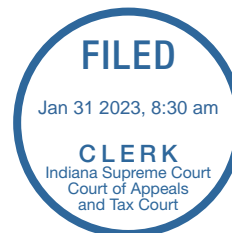


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as binding precedent, but it may be cited for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

David E. Dearing
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Dane A. Mize
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Joyce Marie Clark,
Appellant-Plaintiff,

v.

Thessalonica, Inc.,
Appellee-Defendant.

January 31, 2023

Court of Appeals Case No.
22A-PL-1254

Appeal from the Marion Superior
Court

The Honorable Heather A. Welch,
Judge

The Honorable Jeffrey L. Marchal,
Magistrate

Trial Court Cause No.
49D01-1707-PL-26927

Altice, Chief Judge.

Case Summary

- [1] Landowner Joyce Marie Clark filed a complaint against Thessalonica, Inc., a neighboring property owner and developer, alleging civil and criminal trespass,

negligence, and nuisance. Clark's claims were based on land surveyors entering her property at Thessalonica's direction and Thessalonica collecting and casting water on her property. Clark appeals the trial court's grant of Thessalonica's motion for partial summary judgment on several of the trespass claims.

[2] We affirm in part, reverse in part, and remand.

Facts & Procedural History

[3] Clark owns a parcel of property off Southport Road in Indianapolis, which she purchased in 1975. In 2015, Thessalonica acquired property immediately to the north of Clark's property that was and is being developed as a residential subdivision called Glen Ridge Estates. At the time of Thessalonica's purchase, there was an existing drainage system that the former owner and developer, Glen Brizendine, had constructed in 2008, including a man-made ditch that collected surface water and directed it in a concentrated flow toward Clark's property. In July 2016, Thessalonica covered the ditch and re-routed the flow of water to a new retention pond, from which water is discharged through a pipe onto Clark's property. Thessalonica received approval from the City of Indianapolis Department of Code Enforcement (the City) in July 2016 for the Glen Ridge Estates stormwater drainage system.

[4] According to Clark, Thessalonica contacted her and her son, Cameron, in November and December 2016, inquiring about her interest in selling a drainage easement to Thessalonica; Clark declined to sell an easement but expressed willingness to consider an offer to purchase her property. On

December 21 and 22, 2016, a survey crew from Northpointe Surveyors (the Surveyors) entered Clark's property, at Thessalonica's direction, and collected topographic data. They placed some orange flags on the property in certain locations. Clark did not personally see the Surveyors on her property on December 21, but saw them on December 22, at which time her son, Keegan, went out to the property, reminded the Surveyors that they were on private property, and asked them to leave. The Surveyors refused to leave until a neighbor, who is a policeman, came over and spoke to them at Clark's request. During the December 22 encounter, the Surveyors mentioned to Keegan that they had been on the property the day prior as well.

[5] Clark hired an environmental consultant, John Mundell of Mundell & Associates, who prepared a preliminary report in May 2018, a full report in December 2019, and an addendum in February 2020 concerning the drainage of surface water from Glen Ridge Estates onto Clark's property. The full report and addendum included a review of the City's 2016 approval of the drainage system. Mundell concluded that the design or construction of Thessalonica's drainage project was faulty and caused damage to Clark's property and that the documents Thessalonica submitted to the City were missing details and contained incorrect analyses. Each of Mundell's reports was forwarded to Thessalonica.

[6] On July 11, 2017, Clark filed a complaint against Thessalonica,¹ amended on March 31, 2021, alleging (1) civil trespass stemming from the Surveyors entering on her property without permission and from the casting of water in a concentrated flow onto her property; (2) recovery of treble damages and attorney’s fees under Ind. Code § 34-24-3-1 caused by criminal trespass as related to the Surveyors and to the casting of water; (3) negligence for designing and implementing a drainage system that resulted in the discharge of excess amounts of water onto her property; and (4) creation of a nuisance that limited the use of her property and lowered its fair market value.

