

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

JoEll Gorman,
Appellant-Plaintiff,

v.

Michael Brown and David
Pierce,
Appellees-Defendants.

July 25, 2023

Court of Appeals Case No.
23A-PL-172

Appeal from the Delaware Circuit
Court

The Honorable Kimberly S.
Dowling, Judge

Trial Court Cause No.
18C02-2012-PL-140

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

- [1] JoEll Gorman appeals the trial court's judgment in favor of Michael Brown and David Pierce on Gorman's complaint against them. This litigation concerns whether Gorman authorized Brown and Pierce to install drainage tile on her property. Gorman claims that she did not authorize Brown and Pierce to install the drainage tile on her property. Pierce and Brown claim that they had multiple conversations with Gorman about the work and that Gorman was pleased with the work performed. After a bench trial, the trial court entered judgment for Brown and Pierce. On appeal, Gorman argues that the trial court's judgment was erroneous. We disagree and, accordingly, affirm.

Issue

- [2] Gorman raises seven issues, which we consolidate and restate as whether the trial court's judgment in favor of Brown and Pierce is contrary to law.

Facts

- [3] Gorman owns approximately four acres of property in Daleville, which contains her residence, a barn, and two pastures for her horses. Pierce owns adjoining property to the east of Gorman's property, and Brown owns adjoining property to the west of Gorman's property. Brown farms Pierce's property. An adjoining corner of Gorman's and Pierce's properties had a

drainage issue and often had standing water after rain.¹ This corner of Gorman's property was a pasture for her horses.

- [4] In September 2019, Brown contracted and paid for David Osborne to perform excavating work and install a drainage tile on a corner of Gorman's property to alleviate the drainage issues on both properties. A photograph of the work performed is below:



- [5] A week after the work was completed, Gorman told Brown that she did not authorize the work. On December 7, 2020, Gorman filed a complaint against Pierce and Brown.² Gorman alleged: (1) trespass; (2) nuisance; (3) stormwater

¹ In the spring of 2019, Pierce conducted a test on his property by placing dye in rain water on his property and following the dye. Pierce and Brown did not enter Gorman's property to conduct the test, but some of the dye entered her property. Gorman, however, admits that the dye did not harm her property in any way.

² Gorman also named two John Doe defendants in the complaint.

nuisance; and (4) unjust enrichment. A bench trial was held in September 2022.

- [6] At the bench trial, Gorman testified that she was not contacted about the excavation and tile work on her property; that she did not give her consent for the work to be performed on her property; and that she learned of the work after it was performed. Gorman denied having any conversations with Pierce before the drainage work began. Gorman, however, admitted that, in the spring of 2019, she had “maybe three” conversations with Brown about the drainage work. Tr. Vol. II p. 39. Gorman testified that her water issues have not improved due to the drainage tile work and have, in fact, worsened.
- [7] On the other hand, Pierce testified that he had approximately four conversations with Gorman regarding the tile work. Pierce discussed with Gorman that the tile would be inside Gorman’s fence, and Gorman appeared “to look forward to it, get it over with, and get it done.” *Id.* at 135.
- [8] Brown testified that he had four to six conversations with Gorman about the work. Brown told Gorman that he would install a larger drainage tile than she currently had. Brown also discussed the work with another neighbor, Bruce Lamb, because they would have to cross Lamb’s land as well. Lamb approved the work on his property. Gorman told Brown to call her when they were going to perform the work “so she could put the horses up and . . . put them in the other pasture.” *Id.* at 100. Brown testified that Gorman gave him “permission to enter her farm and do the ditching and she [gave him] her phone

number so she could move the horses out.” *Id.* at 118. Brown said that he “would never cross onto somebody’s property without their prior knowledge.” *Id.* at 100.

[9] Osborne testified that, on the Monday before the project was completed, he went to the property to mark the project area so the utility companies could mark the utilities in the area. Gorman came out to talk to Osborne and asked when they were going to install the drainage tile. Osborne told Gorman the work would begin on Friday, and Gorman “acted very happy the work was getting done.” *Id.* at 67. According to Osborne, Gorman’s only concern was making sure that her horses were in the other pasture.

