[Cite as *Rogers v. Hood*, 2009-Ohio-5799.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

MONTE J. ROGERS	C.A. No. 24374
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WILKIE HOOD, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2006 07 4746

DECISION AND JOURNAL ENTRY

Dated: November 4, 2009

CARR, Judge.

{¶1} Appellant, Monte J. Rogers, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms, in part, and reverses, in part.

I.

{¶2} Appellant, Monte J. Rogers, and appellees, Wilkie and Joyce Hood, (hereinafter collectively referred to as "the Hoods") have been neighbors for more than two decades. The parties' garages are located on either side of a gravel driveway. Rogers' garage is constructed at an elevation higher than the grade level of the driveway and the Hoods' garage is at a lower elevation than the driveway. The natural topography between the properties is such that the property to the west of Rogers' property is higher than Rogers' property itself; Rogers' property is higher than the Hoods' property, and the properties to the east of the Hoods' property are lower than the Hoods' property itself. Therefore, run off water follows a natural course running south on the Hoods' property.

{¶3} In 2006, Rogers began building a road bed around a pond on his property. Construction of the road involved bringing in dump trucks filled with dirt and heavy earth moving equipment across the driveway, as well as tow trucks to recover bulldozers that had accidentally fallen into his pond. Rogers did not employ any contractor or engineer to draw up a plan for his projects. The work lasted for more than a year. During the course of the project, Rogers had dirt dumped on the Hoods' property. This caused the natural swale to be altered and resulted in flooding. Rogers also decided to lengthen and deepen his pond and to fill in a swampy area that sat further back on his property. The swampy area was approximately eight feet below the Hoods' property in that particular area and pushed additional surface water forward onto and across the Hoods' property.

{¶4} For many years, the gravel driveway between the properties was shared by Rogers and the Hoods and it was made up of property from both parcels. In 1994, Rogers extended his single car garage to create a two-car garage. This occupied the majority of the area of the Rogers property which had previously been dedicated to the gravel driveway. This caused traffic on the driveway to drive mainly on the Hoods' property and closer to the Hoods' garage. Rogers constructed a retaining wall in order to reinforce the east wall of the garage. The wall occupied additional property which had previously been dedicated to driveway use and brought traffic even closer to the Hoods' garage. Thereafter, the gravel driveway was mostly on the Hoods' property with a very small portion on the Rogers property.

{¶5} Rogers had a pond on his property which was located near the edge of the Hoods' property. In 2002, Rogers began the process of altering his property. In 2006, the construction of the road, the changing dimensions of the pond, and the filling of the swampy area behind the pond resulted in several issues between the parties. Many of these issues stemmed from the fact

that Rogers brought large dump trucks filled with dirt and flat bed trucks with heavy earth moving equipment over the gravel driveway.

{¶6} The water from Rogers' pond naturally drained down a vertical swale between the properties that ran across the Hoods' property until Rogers began the expansion of his pond. In the 1990s, the Hoods had some dirt brought onto their property to fill in some low spots. Rogers claimed that this caused many of the problems which led to this litigation.

{¶7} The Hoods kept horses on their property. In addition to a barn, they have a training rink and a fenced-in area to corral horses. The Hoods complained that the projects undertaken by Rogers prevented them from properly taking care of their horses. Both Joyce and Wilkie Hood attempted to discuss these issues with Rogers. However, the conversations often became combative and the parties were unable to agree on a resolution. As of date of trial in this case, the Hoods no longer kept horses on their property.

{¶8} In 2006, the Hoods attempted to involve governmental agencies to resolve issues between the parties. At that time, the Hoods felt the need to address the flooding issues because they were also receiving complaints from property owners to their east who were receiving increased surface water.

{¶9} The Hoods filed a police report complaining of Rogers trespassing on their property. Law enforcement informed the Hoods that this was a civil matter and that they should take it up with the Green Zoning Department. Green Zoning told the Hoods that because it was a civil matter, they should seek advice from legal counsel. The Hoods proceeded to meet with an attorney. They then capped the drain outlet on their own because of the excess water running from the pond onto their property and onto properties to the east.

{¶10} Soon thereafter, the Hoods notified Rogers of their intent to fence off their west property line which would have prevented Rogers from using the gravel driveway. Rogers proceeded to park a truck on the gravel driveway, between the two garages, so that neither he nor the Hoods could use his driveway. Subsequently, he sought and obtained from the trial court a restraining order against the Hoods.

