IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 5, 2022 Session

MARK CLAYTON v. JOSEPH DIXON ET AL.

Appeal from the Chancery Court for Davidson County
No. 19-753-III Ellen Hobbs Lyle, Chancellor

No. M2021-00521-COA-R3-CV

Property owner sued owners of an adjacent property for damages allegedly caused by the installation of a pipe culvert. The plaintiff alleged that, due to improper installation, the pipe culvert obstructed the downstream flow of water and caused the plaintiff's property to flood. Both sides filed cross-motions for summary judgment. The trial court granted summary judgment to the adjacent property owners based on the statute of repose for defective improvements to real property. We conclude that the statute of repose could not be asserted by the adjacent property owners. So we reverse the grant of summary judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Mark E. Clayton, Nashville, Tennessee, pro se appellant.

Leroy Johnston Ellis IV, Nashville, Tennessee, for the appellees, Joseph Dixon and Faye Dixon.

OPINION

I.

In 2004, Mark Clayton purchased residential property on Laws Road in the Whites Creek area of Davidson County, Tennessee. Joseph and Faye Dixon owned the adjacent property. The western side of the Dixon property faced Laws Road and shared a common boundary with Mr. Clayton's southern property line. A natural watercourse ran north to south through both properties along the eastern side of Laws Road.

Mr. Clayton's driveway was built over a concrete box culvert. In 2011, the Dixons built an access road connecting the western side of their property to Laws Road. They installed a 42-inch corrugated metal pipe underneath their road for storm water drainage. The Dixons' pipe culvert was downstream from the Clayton property.

On June 12, 2019, Mr. Clayton filed suit against the Dixons asserting claims for negligence, nuisance, and trespass. His complaint alleged that the Dixons impermissibly altered a Tennessee waterway when they installed the 42-inch pipe without a proper permit. It also alleged that the Dixons' construction obstructed the natural flow of water causing significant flooding and damage to his property. Mr. Clayton asked for both compensatory damages and an injunction requiring the Dixons to abate the nuisance.

In September, the parties executed a written settlement agreement. Mr. Clayton agreed to dismiss his action if the Dixons satisfactorily installed a 72-inch pipe as specified in the agreement. Although the Dixons installed the larger pipe by the stated deadline, Mr. Clayton refused to dismiss his lawsuit.

Based in part on the settlement agreement, the Dixons moved to dismiss the complaint. But the trial court denied their motion. So the Dixons filed an answer and a counterclaim seeking specific enforcement of the settlement agreement.

After a period of discovery, the parties filed cross-motions for summary judgment. Mr. Clayton argued that he was entitled to a judgment as a matter of law because it was undisputed that the Dixons had "violated the codes" when they installed the pipe culvert. The Dixons' motion was based on the statute of repose and laches.

The court ruled that the statute of repose for defective improvements to real estate barred Mr. Clayton's action. *See* Tenn. Code Ann. §§ 28-3-201 to -205 (2017 & Supp. 2022). So the court granted the Dixons' motion for summary judgment, denied Mr. Clayton's cross-motion, and dismissed the complaint and counterclaim with prejudice.

The court's ruling on the statute of repose pretermitted the remaining issues raised on summary judgment. But "for completeness," the court also briefly addressed two other issues presented in the summary judgment filings. The court interpreted Mr. Clayton's motion as a request for partial summary judgment on his negligence claim. It determined that the record contained genuine issues of material fact as to whether the Dixons' pipe culvert was the proximate cause of the flooding on the Clayton property. And, to the extent that Mr. Clayton was "attempting to bring a regulatory enforcement action," the court ruled that he lacked standing. The court noted that both of these rulings constituted additional grounds to deny Mr. Clayton's motion. But the court reiterated that these rulings were "surplusage" in light of its decision on the statute of repose.

II.

Mr. Clayton has elected to proceed pro se on appeal. He lists seven issues in his statement of the issues. Most of his issues concern the court's decision to grant the Dixons' motion for summary judgment rather than his own.[1] For their part, the Dixons ask us to affirm the trial court's decision. But they challenge the court's proximate cause finding and the dismissal of their counterclaim.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. The moving party has the burden of persuading the court that no genuine issues of material fact exist and that it is entitled to a judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). If the moving party fails to satisfy that burden, the motion for summary judgment should be denied. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008). But if the moving party satisfies its burden, then the nonmoving party must demonstrate that there is a genuine, material factual dispute to avoid entry of summary judgment. *Byrd*, 847 S.W.2d at 215.

