2018 IL App (5th) 180034-U

NO. 5-18-0034

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BERNARD BRUNS and ERIN HENTZ, Plaintiffs and Counterdefendants-Appellants, v. DAVID HAGEN, Defendant and Counterplaintiff-Appellee (Richard Buss; Leo B. Buss, as Trustee of the Leo B. Buss Trust, Dated February 11, 2009; and Mary Ellen Buss, as Trustee of the Mary Ellen Buss Trust, Dated February 11, 2009, Intervening Third-Party Plaintiffs-Appellees, v. Bernard Bruns and Erin Hentz, Third-Party Defendants-Appellants, and Elizabeth Bruns; Winkler Family Farm Trust; Rose Acre Farms, Inc., an Indiana Corporation; James Pingsterhaus; and David Hagen, Third-Party Defendants-Appellees).	)	Appeal from the Circuit Court of Clinton County. No. 15-MR-130 Honorable Michael D. McHaney, Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Barberis and Justice Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order resolving a drainage dispute is affirmed where the court properly established the parameters of the mutual drain; the court properly afforded each party the opportunity to repair their respective portion of the mutual drain; and the court did not err in apportioning costs.

¶ 2 BACKGROUND

¶ 3 The facts giving rise to this appeal stem from a drainage dispute on real estate designated by surveys as section 33 of Breese Township, Clinton County, Illinois. The initial lawsuit was filed by Paul and Elizabeth Bruns (collectively Bruns) against defendant, David Hagen (Hagen), to enjoin Hagen from altering an existing levee and ditch system and from removing lateral support from the Bruns' real estate. Specifically, the complaint states that prior to 2015, water naturally flowed from the Bruns' real estate onto Hagen's real estate. Sometime in 2015, the Bruns asserted that Hagen constructed or caused to be constructed a dam with a small tube which obstructed the natural flow of water from the Bruns' real estate. In addition, the Bruns asserted that Hagen was in the process of constructing, by deepening and widening, ditches and berms which would obstruct the natural flow of water from the Bruns' real estate and remove the lateral support to the Bruns' real estate. The Bruns sought authorization to restore their natural drainage. The Bruns died during the pendency of the lawsuit. In 2017, plaintiffs, Bernard Bruns and Erin Hentz, were substituted as parties in this matter. Plaintiffs are the Bruns' children and are the holders of the remainder interests in the Bruns' land.

¶ 4 A temporary restraining order was entered in November 2015, preventing Hagen from working on any real estate or ditch located on section 33 until further order of the court. In September 2016, Richard Buss, Leo Buss, and Mary Ellen Buss (collectively Buss) filed a

petition to intervene, asserting the drainage system in question was a mutual drain. Buss attached a third-party complaint to their petition to intervene, joining all landowners who own real estate adjacent to the ditch. The following tracts were identified as being served by the mutual drain: Buss tract (ownership: Buss); Bruns tract (ownership: Bruns)—as previously stated, plaintiffs were substituted as parties in this matter in 2017 after Buss filed their petition to intervene and third-party complaint; Winkler tract (ownership: Winkler Family Farm Trust); Rose Acre tract (ownership: Rose Acre Farms, Inc.); Hentz tract (ownership: Erin Hentz); Pingsterhaus tract (ownership: James Pingsterhaus); and Hagen tract (ownership: Hagen). The complaint asserted that for more than 100 years prior to 2015, there was in effect a drainage levee and ditch system that had served to efficiently drain the Buss, Winkler, Rose Acre, Hentz, and Hagen tracts. In addition, the complaint asserted that a portion of the levee was on the Bruns and Pingsterhaus tracts which prevented drainage from those tracts entering into the drain. The complaint alleged that in about 2013, Bernard and/or Paul Bruns materially interfered with the drainage system by breaching the levee near the southeast corner of the Hagen tract, which prevented Hagen from clearing the ditch along the south and east boundary of the Hagen tract. According to the complaint, the actions of Paul Bruns caused substantial flooding on the Hagen and Buss tracts and have prevented the drainage system from efficiently draining the Hagen and Buss tracts.

¶ 5 Buss' third-party complaint sought a judicial finding that a mutual drain existed under section 2-8 of the Illinois Drainage Code (Code). 70 ILCS 605/2-8 (West 2012). The complaint further sought a finding that the drain is a permanent easement under section 2-10 of the Code (*id.* § 2-10); that under section 2-11 of the Code (*id.* § 2-11), Buss is authorized to repair the drain to restore it to a condition that efficiently drains the tracts; and each party be ordered to

maintain their respective portion of the mutual drain and bear the costs associated with maintaining the drain in a proportion determined by the court.