{¶11} Rogers also filed a lawsuit. In his complaint, Rogers asserted claims against the Hoods for nuisance, intentional wrongdoings and malicious interference. Rogers claimed that the Hoods were maintaining a civil nuisance pursuant to R.C. 3767.13(A),(B) and (C); malicious interference by the Hoods causing him damages by interfering with the natural drainage; intentional wrongdoing by allowing horse manure to contaminate Rogers' pond; and that Rogers had an easement over a portion of the Hood property. The Hoods filed a counterclaim for declaratory judgment; trespass; and conversion. The Hoods also sought a declaration that the permission to use their driveway was no more than a license and such was revocable. They further sought damages from Rogers for his trespass on their property and for conversion.

{¶12} A bench trial commenced on January 21, 2008. Ten witnesses testified on behalf of the parties and numerous exhibits, including dozens of photographs were admitted into evidence. On March 19, 2008, the trial court denied Rogers relief on any of the claims in his complaint. With regard to the trespass claim, the trial court entered judgment in favor of the Hoods. With regard to the Hoods' claim for declaratory judgment and Rogers' claim for an easement, the trial court found that the Hoods had granted Rogers a revocable license to use the driveway. Rogers had filed a motion to dismiss the Hoods' conversion claim which the trial court granted in its judgment entry. On July 29, 2008, the trial court found that Rogers' claims

were frivolous pursuant to R.C. 2323.51 and awarded attorney fees to the Hoods in the amount of $15,000 for pro bono counsel and $9,205 for the Hoods' prior counsel.

{¶13} Rogers has raised six assignments of error on appeal.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF IN AWARDING ATTORNEY FEES UNDER RC 2323.51 WHERE THE COURT FOUND THE CLAIMS MADE BY PLAINTIFF WERE SUPPORTED BY LEGAL AUTHORITY AND THERE WAS RATIONAL BASIS FOR THE CLAIMS MADE, AND NO FRIVIOLOUS CONDUCT DEFINED BY R.C. §2323.51 IS IDENTIFIED, BUT RATHER BECAUSE THE TRIAL COURT FOUND THAT PLAINTIFF WAS A 'CANTANKEROUS' NEIGHBOR." (sic)

{¶14} Rogers argues an award of attorney fees was not appropriate under R.C. 2323.51 because the trial court determined that Rogers' claims had a basis in law.

{¶15} R.C. 2323.51 allows a court to award attorney fees to a party who has been adversely affected by frivolous conduct in connection with a civil action. Sanctions may be assessed against a party who has commenced or persisted in maintaining a frivolous action. *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. Nos. 24434, 24436, 2009-Ohio-5148, at ¶31, citing *Sigmon v. Southwest Gen. Health Ctr.*, 8th Dist. No. 88276, 2007-Ohio-2117, at ¶33. See, also, *Kozar v. Bio-Medical Applications of Ohio, Inc.*, 9th Dist. No. 21949, 2004-Ohio-4963, at ¶20. The statute defines "conduct" as "[t]he filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action *** or the taking of any other action in connection with a civil action[.]" R.C. 2323.51(A)(1)(a). Under R.C. 2323.51(A)(2)(a), conduct by a party to a civil action becomes "frivolous conduct" when:

> "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or needless increase in the cost of litigation.
>
> "(ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> "(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> "(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on lack of information or belief."

The relevant inquiry into whether a violation under R.C. 2323.51(A)(2)(a)(ii) had occurred is "whether no reasonable lawyer would have brought the action in light of existing law." *Callahan* at ¶31, quoting *Kozar* at ¶16. "In making its award, the trial court must determine that the conduct was frivolous as defined in the statute and that the opposing party was adversely affected, and if so, then it may determine what amount of fees, costs, and expenses were necessitated by the frivolous conduct. R.C. 2323.51(B)(2)(a)." *Callahan* at ¶31.

{¶16} The inquiry into whether a party's actions were frivolous because the conduct served to merely harass or injure the opposing party is factual in nature. *Callahan* at ¶32, citing *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 233. Thus, this Court reviews such a ruling with a substantial deference to the findings of the trial court. *Callahan* at ¶32.

