2018 IL App (5th) 160435-U

NO. 5-16-0435

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LUCY ADCOCK and LYNDELL ADCOCK,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	St. Clair County.
	)	
v.	)	No. 06-MR-192
	)	
THE CITY OF O'FALLON, ILLINOIS, and H&L BUILDERS, LLC,	)	
	)	
	)	
Defendants	)	Honorable
	)	Vincent J. Lopinot,
(The City of O'Fallon, Illinois, Defendant-Appellee).	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court finding the City of O'Fallon not liable for the new flooding on plaintiffs' land and dismissing the case against the City with prejudice. The circuit court correctly determined that H&L Builders is the party responsible for the new flooding on plaintiffs' land and that because H&L Builders previously settled with plaintiffs and was granted a full release by plaintiffs, the circuit court's order of April 8, 2014, is the final judgment in the matter.

¶ 2 Plaintiffs, Lucy and Lyndell Adcock, filed suit in the circuit court of St. Clair County seeking relief from flooding allegedly caused by the development of land near

their home. This is the third time this case has been before us on appeal. Plaintiffs currently appeal from an order of the circuit court of St. Clair County finding that defendant City of O'Fallon (City) is not legally responsible for the flooding in plaintiffs' yard and refusing to impose injunctive relief against the City. The trial court specifically found that the City did not create the flooding and that there was no way to impose liability on the City where the stormwater was first diverted by defendant H&L Builders, LLC (H&L), the condominium developer. Because H&L previously settled with plaintiffs and plaintiffs granted H&L a full release from nuisance and stormwater liability, the trial court found no further issues remained and dismissed plaintiffs' lawsuit against the City. The trial court ordered plaintiffs and the City to each bear their own costs. In this appeal plaintiffs argue the trial court: (1) erred in denying injunctive relief against the City; (2) erred in finding in favor of the City and against plaintiffs on the issues of liability for nuisance; (3) erred in finding that "[t]here is no way to impose liability on the City where the storm water was first diverted by an intervening party, H&L"; (4) abused its discretion in finding the evidence insufficient to prove that flooding was caused by the City; and (5) erred in failing to find that the City created and maintained a continuing nuisance on plaintiffs' property. We affirm. In this appeal, defendant has filed a motion to dismiss for lack of jurisdiction. This court denies that motion and will address the issues raised by the plaintiffs on the merits.

¶ 3 BACKGROUND

¶ 4 Plaintiffs purchased their home located at 115 Orchard in O'Fallon in 1987. 115 Orchard lies at the lowest point of any property in the area. The previous owner also

experienced flooding on the land. Plaintiffs experienced localized flooding from the time they purchased the home; however, plaintiffs resolved the initial flooding by placing a 12-inch pipe on the property to drain water away from the home.

¶ 5 This litigation began in 2001, when plaintiffs filed No. 01-MR-162, seeking injunctive relief and damages after plaintiffs began experiencing excessive flooding allegedly caused by the development of condominiums near their home. After filing the lawsuit, plaintiffs worked with the City and H&L to ensure that the planned condominium development would not cause flooding issues. That work culminated in the passage of Ordinance 3054, which provided for revisions regarding how the condominium complex was to be built and new specifications meant to resolve plaintiffs' flooding issues and ensure a stormwater management plan that would be able to detain a 100-year storm event.

¶ 6 The ordinance also included specifications as to the location and height of a berm surrounding a detention basin meant to be part of the solution to flooding. From the lowest point of the pond, a concrete outlet lets water from the bottom of the pond flow into a 10-inch underground pipe, which then joins a 24-inch pipe that runs underground towards Cambridge Boulevard. A 30-inch-diameter underground main pipe runs under Cambridge Boulevard. Plaintiffs agreed to dismiss No. 01-MR-162 after Ordinance 3054 was approved. However, after completion of the condominium complex in 2005, plaintiffs again began experiencing flooding.

¶ 7 Plaintiffs filed a complaint to enforce Ordinance 3054 through *mandamus* and also sought injunctive relief, damages, and a finding of nuisance with regard to the flooding.

Prior to the start of trial on these issues, the parties stipulated to $5000 in damages should liability be determined. A six-day bench trial, which included a judicial site visit by the trial judge, was conducted over the course of two months in late December 2009 and January 2010. After hearing the evidence, the trial court took the case under advisement.