¶ 6 An evidentiary hearing was held on May 25, 2017, where the following parties testified regarding the history of the drainage on the tract of land designated as section 33: Patricia Winkler, David Hagen, Bernard Bruns, Michael Bruns, and Richard Buss. Don Wauthier, a consulting agricultural engineer specializing in the areas of soil and water drainage, also testified. Wauthier testified that he is familiar with the Code, which he acknowledged governs drainage districts. Wauthier testified that he physically inspected section 33 in the early spring of 2016. Wauthier testified regarding the history of drainage channels on section 33, the reasonable maintenance and repair of those channels, and the effect of the Bruns' farming practices which encroached on those channels.

¶ 7 Based on Wauthier's judgment and opinion of what he observed on section 33, Wauthier explained:

> "Well, what I saw in 2016 was that Mr. Hagen had started to remove sediment from the channel along his property at the north of the center of the section and was working his way southward to the center of the section and away to remove sediment. He was placing all of the removed sediment on his side of the channel, although I felt as I looked at it that that material should have been placed on the other side of the channel because it was—the berm in that location had been removed and, in fact, farming operations had actually encroached all the way down to near the bottom of the ditch. And so—which was very inappropriate. And so he was obviously trying to stay on his side of the property line. But I felt like what he was doing, the removal was correct, but the berm needed to be on the other side."

¶ 8 Wauthier essentially opined that the Bruns' farming practices eroded a berm which caused problems in the drainage ditch. Wauthier opined to a reasonable degree of engineering and scientific certainty that the system of the movement of surface water on section 33 was a mutual drain within the meaning of the Code. 70 ILCS 605/2-8 (West 2012). Wauthier further testified there was a substantial need for maintenance in order to maintain the integrity of the system.

¶ 9 Following the evidentiary hearing on May 25, 2017, the trial court found that a mutual drain existed within the meaning of the Code. *Id.* The matter was then set for another evidentiary hearing on the rights and responsibilities of the parties concerning the mutual drain. At this subsequent hearing, Hagen, Buss, Bernard Bruns, and Michael Bruns testified regarding the history and condition of the mutual drain. Following this hearing and the submission of proposed orders by all parties, the court entered an order on October 19, 2017, which set forth the physical parameters of the mutual drain system and required each party to bear the cost of the necessary work on the ditches and levees on their respective land. The trial court also afforded each party the opportunity to clean and modify the ditch on their respective tract of land and to rebuild and repair the adjacent levees. If a party failed to adequately repair or construct their drain and levee within 90 days, the order provided that any other party may petition the court for authorization to complete or have completed said repairs or construction. In such an event, the order stated that the court may require the noncomplying party to assure payment of the reasonably estimated cost to perform the work.

¶ 10 Plaintiffs filed a motion to reconsider on November 15, 2017, asserting the trial court lacked the authority to compel plaintiffs or any other landowner to perform work on the mutual drain; the court lacked the authority to engineer a drainage solution, but instead is charged with

determining the historical parameters of the mutual drain; there is no basis in the record on which the court could apportion or tax costs of repair; and the court erred in finding that the levee on the west boundary of the Winkler property was continuous. Third-party defendant James Pingsterhaus filed a motion on November 17, 2017, seeking to clarify or reconsider portions of the trial court's order. Specifically, Pingsterhaus sought reconsideration of the court's finding that the levee should be a height of 32 inches at all locations, and clarification of the court's order regarding the issue of a continuous levee. Thereafter, the court entered an amended final order.

¶ 11 This appeal followed.

¶ 12 ANALYSIS

¶ 13 At the onset of our analysis, we note our standard of review. As set forth above, this appeal is before us from an amended final order entered by the trial court following a bench trial. Following a bench trial, a reviewing court will not reverse the judgment of the trial court unless the judgment is against the manifest weight of the evidence. *Smith, Allen, Mendenhall, Emons & Selby v. Thomson Corp.*, 371 Ill. App. 3d 556, 558 (2006). A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings are unreasonable, arbitrary, or not based on the evidence presented at the trial. *Id.*

¶ 14 It is well settled that as a reviewing court, we are prohibited from reweighing the evidence or substituting our judgment for that of the trier of fact. *Fox v. Heimann*, 375 Ill. App. 3d 35, 46 (2007). The trial court's factual findings are afforded great deference, particularly where credibility determinations are involved. *Id.* Underlying this rule is the recognition that the trial judge, as the trier of fact, is in a superior position to that of a reviewing court to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the

evidence. *Id*. A judgment may not be overturned merely because the reviewing court disagrees with the trial court's judgment or might have come to a different conclusion. *Id*.

