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## Collier v. Dorcik, No. 3009-M 2000, 2000 Ohio App. LEXIS 5540 (Ohio Ct. App. Nov. 29, 2000)

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**OHIO**

**Collier v. Dorcik, No. 3009-M 2000, 2000 Ohio App. LEXIS 5540 (Ohio Ct. App. Nov. 29, 2000)** (holding the Court of Common Pleas abused its discretion when the court failed to enjoin an encroachment to restore the natural flow of water on a parcel of land).

Matthew and Elizabeth Dorcik purchased a parcel of land in Hinkley, Ohio. Because a gas easement limited where they could build their barn, they sought and obtained a local zoning variance for their sideyard setback. The Dorciks mistakenly relied on a 1990 survey to determine the location of their property line.

Rosemary Collier and Alan Junke (collectively, "Collier") had their property surveyed in 1994. The survey revealed sixty feet of the Dorcik's barn encroached on the Collier's property by as much as four feet at one corner. A concrete pad outside of the barn also encroached on the Collier's property. Due to the Dorcik's construction projects, the natural terrain, and each party's efforts to divert the flow of water, water accumulated on each property.

Collier sued the Dorciks seeking injunctive relief to have the Dorcik's encroachment removed and to restore the natural flow of water on their property. They also sought damages for the Dorcik's interference with the use and enjoyment of their property. The Dorciks counterclaimed for damages stemming from Collier's alleged obstruction of the flow of water from their property.

The trial court entered a \$5000 damage judgment for Collier, a \$5001 judgment for the Dorciks, and ordered the Dorciks to remove the concrete pad from Collier's property. Collier appealed and raised fourteen assignments of error.

The Court of Appeals of Ohio determined it did not have jurisdiction to address the zoning variance challenge, and Collier should have raised this challenge through an administrative appeal.

Collier's first two assignments of error pertained to the trial jury's view of the property in question. Collier had not provided the court with a record of the facts, and the court records did not indicate an objection by Collier to the jury view. Thus, it was impossible for Collier to demonstrate any error, much less one that seriously affected the basic fairness, integrity, or public reputation of the judicial process. Therefore, the court overruled the first two assignments.

Collier's third assignment of error stated the trial court erred in failing to order the Dorciks to remove the barn from Collier's property. Collier argued Matthew Dorcik's trial testimony and his prior deposition testimony were inconsistent, and these inconsistencies clearly indicated the trial testimony was evasive, deceptive, and false. Because the trial judge believed Matthew Dorcik's testimony, the appellate court deferred to the trial court's factual finding that the Dorciks did not intentionally build their barn over the property line.

In unintentional encroachment cases, courts balance the parties' equities and weigh the relative conveniences and comparative injuries to each party that would result from granting or refusing to grant injunctive relief. Because an encroaching structure affects a landowner's possessory rights, potentially forever, courts hold the encroacher has the burden of establishing injunctive relief would be oppressive.

Absent injunctive relief, Collier would forever lose the ability to use that portion of their property. On the other hand, there was little evidence that removing the encroachment would cause the Dorciks undue hardship. The potential hardship to the Dorciks did not outweigh the infringement on the property rights of Collier. Thus, the court held the trial court abused its discretion and sustained the third assignment of error.

Collier's fourth assignment of error argued the trial court erred in awarding the Dorciks damages. Collier contended an award of damages to the Dorciks was against the manifest weight of the evidence because they failed to establish Collier caused the damage. Collier argued the evidence demonstrated the Dorciks caused their own damage by building a mound that obstructed the water flow on their property. Yet, it was undisputed that before the Dorciks built a mound on their property, Collier built a mound on their property. The drainage inspector opined the Collier's mound blocked the flow of water on the Dorcik's property. The Dorciks did not remove the mound, nor did they take other steps to facilitate the natural flow of water on their land. Therefore, the court could not say the jury erred in concluding Collier caused the water flow damage to the Dorcik's property. Thus, the court overruled the fourth assignment of error.

The court overruled Collier's ninth, thirteenth, and fourteenth assignments of error. Collier did not object to evidence at trial, nor articulate legal requirements to establish the claims, thus waiving rights to an objection. Also, the court found no merit in Collier's tenth assignment of error stating the trial court abused its discretion in failing to grant their motion for a new trial.

Collier's eleventh assignment of error declared the trial court had a duty to review the trial transcript before it could rule upon their motion for a new trial. Case law has stated when the trial court was able to determine the issues based on its memory of the proceedings, the trial court committed no error by not reviewing the trial transcript. Hence, the court overruled this assignment of error.

Collier's twelfth assignment of error contended the trial court erred in entering judgment on the jury verdict because of an improperly altered jury interrogatory. The court overruled this assignment of error, concluding Collier suffered no prejudice because the alteration had no impact on the jury's answers to the interrogatories or on the verdict.

*Nicole C. Anderson*