When considering cross-motions for summary judgment, the trial court "must rule on each party's motion on an individual and separate basis." *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 83 (Tenn. 2010). For the respective competing motions, the court must view the evidence in the light most favorable to the opposing party and draw all reasonable inferences in the opposing party's favor. *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). The court's decision on one motion does not necessarily dictate its decision on the competing cross-motion. *CAO Holdings, Inc.*, 333 S.W.3d at 83.

A trial court's decision on summary judgment presents a question of law, which we review de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Thus, we must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.*

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[1] On appeal, Mr. Clayton argues that the trial court abused its discretion in denying his motion to amend the complaint and join two additional parties. But Mr. Clayton waived this issue by not including it in his statement of issues. *See Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012) (reasoning that "an issue may be deemed waived when it is argued in the brief but is not designated as an issue").

Mr. Clayton also complains that the trial court failed to disqualify the Dixons' attorney. But he does not explain why he contends that the court's decision was wrong. So this issue is also waived. *Sneed v. Bd. of Prof'l Resp.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

Resolution of the parties' issues, in part, turns on the meaning of two statutes. *See* Tenn. Code Ann. § 28-3-205(a) (2017); Tenn. Code Ann. § 69-3-118(b) (2019). Statutory construction presents a question of law, which we review de novo. *Pickard v. Tenn. Water Quality Control Bd.*, 424 S.W.3d 511, 518 (Tenn. 2013). When interpreting a statute, our goal is to "ascertain and effectuate the legislature's intent." *Kite v. Kite*, 22 S.W.3d 803, 805 (Tenn. 1997). We give the words in a statute a "natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012). "When a statute's meaning is clear and unambiguous after consideration of the statutory text, the broader statutory framework, and any relevant canons of statutory construction, we 'enforce the statute as written.'" *State v. Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022) (quoting *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013)).

A.

The Dixons persuaded the trial court that they were entitled to summary judgment based on the statute of repose for defective improvements to real estate. *See* Tenn. Code Ann. § 28-3-202 (2017). The statute of repose is an affirmative defense. TENN. R. CIV. P. 8.03. The Dixons had the burden of establishing all of its elements. *Carr v. Borchers*, 815 S.W.2d 528, 532 (Tenn. Ct. App. 1991).

Statutes of repose operate as "an absolute time limit within which actions must be brought." *Penley v. Honda Motor Co., Ltd.*, 31 S.W.3d 181, 184 (Tenn. 2000). Unlike a statute of limitations, statutes of repose are "unrelated to the accrual of any cause of action." *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 515 (Tenn. 2005), *as amended on reh'g in part* (Tenn. 2006). These statutes "begin to run with the happening of some [other, unrelated] event." *Penley*, 31 S.W.3d at 184.

When Mr. Clayton filed his complaint, Tennessee Code Annotated § 28-3-202 specified that "[a]ll actions to recover damages for any deficiency in the design, planning, supervision, . . . or construction of an improvement to real property, . . . [must] be brought . . . within four (4) years after substantial completion of [the] improvement." Tenn. Code Ann. § 28-3-202. This statute of repose applies to "*all* actions to recover damages, caused by any deficiency in the design or construction of an improvement," including claims couched as nuisance. *Chrisman v. Hill Home Dev., Inc.*, 978 S.W.2d 535, 540 (Tenn. 1998).

Mr. Clayton's action falls within the ambit of this statute. His complaint sought an award of damages for injuries allegedly caused by the installation of a deficient pipe culvert on the Dixon property. *See id.* at 541 (holding that the statute of repose applied because "[a]t the heart of the plaintiffs' nuisance claim lies the allegation that the drainage system is deficient"); *Caldwell v. PBM Props.*, 310 S.W.3d 818, 821 (Tenn. Ct. App. 2009)

(explaining that the relevant inquiry is "whether the allegations of the complaint sought to impose liability 'for any deficiency in the design . . . or construction of an improvement to real property'" (quoting Tenn. Code Ann. § 28-3-202). The Dixons came forward with evidence that the pipe culvert was completed in 2011. And Mr. Clayton did not file this action until 2019—well beyond the four-year mark.

Mr. Clayton argues that one of the exceptions to the statute of repose for real property improvements applies here and, thus, the court erred in granting the Dixons summary judgment on that basis. Tennessee Code Annotated § 28-3-205(a) provides that the four-year limitation of this statute of repose

> shall not be asserted as a defense by any person in actual possession or . . . control, as owner, tenant, or otherwise, of [the] improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury . . . for which it is proposed to bring an action.

