[Cite as *Colegrove v. Fred A. Nemann Co.*, 2015-Ohio-533.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

WILLIAM COLEGROVE,	:	APPEAL NO. C-140171 TRIAL NO. A-0909193
and	:	
JUDITH COLEGROVE,	:	*O P I N I O N*.
Plaintiffs-Appellants,	:	
vs.	:	
FRED A. NEMANN COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 13, 2015

Ulmer & Berne LLP and *Jesse R. Lipcius*, for Plaintiffs-Appellants,

Law Office of Douglas J. May and *Timothy E. McKay*, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Plaintiffs-appellants William Colegrove ("Frank") and Judith Colegrove ("Judy") appeal from a judgment entered upon a jury verdict in their favor against defendant-appellee Fred A. Nemann Company ("Nemann Company"). They argue that the trial court erred by directing a verdict in favor of the Nemann Company on their claims for negligence, nuisance, intentional and negligent infliction of emotional distress, loss of consortium, punitive damages, and attorney fees, and by instructing the jury that it could only award property damages on their trespass claim. Not finding merit in appellants' arguments, we affirm the trial court's judgment.

Construction of the Sewer Pump Station

{¶2} From June 2007 to January 2008, the Nemann Company constructed a sewer pump station for the Metropolitan Sewer District of Greater Cincinnati ("MSD") approximately 100 feet behind the Colegroves' home. On October 2, 2007, the Colegroves complained that the Nemann Company's work caused vibrations which shook their home. MSD project manager Moustafa Moteleb came to the Colegroves' home to address their complaints. The Colegroves showed Moteleb cracks in the skim coat on their foundation, in the drywall inside their home, and in a retaining wall in their backyard, which they believed had been caused by the construction of the pump station.

{¶3} Moteleb immediately contacted Fred Nemann, Jr., about the Colegroves' complaints. Nemann, Jr., thought that a larger piece of tracked equipment on the construction site, a 963 Cat loader, was causing the vibrations, so he ordered that the equipment be removed from the worksite the following day.

{¶4} Moteleb also hired H.C. Nutting, a geotechnical firm, to monitor the vibrations from the construction project. The monitoring occurred from October 5, 2007, to the conclusion of the project in January 2008. During that time, the

Colegroves contacted Moteleb several times to complain about the vibrations. Moteleb informed them that Ron Ebelhar, the H.C. Nutting engineer who was monitoring the vibrations, had been sending him weekly reports and that none of those reports showed the work being performed on the sewer pump station was producing vibrations that would cause structural damage to their home.

{¶5} On October 27, 2007, the Colegroves awoke to vibrations in their home. Frank became very upset, so Judy went to the construction site and asked Andy Riley, the construction foreman, how long they would be working. Judy described her conversation with Riley as follows:

> And he said, "I don't know." And I said, "[W]ell, do you really have to work today, it's a Saturday. We have had trouble sleeping and our house is shaking. And he just looked up at me, and the reason I say looked up is when I approached him he was in a squatting position, so he wasn't sitting on the ground but he was squatting down. And I just remember that I looked down at him, that my eyes, my eye gaze was downward to him. He didn't stand up to speak with me. So I just was asking him the questions as he was squatting on the ground. * * * I told him that it was very frustrating that our house was shaking, that it was difficult to sleep because of the noise of the construction equipment, but also because of the vibrations. And so I asked him again, how long do you think that you will be here, can you give me any idea. And he said, we will be here 'til we are done.

{¶6} Judy testified that she considered the Nemann Company's response that day to be outrageous, inflammatory, and in conscious disregard for her and Frank's

safety. When Judy returned to their home and reported the situation to Frank, he grabbed a gun and a hatchet and sought to confront the workers. Judy calmed Frank down, but his mental distress grew worse. As the vibrations continued, Frank eventually fell to the floor, grabbed his ears, and began screaming for the workers to stop. Later that day, Frank took some medication at home and fell asleep.

{¶7} Frank and Judy left their home the following day and stayed with friends for four or five days. In November 2007, Frank began seeing a psychiatrist who diagnosed him with aggravation of his post-traumatic stress disorder ("PTSD") and depression resulting from the construction and the vibrations and noises associated with it. Frank testified that his medical costs exceeded $200,000. Frank further testified that because living in the home was a constant reminder of the construction and his mental collapse, he moved to Tennessee in 2012.

