MEMORANDUM DECISION

ATTORNEY FOR APPELLANTS

Andrew K. Porter
Feavel & Porter, LLP
Vincennes, Indiana

ATTORNEYS FOR APPELLEES

Maurice E. Doll
Aaron D. Doll
Doll & Sievers Attorneys at Law LLC
Vincennes, Indiana

IN THE COURT OF APPEALS OF INDIANA

Knox County Board of Commissioners, et al.,

Appellants-Defendants,

v.

Cynthia S. Frey, et al.

Appellees-Plaintiffs.

June 4, 2021

Court of Appeals Case No. 20A-PL-1812

Appeal from the Knox Superior Court

The Honorable Dean A. Sobecki, Special Judge

Trial Court Cause No. 42D01-1512-PL-46

Bailey, Judge.

Case Summary

[1] Knox County farmers Mark Frey, Sandra Frey, Michael Frey, and Cynthia Frey ("the Freys") filed a complaint to compel maintenance of the Vieck Ditch drainage system ("the Ditch"), alleging that they had suffered crop loss from flooding, and naming as defendants the Vieck Ditch Association ("the VDA"), three directors of the VDA, in their official capacities, the Knox County Drainage Board ("the Drainage Board"), the Knox County Highway Department ("the Highway Department"), and the Knox County Board of Commissioners ("the County Board"). The trial court mandated that the Highway Department comply with Indiana Code Section 36-9-27-71 by performing hydrological studies for three culvert locations. The trial court also awarded the Freys costs pursuant to Indiana Code Section 34-27-3-3(b), which provides for costs corresponding to a judicial mandate, and attorney's fees pursuant to Indiana Code Section 34-52-1-1, which sets forth a general recovery rule. The Drainage Board and Highway Department ("the Appellants") appeal those orders. We reverse.

Issues

[2] The Appellants articulate five issues for review, which we consolidate and restate as the following two issues:

I. Whether Indiana Code Section 36-9-27-71 is amenable to a judicial mandate; and

II. Whether the award of costs and attorney's fees is erroneous.

Facts and Procedural History

[3] Since the mid-1800s, members of the Frey family have farmed land located in Knox County, growing corn, wheat, and soybeans. In 1930, a court order established the Ditch as a regulated drain, extending fifty-two miles and providing for drainage of water from the Frey farms and several others. Properties served by the Ditch are assessed costs payable to the VDA, which is a private association managed by elected directors. The VDA is responsible for maintenance, performed according to its internal schedule, and the Drainage Board is responsible for ditch construction or reconstruction. The Highway Department, as the entity maintaining public crossings, shares responsibility for alteration or constructions of drains at those crossings.

[4] In the past decade, the Freys observed rapid water flows onto their property. Intermittently, perhaps twice yearly, crop fields would flood. Because standing water threatened or reduced the crop production, the Freys began to investigate the conditions in the Ditch and report their observations to the VDA. The Freys came to believe that, apart from changes in water flow attributable to the expansion of Highway 41 in the City of Vincennes, an increased volume of water was cast upon their farms because of lack of maintenance, undesirable replacement of bridges with culverts, improper placement and sizing of some culverts, obstructions, and intrusions by free-roaming animals (including cows

and a llama). At some point, the VDA responded to complaints by dredging an area of the Ditch south of Ruppel Road, but this did not alleviate the flooding.

[5] On December 1, 2015, the Freys filed a complaint against the VDA and its directors, seeking to compel maintenance of the Ditch. The VDA answered the complaint and asserted that it was not solely responsible for activity in the Ditch. On February 16, 2017, the Freys filed an "Amended Complaint to Compel the Maintenance of the Vieck Ditch." (App. Vol. II, pg. 127.) With respect to the VDA, the Freys asked that the trial court "order the [VDA] to take specific steps to properly maintain the Vieck Ditch drain as required by IC 14-27-8-18;[1] award Plaintiffs costs and fees; and for all other relief that is proper[.]" (*Id.* at 128.) With respect to the Drainage Board, the Freys asked the trial court to "determine the responsibility and liability of the Drainage Board to take specific steps to properly maintain the Vieck Ditch drain, and for all other relief that is proper[.]" (*Id.* at 129.) The Freys asked for identical relief with respect to the Highway Department.