Tenn. Code Ann. § 28-3-205(a) (2017).[2] It is undisputed that the Dixons owned the pipe culvert when it allegedly caused Mr. Clayton's injury. So Mr. Clayton maintains that they cannot assert the statute of repose as an affirmative defense.

The Dixons respond that proof of ownership at the time of injury is not enough. In their view, this exception cannot apply unless the record also demonstrates that their improvement was the proximate cause of Mr. Clayton's injury. We disagree.

The exception serves to exclude persons in possession or control of allegedly deficient improvements from the protection of the statute of repose. *See Belcher v. State*, No. E2003-00642-COA-R3-CV, 2003 WL 22794479, at *5 (Tenn. Ct. App. Nov. 25, 2003) (explaining that "the four-year statute of repose was not intended to be applicable to the owner of the subject property, but rather to the *designer* of the property"). If we were to adopt the Dixons' reading of the exception, it would contravene the legislature's intent. *See Chrisman*, 978 S.W.2d at 540. As our supreme court has explained, the General Assembly enacted this statute of repose "to insulate contractors, architects, engineers, and others from liability for defective construction or design of improvements to realty where the injury happens more than four years after substantial completion of the improvement." *Id.* Property owners were expressly excluded. *See Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522, 524 (Tenn. 1981) (recognizing "a substantial difference" between landowners and building professionals).

Although the exception does reference "the proximate cause of the injury . . . for which it is proposed to bring an action," we must construe those words in context and in

[2] We cite to the version of the statute in effect when Mr. Clayton filed this action.

light of the general purpose of the exception. *Mills*, 360 S.W.3d at 368. In context, the exception focuses on possession or control of the allegedly deficient improvement at a particular point in time. *See* Tenn. Code Ann. § 28-3-205(a). The statute of repose may not be asserted by a person in possession or control of the improvement at the time of the alleged deficiency causing the alleged loss. *See KMI Grp., Inc. v. Wade Acres, LLC*, No. W2018-00301-COA-R3-CV, 2019 WL 1504034, at *7 (Tenn. Ct. App. Apr. 5, 2019) (holding that the "owner of the levee at the time it allegedly caused Plaintiffs' loss . . . cannot assert the statute of repose as a defense"); *Manis v. Gibson*, No. E2005-00007-COA-R3-CV, 2006 WL 521466, at *3 (Tenn. Ct. App. Mar. 3, 2006) (holding that the owners of the improvements "at the time of the alleged deficiency" could not rely on the statute of repose).

Under the Dixons' interpretation, the availability of the statute of repose as an affirmative defense would depend, not on possession or control, but on whether the plaintiff could establish proximate cause at the onset of the litigation. That would be an absurd result, which we must avoid. *See State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000) (recognizing that courts should "not apply a particular interpretation to a statute if that interpretation would yield an absurd result").

Because the Dixons owned the pipe culvert at the time that Mr. Clayton has alleged it proximately caused his injury, they cannot rely on the statute of repose as an affirmative defense. So we reverse the grant of the Dixons' motion for summary judgment.[3]

C.

Having overcome the statute of repose, Mr. Clayton contends that he is entitled to entry of summary judgment in his favor.[4] Our ruling on the Dixons' motion for summary judgment does not dictate the decision on Mr. Clayton's cross-motion. *CAO Holdings, Inc.*, 333 S.W.3d at 83. His motion should only be granted if there is no genuine issue as

[3] At oral argument, the Dixons suggested that we affirm the trial court's judgment on different grounds. They insisted that they were entitled to summary judgment because Mr. Clayton failed to establish proximate cause, an essential element of his negligence claim. *See Rye*, 477 S.W.3d at 264 (explaining that a defendant may seek summary judgment "by attacking the nonmoving party's evidence"). But the Dixons did not seek summary judgment on this basis. *See Barnes v. Barnes*, 193 S.W.3d 495, 501 (Tenn. 2006) (holding that "[i]ssues not raised in the trial court cannot be raised for the first time on appeal").

[4] One of Mr. Clayton's issues on appeal concerns the adequacy of the court's summary judgment order. He complains that the court failed to fully explain its decisions on proximate cause and standing. We conclude the order adequately "state[d] the legal grounds upon which [it] . . . grant[ed]" the Dixons' motion for summary judgment. *See* TENN. R. CIV. P. 56.04. Under the circumstances, the court was not required to elaborate on other possible grounds for denial of Mr. Clayton's cross-motion for summary judgment.

to any material fact and the record demonstrates that he is entitled to a judgment as a matter of law. *Byrd*, 847 S.W.2d at 210.

