[Cite as *Dickess v. Stephens*, 2010-Ohio-32.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

DONNA GAIL DICKESS, et al.,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 08CA38
	:	
vs.	:	**Released: January 5, 2010**
	:	
JASON C. STEPHENS, et al.,	:	DECISION AND
	:	JUDGMENT ENTRY
	:	
Defendants-Appellees.	:	

APPEARANCES:

Fazeel S. Kahn, Blaugrund, Herbert & Martin, Inc., Worthington, Ohio, for Appellants.[1]

J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Robert C. Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for Appellees.

McFarland, J.:

{¶1} This is an appeal from a post-remand decision by the Lawrence County Common Pleas Court which determined the width of a township road and adjacent right-of-way to be thirty (30) feet.[2] On appeal,

[1] Appellants' initial notice of appeal was filed by their trial counsel, Stephen C. Rodeheffer; however, Mr. Rodeheffer subsequently withdrew from the case via a notice of substitution that was filed with this Court on January 6, 2009, which substituted Appellant's current counsel, Mr. Kahn, in place of Mr. Rodeheffer.

[2] The County Commissioners named in this action are Jason C. Stephens, Paul H. Herrell and George R. Patterson. The Township Trustees named in this action are Kenneth L. Everhart, Jon P. Collier and Alvin J. Harper, Jr. The property owners named in this action are John Harper, Norma J. Harper, Merrill David Humphreys, Edith R. Humphreys, Robert Jameson, Janice Jameson, William McKenzie and Karen McKenzie.

Appellants, Donna[3] and Kenneth Dickess, raise only one assignment of error, contending that the trial court erred in including land in the right-of-way beyond that required to maintain the existing ten (10) foot wide road. Because we conclude that the trial court's decision was based upon competent, credible evidence, we overrule Appellant's sole assignment of error. Accordingly, we affirm the decision of the trial court.

FACTS

{¶2} As set forth in our most recent consideration of this matter, Appellants are the owners of real property adjacent to Lawrence Township Road 248. On August 22, 2002, the Commissioners passed a resolution declaring the width of the road to be thirty feet, thereby widening the road from its historical width of ten feet. Appellants commenced this case in an effort to block that action. Specifically, they argued that the Commissioners violated various provisions in R.C. Chapter 5553 regarding alteration of county roads. Appellants asked for injunctive relief, a declaratory judgment that the Commissioners' resolution was null and void, and a judgment directing them to proceed with a land appropriation proceeding pursuant to R.C. Chapter 163. The Commissioners and the Trustees filed a joint answer and denied that their attempts to widen the road were unlawful.

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[3] The record reveals that Appellants' trial counsel filed a suggestion of death on June 26, 2008, indicating Mrs. Dickess died on January 27, 2008.

{¶3} Appellants filed a motion for summary judgment asserting that no genuine issues of material fact existed in this case. Appellants specifically argued that they were entitled to a judgment 1) finding the township road is ten feet wide; 2) ordering the Lawrence County Engineer to submit a survey that establishes a description of the roadway; and 3) declaring that the Commissioners and Trustees failed to comply with statutory provisions necessary for widening the road. Appellees filed a memorandum contra, arguing that genuine issues of material fact remained and must be resolved.

{¶4} On July 28, 2004, the trial court granted summary judgment in favor of the Appellees, but only as to the issue of the roadway's width. The court determined that no genuine issues of material fact existed with regard to the width of the road and, as Appellants argued in their motion, the road was ten feet wide. The court further ordered the Lawrence County Engineer to conduct a survey to establish a description of the roadway. Having found that the road was ten feet wide, the court further found that the other matters raised in the motion had been rendered moot and, thus, overruled them. The court then found "no just cause for delay." An appeal followed, which this Court dismissed without addressing the merits.

{¶5} In that opinion, we found a jurisdictional problem in that the judgment appealed was not a final, appealable order. Our reasoning was based on our determination that the trial court, in its judgment entry, merely determined the width of the road at issue, which was a determination that did not affect a substantial right.[4] As such, the trial court had failed to actually enter judgment for either party on any claim in the case. We also noted that there were three branches to Appellees' Complaint and the trial court did not enter judgment for any party on any of the three branches.

