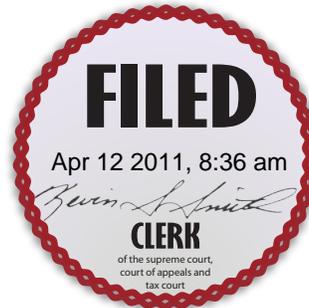


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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SIEB CORP., INC., KURT JEFFREY SIEBERT, )  
KURT SIEBERT and RIVER VALLEY SHEET METAL, )  
Appellants, )

vs. )

No. 71A03-1010-CT-531

L Aidig Systems, Inc., Mishawaka Leasing )  
Corporation, Wyn Laidig, DJ Construction )  
Co., Inc., Progressive Engineering, Inc. and )  
Clarkco, Inc., )  
Appellees. )

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APPEAL FROM THE ST. JOSEPH CIRCUIT COURT  
The Honorable Michael G. Gotsch, Judge  
Cause No. 71C01-0903-CT-39

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**April 12, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

**STATEMENT OF THE CASE**

Sieb Corp, Inc.<sup>1</sup> (“Sieb Corp”), Kurt Siebert (“Siebert”), and River Valley Sheet Metal, Inc. (“River Valley”) (collectively “Sieb Corp”) appeal from the trial court’s grant of summary judgment in favor of Laidig Systems, Inc. (“Laidig Systems”), Mishawaka Leasing Corp. (“MLC”), and Wyn Laidig (“Wyn”) (collectively “Laidig”); and DJ Construction, Co., Inc. (“DJ Construction”), Progressive Engineering, Inc. (“Progressive”), and Clarkco, Inc. (“Clarkco”) (collectively, the “Contractors”) on Sieb Corp’s complaint seeking compensation from Laidig and the Contractors for damages Sieb Corp sustained to its property during a flood. We hold that while the trial court properly granted summary judgment in favor of Contractors, there is a genuine issue of material fact whether the common enemy doctrine bars Sieb Corp’s claims against Laidig.

Affirmed in part, reversed in part, and remanded for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

In September 2008, Sieb Corp operated a sheet metal fabricating company at a facility located in Mishawaka. Laidig leased commercial property from MLC located near the Sieb Corp property and was expanding the existing facility there. The expansion required the construction of a large retention basin to collect surface water runoff. Laidig

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<sup>1</sup> The pleadings consistently list “Sieb Corp, Inc.” as not having a period after “Corp,” and we will do likewise.

hired DJ Construction to design and build the expansion of the commercial building on the property, and DJ Construction retained Progressive to develop “a master plan for proposed future additions” to the property. Appellees’ App. at 138. Progressive’s work on the project included “calculat[ing] [water] retention requirements for the proposed improvements[.]” Id.

The plans for the improvements on the Laidig property were subject to St. Joseph County Storm Drainage and Sediment Control Ordinance No. 33-06, which provided in relevant part that “design of storm water detention and retention facilities shall be based on not less than a 24 hour, 100 year storm, plus 6% for siltation.” Id. at 31. A so-called “100 year storm” is a rainstorm that has a 1% likelihood of occurring and that has an intensity of approximately 5.6 inches of rain in a twenty-four hour period. Because of the nature and extent of the improvements planned for the Laidig property, including future improvements, Progressive determined that a “detention/retention capacity of 164,027 cubic feet, or 3.766 acreage feet” was required in order to comply with the ordinance. Id. The construction plans for the retention basin exceeded that calculation by approximately 28% with a capacity of 170,609.5 cubic feet, or 3.92 acreage feet. Accordingly, after the plans were submitted to the St. Joseph County Planning and Building Department, they were approved and a permit was issued.

