TROY A. MUSSSER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Petitioner	:	
	:	
vs.	:	NO. 00-01,585
	:	
TIMOTHY and SANDRA HILL,	:	CIVIL ACTION - LAW
	:	
Respondent	:	1925(a) OPINION

Date: March 18, 2003

OPINION IN SUPPORT OF THE ORDERS OF JULY 30, 2002 AND DECEMBER 3, 2002, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Hills have appealed this Court's ruling on post-trial motions, and amended adjudication following a non-jury trial. The dispute relates to a private road, which serves the lands of Troy A. Musser (hereafter "Musser") and crosses the land of the Hills, Timothy and Sandra Hill (hereafter collectively "Hills"). A non-jury trial was held on May 23 and July 15, 2002. At the completion of testimony and after argument by counsel, this Court entered an Order on July 15th indicating the Court would make an award to Musser in the maximum amount of $20,000 and an award to Hills on their counterclaim in the amount of $2,800. The Court also directed that additional briefs were to be filed as would relate to the amount of and calculation of damages to which Musser was entitled under his tortious interference of contract claim. Subsequently, by Order of Adjudication and Verdict dated July 26 and filed July 30, 2002, the Court found in favor of Musser against Hills in the amount of $20,000 and found in favor of Hills against Musser in the amount of $2,800.

Following the filing of post-trial motions and argument thereon, this Court entered an Opinion and Order dated November 27, 2002, filed December 2, 2002, which reaffirmed the Court's verdict in favor of Musser and against Timothy Hill in the amount of $20,000. But the Court modified the verdict in favor of Hills against Musser on their counterclaim to direct that the amount of damages owed would be $800 and further provided for equitable relief to be granted to Hills, which would require Musser to stone and properly grade a portion of the private road that was in dispute. It was from these adjudications and orders that Hills have taken their appeal.

In the Concise Statement of Matters Complained of on the Appeal filed January 10, 2003, Hills essentially have alleged five points of error in paragraphs 7 through 11 thereof, which are summarized in paragraph 12 which asserts the Order and Verdict of the Court was substantially against the weight of the evidence presented. Specifically, in paragraph 7, Hills assert that the evidence was not sufficient to allow a finding that Timothy Hill was the individual who was present and stopped Musser's delivery men from delivering topsoil to Musser's land via the road in question in January of 2000. In paragraph 8, Hills continue asserting that the evidence was not sufficient to find that in January of 2000 Timothy Hill made any statements to Musser's agents, that any statements made by Timothy Hill to any agents were not sufficient to interfere with the delivery of topsoil, and did not constitute a tortious interference with Musser's contract. In paragraph 9, Hills assert that the evidence was not sufficient to find Musser had entered into a contractual relationship for delivery of topsoil to be made to Musser (over the roadway). In paragraph 10, Hills assert that the evidence was not sufficient to establish that Musser had suffered $20,000 in damages due to the alleged interference of the contract by Timothy Hill.

Finally, in paragraph 11 Hills assert that the evidence was "sufficient" to find that Hills were entitled to damages in excess of $2,800 resulting from Musser's alterations to the roadway, which is the reverse of stating that the evidence was not sufficient to sustain the Court's verdict that Hills suffered damages, limited in an amount to $800, and were otherwise entitled to equitable relief which required that Musser repair and upgrade the roadway.

This Court believes the reasons for its rulings and justification are properly set forth in the Opinion and Order of November 27, 2002, the Adjudication and Verdict of July 26, 2002 and the reasons stated on the record July 15, 2002, following closing arguments by counsel, as reflected in the transcript of that date at pp. ____ through ____.[1] However, since the challenge on appeal goes to the weight and sufficiency of the evidence, this Court believes it has an obligation to further review the record and to discuss the testimony presented which support its reasoning and final determination made by this Court.

Relevant Procedural Background

A brief review of the order and nature of the pleadings filed in this matter is appropriate in order to place in perspective the matters under consideration for the Court at the non-jury trial. Musser initially commenced the action on October 9, 2000 filing a complaint in a civil action in equity seeking an *ex parte* injunction to prohibit Hills from interfering with Musser's use of a 50-foot right-of-way.[2] By an Order of the same date, this Court granted the *ex parte* injunction and directed that a preliminary injunction hearing be held on October 16, 2000.

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[1] As of the date of filing this Opinion the record of this part of the July 15, 2002 proceeding has not been filed.

[2] As of the filing of this Opinion the original complaint filed on October 9, 2000, is not contained within the Court file.

On October 16, 2000, the parties reached an agreement, which continued the temporary injunction of October 9th in effect until a further hearing could be held to determine the injunctive relief request and the issues of contempt based on Musser's October 16th petition to hold Sandra Hill in contempt of the October 9, 2000, Order. Also, on October 16, 2000, Musser filed an amended complaint in equity, which asserted that Hills had previously interfered with Musser's delivery of topsoil to his property in January 2000 as well as in October 2000. Musser claimed to have suffered a monetary loss from the January 2000 interference of his contract for the delivery of the topsoil. (*See* Amended Complaint, October 16, 2000, paragraphs 7-12, et al.) Although asserting this loss, the Amended Complaint only sought injunctive relief in the way of a permanent and preliminary injunction.