{¶8} Judy has remained in their home. Judy testified that she has been treated for mental-health issues and she has incurred medical bills in the amount of $12,895.00. Her treating psychologist testified that Judy suffered from adjustment disorder with mixed emotional features, anxiety, and depression as a result of Frank's mental collapse on October 27, 2007.

{¶9} In September 2009, the Colegroves initiated this lawsuit against the Nemann Company seeking compensatory and punitive damages in connection with its construction of the sewer pump station behind their home. They asserted claims for negligence, trespass, nuisance, and negligent and intentional infliction of emotional distress, loss of consortium, and punitive damages. The Nemann Company moved for summary judgment on some of the Colegroves' claims. The trial court granted the Colegroves' motion to strike the Nemann Company's motion for summary judgment as

being untimely because it was filed outside the dispositive motion deadline on the scheduling order. The Colegroves' claims then proceeded to trial before a jury.

{¶10} At trial, the Colegroves testified, as well as Frank's psychiatrist, Judy's psychologist, and a friend, Michael Brown. They also presented expert testimony from William Turner, a civil engineer. The Nemann Company presented testimony from Fred Nemann, Jr., Fred Newman III, Riley, Arthur Sturbam, an engineer and expert witness, Ebelhar, the engineer who had monitored the vibrations at the Colegroves' home, Steven Davis, the Colegroves' former attorney, and MSD employees Moteleb, David Gilday, and Leonard Bauer.

{¶11} At the conclusion of the testimony, the trial court granted the Nemann Company's motion for a directed verdict on all of the Colegroves' claims except for their trespass claim. The trial court then instructed the jury that it could award damages on their trespass claim only for actual damage to the Colegroves' property. The jury returned a verdict in favor of the Colegroves, awarding them $8229.00. The Colegroves have timely appealed the trial court's judgment.

Directed Verdict

{¶12} In their first assignment of error, the Colegroves argue that the trial court erred in granting a directed verdict for the Nemann Company on their claims for negligence, nuisance, intentional and negligent infliction of emotional distress, loss of consortium, punitive damages, and attorney fees.

{¶13} In considering a motion for a directed verdict, the trial court must construe the evidence most strongly in favor of the party opposing the motion. The trial court may grant the motion where reasonable jurors could come to only one conclusion and that conclusion is adverse to the party opposing the motion. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d

835, ¶ 3, quoting Civ.R. 50(A)(4) and *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68-69, 430 N.E.2d 935 (1982). Because a motion for a directed verdict presents a question of law going to the sufficiency of the evidence, the trial court must not consider the weight of the evidence or the credibility of the witnesses. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 284-285, 423 N.E.2d 467 (1981). An appellate court reviews a ruling on a motion for a directed verdict de novo. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033, ¶ 22; *Eysoldt v. Proscan Imaging*, 194 Ohio App.3d 630, 2011-Ohio-2359, 957 N.E.2d 780, ¶ 18 (1st Dist.).

Negligence Claim

{¶14} The Colegroves first argue that the trial court erred by directing a verdict on their negligence claim. To prove the Nemann Company's negligence, the Colegroves had to show the existence of a duty, a breach of that duty, and injury proximately resulting from the breach. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984); *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998). "A defendant's duty may be established by common law, legislative enactment, or by the particular facts and circumstances of the case." *Chambers* at 565, citing *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440 (1954), paragraph one of the syllabus.

{¶15} The Colegroves argue that the Nemann Company had a duty to perform the work on the project in a reasonable and safe workmanlike manner, and that the company had breached that duty. They point to Ohio Department of Transportation, Construction and Material Specifications ("ODOT Specs") in the contract between MSD and the Nemann Company, which they assert governed the Nemann Company's work on the sewer pump station. In particular, they rely upon the Section 107.07 of the ODOT Specs, which set forth a duty for the Nemann Company to

provide for the protection of persons and property, and Section 108.05, which required the Nemann Company to ensure that the equipment used to complete the sewer pump station did not harm adjacent property or the public. They argued that by causing injuries to them and damage to their property, the Nemann Company had breached its duty under the ODOT Specs.

{¶16} In directing a verdict on their negligence claim, the trial court found that the ODOT Specs in the Nemann Company's contract with MSD did not create a duty to the Colegroves. The trial court further found that Turner, the Colegrove's expert, had only testified that the Nemann Company had other options available to complete the work. Further, Turner had testified that he had no evidence that the Nemann Company's use of the equipment or the construction that was undertaken by the Nemann Company had not been performed in a workmanlike manner.

