TROY A. MUSSER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	NON-JURY TRIAL
	:	
vs.	:	NO. 00-01,585
	:	
TIMOTHY A. HILL and	:	CIVIL ACTION
SANDRA L. HILL,	:	
	:	
Defendants	:	POST-TRIAL MOTIONS

Date*: *November 27, 2002

OPINION and ORDER

Before the Court is Plaintiff's Post-Trial Motion filed on August 12, 2002. The Motion requests the Court to modify the award made by this Court to Defendants on their counter-claim in the amount of $2,800 following a non-jury trial.

Background

The litigation in this case involves Plaintiff's claim that Defendants had tortuously interfered with Plaintiff's contract for delivery of topsoil by a third party to Plaintiff's property. This Court found at trial that Defendants did so by blocking a private access road. The road crossed Defendants' property and led to Plaintiff's property, where the topsoil was to be delivered.

At the conclusion of the trial this Court entered an Order dated July 13, 2002, announcing conclusions as to facts and matters related to the law applicable to the case and indicated that the maximum award to be given Plaintiff was in the amount of $20,000 and the maximum award to be given Defendants on their counterclaim was $2,800. Subsequently, following further argument and briefs by the parties this Court entered an Adjudication and Verdict dated July 26, 2002 (filed July 30, 2002) finding in favor of Plaintiff on his claim against Defendant Timothy A.

Hill in the amount of $20,000 and in favor of Defendants, Timothy A. Hill and Sandra L. Hill on their counter-claim against Plaintiff, Troy A. Musser, in the amount of $2,800.

Post-trial Motions were filed by both parties. This Court summarily denied Defendants' Post-Trial Motions as indicated by an Order dated August 13, 2002, on the basis that the Court had found the evidence sufficient at trial to support its adjudication and verdict as to Plaintiff's claim. Plaintiff's Motion sought both to modify the verdict rendered in favor of Plaintiff by adding Defendant Sandra L. Hill as a liable Defendant and increasing the verdict amount to $38,250. The Motion also sought to vacate the award made to Defendants on their counterclaim. Except as to the request to vacate the amount awarded on the counterclaim, this Court summarily dismissed Plaintiff's motion based upon its prior adjudication and reasons stated on the record.

The amount awarded on the counterclaim of Defendants against Plaintiff had been based upon this Court's finding that Plaintiff was responsible to pay to Defendants the sum of $2,000 to provide stone necessary to improve the private roadway across Defendants' property plus $800 due to Plaintiff removing topsoil valued in that amount from the right-of-way area on Defendants' property.

Discussion

Defendants' property is a single house lot, residential property, in Mifflin Township, basically "L" shaped with a "leg" approximately 180 feet in length and 70 feet in width, extending southeasterly from a rectangular part of the lot to a public road. A 50-foot right-of-way was established over Defendants' lot by Edward H. Fisher, a predecessor in the chain of title of both Plaintiff and Defendants, leading to Plaintiff's property and other lands formerly owned by Fisher.

The right-of-way is depicted on the survey map Defendants' Exhibit 3. The right-of-way traverses over the 180' x 70' portion of Defendants' lot, extending northerly from the public road to Defendants' northern boundary, and then continues westerly, at a right angle, over the northern portion of Defendants' lot, exiting that lot at its western boundary and entering onto Plaintiff's land. At the time Fisher conveyed to Hills the width of the cartway in the right-of-way area was approximately 15 feet and it remained so until October of 2000.

Defendants' deed for their property, Defendants' Exhibit 1, dated May 17, 1988, contains reference to the 50-foot right-of-way identified on the subdivision plot plan of Edward H. Fisher, Plaintiff's Exhibit 2, which shows the same 50-foot right-of-way depicted on Defendants' Exhibit 3. On Plaintiff's Exhibit 2 a handwritten notation indicates that the right-of-way area is designated as "Zink Lane." The reference to the right-of-way in Defendants deed indicates that the Grantor, (Fisher) his heirs and assigns are to have the right of use of the right-of-way and the Grantor agreed to assume, in common with all other users, his equal share of upkeep and maintenance of the private road. The Grantees, (Hills) their heirs and assigns were granted the right of ingress, egress and regress in common with the Grantor over the 50-foot right-of-way extending only to the edge of the property conveyed to the Grantees. Another reference in that same deed provides that Grantees, their heirs and assigns should have the right to use the private road shown on the plot plan with an agreement to assume in common with all other users an equal share of upkeep and maintenance of the private road.

Plaintiff acquired his property, which consists of a large tract of ground adjoining Hills' property to the north and west from Fisher's successors in 1998. Plaintiff's deed mentions the

right-of-way area as a boundary road. Otherwise, his deed does not contain any express reference to it. *See,* Defendants' Exhibit 2.

In January 2000 Plaintiff sought to have topsoil delivered to his property over the right-of-way, in anticipation of improving part of his land so that it could be subdivided into single home residential lots. Defendant Timothy Hill's interference with Plaintiff's use of the right-of-way at that time resulted in this Court's finding that Defendant Timothy A. Hill was liable to Plaintiff in the amount of $20,000. The basis of the award was the difference in fair market value of the lots without as compared to with the intended topsoil.

In the course of the dispute concerning the use of the right-of-way and as Plaintiff attempted to obtain an undisputed right to make use of the right-of-way Plaintiff and Defendant Timothy A. Hill signed an agreement dated January 31, 2000, Defendants' Exhibit 5. In this document Plaintiff agreed to be responsible for the repair of any significant damage to the shared right-of-way caused by him or agents of him, including delivery men, in consideration of "Hill's" acknowledgement that the right-of-way does serve Plaintiff's property.

In October of 2000, to complete subdivision planning and to obtain subdivision approval for developing his property, Plaintiff made improvements to the right-of-way pursuant to a plan approved by the Township and County planning bodies. The improvement resulted in the widening of the cartway portion of the right-of-way to a width of approximately 24 feet and its re-grading and stoning. During the course of the re-grading, topsoil was removed from the right-of-way area so that the widened stone cartway could be put in place. In doing this Defendants contended that shrubs and other landscape improvements were removed by Plaintiff from the right-

of-way area together with the removal of topsoil and also that Plaintiff did work outside of the right-of-way area.

This Court was satisfied from the evidence presented and the law that Plaintiff had the right to improve the right-of-way in question by removing the topsoil and replacing it with appropriate stone, referred to as 2B stone. Plaintiff only had a right-of-way over Plaintiff's property and did not own the soil within that right-of-way nor any other thing of value in the right-of-way area. While Plaintiff had the right to remove the topsoil he did not have a right to remove it in such a way as to exert ownership over it. Rather, the topsoil remained the property of Defendants. Since Plaintiff had removed the soil and transported it to some other location (presumably to Plaintiff's property) Plaintiff was found to owe to Defendants the value of that soil.

This Court found, based upon the evidence, that the value of the topsoil removed was $800. Defendants provided trial testimony through themselves and their "expert" that six truckloads would be needed to replace the soil removed. Plaintiff acknowledged that some topsoil had been removed to the east of the original cartway but disputed the actual amount of soil removed. In the course of the trial witnesses for both parties provided testimony as to the value of a load of topsoil ranging from $150 per load for low-grade topsoil to a high of $250. This Court fixed a value of the topsoil removed from Plaintiff's property at $200 per load. This Court based the total value of the soil upon its finding that four truckloads of topsoil had been removed. Defendants presented neither evidence as to the value of shrubbery or trees removed during widening work nor any exact statement as to their kind or number.

Defendants presented claims for $375 to repair the yard where they contended work was done outside of the right-of-way area. This claim was and is denied as the Court finds there was no damage to the area outside of the 50-foot wide easement area. Defendants also presented claims based on estimates for restoring the right-of-way including removal of the widened road which ranged in excess of $20,000. *See*, Defendants' Exhibit 6. Defendants claim in this regard is based on their contention that a catch basin and other very expensive improvements are needed to eliminate the water standing and run-off problem and that the widened road should be re moved. Having again reviewed the testimony in this matter, this Court again rejects Defendants' arguments that such work as the catch basin or removal of the widened cartway is needed or permissible under the law. This Court also found that with the exception of the removal of topsoil from the right-of-way the evidence did not support Defendants' contention that their property was otherwise damaged.

This Court did find, however, that sufficient stone had not been placed upon the unimproved part of the right-of-way by Plaintiff so as to eliminate the standing and ponding of water on the cartway in times of heavy rain. This finding was based on the photographs and other evidence, which convinced the Court that water did not properly drain off of the cartway.