{¶17} Here, the trial court specifically found that "the claims made by Plaintiff were supported by legal authority and there was a rational basis for the claims he made." Therefore, our discussion of an award of attorney fees under R.C. 2323.51 will be confined to whether the conduct of Rogers, or his attorney, served to merely harass or injure the Hoods. The trial court made the following findings with regard to Rogers' conduct:

> "The evidence was that the Plaintiff was a cantankerous, difficult and unreasonable neighbor, who used Defendants' property to achieve his own purposes, without regard for the inconvenience and problems such use inflicted upon Defendants. Defendants were forced to hire an attorney and to obtain an expert to defend against Plaintiff's claims. Because of the prolonged litigation, Defendants' first counsel withdrew. Plaintiff knew the Defendants were without legal counsel for lack of funds and he told Defendants it was his intent to 'own their property.'"

The trial court concluded by finding that Rogers "had an ill-will toward Defendants justifying a finding that Plaintiff's conduct was frivolous" and that the Hoods were "adversely affected by Plaintiff's litigation as they were without legal representation for a period of time because of lack of funds and they were forced to remortgage their property to have funds to pay for some litigation costs."

{¶18} The trial court clearly found that Rogers' behavior towards the Hoods was both unreasonable and offensive. However, this Court has held that sanctions cannot be imposed on the grounds that a party's conduct served to harass or maliciously injure a party, absent specific finding to that effect under R.C. 2323.51(A)(2)(a). *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 234. While the trial court undeniably took exception to Rogers' behavior, its findings with regard to Rogers' conduct related to the civil action, as defined by R.C. 2323.51(A)(1)(a), do not merit an award of attorney fees. Given the trial court's finding that Rogers' claims had a basis in law, the fact that the Hoods were forced to hire an attorney does not justify a finding of frivolous conduct. Similarly, such a finding cannot be justified simply because the duration of the litigation resulted in the Hoods' first attorney withdrawing or because defending the lawsuit resulted in the Hoods' having to remortgage their property. While all these findings show that the Hoods were burdened by the filing of the lawsuit, it does not show that Rogers' purpose in filing the lawsuit, or his conduct thereafter, was aimed at harassing and injuring the Hoods. Rogers' cantankerous behavior prior to the commencement of the lawsuit,

coupled with the comments he made to the Hoods, served to show that the parties had a highly contentious relationship that almost certainly would spawn litigation. However, the findings by the trial court do not show that Rogers' "conduct" within the civil action, as defined by R.C. 2323.51(A)(1)(a), was aimed at harassment and injury and merited an award of attorney fees under R.C. 2323.51.

{¶19} Rogers' first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF IN AWARDING ATTORNEY FEES FOR PRO BONO COUNSEL."

{¶20} In his second assignment of error, Rogers argues an award of attorney fees is not appropriate under R.C. 2323.51 for representation by pro bono counsel. Because our resolution of the first assignment of error is dispositive of this issue, this Court declines to address Rogers' second assignment of error as it is rendered moot. See App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF:

A. IN DECLARING THAT PLAINTIFF DID NOT HAVE AN EASEMENT OVER THE SHARED DRIVEWAY;

B. IN NEVER ADDRESSING PLAINTIFF'S EASEMENT BY ESTOPPEL CLAIM; AND

C. IN DECLARING THAT PLAINTIFF HAD ONLY A LICENSE TO USE THE DRIVEWAY FOR A VERY LIMITED PURPOSE WHICH WAS REVOKED."

{¶21} Rogers argues the trial court erred in finding that Rogers did not have an easement over the shared driveway and, instead, had a license which was revoked. This Court disagrees.

{¶22} When reviewing a judgment entered in a bench trial, the proper standard of review in assessing the trial court's factual findings is whether the trial court's judgment is

"supported by some competent, credible evidence going to all the essential elements of the case." *Luo v. Gao*, 9th Dist. No. 22310, 2007-Ohio-959, at ¶7, citing *Estate of Barbieri v. Evans* (1998), 127 Ohio App.3d 207, 211. "This standard is highly deferential and even 'some' evidence is sufficient to sustain the judgment and to prevent a reversal. Therefore, this Court does not decide whether it would have come to the same conclusion as the trial court. Rather, this Court is required to uphold the judgment so long as the record, as a whole, contains some evidence from which the trier of fact could have reached its ultimate factual conclusions." (Citations omitted.) *Liberty Excavating, Inc. v. Welty Bldg. Co., Ltd.*, 9th Dist. No. 21807, 2004-Ohio-4873, at ¶8.

