

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

HELEN DUNCAN, et al.,	:	<b>O P I N I O N</b>
Plaintiffs-Appellants,	:	
- VS -	:	<b>CASE NO. 2011-P-0060</b>
GEORGE W. CLAPP, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2009 CV 00913.

Judgment: Affirmed in part; reversed in part and remanded.

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THOMAS R. WRIGHT, J.

{¶1} This accelerated-calendar appeal is from a final order of the Portage County Court of Common Pleas. In that order, the trial court granted summary judgment in favor of appellees, George and Margaret Clapp, on all four claims asserted by appellants, Helen and Donna Duncan. As the primary grounds for their appeal, the Duncans contend that the trial court erred in concluding that their evidentiary materials were not sufficient to raise legitimate factual disputes under each of their claims.

{¶2} Helen Duncan is the owner of a home and accompanying tract of property which is located at 9673 Diagonal Road, Mantua, Ohio. Helen originally purchased the tract in 1975, and has resided in the home continuously with her daughter, Donna.

{¶3} Directly south of the Duncan property are two separate tracts of land that are presently owned by the Clapps. The tract which is directly adjacent to the Duncans, 9657 Diagonal Road, presently contains both a renovated stone cottage and a retention pond. The next tract of land, which only abuts the “cottage” tract and is located at 9645 Diagonal Road, contains the Clapps’ marital residence.

{¶4} The Clapps bought their home and accompanying property sometime in 1977. During that same time frame, a problem developed with part of the roadway near the Duncan property. Specifically, mud would sometimes inundate the roadway during periods of heavy rain. Accordingly, in 1978, county officials chose to raise the elevation of the roadway in that general area. Once this construction was completed, though, it had the effect of causing some flooding on parts of the Duncan tract and the “cottage” tract during certain times of each year. Since the stone cottage was situated on a knoll, the floods never affected it. However, because the Duncan home was located nearer to the road, the potential for flooding was always greater.

{¶5} During the 1980’s, a considerable portion of the “cottage” property was a swamp in which water was present the majority of each year. Furthermore, since the Duncan property was higher than the “cottage” tract, any accumulation of water on the Duncan land would naturally flow into the swampy area. Similarly, since the leech bed for the Duncan home was located near the border between the two tracts, the excess water from the septic system also flowed toward the swamp.

{¶6} Prior to the 1990's, no specific steps were taken to improve the "cottage" property; as a result, non-residents of the area would often dump trash and debris into the swamp. However, in 1993, the Clapps decided to purchase the "cottage" tract and attempt to "clean up" the property so that the cottage could be used as a rental. Since George Clapp owned an excavation company and was licensed by the state of Ohio to install septic systems, he personally took steps to dredge the swamp and remove much of the trash and debris. He also deepened a portion of the swamp area by digging out a considerable amount of muck. In addition, Clapp tried to give definition to the sides of the swamp and planted grass around its entire border so that further dumping would be discouraged. In essence, Clapp changed the swamp into a retention pond.

{¶7} George Clapp's efforts in 1993 had no meaningful effect upon the Duncan property. Water from the Duncan land continued to seep into the retention pond on the "cottage" tract, but the flow was not significant enough to stop occasional flooding in the general area. Approximately fifteen years later, Clapp began to notice that portions of the surface water flowing from the Duncans' property contained waste from their septic system. In light of this, Clapp surmised that the septic system was no longer working, and that the flow of the contaminants was causing the retention pond to have a terrible odor. Clapp also noticed that the sides of the pond were beginning to deteriorate again, and that the level of the muck on the bottom of the pond was increasing.

{¶8} After initially considering whether it would be better to fill in the retention pond, Clapp decided to wait for the pond to become completely dry in 2007, and then to again dig out the muck and lower the bottom of the pond by several feet. As part of that process, Clapp extracted more trash and debris from the muck, and laid it by the side of

the retention pond near the Duncan property. Clapp also removed certain drainage tiles which had originated from the Duncan tract. He concluded that the tiles were over fifty years old and were presently useless because they were clogged with mud.

{¶9} In the same year as Clapp's second excavation of the swamp/pond area, his company was hired to demolish some public buildings in a local city. In an effort to stabilize the sides of the pond and stop the muck from sliding back to the bottom, Clapp began to transport some of the masonry debris from the demolition sites to the "cottage" tract. Before his removal of the debris from the sites, Clapp's actions were approved by a state agency. Moreover, once Clapp dumped the masonry debris near the retention pond, he did not place any of the old masonry into the pond until he and his wife sorted the materials further and removed any inappropriate items.