{¶17} The Colegroves have not cited any case law to support their position that the ODOT Specs in Nemann Company's contract with the MSD created a private duty between the Nemann Company and them as third-party landowners. After reviewing the ODOT Specs in the contract and the law, we conclude, like the trial court, that they provide general safety requirements and do not set forth any specific duty that the Nemann Company must adhere to in terms of the means or manner of its work. *See, e.g., Kooyman v. Staffco Constr., Inc.*, 189 Ohio App.3d 48, 2010-Ohio-2268, 937 N.E.2d 576, ¶ 14-22 (2d Dist.) (holding that the trial court erred in ruling that a construction company's failure to comply with a statute dealing with permit applications constituted negligence per se); *Huff v. First Energy Corp.*, 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3 (holding that a contract specification in a contract between the utility company and a contractor which provided that "the contractor shall plan and conduct the work to adequately safeguard all persons and

property from injury" did not create a duty from the contractor to members of the general public who were walking on public roads).

{¶18} Our review of the record likewise reveals that while Turner testified on direct examination that the Nemann Company had breached the ODOT Specs, he admitted on cross-examination that he had no evidence that the Nemann Company had used its equipment in a negligent manner on the project, that the Nemann Company had conducted activities outside its job specifications, or that the plans themselves, as set forth by MSD, were so obviously dangerous or defective that no reasonable person would follow them.

{¶19} In *Hortman v. Miamisburg*, 161 Ohio App.3d 559, 2005-Ohio-2862, 831 N.E.2d 467, ¶ 22-26 (2d Dist.), on substantially similar facts, the Second Appellate District affirmed a grant of summary judgment to a construction contractor for damages allegedly caused to real property by vibrations from a road construction project. In that case, the homeowners had likewise failed to present any evidence that the contractor had used its equipment in a negligent manner or had conducted activities outside of its job specifications, and had failed to present any evidence that the city's plans were so defective that a reasonable person would not follow them. The Colegroves, moreover, did not present any other evidence that the Nemann Company had failed to exercise ordinary care during the construction project. As a result, we cannot conclude that the trial court erred in directing a verdict on their negligence claim.

Nuisance Claim

{¶20} The Colegroves next argue that the trial court erred in directing a verdict on their private-nuisance claim. A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Brown v. Cty. Commrs.*, 87

Ohio App.3d 704, 712, 622 N.E.2d 1153 (4th Dist.1993). In order for a private-nuisance claim to be actionable, the invasion must be either intentional and unreasonable or unintentional but caused by negligent, reckless, or abnormally dangerous conduct. *Id*.; *see Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724 (1944), paragraph three of the syllabus.

{¶21} At trial, the Colegroves' private-nuisance claim against the Nemann Company was predicated solely upon a negligence theory. Because we have already concluded that the Colegroves failed to present any evidence that the Nemann Company had acted negligently in constructing the pump station, the trial court did not err in granting the Nemann Company's motion for a directed verdict on their nuisance claim. *See Brown* at 715.

Negligent-Infliction-of-Emotional-Distress Claim

{¶22} The trial court also did not err in directing a verdict on the Colegroves' claim for negligent infliction of emotional distress. "A plaintiff may not recover under this claim absent proof that 'the defendant's negligence produced [an] actual threat of physical harm to the plaintiff or any other person.' " *Daudistel v. Silverton*, 1st Dist. Hamilton No. C-130661, 2014-Ohio-5731, ¶ 41, citing *Straser v. Seven Hills Ob-Gyn Assocs.*, 170 Ohio App.3d 98, 2007-Ohio-171, 866 N.E.2d 48, ¶ 14 (1st Dist.), quoting *Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 82, 652 N.E.2d 664 (1995).

{¶23} The Colegroves failed to present any evidence that the Nemann Company acted negligently in its construction of the pump station. Moreover, they failed to present any evidence of an actual threat of physical harm during the construction. Although Frank and Judy testified that they believed the vibrations from the Nemann Company's construction of the pump station were causing structural damage to the home and they feared their home was falling down, expert testimony

demonstrated that the vibrations, which had been measured during the construction of the pump station, were not strong enough to cause structural damage to the Colegroves' home. As a result, the trial court properly directed a verdict on their claim for negligent infliction of emotional distress.