[7] On March 24, 2022, Thessalonica filed a motion for partial summary judgment on Clark’s claims for civil and criminal trespass as they relate to the presence of the Surveyors on her property, arguing that (1) Ind. Code § 25-21.5-9-7(b) allows a land surveyor to enter upon property for the limited purpose of land surveying, and (2) Clark suffered no pecuniary loss as a result of the Surveyors’ presence on her property. Thessalonica also sought summary judgment on Clark’s claim for criminal trespass as it related to the collecting and casting of water in a concentrated flow, arguing that the criminal trespass statute “is intended to apply to a ‘person’ who ‘enters’ on the real property of another” without authorization, not the collecting and casting of water.² *Appendix* at 68.

¹ Clark also named as a defendant GR Phase 2 HOA, Inc., to whom Thessalonica had deeded part of its property in 2017. GR Phase 2 HOA does not participate in this appeal.

² Thessalonica did not seek summary judgment on Clark’s claim for *civil* trespass related to the collecting and casting of water on her property.

In support of its motion for summary judgment, Thessalonica designated Clark's complaint, Clark's answers to interrogatories, and excerpts from her deposition and that of an individual named Neil Marcus.³

[8] On April 24, 2022, Clark filed her response to Thessalonica's motion. As to Thessalonica's arguments regarding the Surveyors, Clark argued that (1) Thessalonica was not shielded from liability under I.C. § 25-21.5-9-7(b) because the Surveyors failed to provide identification to Clark as required by subsection 8(a) of that statute, and (2) although she "ha[d] not yet identified" out-of-pocket expenses related to the Surveyors' actions, Thessalonica "cannot obtain summary judgment merely by showing that [she] lacks evidence of an essential element of her claim." *Appendix* at 78-79. As to Thessalonica's assertion that collecting and casting water does not constitute criminal trespass, Clark argued that knowingly or intentionally interfering with possession or use of one's property without that person's consent can constitute criminal trespass. In support of her response, Clark designated her original and amended complaints, and the sworn declarations of Mundell and Cameron.

[9] Thessalonica filed a reply on May 9. A week later, the trial court issued an order summarily granting Thessalonica's motion for partial summary judgment on Clark's claims for civil and criminal trespass based on the presence of the Surveyors on her property and on her claim for criminal trespass for casting

³ The included excerpts from Marcus's deposition do not identify his position or association with Clark or Thessalonica, but he testified to aspects of the city's approval of Thessalonica's drainage plans.

water on her property.⁴ Clark filed a motion to correct error, which the trial court denied. Clark now appeals.⁵ Additional facts will be provided as needed.

Discussion & Decision

[10] This court reviews grants or denials of summary judgment de novo, applying the same standard as the trial court. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012). The moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Id.* (quotation omitted). If the movant succeeds in doing so, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* In determining whether summary judgment is proper, the reviewing court considers only the evidentiary matter the parties have specifically designated to the trial court. *See* Ind. Trial Rule 56(C), (H). And we construe all factual inferences in the non-moving party's favor and resolve all doubts as to the existence of a material issue against the moving party. *Kroger Co. v. WC Assoc., LLC*, 967 N.E.2d 29, 34 (Ind. Ct. App. 2012), *trans. denied*. A summary judgment determination is

⁴ Clark argues that, in granting summary judgment on Count I (civil trespass), the trial court erred because it “failed to specify that its ruling pertained only to the actions of the surveyors.” *Appellant’s Brief* at 12. We agree that the court’s order could have been more specific as to what was included or excluded. However, given that Thessalonica’s motion did not seek summary judgment for the claim of civil trespass based on the casting of water, we do not find that remand is necessary for clarification that said claim was not part of the summary judgment order.