{¶6} As a result of the dismissal of the prior appeal, the trial court, on July 12, 2005, released a second judgment entry. In this entry, the trial court again determined the width of roadway to be ten feet, but also affirmatively granted judgment in favor of Appellees on Branch One of their Complaint.[5] The trial court also declared the Resolution of the Lawrence Township Trustees relating to Township Road 248 to be null and void and in violation of Appellants' property rights. Further, the trial court again ordered the Lawrence County Engineer to conduct a survey to establish a description of the roadway. Thus, we found the trial court's judgment entry of July 12,

[4] We reasoned that the width of a roadway is an interlocutory determination capable of being changed by the court at any time prior to the entry of final judgment for either party.

[5] Just prior to release of the trial court's second judgment entry, Appellees voluntarily dismissed Branches two and three of their Complaint.

2005, to be a final, appealable order and therefore addressed the merits of the appeal.

{¶7} In the second appeal of this matter, which was initiated by Appellee Commissioners herein, it was argued that the trial court erred in granting summary judgment to Appellants herein because genuine issues of material fact existed. After considering the record before us, we ultimately affirmed the trial court's determination that the actual roadway at issue was ten feet wide; however, we remanded the matter for the limited purpose of determining the width of the right-of-way necessary in order to maintain the roadway. *Dickess, et al. v. Stephens, et al.*, Lawrence App. No. 05CA26, 2006-Ohio-4972. In doing so, we relied upon two Ohio Attorney General Opinions which stated that:

"The right of way of a township road established by common law dedication or prescription includes both the improved road surface used for travel and as much of the land immediately adjacent thereto, and the use thereof, as is necessarily incident to the safe and efficient use of such road surface for actual travel." 1994 Op. Att'y Gen. No. 94-032; 1988 Op. Att'y Gen. No. 88-080.

{¶8} We further based our opinion on the reasoning that "it would be unreasonable to declare Township Road 248 to be a public road, thereby charging the Township with the duty to maintain the road, without granting the Township the right-of-way needed to maintain the road." As such, we

remanded the matter "for further proceedings to determine the width of the right-of-way."

{¶9} In response to our remand order, the trial court held an evidentiary hearing on October 14, 2008. At that hearing, Appellees presented two witnesses; David Lynd, Lawrence County Engineer, and John Collier, a township trustee. The testimony of both witnesses indicated that the total right-of-way needed to maintain the existing road, including the improved portion of the road, needed to be thirty feet wide.

{¶10} Appellants presented several witness, including Appellant, Keith Dickess, as well as Keith Dickess, Jr. and Kenneth Dickess, Appellants' sons. Each of these witnesses testified that no more than ten feet in total was needed to maintain the roadway. Merrill Humphreys, an adjacent property owner, also provided testimony upon questioning by the court. Mr. Humphreys testified that, in his opinion, the road needed to be wide enough so that two cars are able to pass. He testified that currently, if two cars meet, there is no room to pull over and someone is required to back up.

{¶11} After hearing the evidence presented by all parties, the trial court issued a final appealable order on November 5, 2008, finding "that the right-of-way, which includes both the improved road surface used for travel

and the land immediately adjacent thereto for the safe and efficient use of the actual road service should be 30 feet." The trial court further ordered the Lawrence County Engineer to conduct a survey to establish a legal description of the roadway, specifying, in pertinent part, that the width of the right-of-way shall be 15 feet on both sides of the center line. It is from this final order that Appellants' have filed an appeal, assigning a sole assignment of error for our review.[6]

ASSIGNMENT OF ERROR

"I. THE HONORABLE TRIAL COURT ERRED IN INCLUDING LAND IN THE RIGHT OF WAY BEYOND THAT REQUIRED TO MAINTAIN THE EXISTING TEN (10) FOOT WIDE ROAD."

LEGAL ANALYSIS

{¶12} In their sole assignment of error, Appellants contend that the trial court erred in including land in the right-of-way beyond that required to maintain the existing ten foot wide road. Appellants contend that the issue before us is whether the trial court determined the width of the right-of-way based on the competent, credible evidence before it. In support of their stated issue for review, Appellants set forth a three-pronged argument, claiming that 1) the scope of the issue on remand was limited to how much

[6] Subsequently, on February 2, 2009, Appellants filed a motion to stay execution of judgment, claiming irreparable harm would result if the trial court's judgment was executed pending appeal. Specifically, Appellant, Keith Dickess, claimed that the trees on his property would be destroyed. By entry dated March 2, 2009, this Court granted Appellants' request for a stay, pending further order of this Court.

land on either side of the traveled portion of the road was required to maintain the road, based on evidence limited to the prior past maintenance of the road; 2) based upon the uncontroverted testimony at trial, the only past maintenance performed on the road was grading and gravelling; and 3) the expert opinions provided by Lawrence County Engineer, David Lynd, were irrelevant and contrary to the issue to be determined at trial. Thus, Appellants essentially argue that the trial court's decision was against the manifest weight of the evidence.

{¶13} The judgment of a trial court should not be overturned as being against the manifest weight of the evidence if some competent and credible evidence supports that judgment. See, e .g., *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St .2d 279, 376 N.E.2d 578, at the syllabus.

{¶14} Further, in determining whether a judgment is against the manifest weight of the evidence, the credibility of witnesses and the weight given to the evidence are issues for the trier of fact. See, e.g., *Cole v. Complete Auto Transit, Inc.* (1997), 119 Ohio App.3d 771, 777-778, 696 N.E.2d 289; *GTE Telephone Operations v. J & H Reinforcing & Structural Erectors, Inc* ., Scioto App. No. 01CA2808, 2002-Ohio-2553, at ¶ 10; *Reed v. Smith* (Mar. 14, 2001), 4th Dist. No. 00CA650. The trier of fact is better

suited than an appellate court to view the witnesses and observe their demeanor, gestures, and voice inflections and to use those observations in weighing credibility. Thus, the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it. *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591; see, also, *State v. Nichols* (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; *State v. Harriston* (1989), 63 Ohio App.3d 58, 63, 577 N.E.2d 1144.

{¶15} Appellees respond to the arguments raised under Appellants' assignment of error by stating that Appellants' position that the hearing on remand was limited to prior past maintenance of the road versus what maintenance is presently needed is simply incorrect. We agree. As set forth in our prior decision of this matter, we found that a genuine issue of material fact existed as "to the width of the right-of-way necessary to maintain Township Road 248." As such, we remanded the matter "for further proceedings to determine the width of the right-of-way." The trial court complied and held an evidentiary hearing on October 14, 2008.

{¶16} At that hearing, Appellees presented two witnesses: 1) David Lynd, Lawrence County Engineer; and 2) John Collier, a township trustee. Appellants challenge Lynd's testimony, claiming that it was irrelevant and

speculative. Specifically, Appellants challenge the admissibility of Lynd's testimony as expert testimony, arguing that the matter at issue did not relate to anything beyond the knowledge or experience possessed by lay persons. In response to this challenge by Appellants, we note that a review of the record fails to indicate any objection whatsoever to Lynd's testimony, before, during, or after the hearing. Thus, Appellants' challenge to his testimony is not well taken. Additionally, Lynd testified that he had been the Lawrence County Engineer for twenty five years, had a master's degree in civil engineering, was a registered professional engineer and surveyor in Ohio and West Virginia and was familiar with the roadway at issue. Accordingly, even if Appellants had properly preserved their challenge to his testimony by lodging an objection below, we would have concluded that he was certainly qualified to provide expert opinion and that his testimony was helpful to the trier of fact in reaching its decision.

{¶17} Further, although Appellants argue that Lynd's testimony was speculative in that he testified regarding what maintenance may be required on the road in the future, a review of Lynd's complete testimony reveals that he offered his opinions as to what maintenance was presently required, based upon the current condition of the road, as well as what might be

needed in the future if certain conditions arise. For example, the following testimony was offered by Lynd on direct examination at the hearing:

"Q. And given that and given your experience and the things you testified about, the need besides the width of the roadway, in particular to township road 248, do you have an opinion, to a reasonable degree of professional engineering certainty, as to the width of the right of way that would be reasonably necessary in order for the township trustees to adequately maintain township 248?

A. In general and in particular I believe that thirty feet would be appropriate to maintain the road.

Q. All right, now when you are talking about thirty feet are you talking about including the ten feet?

A. Thirty feet total, yes. