[Cite as *Pingue v. Preferred Real Estate Invests II, L.L.C.*, 2015-Ohio-4751.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GIUSEPPE A. PINGUE, SR.,	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff - Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
PREFERRED REAL ESTATE INVESTMENTS II, LLC, ET AL.,	:	Case No. 15 CAE 01 0008
	:	
	:	
Defendants - Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 11 CV C 08 1059

JUDGMENT: Affirmed

DATE OF JUDGMENT: November 5, 2015

APPEARANCES:

For Plaintiff-Appellant

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For Defendants-Appellees

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Baldwin, J.

{¶1} Plaintiff-appellant Giuseppe Pingue, Sr. appeals from the January 12, 2015 and February 5, 2015 Judgment Entries of the Delaware County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Giuseppe Pingue, Sr. was the original owner of four parcels of real estate. In 2007, appellant, a real estate developer, sold approximately seven acres of undeveloped land to appellee Preferred Real Estate Investments II, LLC. ("Preferred"). The parcel was one of three adjacent properties that are subject to a 1995 ingress and egress easement that appellant, as lessor, had entered into with BP Exploration & Oil, Inc, as lessee. BP had leased Parcel 1 from appellant. The 1995 Easement states, in relevant part, as follows:

> Lessor, pursuant to the terms and conditions herein, grants and coveys to Lessee, for the benefit of Parcel 1, a perpetual non-exclusive easement and right of way upon and across the Easement Area, for pedestrian and vehicular egress and ingress from Parcel 1 to and from the public roads. The only persons entitled to use the driveway improvements to be constructed in the Easement Area shall be the owners of the Parcels, together with the lessees of those Parcels and their respective customers and business invitees.

{¶3} The Easement further provides that "all provisions of this instrument, including the benefits and burdens, run with the land and are binding upon and inure to the benefit of the Owners."

{¶4} In 2008, appellee Preferred assigned its interest and obligations under the 2007 Purchase Agreement to appellee Alexander Square LLC. The parcel was later developed by appellee Preferred into the Alexander Square Property. In March of 2008, an Easement Agreement was entered into between appellant and appellee Alexander Square, LLC. The Easement Agreement states, in relevant part, as follows:

> 1. INGRESS AND EGRESS EASEMENTS.
>
> AS LLC grants to Pingue, and Pingue grants to AS LLC on the terms and conditions contained in this Agreement, a perpetual, nonexclusive easement on, over and across the portion of the Easement Area owned by each for purposes of vehicular and pedestrian ingress and egress. This easement shall be for the benefit of, and useable by, AS LLC and Pingue, their respective employees, agents, tenants, customers, licenses and invitees…

{¶5} This agreement created an Easement between a 7.488 acres parcel owned by appellant and appellee Alexander Square's property on its west side.

{¶6} On August 30, 2011, appellant filed an eleven count complaint against appellees Preferred, Alexander Square, LLC and Michael Kenney. Count 1 set forth a claim for trespass against appellee Alexander Square, LLC, alleging that a garage structure that it erected encroached on appellant's adjacent property. Count 2 set forth a

claim against appellee Alexander Square, LLC for trespass, alleging that it allowed vehicles to park in portions of the 1995 easement area and trespassed upon the 1995 easement area. In Count 3, appellant alleged that appellee Alexander Square LLC had violated the 1995 Easement.

{¶7} In Counts 4 and 5 of his complaint, appellant alleged that appellee Alexander Square LLC and/or appellee Preferred had trespassed on the 2008 easement and had violated the 2008 Easement. Appellant, in Count 6, alleged that appellee Michael Kenney, an employee and/or agent of appellee Preferred, had committed fraud in the execution. Count 7 of appellant's complaint set forth a claim of negligent misrepresentation against appellees Kenney and Preferred and Count 8 set forth a claim of unjust enrichment against the two. The remaining three counts of appellant's complaint alleged that appellee Preferred and/or appellee Alexander Square LLC committed trespass by virtue of persons and equipment being on appellant's property (Count 9), construction of a fence on appellant's property (Count 10) and a sprinkler system running through appellant's property (Count 11).

{¶8} On October 28, 2011, appellee Alexander Square LLC filed an answer to the complaint.

{¶9} All three appellees, on October 28, 2011, filed a Motion for Partial Dismissal of appellant's complaint, seeking dismissal of Counts 6, 7 and 8. Appellant filed a memorandum in opposition to the same and appellees filed a reply. Pursuant to a Judgment Entry filed on December 9, 2011, the trial court granted the motion and dismissed Counts 6, 7 and 8 of the complaint.

{¶10} On December 23, 2011, appellee Preferred filed an answer and a counterclaim against appellant for abuse of process. Appellee Preferred, in its counterclaim alleged that appellant had threatened to sue it and appellee Kenney if appellee Preferred did not purchase appellant's two vacant parcels adjacent to the Alexander Square property and that after it did not purchase the parcels, appellant responded by filing suit. On January 17, 2012, appellant filed an answer to the counterclaim.

