IN THE COURT OF APPEALS

STANLEY KEEBLER and wife, LEE H. MORRIS KEEBLER,	)	WASHINGTON CIRCUIT
	)	C.A. NO. 03A01-9511-CV-00401
Plaintiffs-Appellants	)	
vs.	)	HON. THOMAS J. SEELEY, JR. JUDGE
CITY OF JOHNSON CITY,	)	AFFIRMED AND REMANDED
Defendant-Appellee	)	

THOMAS C. JESSEE, Johnson City, for Appellant.

K. ERICKSON HERRIN, Herrin, Booze & Rambo, Johnson City, for Appellee.

OPINION

McMurray, J.

The plaintiffs brought this action on the theory of trespass and nuisance claiming that the defendant unlawfully diverted

surface waters upon their property during the course of improving an adjacent street.[1] After a bench trial, judgment was entered in favor of the plaintiffs in the amount of $137.00. The plaintiffs appealed. We affirm the judgment of the trial court.

The appellants have presented the following issues for our consideration:

1. The trial court erred in applying Tennessee Code Annotated Section 29-20-305(b) rather than Tennessee Code Annotated Section 28-3-105.

2. Did the trial court err in finding a one year statute of limitations barring certain damages when the nuisance is by its nature "temporary?"

3. Did the trial court err in not finding that the City would be estopped as a matter of law from denying their contractual obligation to pay the plaintiffs for certain items.[2]

Our standard of review is de novo upon the record, with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent an error of law. See Rule 13(d), Tennessee Rules of Appellate Procedure. No presumption attaches to conclu-

[1]The court's memorandum opinion reflects that the plaintiffs were permitted to orally amend their complaint to seek damages for inverse condemnation. As will be later seen in the statement of issues, no issue is presented relating to inverse condemnation.

[2]We should note that if the plaintiffs had a contract action against the defendant, it was not properly pled in the trial court and is not before this court. We are limited to the issue of estoppel.

sions of law. Adams v. Dean Roofing Co., 715 S.W.2d 341, 343 (Tenn. Ct. App. 1986).

The first two issues presented for review by the appellants are, for all practical purposes, one and the same, i.e., did the trial court apply the appropriate statute of limitations?

T.C.A. § 29-20-305(b) is a part of the Governmental Tort Liability Act. It provides as follows:

> (b) Said action [any action maintainable under the Governmental Tort Liability Act] must be commenced within twelve (12) months after the cause of action arises.

T.C.A. § 28-3-105 provides that actions for injuries to personal or real property shall be brought within three years. It appears, however, that cases governed by the Governmental Tort Liability Act, nuisance or otherwise, do not fall within the purview of T.C.A. § 28-3-105.

> The Tennessee Governmental Tort Liability Act expressly provides that except as allowed by the Act all governmental entities are immune from suit for any injuries resulting from the activities of the entity in the exercise or discharge of any of its functions. T.C.A. § 29-20-201 (1980). Actions against governmental entities for damages on the theory of liability historically labeled nuisance are included in and covered by the act. Collier v. Memphis Light, Gas & Water Division, 657 S.W.2d 771 (Tenn. App. 1983).

Smith v. City of Covington, 734 S.W.2d 327.

> ... The legislature left little doubt that actions against governmental entities for damages based on activities historically labeled "nuisance" are now included in and covered by the Act. [Governmental Tort Liability Act.]

Collier v. Memphis Light, Gas & Water Div., 657 S.W.2d 771 (Tenn. App. 1983.

> A nuisance is anything that annoys or disturbs the free use of one's property, or that renders its ordinary use or physical occupation uncomfortable. Pate v. City of Martin, 614 S.W.2d 46, 47 (Tenn. 1981); Anthony v. Construction Products, Inc., 677 S.W.2d 4, 7 (Tenn. App. 1984); Caldwell v. Knox Concrete Products, Inc., 391 S.W.2d 5, 9 (Tenn. App. 1964). A temporary nuisance is one that can be corrected by the expenditure of labor or money. Pate, 614 S.W.2d at 48; Anthony, 677 S.W.2d at 7; Caldwell, 391 S.W.2d at 11. Obviously, the water runoff annoyed or disturbed the free use of [the plaintiff's] property, and the problem was corrected by the expenditure of labor or money. Thus, it seems clear that [the plaintiff's] claim for water damage to the property is a claim for temporary nuisance. However, because the claim is against a municipality of the State of Tennessee, it must be adjudicated under the provisions of the Tennessee Governmental Tort Liability Act, T.C.A. §§ 29-20-101, et seq. (1980 and Supp. 1987).