The docket entries reflect that on October 24, 2000 Hills filed a "Complaint in a Civil Action – Equity", however, that document does not appear to be contained in the Court file as of this date. Also, on October 24th Hills filed a "Praecipe to Settle and Discontinue as to Count 2, Preliminary Injunction." On November 8, 2000 Hills filed an Answer and Counterclaim to Musser's Amended Complaint and on November 9, 2000 Hills also filed an Answer to Musser's contempt petition against Sandra Hill. In Hills' New Matter of November 8, 2000, it was averred that Musser's property was not landlocked and that there was another roadway to Musser's property that would allow him ingress and egress. Hills also asserted a counterclaim that Musser's use of the right-of-way was personal only to him and his heirs and assigns. Hills also asserted that Musser could not use the right-of-way for numerous other successors or those who would make use of the right-of-way if he subdivided his ground into lots as intended. Count 2 of the counterclaim asserted that Musser had widened the existing easement

resulting in damage to Hills' land and lands of others, including loss of one large tree, loss of sod and topsoil and other landscape material, and that Musser had tortiously interfered with Hills' right to use the easement. In the way of relief, Hills requested that Musser be enjoined and precluded from using the right-of-way other than for its original purpose. On December 13, 2000, Musser filed two documents, one entitled "New Matter" and the other "Answer, New Matter and Counterclaim," which responded to Hills' prior pleading of November 8.

On December 15, 2000, the Honorable Kenneth D. Brown held a partial hearing on the contempt issue. Judge Brown entered an order that date indicating the contempt hearing would continue on a future date. On April 11, 2001 the contempt hearing was completed and the Court dismissed the contempt petition that had been filed against Defendant Sandra Hill through an Order of that date which was filed on April 23, 2001.

Also, on December 15, 2000, Judge Brown entered an order which upon agreement of the parties, provided that Musser would have twenty days to file an amended complaint and Hills twenty days thereafter to file a responsive pleading. That Order, which was filed December 22, 2000, also stated that Musser withdrew his claim for injunctive relief and dissolved the October 9, 2000 preliminary injunction.

On January 4, 2001, Musser filed a Second Amended Complaint seeking damages at law in the amount of $104,632 resulting from Hills' asserted January 2000 acts of tortious interference. This complaint stated Hills' interfered with the contract between Musser and an unidentified third-party contractor, under which the contractor was to deliver soil to Musser's property over the right-of-way in

question. In subsequent pleading this contractor is identified as Dave Gutelius Excavating, Inc. (hereafter "Gutelius"). Musser also asserted a count of slander of title. Hills filed timely preliminary objections to this amended complaint on January 19, 2001. By an Order dated and filed September 24, 2001, Judge Brown denied Hills' Preliminary Objections to Count 3 of Musser's Amended Complaint, which had sought monetary damages for tortious interference with the contract. That Order granted the preliminary objections to Count 4 of the Complaint, which asserted a claim for slander of title.

On October 11, 2001 Musser filed his Third Amended Complaint making revisions to Count 4, the slander of title allegations, and including the prior allegations, which pleaded a claim for monetary damages for tortious interference of the contract. Hills again filed preliminary objections to the slander of title count on October 26, 2001. By Order of December 4, 2000, filed the same date, Judge Brown again sustained the preliminary objections to Count 4 and dismissed the slander of title count of the Complaint.

A pretrial conference was held April 2, 2002, before this Judge. The case was listed for trial in the timeframe between May 6 and June 26, 2002. The case was also referred to private mediation. However, the Pretrial Order of April 2, 2002 (filed April 15, 2002) noted a counterclaim might yet be made in the amount of $19,500 for sod and removal of soil and tearing down a tree allegedly caused when Musser expanded the right-of-way.

On April 19, 2002, Hills filed an amended answer to the Third Amended Complaint of Musser and a counterclaim. Hills' Answer incorporated their prior answer of November 8, 2002, to the amended complaint and denied the claim for damages. Hills also set forth a counterclaim seeking

damages for Musser's alleged damage to the 50-foot right-of-way through the removal of sod, topsoil and other materials. Hills also sought damages to their land adjoining the right-of-way caused by water runoff, relying upon an asserted agreement by Musser that he would be responsible for damages resulting from his maintenance and improvement of the right-of-way. The counterclaim also sought attorney's fees and costs of suit. Hills' claim for relief in the addendum clause requested an award of damages in excess of $25,000 and damages less than $25,000, a finding in favor of Hills in the matter, the payment of attorney's fees and costs and "any other relief this Court deems necessary and just." These were essentially the same claims set forth in Hills' Answer and Counterclaim filed November 8, 2002 in response to the Amended Complaint, in which Hills did not seek any specific amount of monetary damages but only equitable relief as to Musser's use of the right-of-way. As noted in this Court's Opinion and Order of November 27, 2002 (filed December 2, 2002) at page 7, a review of Hills' combined Counterclaims indicate they sound in equity as well as in law.

