

NOTICE  
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2023 IL App (5th) 220365-U

NO. 5-22-0365

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

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BRAD FURLONG and BETH FURLONG,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Marion County.
	)	
v.	)	No. 20-CH-34
	)	
FLOYD BOXX and VICKIE BOXX,	)	Honorable
	)	Martin W. Siemer,
Defendants-Appellees.	)	Judge, presiding.

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JUSTICE CATES delivered the judgment of the court.  
Justices Moore and Vaughan concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The circuit court’s determination that the plaintiffs had not demonstrated that drainage issues were caused by the defendants was not against the manifest weight of the evidence, and damages were not appropriate.
- ¶ 2 The plaintiffs, Brad Furlong and Beth Furlong, appeal from the judgment of the circuit court of Marion County denying their request for injunctive relief and damages. The plaintiffs claim that the circuit court erred in finding that the defendants were not in violation of the Illinois Drainage Code (70 ILCS 605/1-1 *et seq.* (West 2020)) and the common law on drainage. The plaintiffs additionally claim that the circuit court erred by denying their claim for damages. For the following reasons, we affirm.

¶ 3

## I. BACKGROUND

¶ 4 The dispute involves a drainage issue between neighboring properties. In 2004, the plaintiffs purchased farmland in Marion County, Illinois. The plaintiffs' property was located along the south side of Crowley Road and along the west side of Stuber Road. Since 1995, the defendants owned residential property along the south side of Crowley Road and the east side of Stuber Road. The properties were divided by Stuber Road, which ran from north to south. Stuber Road has a slight downward grade from Crowley Road towards the south for approximately 270 feet. The natural drainage of water travels from the northeast corner of the plaintiffs' property in an easternly/southeasterly direction. The surface water then flows from the plaintiffs' property across Stuber Road easterly, across the defendants' property, and drains into Horse Creek.

¶ 5 The plaintiffs filed a two-count complaint seeking injunctive relief and damages, along with subsequent amendments. The plaintiffs' final two-count complaint alleged that the defendant, Floyd Boxx, blocked the east side of a culvert that ran across Stuber Road; created an artificial berm on the east side of Stuber Road; threw rock, wood, debris, and concrete cylinders on the east side of the culvert at Stuber Road; and erected a wall made from concrete cylinders on the east side of Stuber Road. The plaintiffs alleged that Floyd's actions caused water to slow, back up, flood the plaintiffs' property, and kill the plaintiffs' crops. The plaintiffs' second count sought damages for the expenses incurred due to the obstruction of the flow of water, including the resulting crop loss in 2017, 2018, 2019, and 2020.

¶ 6 The defendants, in their answer, admitted that the parties own adjoining real property separated by Stuber Road, admitted the legal description of the plaintiffs' property and the plaintiffs' description of the natural flow of water. Defendants also admitted that Floyd Boxx had erected a wall of concrete cylinders on his property, and that the plaintiffs dug a ditch, regraded their property, and installed a culvert across Stuber Road. The defendants denied plaintiffs' remaining allegations.

¶ 7 The defendants additionally raised several affirmative defenses. The defendants alleged that the plaintiffs' claims were barred under the doctrine of unclean hands and barred under the maxim that "he who seeks equity must do equity" because the plaintiffs had altered the terrain causing the flow of water to increase. The defendants also claimed that plaintiffs failed to state a cause of action against Vickie Boxx and that plaintiffs' claim for injunctive relief could not be granted against Vickie, solely as the property owner, because equity acts *in personam* and not *in rem*. As to count II, the defendants alleged that the plaintiffs' claim was barred by their failure to mitigate damages, barred by the doctrine of avoidable consequences, and also because the plaintiffs had altered the natural terrain to increase the flow of water onto the defendants' land. The plaintiffs generally denied the affirmative defenses.

¶ 8 A bench trial began on February 22, 2022. The plaintiffs presented testimony from Billy Hays, the current road commissioner of Haines Township where the parties' land was located; Michael McCormick, the Marion County engineer; and James Morton, a farmer and former Haines Township road commissioner from 1993 until 2005. The plaintiffs additionally provided testimony on their own behalf and called the defendants as adverse

witnesses. The defendants presented Floyd Boxx, and Dylan Bonner, their grandson, as witnesses. A deposition of Gary Wiedle, the parties' neighbor, was also admitted into evidence, as well as several photographs of the area at issue.

¶ 9

#### A. Stuber Road

¶ 10 Stuber Road, an unpaved road maintained by Haines Township, runs from the north to the south. A culvert was located near the lowest point on Stuber Road, approximately 270 feet from the Crowley Road and Stuber Road intersection. The culvert crossed from the plaintiffs' property, traversed under Stuber Road, and emptied onto defendants' property. Before the culvert was installed, water would flow from the plaintiffs' land directly over Stuber Road in a 150-foot-wide span onto the defendants' property. Testimony was presented regarding the plaintiffs' claim that Floyd created a berm along the east side of Stuber Road and filled in the culvert located on the east side of Stuber Road.

¶ 11 In 2017, a berm was created along the east side of Stuber Road. Floyd denied creating the berm and testified that James Morton, the former Haines Township road commissioner, was responsible for creating the berm. Gary Wiedle testified that Morton modified Floyd's side of Stuber Road with a backhoe to remove brush, which allowed Morton to transport his large farm equipment down the road. Dylan additionally testified that he saw Morton "scrape[ ] dirt off the top of the road and he pushed trees over onto my grandpa's property" to widen the road for his farm equipment. Dylan explained that Morton had scraped both sides of the road which removed dirt from both parties' properties. The dirt was piled on Floyd's side creating a berm down the entire side of the road. Morton

testified that he had widened the road and used his tractor to push dirt along the ditch bank to fix a hole in the middle of the road.

¶ 12 Gary Wiedle testified to ruts created in Stuber Road and explained that “when them kids—every time a good rain, they come up there with four-wheelers, and they rut it up so bad you can’t hardly get through there.” Floyd admitted that years ago, he would use the box blade on his tractor to fill in those ruts on the road. After Stuber Road became a township road in 2014, the road commissioner asked Floyd to stop filling in the ruts, and he complied. In 2019, while the road was closed, and with the permission from the road commissioner, Floyd bladed Stuber Road again to fill in ruts.

¶ 13 Floyd denied creating a berm along the east side of Stuber Road and denied blocking the eastern edge of the culvert with dirt. Plaintiff, Brad Furlong, acknowledged that he never saw Floyd block the east side of the culvert or remove dirt or rock to disturb Stuber Road.

¶ 14 B. 2017 Culvert

¶ 15 In 2017, a 15-inch-wide culvert was installed under Stuber Road. Brad Furlong used his excavating equipment to dig the ditch for the culvert, but James Morton actually installed the culvert even though he was no longer the road commissioner. Billy Hays had been recently reelected as road commissioner and was not aware of the placement of the culvert prior to its installation.

¶ 16 The culvert was installed in two pieces—it was part metal and part plastic. Floyd testified that the west side of the culvert was installed lower than the east side. The culvert would frequently clog, and Floyd would actually open up the west side of the culvert to

allow water to flow through. Floyd testified that even after the culvert was installed, approximately 90% of the water continued to come over the road onto his property.

¶ 17 Brad Furlong could not remember whether he suffered crop damage after the culvert was installed in 2017. Brad testified that drainage problems occurred in 2018, because the east side of the culvert filled with debris. Water backed up onto his field and he estimated that an acre and a half of his crops were damaged. In 2019, the culvert was blocked, and the condition of Brad's crops was worse than in 2018. Brad explained that the seed will not germinate if it stands in water. He additionally testified, with regard to the condition of the crops, that "the farther up the bank you go, it started getting better until it got out of the area that was standing in water."