Hayes v. City of Maryville, 747 S.W.2d 346 (Tenn. App. 1987).

The appellants concede in their brief that this is an action for damages arising from a temporary nuisance.

The cases above cited lead to the inescapable conclusion that the case under consideration here is controlled by the Governmental

Tort Liability Act. This conclusion is supported by Williams v. Memphis Light, 773 S.W.2d 522 (Tenn. App. 1988), quoting Automobile Sales Co. v. Johnson, 122 S.W.2d 453 (Tenn. 1938), wherein it is said:

> Where a statute creates a new liability or extends a new right to bring suit and that statute provides a time period within which to bring the action, that period
>
> > 'operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.' As thus defined, the right of action is conditional. The limitation inheres in the right itself.
>
> ... Since the Act [Governmental Tort Liability Act] created a new liability, it must be strictly construed. (Citation omitted). In so doing, we find that the twelve-month limitation period of T.C.A. § 29-20-305(b) for bringing an action is a condition precedent which must be met before a suit may be brought against a governmental entity.

Williams v. Memphis Light, 773 S.W.2d 522, at page 523

> The proof is clear that the [condition complained of] was of a continuing nature ... and could have been corrected by the expenditure of labor or money. Thus, it constituted a temporary nuisance. See Caldwell v. Knox Concrete Products, Inc., 54 Tenn. App. 393, 391 S.W.2d 5, (1964). Where the nuisance is temporary the damages to plaintiff's property are recurrent and may be recovered from time to time until the nuisance is abated. Caldwell v. Knox Concrete Products, Inc., 391 S.W.2d at 11. ...

Smith v. City of Covington, supra, page 329.

We are of the opinion that the trial court correctly applied the time limitation contained in the Governmental Tort Liability Act, T.C.A. § 29-20-305(b). The trial court allowed damages which were found to have been sustained by the appellants during the twelve (12) months immediately preceding the filing of this action. This is in keeping with Smith, supra. No issue is made of the amount of damages for that period. We find no merit in the first two issues.

As to the third issue, it is a general rule that questions or issues not raised in the trial court will not be entertained on appeal. Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983); City of Lavergne v. Southern Silver, Inc., 872 S.W.2d 687 (Tenn. App. 1993). We, therefore, reluctantly address the third issue presented for two reasons. Firstly, the record does not sufficiently establish that the issue was raised in the trial court. Secondly, in their brief, the appellants failed to meet the requirements of the Tennessee Rules of Appellate Procedure. In addressing this issue, the appellants gave no citations to the record whatever to support their position. It is not incumbent upon this Court to sift through the record in order to find proof to substantiate the factual allegations of the parties. See Redbud Coop. Corp. v. Clayton, 700 S.W.2d 551, 557 (Tenn. App. 1985); First American Bank of Nashville v. Woods, 734 S.W.2d 622, 626 (Tenn. App. 1987).

In the interest of justice, however, we will briefly discuss the issue of estoppel. ... "Public agencies are not subject to equitable estoppel or estoppel in pais to the same extent as private parties and very exceptional circumstances are required to invoke the doctrine against the State and its governmental subdivisions." Bledsoe County v. McReynolds, 703 S.W.2d 123, 124 (Tenn. 1985). Suffice it to say that the record as filed with this court does not support a finding of such exceptional circumstances that would permit the application of any doctrine of estoppel to the defendant, City of Johnson City. We find no merit in the appellants' third issue.

The appellee has also presented an issue for our consideration, challenging the sufficiency of the record as filed in this court. Our disposition of the issues raised by the appellants, however, has rendered the appellee's issue moot. We point out that the trial court noted on the partial transcript "[t]his is not a complete transcript of the proceedings and does not 'convey a fair, accurate and complete account of what happened' at the trial (T.R.A.P. 24(b)." Lacking an adequate transcript, we, under applicable law, are at liberty to conclusively presume that the record supports the findings of the trial court. See In re Rockwell, 673 S.W.2d 512, (Tenn. App. 1983); Wilson v. Hafley, 189 Tenn. 598, 226 S.W.2d 308, (1949); and Kyritsis v. Vieron, 53 Tenn.

App. 336, 382 S.W.2d 553, (1964). Nevertheless, we have endeavored to review the case as completely as the limited record permits.

We affirm the judgment of the trial court. Costs are assessed to the appellants and this case is remanded to the trial court for the collection thereof.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

_____
Charles D. Susano, Jr., Judge

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	)	JUDGE
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ORDER

This appeal came on to be heard upon the record from the Circuit Court of Washington County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court. Costs are assessed to the appellants and this case is remanded to the trial court for the collection thereof.

PER CURIAM