Intentional-Infliction-of-Emotional-Distress Claim

{¶24} The Colegroves additionally argue that the trial court erred in granting the Nemann Company's motion for a directed verdict on their claim for intentional infliction of emotional distress. To recover on this claim, the Colegroves had to prove "(1) that [the Nemann Company] had intended to cause them serious emotional distress; (2) that [the Nemann Company's] conduct was extreme and outrageous; and (3) the [Nemann Company's] conduct was the proximate cause of their serious mental distress." *See Phung v. Waste Mgt. Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994).

{¶25} The Ohio Supreme Court has stated that an act is extreme and outrageous when it passes all bounds of decency and is excessive, wanton, and gross. *Reamsnyder v. Jaskolski*, 10 Ohio St.3d 150, 153, 462 N.E.2d 392 (1984). The court has further stated that "mere insults, indignities, threats, annoyances, or petty oppressions are not enough as people are expected to be hardened to a certain amount of rough language or acts which are inconsiderate or unkind." *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983), syllabus. Whether a defendant's conduct rises to the level of "extreme and outrageous conduct" is a question of law. *See Morrow v. Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 48 (10th Dist.).

{¶26} Based upon our review of the record, we cannot conclude that the trial court erred in directing a verdict on the Colegroves' claim for intentional infliction of emotional distress. The Colegroves failed to present any evidence that the Nemann

Company had intended to cause them serious mental distress or that it had acted in an extreme or outrageous manner during its construction of the pump station. When the Colegroves initially complained to MSD about the vibrations from the construction, MSD contacted Fred Nemann, Jr., who proposed removing a large piece of equipment that he felt could be causing the vibrations. That piece of equipment was removed from the construction site the following day. MSD then engaged H.C. Nutting to monitor the vibrations to the property. That monitoring revealed the vibrations were not strong enough to cause any structural damage to the Colegroves' home. Although Judy testified that Riley had committed an extreme and outrageous act by failing to stop construction on the morning of October 27, 2007, after she had asked him to, the Nemann Company's failure to stop construction that day cannot be reasonably described as "beyond all possible bounds of decency." *See Yeager* at 365. Therefore, the trial court properly directed a verdict on their intentional-infliction-of-emotional-distress claim.

Punitive-Damages/Attorney-Fees Claim

{¶27} The Colegroves next argue that the trial court erred in granting the Nemann Company's motion for a directed verdict on their claims for punitive damages and attorney fees.

{¶28} Punitive damages may be awarded as a punishment to discourage others from committing similar wrongful acts if a plaintiff proves by clear and convincing evidence that a defendant acted with malice. *Preston v. Murty*, 32 Ohio St.3d 334, 335, 512 N.E.2d 1174 (1984). The Ohio Supreme Court has defined malice as "that state of mind under which a person's conduct is characterized by hatred, ill will, or spirit of revenge, or a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Id.* at syllabus. "An award of attorney fees is proper 'as an element of compensatory damages where the jury finds that

punitive damages are warranted.' " *Hartman v. Perler-Tomboly*, 1st Dist. Hamilton Nos. C-120428, C-120597 and C-120604, 2013-Ohio-1752, ¶ 19, quoting *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 557, 644 N.E.2d 397 (1994).

{¶29} The Colegroves argue that "the Nemann Company's continuing construction of the sewer pump station, without alteration after notice of their damages and distress, constituted clear and convincing evidence of its malice and conscious disregard for the Colegroves' safety." But given our conclusion that the Colegroves have failed to present any evidence that the Nemann Company had acted negligently during its construction of the pump station, which is a lesser standard than malice, we cannot say the trial court erred in granting the Nemann Company's motion for a directed verdict on the Colegroves' claims for punitive damages and attorney fees.

Loss-of-Consortium Claim

{¶30} Finally, the Colegroves argue the trial court erred in directing a verdict on Judy's claim for loss of consortium. They admit that Judy's loss-of-consortium claim was dependent upon evidence of injury to Frank. *See Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 91, 585 N.E.2d 384 (1992) (holding that a loss-of-consortium claim is a derivative claim that depends upon a defendant having committed a legally cognizable tort against someone). Because we have concluded that the trial court correctly determined that the Colegroves could not recover for any personal injuries suffered by Frank, Judy's loss-of-consortium claim failed as a matter of law. *See id.* Therefore, the trial court properly directed a verdict on this claim.