¶ 8 On September 22, 2010, the trial court entered judgment in favor of defendants, dismissed the case with prejudice, and ordered plaintiffs to pay costs. On appeal, this court, in an unpublished order pursuant to Illinois Supreme Court Rule 23 (eff. Jan. 1, 2011), found two findings of the trial court in error: (1) that plaintiffs were barred from bringing a new action due to dismissal of 01-MR-162 and plaintiffs' participation in and approval of Ordinance 3054 and (2) that there was insufficient evidence that the nuisance action was due to new and different water collection than had previously occurred on plaintiffs' property. *Adcock v. City of O'Fallon*, 2012 IL App (5th) 100484-U (*Adcock I*). The best evidence we could find that the litigation covered a new and different source of water than was addressed in the 2001 lawsuit was the fact that plaintiffs purchased adjoining property, 117 Orchard, in 2004: "If the water issues had not been resolved or abated after settlement of the 2001 lawsuit, plaintiffs would not have chosen to invest additional money in 117 Orchard." *Id.* ¶ 26. Accordingly, we reversed and remanded with directions, specifically stating as follows:

> "The trial court's ruling *may* be against the manifest weight of the evidence, but we need not determine that at this point. Instead we reverse and remand with directions for additional testimony and evidence as to the status of the flooding at this point and any corrective action that may have been taken since the trial court

entered its order on September 22, 2010. As to the City's argument of governmental immunity, the trial court's order does not address this issue. Upon remand, this is an issue that should be further developed and ruled upon by the trial court." (Emphasis added.) *Id.* ¶ 31.

Upon remand, the parties agreed no corrective action had been taken.

¶ 9 Neither party submitted any additional evidence. The City's counsel agreed that while a city is immune from damages, a city is not immune from injunctive relief. Ultimately, plaintiffs' filed a motion for summary judgment, injunctive relief, and damages after appeal. Defendants filed responses, and the trial court heard arguments. On April 8, 2014, the trial court entered an order finding that H&L was not in compliance with O'Fallon City Ordinance 3054 and that H&L created and maintained a private nuisance and continues to do so as evidenced by the flooding which remains the same as it was in 2010.

¶ 10 The trial court ordered H&L to: (1) comply with all aspects of Ordinance 3054; (2) immediately remove the black corrugated pipe that extends through the berm onto plaintiffs' property and fix the berm of the detention area by performing a series of tasks within the following 30 days from entry of the order; (3) immediately disconnect any outlet or hydraulic cross-connections of the detention basin with the Cambridge Boulevard storm sewer within 30 days; (4) pay plaintiffs $5000 in damages as previously stipulated; (5) obtain an appraisal of the value of any easements required on plaintiffs' property and any other property needed to implement the engineering solution found in the "Hoelscher Report"; (6) pay fair market value for any required easements; (7) begin

implementation of the engineering remedy contained in the Hoelscher Report within the following 90 days; and (8) pay plaintiffs' attorney fees in the amount of $85,069.25, $144,301.18, and any additional attorney fees going forward, along with litigation expenses, including engineering fees. The trial court rejected plaintiffs' proposed order which asked for a finding that the City created or maintained a nuisance and to enter injunctive relief only against the City, not H&L. The trial court, however, ordered the City to "verify the final height of the berm and the disconnection of Cambridge Boulevard outlets and cross-connections" and to "work with the parties to effectuate the proper engineering solution." H&L filed a motion to reconsider, which was denied. Plaintiffs filed a motion for sanctions, which was also denied.

¶ 11 H&L filed a notice of appeal from the April 8, 2014, order. Plaintiffs filed a notice of cross-appeal, appealing that portion of the order which denied their motion for sanctions against H&L's new attorneys and for not granting injunctive relief against the City. The order was not stayed pending appeal.

¶ 12 Additional proceedings were held in the trial court concerning enforcement of the monetary judgment for attorney fees and resulting contempt proceedings against H&L and its principals, Heather and Jeff Holland. The record shows that H&L and the Hollands were having severe financial difficulties. Ultimately, H&L entered into a good-faith settlement agreement with plaintiffs on June 15, 2015. In lieu of injunctive relief, plaintiffs accepted $250,000 and granted H&L a full release "from any and all claims regarding nuisance and stormwater liability." The City did not object to the finding of good faith. The matter was then set for a tentative hearing "on remaining issues

as to the City" if plaintiffs and the City were unable to reach an agreement on injunctive relief.

