NOTICE
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2012 IL App (5th) 100484-U

NO. 5-10-0484

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

LUCY ADCOCK and LYNDELL ADCOCK,	)	Appeal from the
	)	Circuit Court
Plaintiffs-Appellants,	)	St. Clair County.
	)	
v.	)	No. 06-MR-192
	)	
CITY OF O'FALLON, H&L BUILDERS,	)	
LLC,	)	Honorable
	)	Vincent J. Lopinot,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing plaintiffs' complaint seeking injunctive relief and damages for flooding to plaintiffs' property allegedly caused by defendants' development of land adjacent to plaintiffs' property and seeking compliance with a city ordinance which addresses flooding issues.

¶ 2 Plaintiffs, Lucy and Lyndell Adcock, sought relief in the circuit court of St. Clair County against defendants, City of O'Fallon (City) and H&L Builders, LLC (H&L), from flooding allegedly caused by the development of land located near plaintiffs' home. The complaint also seeks to order H&L to comply with City Ordinance 3054, which contains stormwater management plans for the Cambridge Condominiums, the development in question. After a bench trial, the trial court entered an order finding in favor of the City and H&L on all issues and dismissing plaintiffs' complaint. Plaintiffs raise the following issues on appeal: (1) whether the trial court's findings in favor of defendants are against the manifest weight of the evidence; (2) whether the trial court erred in finding there was

insufficient evidence to support plaintiffs' action for nuisance; (3) whether the trial court erred in finding that plaintiffs' claims are barred by the dismissal of a previous lawsuit and the approval of Ordinance 3054; (4) whether the trial court erred in finding insufficient evidence to support plaintiffs' assertion that the flooding was caused by the City; (5) whether the trial court erred in finding insufficient evidence to support plaintiffs' assertion of a violation of Ordinance 3054 now or when the system was built; (6) whether the trial court erred in determining that photographs and videos showing water on plaintiffs' property and adjoining properties were merely anecdotal; and (7) whether the trial court erred in denying injunctive relief. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 Plaintiffs own a home at 115 Orchard in O'Fallon and have lived in the home since December 15, 1987. In 2004, plaintiffs bought 117 Orchard, which has no structures upon it and is located immediately west of 115 Orchard. In 1999, H&L Builders started developing Cambridge Condominiums on Third Street in O'Fallon located within 1200 feet of plaintiffs' home. Jeff Holland is the principal of H&L. This is not the first lawsuit to address flooding issues allegedly caused by the development of Cambridge Condominiums, which began being developed in 1999. Plaintiffs originally filed No. 01-MR-162, a complaint for injunctive relief and damages on May 24, 2001, before the condominium buildings were built but while the land was being prepared for the development of condominiums and after plaintiffs began experiencing excessive flooding allegedly caused by such development.

¶ 5 Plaintiffs' land lies at the lowest point of any property in the area. Mr. Adcock testified that he had some localized flooding issues when he first moved to the home, which he resolved by placing a 12-inch pipe on his property to drain the water away from his home. The previous owner dug a ditch across the property to alleviate flooding problems. Between

1999 and 2001, plaintiffs experienced excessive flooding during regular storm events. A 2001 video shows flooding allegedly caused by the raising of the ground elevation at the north end of the condominium complex and the insertion of a pipe that drained water from another uncontrolled drainage area onto Elm street.

¶ 6 The preliminary injunction requested by plaintiffs in May 2001 asked that defendants ensure through approval and planning of the condominium development that postdevelopment stormwater runoff be the same or less than predevelopment runoff. The parties worked together to resolve the flooding issues, which culminated in the passage of Ordinance 3054. The ordinance provides in pertinent part as follows:

> "**WHEREAS,** the applicant, H and L Builders, proposes the construction of a planned multi-family development that will include 84 condominium units on 9.96 acres of land, and the applicant has requested and heretofore filed a petition with the Planning Commission of the City of O'Fallon for a zoning change from MR-2 to MR-2(P) 'Planned Multi-Family Residential', pursuant to the requirements of all applicable laws, including City Ordinance 2052 'Planned Uses', for the proposed Cambridge Condominiums Development shown on the attached preliminary development plan as 'Exhibit A'; and
>
> **WHEREAS,** said Planning Commission of the City of O'Fallon, Illinois held a public hearing April 10, 2001, according to state statute, and recommended 4-5 against the project as proposed, citing a lack of setbacks and open space, not enough internal sidewalks, insufficient buffering and landscaping throughout the development, poor drainage patterns on and adjacent to the site, and the presence of active mine subsidence on the property; and
>
> **WHEREAS,** the applicant subsequently made certain revisions to the project in an attempt to address the concerns of the Planning Commission by improving the

landscaping, sidewalks, and setbacks, *and has agreed to build the water detention infrastructure in the first phase of the development* ***." (Emphasis added.)

