[Cite as *McCloud v. Living Word Church*, 2009-Ohio-2545.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JESSE McCLOUD, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 22987

v. : T.C. NO. 2007 CV 4569

THE LIVING WORD CHURCH : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 29th day of May, 2009.

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BARRY S. GALEN, Atty. Reg. No. 0045540, 111 W. First Street, Suite 1000, Dayton, Ohio 45402
Attorney for Plaintiffs-Appellants

J. STEVEN JUSTICE, Atty. Reg. No. 0063719 and TIMOTHY G. PEPPER, Atty. Reg. No. 0071076, 110 N. Main Street, Suite 900, Dayton, Ohio 45402
Attorneys for Defendant-Appellee

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DONOVAN, P.J.

{¶ 1} Plaintiff-appellants/cross-appellees Jesse McCloud and Judy McCloud (hereinafter "appellants") appeal the judgment of the Montgomery County Court of Common Pleas, General Division, which found in favor of appellees/cross-appellants the Living Word Church (hereinafter "appellee") on appellants' claim for trespass. In its cross-appeal, appellee

argues that the trial court erred in awarding appellants $1455.00 from appellee on their claim for qualified nuisance. Appellants filed a timely notice of appeal with this Court on October 14, 2008. Appellee filed notice of its cross-appeal on October 27, 2008.

I

{¶ 2} Appellants owned commercial warehouse properties located at 811, 817, and 905 East Third Street in Dayton, Ohio. Appellants owned the properties subject to a mortgage held by Farmers and Merchants Bank. In February of 2005, appellants leased the properties at 811 and 905 East Third Street to Reverend Dan Ellis for approximately $5000.00 a month. Initially, Ellis attempted to use the two properties to house a religious ministry that helped "troubled young adults."

{¶ 3} In the aftermath of Hurricane Katrina in August and September of 2005, appellants and Ellis attended a community-wide meeting with appellee's representatives in order to locate a suitable place to store the large amount of donations appellee was collecting for the victims of the storm. Ellis' lease on appellants' property was still in force, and he volunteered the commercial warehouses to appellee to temporarily house the donations. Soon thereafter, appellee began storing Katrina donations in the warehouses.

{¶ 4} Almost immediately, problems arose regarding the distribution of the donations. Appellee's senior pastor, Dr. Pat Murray, went to appellants' property in an effort to identify and correct the problems associated with the distribution of the donations. Appellants met Dr. Murray at the commercial property in order to discuss payment for use of the property as a storage site for the donations. During the meeting, a disagreement arose regarding whether appellee was responsible for payments to appellants for appellee's use of the property. A few

days after the meeting, individuals employed by appellee arrived at appellants' commercial property and "took what it believed to be its property." Appellee argues that it essentially vacated appellants' property at this point. It is undisputed that Ellis continued to receive donations at appellants' property after appellee allegedly vacated the same.

{¶ 5} Issues regarding appellee's financial responsibility for the use of appellants' property continued, and in September or October of 2006, appellee and appellant, both accompanied by their respective attorneys, toured appellants' commercial properties. Appellee allegedly offered to assist appellants in cleaning up the property and disposing of the left over donations. During this meeting, the parties discussed the execution of a formal release for the remaining donations by appellee to appellants. The release contemplated by the parties, however, was never properly executed and never took effect.

{¶ 6} Shortly thereafter, appellants initiated a forcible entry and detainer action in order to take back possession of the property. Appellants were granted possession of the property pursuant to the action, and they were also awarded a judgment against Ellis in the amount of $127,000.00 for unpaid rents and utilities. After they took back possession, the appellants were unable to lease the property to any other tenants.[1]

{¶ 7} The property was eventually foreclosed upon, and appellants received a notice to vacate the property in July of 2008. In response to the notice to vacate, appellants hired a few

[1]The record contains conflicting evidence regarding the reason behind appellants' inability to lease the property to other tenants. Appellants claim that they were unable to rent the property because appellee refused to remove the remainder of the donations from the hurricane relief effort. Appellee contends that appellants "made minimal and inadequate attempts to lease the property" after Ellis was successfully evicted.

individuals and instructed them to remove the remainder of the donations that were allegedly left by appellee. Appellants and their hired help were only able to remove a portion of the goods from the property before being locked out in July of 2008.