Mr. Clayton moved for summary judgment, arguing that he was entitled to a judgment in his favor because the Dixons "violated the codes" when they installed their pipe culvert. The trial court interpreted Mr. Clayton's argument as a request for summary judgment on his negligence claim. And so do we.

The essential elements of a negligence claim are well-known: "duty, breach of duty, cause in fact, loss or injury, and proximate cause." *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). Here, the parties focus their arguments on whether the Dixons' pipe culvert was both the factual and the proximate cause of the flooding on Mr. Clayton's property.

Cause in fact and proximate cause are distinct concepts. *Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997). "The defendant's conduct is the cause in fact of the plaintiff's injury if, as a factual matter, it directly contributed to the plaintiff's injury." *Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005). Proximate cause "puts a limit on the causal chain." *Id.* at 719. It represents "a policy decision by the judiciary to deny liability for otherwise actionable conduct." *Waste Mgmt., Inc.*, 15 S.W.3d at 430.

We use "a three-pronged test" to determine whether a defendant's conduct was a proximate cause of a plaintiff's injury. *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991). First, we must determine whether the defendant's conduct was "a 'substantial factor' in bringing about the harm being complained of." *Id.* Then we ask "whether there is any rule or policy consideration which should limit liability" under the circumstances. *King v. Anderson Cnty.*, 419 S.W.3d 232, 247 (Tenn. 2013). Finally, the plaintiff's injury must have been reasonably foreseeable when the alleged negligence occurred. *Id.* at 248.

Mr. Clayton relied on an expert report from John Dewaal, a professional engineer, to establish both cause in fact and proximate cause. Mr. Dewaal determined that the Dixons' original pipe was too small to handle the expected waterflow in that area. He opined that the pipe would cause stormwater to back up onto the Clayton property. His drainage calculations showed that stormwater would back up "to a point approximately 60 feet upstream of the existing driveway bridge [on the Clayton property] and approximately within 25 feet on the southwest corner of [Mr. Clayton's] home." This amount of backwater would "obstruct over 40% of the opening of the existing concrete driveway bridge serving [Mr. Clayton's] home." As a result, the water flowing downstream through the Clayton property would "overtop" Mr. Clayton's driveway bridge causing erosion to his driveway and surrounding property.

On cause in fact, the Dixons argue that Mr. Clayton failed to demonstrate that their culvert contributed to an injury. But Mr. Clayton did connect the culvert to his alleged injury. Among other things, Mr. Dewaal determined that the installation of a 42-inch pipe on the Dixons' property was a probable cause of the flooding Mr. Clayton had reported. *See Kilpatrick v. Bryant*, 868 S.W.2d 594, 602 (Tenn. 1993) ("Causation in fact is a matter of probability, not possibility.").

The Dixons also contend that Mr. Clayton did not establish proximate cause because there is no evidence that he sustained an injury. They emphasize that Mr. Dewaal never saw any actual flooding or damage. While that may be true, Mr. Clayton provided the necessary proof of injury through his affidavit, sworn discovery responses, and his flood video. He described the flooding on his property as "legion and ongoing" from "the summer of 2011 until October of 2019."

Faced with a properly supported motion for summary judgment, the Dixons were "required to produce evidence of specific facts establishing that genuine issues of material fact exist." *Martin*, 271 S.W.3d at 84. They came forward with evidence suggesting that upstream changes and/or clogging of Mr. Clayton's culvert caused or contributed to the flooding.

The Dixons submitted an investigative file from the stormwater division of Metro Water Services. According to these documents, Mr. Clayton complained to the stormwater division in 2011 that recent upstream changes were adversely affecting his property. It appears that Metro Water installed "two new driveway culverts" upstream from the Clayton property. Mr. Clayton believed these new culverts had increased the amount of stormwater runoff on his property.

They also filed an affidavit from Mr. Dixon. Mr. Dixon explained that he used to live on the Clayton property. When he lived there, he "spent many weekends clearing and cleaning the culvert of vegetation and debris to prevent blockages." He noted that Mr. Clayton had allowed a considerable amount of vegetation to grow in the area around his culvert. And a large tree located near the culvert fell in 2016 and damaged the culvert. He submitted recent pictures of the damaged culvert, which had never been repaired.