[6] On July 18, 2018, the Freys filed a list of contentions, which set forth their prayer for relief more specifically. The Freys identified four locations underneath three roads (St. Thomas, Airport, and Ruppel) where bridges had been replaced with culverts. They requested that the trial court order the

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[1] Indiana Code Section 14-27-8-18(a) provides: "The drainage commissioners: (1) shall at all times keep and maintain the dredge ditch and drain in proper condition; and (2) may, subject to subsection (b), hire all labor, purchase all material, and do all acts that are necessary and incident to maintain the ditch and drain." Subsection (b) provides that an obligation may not be made until assessments are levied.

reinstallation of bridges at those locations. The Freys also requested cleaning of a specific fork in the Drain to prevent water pooling or backflow, removal of private culverts, removal of livestock and fencing, and implementation of a three-year rotating maintenance schedule. Also, the Freys timely requested findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52.

[7] The trial court conducted a three-day evidentiary hearing commencing on February 6, 2019, and an additional one-day hearing on May 30, 2019. At the outset, the defendants jointly argued that a mandate against the public entities would be available only if an action to be performed was ministerial as opposed to discretionary. They lodged a continuing objection to the admission of evidence as to specific actions the public entities allegedly should have taken. Testimony was heard from the Freys, other local farmers, expert witnesses, and the Knox County Surveyor, Richard Vermillion ("Vermillion"). A picture emerged of some of the challenges affecting water drainage. The topography of the Ditch is relatively flat and, according to Vermillion, "benchmarks [from the 1800s] that define elevation don't exist anymore." (Tr. Vol. III, pg. 168.) Vermillion described his struggle to encourage former members of the Drainage Board (formally organized in Knox County in 2011) to conduct regular

meetings and observe the specific provisions of the Indiana Drainage Code.[2] He described earlier lack of Code enforcement as "embarrassing." (*Id.* at 208.)

[8] By all indications, four bridges in the Ditch had been replaced with culverts, without the benefit of hydraulic or hydrological studies.[3] One culvert was installed five feet above the water flow, two others were placed at least one foot too high, and one culvert had inconsistent diameters for input and output. One private culvert appeared to be fashioned from an empty truck tank; several photographic exhibits depicted debris in fencing and animals near or in standing water. Notwithstanding the generally flat topography, surveyor Greg Kissel identified a fall in land elevation of 4.8 feet, extending over only four to five miles. According to engineer James Morley ("Morley"), the ability of water to flow southwest was limited in part because the elevation of pipes was not staggered continuously lower. He described pipe placement as erratic.

[9] In addition to the evidence of existing conditions, the trial court admitted expert testimony regarding appropriate practices and proposed remedial work. Morley explained that a proper overall design would ideally be based upon engineering studies specific to the eight-square-mile watershed and, in general, culverts should be bigger downstream than upstream. But he "didn't know how much a

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[2] Indiana first enacted a drainage code in 1881, and it has since been recodified. Indiana's 1927 Drainage Act was in effect when the Ditch was established by court order as a regulated drain. The applicable drainage code is now found at Indiana Code Section 36-9-27-1, *et seq.*

[3] Engineer Jeffrey Healy described hydrology as a "science to determine how a given precipitation event generates runoff" and hydraulics as "what you do with it once it starts to run off – how does liquid get from [point] A to B." (Tr. Supp. Vol. II, pgs. 99-100.)