¶ 13 A hearing was held on September 2, 2015. The parties submitted closing arguments. It is clear from H&L's closing arguments that H&L hired a new expert, Bryan Martindale, formerly of Hoelscher Engineering, to come up with a solution to the flooding. At the hearing, Martindale testified about three solutions he designed to solve the flooding on plaintiffs' land, with "Alternative 2" being the most cost effective solution. Plaintiffs no longer wanted the solution submitted in the "Hoelscher Report," but now asked "that the City retain Hoelscher Engineering or another qualified water resources engineering firm to complete the design plans and all engineering support documentation required to implement the solution identified as 'Alternative 2.' "

¶ 14 On October 13, 2015, this court entered an order concerning plaintiffs' cross-appeal in which we explained that on May 12, 2015, we entered a partial dismissal order of the appeal, but the cross-appeal still remained. However, plaintiffs had since filed a motion to dismiss the cross-appeal. We, therefore, granted plaintiffs' motion and dismissed the cross-appeal.

¶ 15 On September 15, 2016, the trial court entered a final order from which plaintiffs now appeal. The trial court acknowledged the long history of the case, our finding that the circuit court's order "*may* have been against the manifest weight of the evidence" (emphasis added), and our directives to take additional testimony as to the status of the flooding and further develop the issue of governmental immunity. The trial court noted that no additional evidence as to the status of the flooding was presented and highlighted

its April 8, 2014, order in which it found that H&L violated Ordinance 3054, created a private nuisance, and ordered H&L to perform remedial work to fix the problem.

¶ 16 The trial court pointed out that its order made no finding of liability as to the City and reiterated that the City could not be liable for damages, but only *possible* injunctive relief. The trial court also pointed out that it specifically rejected plaintiffs' proposed order containing a finding that the City created and maintained a nuisance. It noted the appeal and cross-appeal of its order and plaintiffs' eventual settlement with H&L for $250,000. The trial court then reflected on the hearing which it held on the remaining issues, stating "[t]here was a wide disparity in what the parties believed remained" and that plaintiffs turned their "sights on the City," presenting evidence from Bryan Martindale, a registered professional engineer, who participated in the "Hoelscher plans," but now criticized that plan "and came up with a new scheme to alleviate the flooding." The trial court found the City was not liable because it does not own or control the land or the drainage structures prior to the 30-inch main under Cambridge Boulevard.

¶ 17 The trial court further found (1) that the City has no duty to inspect or maintain a private drainage system, (2) that H&L, not the City, created this situation, but has since been released from the lawsuit, and (3) that there was no way to impose liability on the City where the stormwater was first diverted by H&L. The trial court declared its order of April 8, 2014, as the final judgment in the matter and held that no issues remain with respect to the City. Accordingly, the trial court dismissed the case against the City with prejudice and ordered each party to bear its own costs. Plaintiffs filed a timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 Plaintiffs raise five alleged errors in the trial court's findings. Plaintiffs specifically allege the trial court erred in (1) denying injunctive relief against the City, (2) finding in favor of the City and against plaintiffs on the issue of liability, (3) finding no way to impose liability on the City because the stormwater was first diverted by H&L, and (4) failing to find that the City created and maintained a continuing nuisance of plaintiffs' property. Plaintiffs also contend the trial court abused its discretion in finding the evidence insufficient to prove the flooding was caused by the City. Plaintiffs insist that their acceptance of the settlement with H&L presumed an injunction against the City would follow and that it is outrageous that the City is completely free from liability while the flooding continues. Plaintiffs argue the evidence is uncontroverted that the City is causing the flooding and the need for injunctive relief was proven and is the only legal solution to the longstanding flooding issue. We agree with the City, however, that H&L is the real culprit, as the City did not create the nuisance, nor is the City an adjacent dominant landowner. Moreover, while we are not completely unsympathetic to plaintiffs' plight, equity simply does not require the City to engage in the vague and costly injunctive relief demanded by plaintiffs.

¶ 20 The decision to grant or deny injunctive relief is committed to the sound discretion of the trial court, and its decision will not be disturbed on review absent an abuse of that discretion. *Gerber v. Hamilton*, 276 Ill. App. 3d 1091, 1093 (1995). The test for determining whether the trial court abused its discretion is whether the trial court's decision is against to the manifest weight of the evidence. *Id.* A trial court's judgment is

against the manifest weight of the evidence only if the opposite result is clearly evident. *Id.*

¶ 21 In *Adcock I*, we found the record "replete with evidence and testimony that the stormwater system does not function as promised." *Adcock I*, 2012 IL App (5th) 100484-U, ¶ 23. However, contrary to plaintiffs' assertions, we made no finding as to liability against the City. We found that the trial court erred in finding insufficient evidence that the nuisance action was due to new and different water collection than what had previously occurred on plaintiffs' property and that the trial court's ruling *may* be against the manifest weight of the evidence. We reversed and remanded for further proceedings consistent with our order.

