiring removal of the pipe would be an inequitable result.

Moreover, as noted by the trial court, equity seeks to do justice, and he who seeks equity must do equity. *Huber v. Sering*, 867 N.E.2d 698, 710 (Ind. Ct. App. 2007), *trans. denied*. The record shows that Cornett purposely plugged several drains, some of which had been in place for more than forty years. This type of behavior is not favored in equity. Under the circumstances, the trial court did not err when it declined to order the removal of the pipe and, instead, entered judgment in favor of the Bamishes.

IV. Maintenance of Drain Tiles

Finally, Cornett asserts that the trial court erred when it concluded that the Bamishes may enter onto his property for the purpose of repairing and maintaining underground tile leading to the Harris ditch. Cornett argues that the Indiana Drainage Obstruction Act, Indiana Code Chapter 36-9-27.4 (“Drainage Obstruction Act”) provides the exclusive remedy to landowners where material needs to be removed from drains or when drains are in need of repair. We disagree.

As with the Drainage Act, we note that Cornett did not raise any provision of the Drainage Obstruction Act or its application in this case during trial and, therefore, has waived any allegation that the trial court erred in not considering the same. *See GKC Indiana Theaters, Inc.*, 764 N.E.2d at 651. To the extent that Cornett argues that the Act deprived the trial court of subject matter jurisdiction, in *Romine*, we specifically held that complainants are not required to first seek administrative redress with the Drainage Board under the Drainage Obstruction Act, but may choose to commence action in a trial court. *Romine*, 782 N.E.2d at 379.

Conclusion

The trial court’s judgment in the instant case is not precluded by or in contravention of our drainage laws. With regard to the trial court’s findings of apparent authority, those erroneous findings were unnecessary and not fatal to the judgment, as the evidence supports a finding of actual authority. Based upon the record before us, we cannot say that the trial court’s judgment is contrary to law. The trial court’s findings are supported by the evidence, and the findings support the trial court’s judgment in favor of the Bamishes.

Affirmed.

MAY, J., and BROWN, J., concur.