[Cite as *Craig v. Knaub*, 2004-Ohio-6646.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RAYMOND CRAIG

Plaintiff-Appellee

-vs-

PAUL KNAUB, et al.

Defendants-Appellants

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 04 CA 9

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 03 CV 371
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 9, 2004

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellants

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Wise, J.

{¶1} Appellants Paul and Jencie Knaub appeal the decision of the Court of Common Pleas, Perry County, which granted summary judgment in favor of Appellee Raymond Craig, and simultaneously denied appellants' own motion for summary judgment. The relevant facts leading to this appeal are as follows.

{¶2} Appellants own residential property at 6369 Saltlick Township Road 273 in Perry County. The road at issue in this matter, Saltlick Township Road 273 (hereinafter "T.R. 273"), runs in a generally perpendicular direction off of State Route 93. Appellee owns real estate adjoining that owned by appellants. On October 8, 2003, appellee filed a complaint seeking a preliminary and permanent injunction against appellants, alleging that appellants were preventing him from using T.R. 273 for ingress and egress from his property. Appellants timely filed an answer, counterclaim, and request for a restraining order, alleging appellee had damaged their property by using a bulldozer on their land, and by dumping gravel on the nonmaintained portion of the roadway, which appellants claimed was abandoned. Appellants alleged in their accompanying affidavits that neither the county nor the township had maintained T.R. 273 past the point of appellants' house, i.e., approximately 750 feet from the intersection with State Route 93, since before 1995.

{¶3} On January 23, 2004, the trial court granted appellants an order restraining appellee from making further changes to the property areas in dispute. Both sides thereafter filed motions for summary judgment. On May 3, 2004, the trial court issued judgment entries denying appellants' motion for summary judgment, granting appellee's motion for summary judgment, and vacating appellants' restraining order.

Appellee was thus permitted to use the roadway in question to enter and exit his property.

{¶4} Appellants thereupon timely appealed, and hereby raise the following two Assignments of Error:

{¶5} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF IN THAT THERE IS A DISPUTE OF MATERIAL FACT RELATED TO THE OWNERSHIP OF THE PROPERTY THROUGH WHICH PLAINTIFF'S IMPROVED ROADWAY RUNS AND AS TO THE COURSE TOWNSHIP ROAD 273 TAKES ONCE IT PASSES THE DEFENDANTS' HOME.

{¶6} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF AND IN DENYING SUMMARY JUDGMENT TO THE DEFENDANTS IN THAT THE PLAINTIFF HAD NO GROUNDS UPON WHICH TO ASSERT THE RIGHTS OF THE TOWNSHIP TRUSTEES TO IMPROVE AND MAINTAIN TOWNSHIP ROAD 273.

Standard of Review

{¶7} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, 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 therefrom, 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 his favor.

{¶8} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶9} We will address the two Assignments of Error in reverse order.

II.

{¶10} In their Second Assignment of Error, appellants argue that the trial court erred in denying summary judgment to appellants and granting summary judgment in favor of appellee concerning appellee's right to make improvements to T.R. 273. We disagree.

{¶11} Under Ohio law, legal abandonment of a public township road requires formal abandonment proceedings before the local board of county commissioners, as outlined in R.C. 5553.042(A): "A township shall lose all rights in and to any public road, highway, street, or alley which has been abandoned and not used for a period of twenty-one years, after formal proceedings for vacation as provided in sections 5553.04 to 5553.11 of the Revised Code have been taken.* * *" The Ohio Supreme Court has held that "R.C. 5553.042 provides the exclusive remedy for abutting landowners who desire a township road to be vacated." *Bigler v. York Twp*. (1993), 66 Ohio St.3d 98, syllabus. Accord *Haudenschield v. Lotz* (Aug. 10, 1992), Hardin App. No. 6-91-27.

{¶12} Appellants provided no demonstration to the trial court of statutory abandonment proceedings, involving appellants or any other party, in connection T.R. 273. We hold that appellants failed to demonstrate the existence of abandonment as a matter of law, and therefore summary judgment was properly granted to appellee and denied to appellants. Furthermore, appellants have failed to provide us with any authority that they had standing to contest the improvements made by appellee to T.R. 273, where the township was not made a party to the case.

{¶13} Appellants' Second Assignment of Error is therefore overruled.

I.

{¶14} In their First Assignment of Error, appellants again contend the court erred in granting summary judgment in favor of appellee. We disagree.

{¶15} Appellants' chief contention herein is that a material issue of fact was evinced when appellee stated the following in his plaintiff's pretrial statement: "1. STATEMENT OF FACTS. The plaintiff and defendants own real estate which is

adjoining. The plaintiff claims that the boundary to the real estate is in one location and the defendants claim that th[e] boundary is at another." Plaintiff's Pretrial Statement, February 6, 2004. Thus, urge appellants, appellee's pleadings constitute an "admission" that a boundary dispute exists, making summary judgment improper.

{¶16} We are unpersuaded by appellants' arguments in this regard, which appear to merely create a red herring. Whatever the "issue" created by appellee's pretrial statement, the gist of his complaint remained his desire to access and utilize the nonmaintained township road. We find the alleged property boundary dispute was therefore immaterial to appellee's complaint concerning T.R. 273, especially in light of both appellants' unambiguous references to the road in their various averments. For example, appellants alleged that " * * * as a direct and proximate result of [appellee's] actions, Township Road 273 now appears to be usable by motor vehicles of almost any type." See Affidavits of Paul and Jencie Knaub, September 4, 2003. Likewise, both appellants averred that neither the county nor the township had for several years cleared any snow, removed debris, nor put down gravel or pavement materials on T.R. 273 past the point where their residence stands. Id. Such evidence clearly indicates that appellants have heretofore expressed no serious doubts as to the location of the roadway they sought to curtail or to have declared abandoned by the trial court.

{¶17} Accordingly, upon review, we concur with the trial court's conclusion that no genuine issue of material fact existed which would prevent summary judgment in favor of appellee on his complaint for a permanent injunction to ensure ingress and egress.

{¶18} Appellants' First Assignment of Error is overruled.

{¶19} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Perry County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Edwards, J., concur.

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JUDGES

JWW/d 1115

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RAYMOND CRAIG	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
PAUL KNAUB, ET AL.	:	
	:	
Defendants-Appellants	:	Case No. 04 CA 9

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Perry County, Ohio, is affirmed.

Costs to appellants.

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JUDGES