¶ 22 On remand, the trial court entered an order finding that H&L was not in compliance with Ordinance 3054 and that H&L maintained and continued to maintain a private nuisance. The trial court ordered H&L to comply with all aspects of Ordinance 3054, take several remedial actions to attempt to alleviate the flooding, pay stipulated damages of $5000, begin implementation of the engineering solution proposed in the Hoelscher Report, and pay approximately $230,000 in accrued attorney fees. However, the trial court specifically rejected plaintiffs' proposed order which asked for a finding that the City created or maintained a nuisance and a request to enter injunctive relief only against the City.

¶ 23 After it became clear that H&L and its president, Jeff Holland, were in severe financial trouble likely resulting in bankruptcy, plaintiffs settled with H&L for $250,000. The trial court approved the good-faith settlement and allowed dismissal with prejudice

in favor of H&L. However, as the City points out, it was plaintiffs, not the trial court, who gave H&L a full release from liability and injunctive relief after receiving the $250,000 settlement. We also agree with the City that even if H&L filed for bankruptcy protection, a bankruptcy trustee may have found a way to make it possible for plaintiffs to pay for the injunctive remedy they seek. But we will never know because plaintiffs not only settled, but also granted H&L a full release.

¶ 24 While plaintiffs may have believed the City would be on the hook for the injunctive relief they desire, there is nothing in the record to show that was how the case would be resolved. To the contrary, the trial court specifically rejected plaintiffs' proposed order containing a finding that the City created and maintained a nuisance. The trial court's ultimate refusal to order injunctive relief against the City should not have come as a shock to plaintiffs, and we find their outrage in this appeal is not justified. Plaintiffs had an enforceable, final judgment against the developer, H&L, but plaintiffs released H&L from that judgment. Plaintiffs' acceptance of $250,000 from H&L in exchange for a full release of liability ultimately sealed their fate.

¶ 25 We are aware of the longstanding Illinois common law of drainage which holds that the servient (lower) property "is not obligated to receive surface water in different quantities or at different times than would come" naturally from the dominant (higher) property. *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill. App. 3d 560, 574 (2004). However, over time, this rule has been modified to recognize the necessity of permitting some development of the higher property. While this modification began as a "good husbandry" exception applicable in agricultural settings, it has been extended to urban

settings. See *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 28 (citing *Templeton v. Huss*, 57 Ill. 2d 134, 141 (1974)). Accordingly, the modern legal standard applied in drainage cases is a reasonableness standard that balances the benefit of the dominant property against the harm to the servient property:

> "In other words, to what extent does the change in the natural flow of surface water benefit the higher land and harm the lower land, and is this balance of harm and benefit equitable? In addressing those questions, the trier of fact may consider the following factors ***: (1) the extent of the harm, (2) the character of the harm, (3) the social value that the law attaches to the use or enjoyment invaded, (4) the suitability of that use or enjoyment to the character of the locality, (5) the burden on the servient estate of avoiding the harm, and (6) the usefulness of the development of the dominant estate." *Id.* ¶ 29.

Furthermore, where the defendant in a drainage case is a municipality, it has obligations to promote the health, welfare, and safety of the entire public it serves, and the actions it takes to fulfill those obligations qualify as actions to "use" or "develop" the territory it encompasses. *Smith v. City of Woodstock*, 17 Ill. App. 3d 948, 955 (1974).

¶ 26 Courts regularly apply the balancing test to suits arising from municipal actions that are alleged to have increased the flow on certain parcels. See, *e.g.*, *Dovin v. Winfield Township*, 164 Ill. App. 3d 326, 336 (1987) (applying the balancing test where city's street improvement was alleged to have caused a nuisance and trespass through increased flow of water onto the plaintiff's property); *Smith*, 17 Ill. App. 3d at 955 (applying the balancing test where the defendant city's operation of a disposal plant and proposed

construction of a storm drain were alleged to unreasonably alter the flow of water on the plaintiffs' land).

¶ 27 In the instant case, contrary to plaintiffs' assertions, the City did not create the nuisance—H&L did by developing condominiums. We first point out that the City worked with plaintiffs and H&L to resolve the flooding issues, ultimately passing Ordinance 3054; however, plaintiffs no longer believe the requirements set forth in Ordinance 3054, such as specifications as to the height of a berm surrounding a detention basin, will solve their flooding problems.

¶ 28 Second, there is no evidence in the record that the City is an adjacent, dominant landowner. The City owns the 30-inch pipe that runs under Cambridge Boulevard, but the detention pond, the 24-inch pipe, and the other inlets into the 30-inch pipe are on private property.