{¶10} The foregoing work in 2007 had the effect of reducing the basic perimeter of the retention pond, but increasing its general depth by seven feet. In conjunction with the work on the pond itself, Clapp also built a "landscaping mound" which was located in the area on the "cottage" tract between the border of the Duncan property and the pond. Although the mound was only twelve inches high in most places and did not completely stop surface water on the Duncan land from flowing unto the "cottage" tract, it did force the water to flow toward the front of the Duncan tract before it came upon the "cottage" property and seeped into the retention pond. Therefore, by creating the mound, Clapp hoped to keep any contaminants in the surface water as far away from the cottage as possible.

{¶11} Once Clapp had completed the 2007 changes to the "cottage" tract, the Duncans began to experience more frequent and more severe flooding on their land. In

fact, the increase in the flooding was so substantial that the Duncans decided to place a line of sandbags around the back of their home and to install an additional sump pump on their property.

{¶12} In June 2009, the Duncans instituted the underlying civil action against the Clapps. In regard to the restriction of the flow of surface water from their property, the Duncans' complaint asserted three claims sounding in interference with surface water rights, trespass, and nuisance. In a fourth claim, they alleged that George Clapps had created a separate nuisance by dumping hazardous materials on the "cottage" tract. In addition to requesting both compensatory and punitive damages, the Duncans sought an order which would obligate the Clapps to abate the nuisances through the removal of the landscaping mound and the alleged hazardous materials.

{¶13} After the Clapps had answered the complaint and asserted a counterclaim against the Duncans, the parties engaged in considerable discovery and court-ordered mediation. Once the matter had been pending for over a year, the Clapps filed a motion for summary judgment on all four of the Duncans' claims. Regarding the three "surface water" claims, the Clapps primarily argued that blockage/re-routing of the surface water had been justified as a result of the contaminants in the water caused by the breakdown of the Duncans' septic system. In support of this argument, they cited the testimony of George Clapp during his deposition.

{¶14} In responding to the Clapps' motion, the Duncans did not directly address the Clapps' specific arguments. Instead, the Duncans only maintained that, given the extent of the discovery had by the parties, there had to be factual disputes which could only be decided by a jury. As for evidentiary materials, the Duncans relied solely upon

the affidavit of Helen Duncan, who essentially restated the basic factual allegations that had formed the basis of their complaint.

{¶15} After the Clapps had filed a reply brief, the trial court rendered its decision granting summary judgment for the Clapps on all of the Duncan claims. Concerning the three “surface water” claims, the court first concluded that there was no factual dispute that the Duncans’ septic system was not working properly, causing contaminant to seep into the surface water. Building upon this, the trial court then held that the Duncans had failed to show that the Clapps had acted unreasonably in altering the flow of the water to protect the “cottage” property. In addition, the court found that the Duncans had not submitted any evidentiary materials to support their assertions that the new mound had been built upon their property or that hazardous items had been disposed in the pond.

{¶16} After the release of its summary judgment ruling, the trial court issued a *nunc pro tunc* order, finding that there was no just reason for delay under Civ.R. 54(B). The Duncans then brought this appeal, and have raised two assignments for review:

{¶17} “[1.] The trial court committed prejudicial error by not properly applying the *McGlashan* ‘reasonable-use’ rule pertaining to surface-water disputes in conjunction with Ohio Civ.R. 56, in granting [the Clapps’] motion for summary judgment on [the Duncans’] claims that [the Clapps] are liable for negligence, trespass, and nuisance by wrongfully diverting surface water onto [the Duncans’] property.

{¶18} “[2.] The trial court did not properly apply the provisions of Ohio Civ.R. 56 in granting [the Clapps’] motion for summary judgment on [the Duncans’] claims that [the Clapps] are liable for trespass and nuisance by creating a levee and disposing of construction debris on and around [the Duncans’] property.”