The Dixons also filed portions of Mr. Dewaal's deposition. Mr. Dewaal agreed that the heavily wooded nature of the area would make clogging an ongoing problem. As he noted in his report, his calculations did not account for the "high likelihood of clogging" in the culverts. In his opinion, clogging would exacerbate the problems he had identified "even during much smaller storm events, depending on the extent of the clogging."

Mr. Clayton argues that expert proof is necessary to determine whether these other factors caused the flooding on his property. And the Dixons did not submit any expert proof. Whether expert testimony is necessary depends on the subject matter of the inquiry.

Kinley v. Tenn. State Mut. Ins. Co., 620 S.W.2d 79, 81 (Tenn. 1981). But, if an ordinary person can understand the subject matter without the aid of specialized knowledge or experience, no expert testimony is required. *Lawrence Cnty. Bank v. Riddle*, 621 S.W.2d 735, 737 (Tenn. 1981).

"Most people of average intelligence know how water flows and that a ditch facilitates the flow, even though they may not understand all the natural forces that make it do so." *Id.* For that reason, we have previously held that expert testimony was not required to determine "whether [a] culvert was clogged and, if so, whether the clogging caused water to be unable to get through the culvert." *Chambers v. Illinois Cent. R.R. Co.*, No. W2013-02671-COA-R3-CV, 2015 WL 2105537, at *8 (Tenn. Ct. App. May 5, 2015). Similarly, a fact finder could determine whether removal of a railroad berm caused flooding on a downstream property based on lay witness testimony. *Butler v. Burrow*, No. M2018-02283-COA-R3-CV, 2020 WL 91103, at *7 (Tenn. Ct. App. Jan. 7, 2020).

We conclude that whether Mr. Clayton's culvert was clogged and, if so, whether the clogging would impede water flow through his property can also be decided based on ordinary knowledge and practical experience. *See Chambers*, 2015 WL 2105537, at *8. Mr. Clayton's reliance on our decision in *Ray v. Neff*, No. M2016-02217-COA-R3-CV, 2018 WL 3493158 (Tenn. Ct. App. July 20, 2018), to argue otherwise is misplaced. In *Ray v. Neff*, the plaintiffs could only recover for damages caused solely by the alteration of a drainage pipe. *Id.* at *10. Yet it was undisputed that other extensive modifications had also been made to the upstream property that could have caused or contributed to the flooding. *Id.* We concluded that a fact finder could not separate the effects of the altered pipe from the effects of the other extensive modifications to the upstream property without the aid of an expert. *Id.* "Determining whether the pipe alone caused the trespass to [the plaintiffs'] land require[d], at the very least, knowledge of water flow patterns, the effects, if any, of the land modification on the water flow, and the effects, if any, of the pipe alone on the water flow." *Id.*

Here, we are not concerned with separating the effects of the Dixons' pipe culvert from these other factors. The Dixons were not required to establish that clogging was the sole cause of the flooding, just a cause. *Hale*, 166 S.W.3d at 718. And the Dixons came forward with proof that "affords a reasonable basis for the conclusion that it is more likely than not" that Mr. Clayton's failure to maintain the area in and around his culvert caused or contributed to the alleged flooding. *Kilpatrick*, 868 S.W.2d at 602 (quoting *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 861 (Tenn. 1985)).

But the Dixons did not establish that upstream changes more probably than not caused or contributed to flooding on the Clayton property. The mere fact that Mr. Clayton complained about the addition of two new upstream culverts does not establish causation. We agree that expert testimony would be necessary to establish the effects, if any, of these additional upstream culverts on the downstream waterflow.

In sum, we agree with the trial court that disputed issues of material fact precluded a grant of summary judgment to Mr. Clayton on his negligence claim. Proximate cause "is a jury question unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome." *McClenahan*, 806 S.W.2d at 775. In our review, we accept the Dixons' evidence "as true; allow all reasonable inferences in [their] favor; and resolve any doubts about the existence of a genuine issue of material fact in favor of [the Dixons]." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 887 (Tenn. 2019). The Dixons came forward with evidence from which it would be reasonable to conclude that Mr. Clayton's failure to maintain his culvert more probably than not caused or contributed to the flooding on his property. Reasonable persons could thus disagree as to whether the Dixons' culvert was a substantial factor in causing the flooding on Mr. Clayton's property. *See King*, 419 S.W.3d at 247.

D.