[10] On the next Friday, they removed approximately ten feet of Gorman’s fence, excavated for the drainage tile, installed approximately 225 feet of drainage tile, backfilled the trench with dirt, and repaired the fence. When performing the work, Osborne found that a post in Gorman’s fence had damaged her old drainage tile. Osborne also discovered that Gorman’s old clay tile was “backed up and full of dirt.” *Id.* at 71. Osborne hooked up the old clay tile to the new tile because “a lot of times those old tiles will clean out and start moving [water].” *Id.*

[11] Gorman arrived as they were installing the drainage tile. Brown explained to Gorman the work that had been performed. According to Osborne, Gorman “seemed very happy” and “very appreciative.” *Id.* at 70. Osborne thought Gorman was “happy” with the work they performed. *Id.* According to Brown,

Gorman looked at the work, talked to Brown “quite a bit,” and “seemed very pleased.” *Id.* at 106.

[12] A neighbor, Kyle Jackson, arrived when the work was being completed. Gorman and Brown were discussing the work when Jackson arrived. According to Jackson, Brown told Gorman that, “after the dirt settled they would come back and smooth it off and put some grass seed down.” *Id.* at 86. Jackson testified that Gorman “appeared to be happy with the things that had taken place. She was not upset.” *Id.* at 87.

[13] A few days after the work was completed, Brown asked Gorman if the fence was repaired properly, and Gorman responded that the fence was fine. Approximately one week later, however, Gorman arranged a meeting with Brown to express her displeasure that he had performed the work without, according to her, her permission.

[14] The trial court entered judgment for Pierce and Brown as follows:

1. The question in this case was whether there was an oral contract between the parties to provide for some excavation and drainage work to be done on Plaintiff’s property.

2. The Court has considered all of the testimony and the exhibits, and has weighed the credibility of the witnesses and finds that Plaintiff has not proven her case by a preponderance of the evidence.

3. Judgement [sic] is entered for the Defendants. Costs vs. Plaintiff.

Appellant's App. Vol. II p. 11. Gorman now appeals.

Discussion and Decision

- [15] Gorman appeals the trial court's judgment for Brown and Pierce. "A party who had the burden of proof at trial appeals from a negative judgment and will prevail only if it establishes that the judgment is contrary to law." *PointOne Recruiting Sols., Inc. v. Omen USA, Inc.*, 177 N.E.3d 81, 83 (Ind. Ct. App. 2021). "A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion." *Id.* "When a trial court enters a general judgment, as is the case here, the judgment will be affirmed if it can be sustained upon any legal theory consistent with the evidence." *Id.* "In making this determination, we neither reweigh the evidence nor judge the credibility of witnesses." *Id.* "Rather, we consider only the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom." *Id.*
- [16] On appeal, Gorman argues that: (A) the trial court erred by finding an oral agreement permitted the trespass; (B) the trial court's order creates an oral easement and an oral contract for the conveyance of an interest in real property

is invalid under the statute of frauds; and (C) the burial of the drainage pipe on Gorman's property constitutes a nuisance.³

A. Trespass

[17] Much of Gorman's brief is devoted to her claim that Brown and Pierce trespassed upon her property. Indiana Code Section 35-43-2-2(b) provides: "A person who . . . (4) knowingly or intentionally interferes with the possession or use of the property of another person **without the person's consent** . . . commits criminal trespass. . . ." (emphasis added).

[18] Whether Gorman consented to Brown and Pierce performing the drainage tile work on her property was disputed at the trial. Gorman testified that she did not approve the installation of the drainage tile; while Brown, Pierce, and others testified that she was well aware of the work, had several discussions with Brown and Pierce regarding the work, and appeared to be pleased that the work was being performed.

