

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.

ATTORNEYS FOR APPELLANT:

RANDY J. WILLIAMS
CHERYL M. KNODLE
Ball Eggleston PC
Lafayette, Indiana

ATTORNEYS FOR APPELLEES:

STUART K. WELIEVER
AMY S. CARLSON
Henthorn, Harris & Weliever
Crawfordsville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER CORNETT,)

Appellant-Plaintiff,)

vs.)

No. 54A01-0702-CV-109

EVERETT BAMISH and MARY BAMISH,)

Appellees-Defendants.)

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

November 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, Christopher Cornett (Cornett), appeals the trial court's grant of summary judgment in favor of Appellees-Defendants, Everett and Mary Bamish (collectively the Bamishes).

We reverse and remand for further proceedings.

ISSUE

Cornett presents one issue on appeal, which we restate as follows: Whether the trial court properly applied a six-year statute of limitations to Cornett's action.

FACTS AND PROCEDURAL HISTORY

Cornett is the owner of a 9.4 acre parcel of land in Montgomery County, Indiana. The Bamishes own real property which abuts the Cornett property. The Central Indiana right-of-way serves as a boundary line between the Cornett and Bamish properties. Cornett owns the northern half and the Bamishes own the southern half of the right-of-way, which is a raised berm.

In 1997, the Bamishes installed a fourteen-inch diameter pipe across the right-of-way to drain surface water that would occasionally accumulate on the their property.¹ The pipe was buried into the raised berm and placed so that water would drain into an open waterway on Cornett's side of the right-of-way. Later in 1997, Cornett, sent a letter to the Bamishes explaining that the pipe trespassed over his property and asking them to remove the pipe and repair the property. The pipe was not removed.

¹ Other pipes crossing the right-of-way to drain surface water from the Bamish property onto the Cornett property pre-existed the pipe installed in 1997, but Cornett's complaint does not address those pipes.

In 2003, Cornett and Everett Bamish noticed flooding of Cornett's property and erosion damage. Cornett attributes flooding of his property and erosion damage to the actions by the Bamishes.

On May 19, 2005, Cornett filed a complaint in Montgomery County seeking damages and equitable relief. 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 applied the six-year statute of limitations codified at I.C. § 34-11-2-7(2) to Cornett's action, found that it had run prior to Cornett's commencement of the action and granted the Bamishes summary judgment.

Cornett now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *AutoXchange.com, Inc v. Dryer and Reinbold, Inc.*, 816 N.E.2d 40, 47 (Ind. Ct. App. 2004). Thus, on appeal, we determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* In so doing, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* We must accept as true those facts alleged by the non-moving party, but only those facts supported by affidavit or other evidence must be taken as true. *McDonald v. Lattire*, 844 N.E.2d 206, 212

(Ind. Ct. App. 2007). The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts presented to the trial court. *See Ayers v. Indian Heights Volunteer Fire Dep.'t, Inc.*, 493 N.E.2d 1229, 1234 (Ind. 1986).

II. Analysis

a. *The Existence of Other Pipes*

Cornett argues in conjunction with his arguments addressing his equitable claim and claim for damages that the trial court erred when it failed to acknowledge as true his allegation that other pipes have been installed since the pipe at issue was installed in 1997. Cornett explains that “the Bamishes installed yet another drainage pipe several years after 1997, that it contributed to his damages, and that six years had not yet expired from the installation of the later pipe.” (Appellant's Brief p. 8). In support of this contention, Cornett cites to his own deposition testimony, which states in pertinent part:

[Cornett's Counsel]: I believe you indicated the first time that you recall seeing, and I may be mistaken here, the first time you saw the water across the property would have be in that April, May of 2003 in those photographs?

[Cornett]: Yes.

[Cornett's Counsel]: And the first time you would have seen the third pipe would have been in that April of 2003; is that correct?

[Cornett]: I believe that's correct, Randy.

(Appellant's App. p. 120). Although Cornett may hold a belief that another pipe was installed after 1997, we do not find any support for his contention in the record. Cornett's

own testimony on the issue, which is the sole source cited for the contention, is vague and inconclusive; he presents no evidence of when another pipe was installed. Thus, we conclude that the trial court did not err by failing to consider the installation of other pipes, post 1997.

b. *Claim in Equity*

In support of Cornett's contention that his claim in equity is not barred by the statute of limitations found at I.C. § 34-11-2-7(2), Cornett argues, if he is not awarded a remedy ordering the removal of the pipe from his property, the Bamishes may eventually gain a prescriptive easement for the pipe. We find Cornett's argument persuasive.

Our supreme court has explained in the context of adverse possession, a person without title to land can obtain title by establishing that he has satisfied the required elements of adverse possession: (1) control; (2) intent; (3) notice; and (4) duration. *Fraley v. Minger*, 829 N.E.2d 476, 486 (Ind. 2005). This formula for establishing adverse possession also applies to establishing prescriptive easements. *Wilfong v. Cessna Corp.*, 838 N.E.2d 403, 406 (Ind. 2005). Prescriptive easements can be acquired for drainage systems. *See Powell v. Dawson*, 469 N.E.2d 1179, 1181 (Ind. Ct. App. 1984).

In *Powell*, we reviewed several cases litigating the existence of a prescriptive easement for drainage systems and noted that the reoccurring focus of such inquiry is upon the element of "open," which now constitutes a portion of the notice aspect of the formula for determining an easement by prescription. *Id.* at 1181-1182. Notice is not an issue in this case, however. The pipe traverses a raised berm and is noticeable from both the Bamish and Cornett properties.

As for the other elements that could establish a prescriptive easement in favor of the Bamishes, Everett Bamish testified at a deposition that he installed the pipe and left it on Cornett's property despite Cornett's demand that it be removed. We conclude that these activities alone are sufficient to support a finding that the Bamishes have satisfied the control and intent requirements to gain a prescriptive easement. Of course, these elements have only been satisfied for a fraction of the duration required for the Bamishes to gain a prescriptive easement. However, because the other elements for a prescriptive easement have been satisfied, we find persuasive the argument that if Cornett is not granted a remedy the Bamishes may gain a prescriptive easement, which are not favored by our law. *See Carnahan v. Moriah Property Owners Ass'n, Inc.*, 716 N.E.2d 437, 441 (Ind. 1999).

Now we must address how our finding of the Bamishes' potential claim for a prescriptive easement applies to the trial court's determination that Cornett's action should be barred by a six-year statute of limitations. The trial court applied the statute of limitations governing actions for use, rents, and profits of real property. *See* I.C. § 34-11-2-7(2). In *Miller v. Richards*, 139 Ind. 263, 38 N.E. 854 (Ind. 1894), our supreme court addressed a situation where the Appellant had sued the Appellees to secure removal of obstructions placed in a private way. *Id.* at 854. The Appellees argued that a six-year statute of limitations applied, but our supreme court disagreed, stating:

It is manifest that they misapply the statute of limitations. An action for the "use, rents, and profits of real property" is limited to six years, but the present action was for neither use, rents, nor profits. The right asserted by the [A]ppellant was the ownership of an interest in land, an easement in the possession of which he had disturbed. The action was essentially of a possessory character.

Id. at 855 (internal citations omitted). Likewise, we view Cornett's claim for an equitable remedy as a claim to protect his ownership interest in the area of his land where the pipe is located. Therefore, we conclude that the statute of limitations for actions for use, rents, and profits of real property found in I.C. § 34-11-2-7(2) does not apply to Cornett's claim for equitable relief.

In determining the appropriate statute of limitations to apply to the claim for equitable relief brought by Cornett, we conclude that the twenty-year period necessary to acquire an easement by prescription is the statute of limitations which runs against Cornett. I.C. § 32-23-1-1; *See Greene v. Jones*, 490 N.E.2d 776, 777 (Ind. Ct. App. 1986), *reh'g denied, trans. denied* (holding the ten-year period to obtain title by adverse possession is the statute of limitations which runs against the titleholder). If Cornett were to fail to oust the Bamishes within the twenty-year period, the Bamishes may gain an easement by prescription for the pipe that they have installed upon Cornett's property.

c. Claim for Damages

Cornett further contends that the trial court erred when it applied the statute of limitations codified at I.C. § 34-11-2-7(2) to bar his claim for damages. In making his argument, Cornett accepts that the statute of limitations imposed by the trial court is applicable to his claim; however, he disputes how the statute was applied. Specifically, Cornett argues that the actions by the Bamishes caused injury to his property after the installation of the pipe, and he deserves damages for any injury suffered within six years prior to the filing of his complaint. To the contrary, the trial court found that the installation of the pipe was a permanent wrong, and although damage may be occasionally caused by

water discharged from the pipe, “[t]he damage all relates back to the original installation of the pipe.” (Appellant’s App. p. 8).

Cornett cites to *Dolph v. Mangus*, 400 N.E.2d 189 (Ind. Ct. App. 1980), in developing his argument that the flooding of his property, which both he and the Bamishes noticed in 2003, began the clock for the statute of limitations for that specific injury. In *Dolph*, we examined a situation where the defendant installed a drainage system on his own property. The force of water expelled by the drainage system quickly cut a gully to and across the boundary line between the defendant’s and plaintiff’s property and the trial court found that these actions constituted a trespass. We acknowledged that many jurisdictions dealing with this type of problem have drawn a distinction between injuries termed “original” or “permanent” on the one hand and those referred to as “temporary,” “transient,” “continuing” or “recurring” on the other. *Id.* at 191.

[I]f the claim is of the permanent variety, the action must be commenced within the statutory period or it is barred. On the other hand, if the injury is of the temporary variety each new injury starts the limitations statute running anew with the effect that at any given time the plaintiff can recover the actual damage incurred for the various temporary injuries which have occurred within the statutory period preceding the filing of the complaint.

Id.

When analyzing the record before us, we find that the trespass of the pipe and the injuries from the flooding must be considered separately. We find that the trespass of the pipe itself is a permanent injury for which Cornett did not satisfy the six-year statute of limitations. Therefore, we conclude the trial court appropriately awarded summary judgment to the Bamishes on Cornett’s claim for damages caused by the trespass of the pipe.

However, the injuries of erosion and flooding are injuries separate and distinct from the trespass of the pipe itself. We cannot tell from the record whether those injuries are permanent or temporary. The record contains only that the erosion and flooding was first noticed in 2003, six years after the installation of the pipe. Moreover, the pipe was placed so that it would drain into an existing waterway on Cornett's property. There is no evidence in the record that Cornett knew or should have known that the pipe would cause erosion or flooding prior to 2003. Even if the injuries of flooding and erosion are permanent injuries, we find that they were first noticed in 2003, within six years prior to when Cornett filed his complaint addressing those injuries. Thus, we conclude that Cornett has satisfied the statute of limitations for addressing the injuries of flooding and erosion to his property.

CONCLUSION

For the foregoing reasons, we conclude that Cornett has satisfied the appropriate twenty-year statute of limitations to bring his equitable claim, has satisfied the six-year statute of limitations to bring a claim for damages to address the injuries of flooding and

erosion, but has not satisfied the statute of limitations to bring a claim for damages to address the trespass of the pipe.

Reversed and remanded.

FRIEDLANDER, J., and SHARPNACK, J., concur.