Mr. Clayton also argues that the trial court erred in concluding that he lacked standing to brings a regulatory enforcement action against the Dixons. He insists that he has a private right of action to enforce the Water Quality Control Act. *See* Tenn. Code Ann. §§ 69-3-101 to -303 (2019 & Supp. 2022). The primary purpose of the Act is to protect Tennessee waters from pollution. *Id.* § 69-3-102; *see generally Pickard*, 424 S.W.3d at 518-19 (discussing the creation of the Act). Among other things, the Act regulates activities that affect state waters. *See* Tenn. Code Ann. § 69-3-108. The Commissioner of the Tennessee Department of Environment and Conservation ("TDEC") is authorized to enforce the Act and all of its "standards, policies, rules, and regulations." *Id.* § 69-3-107(1). The Commissioner issues permits for regulated activities, investigates complaints, assesses civil penalties, and pursues other available remedies against violators. *Id.* §§ 69-3-107, 69-3-115 to -118.

A private party, such as Mr. Clayton, may file "a signed complaint" with the Commissioner alleging a violation of the Act.[5] *Id.* § 69-3-118(a)(1). The Commissioner must then promptly investigate and determine the appropriate response. *Id.* If the

[5] In 2021, Mr. Clayton filed a formal complaint with the TDEC Commissioner alleging that the Dixons violated the Water Quality Control Act. *See* Tenn. Code Ann. § 69-3-118(a). The Dixons asked this Court to consider the Commissioner's official response as a post-judgment fact. *See* TENN. R. APP. P. 14. On March 7, 2022, the Commissioner issued a determination report reflecting that the Dixons' construction did not violate the Act. The Dixons contend that the Commissioner's report renders Mr. Clayton's arguments on this issue moot. We have the discretion to consider post-judgment facts that are "capable of ready demonstration, affecting the positions of the parties or the subject matter." *Id.* But "such facts must be unrelated to the merits and not genuinely disputed." *Edwards v. Hallsdale-Powell Util. Dist.*, 115 S.W.3d 461, 464 n.3 (Tenn. 2003). Mr. Clayton clearly disputes the legality of the Dixon culvert. And he may appeal the Commissioner's determination. *See* Tenn. Code Ann. § 69-3-118(a)(2). So we deny the motion.

complainant is unhappy with the Commissioner's decision, he may request a contested case hearing before the Water Quality Board. *Id.* § 69-3-118(a)(2); *see id.* § 69-3-110. The complainant may also seek further review in state court. *Id.* § 69-3-111.

Contrary to Mr. Clayton's claims, Tennessee Code Annotated § 69-3-118(b) does not give him the additional right to bring a private enforcement action in state court. *See id.* § 1-3-119(a) (2014) ("In order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right."). The statute provides:

> Nothing contained in this section shall be construed to abridge or alter rights of action or remedies in equity or under common law or statutory law, criminal or civil, nor shall any provision of §§ 69-3-115 — 69-3-117 or this section, or any act done by virtue thereof, be construed as estopping the state or any municipality or person, as riparian owners or otherwise, in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances, to abate pollution, or to recover damages resulting from such pollution.

Id. § 69-3-118(b). This statutory provision does not expressly create a private right of action. It simply preserves a private party's existing common law and statutory remedies.

E.

Finally, the Dixons argue that the trial court erred in dismissing their counterclaim for breach of the settlement agreement. They ask this Court to reverse the dismissal and order specific performance of the settlement agreement.

We are empowered to "grant the parties any 'relief on the law and facts to which [a] party is entitled or the proceeding otherwise requires' unless the relief would contravene the 'province of the trier of fact.'" *Johnson v. Hardin*, 926 S.W.2d 236, 238 (Tenn. 1996) (alteration in original) (quoting TENN. R. APP. P. 36(a)). The court premised the dismissal of the Dixons' counterclaim on its grant of their motion for summary judgment dismissing Mr. Clayton's claims. Because we reverse the grant of summary judgment to the Dixons, we also reverse the court's dismissal of their counterclaim.

But we decline the Dixons' invitation to rule on their counterclaim. We may not grant relief that contravenes "the province of the trier of fact." TENN. R. APP. P. 36(a). Resolution of their breach of contract claim entails questions of fact. *Forrest Constr. Co., LLC v. Laughlin*, 337 S.W.3d 211, 225 (Tenn. Ct. App. 2009) ("Whether a party has fulfilled its obligations under a contract or is in breach of the contract is a question of fact.").

III.

We conclude that the statute of repose does not bar Mr. Clayton's action. So we reverse the entry of summary judgment and the dismissal of the complaint and counterclaim. This case is remanded for further proceedings consistent with this opinion.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE