

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

MARGARET ROBINSON,	:	
	:	CASE NO. CA2014-09-191
Appellant,	:	
	:	<u>OPINION</u>
	:	4/20/2015
- VS -	:	
	:	
CHRISTOPHER J. CAMERON, et al.	:	
	:	
Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2012-12-4327

David T. Davidson, 127 North Second Street, P.O. Box 567, Hamilton, Ohio 45011, for appellant

Markesbery & Richardson Co. LPA, Katherine A. Clemons and Glenn A. Markesbery, 2368 Victory Parkway, Suite 200, P.O. Box 6491, Cincinnati, Ohio 45206, for appellees

M. POWELL, J.

{¶ 1} Plaintiff-appellant, Margaret Robinson, appeals a decision of the Butler County Court of Common Pleas granting summary judgment to defendants-appellees, Christopher and Tonya Cameron, in a trespass case.

{¶ 2} The parties live on Amberly Drive in Hamilton, Ohio and are next-door neighbors. Robinson has lived in her house since 1998. In 2003, the Camerons installed an

in-ground swimming pool in their backyard. In February 2007, Robinson noticed a crack in a foundation wall in her basement. Later that year, she noticed several cracks on the walls and ceilings of her house. She also noticed that walls, ceilings, and floors were separating in some of the rooms, and that the garage floor, the back patio, and the back porch had dropped.

{¶ 3} Believing the damages in her house were caused by a water reservoir owned by the city of Hamilton and located uphill from her property, Robinson initially filed a complaint against the city. Subsequently, an expert she had retained provided an opinion that the water infiltrating her home had a high concentration of chloride. Based upon the expert's report, Robinson voluntarily dismissed her lawsuit against the city, and on December 2, 2012, filed a complaint against the Camerons for trespass. Robinson alleged that the Camerons' pool had been leaking water, which in turn had infiltrated her property and home, undermining and causing structural damages to her home.

{¶ 4} The Camerons moved for summary judgment and attached their respective affidavits to the motion. Robinson filed a memorandum in opposition to the Camerons' motion for summary judgment. She did not submit any evidence with her memorandum. Her deposition and that of her expert were filed with the trial court in June and July 2014 respectively.

{¶ 5} On September 8, 2014, the trial court granted summary judgment to the Camerons. Finding that a trespass cause of action requires an intentional invasion of property, and based upon the Camerons' affidavits and Robinson's deposition, the trial court held, "the court cannot conclude that the evidence is sufficient to create a genuine issue of material fact as to whether the Camerons knew or were substantially certain that their pool water was infiltrating Robinson's property or home."

{¶ 6} Robinson appeals, raising one assignment of error:

{¶ 7} THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON THE ELEMENT OF INTENT IN A TRESPASS ACTION.

{¶ 8} Robinson argues that the trial court erred in granting summary judgment to the Camerons because in doing so, the trial court "failed to consider that the element of intent within the tort of trespass is not the intent to commit a trespass, but rather the intent to act." Robinson asserts that because the Camerons intentionally installed a swimming pool in their backyard, they are liable for trespass regardless of whether they intended for any water to infiltrate Robinson's property. In other words, the "question is not whether it was the [Camerons'] intention for their pool water to significantly damage Mrs. Robinson's property, but rather * * * whether the [Camerons'] conduct that led to the trespass [i.e., the installation of the pool] was intentional."

{¶ 9} Summary judgment is proper when (1) there is no genuine issue of any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once this burden is met, the nonmoving party has a reciprocal burden to set forth specific facts showing there is some genuine issue of material fact yet remaining for the trial court to resolve. *Id.* In determining whether a genuine issue of material fact exists, the evidence must be construed in favor of the nonmoving party. *Walters v. Middletown Properties Co.*, 12th Dist. Butler No. CA2001-10-249, 2002-Ohio-3730, ¶ 10.

{¶ 10} An appellate court reviews a trial court's decision to grant or deny summary judgment de novo, without any deference to the trial court's judgment. *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶ 9 (12th Dist.).

{¶ 11} Trespass is the unlawful entry upon the property of another. *Chance v. BP Chemicals, Inc.*, 77 Ohio St.3d 17, 24 (1996). To state a cause of action in trespass, a property owner must prove two essential elements: (1) an unauthorized intentional act, and (2) an intrusion that interferes with the owner's right of exclusive possession of her property. *Merino v. Salem Hunting Club*, 7th Dist. Columbiana No. 07 CO 16, 2008-Ohio-6366, ¶ 41. The plaintiff bears the burden of proving each element of a trespass claim. *Coyne v. Stapleton*, 12th Dist. Clermont No. CA2006-10-080, 2007-Ohio-6170, ¶ 36.