¶ 18 C. Concrete Cylinder Wall

¶ 19 Floyd testified that he installed a concrete cylinder wall over the course of several months, from approximately June of 2019 until November of 2019. The wall was 200 feet long, 30 inches high, and consisted of six rows of five-inch concrete cylinders. It was located 23 feet from the eastern edge of Stuber Road on the defendants' property. Floyd testified that the purpose of the wall was "to slow the water down that was coming across the road and spread it out so it wouldn't wash away our soil." Because the wall was constructed using cylinders, there were holes in the wall that allowed the water to "roll[ ] right through." Floyd additionally testified that mud would flow through the cylinder wall and would accumulate on his property.

¶ 20 Brad Furlong testified that the wall obstructed and restricted the flow of the waterway and was "causing silt," which meant that dirt would build up and create a

blockage to the flow line of water on the east side of Stuber Road. Brad also explained that debris accumulated on the defendants' wall which created water to pool and restricted the flow of water.

¶ 21

#### D. 2020 Culvert

¶ 22 In 2020, Brad Furlong was not able to locate the culvert that was installed in 2017. He testified that "someone had taken dirt and placed it over the culvert." The culvert was not visible on either side.

¶ 23 During the first week in April of 2020, Brad installed a new culvert along the north side of the existing culvert. The new culvert was larger than the 15-inch-wide culvert installed in 2017. The 2020 culvert was approximately 30 feet long and 24 inches in diameter. According to Floyd, the culvert was flush on the plaintiffs' side of the road and "stuck out six foot on our side." Floyd additionally testified that, as between the two properties, the top of the culvert on plaintiffs' property was approximately the same height or taller than the top of the concrete cylinder wall located on Floyd's property.

¶ 24 Michael McCormick, the Marion County engineer, testified that a culvert 10 to 15% larger than the prior 2017 culvert was recommended. The prior ditches had been silted in. Corrective measures such as filling in ruts, opening ditches, and using three-inch minus rock on the field were required in addition to the installation of a new culvert.

¶ 25 Billy Hays, the current road commissioner, testified that Floyd had contacted him in 2020 to inquire whether Billy was aware that Brad Furlong had replaced the culvert. Brad had informed Billy that the 2017 culvert was plugged. After a new culvert was installed in 2020, the plaintiffs provided Billy Hays with a document to sign which gave

the plaintiffs permission to install the culvert. Billy was blind, and the document had to be read to him. The document stated that the county did not have funding to replace the culvert, and that the work was necessary because water was flooding and killing Brad's crops. Billy testified that he signed the document because the culvert was installed correctly. Billy additionally testified that he never had a conversation with Brad about whether the county had money, and he was unable to see the farm field.

¶ 26 Brad provided testimony that after the culvert was installed in 2020, his property drained, but it did not "drain freely" due to the cylinders obstructing the east end of the culvert. Ten days after the installation of the culvert, Brad found concrete test cylinders, limbs, and debris in front of the east side of the culvert. Floyd had placed 8 to 10 concrete cylinders in front of the outlet on the east side of the culvert, but they were on his own property, several feet from the outlet.

¶ 27 Floyd testified that Brad had to dig on Floyd's land to install the culvert. Floyd indicated that he rearranged those concrete cylinders thrown in front of the culvert to fill in that space. He denied using those concrete cylinders to stop the flow of water. He also denied throwing any other material in front of the culvert opening to stop the flow of water. Dylan Bonner, the defendants' grandson, additionally testified that a hole had been dug in front of the culvert on his grandparents' property.

¶ 28 E. Furlong Property Modifications

¶ 29 Floyd testified that he had lived on his property since 1996 and he never had drainage problems prior to the plaintiffs purchasing the neighboring property. A portion of



Brad's property was once used as a rock road that led to an oil well. Brad was farming that section where crops struggled to grow.

¶ 30 Brad admitted that he had used a field ditcher since 2010 or 2012 to cut waterways to drain his fields. He explained that it was common practice for farmers with drainage problems to use a ditcher, "a three-point hitch attachment," which created a ditch about four inches deep to keep water from ponding on a field.