{¶23} As a preliminary matter, we note that a review of the transcripts indicates that there was a significant amount of conflicting testimony offered by the parties at trial regarding the use of the shared driveway, communications between the parties regarding the use of the driveway, as well as how each party's land was affected by the opposing party's use of the driveway. In dealing with conflicting testimony, the Supreme Court of Ohio has held that appellate courts must defer to the trial court as the finder of fact, insofar as the trial court is in the best position to weigh the credibility of the witnesses. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. It follows that a reviewing court should not substitute its judgment for that of the trial court. Id. The decision of that trier of fact, be it judge or jury, will not be reversed as being against the manifest weight of the evidence as long as it is supported by some competent, credible evidence going to each of the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. We note that the trial court explicitly found that Rogers was "not a credible witness."

{¶24} Turning to Rogers' third assignment of error, Rogers argues that he has an easement over the shared driveway. A review of the record indicates there was credible evidence to support the trial court's conclusion that Rogers had a license, and not an easement, to use the property in question. A revocable license extends a privilege to do an act on another's land. *Hampton Ridge Condominium Assn. No. 1 v. Hampton Woods Condominium, Inc.*, 9th Dist. No. 22036, 2005-Ohio-9, at ¶6. "In order to establish the right to a prescriptive easement, the moving party must establish that he has used the subject property (1) openly, (2) notoriously, (3) adversely to the servient property owner's rights, (4) continuously, and (5) for a period of at least 21 years." *Heiney v. Godwin*, 9th Dist. No. 22552, 2005-Ohio-5659, at ¶14. The Hoods moved onto their property in 1985. Because of the relationship between the previous property owner and Rogers, the Hoods came to the property with a permissive use relationship in place. A review of the transcript reveals Rogers used the driveway to access a septic tank and to transport boats and other things that he stored on the back of his property. The Hoods transported machinery, as well as horses and bails of hay via trailer, on the shared driveway. The Hoods permissive use of the property was terminated when Rogers constructed the two-car garage and a garage retaining wall in 1994. At around the time Rogers expanded his garage and constructed the retaining wall, he approached Wilkie Hood and requested permission to both expand the driveway and then use it for the limited purpose of transporting his boat, via trailer, to the rear of the property. Wilkie Hood's testimony indicates that Rogers requested permission to use the driveway "occasionally to transport his boat back and forth from his back yard." According to his testimony, Wilkie Hood informed Rogers it would not be a problem "as long as that was all it was used for." Joyce Hood also testified that Rogers' use of the property was to be confined to that limited purpose.

{¶25} This grant of permission to use the land in question fits comfortably within the definition of a revocable license. When Rogers successfully obtained permission from the Hoods to expand and use the gravel driveway to access the back of his property, a license was created. After a period of time, the Hoods objected to Rogers bringing construction equipment over the driveway and the license belonging to Rogers was revoked. This permissive use of the land supports the trial court's conclusion that Rogers had only a license to use the land. Furthermore, the fact that Rogers sought permission to use the driveway reinforces the trial court's finding that an easement did not exist.

{¶26} We turn now to Rogers' argument that the trial court erred in not addressing his easement by estoppel claim. The trial court explicitly stated in its judgment entry that Rogers did not file a "document setting forth easement rights." The trial court also noted that it found no "evidence of a mutual dedication of land for a common use." Therefore, the trial court reasoned, the only applicable analysis was whether a prescriptive easement existed. In order for a party to establish that he has an easement by estoppel, he must show: (1) the landowner made a misrepresentation or fraudulently failed to speak; and (2) reasonable detrimental reliance. *Maloney v. Patterson* (1989), 63 Ohio App.3d 405, 410. Here, there was no evidence presented that the Hoods either made a misrepresentation or fraudulently failed to speak regarding Rogers' use of their property. The evidence presented at trial, including the testimony of Rogers, showed that the Hoods had granted Rogers permission to use the property for the purpose of transporting his boat. Rogers' decision to make improvements was made without the Hoods' direct involvement. Therefore, because Rogers could not have argued detrimental reliance, the trial court did not err in conducting a prescriptive easement analysis instead of an easement by estoppel analysis. It follows that the third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF IN GRANTING THE DEFENDANTS' TRESPASS CLAIM, FOR THE REASONS THAT:

A. DEFENDANTS PERMITTED PLAINTIFF'S USE OF THE DRIVEWAY AND DID NOT EVEN ASK PLAINTIFF NOT TO USE DRIVEWAY UNTIL JUST BEFORE SUIT WAS FILED.

B. THERE WAS NO EVIDENCE OF 'CONTINUAL TRESPASS' AFTER DEFENDANTS ASKED PLAINTIFF TO STOP USING THE SHARED DRIVEWAY."

{¶27} In Rogers' fourth assignment of error, he argues the trial court erred in granting the Hoods' trespass claim. This Court disagrees.

{¶28} In order to prevail on a claim of trespass, a party must prove an unauthorized intentional act of entry upon land in the possession of another. *Elite Designer Homes, Inc. v. Landmark Partners*, 9th Dist. No. 22975, 2006-Ohio-4079, at ¶28. Because a trespass claim is designed to protect one's interest in the exclusive possession of real estate, the claimant must establish a possessory interest in the premises at the time of trespass. Id., citing *Kay Homes, Inc. v. South* (Nov. 18, 1994), 11th Dist. No. 93-L-182. In support of his fourth assignment of error, Rogers argues that the Hoods did not tell him to stop using the driveway until just prior to the filing of the lawsuit. Rogers further contends that the evidence shows that there was no continuous use of the property after the Hoods had asked Rogers not to use the driveway.

{¶29} As we noted in our discussion above, the trial court's conclusion that the Hoods granted to Rogers a license for the limited purpose of accessing the rear of his property for storage purposes was supported by competent, credible evidence. The parties do not dispute that the Hoods had a possessory interest in their property. In light of the conflicting testimony regarding the trespass issue, our inquiry into Rogers' assignment of error relating to trespass is confined to whether there was some competent, credible evidence presented at trial which

showed that Rogers intentionally entered property in possession of the Hoods without authority. See *Seasons Coal*, 10 Ohio St.3d at 80.

{¶30} The testimony of Wilkie and Joyce Hood indicates that Rogers' use of the property frequently exceeded that for which the Hoods had given him permission. While the Hoods had permitted Rogers to use the driveway "once or twice a week to take his boat in and out," Rogers proceeded to use the driveway excessively. When the Hoods returned from Colorado in 2002, they found that Rogers had begun the process of making alterations to his property. These projects involved dump trucks carrying dirt and trailers carrying heavy machinery frequently traversing the driveway. At the instruction of Rogers, large amounts of dirt were dumped on the Hoods' property. Joyce Hood testified that Rogers never asked the Hoods for permission to dump the dirt on their property. The flow of traffic on the driveway, which Joyce Hood described as "constant," caused the walls of the Hoods' garage to crack and separate. Bulldozers which had been transported onto Rogers' property slid into his pond on at least four occasions. Each time this occurred, a tow truck was called to tow the bulldozer out of the pond. Joyce Hood testified that the trucks needed to drive not only on the driveway but onto the Hoods' property in order salvage the bulldozers. In order for the trucks to enter their property, the Hoods' fence had to be temporarily taken down. Joyce Hood testified that Rogers asked her to take her fence down "about nine times" during the course of his projects and, on one occasion when the Hoods were out of town, Rogers cut the fence. Joyce Hood explained to Rogers on multiple occasions that it was necessary for the fence to be kept intact but Rogers told her he did not care.

{¶31} Joyce Hood testified that she was reluctant to confront Rogers for a period of time because he acted "belligerent" toward her and used "profanity to the extreme" during previous

discussions. On July 22, 2006, the Hoods sent a letter to Rogers informing him that they intended to install a "GATE/FENCE" on the west side of their property and that "DUE TO DAMAGES & SECURITY OF SAID PROPERTY ACCESS WILL NO LONGER BE GRANTED." However, Rogers did not cease his use of the driveway. Wilkie Hood testified that the purpose of erecting the fence was to keep Rogers off the property.