DJ Construction hired Clarkco to dig and build the retention basin, and by July 23, 2008, a portion of the work was complete. On that date, the basin was capable of holding 105,803 cubic feet of water, and, given the extent of improvements made to the Laidig

property as of that date, the basin was required to hold a minimum of 102,391 cubic feet. Thus, the basin's capacity exceeded the minimum requirements at that time.<sup>2</sup>

On September 13 and 14, 2008, parts of St. Joseph County were inundated by a total of 10.65 inches of rain over the course of thirty-six hours. 6.58 inches of rain fell during the first twenty-four hour period, exceeding the parameters of a 100-year storm. As a result of the heavy rains, during the afternoon of September 14, water overflowed the retention basin on the Laidig property, flowed across a parking lot, through a ditch on a neighboring property, across a street, and onto the Sieb Corp property. Kurt Siebert was present and saw water escaping from the retention basin and flowing "like a white water rapids from the Laidig property" and across the neighboring property and street. Appellants' App. at 35. Siebert observed a "big gap or notch" in the top of the wall of the retention basin, and he described that gap as "channel[ing]" the escaping water "like a spout so that it flowed directly on to the [Sieb Corp] property." *Id.* As a result, Sieb Corp sustained flood damage to its premises.

On March 25, 2009, Sieb Corp filed a complaint for damages,<sup>3</sup> and, on July 6, Sieb Corp filed an amended complaint against Laidig and the Contractors seeking compensation for damages allegedly caused by Laidig's and the Contractors' negligence, trespass, and criminal mischief. In April 2010, Laidig filed a joint motion for summary judgment, and each of the Contractors filed separate motions for summary judgment.

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<sup>2</sup> To the extent Sieb Corp attempts to dispute this fact on appeal, it does not direct us to designated evidence that contradicts the evidence designated by Laidig.

<sup>3</sup> None of the parties have provided this court with a copy of the original complaint.

Following a hearing, the trial court entered summary judgment in favor of each of the defendants. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Standard of Review**

We review a summary judgment order de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. Shelter Ins. Co. v. Woolems, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), trans. denied. We must determine whether the evidence that the parties designated to the trial court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); Bules, 920 N.E.2d at 250. We construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250. Summary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use. Heeb v. Smith, 613 N.E.2d 416, 420 (Ind. Ct. App. 1993), trans. denied.

### **Laidig**

Sieb Corp first contends that the common enemy doctrine does not bar its claims against Laidig, MLC, and Wyn (again, collectively "Laidig"). In Argyelan v. Haviland, 435 N.E.2d 973, 975-77 (Ind. 1982), our Supreme Court explained the common enemy doctrine as follows:

In its most simplistic and pure form the rule known as the "common enemy doctrine" declares that surface water which does not flow in defined

channels is a common enemy and that each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.

\* \* \*

Under the common enemy doctrine, it is not unlawful to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land. These two things, we may concede, are shown by the evidence to have resulted from Defendants' improvements. However, the only evidence that water from the defendants' premises entered those of the plaintiffs' was testimony that, on occasions following sustained moderate to heavy rains, the water built up behind the wall and overflowed it. There was no showing whatever that the defendants[] conducted the water "by new channels in unusual quantities onto particular parts of the lower field" as in Templeton v. Voshloe, (1880) 72 Ind. 134[,] or collected the water in a volume and cast it, as in Davis v. City of Crawfordsville, (1888) 119 Ind. 1, 21 N.E. 449[,] and in Patoka Township et al v. Hopkins, (1891) 131 Ind. 142, 30 N.E. 896, or "shed the water from their building so as to throw it upon the appellant's lot" . . . as in Conner v. Woodfill et al, (1890) 126 Ind. 85, 25 N.E. 876.

We do not intimate . . . that a distinction can be drawn between the case before us and the Conner case upon the basis that Defendants' downspouts are situated twenty feet from the property line whereas in Conner they were but eight feet removed. The distinction lies in the character of the flow as it entered the adjoining property. That water was once impounded or channeled can be of no moment if it is diffused to a general flow at the point of entering the adjoining land.

Except as modified by the above cited cases and others holding that one may not, by artificial means[,] throw or cast surface water upon his neighbor in unusual quantities so as to amplify the force at a given point or points, the law of this state remains as hereinafter quoted by this Court in Taylor, Administrator v. Fickas, (1878) 64 Ind. 167 at 173:

"The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owner that an alteration in the mode of its improvement or occupation in any portion of it will cause

water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow.”

Again, from the same cause:

“The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil.”

. . . [A]lthough the Common Enemy Doctrine may, at times, inflict hardships, it is as fair to one as it is to another—a guiding precept of the law. Additionally, it has worked satisfactorily in this State from the beginning, and it is well understood.