¶ 31 Gary Wiedle, a neighbor, testified that Brad used his ditcher on ditches already in the field, which sped up the water moving through his property. When it rained, "the seed washes out of the field" and there were "beans growing in the road." Gary additionally stated, "if he thinks it's drowning, it's a far-cry, because after a rain, there ain't no water that ever sits there at any time at all."

¶ 32 According to Floyd's grandson, Dylan Bonner, Brad cut ditches on his property for water to flow to the east. The ditches were more than four inches deep. Dylan additionally testified that Brad changed the natural flow of water from his property. Brad used two skid steers to make a "V" in his field in 2016 or 2017. He sloped the hill and made two hills with a valley in the middle of both hills.

¶ 33 Brad Furlong testified to the fieldwork completed in 2016 or 2017. He testified that he cultivated the land and filled in the washes with the skid steer. He denied removing dirt from his property and spreading it out elsewhere. In April of 2020, Brad used his excavating equipment to regrade an 80-foot by 30-foot section of the slope of the bank on his property. He also made additional ditches in 2020. He further testified that the ditching he performed on his property was consistent with the natural flow of the water.

¶ 34

#### F. Water Flow

¶ 35 Brad testified that 2½ to 3 acres of his property drain easternly toward the defendants' property. He estimated that there was a five-foot incline from the top of his field to the flow line of the western edge of the culvert opening. Gary Wiedle believed that Brad's field dropped 10 feet in elevation before reaching Floyd's land.

¶ 36 Floyd testified that on the plaintiffs' side of the culvert, the plaintiffs' property was a foot higher in elevation than the road. The top of the culvert was buried approximately four to six inches under the road. Floyd additionally testified that for water to back up onto the plaintiffs' property, the water would have to be deeper than the culvert by a foot and a half and he never witnessed water that deep. Floyd explained that water would pour off the plaintiffs' property and come across the road down onto his property.

¶ 37 Floyd additionally testified to a significant rain event that occurred on July 1, 2020, where it rained an inch and a half in 30 minutes. Floyd inspected the wall when it was raining, and water was going over the top and through every hole in the wall. He testified that water was pouring off the road because the culvert could not handle the amount of water caused by the storm. No water was standing on the plaintiffs' property during that event, as water was running off the road and along the defendants' property.

¶ 38 When asked whether the wall caused water to back up, Floyd responded "just up to the edge of the road." Floyd testified that in the past 25 years, water has never backed up onto the plaintiffs' property. Floyd was shown photographs taken on February 17, 2022, marked as exhibits U4 and U5. He testified that the photographs showed water running from the plaintiffs' property through the culvert and water was not pooling at the base of

the eastern edge of the culvert. Floyd additionally testified that without the wall, water would flow straight across, and would not be spread out along the wall.

¶ 39 Floyd was also shown a photograph taken on February 17, 2022, of water in the culvert marked exhibit BB. The photograph shows that approximately half of the culvert is filled with water. Floyd explained that as the water flowed through the culvert, and over his property, it drained as anticipated, leaving “hard ground.”

¶ 40 Dylan Bonner explained that water barely pools behind the wall “because the wall is so long it [water] flows down the edge of the wall and through all the holes at the same time.” He had never seen water back up onto the plaintiffs’ side of the road. Gary Wiedle additionally testified that the water on the defendants’ property was “not even high enough to interfere with the road and if you think it’s damming it up, it’s a far-cry from that.”

¶ 41 G. Damages

¶ 42 Brad Furlong admitted that he was not concerned with the cost of the culvert when it was replaced because he believed it was a good thing to do. Beth Furlong testified that she was married to Brad Furlong and was the bookkeeper for Furlong Excavating, Inc., which installed the culvert. The company was owned by the plaintiffs. An invoice for the installation of the 2017 culvert and the 2020 culvert with a total charge of \$6832 was admitted into evidence. The invoice was never given to Floyd or Haines Township. Nevertheless, Brad Furlong testified that a monetary award would be an adequate remedy.