Ordinance 3054 and plans attached thereto codified the agreement of the parties to resolve the flooding issues, particularly the representations made by the developer, Mr. Halloran, and his engineer, Mr. Netemeyer.

¶ 7 The ordinance also included specifications as to the location and height of a berm surrounding a detention basin which was part of the flooding solution. The detention pond is over 1000 feet long, 15 to 30 feet wide, and 4 feet deep at its lowest point. From the lowest point, a concrete outlet lets water from the bottom of the pond flow into a 10-inch underground pipe, which then joins a 24-inch pipe that runs underground towards Cambridge Boulevard. A 30-inch-diameter underground main pipe runs under Cambridge Boulevard and is owned by the City. The detention pond, the 24-inch pipe, and the other inlets into the 30-inch pipe are on private property. The stormwater management plan agreed to by the parties was supposed to ensure a solution that would be able to detain a 100-year storm event.

¶ 8 On September 5, 2001, the City filed Ordinance 3054, approving the condominium project as revised. The revisions included the implementation of specifications expected to resolve plaintiffs' flooding issues. Accordingly, plaintiffs agreed to dismiss 01-MR-162, and an order was entered by the trial court dismissing the complaint and plaintiffs' motion for preliminary injunction with prejudice. The instant case concerns, *inter alia*, the enforcement of Ordinance 3054.

¶ 9 After completion of the condominium complex in 2005, plaintiffs again began experiencing flooding issues, and on July 6, 2006, plaintiffs filed a complaint to enforce Ordinance 3054 through *mandamus*. On November 15, 2007, plaintiffs filed their fourth amended complaint in which they sought not only injunctive relief and damages but also a finding of nuisance with regard to new flooding against both defendants, as well as a lack

of compliance with city ordinances against H&L. Allegations against the City involve the new Third Street, a/k/a Cambridge Boulevard, which was designed by engineer Pat Netemeyer and accepted by the City for ownership.

¶ 10 Prior to the start of trial, the parties stipulated that if liability was found, damages would be $5000. A bench trial was conducted over the course of two months in late December 2009 and January 2010, during which six days of testimony was presented and 90 exhibits were introduced. The trial judge visited the site in question upon plaintiffs' motion for a judicial site visit. The trial court took the case under advisement and on September 22, 2010, entered its final order in which it specifically found as to the City as follows:

> "1. Ordinance 3054 was a final, agreed engineering solution based on engineering calculations and specifications that were studied, reviewed and agreed to by the Plaintiffs, their lawyer, and their engineers. This ordinance was passed as a result of a settlement in a prior lawsuit 01-MR-162.
>
> 2. There is no evidence that the City of O'Fallon owns, operates of [*sic*] maintains any streets or stormwater systems involved in this case other than those under Cambridge Drive.
>
> 3. There is not sufficient evidence that the nuisance action is due to new and different water collection than had previously occurred on the property of the [plaintiffs].
>
> 4. The 2001 lawsuit and the 2006 lawsuit are substantially similar as it relates to the City of O'Fallon.
>
> 5. The evidence is insufficient to find that any alleged flooding was caused by the City of O'Fallon.
>
> 6. There is insufficient evidence that there were any violations of Ordinance 3054 now or when the system was built in 2003."

As to H&L, the trial court specifically found as follows:

"1. There was testimony from one of the engineers that the stormwater system here could have been monitored with instruments that would have precisely indicated whether the stormwater system was operating as it was designed. None of the parties did such tests or presented such evidence.

2. There is insufficient evidence that flooding has been caused by the raising of the elevation of the property where the Cambridge Condo's [*sic*] were built or that the elevation was actually raised.

3. The parties introduced into evidence hundreds of photographs and a number of videos showing water on the [plaintiffs'] and adjoining properties. The parties then drew all kind of conclusions based upon that anecdotal evidence.

4. There is not sufficient objective measurable evidence that the flow of water has gotten worse on the [plaintiffs'] property over time. The Plaintiffs have simply not met their burden of proof. The [c]ourt cannot guess as to liability based upon the evidence that was produced.