¶ 15 I. Parameters of the Mutual Drain

¶ 16 Plaintiffs first argue that the trial court erred in establishing the parameters of the mutual drain. Specifically, plaintiffs argue the trial court was supposed to determine the historical depth of the ditch, not determine what is currently necessary or desired; the court erred in finding there was no open waterway or culvert in the levee at the center of section 33; and the trial court's modification in its amended final order to find that the Pingsterhaus portion of the levee should be 18 inches tall as opposed to 32 inches tall was contrary to the manifest weight of the evidence.

¶ 17 In support of their argument, plaintiffs argue that in determining the physical parameters of the mutual drain, the trial court is bound by the historical parameters of the system at the time it was "definitely settled and located." *Sullivan v. Bagby*, 335 Ill. 192, 195 (1929). Plaintiffs assert that the testimony presented at the hearing shows the mutual drain system was established in 1914, more than 100 years ago, and it was error for the trial court to make orders to repair and maintain the system without regard to the mutual drain's historic parameters. Plaintiffs assert the court ordered that the depth of the mutual drain be adjusted to conform to work to be completed in the future by Breese Township on the part of the drain located on a public right-of-way, and "[t]here is no way that the historic depth of the ditch (mutual drain) can be related to work to be done by Breese Township."

¶ 18 In this case, following an evidentiary hearing, the trial court determined the "evidence established clearly, convincingly and overwhelmingly, the existence of a mutual drainage system." Thereafter, the court held an additional evidentiary hearing to determine the parameters of the mutual drain. As previously stated, Hagen, Buss, Bernard Bruns, and Michael Bruns all

testified extensively regarding the history and condition of the mutual drain, including the historical height of the levy. The record shows the court was presented an abundance of evidence regarding the history of the mutual drain system. The court was presented current and historic photographs of the system, a Lidar map of the elevation of the area in one-foot intervals, and heard the expert testimony of a soil engineer. Although the evidence established that the drain has existed since 1914, it is evident that there are no aerial photographs or witnesses who can testify about the drain as it existed in 1914. That being said, several witnesses testified regarding the history of the mutual drain dating back to the 1960s. In reaching its conclusion establishing the parameters of the mutual drain, it was incumbent upon the court to assess the credibility of the witnesses and weigh the evidence. Based on our review of the record and the findings of the trial court, we cannot say the judgment was against the manifest weight of the evidence. The trial court was presented ample evidence to support its ruling.

¶ 19 Plaintiffs assert that a contentious issue in this case was whether an open ditch existed in the eastern levee at the northeast corner of the Bruns' tract. Plaintiffs contend the court's finding that the levee on the east side of the ditch was continuous and connected at the northeast corner of the Bruns' tract is against the manifest weight of the evidence. We disagree. As stated above, the trial court was presented ample evidence regarding the layout and parameters of section 33. Again, the trial court is in a much better position than this court to observe the witnesses, assess their credibility, and weigh the evidence. *Fox*, 375 Ill. App. 3d at 46. Based on our review of the record, we find no reason to disturb the trial court's judgment. Accordingly, we reject plaintiffs' argument.

¶ 20 As to the court's modification in its amended final order finding Pingsterhaus' portion of the levee shall not be less than a height of 18 inches as opposed to all other levees being ordered

to be constructed or repaired to a height of not less than 32 inches, we similarly conclude the court's judgment was not against the manifest weight of the evidence. The record shows that no relief was asked of Pingsterhaus concerning the height of his levee, and the testimony adduced at the hearing shows there is no fault in the way Pingsterhaus' levee is maintained. In contrast, the evidence shows Pingsterhaus' portion of the levee has been adequately maintained. Moreover, Pingsterhaus' levee has maintained approximately the same height for several decades. Unlike plaintiffs' property, there was no allegation that Pingsterhaus eroded the top of his levee by farming, and no reason to believe Pingsterhaus' levee had become too low. Based on the foregoing, we do not find the court erred in modifying its order to find that Pingsterhaus' portion of the levee shall not be less than a height of 18 inches.

¶ 21 Third-party defendant James Pingsterhaus contends the trial court's order should be affirmed except as applicable to paragraph 2 of the amended final order. Paragraph 2 provides as follows:

> "2. Upon completion of the cleaning of said road ditch to the depth permitted by the Township, each of the parties shall have 90 days to complete the cleaning of the ditch upon their individual properties to a depth as reasonably necessary taking into account the depth of the Drive In road ditch to allow surface drain water to flow freely and naturally from the SE corner of the Hagen tract westerly across the ditch along the southern boundary of the Hagen and Pingsterhaus tracts into the Drive In road ditch thence South in said Drive In road ditch. Slope of the drainage ditches shall be one inch (1") per 100 linear feet."