¶ 43 At the conclusion of all the testimony, the circuit court took the matter under advisement. The circuit court issued its written decision on May 16, 2022. The circuit court found the defendants’ witnesses to be credible and that the plaintiffs had not

established that the defendants had taken any action to block drainage under the Illinois Drainage Code (70 ILCS 605/1-1 *et seq.* (West 2020)) or pursuant to the common law. The plaintiffs had not presented clear evidence of a right to an injunction. A judgment was entered in favor of the defendants and against the plaintiffs, and the circuit court found that there was insufficient evidence to support an award of money damages. This appeal followed.

¶ 44

## II. ANALYSIS

¶ 45 On appeal, the plaintiffs claim that the circuit court’s decision was against the manifest weight of the evidence where the defendants’ actions were in violation of the Illinois Drainage Code (70 ILCS 605/1-1 *et seq.* (West 2020)) and contrary to the common law on drainage. The plaintiffs additionally claim that the circuit court erred by denying their claim for damages.

¶ 46 We first consider whether, under the facts of the case, the plaintiffs’ drainage rights were violated. The standard of review is whether the judgment was against the manifest weight of the evidence because the appeal involves a question of fact. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 23. “A determination is against the manifest weight of the evidence when the opposite conclusion is clearly evident.” *Cunningham v. Schaefflein*, 2012 IL App (1st) 120529, ¶ 19. The circuit court is in the best position to observe the demeanor and conduct of the parties and witnesses; therefore, we give deference to the circuit court as the finder of fact. *Best v. Best*, 223 Ill. 2d 342, 350 (2006). We will not substitute our judgment regarding the credibility of witnesses, the weight to be given to the

evidence, or the inferences to be drawn for that of the circuit court. *Best*, 223 Ill. 2d at 350-51.

¶ 47 According to section 2-1 of the Illinois Drainage Code:

“Land may be drained in the general course of natural drainage by either open or covered drains. When such a drain is entirely upon the land of the owner constructing the drain, he shall not be liable in damages therefor.” 70 ILCS 605/2-1 (West 2020).

¶ 48 Section 2-12 of the Illinois Drainage Code prohibits the interference with the natural flow of water and states:

“The landowner shall not wilfully and intentionally interfere with any ditches or natural drains which cross his land in such manner that such ditches or natural drains shall fill or become obstructed with any matter which shall materially impede or interfere with the flow of water. If the landowner violates the provisions of this Section he commits a petty offense. Each day’s violation shall be a separate offense. Provided, this Section does not apply to any ditches or drains which are entirely on the land of the landowner, nor does this Section prohibit the construction of artificial impoundments or the temporary interruption of the flow of water by such impoundments.” 70 ILCS 605/2-12 (West 2020).

¶ 49 The Illinois Drainage Code defines “ditch” as “an artificially constructed open drain or a natural drain which has been artificially improved.” 70 ILCS 605/1-2(c) (West 2020).

The term “drain” includes ditch and is defined as “any water course or conduit, whether open, covered or enclosed, natural or artificial, or partly natural and partly artificial, by which waters coming or falling upon lands are carried away.” 70 ILCS 605/1-2(d) (West 2020).

¶ 50 Under the common law rule, “[w]here water from one tract of land falls naturally upon the land of another, the owner of the lower land must suffer the water to be discharged upon his land and has no right to stop or impede the natural flow of the surface water.”

*Gough v. Goble*, 2 Ill. 2d 577, 580 (1954). The owner of the lower or servient land cannot obstruct the natural flow and throw it back upon the upper proprietor. *Dessen v. Jones*, 194 Ill. App. 3d 869, 876 (1990).

¶ 51 According to the “good husbandry” rule, the owner of dominant agricultural land is permitted to alter the flow of water onto the servient land for the purpose of proper husbandry of the dominant land. *Dessen*, 194 Ill. App. 3d at 876. The dominant estate is limited in the amount of interference with the natural drainage for agricultural purposes to a reasonable development standard. *Templeton v. Huss*, 57 Ill. 2d 134, 141 (1974).

