MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

James A. Haddix and Rebecca A. Haddix,

Appellants-Plaintiffs,

v.

Richard Klink, Trustee of the Restatement of the Revocable Trust Agreement of 2/15/1993 by Richard Klink, dated 3/18/2020, an undivided one-half interest, and Janet E. Klink, Trustee of the Restatement of the Revocable Trust Agreement of 2/15/1993 by Janet E. Klink, dated 3/18/2020, an undivided one-half interest,

Appellees-Defendants

July 29, 2022

Court of Appeals Case No. 22A-CT-145

Appeal from the Steuben Superior Court

The Honorable William C. Fee, Judge

Trial Court Cause No. 76D01-2005-CT-177

Crone, Judge.

Case Summary

[1] James A. Haddix and Rebecca A. Haddix sought an injunction against their neighbors, Richard Klink and Janet E. Klink, alleging that they were suffering water damage to their property as a result of improvements made to the Klinks' property. The Klinks moved for summary judgment, which the trial court granted on the basis that the Haddixes' claims are foreclosed by the common enemy doctrine. The Haddixes now appeal, arguing that a genuine issue of material fact exists regarding the doctrine's applicability. We agree, and therefore we reverse and remand.

Facts and Procedural History

[2] The Haddixes purchased their home in a rural area in Angola in 1977. At that time, a swamp was located on an adjoining parcel to the east, which was purchased by the Klinks in the early 1990s. At some point, the Klinks constructed a lake on the swamp site.

[3] In May 2020, the Haddixes filed a complaint for nuisance and trespass alleging that the Klinks' lake had "repeatedly overflowed, spilling water upon [the Haddixes'] home, and personal property, otherwise frequently making [the Haddixes'] home, and premises uninhabitable." Appellants' App. Vol. 2 at 13. The complaint also alleged that the Klinks had "failed to install appropriate drainage from [the lake], thereby routinely flooding [the Haddixes'] property, structures, and washing out [the Haddixes'] driveway." *Id.* The Haddixes

requested "a temporary and permanent injunction against [the Klinks], associated with the drainage and overflow of water." *Id.*

[4] In March 2021, the Klinks filed a motion for summary judgment asserting that they "are immune from any liability under Indiana's common enemy doctrine." *Id.* at 29. In support of their motion, the Klinks designated portions of James Haddix's December 2020 deposition. The Haddixes filed a response to the motion, in support of which they designated the entire deposition, among other items.[1] During the deposition, James testified that when the lake was being constructed, Richard Klink installed a drain tile that runs "downhill" to a drain just to the east of the Haddixes' property. *Id.* at 74. The lake is "higher than what the original swamp was[,]" and both the lake and the drain are above the Haddixes' "ground level[.]" *Id.* at 91, 74.

[5] James testified that during the summer of 2019, three similar incidents of "heavy rain" (i.e., "three inches in a relatively short amount of time") that occurred "weeks to months apart" caused the drain to overflow and "flood[ed] all [his] low ground clear up to including, like, five or six inches up the side of [his] garage and went down and washed out [his] driveway quite severely." *Id.* at 77, 86, 78. "[F]or long periods of time, the water was standing [in his yard] so [he] could not mow it." *Id.* at 86. James believed that the flooding was

[1] The Klinks filed a motion to strike some of those other items, which the trial court denied. The Klinks question the propriety of this ruling in a footnote in their brief, but we need not address it here because those items played no part in our decision.

caused not by the lake overflowing, but by the drain tile "not being able to move water fast enough." *Id*. at 93. He had no problems "even with heavy rain prior to the lake being installed[.]" *Id*. at 104.

[6] In December 2021, after a hearing, the trial court issued an order granting the Klinks' summary judgment motion that reads in pertinent part as follows:

> [T]he [Haddixes] have not shown a connection between their designated evidence and actionable flooding of [the Haddixes'] property by [the Klinks]. The [Haddixes] assert that flooding was caused by the [Klinks'] creation of a watercourse diverting water from the [Klinks'] newly created pond. However, their designated evidence does not support such an inference. If anything, it tends to show any such flooding was caused by surface water. As such, it is not actionable under the "common enemy doctrine."

Appealed Order at 1. This appeal ensued.

Discussion and Decision

[7] The Haddixes contend that the trial court erred in granting the Klinks' summary judgment motion based on the common enemy doctrine. "We review such rulings de novo." *Bah v. Mac's Convenience Stores, LLC*, 37 N.E.3d 539, 546 (Ind. Ct. App. 2015), *trans. denied* (2016). "Pursuant to Indiana Trial Rule 56(C), a summary judgment movant must make 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*. "If the movant satisfies this burden, 'the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating

the existence of a genuine issue for trial.'" *Id*. (quoting *Morris v. Crain*, 969 N.E.2d 119, 124 (Ind. Ct. App. 2012)). "We must construe all evidence and resolve all doubts in favor of the non-moving party, so as to avoid improperly denying that party's day in court." *Id*. (quoting *Prancik v. Oak Hill United Sch. Corp.*, 997 N.E.2d 401, 403 (Ind. Ct. App. 2013), *trans. denied* (2014)). "The party that lost in the trial court has the burden of persuading the appellate court that the trial court erred. Our review of a summary judgment motion is limited to those materials designated to the trial court." *Id*. (quoting *City of Bloomington v. Underwood*, 995 N.E.2d 640, 644 (Ind. Ct. App. 2013), *trans. denied* (2014)).