¶ 29 Third, there is no showing in the record that the remedial work requested by plaintiffs will correct the flooding problems associated with plaintiffs' land. By all accounts, plaintiffs' land is the lowest lying in the area, and even before development, water flowed naturally onto plaintiffs' land and caused flooding. The trial court saw a video filmed in July 2001 showing Mr. Adcock standing on his land with water rushing over his boots. This was well before the 84-unit condominium project was even started. During the six-day trial conducted in December 2009 and January 2010, Gary Hoelscher, an independent engineer hired by the City to study the cause of the new flooding, testified about a solution to convey water to Route 50 and suggested remedial actions to correct flooding in what is known as the "Hoelscher Report." However, by September 2015,

plaintiffs rejected the measures in the "Hoelscher Report" and advocated for a solution proposed by Bryan Martindale, plaintiffs' new expert. Plaintiffs hired Martindale after they settled with H&L.

¶ 30 Essentially, plaintiffs no longer want the remedial actions to prevent flooding set forth in the Hoelscher Report, but are pushing one of three solutions espoused by Martindale. In addition to the $250,000 settlement plaintiffs obtained from H&L, plaintiffs want the City to be forced to stop their land from flooding. Unfortunately, given the record before us, it is not even clear if there is a solution to the flooding, especially in light of the low-lying nature of plaintiffs' land and the fact that water naturally drains to the lowest area.

¶ 31 Plaintiffs admit in their brief that none of their proposed solutions will meet the 100-year storm event requirement. And the record fails to show with any real certainty what Alternative 2 would cost to implement. After considering the circumstances presented here and the balancing of the equities of the parties, we cannot say the trial court abused its discretion denying injunctive relief in favor of plaintiffs and against the City. Nor can we say that the trial court's judgment was against the manifest weight of the evidence.

¶ 32 The standard of review in a bench trial is whether the judgment is against the manifest weight of the evidence. *Green v. Papa*, 2014 IL App (5th) 130029, ¶ 32. A judgment is only against the manifest weight of the evidence if the opposite conclusion is clearly apparent or if the findings appear unreasonable, arbitrary, or not based upon the

evidence. *Id.* In the instant case, there is ample evidence that the City did not cause or create the flooding on plaintiffs' property.

¶ 33 The property flooded before construction of the condominiums; it continues to flood. The trial court visited the site during the six-day trial conducted in December 2009 and January 2010; therefore, the trial court has a better understanding of the topography of plaintiffs' land and the surrounding development than we do. While we previously determined that new flooding occurred after construction of the condominiums, we made no findings as to who was responsible for the new flooding.

¶ 34 Upon remand, the trial court found that H&L violated City Ordinance 3054, which was enacted specifically to resolve the new flooding, and found that H&L "created and maintained a private nuisance." The trial court entered an injunction against H&L and ordered H&L to implement the remedial work found in the Hoelscher Report. The trial court specifically rejected finding the City created or maintained a nuisance. While the City owns the 30-inch pipe under Cambridge Boulevard, it does not own the 24-inch pipes that are diverting the water. Moreover, while plaintiffs attempt to establish the City's liability through a detention pond known as "Hubbard Pond," there is no evidence that the City owns Hubbard pond, nor is Hubbard Pond even adjacent to plaintiffs' property. It lies approximately 1000 feet to the south.

¶ 35 We have carefully considered the issues raised by plaintiffs; however, plaintiffs have failed to convince us that any of the trial court's findings in favor of the City and against plaintiffs were in error. The evidence presented to the trial court amply supports the trial court's findings. H&L is the party that created the new flooding problems and the

party that violated Ordinance 3054. The trial court ordered H&L to perform remedial work to stop the flooding. Plaintiffs chose to settle with H&L and give H&L a full release in exchange for $250,000. Plaintiffs have failed to convince us that the City should now bear the burden of fixing plaintiffs' flooding issues, especially where the record fails to show with any certainty what the solution should be.

¶ 36 CONCLUSION

¶ 37 After considering the facts and circumstances of this case, we cannot say the trial court's decision is against the manifest weight of the evidence because the opposite conclusion is not apparent nor do the trial court's findings appear unreasonable, arbitrary, or not based upon the evidence. Accordingly, we affirm the judgment of the circuit court in favor of the City and against plaintiffs. The trial court properly dismissed the action against the City with prejudice. As the trial court stated in its judgment order, the trial court's order of April 8, 2014, is the final judgment in this matter. Because H&L settled with plaintiffs and was fully released, no further issues remain with respect to either H&L or the City.

¶ 38 Affirmed.