{¶ 12} "[I]ntentional conduct is an element of trespass." *Baker v. Shymkiv*, 6 Ohio St.3d 151, 153 (1983). "One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he *intentionally* * * * enters land in the possession of the other or causes a thing or a third person to do so[.]" (Emphasis sic.) *Id.* "[A]n intentional tort occurs when the actor desires to cause consequences of his act, or believes that the consequences are substantially certain to result from it." *Harasyn v. Normandy Metals, Inc.*, 49 Ohio St.3d 173, 175 (1990). "This definition encompasses two different levels of intent." *Id.* One level occurs when "the actor does something which brings about the exact result desired." *Id.* The other level occurs when "the actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result." *Id.*

{¶ 13} Upon reviewing the evidence submitted by the parties, we find the evidence is so one-sided that the Camerons are entitled to judgment as a matter of law. See *Wilson v. Maple*, 12th Dist. Clermont No. CA2005-08-075, 2006-Ohio-3536. At the outset, we note that contrary to Robinson's assertion, the issue in the case at bar was not whether the Camerons intentionally built a swimming pool in their backyard with the knowledge that water from the pool could enter Robinson's property. Rather, in light of the Ohio Supreme Court's foregoing definitions, the issue was whether the Camerons intended to bring about the exact result,

namely for the pool water to infiltrate Robinson's property and home, by building their pool, or whether they believed it to be substantially certain that building the pool would cause that result.¹

{¶ 14} In their respective affidavit, the Camerons stated that (1) they never noticed the water level in their pool decrease, "other than by the small amount associated with typical evaporation," (2) their water bills gave them "no reason to believe, know, or anticipate that there might be a problem with the pool in terms of leaking or otherwise putting off or losing water," and (3) prior to Robinson's lawsuit, they "had no notice or knowledge whatsoever that the pool might be leaking or putting off water onto [Robinson's] property."

{¶ 15} In her deposition, Robinson testified she had no evidence, other than her expert's report, that the Camerons' pool was leaking. She had never seen the Camerons refill their pool, and when she used to pool-sit for the Camerons, she never noticed the water level drop and never had to refill the pool. Robinson also testified that prior to collecting a water sample from the pool, she did not think the problems in her house were caused by pool water. In fact, at the time of the deposition, she "still [did] not know what's happening." Finally, when asked whether she had "any evidence the Camerons might have suspected something was wrong with their pool prior to you filing suit," Robinson replied, "No."

{¶ 16} In light of the foregoing, we agree with the trial court that there is simply no evidence to satisfy the intentional element of Robinson's trespass claim. *See Merino*, 2008-

1. Robinson cites a decision of this court in which we stated that "[s]ummary judgment is to be granted only in those rare cases where a plaintiff cannot point to some competent evidence to support the elements of his or her case." *Creech v. Brock Assoc. Constr., Inc.*, 183 Ohio App.3d 711, 2009-Ohio-3930, ¶ 13 (12th Dist.). In indirect support of this statement, this court cited a decision of the Sixth Appellate District for the proposition that "whether defendant's actions [regarding private nuisance and trespass claims] were reasonable, intentional, or negligent are decisions to be made by the trier of fact, not on summary judgment." *Creech* at ¶ 13, citing *Peters v. Angel's Path, LLC*, 6th Dist. Erie No. E-06-059, 2007-Ohio-7103, ¶ 39. Notwithstanding the fact that *Peters* involved a trespass claim, we find that our decision in *Creech* is not applicable here. First, *Creech* involved one property owner diverting surface storm water onto the property of another. Second, this court never addressed the legal theory of trespass in *Creech*. Finally, as is discussed in the case at bar, Robinson cannot point to competent evidence to support one of the essential elements of her trespass claim, to wit, an unauthorized intentional conduct.

Ohio-6366 (summary judgment properly granted to hunting club on a trespass claim where plaintiff submitted no evidence that hunting club intentionally allowed bullets or hazardous substances to travel onto plaintiff's property); *Randles v. Vespar, L.L.C.*, 5th Dist. Stark No. 2008 CA 00157, 2009-Ohio-377 (judgment in favor of plaintiff on trespass claim reversed where magistrate never made findings that defendant intentionally caused well water to flow onto plaintiff's property). The trial court therefore did not err in granting summary judgment to the Camerons.

{¶ 17} Robinson's assignment of error is overruled.

{¶ 18} Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.