{¶11} Appellant, on January 20, 2012, filed a Motion for Partial Summary Judgment seeking to enjoin appellee Alexander Square," its lessees, customers and/or business invites from parking in the (sic) any portion of a shared driveway easement through which [appellant] and his business invitees have rights on ingress and egress, and to enjoin AS [Alexander Square] from using the shared driveway easement for purposes of unloading a trash dumpster." The motion addressed Counts 2 and 3 of the complaint. On February 10, 2012, appellees Preferred and Alexander Square LLC filed a combined memorandum contra to appellant's motion and a Cross Motion for Partial Summary Judgment with respect to Counts 2 and 3 of appellant's complaint. Appellant, on March 27, 2012, filed a Motion for Summary Judgment on the counterclaim.

{¶12} Pursuant to a Judgment Entry filed on April 29, 2014, the trial court denied appellant's Motion for Partial Summary Judgment as to Counts 2 and 3 and granted appellees' Cross Motion for Partial Summary Judgment as to such counts. The trial court found that the parking of cars within the driveway easement area did not result in a trespass, that the parked cars did not impede access to the BP station, and that there was no violation of the 1995 Easement. The trial court also denied appellant's Motion

for Summary Judgment as to the counterclaim. The trial court ordered that the matter be scheduled for trial upon Counts 1, 4, 5, 9, 10 and 11 and upon the counterclaim.

{¶13} A jury trial commenced on December 8, 2014. At the close of appellant's case, the trial court, as memorialized in a Judgment Entry filed on December 9, 2014, granted appellees' Motion for a Directed Verdict as to the issue of damages. The trial court found that appellant had presented no evidence as to damages and further found that "based upon the record, that the jury may only award nominal damages should the jury find that a trespass occurred as alleged." The abuse of process claim was then litigated.

{¶14} On December 12, 2014, the jury returned with a verdict. The jury found in appellant's favor on his trespass claim against appellees Preferred and Alexander Square LLC and awarded nominal damages of $1.00 against each. In the interrogatories, the jury found that neither appellee Alexander Square LLC nor appellee Preferred had trespassed as to the Easement, the garage overhang or the fence and that the only trespass was as to the sprinkler system. The jury also found that appellee Alexander Square LLC did not violate the 2008 Easement. The jury further found in favor of appellee Preferred on its counterclaim and awarded appellee Preferred $229,527.25 in damages. The jury also awarded appellee Preferred $400,000.00 in punitive damages and found that attorney fees should be awarded against appellant.

{¶15} As memorialized in a Judgment Entry filed on January 12, 2015, the trial court entered final judgment, after reducing the punitive damage award to $350,000.00 due to the statutory cap, and also ordered that a hearing to determine attorneys' fees and costs be scheduled for February 3, 2015. Pursuant to Judgment Entry filed on

February 5, 2013, the trial court awarded appellee Preferred attorney fees and litigation expenses in the amount of $134,772.53 in addition to the compensatory damages previously awarded by the jury.

{¶16} Appellant now raises the following assignments of error on appeal:

{¶17} I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT CARS WERE NOT PROHIBITED FROM PARKING WITHIN THE SHARED EASEMENTS AND BY DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING APPELLEE'S CROSS MOTIONS FOR SUMMARY JUDGMENT ON THIS ISSUE.

{¶18} II. THE TRIAL COURT ERRED BY NOT GRANTING SUMMARY JUDGMENT TO MR. PINGUE ON THE ABUSE OF PROCESS CLAIM, AND THE ABUSE OF PROCESS VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} III. DUE TO THE APPELLEES CONTINUING TRESPASS, MR. PINGUE'S LAND WAS NOT MARKETABLE, AND THE TRIAL COURT'S EXCLUSION OF EXPERT TESTIMONY ON THAT POINT WAS ERROR.

{¶20} IV. MR. PINGUE'S EVIDENCE OF THE DAMAGE CAUSED BY APPELLEES CONTINUING TRESPASS WAS APPROPRIATE AND RELEVANT, AND THE COURT ERRED BY INSTRUCTING THE JURY OTHERWISE.

{¶21} V. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE PUNITIVE DAMAGES CLAIMS AND BY FAILING TO BIFURCATE THE ISSUE PURSUANT TO R.C. 2315.21.

{¶22} VI. THE CUMULATIVE EFFECT OF NUMEROUS ERRONEOUS RULINGS CONSTITUTED REVERSIBLE ERROR.

{¶23} VII. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING APPELLESS ADDITIONAL ATTORNEY FEES OF $134,772.53.

{¶24} VIII. THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION TO DISMISS MR. PINGUE'S FRAUD CLAIM.

I

{¶25} Appellant, in his first assignment of error, argues that the trial court erred in denying his Motion for Partial Summary Judgment as to Counts 2 and 3 of his complaint while granting appellees' Cross Motion for Partial Summary Judgment as to such Counts.

{¶26} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.* * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that

> conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶27} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264. The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988). Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164*,* citing *Dresher, supra.*

{¶28} As is stated above, appellees Preferred and Alexander Square LLC and appellant moved for summary Judgment with respect to Counts 2 and 3 of the complaint. Count 2 set forth a claim against appellee Alexander Square, LLC for trespass, alleging that it allowed vehicles to park in portions of the 1995 easement area and trespassed upon the 1995 easement area. In Count 3, appellant alleged that appellee Alexander Square LLC had violated the 1995 Easement.

{¶29} The 1995 Easement states as follows:

> Lessor, pursuant to the terms and conditions herein, grants and coveys to Lessee, for the benefit of Parcel 1, a perpetual non-exclusive easement and right of way upon and across the Easement Area, for pedestrian and vehicular egress and ingress from Parcel 1 to and from the public roads. The only persons entitled to use the driveway improvements to be constructed in the Easement Area shall be the owners of the Parcels, together with the lessees of those Parcels and their respective customers and business invitees.

{¶30} An easement is a grant of only limited use of the land. *Crane Hollow, Inc. v. Marathon Ashland Pipeline, LLC,* 138 Ohio App.3d 57, 66, 740 N.E.2d 328 (2000), citations deleted. When interpreting the terms of a written easement, the court must follow the ordinary rules of contract construction so as to carry out the intent of the parties as demonstrated by the language in the contract. *Lakewood Homes v. BP Oil, Inc.* 11th District Hancock No. 5–98–29, 1999–Ohio–851 at 4, citing *Skivoloski v. East Ohio Gas Company,* 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), syllabus, paragraph one.

{¶31} If the question is the scope of an easement, the court must look to the language of the easement to determine the extent. If there is no specific delineation of the easement, or if the document is ambiguous, then the court must look to the surrounding circumstances in order to determine the intent of the parties. *Murray v. Lyon,* 95 Ohio App.3d 215, 219, 642 N.E.2d 41 (1994). The language of the easement,

coupled with the surrounding circumstances, is the best indication of the extent and limitations of the easement. *Apel v. Katz,* 83 Ohio St.3d 11, 17, 1998–Ohio-420, 697 N.E.2d 600.

{¶32} As noted by the court in *Bell v. Joecken*, 9th Dist. Summit No. 20705, 2002-Ohio-1644 at 2: "The wrongful obstruction of an easement is a trespass. *Shields v. Titus* (1889), 46 Ohio St. 528, 541, 22 N.E. 717. To prove a trespass claim, the party must show that: (1) he or she had a possessory interest in the property; and (2) the offending party entered the property without consent or proper authorization or authority. See *Chalker v. Howland Twp. Trustees* (1995), 74 Ohio Misc.2d 5, 18, 658 N.E.2d 335."

{¶33} We concur with the trial court that the 1995 Easement expressly provides that driveway improvements are to be located <u>within</u> the easement area. Thus, the Easement instrument distinguishes between the easement area and the driveway improvements. The 1995 agreement provides for an ingress and egress easement which does not encompass the whole of the easement area. We concur with appellees that "[t]he parties only provided for an easement within which there is supposed to be a driveway improvement for the ingress and egress of vehicles to and from the BP parcel to the public roads." We find that the parking of cars within the driveway easement area does not result in a trespass or a violation of the 1995 Easement. There was no evidence that parking on the edges of the 1995 Easement impeded access to and from the BP station.

{¶34} Appellant's first assignment of error is, therefore, overruled.

II

{¶35} Appellant, in his second assignment of error, argues that the trial court erred when it denied his Motion for Summary Judgment on the abuse of process counterclaim. Appellant also argues that the verdict on the counterclaim was against the manifest weight of the evidence.

{¶36} The Ohio Supreme Court has held any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 1994-Ohio-362, 642 N.E.2d 615. Upon review, the subsequent trial demonstrated the trial court did not err in denying the Motion for Summary Judgment.

{¶37} As is stated above, appellant also contends that the abuse of process verdict was against the manifest weight of the evidence. In *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, the Ohio Supreme Court clarified the standard of review appellate courts should apply when assessing the manifest weight of the evidence in a civil case. The Ohio Supreme Court, in *Eastley*, held the standard of review for manifest weight of the evidence for criminal cases stated in *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541 is also applicable in civil cases. A reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine “whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new

trial ordered." *Eastley*, supra at paragraph 20. See also *Sheet Metal Workers Local Union No. 33 v. Sutton,* 5th Dist. Stark No.2011 CA 00262, 2012–Ohio–3549. "In a civil case, in which the burden of persuasion is only by a preponderance of the evidence, rather than beyond a reasonable doubt, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight)." *Eastley,* at paragraph 19.

{¶38} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. *Markel v. Wright,* 5th Dist. Coshocton No.2013CA0004, 2013–Ohio–5274. Further, "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusion of law." *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The underlying rationale for giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Id.* Accordingly, a trial court may believe all, part, or none of the testimony of any witness who appears before it. *Rogers v. Hill,* 124 Ohio App.3d 468, 706 N.E.2d 438 (4th Dist.1998).

{¶39} The three elements of the tort of abuse of process are (1) that a legal proceeding has been set in motion in proper form and with probable cause, (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed, and (3) that direct damage has resulted from the wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, 68 Ohio St.3d 294,1994-Ohio-503,

626 N.E.2d 115, paragraph one of the syllabus. There is no liability for abuse of process when the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. Id. at 298, fn. 2.