{¶32} Furthermore, a land owner who alters the natural flow of water across his property so as to increase the volume and intensity of the flow onto adjoining property may be held liable in trespass to an injured landowner. *Kromer v. Island Recreation Assn., Inc.* (1992), 82 Ohio App.3d 787, 790. In his testimony, Rogers indicated that he did not consult a professional prior to engaging in several projects which altered the topography of his land, including the widening and deepening of his pond. Joseph Mosyjowski, a civil engineer, testified on behalf of Rogers at trial. On cross examination, Mosyjowski testified that trucking in loads of dirt can cause flooding if the ground is not properly graded. Joyce Hood testified that she began to experience significant flooding issues on her property when Rogers had dirt moved to the back of his property to begin the process of building up the area behind his pond. According to Joyce Hood, the natural drainage of the pond was altered, and flooding on her property ensued, when Rogers moved dirt, tires, and other debris to the back of the property. From this testimony, it was reasonable for the trial court to conclude that the flooding constituted trespass on the part of Rogers.

{¶33} In light of the evidence presented at trial, the trial court did not err in finding that Rogers trespassed on the Hoods' property. Rogers' fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF IN DENYING PLAINTIFFS' CLAIM THAT DEFENDANTS INTENTIONALLY ALTERED THE NATURAL FLOW OF WATER FROM THE POND CAUSING THE FLOODING."

{¶34} In his fifth assignment of error, Rogers argues the trial court committed reversible error in denying his claim that the Hoods intentionally altered the natural flow of water from the pond causing flooding. This Court disagrees.

{¶35} In his complaint, Rogers claimed that the Hoods altered the natural flow of water in violation of R.C. 3767.13(C). Because the trial court determined that Rogers, as a private individual, did not have standing to pursue a claim under R.C. 3767.13(C), the trial court characterized Rogers' claim as a common law cause of action. In cases where damage to one's property is alleged by water run-off created by an adjacent property owner, Ohio has adopted a reasonable use rule. *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp*. (1980), 62 Ohio St.2d 55, at syllabus. Under the reasonable use rule, "[e]ach 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." Id. The rule emanates from the premise that "a possessor of land is not unqualifiedly privileged to deal with surface waters as he pleases, nor absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others." Id.

{¶36} Rogers argues that the Hoods' actions of capping the drainage pipe resulted in flooding and constituted an unreasonable alteration of the natural flow of water. In support of this position, Rogers points to the expert testimony of Joseph Mosyjowski and Charles Flanigan, as well as the testimony of Ronald Stalnaker, to highlight the fact that the natural flow of water

in the watershed flows across the Hoods' property. As we have repeatedly emphasized in this case, the testimony of the witnesses at trial contained sharp contradictions with regard to a variety of issues and the trier of fact was in the best position to evaluate the credibility of the witnesses. *Seasons Coal*, 10 Ohio St.3d at 80. The trial court found that the Hoods' decision to cap the pipe was done out of desperation "to protect their property from further damage as well as to prevent flooding properties to the east of the Defendants." The trial court concluded that Rogers installed a drainage pipe onto the Hoods' property without first seeking their permission. The trial court went on to state that the interference that occurred with regard to the natural drainage on both properties was a "direct result" of activities Rogers had undertaken on his property.

{¶37} Based on our review of the transcript, there was some competent, credible evidence to support the trial court's finding with regard to the interruption of the natural flow of water. Joyce Hood testified that when Rogers began the alteration of his pond, the Hoods began to experience flooding issues. Specifically, Joyce Hood testified that Rogers "stopped the drainage" of his pond when he had a significant amount of dirt placed on the back of his property, on the edge of the pond. Several photographs were admitted into evidence which depicted the flooding and allowed Joyce Hood to identify where Rogers had the dirt placed, as well as how the topography of the land had been altered. Joyce Hood further testified that during the course of expanding the size of the pond, a lot of trash and debris, as well as dirt, was placed at the back of Rogers' property. According to Joyce Hood, this "dammed up the water that would go back there to relieve any overflow."

{¶38} Rogers had repeatedly asked Joyce Hood to dig a ditch through her yard which would help with drainage. The Hoods informed Rogers that they did not want to pursue that

option because they were worried about being able to access their barn. Joyce Hood stated that in 2006, after a period of harassment, Rogers again requested permission to dig a trench across a portion of the Hoods' yard. In her testimony, Joyce Hood stated that she granted Rogers permission with the understanding that the trench would be temporary. Joyce Hood indicated that she was under the impression that once Rogers had drained his pond to alleviate the flooding problems, he would fill in the trench. When this did not happen, Joyce Hood approached Rogers because Wilkie Hood could not get his truck out of the barn and the Hoods' horses could not be taken to their pen. According to Joyce Hood's testimony, Rogers told her to build a bridge and that, otherwise, it was not his problem. After a series of confrontations, the Hoods approached the Green Zoning Board about the situation where they were advised to consult an attorney. After consulting with the attorney, the Hoods decided to cap the pipe which had allowed the water to drain across their property. Joyce Hood also testified that she felt that capping the pipe was necessary because another neighbor had threatened to file a lawsuit because of the flow of water onto their property.