⁵ The trial court certified the order as a final judgment as to some but fewer than all claims under Ind. Trial Rule 54(B), expressly stating that “[t]here being no just reason for delay, this Judgment is final and appealable.” *Appendix* at 17. The order is thus a final judgment over which we have jurisdiction. Ind. Appellate Rules 2(H)(2), 5(A).

clothed with a presumption of validity on appeal, and the appellant bears the burden to show the trial court erred. *Dyer v. Hall*, 928 N.E.2d 273, 276 (Ind. Ct. App. 2010), *trans. denied*. However, we carefully review decisions on summary judgment to ensure that the parties are not improperly denied their day in court. *KB Home Indiana Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 303 (Ind. Ct. App. 2010).

Count I - Civil Trespass for Surveyors on Property

[11] Thessalonica moved for summary judgment on the portion of Count I of Clark’s complaint that alleged Surveyors “committed a civil trespass” when they entered the Clark property without permission and that Thessalonica “is legally responsible” for said trespass. *Appendix* at 29. We have held that to show common law civil trespass, “it is necessary for the plaintiff to prove only that he was in possession of the land and that the defendant entered thereon without right.” *Dyer*, 928 N.E.2d at 280 (quoting *Hawke v. Maus*, 141 Ind.App. 126, 131, 226 N.E.2d 713, 717 (1967)), *trans. denied*. If the plaintiff proves both of those elements, he is entitled to nominal damages without proof of injury. *Ind. Mich. Power Co. v. Runge*, 717 N.E.2d 216, 227 (Ind. Ct. App. 1999). This is so because “trespass actions are possessory actions and [] the right interfered with is the plaintiff’s right to the exclusive possession of a chattel of land.” *Id.* “[U]pon additional proof of injury to products of the soil, the plaintiff is entitled to compensatory damages.” *Dyer*, 928 N.E.2d at 280; *see also Sigsbee v. Swathwood*, 419 N.E.2d 789, 799 (Ind. Ct. App. 1981) (“If the plaintiff proves

additional injury, proximately caused by the trespass, the plaintiff is entitled to compensatory damages.”).

[12] Thessalonica argues that the Surveyors were permitted by statute to enter Clark’s property for the purpose of land surveying and, thus, they did not enter her property “without right” as required for civil trespass. We agree.

[13] I.C. § 25-21.5-9-7(b) provides:

(b) Subject to section 8 of this chapter and except as provided in subsection (c), *a land surveyor* and any personnel under the supervision of a land surveyor *may enter upon, over, or under any land, water, or property within Indiana for the limited purpose of the practice of land surveying.* The land surveyor and any personnel under the supervision of the land surveyor may not interfere with any construction, operation, or maintenance activity being conducted upon the land, water, or property by the owner or occupant.

(Emphases added). Based on Clark’s amended complaint and her designated testimony, the Surveyors “collected topographical data” and placed some flagged stakes on her property, but took no action unrelated to the practice of land surveying. *Appendix* at 27-28.

[14] Clark suggests that the surveyors lost any protection provided by I.C. § 25-21.5-9-7(b) because they failed to first present identification. Her argument is based upon subsection 8(a), which states:

(a) To the extent practicable, before entering upon, over, or under any land, water, or property under section 7 of this chapter, a

land surveyor and any personnel under the supervision of a land surveyor shall present written identification to the occupant of the land, water, or property.

Clark argues that, based on this language, our legislature “clearly indicated that a surveyor must comply with section 8(a) in order to exercise a right of entry under section 7.” *Appellant’s Brief* at 14. We disagree and are not persuaded that failure to show identification negates the protection afforded to a land surveyor by subsection 7(b).

[15] In reaching that decision, we examine subsection 8(b) which addresses the liability of a land surveyor and states:

(b) A land surveyor and any personnel under the supervision of a land surveyor *is liable for any damage that may occur to the land, water, or property as a result of entry upon, over, or under the land, water, or property under section 7* of this chapter.

(Emphases added.) These statutes, when read together, reveal that showing identification does not shield a surveyor from liability for damage caused while on the property and neither does failing to show identification constitute damage or create a cause of action. Accordingly, Thessalonica was entitled to summary judgment on Clark’s civil trespass claim stemming from the Surveyors entering her property and performing land surveying thereon.