[19] The trial court found that Gorman did not meet her burden of proof, and we cannot say the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to the opposite conclusion. Doing so would require this Court to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. The judgment for Brown and Pierce on

³ Gorman makes no argument on appeal regarding her stormwater nuisance and unjust enrichment claims. Gorman also argues that the trial court erred by not awarding her damages. Given our resolution of her other claims, we do not address her damages claim.

Gorman’s trespass claim is not contrary to law. *See, e.g., Albanese Confectionery Grp., Inc. v. Cwik*, 165 N.E.3d 139, 147 (Ind. Ct. App. 2021) (holding that plaintiff’s trespass claim failed where she authorized and consented to her employer’s access of her phone), *trans. denied*.

B. Statute of Frauds

[20] Gorman contends that the trial court “erred in finding that an oral contract granted an easement and authorized the ongoing trespass of the 100[-]year drainage tile onto Appellant’s property.” Appellant’s Br. p. 13. Gorman argues that an easement is subject to the statute of frauds, which provides:

A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party’s authorized agent:

* * * * *

(4) An action involving any contract for the sale of land.

Ind. Code § 32-21-1-1(b).

[21] We have held:

An easement is the right to use the land of another. *Drees Co. v. Thompson*, 868 N.E.2d 32, 41 (Ind. Ct. App. 2007), *trans. denied*. “An easement implies an interest in the land, which is ordinarily created by a grant in a deed, and is often permanent.” *Jones v.*

Nichols, 765 N.E.2d 153, 158 (Ind. Ct. App. 2002), *trans. denied*.
The nature, extent and duration of an easement created by an express agreement or by grant in a deed must be determined by the provisions of the instrument creating the easement.

Borovilos Rest. Corp. II v. Lutheran Univ. Ass'n Inc., 920 N.E.2d 759, 764 (Ind. Ct. App. 2010), *trans. denied*. “An easement is an interest in land within the meaning of the Statute of Frauds, and a contract creating such an interest must be in writing.” *Ellison v. Town of Yorktown*, 47 N.E.3d 610, 620 (Ind. Ct. App. 2015).

[22] Pierce’s and Brown’s installation of the drainage tile, however, did not create an oral easement. The evidence showed that Gorman granted Pierce and Brown permission to install the drainage tile. Pierce and Brown were not granted permission to do further work on Gorman’s land, and they did not receive an easement over her property. Accordingly, the statute of frauds is inapplicable here.

C. Nuisance

[23] Finally, Gorman argues that the burial of the drainage tile on her property constitutes a nuisance. Indiana Code Section 32-30-6-6 defines nuisance as “[w]hatever is . . . an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.” According to Gorman, the drainage tile interferes with the free use of her property because she “may want to install a retention pond, a swimming pool, construct a larger home with a basement, etc.”

Appellant's Br. p. 16. Further, she argues that the drainage tiles "changed the natural course of water and cast it onto Gorman's land." *Id.*

[24] The evidence regarding whether the installation of the drainage tile constituted a nuisance was conflicting. Evidence was presented that Gorman's property lies at a low spot and traditionally has had drainage issues. Gorman's land already contained clay tiles, which were installed in the early 1900s, and drainage tiles, which were installed by Gorman in approximately 2007. Gorman testified that her drainage issues have worsened since the installation of drainage tiles by Pierce and Brown.

[25] Osborne, however, testified that he did not "harm [Gorman's] existing tile in any [] way" and that the new drainage tile "should be nothing but a benefit." Tr. Vol. II pp. 71-72. Jackson testified that the drainage work "definitely has not hurt" and "most likely has helped" *Id.* at 90. Pierce testified that the new drainage tile has "not harmed" Gorman's property. *Id.* at 139.

[26] Again, we cannot say the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to the opposite conclusion. Doing so would require this Court to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Accordingly, we conclude that the judgment for Brown and Pierce on Gorman's nuisance claim is not contrary to law.

Conclusion

[27] The trial court's judgment for Brown and Pierce is not contrary to law.

Accordingly, we affirm.

[28] Affirmed.

Bailey, J., and Kenworthy, J., concur.