Pingsterhaus argues that the floor of the mutual drain system should be no lower than the historical level to be determined by an analysis of subsoil vs. sediment unless agreed by all

parties. Pingsterhaus alleges the trial court incorrectly stated the method of determining the historic depth of the mutual drain system, and asks this court to order the trial judge to delete paragraph 2 of the order and substitute it with the following:

> "2. Each of the parties shall have 90 days from the entry of the decision of the Appellate Court herein to complete the cleaning of the ditch upon their individual properties to the historical depth as determined by the boundary between the subsoil and the sediment. Only sediment shall be removed."

¶ 22 After careful consideration, we are unconvinced by Pingsterhaus' argument. The court's determination as to depth was a matter within the province of the trial court, which considered and weighed the evidence presented at the hearing. Based on our review of the record, we find no reason to disturb that determination.

¶ 23 In sum, we find it important to stress that it is the trier of fact's role to resolve conflicts and inconsistencies in the evidence, weigh the evidence presented, and assess the witnesses' credibility. *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 688 (2010). Because the trier of fact sits in a better position to observe the witnesses, assess their credibility, weigh the evidence, and resolve conflicts therein, a reviewing court's judgment will not ordinarily be substituted for the judgment of the trier of fact. *Long v. Illinois Power Co.*, 187 Ill. App. 3d 614, 625 (1989). Here, we find no reason to disturb the trial court's judgment, which we find is amply supported by the record. For these reasons, we find the trial court's comprehensive order, which defined the parameters of the mutual drain, was not against the manifest weight of the evidence.

¶ 24 II. Repairs to the Mutual Drain

¶ 25 Plaintiffs next argue that the trial court erred when it ordered the parties to make repairs to the mutual drain, as these mandates are contrary to Illinois law. In support of their position, plaintiffs cite to *Fobar v. Higginson*, 6 Ill. App. 2d 29, 32 (1955), which observed "there is no statutory duty on the part of the members of [a drainage] system to repair and maintain the system."

¶ 26 In this case, the court ordered as follows regarding repairs to the mutual drain:

> "3. Each of the parties shall be given a like time (90 days) after completion of the cleaning of the Drive In road ditch to rebuild and repair the levees upon their individual properties along the mutual drain.
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> * * *
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> 8. In the event any party fails to adequately repair or construct the drains and levees herein described within the times herein set forth, any other party may petition this Court to authorize the petitioning party, or someone retained by said party, to complete or have completed said repairs or construction. In such event, the Court may require the non-complying party to deposit with the Clerk of the Court, or otherwise provide adequate security, to assure payment of the reasonably estimated cost to perform said work."

¶ 27 After careful consideration, we find plaintiffs' argument is misplaced. Although plaintiffs accurately observe that there is no statutory duty for members of a mutual drain system to repair and maintain the system, the trial court in this case did not mandate the parties to clean, rebuild, and/or repair portions of the ditch and levees that comprise the mutual drain. Rather, the court afforded each party the opportunity to repair their respective portion of the mutual drain within

90 days. If a party fails to repair their respective portion within 90 days, the court's order allows any other party to petition the court for authorization to have those repairs completed. The court's order does not require a party to make repairs to the mutual drain, and provides a practicable alternative in the event that a party fails to make repairs to their respective portion of the mutual drain. In short, we do not find the court erred in affording each party the opportunity to repair their respective portion of the mutual drain before allowing a party to seek authorization to have the repairs completed in the event that a party fails to make repairs to their own land. For these reasons, we reject plaintiffs' argument.

¶ 28 III. Apportionment of Costs

¶ 29 Plaintiffs' final contention alleges the trial court erred when it apportioned costs. Specifically, plaintiffs argue (1) the issue of cost apportionment was outside the scope of the hearing; and (2) there was no basis in the record to apportion costs, as there was no evidence presented regarding the benefit of any proposed repair or maintenance received by any particular tract or landowner. For these reasons, plaintiffs contend the court's apportionment was against the manifest weight of the evidence and must be vacated.