Count II – Criminal Trespass

[16] Clark’s second claim for relief, titled “Pecuniary Loss Due to Property Offense,” is brought under Ind. Code § 34-24-3-1, which carries the same title.

That statute, known as the Crime Victims Relief Act (the Act), provides that a person who “suffers a pecuniary loss” as a result of a violation of various listed criminal offenses, including criminal trespass, “may bring a civil action against the person who caused the loss” for treble damages, costs, and attorney’s fees. I.C. § 34-24-3-1. Unlike in a criminal trial, a claimant need prove by only a preponderance of the evidence that the defendant committed the criminal act. *CT102 LLC v. Auto. Fin. Corp.*, 175 N.E.3d 869, 873 (Ind. Ct. App. 2021). A conviction is not a condition precedent to recovery in a civil action brought under the Act, but the claimant must prove all the elements of the criminal act. *Id.* at 873-74.

[17] Clark’s complaint alleged that criminal trespass occurred in two ways: by the Surveyors entering her land and by Thessalonica casting water onto her property. As discussed below, we conclude that Thessalonica was entitled to summary judgment on one basis but not the other.

a. Surveyors on Property

[18] I.C. § 35-43-2-2 includes several definitions of criminal trespass and includes circumstances in which a person knowingly or intentionally (1) enters real property of another person after having been denied entry by that person or her agent and (2) refuses to leave the real property of another person after having been asked to leave. I.C. §§ 35-43-2-2(b)(1), (2). Here, Clark alleges in her complaint that the Surveyors, knowingly or intentionally, both “entered the Clark property after having been denied entry” and “refused to leave the Clark property after [Clark]’s son told them to leave” and that, as a result of the

Surveyors' criminal trespass – for which Clark alleged Thessalonica was “legally responsible” – Clark “has suffered and continues to suffer pecuniary loss.” *Appendix* at 29-30.

[19] As an initial matter, we observe that there is no evidence, or indeed even any allegation, that the Surveyors entered “after having been denied entry.” *See* I.C. §35-43-2-2(b)(1). Rather, Clark’s claim is that “Thessalonica knew that [Clark] had not given permission for that entry.” *Appendix* at 29. Not having received prior approval is not necessarily the equivalent of being denied entry, and thus we decline to find that criminal trespass occurred on the ground that the Surveyors entered after having been denied permission to do so. *See Frazee v. Skees*, 30 N.E.3d 22, 40 (Ind. Ct. App. 2015) (recognizing that “having been denied entry” requires that a communication denying access precede entry on property).

[20] Turning to the other allegation – that the Surveyors refused to leave – we acknowledge that evidence was presented that the Surveyors did not immediately leave when Clark’s son confronted them and only did so after the neighbor policeman arrived and spoke to them. Assuming without deciding that this activity satisfied the criminal trespass threshold, we find that Clark is not entitled to recovery because she has shown no damages.

[21] I.C. § 34 -24-3-1 allows for recovery if a person “suffer[ed] a pecuniary loss” as a result of criminal trespass. The record reflects that Clark has not identified any pecuniary loss incurred as a result of the Surveyors entering upon her

property. The designated evidence established that the Surveyors placed some temporary flag markers into the ground and that they may have driven on the grass in a couple of places where they parked along the edge of the lane. Clark stated in her interrogatory answers that she had “not incurred any out-of-pocket expenses for repair or property damage to date.” *Appendix* at 35. To the extent that “to date” suggests that damage caused by the Surveyors has yet to be determined, we observe that Clark had over five years after their entry on her land and before summary judgment was filed to assess any damages.

[22] On the record before us, we find that Thessalonica was entitled to summary judgment on the portion of Count II that alleged criminal trespass related to the Surveyors on her property.

b. Thessalonica’s Collecting and Casting of Water

[23] We next turn to the second part of Count II, which alleges that Thessalonica “committed and continues to commit” criminal trespass by “knowingly and intentionally interfer[ing] with [Clark]’s possession or use of [her] Property without [her] consent . . . by collecting surface water and casting it on [her] Property in a concentrated flow.” *Id.* at 30.