new design would help or cost." (Tr. Vol. II, pg. 222.) He suggested hydraulic calculations and use of data from the Army Corps of Engineers. Hamilton County Surveyor Kenton Ward testified that the replacement of a bridge with a culvert should be preceded by hydraulic and engineering studies, as a "best practice." (Tr. Vol. III, pgs. 98-99. Highway Department engineer Frederick Boyd agreed that hydraulic studies were recommended "if a bridge was replaced with less costly pipe." (Tr. Vol. II, pg. 71.) Engineer Jeffrey Healy was unpersuaded that the alleged drainage problems could be remedied without professional studies.[4] He and the other expert witnesses provided testimony differentiating between maintenance activities (such as removing sediment or performing minor repair) that would be within the province of the VDA and reconstruction activities (such as increasing culvert size, relocating a culvert, or changing the scope of a drain) that would be within the province of the Drainage Board and the Highway Department.

[10] On November 22, 2019, the trial court entered its findings, conclusions, and order. The trial court declined to enter a mandate against the VDA, observing that the VDA was performing maintenance with "what is probably inadequate

[4] Vermillion seemed to concur with Healy's somewhat equivocal assessment of a specific need for engineering studies. Vermillion testified: "To determine what the correct level a culvert would need to be, you'd first need to conduct a cross-section and profile survey of the channel and determine what design you want it to be – if you do not have that design. Then you would have to incur the services of a hydrologist and hydraulic engineer, or a surveyor if they're clearanced [sic] and qualified to do it – and conduct what's called an H & H analysis, hydrologic and hydraulic analysis to determine the design of that culvert and the size of it." (Tr. Vol. III, pg. 183.) Asked whether "that's what's needed" to satisfy the Freys' requests, Vermillion responded: "I don't have enough information to get that. Nobody does at this point." (*Id.*)

funding" and declining to "supplant those [maintenance] decisions with its own in the form of a mandate." (Appealed Order at 5.) Additionally, the order provided:

> [t]he Knox County Highway Department, c/o the Knox County Board of Commissioners[,] is hereby mandated and ordered to comply with Indiana Code 36-9-27-71 by performing the necessary hydrological studies for the culverts at Ruppel Road, St. Thomas Road and Airport Road and to provide the same to the plaintiffs and to the Knox County Surveyor so that it can properly comply with the statute. Such studies shall be completed within twelve (12) months of the issuance of this Order.

(Appealed Order at 6-7.)

[11] On February 28, 2020, the trial court conducted a hearing on the issue of costs and attorney's fees. The Freys claimed entitlement to attorney's fees on grounds that the defendants knew reconstruction actions had been taken absent hydrological studies and thus had litigated a groundless defense. The defendants responded that performance of hydrological studies had not been part of the Freys' prayer for relief and no defense pertaining to such studies had been litigated. On September 11, 2020, the trial court awarded the Freys costs of $7,956.32 (for expert witness fees, surveys, mediation costs, depositions, and reports) and attorney's fees of $80,930.62. Mark Frey was awarded lost wages of $2,365.70 and Michael Frey was awarded lost wages of $938.00. The order did not by its language exclude any of the defendants from liability. The Drainage Board and the Highway Department now appeal.

Discussion and Decision

Standard of Review

[12] Where, as here, a trial court has entered special findings upon a party's timely written request pursuant to Indiana Trial Rule 52, our role is to examine whether the evidence supports the findings and the findings support the judgment. *Masters v. Masters*, 43 N.E.3d 570, 575 (Ind. 2015). We do not reweigh the evidence, and we will reverse the judgment of the trial court only upon a showing of clear error, which is "that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* (quoting *Egly v. Blackford Cty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)). A finding is clearly erroneous if "the record contains no facts supporting [it] either directly or inferentially." *Town of Brownsburg v. Fight Against Brownsburg Annexation*, 124 N.E.3d 597, 601 (Ind. 2019). The judgment, which must follow from the findings, "is clearly erroneous if the court applied the 'wrong legal standard to properly found facts.'" *Id.* (quoting *Town of Fortville v. Certain Fortville Annexation Territory Landowners*, 51 N.E.3d 1195, 1198 (Ind. 2016)). Although we defer to the trial court's factual findings, to the extent that an appeal turns on questions of law, we review questions of law *de novo*. *Id.*