{¶31} Because we have concluded that the trial court did not err in directing a verdict on the Colegroves' claims for negligence, nuisance, negligent and intentional infliction of emotional distress, punitive damages and attorney fees, and Judy's loss-of-consortium claim, we overrule their first assignment of error.

Jury Instruction on the Trespass Claim

{¶32} In their second assignment of error, the Colegroves argue the trial court erred in instructing the jury on the damages that they could recover on their trespass claim.

{¶33} The trial court limited the Colegroves' damages on their trespass claim to physical damage to the property, concluding that it was not reasonably foreseeable that the vibrations would have caused an aggravation of Frank's PTSD. The trial court then instructed the jury, over the Colegroves' objection, as follows:

> If you find for the plaintiffs, you will determine from the greater weight of the evidence the amount of money that will reasonably compensate them for actual damage to the real property.
>
> If the damage to the real property is temporary, and such that the property can be restored to its original condition, then the owner may recover the reasonable cost of the necessary repairs.

{¶34} The Colegroves argue that the jury should have been allowed to consider other sources of damage in addition to the property damage on their trespass claim. They argue that pursuant to this court's opinion in *Denoyer v. Lamb*, 22 Ohio App.3d 136, 490 N.E.2d 615 (1st Dist.1984), the jury should have been permitted to award them damages for loss of use and for annoyance and discomfort.

{¶35} In *Denoyer*, this court, in a direct-trespass action, held that in recovering compensatory damages for cutting, destroying, and damaging trees, and other growth, and for related damage to the land, the owner is not limited to the diminution in value or to the stumpage or other commercial value of the timber. *Id.* at 139. The owner "may recover as damages the costs of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible,

without requiring grossly disproportionate expenditures and with allowance for the natural processes of regeneration within a reasonable period of time." *Id.* We cited the damage rule in Restatement of the Law 2d, Torts, Section 929 (1979), which states:

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
>
> (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,
>
> (b) the loss of use of the land, and
>
> (c) discomfort and annoyance to him as an occupant.

Id. at 139, fn. 3.

{¶36} As the Nemann Company pointed out in oral argument, the defendant in *Denoyer* had directly trespassed upon the plaintiff's land. Here, however, the Colegroves argued that the Nemann Company had indirectly trespassed on their property by way of the vibrations from the construction of the sewer pump station. Ohio courts have held that when a party seeks to recover damages for such an indirect trespass, the damages must be substantial. *See, e.g., Hager v. Waste Technologies Industries*, 7th Dist. Columbiana No. 2000-CO-45, 2002-Ohio-3466, ¶ 32-58; *Lueke v. Union Oil Co.*, 6th Dist. Ottawa No. OT-00-008, 2000 Ohio App. LEXIS 4845, *14-20 (Oct. 20, 2000); *Williams v. Oeder*, 103 Ohio App.3d 333, 659 N.E.2d 379 (12th Dist.1995); *Baker v. Chevron*, 533 Fed.Appx. 509, 522-524, (6th Cir.2013).

{¶37} Here, there was no evidence that the Colegroves had sustained substantial damages. Their expert testified that their home had sustained merely cosmetic damage. As to the loss-of-use damages, the Colegroves lived in their home throughout the entire construction except for a five-day period when they stayed with friends following Frank's collapse. Although Frank moved to Tennessee at some point, it was well after the construction had been completed, and Judy has continued to live in their home.

{¶38} With respect to any personal injuries flowing from the trespass, the trial court directed a verdict on their claims, finding that any emotional-distress damages were not foreseeable by the Nemann Company. During the trial, Frank's treating psychiatrist testified that he had suffered from major-manic-depressive disorder and PTSD, which had preexisted the construction of the pump station. The Colegroves made no attempt to separate out their claimed damages for annoyance and discomfort from their mental-distress damages. Furthermore, our review of the record reveals that any discomfort they claimed was either de minimis or irrational, and therefore, not compensable. *See Baker* at 524. Thus, on the state of this record, we cannot say the trial court erred in failing to instruct the jury that the Colegroves were entitled to annoyance-and-discomfort damages. We, therefore, overrule the Colegroves' second assignment of error, and affirm the judgment of the trial court.

Judgment affirmed.

HENDON, P.J, and **DEWINE, J.,** concur.

Please note:

The court has recorded its own entry this date.