Musser filed an answer of denial to the counterclaims on April 30, 2002.

Discussion

This Court's conclusions as to the facts found from the testimony in this case have previously been noted on the record on July 15, 2002 (*See*, pp. ____)[3] as well as in its written Adjudication and Verdict of July 26, 2002 and fully summarized in the Opinion and Order of July 27, 2002 (*see*, particularly pp. 2-7). Nevertheless, in order to appropriately place of record the view of the Court as to the sufficiency of evidence claims set forth in the Matters Complained of on Appeal, this Court will again review the evidence and make appropriate references to the places in the record where

testimony relied upon by the Court can be found. In doing so, this Court will first address the issues in accordance with the order that they were addressed by this Court in arriving at its verdict, as follows:

> 1. Whether the evidence was sufficient to find that Plaintiff entered into a contract for delivery of topsoil to his ground with a third party (*see* paragraph 9 of Concise Statement of Matters Complained of on Appeal);
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> 2. Whether the evidence was sufficient to establish that Defendant Timothy Hill tortiously interfered with Plaintiff's contract? Specifically, whether Timothy Hill is correctly identified as the individual on the right-of-way at the time in question when the topsoil was attempted to be delivered across the roadway to Plaintiff's lands in January of 2000; whether the evidence was sufficient to establish that Defendant Timothy Hill did make statements at that time; whether or not those statements were sufficient to interfere with the delivery of the topsoil;
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> 3. Whether the evidence was sufficient to support the Court's award of $20,000 in damages to Plaintiff against Defendant Timothy Hill (*see* Concise Statement of Matters Complained of on Appeal, paragraph 10); and,
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> 4. Whether the evidence was sufficient to support this Court's award of damages to Defendants in the amount of $800 for the removal of topsoil from the roadway and directing Plaintiff to make repairs to the roadway?

Before entering into this evidentiary discussion, however, it is appropriate for this Court to note several relevant legal standards.

Musser's Complaint asserts an action for tortious interference with a contract. In order to set forth a legally sufficient cause of action it is required that Musser plead and establish four elements: first, the existence of a contract or a perspective contractual relationship between Musser and a third party; second, a purposeful action on the part of Hills, specifically intended to harm an existing relation or to prevent a perspective relationship from occurring; third, the absence of a privilege or justification on

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[3] As of the date of filing this Opinion the record of this part of the July 15, 2002 proceeding has not been filed.

the part of Hills; and, four, the occasioning of actual legal damage as a result of Hills' conduct. ***Pelagatti v. Cohen***, 536 A.2d 1337 (Pa. Super. 1987). When a plaintiff's claim of interference with a contract is established, the damages that are generally recoverable are the lost prospective contract. ***Id.*** at 1333. The Superior Court has approved applying the damages listed in §774A(1) of Restatement (Second) of Torts to determine damages in a case involving interference with a contract. This section provides that a party liable to another for interference of a contract or prospective contract is liable for damages for:

> (a) the pecuniary loss of the benefits of the contract or the prospective relation;
> (b) consequential losses for which the interference is a legal cause; and
> (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference. . . .

Pelagatti, *supra*. at 1334; (*quoting* Restatement (Second) of Torts §774A(1)); s*ee also*, ***Shiner v. Moriarty***, 706 A.2d 1228 (Pa. Super. 1998).

When a court is faced with a challenge to the sufficiency of the evidence, the claim is primarily addressed to the discretion of the judge who presided at trial. The trial judge's ability to upset a verdict premised upon a weight claim is narrowly circumscribed and the judge cannot grant a new trial based upon a mere conflict in testimony. ***Armbruster v. Horowitz***, 813 A.2d 698 (Pa. 2002) "Instead, a new trial should be granted only in truly extraordinary circumstances, *i.e.*, 'when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and an award of a new trial is imperative so that right may be given another opportunity to prevail.'" ***Id.*** at 703 (*quoting* ***Commonwealth v. Brown,*** 648 A.2d 1177, 1189 (Pa. 1994)). Although ***Armbruster*** dealt with a trial judge reviewing a verdict rendered by a jury, the same standard needs to be applied by this Court in

determining whether or not the verdict rendered by the Court is so contrary to the evidence upon again independently reviewing it, so as to shock this Court's sense of justice.

After conducting a review of the testimony, this Court has determined that the evidence is sufficient to sustain its prior verdict and that Hills' complaint as to the weight merely asserts that there were conflicts in the testimony and this Court should have given more credibility and weight to Hills' testimony than it did to Musser's. Such is not a sufficient basis to upset this Court's prior determination, particularly as this Court finds its prior determination as to credibility are reinforced by a review of the written transcript.