Here, the trial court entered detailed findings and conclusions in granting summary judgment in favor of Laidig and the Contractors. While we are not bound by the trial court’s findings and conclusions and give them no deference, they aid our review by providing the reasons for the trial court’s decision. See GDC Envtl. Servs. Inc. v. Ransbottom Landfill, 740 N.E.2d 1254, 1257 (Ind. Ct. App. 2000). The trial court concluded in relevant part:

2. The defendants primarily rely on what’s known as the common enemy doctrine as the basis for summary judgment. In its “most simplistic and pure form,” the doctrine provides that a landowner may deal with surface water that doesn’t flow in defined channels “as best suits his convenience.” Accordingly, a landowner may wall surface water out, wall it in, and divert or accelerate its flow by any means. This is true even if the landowner’s changes cause water to stand in unusual quantities on adjacent land or to pass into or over adjacent lands in greater quantities than the water flowed before.

3. The plaintiffs agree with how the defendants describe the common enemy doctrine. But they argue that it doesn’t apply here because the

defendants collected and cast surface water onto the plaintiffs' property. Indeed, the Indiana Supreme Court has recognized that despite the common enemy doctrine, a landowner may not "by artificial means throw or cast surface water upon his neighbor in unusual quantities so as to amplify the force at a given point or points." So the question in considering the defendants' summary judgment motions is whether there is some evidence that the defendants by artificial means threw or cast surface water upon the plaintiffs' property.

4. Indiana's appellate courts define "throwing" or "casting" surface water to include creating channels that direct the flow of surface water onto neighboring property, or taking specific action that allows collected water to escape onto neighboring property.

5. Allowing water to overflow a retaining wall, on the other hand, does not constitute "throwing" or "casting."

6. The evidence offered by the defendants supports the conclusion that water simply overflowed the retention basin. First, the basin was required by a county ordinance, which also set the required size of the basin. It's undisputed that the basin was designed and built to hold more water than the ordinance required.

7. The amount of rain that fell on September 13 and 14 is also undisputed. It's an amount that far exceeded the 100-year storm anticipated by the ordinance.

8. Finally, the plaintiffs have not disputed the defendants' evidence about the condition of the basin. It was structurally sound. None of its banks failed or crumbled. The water in the basin didn't escape through a channel, pipe, culvert, chute, or similar path. And no one altered the basin before or during the rain in a way that would have allowed water to escape the basin.

9. Accordingly, there was no artificial means for the water to escape the basin; it just overflowed the basin's walls.

10. The plaintiffs, however, argue that the evidence of a notch in the basin wall raises an issue of fact over whether the water was cast onto the plaintiffs' property. This comes from a statement in Siebert's affidavit. But to the extent that the statement implies that one of the defendants cut the notch out of the basin wall or designed the basin to include a notch or gap, there is no foundation for the implication. Siebert didn't say he saw someone cutting the notch out. Nor did he say the plans called for a notch or gap. He didn't even explain when and how he saw a notch or gap.

Accordingly, Siebert's statement is, at best, evidence that a notch or gap simply existed.

11. But there was a picture of the retention basin in the record, a picture that didn't show a "big gap"—as Siebert classified it—or even a notch. The picture showed what could be classified as a low point in the basin wall.

12. But even if the notch or gap exists as Siebert classifies it, Siebert's statement is not enough to create an issue of fact over whether the defendants "artificially" cast water onto the plaintiffs' property. Siebert doesn't say where the notch came from. So nothing in what Siebert said conflicts with the defendants' evidence that nobody altered the basin's walls.

13. In light of all the evidence together, it is found that water from the basin simply overflowed at the lowest point of the basin wall and that the defendants did nothing to artificially create the low point. They didn't cut out a notch or big gap, like the defendant in Gumz v. Bejes[, 163 Ind. App. 55, 321 N.E.2d 851 (1975)]. Nor did they channel the water to that point in an effort to remove it from Laidig's property, like the defendants in numerous cases where Indiana courts have found the defendant cast water. Accordingly, any water that flowed out of the retention basin was not artificially cast onto the plaintiffs' property.