¶ 52 In order for the plaintiffs to be entitled to a permanent injunction, they must establish “(1) a clear and ascertainable right in need of protection, (2) irreparable harm if injunctive relief is not granted, and (3) no adequate remedy at law.” *Sparks v. Gray*, 334 Ill. App. 3d 390, 395 (2002). Injunctive relief should only be granted where a plaintiff clearly establishes a right to relief. *Bodenschatz v. Parrott*, 153 Ill. App. 3d 1008, 1012 (1987). In *Bossler v. Countryside Gardens, Inc.*, 44 Ill. App. 3d 423 (1976), evidence of a dam constructed on the servient land was not enough to establish that the dominant owner had a right to injunctive relief. The plaintiff’s land was at a higher elevation and there was no evidence of “passing back” of water onto the plaintiffs’ dominant land. *Bossler*, 44 Ill. App. 3d at 426. The circuit court may consider other causes of drainage issues. *Bossler*, 44 Ill. App. 3d at 426. Similarly, the plaintiffs here have not established a clear right to relief.

¶ 53 The record demonstrates that the plaintiffs are the owners of the dominant land, and the defendants are the owners of the servient land. It is undisputed that a wall made of concrete cylinders was erected entirely on the defendants’ land in 2019. The evidence

presented, however, has not demonstrated that placing concrete cylinders near the culvert and the construction of the wall of concrete cylinders has obstructed or interfered with the plaintiffs' drainage rights.

¶ 54 Brad Furlong's property is a foot higher in elevation where the culvert is located on the west side of Stuber Road. The top of the culvert is approximately six inches under Stuber Road. The top of the concrete cylinder wall on the opposite side of the road does not exceed the height of the culvert located on Brad's property. Additionally, the concrete cylinder wall is porous, which allows water to flow through onto the defendants' property.

¶ 55 The circuit court found Floyd and his witnesses to be credible. Floyd testified that the concrete cylinder wall caused water to spread out and was placed 23 feet from the edge of the road, where water does not back onto the plaintiffs' property. According to Floyd, in the past 25 years, water has never backed up onto the plaintiffs' property. Dylan Bonner and Gary Wiedle additionally testified that the water has not backed up onto the plaintiffs' property. The plaintiffs did not produce any photographic evidence of water backing up on the west side of the culvert onto their land.

¶ 56 Historically, Brad Furlong's property has suffered from poor drainage. A portion of the plaintiffs' property that he now farms was once a rock road. Brad has "ditched" his property since 2010 or 2012 to aid drainage. Evidence was presented that James Morton moved dirt on Stuber Road, while no evidence was presented that Floyd created a berm or blocked the east side of the culvert. In 2020, Brad Furlong modified the ditch on his side of the road. At that time, a significantly larger culvert was placed along the north side of

the existing culvert. No expert witnesses were presented to establish that the defendants caused a change in drainage as opposed to the actions of Brad or James Morton.

¶ 57 Brad Furlong sought relief for crop damage he suffered since 2017, claiming that the drainage issue impacted his farm fields when the seeds were planted. Floyd finished construction of the wall in November of 2019. Brad did not present sufficient evidence to establish that the drainage was made worse due to the construction of the concrete cylinder wall or by any other actions by the defendants.

¶ 58 As explained above, on review, this court will not reweigh the evidence or reassess the credibility of the witnesses. The circuit court was in the best position to make a credibility assessment of the witnesses' testimony. We have thoroughly reviewed the record on appeal and conclude that it does not clearly demonstrate that the defendants caused water to back onto the plaintiffs' property in violation of the common law of drainage or the Illinois Drainage Act. The circuit court's determination was not against the manifest weight of the evidence.

¶ 59 The plaintiffs additionally sought damages for the replacement costs of the culvert. Section 12-7 of Illinois Drainage Code mandates that a servient landowner be held liable for the cost of repairing a drain they willfully or negligently obstruct. 70 ILCS 605/12-7 (West 2020). Because the plaintiffs have not demonstrated that the circuit court's decision was against the manifest weight of the evidence, an award of damages is not appropriate.

¶ 60

### III. CONCLUSION

¶ 61 For the reasons stated above, we affirm the judgment of the circuit court of Marion County.



¶ 62 Affirmed.