5. The [c]ourt further rules that the Plaintiffs are barred from bringing these claims because of the prior dismissal of an earlier lawsuit and their participation in and approval of Ordinance 3054."

The trial court found in favor of defendants on all issues, entered judgment and dismissal with prejudice in favor of defendants and against plaintiffs, and ordered plaintiffs to pay costs. Plaintiffs filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 Plaintiffs raise several issues on appeal. Plaintiffs' argument in a nutshell is that their land floods because the City's roadway pipes back up and because H&L did not build the detention basin to the specifications required by Ordinance 3054. Plaintiffs are aware that

their land is the lowest lying in the area, but took steps to alleviate previous flooding, and did in fact alleviate other flooding and codified plans to alleviate future flooding through the enactment of the ordinance before the condominium complex was built. The instant litigation, however, involves flooding that occurred after H&L Builders built 84 condominiums near their property and after the requirements of the ordinance failed to be met. Defendants respond that the trial court properly weighed all of the evidence before it, including the testimony, the credibility, and the demeanor of the witnesses, the photographic evidence, and the trial court's own observations during the site visit, and came to an opposite conclusion.

¶ 13 While plaintiffs raise numerous issues on appeal, there are two particular findings of the trial court that are of major concern to us and which we believe require reversal. First, we find the trial court erred as to the implications of the 2001 lawsuit. In particular, we believe the trial court was wrong in its finding that plaintiffs are barred from bringing a new action because of dismissal of the prior lawsuit and plaintiffs' participation in and approval of Ordinance 3054. Second, we find the trial court erred in finding insufficient evidence that the instant nuisance action is due to new and different water collection than had previously occurred on plaintiffs' property.

¶ 14 I. IMPLICATIONS OF PRIOR LAWSUIT

¶ 15 The preclusive effect of a prior adjudication on a subsequent claim or cause of action falls under the law of *res judicata*. *Res judicata* is separated into two separate categories: (1) true "*res judicata*," also known as "claim preclusion," and (2) collateral estoppel, also known as "issue preclusion." *Hayes v. State Teacher Certification Board*, 359 Ill. App. 3d 1153, 1161, 835 N.E.2d 146, 154 (2005). *Res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars a subsequent action between the same parties or their privies on the same cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d

462, 467, 889 N.E.2d 210, 213 (2008). For the doctrine of *res judicata* to apply, three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302, 703 N.E.2d 883, 889 (1998). *Res judicata* bars litigation of all issues that were actually decided as well as all issues that could have been raised and decided in the earlier action. *Arvia v. Madigan*, 209 Ill. 2d 520, 533, 809 N.E.2d 88, 97 (2004).

¶ 16 Collateral estoppel applies when a party participates in two separate and consecutive cases arising out of different causes of action and some controlling factor or question material to the determination of both cases has been adjudicated against the party in the former suit by a court of competent jurisdiction. *Stathis v. First Arlington National Bank*, 226 Ill. App. 3d 47, 53, 589 N.E.2d 625, 630 (1992). The minium threshold requirements for the application of collateral estoppel are: (1) the issue decided in the prior adjudication is *identical* to the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77, 744 N.E.2d 845, 849 (2001). In deciding whether collateral estoppel is applicable, a court must balance the need to limit litigation against the right of a fair adversarial proceeding in which a party may fully present his case. *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 391, 757 N.E.2d 471, 478 (2001). Whether a party has had a full and fair opportunity to litigate an issue in a prior action requires an examination of those elements which comprise the practical realities of litigation. *Nowak*, 197 Ill. 2d at 391, 757 N.E.2d at 478.

¶ 17 Prior to trial, the trial court correctly denied defendants' multiple claims of *res judicata* and collateral estoppel, but defendants raised the issues again during closing

arguments, and this time the trial court determined that the 2001 and 2006 lawsuits were "substantially similar as it relates to the City of O'Fallon" and further found that plaintiffs were barred from bringing the instant claims due to the "prior dismissal of an earlier lawsuit and their participation in and approval of Ordinance 3054," thereby finding the principles of *res judicata* and collateral estoppel applicable in the instant case. We disagree.