{¶ 8} Appellants subsequently filed a complaint against appellee sounding in trespass, nuisance, conversion, and negligence. On July 27, 2007, appellee filed a motion to dismiss all of appellants' claims. Appellants filed a memorandum contra on August 24, 2007. On October 18, 2007, the trial court issued a decision in which it overruled appellee's motion with respect to appellants' claims for trespass, nuisance, and negligence, but sustained the motion as to the conversion claim.

{¶ 9} On January 23, 2008, appellee filed a motion for summary judgment as to appellants' remaining claims. The trial court overruled the motion for summary judgment, but ultimately limited appellee's potential liability for failure to remove property to a limited time period.

{¶ 10} After a two-day bench trial, the trial court held that appellee was not liable to appellants for civil trespass. The court, however, held that appellee was liable to appellants under a theory of qualified nuisance and awarded appellants damages in the amount of $1455.00 against appellee. The damage amount represented the money appellants paid to the individuals they hired to remove the remainder of the donations from the property in July of 2008.

II

{¶ 11} Initially, it should be noted that appellee correctly points out that our review of the instant appeal is limited to whether the judgment of the trial court was supported by the manifest weight of the evidence. The manifest-weight standard-of-review is very

deferential to a trial court. A reviewing court "has an obligation to presume that the findings of the trier of fact are correct." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24. It is not the reviewing court's proper place to (re)weigh the credibility of witnesses and evidence presented to the trial court. Id. Thus, if a trial court's judgment is "supported by some competent, credible evidence going to all the essential elements of the case," the reviewing court should affirm. Id. at ¶26 (citation omitted).

III

{¶ 12} Appellants' first assignment of error is as follows:

{¶ 13} "THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT APPELLEE IS LIABLE TO APPELLANTS FOR TRESPASS."

{¶ 14} In their first assignment, appellants contend that the trial court erred when it held that appellee was not liable to appellants for trespass. Specifically, appellants argue that the court applied a too narrow definition of what constitutes civil trespass in the instant case. Appellants concede that appellee initially had the permission of appellants to use the property for storage. That permission, however, was subsequently revoked by appellants, and appellee became a trespasser when it allegedly refused to remove the remainder of the donations from the property.

{¶ 15} "[Civil] trespass is the unlawful entry upon the property of another." *Jenkins v. Guy*, Lawrence App. No. 03CA34, 2004-Ohio-4254, citing, *Chance v. BP Chemicals, Inc.* (1996), 77 Ohio St.3d 17, 24, 1996-Ohio-352. The elements of trespass are "1) an unauthorized intentional act; and 2) entry upon land in the possession of another." *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d

704, 716. In order to recover on a trespass claim, a plaintiff must prove that he or she had actual or constructive possession of the land at the time that the trespass occurred. *Northfield Park Assoc. v. Northeast Ohio Harness* (1987), 36 Ohio App.3d 14.

{¶ 16} The evidence adduced during the bench trial failed to establish that appellee trespassed upon appellants' property. Contrary to appellants' assertions, the record demonstrates that appellee attempted to remove the donated goods and totally vacate appellants' property in September or October of 2006. At that time, Ellis was still the leaseholder on the property, and he continued to take in and store hurricane relief donations at appellants' property after appellee had attempted to vacate said property. Although the trial court found that appellee may have abandoned some of the donations at appellants' property, the testimony offered at trial failed to provide any basis upon which to differentiate the items left by appellee and the additional donations received by Ellis at the property prior to his eventual eviction. No evidence was presented, except for the self-serving testimony of Jesse McCloud, that appellee agreed at any time to assume responsibility for the payment of rent and utilities at the commercial property. Lastly, appellants were awarded a judgment against Ellis in the amount of $127,000.00 for unpaid rents and utilities, and appellants failed to establish what, if any, portion of the judgment was attributable to appellee. Thus, the trial court's judgment holding that appellee was not liable to appellants for civil trespass was not against the manifest weight of the evidence.