{¶19} Under their first assignment, the Duncans contest both aspects of the trial court's analysis as to the merits of their three water-surface claims. First, they contend that the averments in Helen Duncan's affidavit were sufficient to create a factual dispute concerning whether their septic system had been functioning properly at the time of the 2007 excavation of the retention pond and construction of the new landscaping mound. Second, they submit that, given Helen's averments as to the extent of the flooding after the 2007 changes on the "cottage" property, their evidentiary materials were sufficient to create a factual dispute regarding whether the Clapps' alteration of the flow of the water was reasonable under the circumstances.

{¶20} In relation to the "septic system" issue, a review of the trial record shows that the Clapps' entire contention on this point was based upon the testimony of George Clapp during his deposition. First, George stated that he had taken specialized training on septic systems and held a license from the state of Ohio to install them. George also stated that, in light of the smell of the pond water and other facts, he became aware that the Duncans' septic system was not in compliance with applicable regulations and, thus, was not working correctly. Last, he expressly testified that, prior to 2007, he told Donna Duncan that the water in his retention pond was contaminated as a result of the failure of their septic system.

{¶21} As was noted above, in responding to the summary judgment motion, the Duncans only submitted the affidavit of Helen Duncan. A review of that affidavit readily demonstrates that it only contained one statement about the septic system. That is, she averred that, as a result of the new flooding on their land, "my septic field has leached upwards causing me to incur more damages."

{¶22} Even when construed in a manner most favorable to the Duncans, Helen's statement only provides an explanation as to why the surface water on her land *after 2007* might be contaminated. Her averment simply did not address the issue of whether the water flowing from her property *prior to the 2007 alterations* had been contaminated and whether her septic systems had been functioning properly before the Clapps built the landscaping mound and modified the retention pond. To this extent, Helen's sole applicable statement was not sufficient to contradict George's testimony and create a factual dispute. Thus, the trial court did not err in finding that the Duncan septic system was not working correctly prior to 2007, thereby allowing contaminants to seep into the surface water that eventually went into the retention pond.

{¶23} As both parties aptly state, the standard for disposing of claims involving interference with surface-water rights is well-established under Ohio law:

{¶24} "In resolving surface water disputes, courts of this state will apply a reasonable-use rule under which a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, and the possessor incurs liability only when his harmful interference with the flow of surface water is unreasonable." *Hughes v. Mill Creek Properties, LTD.*, 11th Dist. No. 2005-T-0151, 2006-Ohio-7008, at ¶20, quoting *McGlashan v. Spade Rockledge Terrace Condo. Dev. Corp.*, 62 Ohio St.2d 55, syllabus (1980).

{¶25} In the instant case, the averments in Helen Duncan's affidavit were clearly



sufficient to show that the amount of flooding on her land increased considerably after the changes to the “cottage” property in 2007, and that this new flooding had resulted in damages that had substantially lowered the value of her property. On the other hand, there is no dispute that the Clapps made the 2007 changes to the “cottage” property in order to protect it from the contaminants which were seeping into the surface water from the Duncan septic system.

{¶26} Given that the contaminants in the surface water were already causing the retention pond to smell and could have led to the other health problems that may have adversely affected the habitability of the renovated cottage, the Clapps were justified in taking steps to re-direct or limit the flow of surface water unto the “cottage” property. In other words, because the presence of contaminants in the pond water posed a health risk, the Clapps acted reasonably in creating the new landscaping mound and changing the perimeter and depth of the retention pond.

{¶27} “To prevail in a summary judgment exercise, the moving party must show that: (1) there are no genuine issues of material fact remaining to be litigated; (2) [the moving party] is entitled to judgment as a matter of law; and (3) the state of the evidentiary materials is such that, even when those materials are construed in a manner most favorable to the non-moving party; a reasonable person could only reach a conclusion adverse to that particular party.” *Tutulo v. Young*, 11th Dist. No. 2010-L-118, 2012-Ohio-121, at ¶48. Applying the foregoing standard to the Duncans’ three “surface water” claims, this court concludes that the trial court did not err in entering summary judgment of favor of the Clapps. That is, the trial record readily indicates that there was no factual dispute concerning whether the Duncans’ faulty septic system was allowing

contaminants to seep into the surface water that naturally flowed into the retention pond on the Clapps' property. In light of this fact, a reasonable person could only conclude that the steps taken by the Clapps were a justifiable means of protecting the welfare of their property. Hence, since the Clapps were entitled to prevail on each of the "surface water" claims, the Duncans' first assignment of error lacks merit.

