NO. COA10-568

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

RICK BACSTROM
PAMELA BACSTROM,
Plaintiffs.

v. Franklin County
No. 08 CVD 1612

JOANN FOYE,
Defendant.

Appeal by defendant from judgment[1] entered 3 December 2009 by Judge S. Quon Bridges in Franklin County District Court. Heard in the Court of Appeals 4 November 2010.

*Jeffrey Scott Thompson, for plaintiffs-appellees.*

*Richard E. Jester, for defendant-appellant.*

THIGPEN, Judge.

On 17 December 2008, plaintiffs filed a complaint alleging property damage by defendant in the amount of $2975.00. Plaintiffs allege that the moving of an original roadway and other actions by defendant caused this damage. On 3 December 2009, the trial court entered judgment in favor of plaintiffs in the amount of $1200.00. Defendant gave written notice of appeal.

[1]The spelling of plaintiffs' and defendant's first and last names vary in the record. The chosen spelling is that from the actual judgment.

Defendant and plaintiffs are neighbors. Defendant and her husband purchased their lots in 1998. The subdivision's development plan provided for roadways to give access and provided for a 60 foot easement. Defendant and her husband laid gravel within the easement to establish access to their property and they maintained this roadway. Plaintiffs bought their lot in 2006. A new survey of the area was completed in 2008. This survey showed that the roadway was not on the centerline of the easement. Defendant's husband paid a contractor to move the roadway. Plaintiffs allege that the movement of the roadway caused significant damage to their property which was exacerbated by defendant parking her car on the roadway and defendant's placement of cinder blocks within the easement. Plaintiffs obtained an estimate of $2975.00 to repair 1500 square feet of property. There was conflicting evidence given regarding the measurement of the damaged area. The trial court concluded 800 feet of plaintiffs' property was damaged, that defendant violated various restrictive covenants of the development, and that defendant was responsible for the damage in the amount of $1200.00.

Defendant first argues that the trial court erred in its findings of fact, conclusions of law, and in its order finding that defendant's actions damaged plaintiffs' property. "It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such

facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Defendant specifically challenges Findings of Fact 5-12, 14, 15, 16, and 17. We conclude these findings were supported by competent evidence.

With regard to Findings of Fact 5-12, defendant argues that in these findings the trial court merely restates the evidence and does not weigh in on the truthfulness of the testimony. Statements that "do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented" are not findings of fact. *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984). In Findings of Fact 5-12, the trial court merely gives background information on who testified and what evidence was presented. We conclude any error is harmless as the remaining findings of fact support the conclusions of law.

Finding of Fact 14 states "The court finds that the area of damage consist [sic] of 800 square feet near the property and home of the Plaintiffs." Mr. Bacstrom, one of the plaintiffs, testified he measured the length and width of the damaged area and that Heaven and Earth Landscaping gave him an estimate to fix 1500 square feet. Mr. Bacstrom also testified that the road had been moved four feet and the damaged "road frontage" was one-hundred feet. This would seem to indicate a damaged area of four-hundred square feet. "[W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the

credibility of the witnesses, the weight to be given their testimony and *the reasonable inferences to be drawn therefrom." In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (internal quotation marks omitted). The trial court was therefore free to weigh the evidence and find that the damaged area was actually 800 square feet, an amount between the two amounts supported by Mr. Bacstrom's testimony. Therefore, we conclude Finding of Fact 14 was supported by the evidence.

Finding of Fact 15 states "That defendant intentionally dug up the private road located in the right-of-way between Plaintiff's and Defendant's property." Defendant argues she did not "dig up" the road, but merely moved it. However, defendant's husband testified he hired a contractor "[t]o take the gravel that my wife and I paid for" and move it over so that the driveway was "true to center." This moving of the gravel constituted the "digging" that the trial court describes in Finding of Fact 15. Thus, this finding of fact is supported by the evidence.

Finding of Fact 16 states "That the digging damaged the original private road rendering it more difficult to travel on and has created soil erosion and large ruts which gather water creating hazardous road conditions." Evidence was presented in the form of pictures and testimony which was relevant to the condition of the road after the gravel was moved. This evidence supports Finding of Fact 16.

Finding of Fact 17 states "That Defendant parks her car on the new road to block Plaintiff's use of the right-of-way to get to and

from their residence causing Plaintiffs to drive upon the area of erosion and ruts which has further escalated the original roads damage." This finding is also supported by the evidence. Mr. Bacstrom testified that defendant parked her car in such a way as to force him to travel up the damaged portion of the road and that this travel further damaged the road.

Defendant also challenges Conclusions of Law 4 and 5. Conclusions of Law 4 and 5 state there were a number of restrictive covenants allowing for a private road to be used by the owners of the lot and the general public and prohibiting "noxious or offensive activity." We conclude that the court's findings of the above actions support a conclusion that defendant violated the restrictive covenants against "noxious or offensive activity."

Defendant next argues the trial court erred in its order because the amount of damages was based on speculation. The trial court awarded plaintiffs $1200.00. This amount is somewhere between the $2975.00 estimated by Heaven and Earth Landscaping to fix the road and $300.00 that defendant's husband testified could be used to cover the entire road. Thus, the amount was supported by the evidence and not speculative.

Defendant finally argues that the trial court erred in refusing to allow her to admit evidence of the value of their improvements and repairs to the roadway. We conclude that this argument has no merit. It appears the trial court wanted defendant to testify to total amounts spent rather than having all the receipts entered into evidence. Defendant testified she and her

husband established the road and that she and her husband spent a total of $709.00 on the gravel. Defendant also presented testimony and evidence in the form of pictures of her husband's work to maintain the road. Since defendant was allowed to testify, this argument is overruled.

In their brief, plaintiffs have requested sanctions against defendant for filing a frivolous appeal under N.C. Rule of Appellate Procedure 34. This rule authorizes this Court to "impose a sanction against a party or attorney or both" if we determine that:

> an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> (1) the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]

N.C.R. App. 34. Although the evidence clearly supports the trial court's conclusions, we find no evidence in the record to support the imposition of sanctions under the conditions of Rule 34 set forth above.

Affirmed.

Judges CALABRIA and GEER concur.

Report per 30(e).