{¶40} "[A]buse of process differs from malicious prosecution in that abuse of process connotes the use of process properly initiated for improper purposes, while malicious prosecution is the malicious initiation of a lawsuit that one has no reasonable chance of winning". *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 271, 1996-Ohio-189, 271, 662 N.E.2d 9. (Citation omitted).

{¶41} The parties do not dispute that the first element for a claim of abuse of process was met. With respect to the second element, during opening statements, appellees' counsel stated that the trespass and easement claims were brought for ulterior purposes, namely (1) that appellant believed that he had been cheated out of $78,970.00 at the 2008 closing and (2) appellant wanted appellee Preferred to purchase appellant's other vacant lots for far more than their fair market value.

{¶42} At trial, appellant testified that he executed the purchase agreement with appellee Preferred in 2007 and that the closing occurred in April of 2008. He admitted that he warned appellee Preferred at the closing that he would be watching it closely and that he warned it not to trespass "one inch" on his property. Trial Transcript at 182. Appellant further testified that he did not receive what he should have received at the closing and that he "didn't want to jeopardize their development so I went ahead and took a cut that they hid from me in which I was shorted about $80,000." Trial Transcript at 182. At trial, appellant agreed that, at a hearing in this case in April of 2013, he

admitted that his feeling of being cheated was one of the reasons he filed the present suit.

{¶43} Appellant also testified that in March of 2011, he sent appellee Preferred a letter about the alleged trespassing and "told them that needed to be taken care of because otherwise we would probably,…but indication that we have a major problem to overcome." Trial Transcript at 587. In response, appellee Michael Kenney and Don Kenney, his father, made an offer to appellant in March of 2011 to purchase two parcels totaling approximately 9 acres from appellant. Nicholas King, who is co-owner of appellee Preferred with Michael Kenney, testified that "we were tired of being harassed by Mr. Pingue. We were tired of his demands on a nearly monthly basis for his $78,000...in an effort to keep him from harassing our tenants, employees and subcontractors,…we felt it might be worthwhile just to acquire the property…" Trial Transcript at 460. The following is an excerpt from his testimony:

{¶44} Q: Okay, so he was threatening to sue on these issues that we've already talked about and then you guys made an offer to buy the property; is that right?

{¶45} A: With the caveat that all, all these other claims, the erroneous claims that he had - - basically to get him to go away. The purpose of the offer was so we wouldn't be sitting here today, right, so I wouldn't have paid out over a quarter million dollars to defend ourselves against these frivolous claims, that was the intent.

{¶46} Trial Transcript at 461.

{¶47} Testimony was adduced at trial that, in June of 2011, appellant made a counteroffer. Appellant's counteroffer demanded $60,000.00 more per acre than offered

and imposed unreasonable contingencies. After his offer was not accepted, appellant filed suit.

{¶48} Based on the foregoing, we find that the jury did not lose its way in finding in favor of appellee Preferred on the abuse of process counterclaim.

{¶49} We note that appellant, in his second assignment of error, argues that appellee Preferred, which filed the counterclaim for abuse of process, was not a real party in interest because it was not a party to the negotiations over the adjacent property. Appellant contends that appellee Michael Kenney and Don Kenney were the real parties in interest. However, as noted by appellees, appellant sent appellee Preferred a threatening letter in March of 2011, it was appellee Preferred's President who was involved in the negotiations for the additional parcel, and it was appellee Preferred to whom appellant sent threatening letters[1] and invoices demanding, in part, that it pay rent for trespassing. Moreover, appellee Preferred was named as a party in appellant's suit. Clearly, appellee Preferred was a victim of appellant's conduct.

{¶50} Appellant also argues that the trial court abused its discretion in admitting questioning and introduction of appellant's litigation history. Appellant specifically argues that the trial court erred in admitting evidence relating to cases that appellant was involved in Franklin and Delaware counties and documents from its own docket.

{¶51} During opening statements, appellant's counsel stated that appellant was "not someone who likes litigation." Trial Transcript at 39. During cross-examination, appellant was asked whether he had been either a plaintiff or a defendant in over one hundred lawsuits in Franklin and Delaware counties. On redirect, appellant's counsel asked appellant if he had been involved in over a hundred lawsuits and appellant stated

[1] The letters were sent to appellee Preferred c/o Nick King and Mike Kenney.

that he had not. On recross, appellees' counsel questioned appellant about whether or not he was a party to over one hundred lawsuits in Franklin County and whether or not he had sued his son in Franklin and Delaware Counties. Appellant's counsel then objected on the basis of relevancy, arguing that the evidence was prejudicial. The trial court indicated that he was permitting the evidence of prior lawsuits because, as noted by appellees' counsel, "counsel had made representation to the jury that the Plaintiff was not a fan or had no interest in litigation, that is false." Trial Transcript at 249. We find that appellant's counsel opened the door for evidence of appellant's extensive litigation history, including the history in this case, by the statement that he made during opening statements. *See Ohio Edison v. Dessecker,* 89 Ohio App.3d 164, 623 N.E.2d 1251 (5th Dist. 1993).

{¶52} Appellant, in his second assignment of error, also argues that the trial court erred by excluding appellant from testifying in his own defense with respect to the abuse of process counterclaim.

{¶53} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage,* 31 Ohio St.3d 173, 180, 510 N.E.2d 353, 358 (1987). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

{¶54} Prior to seating the jury, the parties agreed that appellant would present his case first and then, after appellant rested his case, the counterclaim for abuse of process would be tried. After appellee Preferred rested following its presentation of evidence on the abuse of process claim, appellant did not offer any additional evidence

in response to the evidence elicited by appellee Preferred on its counterclaim. The following discussion took place on the record:

{¶55} THE COURT: While we finish up the jury instructions, let's go on the Record outside the hearing of the jury.

It's my understanding, Mr. Little, Mr. Zeiger, the Defendant has completed their testimony; is that correct?

{¶56} MR. LITTLE: Yes, Your Honor, subject to again a proffer we'd make as to one of the exhibits.

{¶57} Trial Transcript at 626. Appellant's counsel then sought to proffer appellant's testimony relating to his intent with respect to the 1995 easement. The trial court, however, refused to allow further testimony, noting that "[t]he testimony, evidentiary part of this case has been completed, we're not going to get into other testimony." Trial Transcript at 647. We find that the trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶58} To conclude, based on the foregoing, we find that the verdict on the counterclaim was not against the manifest weight of the evidence. Examining the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered

{¶59} Appellant's second assignment of error is, therefore, overruled.

III, IV

{¶60} Appellant, in his third assignment of error, argues that the trial court erred in excluding expert testimony from Timothy Madison, Esq. on the issue of damages caused by trespass. Appellant, in his fourth assignment of error, argues that the trial court erred in excluding his own testimony as to the damages he suffered as a result of the trespass.

{¶61} As noted by the court in *Fantozzi v. Henderson*, 8th Dist No. 87270, 2006 -Ohio- 5590 at paragraphs 16-17

> In an action to recover damages for injury to real property as the result of trespass, a landowner is entitled to recover reasonable restoration costs, plus the reasonable value of the loss of use of the property between the time of the injury and the time of restoration. *Reeser v. Weaver Bros., Inc.* (1992), 78 Ohio App.3d 681. However, under the general damages rule, recoverable restoration costs are limited to the difference between the pre-injury and post-injury fair market value of the real property. *Reeser,* supra. Therefore, if restoration costs exceed the diminution in fair market value, the diminution in value becomes the measure of damages. *Bohaty,* supra. Moreover, recovery under this rule necessarily places the burden of establishing the diminution in value on the complaining party. *Bohaty,* supra; *Reeser,* supra.

> An exception to this general damages rule provides that restoration costs may be recovered in excess of diminution in fair market value when real estate is held for noncommercial use, when there are reasons personal to the owner for seeking restoration, and when the diminution in fair market value does not adequately compensate the owner for the harm done. *Apel v. Katz* (1998), 83 Ohio St.3d 11, 20, 1998-Ohio-420; *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136. Courts that have applied this exception to the general rule regarding trespass damages require a showing that the trespass caused damage to a unique aspect of the injured property that was important to the owner's use of the injured land. *Denoyer,* supra. *Johnson v. Hershberger,* Columbiana App. No. 99-CO-38, 2000-Ohio-2580

{¶62} With respect to damages, at trial, appellant sought to introduce the testimony of Timothy Madison, a real estate attorney, to the effect that, due to the encroachments by the garage, the fence and the sprinkler, appellant's property was not marketable. During voir dire, Madison testified that, during his deposition, he had opined that the garage, the fence, and the sprinkler all encroached on appellant's property and that the encroachments affected the marketability of title. He further testified that, during his deposition, he opined that the property was not marketable due to the encroachments and indicated that he was not qualified to put a dollar amount on the damages and that the trespasses were not permanent. He testified that all of his

opinions were legal opinions. The following discussion took place on the record after his voir dire:

{¶63} THE COURT: Doesn't the jury have to decide whether or not there's a trespass.

{¶64} MR. ANTHONY: The jury is going to have to decide whether there's a trespass.

{¶65} THE COURT: That's right. And they don't need an expert to tell them whether or not there's a trespass, that's their job as a juror.

{¶66} MR. ANTHONY: But they're going to need someone to describe what marketability of title is.

{¶67} THE COURT: No, not a standard of damages under Ohio law. Have you done any research, Mr. Madison, as to the fair market value of this property?

{¶68} THE WITNESS: No, Your Honor.

{¶69} THE COURT: Have you done any research or study as to the restoration costs to remove these alleged encroachments?

{¶70} THE WITNESS: I was never asked to, Your Honor, no.

{¶71} THE COURT: You haven't done it right?

{¶72} THE WITNESS: Correct.

{¶73} THE COURT: Okay. The Court does not see how it's admissible. The Court is not going to allow him to testify as to those subjects.

{¶74} MR. ANTHONY: Thank you, Mr. Madison.

{¶75} Trial Transcript at 315-316.