14. Nor does the mere existence of the basin raise an issue over whether the water was artificially cast. It's true that the basin is not a naturally occurring feature of Laidig's property. But it is significant that the basin was also not "voluntarily" placed there. The law required it. Finding that the defendants could be liable simply for building the basin would have problematic consequences. Under the common enemy doctrine, landowners may pave the entire surface of their property without fear of liability for any flooding it may cause. So landowners would be left with the choice of either violating a county ordinance by not putting in a retention basin or facing potential liability to its neighbors by putting one in. In other words, it would be poor policy to allow a landowner the protection of the common enemy doctrine when the landowner violates the law, but not when he complies with it. So putting in the basin alone does not constitute artificially casting water onto the plaintiffs' property.

15. Because the plaintiffs have offered no evidence that the defendants by artificial means cast water onto the plaintiffs' property, the common enemy doctrine must apply to this case. There is no genuine issue of material fact

and the facts as they are show that all the defendants are entitled to judgment as a matter of law under the common enemy doctrine.

Appellants' App. at 16-20 (some emphases added, footnotes omitted).

In sum, the trial court concluded that none of the designated evidence creates a genuine issue of material fact whether Laidig artificially cast water onto Sieb Corp's property. In reaching that conclusion, the trial court found the facts in Argyelan closely analogous to those in this case. In Argyelan, "following sustained moderate to heavy rains," water flowed over the top of a six-inch curb on the defendant's property, and our supreme court held that the common enemy doctrine precluded liability. 435 N.E.2d at 976. In particular, the court observed that "water once impounded or channeled can be of no moment if it is diffused to a general flow at the point of entering the adjoining land."

Id.

Here, however, the only eyewitness testimony concerning the character of the water escaping Laidig's retention basin is Siebert's description of the water being funneled or channeled from a gap or notch in the basin and running like a "white water rapids" onto Sieb Corp's property. Appellants' App. at 35. Siebert described the water shooting out of the basin through a gap or notch "like a spout." Id. The designated evidence does not show that the water merely overflowed the edge of the basin, nor does it show that the water was otherwise "diffused to a general flow at the point of entering" Sieb Corp's property.<sup>4</sup> Finally, Argeylan was an appeal following a trial, not summary

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<sup>4</sup> The factual scenario outlined in the dissenting opinion may well prove correct. A factfinder may ultimately determine that the evidence creates a reasonable inference that the water was diffused by the time it passed over the neighboring property and entered Sieb Corp's property. But without any such designated evidence, and in light of the disputed evidence on this point, summary judgment is inappropriate on this material issue of fact.

judgment. As such, the facts and procedural posture of Argyelan distinguish that case from the instant case.

But the facts in Bulldog Battery Corp. v. Pica Investments, Inc., 736 N.E.2d 333 (Ind. Ct. App. 2000), are closely analogous to those in this case. In Bulldog, the plaintiff's property sustained damage after "a 'one hundred year flood' wherein approximately eight inches of rain fell, the entire city was flooded, and a state of emergency was declared." Id. at 336. The plaintiff sued, alleging that water was "shooting out" of a "catch basin" and downspouts onto the defendant's property and ran "in channels" from the defendant's property onto the plaintiff's property. Id. at 340. The defendant moved for summary judgment on the basis that the common enemy doctrine precluded any liability for the flooding, and the trial court denied that motion.

On appeal, this court affirmed the trial court's denial of summary judgment on the common enemy doctrine issue. In particular, we observed that "[w]hether surface water<sup>5</sup> is collected and cast upon neighboring land as a body or collected but diffused before entering neighboring property will be largely a question of fact." Id. And we noted that while the water from the catch basin was supposed to "be routed into the city's drainage system[,]" the plaintiff "personally witnessed water 'shooting out' of the catch basin and downspouts, and observed water running in channels off Bulldog Battery's paved parking lot and onto Pica's property." Id. at 340. Thus, we held that

there is a genuine issue of material fact for the trier of fact regarding whether Bulldog Battery's improvements to its land merely altered the flow

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<sup>5</sup> The common enemy doctrine applies to damage due to surface water, but it does not apply to damage due to water in a watercourse. See Birdwell v. Moore, 439 N.E.2d 718, 721 (Ind. Ct. App. 1982). The parties do not dispute that the water at issue here was surface water.

of the surface water resulting in a general flow of water onto Pica's land or collected it by artificial means and cast it in a body upon Pica's land.

Id.

In this case, the trial court concluded that there was no issue of material fact since there was no designated evidence that Laidig caused a gap or notch to exist in the retention basin. In particular, the trial court concluded

[T]o the extent that [Sieb Corp] implies that one of the defendants cut the notch out of the basin wall or designed the basin to include a notch or gap, there is no foundation for the implication. Siebert didn't say he saw someone cutting the notch out. Nor did he say the plans called for a notch or gap. He didn't even explain when and how he saw a notch or gap. Accordingly, Siebert's statement is, at best, evidence that a notch or gap simply existed.

Appellants' App. at 19. But it is not necessary that Sieb prove its case, only that the designated evidence supports an inference that precludes summary judgment. Both the trial court and this court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. See Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). Thus, evidence that there was a notch or gap is enough to preclude summary judgment under the circumstances.

In Bulldog, there was likewise no designated evidence whether the defendants did anything to cause the water to "shoot" onto the plaintiff's property. Again, the water in that case was designed to be diverted to the city's drainage system, not to be cast onto the plaintiff's property. The evidence in Bulldog was merely that the plaintiff witnessed the water being channeled in the manner described, and we held that that was enough to create a question of fact precluding summary judgment. Here, the retention basin was

designed to absorb the collected surface water, not to cast it onto an adjacent property. But Siebert witnessed the water escaping from the basin instead of being absorbed, and he described it as being “channeled . . . like a spout” and “funneled by the gap or notch[.]” Id. at 35. We follow Bulldog and hold that Siebert’s testimony is sufficient to create a genuine issue of material fact precluding summary judgment.

We note that in granting summary judgment, the trial court concluded, after looking at a photograph designated as evidence, that no gap or notch existed in the side of the retention basin on Laidig’s property, that “[t]he water in the basin didn’t escape through a channel, pipe, culvert, chute, or similar path,” and that the picture “showed what could be classified as a low point in the basin wall.” Appellants’ App. at 18-19. One man’s “notch or gap” is another man’s “low point.” It is for the trier of fact to assess Siebert’s credibility and to weigh his testimony and any other evidence that may be introduced at trial. It is for the trier of fact to determine whether a gap, notch or low point existed in the retention basin which caused the surface water collected in the basin to be concentrated, directed and artificially cast upon the Sieb Corp property where no natural watercourse had existed previously, see Gene B. Glick Co. v. Marion Const. Corp., 165 Ind. App. 72, 331 N.E.2d 26, 31 (1975), or whether, as the trial court found, the water simply overflowed the basin wall and Sieb Corp’s complaint is barred by the common enemy doctrine.<sup>6</sup>

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<sup>6</sup> We note that the parties and trial court devote a lot of attention to the issue of whether Laidig complied with the applicable ordinance with respect to the basin’s capacity to hold water. But that attention is misdirected. Again, as our Supreme Court observed in Argvelan, as long as a landowner does not “artificially cast” surface water upon his neighbor “in unusual quantities so as to amplify the force at a given point[.]” he may manage surface water by “diverting or accelerating its flow by any means whatever.” 435 N.E.2d at 975-76 (emphasis added). Thus, a landowner might be in total compliance

## Contractors

With respect to the grant of summary judgment in favor of the Contractors, the trial court concluded in relevant part:

16. Summary judgment for Progressive is also appropriate on other grounds. In Indiana, plaintiffs generally must have a contractual relationship with an architect or engineer to maintain a suit against them. Only if an architect or engineer's design was "done so negligently as to create a condition imminently dangerous to third persons" will a plaintiff have a claim without a contract. Because Progressive didn't have a contract with the plaintiffs, they must show that Progressive's design of the retention basin created an imminently dangerous condition.

17. For its part, Progressive presented evidence that the design was done with reasonable care and was not imminently dangerous. Significantly, the design complied with the county ordinance governing retention basins. The county said as much when it signed off on the plans. Because the plaintiffs offered no evidence that the plans were faulty or that the retention basin's design was imminently dangerous, there is no issue of fact with regard to this point. Progressive, under law, owed no duty to the plaintiffs and has a second basis for summary judgment.