{¶28} The Duncans' second assignment addresses the merits of their second nuisance claim and a separate issue under their sole trespass claim. First, they submit that the averments in Helen Duncan's affidavit were sufficient to raise a factual dispute as to whether George Clapp had created a nuisance by placing hazardous materials in the retention pond as part of the 2010 alteration. Second, they contend that her affidavit also created a factual dispute regarding whether a part of the new landscaping mound was built upon their property.

{¶29} Concerning the first issue, our review of Helen's affidavit confirms that she expressly averred that she had personally seen George Clapp dump many "truckloads" of hazardous construction debris on the "cottage" tract. However, in making this conclusory averment, Helen never stated the basis of her alleged knowledge that the construction debris was hazardous. To this extent, she failed to present a proper foundation for her averment.

{¶30} More importantly, before the Duncans filed their response to the motion for summary judgment, the Clapps had already presented evidentiary materials on this point. While admitting that debris from demolition sites had been used in strengthening the sides of the ponds, the materials stated that: 1) before the debris was removed from the demolition sites, its use had been approved by a state environmental protection

agency; and (2) even after the debris had been dumped on the property, the Clapps had further sorted it and removed any questionable items. Their evidentiary materials also showed that, although a county health department had conducted an investigation into the dumping, a proceeding on the matter was dismissed for lack of evidence following a meeting with the county prosecutor.

{¶31} In her affidavit, Helen Duncan did not attempt to refute any of these facts, as set forth in the Clapps' evidentiary materials. These facts further demonstrated that, prior to placing some of the debris in the pond, the Clapps had taken steps to ensure that any hazardous items were removed. Thus, for purposes for their second nuisance claim, the Duncans failed to create any factual dispute concerning the legal propriety of the Clapps' actions.

{¶32} As to the issue of whether a portion of the landscaping mound encroached upon the Duncans' property, a review of the trial record shows that the Clapps did not present any evidentiary materials as to the actual location of the new landscaping mound. Instead, they merely argued in their motion that they should not be held liable for any intrusion upon the Duncan property because they had previously offered to remove any dirt or debris that may have been placed on the Duncan's property.

{¶33} As part of Helen Duncan's affidavit accompanying their response to the motion, she averred that a section of the mound was built upon her land. In their reply brief, the Clapps again did not address the location of the mound; instead, they generally argued that Helen's affidavit should be rejected because it was self-serving and not supported by any other evidence. In its final judgment, the trial court adopted the Clapps' reasoning as to the propriety of the affidavit.

{¶34} As a general proposition, this court has held that the responding party in a summary judgment exercise cannot create a factual dispute by submitting an affidavit which merely contains bald assertions contradicting the evidence offered by the moving party. *Citibank, NA v. Eckmeyer*, 11th Dist. No. 2008-P-0069, 2009-Ohio-2435, ¶60. Yet, in the instant case, the Clapps' evidentiary materials did not address the location of the new mound; hence, it cannot be said that, in making her "mound" averment, Helen was merely contradicting the Clapps' evidence. Moreover, as the Duncans aptly note, the Sixth Appellate District has held that, for purposes of summary judgment, a landowner is competent to testify concerning the boundaries of her property. *Peters v. Angel's Path, LLC*, 6th Dist. No. E-06-059, 2007-Ohio-7103, ¶36. For this reason, this court holds that Helen's averment as to the location of the landscaping mound constituted proper evidence for purposes of her trespass claim.

{¶35} In granting summary judgment on the "mound" issue, the trial court did not base its decision upon the Clapps' legal argument that they could not be held liable when they had offered to remove the mound from the Duncans' land. Instead, the trial court only held that the evidence in the case did not support a claim of trespass. Given that Helen Duncan's statement regarding the location of the new landscaping mound was the sole evidentiary material presented on that point, the trial record does not support the trial court's conclusion. Helen's affidavit was sufficient to raise a factual dispute as to whether the Clapps trespassed on the Duncan property in constructing the new landscaping mound.

{¶36} Pursuant to the foregoing analysis, the trial court should not have granted summary judgment as to the "mound" issue under the Duncans' trespass claim. To this

limited extent, appellants' second assignment is well taken.

{¶37} For the foregoing reasons, it is the judgment and order of this court that the trial court's summary judgment determination as to the "landscaping mound" aspect of appellants' trespass claim is reversed, and the case is hereby remanded for further proceedings consistent with this opinion. In all other respects, the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.