{¶76} We find that the trial court did not err in excluding Madison as a witness because expert opinions which express a legal conclusion are not admissible. See, for example, *Ferron v. Video Professor*, 5th Dist. Delaware No. 08-CAE-0055, 2009-Ohio-3133 at paragraph 74. Moreover, as is noted above, was unable to testify as to the fair market value or the restoration costs.

{¶77} Appellant argues that the trial court, in instructing the jury as to damages, was not limited to instructions on diminution in value or restoration costs. Appellant argues that the court should have instructed the jury that the reasonable rental value of a piece of property during a continuing trespass is an appropriate measure of damages. Appellant notes that he invoiced appellees for the reasonable rental value of encroaching on his property. We concur with appellees, however, that rental damages are not the proper measure of damages when the property is not held for rental purposes. See *Weber v. Obuch*, 9th Dist. Medina No. 05CA0048-M, 2005-Ohio-6993. Appellant's property was not held for rental purposes.

{¶78} Appellant also argues that the trial court erred in failing to allow the jury to consider his testimony that, due to the encroachments, the property had no value and was not marketable in determining his damages. "Under the owner-opinion rule, an owner of real property, by virtue of his ownership and without qualification as an expert, is competent to testify to his property's fair market value. * * * The rule is based on the presumption that 'the owner of real estate * * * possess[es] sufficient acquaintance with it to estimate the value of the property, and his estimate is therefore received although his knowledge on the subject is not such as would qualify him to testify if he were not the owner.' "(Citations omitted.) *Cincinnati v. Banks,* 143 Ohio App.3d 272, 291, 757

N.E.2d 1205, (1st Dist.2001). Appellant, however, was not offering testimony as to the diminution in the fair market value of his property. Rather, he was offering testimony that his property had no value.

{¶79} Finally, we note that the only trespass claim that appellant prevailed on was the placement of the sprinkler system within the 2008 Easement. The jury, in its responses the interrogatories, found that appellees Preferred and Alexander Square trespassed as to the sprinkler system. However, there was no evidence relating to damages caused by the same. Appellant testified that he had not paid "a single dollar related to the sprinkler system in the 2008 Easement area." Trial Transcript at 233.

{¶80} Based on the foregoing, appellant's third and fourth assignments of error are overruled.

V

{¶81} Appellant, in his fifth assignment of error, argues that the trial court abused its discretion by allowing the punitive damage claim and by failing to bifurcate the issue pursuant to R.C. 2315.21.

{¶82} As is stated above, the jury, in the case sub judice, awarded appellee Preferred $400,000.00 in punitive damages with respect to its counterclaim for abuse of process. Appellant now argues that there was no claim for punitive damages pled by appellee Preferred in its counterclaim.

{¶83} In *Lashua v. Lakeside Title & Escrow Agency,* 5th Dist. Stark App. No.2004CA00237, 2005-Ohio-1728, this Court held that "[i]t is not necessary that punitive damages be specially pleaded or claimed." Id at paragraph 48, citing *Brookridge Party Ctr., Inc. v. Fisher Foods, Inc.*, 12 Ohio App.3d 130, 131, 468 N.E.2d

63 (8th Dist. 1983). This Court further held that "the plaintiff must allege facts, in the complaint, from which the essential element of malice may be inferred." *Lashua,* supra, citing *Columbus Finance Inc., v. Howard*, 42 Ohio St.2d 178, 183, 327 N.E.2d 654 (1975). We find that appellee Preferred's counterclaim for abuse of process alleged facts from which malice could be inferred and note that the jury, in response to Interrogatory 9, found that appellant had acted with malice.

{¶84} Appellant next maintains that the trial court erred in failing to bifurcate the issue of punitive damages pursuant to R.C. 2315.21. We review a denial of a motion to bifurcate claims or issues for trial under an abuse-of-discretion standard. *Amerifirst Savings Bank of Xenia v. Krug,* 136 Ohio App.3d 468, 485, 737 N.E.2d 68 (2nd Dist. 1999). The term "abuse of discretion" connotes more than a mere error of law or judgment, it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. Id.; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶85} R.C. 2315.21 (B) states, in relevant part, as follows:

> (B)(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:
>
> (a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover

> compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.
>
> (b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

{¶86} As noted by appellee Preferred, the statute "presupposes that the motion to bifurcate is made prior to trial as the initial stages of trial cannot be bifurcated if trial has been completed prior to the motion being made." In the case sub judice, appellant did not make a request for bifurcation until after the close of evidence. The trial court, in overruling the request to bifurcate, stated, in relevant part, as follows:

{¶87} "THE COURT: I think the Record needs to reflect that we have completed the evidentiary portion of this case with the exception of the Court has not

ruled on the Defendant's exhibits. The Court feels that if either side wished to have had this bifurcated, they should have made a motion to that effect under the statute.

"More importantly, because of the issues in the abuse of process, the evidences that's admissible on the abuse of process is the exact same evidence that the parties would submit if we were to bifurcate the punitive damage issue and the Courts sees no reason, it's not that complicated of a case, the jurors are going to be able to understand the law, so I'm going to overrule your motion. You made your Record that you want to bifurcate, I'm overruling your Motion to Bifurcation."