18. Likewise, Clarkco is entitled to summary judgment on grounds in addition to the common enemy doctrine. Clarkco, an independent contractor, performed its work according to the approved plans, as prepared by Progressive. The plans were not obviously defective, and the work performed was not imminently dangerous. Therefore, Clarkco breached no duty owed to the Plaintiffs, thus negating the negligence claim. Accordingly, Clarkco is entitled to summary judgment on that second basis.

Appellants' App. at 21-22 (footnotes omitted).

On appeal, Sieb Corp contends that "[t]here are genuine issues of material fact over whether the plans [for expansion of the Laidig property facilities] were defective and there is a genuine issue of material fact over whether the defective plans caused harm to a third person[.]" Brief of Appellants at 11. Thus, Sieb Corp maintains that the trial

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with all applicable laws and still be liable under the common enemy doctrine if he artificially casts water onto his neighbor's property with a certain intensity, and the converse is also true.

court erred when it granted summary judgment in favor of the Contractors. Initially, we note that Sieb Corp does not support its contentions on this issue with cogent argument or citation to authority. See Ind. Appellate Rule 46(A)(8)(a). As such, the issue is waived.

Waiver notwithstanding, we hold that the Contractors are not liable to Sieb Corp as a matter of law. Progressive, a subcontractor hired by DJ Construction, developed a site plan for the Laidig property expansion, including plans for dealing with surface water. Because Sieb Corp had no privity of contract with either Progressive or DJ Construction, in order for Sieb Corp to recover for the alleged negligence, Sieb Corp was required to prove that the site plan was “so negligent ‘as to create a condition imminently dangerous to third persons[.]’ ” See Hamilton v. Roger Sherman Architects, 565 N.E.2d 1136, 1139 (Ind. Ct. App. 1991) (quoting Hiatt v. Brown, 422 N.E.2d 736, 740 (Ind. Ct. App. 1981)). Again, Sieb Corp does not make a cogent argument on this issue. Indeed, Sieb Corp does not even suggest that the site plan was imminently dangerous. Sieb Corp merely alleges that the site plan was “defective.” Brief of Appellants at 11. But, aside from baldly asserting as much, Sieb Corp has designated no evidence to support its assertion. Thus, the trial court did not err when it entered summary judgment in favor of DJ Construction and Progressive.

Finally, the undisputed designated evidence shows that Clarkco merely followed Progressive’s plans when it constructed the retention basin on the Laidig property. It is well settled that “there is no breach of duty and consequently no negligence where a contractor merely follows the plans or specifications given him by the owner so long as they are not so obviously dangerous or defective that no reasonable contractor would

follow them.” Peters v. Forster, 804 N.E.2d 736, 742 (Ind. 2004). Again, Sieb Corp makes no contention that the plans were “so obviously dangerous or defective that no reasonable contractor would follow them.” See id. Accordingly, the trial court did not err when it entered summary judgment in favor of Clarkco.

### **Conclusion**

A factfinder may well enter judgment for Laidig following a trial, but Laidig is not entitled to summary judgment. Sieb Corp has designated evidence to establish a genuine issue of material fact. Our case law is clear. The common enemy doctrine permits landowners to alter their premises such that surface water may either “ ‘stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow.’ ” Id. at 977 (quoting Taylor, 64 Ind. at 173). A landowner may not, however, “by artificial means throw or cast surface water upon his neighbor in unusual quantities so as to amplify the force at a given point or points[.]” Id. We reverse the trial court’s grant of summary judgment in favor of Laidig Systems, Wyn, and MLC. The trial court properly granted summary judgment in favor of DJ Construction, Progressive, and Clarkco.

Affirmed in part, reversed in part, and remanded for further proceedings.

DARDEN, J., concurs.

BAILEY, J., concurs in part and dissents in part with separate opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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SIEB CORP., INC., KURT JEFFREY SIEBERT,	)	
KURT SIEBERT and RIVER VALLEY SHEET METAL,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 71A01-1010-CT-531
	)	
L Aidig Systems, Inc., Mishawaka Leasing	)	
Corporation, Wyn Laidig, DJ Construction	)	
Co., Inc., Progressive Engineering, Inc. and	)	
Clarkco, Inc.,	)	
	)	
Appellees.	)	

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**BAILEY, Judge, concurring in part and dissenting in part**

I agree that DJ Construction, Progressive, and Clarkco are entitled to summary judgment. However, I disagree with the majority position that there exists a genuine issue of material fact precluding summary judgment for Laidig Systems, Wyn, and MLC.