[8] The common enemy doctrine arises in cases involving the drainage of surface water, which has been defined as "[w]ater from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel …." *Kramer v. Rager*, 441 N.E.2d 700, 705 (Ind. Ct. App. 1982) (quoting *Capes v. Barger*, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953)). "In its most simplistic and pure form[,]" the doctrine "declares that surface water which does not flow in defined channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience." *Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982). "Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever." *Id*.

> Thus, under the common enemy doctrine of water diversion, 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 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 Inv., Inc., 736 N.E.2d 333, 339 (Ind. Ct. App. 2000).

[9] "The common enemy doctrine applies regardless of the form of action brought by the plaintiff, that is, regardless of whether the plaintiff asserts his claims as an action for negligence, trespass, or nuisance." *Id*. "The only limitation on the common enemy doctrine that has thus far been recognized is that 'one may not collect or concentrate surface water and cast it, in a body, upon his neighbor.'" *Id*. (quoting *Argyelan*, 435 N.E.2d at 976); *see also Samples v. Wilson*, 12 N.E.3d 946, 950 (Ind. Ct. App. 2014) ("An exception to the common enemy doctrine exists where an owner of land has, by artificial means, thrown or cast water onto his neighbor in unusual quantities so as to amplify the force at a given point or points.") (citing *Argyelan*, 435 N.E.2d at 976). Or, as stated more elaborately in *Gene B. Glick Co. v. Marion Construction Corp.*,

> While the owner of upper or higher land may make such drains on his land as are required by good husbandry and the proper improvement of the surface of the ground, and such as may be discharged into natural channels without inflicting unnecessary injury on the adjacent owner, the right of the upper landowner to discharge surface water on the lower land is a right of flowage only in the natural ways and in natural quantities, and he may not alter the natural conditions so as to change the course of the

> water, or concentrate it at a particular point, or by artificial means increase its volume. Accordingly, an upper landowner may not, by a channel, sewer, ditch, or drain, collect or concentrate the surface water and cast it on the lands of the lower proprietor, *either intentionally or negligently*, without incurring liability for the damages caused thereby.

165 Ind. App. 72, 78-79, 331 N.E.2d 26, 31 (1975) (emphasis added) (quoting *Smith v. Atkinson*, 133 Ind. App. 430, 433, 180 N.E.2d 542, 543 (1962)).[2]

[10] "Whether surface water is collected and cast upon neighboring land as a body or collected but diffused before entering neighboring property will be largely a question of fact." *Bulldog Battery Corp.*, 736 N.E.2d at 340. The Haddixes assert that a question of fact exists here, and we agree. Construed most favorably to the Haddixes as the non-moving parties, the designated evidence establishes that heavy rains that fell on the Klinks' property were collected and concentrated in their drainage system, which cast the surface water on the Haddixes' property through the overwhelmed drain with sufficient force and volume to wash away their driveway.[3] The Klinks claim that "[i]f no drain tile had been installed, it is clear that the area would naturally flood due to the

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[2] The Klinks incorrectly suggest that a landowner may be liable for the casting of surface water only if the casting is intentional. Appellees' Br. at 15.

[3] Because the drain was not separated from the Haddixes' property by a protective curb or berm, we are unpersuaded by the Klinks' reliance on *Argyelan*, in which the court essentially concluded that, based on the evidence presented at trial, concrete curbing sufficiently diffused any surface water from the defendants' downspouts that "eventually flow[ed] over" the curbing onto the plaintiffs' property. 435 N.E.2d at 975. *See id.* at 976 ("There is simply no evidence that any surface water was ever channeled from Defendants' land onto that of the plaintiffs or cast in a body upon them.… That water was once impounded or channeled can be of no moment if it is diffused to a general flow at the point of entering the adjoining land.").

surface water caused by the heavy rain[,]" Appellees' Br. at 15, but this is pure speculation. Accordingly, we reverse the trial court's grant of summary judgment for the Klinks and remand for further proceedings.[4]

[11] Reversed and remanded.

Vaidik, J., and Altice, J., concur.

[4] We decline the Haddixes' request to invite our supreme court to repeal the common enemy doctrine. The court affirmed its commitment to the doctrine in *Argyelan* in no uncertain terms.