¶ 30 In its amended final order, the trial court ruled as follows regarding the repairs and construction to the mutual drain system and the cost apportionment to be attributed to those repairs and construction:

> "2. Upon completion of the cleaning of said road ditch to the depth permitted by the Township, each of the parties shall have 90 days to complete the cleaning of the ditch upon their individual properties to a depth as reasonably necessary taking into account the depth of the Drive In road ditch to allow surface drain water to flow freely and naturally from the SE corner of the Hagen Tract westerly across the ditch along the

southern boundary of the Hagen and Pingsterhaus tracts into the Drive In road ditch thence South in said Drive In road ditch. Slope of the drainage ditches shall be one inch (1") per 100 linear feet.

3. Each of the parties shall be given a like time (90 days) after completion of the cleaning of the Drive In road ditch to rebuild and repair the levees upon their individual properties along the mutual drain.

* * *

6. Each party shall bear the cost of the necessary work upon the ditches and levees upon their property.

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8. In the event any party fails to adequately repair or construct the drains and levees herein described within the times herein set forth, any other party may petition this Court to authorize the petitioning party, or someone retained by said party, to complete or have completed said repairs or construction. In such event, the Court may require the non-complying party to deposit with the Clerk of the Court, or otherwise provide adequate security, to assure payment of the reasonably estimated cost to perform said work."

¶ 31 After careful consideration, we do not find the trial court's order regarding cost apportionment was against the manifest weight of the evidence. As it pertains to plaintiffs' argument that cost apportionment was outside the scope of the hearing, we note that the court's order was issued following the hearing on the rights and responsibilities of the parties to the mutual drain. A party's responsibility to the mutual drain certainly includes the cost of maintaining the drain. In fact, the cost of maintaining the mutual drain is an inherent

responsibility of a party to the mutual drain. Accordingly, we find the court's order, which in part outlines how the issue of cost apportionment will proceed, was not outside the scope of the hearing. We are mindful that counsel for Hagen and Buss objected at the hearing when the issue of cost arose. However, the court overruled the objection, and we find the court did not overstep its bounds in doing so.

¶ 32 Regarding plaintiffs' contention that there was no basis in the record to apportion costs because there was no evidence presented regarding the benefit of any proposed repair or maintenance received by any particular tract or landowner, we find plaintiffs' argument is misplaced. Although plaintiffs accurately note that the Code does not impose a statutory duty on a member of a mutual drainage system to contribute to the costs of repairing and maintaining the system, the members do have a duty to pay a proportionate share of the costs of its repair and maintenance in accordance with the benefits enjoyed. As our colleagues in the Second District have observed:

> "[A] court may, in the exercise of its equitable powers, provide an appropriate remedy where none is provided by statute. [Citation.] Courts in Illinois have long recognized the existence of an equitable remedy for members of a mutual drainage system seeking to compel their fellow members to contribute to the cost of maintaining or repairing the system. Under this equitable approach, which is to be determined based on the facts of each case, members of a mutual drainage system can be compelled to bear a portion of the cost of repair in proportion to the benefit they receive as a result." *Reimer v. Leahy*, 204 Ill. App. 3d 918, 921 (1990).

¶ 33 With these principles in mind, plaintiffs' argument that there was no basis in the record to apportion costs carries weight, as there was no evidence presented regarding any benefit received

by a landowner from the mutual drain. However, based on our reading of the trial court's order, we find the court outlined how the issue of cost apportionment would proceed rather than apportion specific costs to particular parties. As stated above, paragraphs 2 and 3 of the order afford each party the opportunity to repair their portion of the drain within 90 days, with each party to bear their own costs. However, paragraph 8 provides an alternative in the event that a party fails to make repairs to their respective portion of the mutual drain within 90 days, as any party may then petition the court for authorization to have those repairs completed with the issue of cost assessment to be determined by the court. Our reading of the court's order concludes that no party is forced to take any action with regard to the mutual drain repairs and the cost associated with those repairs unless the party willingly undertakes the repairs and the associated cost. A party can simply do nothing and wait for the court to apportion costs. In short, the court afforded each party the opportunity to repair their own land at their own cost. Although the order provides that each party "shall" have 90 days to make repairs to the mutual drain on their respective property, paragraph 8 clearly indicates that no party is forced to make repairs to their own land at their own cost. Again, if a party fails to repair their land within 90 days, any other party may petition the court for authorization to have those repairs completed with the issue of cost apportionment to be determined by the court. In light of the foregoing, we cannot say the court's judgment was against the manifest weight of the evidence.

¶ 34 CONCLUSION

¶ 35 In sum, we find the trial court entered a fair and equitable order which resolved the longstanding drainage dispute between the adjoining landowners. For the foregoing reasons, the judgment of the circuit court of Clinton County is hereby affirmed.

¶ 36 Affirmed.