Sieb Corp’s Amended Complaint alleged that “the Defendants negligently collected and concentrated the surface water and cast it in a body upon the Plaintiffs’ property located at 58785 Executive Drive in Mishawaka, Indiana.” (Appellee’s App. 325-26.) Sieb Corp also alleged trespass, nuisance, and criminal mischief, again with reference to Laidig’s conduct of “collecting” and “casting” water. The common enemy doctrine of water diversion applies regardless of the form of action brought by the plaintiff, that is, whether he asserts his claims as an action for negligence, trespass, or nuisance. Luhnow v. Horn, 760 N.E.2d 621, 631 (Ind. Ct. App. 2001).

I acknowledge that an exception to the common enemy doctrine exists where an owner of land has, by artificial means, thrown or cast water onto his neighbor in unusual quantities so as to amplify the force at a given point or points. Argyelan v. Haviland, 435 N.E.2d 973, 976 (Ind. 1982). I further acknowledge that “whether surface water is collected and cast upon neighboring land as a body or collected but diffused before entering neighboring property will be largely a question of fact.” Bulldog Battery Corp. v. Pica Investments, Inc., 736 N.E.2d 333, 340 (Ind. Ct. App. 2000). Here, however, uncontroverted facts can lead but to a single conclusion – Laidig did not cast collected water onto Sieb Corp’s land.

Kurt Siebert averred that he had seen a “big gap or notch” in the wall of the retention basin, “channel[ing]” escaping water “like a spout so that it flowed directly on to the [Sieb Corp] property.” (Appellant’s App. 35.) Because in summary judgment facts will be taken in a light most favorable to the non-movant, I assume that water escaped Laidig’s retention basin via a “big gap or notch” in the wall. (Appellant’s App. 35.) However, Siebert’s self-serving characterization of “direct” water flow notwithstanding,<sup>7</sup> the water could not have arrived at Sieb Corp’s property as a consequence of having been “cast” there, as alleged in the Amended Complaint. Any “casting” would have been upon an adjacent parking lot bordered by a public street.

Via affidavit, Wyn Laidig averred that water escaping the retention basin had to travel 250 feet across a parking lot on another parcel<sup>8</sup> and across a public street before it

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<sup>7</sup> Conclusory statements not admissible at trial should be disregarded in determining whether to grant or deny a motion for summary judgment. Paramo v. Edwards, 563 N.E.2d 595, 600 (Ind. 1990).

<sup>8</sup> The ownership of this parcel has not been established.

could reach Sieb Corp. (Appellee's App. 155-56.) This factual scenario was not disputed by Sieb Corp. During the flood event, with 10.65 inches of rain falling in thirty-six hours, water from the retention basin flowed onto a neighboring landowner's parking lot, commingled with surface waters falling thereon, crossed the 250 foot length, reached the first ditch at the side of a public roadway, commingled with surface waters therein, overflowed when the ditch was filled, crossed the public roadway, again commingling with surface water falling upon the public roadway, filled the ditch on the far side of the roadway, and headed toward Sieb Corp's property. Any water from the retention basin that joined with flood waters and eventually reached Sieb Corp could not have done so in anything other than a diffuse manner.

If "casting" occurred, it was upon the property of the unidentified owner of the parking lot, where the "cast" waters commingled with surface waters flowing across that property and went on to commingle with the surface waters flowing across the public street and public ditches. In its Amended Complaint, Sieb Corp is essentially trying to step into the shoes of the non-party owner and claim negligence, trespass, nuisance and criminal mischief vis-à-vis the property of another. We may affirm a grant of summary judgment upon any basis supported by the record of designated materials. Rodriquez v. Tech Credit Union Corp., 824 N.E.2d 442, 446 (Ind. Ct. App. 2005). I would affirm the summary judgment in favor of Laidig Systems, Wyn, and MLC upon the basis that Sieb Corp alleged that it was harmed by Laidig's conduct of "casting" water in a body onto Sieb Corp's property, but Laidig demonstrated that this was not the case.