[13] When it is necessary to interpret a statute, the first step is to determine whether the legislature has spoken clearly and unambiguously on the point in question. *City of N. Vernon v. Jennings Nw. Reg'l Utils.,* 829 N.E.2d 1, 4 (Ind. 2005). When a statute is clear and unambiguous, we need not apply any rule of construction

other than to give the words and phrases their plain, ordinary, and usual meaning. *Id.* When faced with an ambiguous statute, our primary goal of statutory construction is to determine, give effect to, and implement the intent of the legislature. *Id.*

Statutory Mandate

[14] Indiana Code Section 34-27-3-1 provides:

> An action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer, or person to compel the performance of any:
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> (1) act that the law specifically requires; or
>
> (2) duty resulting from any office, trust, or station.

"Under our mandate statute and case law interpreting it, such relief is available only to compel a specific, ministerial act, and only if the plaintiff is clearly entitled to that relief." *Price v. Ind. Dep't of Child Servs.*, 80 N.E.3d 170, 174 (Ind. 2017). An action in mandamus does not lie to establish a right or to define and impose a duty. *Belork v. Latimer*, 54 N.E.3d 288, 395 (Ind. Ct. App. 2016). Public officials, boards, and commissions may be mandated to perform a ministerial act when a clear legal duty to perform the act exists. *Id.* However, a mandate action is not appropriate where there is an adequate remedy at law. *Id.* A judicial mandate is an extraordinary remedy, and "Indiana law harbors a strong presumption against judicial mandates." *Price,* 80 N.E.3d at 174. A court must decide whether a mandate is appropriate on a case-by-case basis,

with reference to the relevant statutes and applicable mandate case precedent. *Id*.

[15] A judicial mandate is appropriate only when two elements are present, that is, "(1) the defendant bears an imperative legal duty to perform the ministerial act or function demanded and (2) the plaintiff has a clear legal right to compel the performance of that specific duty." *Id.* at 175. A judicial mandate should not be granted in a doubtful case. *Id.*

[16] A mandate's duty element is not satisfied by the imposition of "a generalized duty." *Id.* In other words,

> a mandate commanding general compliance with a statute to achieve a certain outcome, without identifying the specific act required, is no mandate at all – because it leaves the defendant with discretion to fulfill the required outcome. If the defendant has discretion, there is no clear, absolute duty to perform a specific act – without which there can be no mandate.

Id. When there exists a clear legal duty to perform a specific act, the act must also be one that is ministerial. *Id.* at 176. A ministerial act is non-discretionary and has been described as '"one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done."' *Id.* (quoting *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 174 (1861)). Examples of a ministerial act include such things as ruling upon a permit application, approving a subdivision plat, paying a salary, and paying a judgment. *Id.* Although a statute may employ mandatory terms such as

"shall," the use of a mandatory term does not alone render a statute amenable to judicial mandate. *Id.* at 177. The statute must "compel the performance of a specific act, not just a specific outcome." *Id.* Acts are subject to mandate while outcomes are not. *Id.* at 178.

[17] We turn to our examination of the statute herein identified as the basis for a mandate order to the Highway Department. Indiana Code Section 36-9-27-71, captioned "Drains crossing public highways and railroad rights-of-way," is applicable "[w]hen, in the construction or reconstruction of a regulated drain, the county surveyor determines that the proposed drain will cross a public highway[.]" When the board has found that, in the course of construction, reconstruction, or maintenance of a regulated drain, it is necessary to alter, enlarge, repair, or replace a crossing, the cost of the work is to be paid by the owner of the public highway. *Id.* Subsections (e), (f), and (g) are addressed to the approval or disapproval process, including review of plans and hydraulic data:

> If the county surveyor is registered under IC 25-31, the county surveyor must review and approve or disapprove the plans and hydraulic data for an existing crossing that is to be altered, enlarged, repaired, or replaced, or the construction of a new crossing for a public highway or the right-of-way of a railroad company. The county surveyor shall disapprove the plans and hydraulic data if they do not show that the structure will meet hydraulic requirements that will permit the drain to function properly.