{¶ 17} Appellants' first assignment of error is overruled.

IV

{¶ 18} Because they are interrelated, appellants' second and final assignment of error will be discussed along with appellee's sole assignment of error in its cross-appeal.

{¶ 19} "THE TRIAL COURT ERRED IN ITS AWARD OF ONLY ONE THOUSAND FOUR HUNDRED FIFTY-FIVE DOLLARS ($1455.00) TO APPELLANTS ON THEIR CLAIM FOR NUISANCE."

{¶ 20} Appellee's sole assignment in its cross-appeal is as follows:

{¶ 21} "THE TRIAL COURT ERRED IN FINDING IN FAVOR OF MCCLOUD ON HIS NUISANCE CLAIM AND ERRED IN AWARDING DAMAGES FOR THE SAME."

{¶ 22} In their final assignment of error, appellants contend that the trial court's award of $1455.00 on their claim for qualified nuisance was insufficient to make them whole. Appellants argue that the trial court erred by not awarding damages for the "payment in kind from the abandoned materials or payment derived from [a]ppellants' own property stored on the property." Appellants further assert that the trial court erred by failing to award them damages for the loss of use of the property, as well as the discomfort and annoyance arising from the nuisance.

{¶ 23} Ohio courts have described nuisance law as the most "impenetrable jungle in the entire law." *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 712, quoting Prosser & Keeton, The Law of Torts (5th Ed.1984) 616, Section 86. Traditionally, nuisance is defined as "the wrongful invasion of a legal right or interest." * * * " 'Wrongful invasion' encompasses the use and enjoyment of property or of personal rights and privileges." *Kramer v. Angel's Path, L.L.C.,* 174 Ohio App.3d 359, 366-367, 2007-Ohio-7099, at ¶ 15 (citations omitted). A private nuisance has also

been defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Brown v. Scioto Cty. Bd. of Commrs*. (1993), 87 Ohio App.3d at 712, (citation omitted).

{¶ 24} In limiting appellants' damages to the cost they incurred to remove the abandoned donations from the property, the trial court found that appellants had failed to present any evidence regarding the fair rental value of the property. Thus, the court was unable to fashion an award to appellants for the loss of use of the property because of appellee's failure to remove its goods. Moreover, the trial court pointed out that appellants had already been awarded a judgment in the amount of $127,000.00 against Ellis for unpaid rents and utilities. There is simply no evidence in the record that establishes what portion of that judgment may be attributable to appellee. Additionally, appellants failed to present any evidence of damages that they incurred from the annoyance and discomfort resulting from appellee's failure to remove its goods from the property. In light of the foregoing, the trial court did not err by refusing to award appellants damages for loss of use of the property and annoyance and discomfort as part of their nuisance claim.

{¶ 25} Appellants, however, did provide sufficient evidence regarding the amounts paid to the individuals who helped them remove the remainder of the abandoned donations from the property. Evidence was adduced which clearly established that Jesse McCloud paid three individuals varying sums of money for the removal and clean-up work they performed for him prior to the foreclosure on the property. Thus, the trial court's holding that appellee was liable to appellants on a theory of qualified nuisance, as well as the court's award of damages to appellants for

the cost of removal, were not against the manifest weight of the evidence.

{¶ 26} Appellants' second and final assignment of error is overruled.

{¶ 27} Appellee's sole assignment of error in its cross-appeal is also overruled.

V

{¶ 28} All of appellants' and appellee's assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Barry S. Galen
J. Steven Justice
Timothy G. Pepper
Hon. Timothy N. O'Connell