{¶88} Trial Transcript at 606. We cannot say that the trial court abused its discretion. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶89} Appellant's fifth assignment of error is, therefore, overruled.

VI

{¶90} Appellant, in his sixth assignment of error, argues that the cumulative effect of numerous erroneous rulings constituted reversible error.

{¶91} Pursuant to the cumulative error doctrine, which is usually presented in criminal cases, a conviction will be reversed where the cumulative effect of errors in a trial deprives the defendant of the constitutional right to a fair trial even though each individual error by itself does not constitute cause for reversal. *State v. Garner,* 74 Ohio St.3d 49, 656 N.E.2d 623 (1995). Ohio Courts have found "the extension of the cumulative error doctrine to civil cases is warranted where the court is confronted with several errors, which either are harmless individually or have marginally prejudicial effects, but combine to require a new trial." *Edge v. Fairview Hosp.,* 8th Dist. Cuyahoga No. 95215, 2011–Ohio–2148, ¶ 46.

{¶92} As an initial matter, we note that appellant, in his sixth assignment, presents a list of 11 alleged errors without any briefing. An assignment of error that simply intones the phrase "cumulative error" but offers no analysis or argument constitutes an assignment of error without substance. *See State v. Bethel,* 110 Ohio St.3d 416, 2006–Ohio–4853, 854 N.E.2d 150, ¶ 197.

{¶93} Moreover, many of appellant's arguments relate to the admission of pleadings and decisions from this case or other cases. However, as is discussed above, appellant's counsel opened the door to the admission of appellant's prior litigation history. We further find that the pleadings and decisions in this case were properly admissible and probative evidence with respect to appellant's abuse of process claim.

{¶94} Appellant also contends that the trial court erred in not permitting him to testify as to the meaning of the 1995 Easement. When confronted with an issue of contract interpretation, a court's role is to give effect to the intent of the parties. *Westfield Ins. Group v. Affinia Dev., L.L.C.,* 2012-Ohio-5348, 982 N.E.2d 132, ¶ 21 (5th Dist.). When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *McDonald v. Canton Med. Edn. Foundation*, Inc., 5th Dist Stark No. 2012CA00240, 2013-Ohio-3659, paragraph 32. Because the Easement here was not ambiguous, it was not error for the trial court to allow appellant to testify about his interpretation of the contract.

{¶95} In short, we find that application of the cumulative error doctrine is not warranted in this case.

{¶96} Appellant's sixth assignment of error is, therefore, overruled.

VII

{¶97} Appellant, in his seventh assignment of error, argues that that trial court abused its discretion in awarding appellees additional attorneys' fees and costs of $134,772.53. [2]

{¶98} An award of attorneys' fees is within the sound discretion of the trial court. *Rand v. Rand,* 18 Ohio St.3d 356, 369, 481 N.E.2d 609 (1985). In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶99} In *Bittner v. Tri–County Toyota,* 58 Ohio St.3d 143, 569 N.E.2d 464 (1991), the Ohio Supreme Court held that the starting point for the determination of a reasonable amount of fees is the number of hours spent by the attorney multiplied by a reasonable hourly rate. *Id.* "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983).

{¶100} The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Canton v. Irwin,* 5th Dist. Stark No.2011 CA00029, 2012–Ohio–344. To establish the number of hours reasonably expended, the party requesting the fees should submit evidence to support the hours worked. *Hensley,* 461 U.S. at 433. A reasonable hourly rate is "the prevailing market rate in the relevant community." *Blum v. Stenson,* 465 U.S. 886, 895, 104 S .Ct. 1541, 79 L.Ed.2d 891 (1984). Once the trial court calculates the "lodestar figure," it can

[2] These fees were in addition to attorneys' fees in the amount of $229,526.00 which had been awarded as compensatory damages.

modify the calculation by applying the factors listed in Rule 1.5 of the Ohio Rules of Professional Conduct (formerly DR 2–106(B)). *Landmark Disposal Ltd. v. Byler Flea Market,* 5th Dist. Stark No.2005CA00294, 2006–Ohio–3935. These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. *Canton v. Irwin,* 5th Dist. Stark No.2011 CA00029, 2012–Ohio–344. "All factors may not be applicable in all cases and the trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation." *Id.,* citing *Bittner v. Tri–County Toyota,* 58 Ohio St.3d 143, 569 N.E.2d 464 (1991). The "trial court maintains discretion to make the determination as to what [attorney] fee award is reasonable in light of all the facts and circumstances of the case." *Mauger v. Inner Circle Condominium Owners Assn.,* 9th Dist. No. 10CA0046–M, 2011–Ohio at paragraph 26.

{¶101} In the case sub judice, the jury determined that appellee Preferred should be awarded attorney fees. A hearing on the issue of attorneys fees was held on February 3, 2015. At the hearing, appellee Preferred presented exhibits. Exhibit AA from the law firm of Zeiger, Tigges & Little indicates that a total of $70,719.50 in legal fees were incurred between December 1, 2014 and December 16, 2014. Of the three attorneys from such firm, one billed $545.00 an hour, another $330.00 an hour and the third $225.00 an hour. In addition, Exhibit BB indicated that during the period from

September 19, 2011 through December 18, 2014, Anthony Heald, appellees' local counsel, billed a total of $21,859.00 and charged $275.00 an hour for his time.