> If the county surveyor is registered under IC 25-21.5, the county surveyor must review and approve or disapprove the plans and hydraulic data for an existing crossing that is to be altered, enlarged, repaired, or replaced or the construction of a new crossing for a public highway or the right-of-way of a railroad company. The county surveyor shall disapprove the plans and hydraulic data if they do not show that the structure will meet hydraulic requirements that will permit the drain to function properly.
>
> Approval of the plans and hydraulic data by a person who is registered under IC 25-21.5 or IC 25-31 is required before the work can take place. However, if the county surveyor is not registered under IC 25-21.5 or IC 25-31, a registered person who is selected under section 30 of this chapter shall: review and approve or disapprove the plans[.]

[18] Indiana Code Section 36-9-27-21 allocates the "cost of [approved] work" to "the owner of the public highway." But insofar as the language of the statute relates to hydraulic data or engineering data, it is in the context of performance of duties by the county surveyor or another registered and selected person. Even so, the language does not command the performance of a ministerial act, one requiring no exercise of discretion. Indeed, the language of the statute contemplates an exercise of discretion – the surveyor or other registered person is to ascertain whether the plans and hydraulic data show that the structure will meet hydraulic requirements that will permit the drain to function properly. As such, the existence of hydraulic data is contemplated, but there is no specific requirement that a particular study be performed or commissioned to be

performed by the Highway Department. The statute simply does not impose upon the Highway Department a specific duty to perform a hydrological study.

[19] To the extent that it can be said that the Freys implicitly demanded the performance of hydrological studies, there is no "imperative legal duty" upon the Highway Department to "perform the ministerial act or function demanded." *See Price*, 80 N.E.3d at 175. As such, we need not address the record support for the second element, that is, "the clear legal right to compel the performance." *Id.*[5]

Costs and Fees

[20] Indiana Code Section 34-27-3-3(b)(3) provides: "In actions for mandate, if the finding and judgments are for the plaintiff, the court rendering the final judgment shall grant the plaintiff costs as the court directs." The Freys are not entitled to the judgment rendered, a mandate based upon Indiana Code Section 36-9-27-21. As such, they are not entitled to costs.

[21] Indiana Code Section 34-52-1-1(b)(1), relevant here, provides that the "court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party brought the action or defense on a claim or defense that is

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[5] "A private party generally may not enforce rights under a statute designed to protect the public in general and containing a comprehensive enforcement mechanism." *Lockett v. Planned Parenthood of Indiana*, 42 N.E.3d 119, 127 (Ind. Ct. App. 2015) (citing *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1260 (Ind. 2000)). "[E]ven where a duty benefits an individual, we will not infer a private right of action unless that appears to be the Legislature's intent." *F.D. v. Ind. Dep't of Child Servs.,* 1 N.E.3d 131, 143 (Ind. 2013) (Rush, J., concurring in part, dissenting in part).

frivolous, unreasonable, or groundless[.]" Because the Freys have not prevailed, they are not entitled to attorney's fees based upon the defendants' pursuit of a groundless defense.

Conclusion

[22] Indiana Code Section 36-9-27-21 is not amenable to a judicial mandate ordering the Highway Department to perform hydrological studies. Because a judicial mandate is not available under the statute, the award of costs is reversed. Because the Freys were not the prevailing party, they may not recover attorney's fees on grounds that the defendants pursued or continued to litigate a frivolous defense.

[23] Reversed.

May, J., and Robb, J., concur.