In considering the testimony as to work necessary to make the roadway suitably passable and in good condition for its intended purpose by eliminating the standing water this Court considered the testimony of Defendants' expert and that expert's initial estimate, Defendants' Exhibit 6, dated 10/23/2000. Defendants also submitted a subsequent estimate dated 5/8/2002 for essentially the same work, Defendants' Exhibit 7, dated 5/8/2002, which was less credible than the

first estimate. This Court found in considering all the testimony and exhibits submitted, including photographs, Defendants' Exhibit 4, that additional stone needed to be placed upon the right-of-way and the fair cost for placing such stone and grading into place it was the amount of $2,000.

At the time the Court announced this decision on July 13, 2002, Plaintiff contended, and still contends, that this stone work is not necessary but that in any event Plaintiff should be permitted to place sufficient stone upon the roadway to eliminate the water ponding and standing water from the roadway for the benefit of all those entitled to use the roadway instead of being required to pay any cash as damages to Defendants. This Court rejected this assertion when it was first made because of our primary belief that the only remedy available to correct Plaintiff's failure to properly improve and widen the road was civil, *i.e.*, the payment of monetary damages. Upon reconsideration, this Court concludes such belief is mistaken. It would not serve just ends for this Court to require Plaintiff to pay Defendants the sum of $2,000, because such payment would enrich Defendants but not improve the road nor benefit the others who have the right to use the road.

A review of Defendants' counterclaim indicates clearly that it sounds in equity, as well as in law. Defendants' counterclaim requests the Court to provide "any other relief this Court indicates it deems necessary and just." *See*, Answer to Count 3 of Plaintiff's Amended Complaint and Counterclaim filed April 19, 2002. Defendants' other answers, counterclaims and new matters, including those filed November 8, 2000 and December 13, 2000, also asserted requests for similar equitable relief. There is no question that the graveman of Defendants' Answers, New Matter and Counterclaim, among other things sought, restoration of the right-of-way, an equitable remedy.

Also, this action was originally commenced in equity as Plaintiff sought an injunction to prevent Defendants from interfering with his right to improve and use the right-of-way.

In taking all these contentions into consideration this Court believes the appropriate relief, as would relate to the insufficient amount of stone being placed upon the right-of-way as improved by Plaintiff, is properly in the form of equitable relief, requiring Plaintiff to adequately stone the cartway portion of the right-of-way so as to eliminate the ponding and standing of water upon it in times of heavy rain. Accordingly, this Court will modify its prior adjudication and verdict rendered on July 26, 2002 as would relate to the amount of damages owed by Plaintiff to Defendants.

ORDER

This Court's verdict rendered July 26, 2002 and filed July 30, 2002 is hereby amended to read as follows:

1. This Court finds in favor of Plaintiff and against Defendant Timothy A. Hill in the amount of $20,000.

2. This Court finds in favor of Defendants Timothy A. Hill and Sandra L. Hill on their counterclaims against Plaintiff Troy A. Musser and directs as follows:

a. Plaintiff owes damages to Timothy A. Hill and Sandra L. Hill in the amount of $800 for removal of topsoil.

b. Plaintiff Troy A. Musser is hereby ORDERED and DIRECTED to stone and properly grade the cartway portion of the right-of-way with a sufficient amount of appropriate stones so as to eliminate the standing and ponding of water upon it in times of heavy rain and at the same time provide for an appropriate drainage of water therefrom in such a way that it does not damage Defendants' property. This shall be accomplished by Plaintiff within the next thirty days from filing and notice of this Order. This work, if done by Plaintiff, shall be done under the supervision of an appropriate contractor selected jointly by Plaintiff's counsel and Defendants' counsel. Counsel shall agree upon such contractor within seven days after notice of this Order. Alternately, Plaintiff may elect to hire this work to be done by an independent contractor, who also shall be jointly selected by counsel to do the necessary work; such selection shall also be made within seven days. The

work of said contractor and/or supervision in the placement of stone upon the roadway and seeing to the proper drainage of water therefrom, in accordance with this Order, shall be paid for in full by Plaintiff when payment is due to and/or requested by those performing the work. In the event that the respective counsel cannot agree upon an appropriate contractor to supervise and/or perform the work within seven days after entry and notice of this Order they shall contact this Court through a conference telephone call and this Court will then select an appropriate contractor to do the work, requiring Plaintiff to immediately deposit the greater of the sum of $5,000 or double the amount of the contractor's estimate with the Court to guarantee appropriate payment for said work.

BY THE COURT:

William S. Kieser, Judge

cc: Marc Drier, Esquire
John A. Gummo, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)