{¶102} At the hearing, the deposition testimony of Quintin Lindsmith, an attorney with Bricker & Eckler, was admitted as an exhibit due to his unavailability. During his deposition, he testified that the rates charged by the Zeiger firm were reasonable and the hours expended were reasonable. He further testified that the rates charged by Heald were reasonable and that the hours he charged as reflected in his statements were reasonable. When asked if, in his opinion, it was necessary for appellees to have three attorneys to try the case, he stated that "given the highly contested and protracted nature of this litigation, having three lawyers participating was not an unreasonable staffing for this type of case." Deposition of Quintin Lindsmith at 31. He further testified that it was reasonable for three lawyers to work a total of 23 hours a day for the period from December 1, 2014 through December 11, 2014 to prepare for trial. On redirect examination, he opined that the fees charged were "very reasonable given the results achieved." Deposition of Quintin Lindsmith at 34.

{¶103} In response, appellant testified at the hearing that his attorneys billed him a combined rate of $190.00 per hour and that his total bill was $18,881.27. Appellant testified that he believed that the bill was a fair and reasonable amount for trial work. Appellant did not offer any other testimony, expert or otherwise.

{¶104} Based on the foregoing, we find that the trial court did not abuse its discretion in awarding appellee additional attorney fees and costs of $134,772.53[3]. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶105} Appellant's seventh assignment of error is, therefore, overruled.

[3] We note that his figure included litigation expenses which appellant did not challenge in his appeal.

VIII

{¶106}Appellant, in his eighth assignment of error, argues that the trial court erred in granting appellees' Motion to Dismiss appellant's fraud claim.

{¶107}In considering a motion to dismiss under Civ.R. 12(B)(6), a court must consider only the facts alleged in the complaint and any material incorporated into it. *State ex rel. Crabtree v. Franklin County Bd. of Health,* 77 Ohio St.3d 247, 249, 1997-Ohio-274, 673 N.E.2d 1281. For purposes of the Rule, the trial court must presume all facts alleged in the complaint are true and it must draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). A court may not dismiss a complaint for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts warranting a recovery. *Id.* This Court reviews an order granting a Civil Rule 12(B)(6) motion to dismiss *de novo. Perrysburg Twp. v. City of Rossford,* 103 Ohio St.3d 79, 2004–Ohio–4362, 814 N.E.2d 44, at ¶ 5.

{¶108}Appellant, in Count 6 of his complaint, set forth a claim for fraud in the execution. Appellant alleged that during negotiations with appellee Michael Kenney, who was acting on behalf of appellee Preferred, numerous drafts of the Real Estate Purchase Agreement were prepared. Appellant contended that after he sent proposed revisions to appellee Kenney, appellee Kenney added language that had not been requested by appellant. The language excluded the shared driveways from the net acreage being sold and, in doing so, reduced the overall price for the property by over $75,000.00. Appellant, who signed the contract, claimed that he was unaware of the shared driveway change and that the fraud was later discovered.

{¶109}Fraud in the factum (or fraud in the execution of a document) occurs "where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement." *Haller v. Borror Corp.,* 50 Ohio St.3d 10, 13, 552 N.E.2d 207 (1990). Where there is mere misrepresentation by one party of the contents of an agreement, the agreement is only voidable for fraud in the inducement, not void for fraud in the factum, when there was an opportunity to read and understand the document before execution. Id at 14. "Fraud in the execution exists when the act of signing itself is infected with fraud; for example, by means of the surreptitious substitution of one paper for another, or by misrepresentation of the nature of the paper when the signer has had no opportunity to read and comprehend it." (Citations omitted.) *Hodge v. Drummond,* 1st Dist. Hamilton No. C–780233, 1979 WL 208703, 2 (June 6, 1979). *See, also, W.K. v. Farrell,* 167 Ohio App.3d 14, 2006–Ohio–2676, 853 N.E.2d 728, ¶ 20 (2d Dist.), citing *Haller* at 14.

{¶110}Appellant, in his complaint, did not allege that he signed the Purchase Agreement believing that it was a document other than what it was (i.e. a Purchase Agreement) or that he was tricked or deceived in any way. He does not allege that he did not have a chance to read the document before he signed or was illiterate and relied on appellee Kenney to read the agreement to him. Rather, as noted by the trial court, appellant alleged that appellee Kenney failed to disclose the contents of the Purchase Agreement to him before he signed it and "[t]he reasonable inference is that [appellant] signed the purchase agreement without reading it."

{¶111}Based on the foregoing, we find that the trial court did not err in granting the Motion to Dismiss. As noted by the court, accepting as true the allegations in

appellant's complaint and drawing all reasonable inferences in favor of appellant, we find that appellant has failed to state a claim for fraud in the execution.

{¶112} Appellant's eighth assignment of error is, therefore, overruled.

{¶113} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Baldwin, J.

Farmer, P.J. and

Delaney, J. concur.