{¶39} Based on these facts, the trial court correctly concluded that the Hoods should not be held liable for intentionally altering the natural flow of surface water. It follows that Rogers' fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS IN AWARDING $30,000 IN DAMAGES FOR DRAINAGE PROBLEMS WHERE DEFENDANTS NEVER REQUESTED DAMAGES FOR SAME AND WHERE DEFENDANTS FAILED TO MITIGATE ANY SUCH DAMAGES."

{¶40} In his sixth assignment of error, Rogers argues that the trial court erred in awarding $30,000 in damages for drainage problems where the Hoods never requested such damages and where the Hoods failed to mitigate any such damages. This Court disagrees.

{¶41} Because Ohio is a notice-pleading state, Ohio law does not generally require a party asserting a claim for relief to plead operative facts with particularity. *Cincinnati v. Beretta U.S.A. Corp*, 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶29. Civ.R. 8(A) provides, in a relevant part, that "[a] pleading that sets forth a claim for relief *** shall contain *** a short and plain statement of the claim showing that the party is entitled to relief, and *** a demand for judgment for the relief to which the party claims to be entitled."

{¶42} In the trial court's judgment entry, dated March 19, 2008, the award of $30,000 to correct surface water and drainage problems was designated as an amount of damages the Hoods were entitled to recover for Rogers' trespasses. In the Hoods counterclaim which was filed on September 26, 2006, the Hoods stated that Rogers' trespass caused damages in an amount exceeding $25,000. Incorporated by reference into the trespass counterclaim was a sentence from the declaratory judgment counterclaim which referenced controversies which had arisen between the parties concerning their individual property rights. In addition to the amount of traffic on the driveway, one of the foremost controversies between the parties was the excessive flooding issue. Therefore, the Hoods' trespass counterclaim was sufficient to merit an award of damages to correct surface water and drainage problems.

{¶43} Rogers also argues that the Hoods failed to take appropriate measures to mitigate damages. "The law in Ohio precludes one who is injured by the tort of another from recovering damages for harm that could have been avoided by reasonable effort or expenditure after the commission of the tort." *Dunn v. Maxey* (1997), 118 Ohio App.3d 665, 668, citing *Johnson v. Univ. Hosps. of Cleveland* (1989), 44 Ohio St.3d 49, 57. However, the rule requiring the injured party to mitigate his or her damages does not require a party to make extraordinary efforts to do

what is unreasonable or impracticable. *Dunn*, 118 Ohio App.3d at 668, citing *Cline v. Am. Aggregates Corp*. (1989), 64 Ohio App.3d 503, 511.

{¶44} In this case, the record reveals that both parties experienced extensive flooding on their respective properties due to complex drainage problems. Charles Flanigan, a licensed engineer and surveyor who testified on behalf of the Hoods, stated that pursuing what he deemed to be a practical solution would have involved cooperation from both parties. Due to the contentious nature of the parties' relationship, taking practical steps to alleviate the flooding was not a reasonable option. Given the cost, level of risk, and liability which would have been inherent in attempting to minimize the damage caused by the flooding, it would have been unreasonable for the Hoods to pursue a unilateral course of action. As we discussed above, there was evidence to support the trial court's finding that the Hoods were forced to cap the drainage pipe out of necessity to protect their property from the flooding which largely resulted from Rogers' decision to undertake projects which altered the topography of his property. Taking any further action would have been both unreasonable and impractical. Therefore, the trial court did not err in awarding $30,000 to the Hoods to correct surface water and drainage problems.

{¶45} Rogers' sixth assignment of error is overruled.

III.

{¶46} Rogers' first assignment of error is sustained and, therefore, his second assignment of error is moot. Rogers' remaining assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed, in part, and reversed, in part, and remanded to the trial court for further proceedings consistent with this decision.

Judgment affirmed, in part,
reversed, in part,
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

R. BRYAN NACE, Attorney at Law, for Appellant.

SALLIE C. LUX and KERRI L. KELLER, Attorneys at Law, for Appellee.