[24] Thessalonica highlights that Clark’s pursuit of damages under I.C. § 34-24-3-1 requires violation of a penal statute, which must be strictly construed, and that Clark is required but has failed to prove by a preponderance of the evidence that Thessalonica committed criminal trespass. Thessalonica argues that “the plain language of the criminal trespass statute makes it clear that it is intended to

apply to a ‘person’ who ‘enters’ the real property of another” and that “[t]here is nothing in the language of the criminal trespass statute that encompasses a claim for water entering the property of another.” *Appellee’s Brief* at 17, 20. These arguments overlook other definitions of criminal trespass, including that a person who “knowingly or intentionally interferes with the possession or use of the property of another person without the person’s consent” commits criminal trespass. I.C. § 35-43-2-2(b)(4). We have recognized that “[t]he defendant in a trespass action need not have personally entered upon the plaintiff’s land, but may trespass by causing a thing to enter the land.” *Reed*, 980 N.E.2d at 294 (citing Restatement (Second) of Torts § 158 cmt. i (1965) (“in the absence of the possessor’s consent, ... it is an actionable trespass to throw rubbish on another’s land, even though he himself uses it as a dump heap”)); *see also Hartwig v. Brademas*, 424 N.E.2d 122 (Ind. Ct. App. 1981) (addressing a permanent injunction “prohibiting a continued trespass[] committed by disposing of water” onto the property of another). We are unconvinced by Thessalonica’s arguments that, as a matter of law, the casting of water onto another’s property may never constitute criminal trespass.

[25] Furthermore, in seeking summary judgment, Thessalonica designated portions of Clark’s interrogatory answers and deposition, wherein Clark was asked to identify any expenses she incurred as a result of the alleged wrongdoing. Clark answered, “I am currently unable to use the property for farming, ranching and/or development due to saturation and inundation of acreage. I have not yet calculated a monetary figure for that loss.” *Appendix* at 35. She also

testified in her deposition that “because of the water situation,” “if I wanted to sell, I wouldn’t be able to sell,” and “just enjoyed having the land” in its prior condition. *Id.* at 51. We recognize that Thessalonica designated evidence that Clark had not previously farmed the property and that development of the property had only progressed as far as discussing the idea with family.

However, that is not dispositive of whether or to what extent she suffered a loss due to water being cast upon her property. Indeed, Clark designated the sworn declarations of Cameron, who testified to “frequently” observing the drainage causing flooding on Clark’s property, and of Mundell, an engineer and geologist, who testified that Thessalonica’s drainage system was faulty and “damaged the Clark property.” *Appendix* at 99, 102. On this record, we find that genuine issues of material fact exist as to whether and how the casting of the concentrated flow of water has damaged Clark and, more specifically, what if any pecuniary loss she suffered.

[26] Further, we observe that, generally, intent is a question of fact under Indiana case law. *See e.g., Stone v. State*, 128 N.E.3d 475, 482 (Ind. Ct. App. 2019) (affirming denial of defendant’s Ind. Trial Rule 12(B)(6) motion to dismiss because his intent under harassment statute was “an open question of fact”), *trans. denied*. In this case, we find that questions of fact remain as to the *mens rea* element of the alleged criminal trespass, i.e., whether Thessalonica’s actions were done knowingly or intentionally as required for criminal trespass.

[27] For these reasons, we reverse the trial court’s grant of summary judgment to Thessalonica on the portion of Count II that alleges criminal trespass based on

the collecting and casting of water in a concentrated flow onto Clark's property, and we remand to the trial court for further proceedings on that claim along with Clark's other pending claims.

[28] Judgment affirmed in part, reversed in part, and remanded.

Brown, J. and Tavitas, J., concur.