¶ 18 The lawsuit filed in 2001 addressed what is known as the "Hubbard" flooding, which was caused by the building of what was referred to as the Hubbard subdivision, as well as the anticipated flooding that would be caused by the development of 84 condominiums known as Cambridge Condominiums. The Hubbard subdivision was already built in 2001. Numerous representations were made as to a redesign that would eliminate the Hubbard flooding, culminating in the passage of Ordinance 3054. In addition to addressing the Hubbard flooding, Ordinance 3054 was also supposed to resolve new flooding issues which were anticipated due to the development of 84 new condominiums. In order to attempt to alleviate the anticipated new flooding, changes were made to the stormwater drainage system. Plaintiff's Exhibit 4 is the drainage design plan prepared by Patrick Netemeyer, an engineer hired by H&L, in August 2001, pursuant to terms of the settlement of 01-MR-162. Exhibit 4 was adopted into City Ordinance 3054. Exhibit 4 shows the condominium detention pond which was to run along the right/east edge of the condominium complex.

¶ 19 The pond is over 1000 feet long, 15 to 30 feet wide, and about 4 feet deep at its lowest point. From the lowest point, a concrete outlet structure allows water from the bottom of the detention pond to flow into a 10-inch underground pipe, which then joins a 24-inch pipe that runs underground toward Cambridge Boulevard. Along that 346 foot stretch, additional storm sewer inlets and downspouts connect to allow surface water to also flow into the 24-inch pipe. A 30-inch pipe then runs under Cambridge Boulevard northeast and out to a drainage creek that flows under Route 50. The City owns Cambridge Boulevard and the 30-

inch drain beneath it.

¶ 20 The evidence in the record indicates that Ordinance 3054 was put in place not only to manage water from a 100-year event coming from the City-owned Hubbard detention basin, but also to control up to a 100-year storm and the anticipated flooding from the soon-to-be-developed Cambridge Condominiums. The parties agreed that the detention pond and stormwater system were designed to hold a 100-year rainfall event. In light of such representations, plaintiffs agreed to settle their lawsuit and 01-MR-162 was dismissed with prejudice.

¶ 21 Both Mr. Netemeyer, who designed the stormwater system at Cambridge Condominiums for the developer, H&L, and the principal of H&L, Mr. Holland, admitted that the purpose of modifying the stormwater system through the changes required by Ordinance 3054 was to ensure that adjoining and nearby landowners would receive less water, not more. In a letter dated July 19, 2001, Mr. Netemeyer made the following promises about Cambridge Condominiums to plaintiffs' engineer, Mike Arnold:

> "In the developed condition, nearly the entire condominium site drains toward the existing detention pond. However, the residential area East of the condominium site was assumed to bypass the existing detention pond to decrease the amount of water flowing North through the existing residential development. The existing detention pond was deepened and increased in size to handle the 100 year design storm without overtopping and flooding the existing residential area to the East."

Plaintiffs were initially satisfied with the promises made by defendants and the results of the changes so that in 2004 they even purchased a second piece of property, 117 Orchard, located adjacent to their present home at 115 Orchard.

¶ 22 The nuisance actions at issue here were instituted by plaintiffs against the City and H&L after the completion of Cambridge Condominiums and the realization that the

stormwater system which was promised to adequately handle stormwater created by new impervious surfaces in the 84 condominium development did not work. Plaintiffs believed that promises made by defendants in the enactment of Ordinance 3054 were broken, and plaintiffs filed suit to enforce the ordinance. The present litigation is essentially an enforcement action to enforce the promises made by the City and H&L in the settlement of the 2001 lawsuit.

¶ 23 The instant case is clearly distinguishable from the case filed in 2001. Here, plaintiffs are seeking to enforce the specifics of the ordinance as they relate to the building of Cambridge Condominiums, none of which were built when 01-MR-162 was dismissed. The record is replete with evidence and testimony that the stormwater system does not function as promised. The testimony of City engineer Dennis Sullivan and the testimony of Gary Hoelscher, an engineer hired by the City to study the cause of the flooding, confirm that the stormwater retention system did not operate as originally planned. Their testimony is discussed in more detail below.

¶ 24 In any event, plaintiffs could not have known in 2001 that the stormwater retention system once completed would not be in compliance with the ordinance. Therefore, neither *res judicata* nor collateral estoppel applies because the issue in the 2001 lawsuit was not identical to the issue decided by the 2006 lawsuit. We agree with plaintiffs that enforcing an ordinance is completely different from obtaining the ordinance, and, thus, we hold that the trial court's finding that plaintiffs are barred from bringing the instant action because of the dismissal of 01-MR-162 and plaintiffs' participation in and approval of Ordinance 3054 was in error.