This Court also must acknowledge that in some ways, particularly at argument and briefing before this Court on the post-trial motions, Hills assertions also ask for judgment n.o.v. to be entered. A judgment n.o.v. is only properly entered in clear cases, where upon viewing the evidence in a light most favorable to the verdict winner, and granting the verdict winner every reasonable and favorable inference therefrom, the evidence is nevertheless insufficient to sustain the verdict. That is to say that a judgment n.o.v. is appropriate where either the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the losing party or the losing party is entitled to a judgment as a matter of law. ***Ferrer, M.D. v. Trustees of the University of Pennsylvania***, Nos. 52 & 53 EAP 2000 (Pa. Dec. 30, 2002); ***Davis v. Irwin Corp***, 690 A.2d 186 (Pa. 1997); ***Campo v. St. Luke's Hospital***, 755 A.2d 20 (Pa. Super. 2000); ***Jackson v. Rohm***, 56 Pa. D.& C.4th, 449 (Philadelphia Co. 2002). Again, this Court is satisfied that the evidence in this case sustains its final adjudication.

1. ***Sufficiency of Evidence as to Existence of Contract Between Musser and Gutelius Excavating Company*.**

At trial Musser first sought to establish the existence of a contractual or a perspective contractual relationship between himself and a company known as Dave Gutelius Excavating, Inc. through calling its president David W. Gutelius as the first witness. Mr. Gutelius testified that his company was involved in a project located near the property of Musser and Hills at the Salladasburg Elementary School. As part of that project Gutelius was required to remove "a lot of excess material" (herein generally referred to as topsoil) and dispose of it offsite, that is, at a location other than the Salladasburg Elementary School. *See*, N.T. 5/23/02, pp. 12-13. Musser's property was selected as a sight because it was the closest available to the Salladasburg Elementary School ***Id.*** at 13. The topsoil to be removed was approximately 5,000 yards. ***Id.*** at 29. Gutelius testified that his company did have an arrangement (concerning the removal of the topsoil) with Musser, through its foreman, and did begin to deliver the topsoil to Musser's property. ***Ibid***. Gutelius further testified that the deliveries did not continue long because of a report made to him by the foreman that the truck drivers got stopped and told they were not allowed to dump "there." ***Id.*** at 29-30. In accordance with his company's policy of not creating waves where there was a problem, they backed away and found another site at which to export the topsoil. ***Id.*** at 32. The secondary site of Gutelius was less desirable being two miles further away and uphill as compared to Musser's location. ***Ibid***.

It was obvious from the testimony of Gutelius that his company had a need to dispose of topsoil from its worksite and by having Musser's permission to dump the soil on his land they received the benefit of being able to complete their contract with the School at the least expense feasible. Thus,

based solely upon Gutelius' testimony, a contract was formed with Musser based upon mutual promises backed by mutual consideration. Gutelius also testified that it was normal to get rid of this type of topsoil/material "free of charge" when it was on a jobsite at which he needed to get rid of it. N.T. 5/23/02 at p. 36. He also supplied testimony that the company's tandem trucks could hold ten cubic yards of material. This made it clear to this Court that Musser had the expectation of over 300 truckloads of topsoil being delivered to his property under the terms of the agreement. ***Id***. at p. 40.

Musser next called himself as a witness. He testified that he bought the property in question from Mr. (Edward) Fisher and at the time of purchase it was a rental property with a barn, house and seven rental trailers on it, together with a field he intended to subdivide and sell off in lots. N.T. 5/23/02 at pp. 57-58. Musser also testified that he was in the business of land development, excavating and construction. ***Id.*** at 59. Musser specifically stated that knowing there was going to be fill removed from the Salladasburg Elementary School site he went to the site and "contacted them and asked if [he] could receive that fill," to which "they said yes." ***Id.*** at 59. Musser inspected the Salladasburg Elementary School project, looked at the plans and determined that 400-500 loads of topsoil would need to be removed from the sight. He had a desire to have that topsoil placed upon his ground in the area where the lots he intended to subdivide were located. ***Id.*** at 60. Accordingly, he arranged for deliveries by Gutelius to begin from the Salladasburg project to his property. ***Id.*** at 62.

Musser testified that deliveries lasted one whole day and part of the next then he subsequently discovered that they had stopped on the second day. ***Id.*** at 63. Upon inquiring of Gutelius as to why deliveries had stopped Musser was advised they were told there was a problem with

delivering over the roadway to his property because it was a private road. ***Ibid.*** Musser was led to believe that a landowner (referenced as Timothy Hill) was concerned that the trucks would crush the pipe underground and that the roadway was that party's driveway. ***Id.*** at 64. As a result, Musser testified that he called Timothy Hill to discuss the situation. ***Id.*** at 65. Thereafter, despite getting a signed agreement from Timothy Hill about using the right-of-way Musser was unable to convince Gutelius to resume deliveries. ***Id.*** at 65, 67. As a result, Musser only received deliveries of 18-20 loads of topsoil to his property. ***Ibid.***

This testimony clearly establishes that Musser entered into an agreement with Gutelius for delivery of a substantial amount of topsoil to his property and that in exchange for his promise to accept the topsoil Gutelius was willing to deliver it. This Court believes that Musser's testimony and that of Gutelius was credible in this regard and established that they had entered into a contract which would benefit both the Gutelius excavating company as well as Musser. It also established that the contract was performed only in part. The mere fact that that contract may have been voidable by Gutelius does not take away from Musser's rights to benefit from the contract or reduce his expectant benefits. Nor does the fact that Musser did not have to pay money for the topsoil, constitute a lack of consideration.

The Court must next decide as to why the contract was only partially performed. Was it interfered with, and if so, who created the interference?

2. <u>Sufficiency of Evidence as to Interference With Musser's Contract by Timothy Hill.</u>

At trial Hills vehemently contested whether or not Timothy Hill or Sandra L. Hill caused any interference with the contract. Specifically, whether or not either of them were responsible for

stopping trucks of Gutelius from crossing the roadway. The testimony of Gutelius referred to above, at pp. 29-30, indicated that Gutelius did not deliver all the topsoil to Musser because it was reported that a truck driver had been stopped and told they could not dump there. This evidence was not admitted for truth that the interference occurred but as evidence as to the reason Gutelius had for its termination of the contract. N.T. 31-32. With a similar vein, Musser testified Gutelius representatives advised him that a driver had indicated that Timothy Hill no longer wanted them (to deliver) because it was his driveway and there was a pipe underground he was afraid was going to be damaged. N.T. 5/23/02, p. 64. This evidence did not serve the purpose of identifying that Timothy Hill took such actions, but was introduced only to explain that as a result of receiving this information Musser contacted Timothy Hill by telephone. ***Id.*** at 64, 65. Musser testified that he did discuss with Timothy Hill by telephone the matter of the trucks being prevented from delivering the topsoil. In that conversation "[Hill] said that there is a pipe in the ground; that we would ruin it; and that there was no more trucks going to be delivering there." ***Id.*** at 65. Musser further testified that at that point he told Timothy Hill that he would sign an agreement to be responsible for any damages, but requested that in return Hills would not interfere with the drivers any more. Subsequently, Timothy Hill and Musser met at Musser's counsel's office. Both Musser and Timothy Hill signed a piece of paper, Musser's Exhibit No. 5, ***Id.*** at 65, 66. That handwritten document (the original being Hills' Exhibit No. 5) states:

> Troy Musser agrees to be responsible for the repair of any significant damage to the shared right-of-way that is caused by him or by any of his agents, including as "agents" any deliverymen making deliveries to his property. Damage includes damage to road surface, ditches or other facilities related to the road right-of-way. This agreement is given in

> consideration of the Hills' acknowledgement that the said right-of-way does serve the Troy Musser (formerly Fisher farm) piece.

Hills' Exhibit No. 5. This writing was signed by Timothy Hill and Troy Musser and dated January 31, 2000. N.T. 5/23/02, and N.T. 7/15/02, at 55. At the time the document was signed and the agreement to allow topsoil deliveries to be made to Musser's property, Timothy Hill admitted to interfering with the topsoil deliveries. N.T. 5/23/2002, p. 67. Despite this document being presented to Gutelius, Musser was unable to persuade Gutelius to continue deliveries. ***Ibid.***

This Court found the foregoing testimony sufficiently credible to establish that Timothy Hill did intentionally interfere with and stop the Gutelius trucks from delivering the topsoil to Musser's property. However, the foregoing was not the only evidence to that effect. Musser testified that in October of 2000, Hills again stopped Musser from using the roadway. This was corroborating circumstantial evidence supporting this Court's conclusion that Hills had the same intention, attitude, and motive for blocking Musser's use of the right-of-way in January of 2000. *See* N.T. 5/23/2002, pp. 84-89. On cross-examination, Musser iterated in a credible fashion that Timothy Hill had admitted being of the intent that no trucks would be coming into Musser's property any longer during the conversation Musser had with Timothy Hill. ***Id.*** at 112, 113. Musser also testified that Hills would have had prior knowledge of Musser's intent to have the heavy equipment use the road in order to make improvements to the proposed subdivision in the fall of 1999, which was prior to the actual act of interfering with the use of the roadway. ***Id.*** at 114.

Hills' own witness Gail Fisher corroborated Musser. Ms. Fisher stated she recalled seeing the trucks transporting the topsoil to Musser's property in January of 2000. When asked if she

observed Timothy Hill stopping any trucks Ms. Fisher replied that she did not think so, but then equivocated stating she did not know or recall. Also, Ms. Fisher acknowledged that she knew in advance that the trucks were to deliver the soil because of the activity of trucks and equipment going to and from the property at that time. N.T. 5/23/02 at pp. 216-217.

This testimony was significant because it countered the argument made by Hills' counsel to the effect that Timothy Hill had no prior knowledge that trucks were going to be using the right-of-way for delivering soil to Musser's property. It was argued that since Timothy Hill was unaware of the intention of Musser and was not home (N.T. 7/15/02, at 46 and 60-64) he would not have been aware of nor had the opportunity to interfere with the deliveries. To this Court that argument was offset by Musser's and Ms. Fisher's testimony and the fact that the trucks made deliveries over the course of two different days. Furthermore, this Court did not accept Hills' testimony they were not at home when any deliveries were made.

Sandra Hill testified that she had not spoken to or saw anyone from Gutelius Excavating entering the right-of-way in January of 2000. She testified and supplied evidence to the effect that she worked in Williamsport each day Monday through Friday in January of 2000 from 7:00 a.m. until 2:30 p.m. *See,* N.T. 7/15/2002, at 31-33. This did not persuade the Court she was unaware of the deliveries.

Timothy Hill also testified that he did not interfere with any deliveries of topsoil to Musser's property in January of 2000 and did not even know about the soil being moved onto Musser's property. N.T. 7/15/2002, at 57-59. Defendant also testified that he was at work every day in January

of 2000. ***Id.*** at 58. Concerning his being at work during the days in question, in January of 2000 Timothy Hill testified that he worked from 7:00 a.m. to 3:00 p.m. and that it took twenty minutes to travel from his home to work. ***Id.*** at 62-64. He claimed he first heard about topsoil being delivered when Attorney Drier (Musser's attorney) called him to discuss signing a paper or agreement, or "something." ***Ibid***. According to Timothy Hill, Attorney Drier never asked if he (Hill) knew anything about the deliveries of topsoil. ***Ibid.*** (*See* lines 21-24) At the same time, Timothy Hill testified that in the conversation Attorney Drier did mention the rumor about someone stopping trucks, but that Attorney Drier never indicated that he (Timothy Hill) was involved in stopping the trucks. ***Id.*** at 59. Timothy Hill also testified that Attorney Drier mentioned that a specific neighbor, John Carson, was the person who had stopped the trucks. Timothy Hill stated he knew his former neighbor, John Carson, had a disability and that he had moved somewhere in New York State, but Timothy Hill did not have an address for Carson. ***Id.*** at 61, 61. Timothy Hill also stated in response to a question on direct examination as to whether he knew deliveries were taking place on Musser's property, that he did not and voluntarily added that he had never mentioned pipes or anything in the driveway and did not know where people came up with that. ***Ibid.***

On cross-examination Timothy Hill indicated he did not express any concern to Attorney Drier in their telephone conversation about damages for the right-of-way. He also denied being aware in January of 2000 of Musser's lots being marked off for delivery of stone and fill for a septic system. ***Id.*** at 72. Further, Timothy Hill did not remember anyone stating to him at the meeting in Attorney Drier's office when he signed the agreement with Musser (Defendants' Exhibit No. 5) that Musser accused him

of stopping trucks on the right-of-way. ***Id.*** at 73. There was also testimony introduced that at a prior deposition Timothy Hill objected to Musser's use of the right-of-way because "it's our property." ***Ibid.*** Timothy Hill also acknowledged that the neighbor, Mr. Carson, had access to his property from Route 287 and was merely a concerned neighbor and not personally affected by Musser's use of the right-of-way over Hills' land. ***Id.*** at 77-78. Timothy Hill also acknowledged he had subsequently interfered with Musser's use of the driveway in October 2002. His view was that if Musser had any right to use the roadway it was limited to twelve feet. ***Id.*** at 73-77. This contrasted to some extent with his own testimony that he had no concern or care as to who used the road. ***Id.*** at 73. Timothy Hill also acknowledged under cross-examination that his timecards which were offered in support of his testimony that he was at work until 3:00 p.m. every day in January did not show a quitting time for the date of January 19th.

This Court found that Timothy Hill's testimony was not credible. In some ways he protested too much that he had no concern about the use of the right-of-way and no awareness of trucks making deliveries over it and in particular that he did not know Musser was going to use it to improve his adjoining lands. Timothy Hill's actions, as verified by his own statements as well as Court records, indicated that such was not the case. In addition, his version of the discussion he had with Attorney Drier (who was representing Musser) was not credible to the extent that Timothy Hill said that no one discussed with him the fact that he had stopped the delivery of topsoil nor with his continuing protest he had no knowledge that the roadway was being used for deliveries of topsoil. It is clear from all the testimony in the case that the fact that topsoil or similar materials were being delivered to Musser's

property would have been evident and anticipated. In addition, the Court found Timothy Hill's claim of not being concerned about pipes in the driveway, also overly defensive on that subject, as this issue had not been brought up to him in any question. Finally, Timothy Hill's explanation that he could not have actually seen that deliveries were being made over his driveway and did not interfere with them because he was at work was not credible.

Clearly, within twenty minutes he could have driven from his work to his property and most likely would have arrived home between 3:20 and 3:30 each afternoon. Similarly Sandra Hill would easily have been able to arrive home between 3:00 and 3:30 p.m. after her workday ended. Musser's testimony established that truck deliveries would have been made at least on one day in that afternoon timeframe and the stopping of the trucks at a time of mid- to late afternoon on the second day would also be consistent with Musser's testimony that Gutelius had been making deliveries when he left the area on the second day in the morning or noon time. Afterwards he found out Gutelius had been stopped later the second day. The truck being stopped late in the afternoon of the second day is also consistent with the approximate number of eighteen truckloads that Musser did receive. Clearly a quantity of 18-20 loads of topsoil being delivered on the property immediately adjacent to Hills' home and within view of it, would have been as visible to Hills as it would to their witness, Gail Fisher. Based upon this lack of credibility of Defendant Timothy Hill and the finding of credibility of Musser and his witnesses, this Court found that it was Timothy Hill who had stopped the trucks from making deliveries of topsoil to Musser's property in January of 2000. The Court also found Timothy Hill's statements made to the Gutelius drivers that he did not want the right-of-way used and that it was his property

constituted sufficient interference with the contract between Musser and Gutelius and in fact did cause Gutelius to withdraw from the contract.

3. Sufficiency of Evidence as to Plaintiff's Damages.

At trial, Musser presented testimony to support a claim for damages in an amount of the value of the topsoil that was not delivered to his property based upon market prices for the quantity of topsoil he believed he was deprived of. This amounted to a claim for deprivation of 4,918 cubic yards (approximately 350 loads) having a minimum value of $45,667. *See*, for example 5/23/2002, N.T. at pp. 105-109 and Hills' Exhibit No. 11. The Court, however, rejected the view of Musser that this figure was an accurate measure of pecuniary loss from the interference of the contract. There was some ambiguity and inconsistency, as well as lack of specificity, in establishing the exact quantity and quality of the topsoil to be delivered as well as its actual market price. It was not clear what Musser would actually have had to spend in order to replace the contracted amount of topsoil. At the time of trial, Musser had not secured additional topsoil to fill the need left by the unsatisfied contract. Regardless, the Court is also mindful that the topsoil was being delivered to Musser's property without his expending any out-of-pocket funds. Musser also convincingly testified that it was his intent to use the topsoil to raise the level of the lots in his proposed subdivision to make them more commercially attractive. Musser testified there would have been a sufficient quantity of topsoil from the contract he had with Gutelius to so improve all of his lots. N.T., 5/23/2002, pp. 58, 60-62, 70-74, 89.

If Musser had purchased additional topsoil to raise the remaining lots that were not improved by the topsoil actually delivered by Gutelius, then he would have had an expense that could

have been used to cite a damage figure. Also, with such an expenditure, Musser also would have had the benefit of more valuable ground and would have been able to sell his lots at a higher price. If his contract with Gutelius had not been disrupted by Timothy Hill's wrongful acts, Musser would have had the benefit of higher valued lots without the expense of purchasing topsoil.

Musser clearly established by his testimony that he had ten lots for sale and that five of the lots were improved with the topsoil that had been delivered by Gutelius. He testified the difference in value of the lots with the topsoil compared to the lots without the topsoil was $5,000 per lot. N.T., 5/23/2002, pp. 71-72. The Court found Musser's testimony credible and reasonable in this regard. *See, **Id.*** at 72-74. It was clear the damage he suffered from the loss of the Gutelius contract was the reduced value of the remaining lots without the added topsoil. However, in considering Musser's interest in the matter and the size and compatibility of the lots in question, this Court felt that a more realistic difference in value between the lots with and without the topsoil was $4,000 per lot rather than $5,000. Hence, we awarded $20,000 to Musser on the basis of a decreased value of $4,000 per lot for the five remaining lots. Although Hills claim that these damages were not substantiated, this Court notes that Hills offered no proof to the contrary; nor on cross-examination did Hills impact Musser's credibility in this regard. Musser's testimony seemed reasonable and knowledgeable and was accepted by the Court. Musser suffered a loss of value as to the improvement the topsoil would have made to his land. This is a pecuniary loss sustained by Musser directly attributable to Hills' interference with the contract.

4. Sufficiency of Evidence as to Defendants' Damages in the Amount of $800 and the Court's Award of Equitable Relief Requiring Plaintiff to Repair the Roadway

At trial there was a significant dispute as to whether or not Musser had caused damage to the 50-foot right-of-way or to any of Hills' property beyond that right-of-way, and if so, the extent of that damage. The Court notes that Hills on appeal have not questioned this Court's finding that Musser had the right to make improvements to the right-of-way suitable for allowing access to his subdivision. Therefore, the evidence and legal principles related thereto will not be discussed. Suffice it to say this Court is satisfied that the right-of-way has a width of 50 feet and was appropriately intended to serve Musser's property including its subdivision. The use made by Musser was not an unreasonable increase in any burden upon Hills.[4]

However, this Court found, primarily based upon Hills' photographic Exhibits (4e through i, in particular), that Musser's improvement of the right-of-way was confined to being entirely within the 50-foot right-of-way area. The only significant difficulty with the work done by Musser was the lack of putting a sufficient amount of stone upon the roadway so as to keep water from standing upon it in times of heavy rain.

The Court was also satisfied, based upon all the testimony, that some topsoil had been removed from this right-of-way when the stone was placed upon it and that Hills had a right to the value of that topsoil. Upon considering the post-verdict motion, this Court determined the value of the moved

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[4] In this regard, reference may be had as to the manner in which the right-of-way was created by the parties' common predecessor in title, Edward Fisher. At that time the Fisher property was subdivided including subdivision to create Hill's residential lot, it was obvious that the reservation of the right-of-way was such as to enable Fisher to further develop and subdivide this property, noting that it had several rental properties and separate lots already created from the main tract. *See*, among others, N.T. 5/23/2002, pp. 55-58. Musser's Exhibits 1, 2 and 3 and also discussion of the Court in Opinion and Order of November 27, 2002.

soil to be $800. Accordingly, Court directed payment of damages of that amount to Hills by Musser and also directed Musser to appropriately improve the right-of-way by placing additional stone in a timely manner so as to remedy the standing water problem. The Court in doing so rejected Hills' contentions that they were entitled to damages for the trees and shrubbery that were removed, that the work exceeded the 50-foot right-of-way, and that storm basins and other improvements to the roadway were necessary. Musser testified that the tree removed was within the 50-foot right-of-way. N. T., 5/23/2002, at pp. 87-88. Timothy Hill also acknowledged that all of the work done was within the 50-foot right-of-way. N.T., 7/15/2002, pp. 77-79. It was also clear from Timothy Hill's testimony that the improvements to the road consisted of grading and adding the stone to increase the cartway width from its original 12 feet to approximately 24 feet. The topsoil removed would have only been from the additional 12 feet of the ground to the right of the original cartway. N.T., 7/15/2002, pp. 79-82.

In determining the amount of damages occasioned by Musser's work on the right-of-way, this Court rejected the testimony of Hills and their expert witness, David Getgen. Mr. Getgen's testimony indicated he had provided several estimates (Hills' Exhibit 7 and Hills' Exhibit 7a on May 8, 2002) to Hills indicating, among other things, that there would be a $14,995 cost to remove the widened road from Hills' property and a $6,995 cost to repair and restore the existing road to its original condition and install a catch basin and grate to remove water. To improve the existing road by removing additional topsoil and piling it on site and to supply a stone base would cost an additional $5,475. *See*, Hills' Exhibit 7 and N.T., 5/23/2002, pp. 135-136. The Court noted Mr. Getgen testified that the amount of topsoil to restore the improved part of the 50-foot right-of-way would have involved six

loads. *See*, N.T., 5/23/2002, p. 138. He also indicated that the main problem with the roadway was that it needed to have the grade increased with more stone being placed upon it so as to raise it. The raising of the roadway would remove the water from it. ***Id.*** at 138, 139. Mr. Getgen also acknowledged that the 15 x 20 foot area for which he submitted an estimate for repair would have been outside of the roadway. ***Id.*** at 139, s*ee also* Hills' Exhibit 7a, an estimate for $375 of work.

As to the 15 x 20-foot area, this Court was not satisfied that any damage to that area was occasioned by anything done by Musser or Musser's employees given Timothy Hill's additional statement that all the work was within the 50-foot right-of-way. The Court found and Hills do not now contest that there was no legal basis to require Musser to remove the stone and restore the right-of-way to its original soiled condition. Furthermore, Getgen's overall estimate was inconsistent. If the roadway was to be returned to its original condition – 12 feet wide instead of 24 feet – stone would be removed, not added. Further, additional topsoil would not be removed and piled on site. Also, Getgen's prices for work in Exhibit 7 were in inconsistent with Hills' Exhibit 6, the original estimate of Mr. Getgen for essentially the same work rendered by him in October of 2000. *See*, N.T., 5/23/2002, pp. 135-136.

Mr. Getgen also acknowledged that $150 per load would be an appropriate price for the topsoil that would have to be delivered. *See*, N.T., 5/23/2002, pp. 132 and 142. Coupled with his testimony that six loads of topsoil were needed to restore the road to its original condition, this allowed the Court to award Hills six truckloads at $150 per truckload, or the total amount of $800 for replacing the right-of-way topsoil that was removed.

The Court was not convinced by Mr. Getgen's testimony that there was a sufficient water problem requiring a catch basin and storm sewer piping, particularly when this roadway plan had been approved by the County and Township Authorities, including a storm water runoff plan. This contrasted with the testimony of Hills' own witness, Gail Fisher, to the extent that the area in question was generally always wet. *See*, N.T., 5/23/2002, p. 221. It also differed from Musser's testimony that the roadway was installed in accordance with roadway design approved by the appropriate municipal authorities charged with the responsibility for doing so. *See*, N.T., 7/15/2002, pp. 97-100.

The Court found that Hills did not meet their burden of proving there was a water run-off problem. They offered no testimony of any damage caused by any run-off. They only established that in times of heavy rainwater ponded on the roadway in certain areas. Musser and Hills' witness, Mr. Getgen, indicated that the ponding problem could be solved by adding more stone to the roadway to grade it appropriately. Therefore, this Court directed Musser to make that improvement to the road.

Conclusion

Based upon the foregoing, the Court believes it has demonstrated there was appropriate evidence introduced at this trial that this Court found credible to support the eventual verdict rendered after argument of post-trial motions. The Court recommends to the Superior Court that it affirm this Court's rulings below and dismiss the appeal.

BY THE COURT,

William S. Kieser, Judge