¶ 25 II. EVIDENCE OF NEW AND DIFFERENT WATER

¶ 26 The best evidence that the instant litigation covers a new and different source of water than what was addressed in the previous lawsuit is the plaintiffs' purchase of 117 Orchard

in 2004. If the water issues had not been resolved or abated after settlement of the 2001 lawsuit, plaintiffs would not have chosen to invest additional money in 117 Orchard. It was not until 2006 that plaintiffs again experienced excessive flooding on their property after the completion of Cambridge Condominiums. As a result, plaintiffs filed the instant action on July 6, 2006.

¶ 27 Dennis Sullivan, the City engineer, hired Gary Hoelscher, an independent engineer who owns Hoelscher Engineering and who is one of Mr. Netemeyer's competitors, after plaintiffs filed their new lawsuit in 2006 to study the cause of the flooding. Sullivan testified Hoelscher is an "excellent engineer" with a good reputation. In an e-mail sent to Jeff Holland, Sullivan explained the cause of plaintiffs' 2006 flooding as follows:

> "As a result of the law suit by [plaintiffs] over the detention pond drainage, we have had Hoelscher Engineering analyze the detention pond. The review has revealed that the detention pond not only takes water from the development, but takes water from Cambridge Boulevard as well. As a result, the water will top the pond bank and flow over onto [plaintiffs'] property. We are now in a position where correction of the pond is needed. Hoelscher has done a preliminary design of a fix. *** Attached is a simplified diagram of the fix. When are you available to discuss the fix?"

¶ 28 Ultimately, Sullivan proposed Hoelscher's design fix to the mayor.

On September 20, 2006, Sullivan sent Mayor Graham the following email:

> "Hoelscher Engineering has been analyzing the detention pond there that is [in] issue in the lawsuit. The review has revealed that the detention pond not only takes water from the [condominium] development, but takes water from Cambridge Boulevard as well. As a result, the water tops the pond and flows over [plaintiffs'] property. The design as a result of an earlier O'Fallon ordinance actually ensured that any overflow from the pond would flow across the property due to the location of the emergency

> release point. Whatever, the City finds itself in the position at this point where due to engineering done by the developer's engineer, our water and the development water flows across [plaintiffs'] property. Hoelscher has designed a fix. By the time we obtain needed easements from O'Fallon Lumber and potentially [plaintiffs], the cost will [be] in the area of $100,000. How do you wish to proceed? Do we want to take the developer and his engineer to court?"

Thus, the City's own commissioned study found that there was a new source of flooding that was not even a possible source of flooding in 2001 when the first lawsuit was dismissed.

¶ 29 The City hired Hoelscher to study the new flooding alleged by plaintiffs. Hoelscher gave extensive testimony about the cause of new flooding and the inadequacies of the stormwater detention basin as built. We need not repeat his testimony here. Suffice it to say, Hoelscher found the stormwater detention system woefully inadequate. Mr. Hoelscher testified about a solution to conveying water to Route 50, and contrary to Netemeyer's testimony, Hoelscher believed that the storm sewer on Route 50 had the capacity to take the water, but it currently does not get there. The City obtained necessary easements from O'Fallon Lumber. The only other easement that would be needed to implement Hoelscher's "fix" would be plaintiffs.

¶ 30 The law is well-settled that a servient landowner, such as plaintiffs herein, must accept the natural flow of surface water and has no right to stop or impede it, but the servient landowner is not required to accept water flowing from the dominant tract that would not ordinarily do so in the course of nature. *Coomer v. Chicago & North Western Transportation Co.*, 91 Ill. App. 3d 17, 22, 414 N.E.2d 865, 869 (1980). The building of 84 condominiums absolutely changed the natural flow of water. The parties were well aware that this would occur and, thus, plaintiffs tried to address the situation in the first lawsuit. However, it is clear from the record that the City's efforts and H&L's efforts were inadequate.

¶ 31 After careful consideration of the record before us, we find the trial court erred in finding insufficient evidence that the nuisance action is due to new and different water collection than had previously occurred on plaintiffs' property. The trial court's ruling may be against the manifest weight of the evidence, but we need not determine that at this point. Instead we reverse and remand with directions for additional testimony and evidence as to the status of the flooding at this point and any corrective action that may have been taken since the trial court entered its order on September 22, 2010. As to the City's argument of governmental immunity, the trial court's order does not address this issue. Upon remand, this is an issue that should be further developed and ruled upon by the trial court.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby reversed and the cause remanded for further proceedings consistent with this order.

¶ 34 Reversed and remanded with directions.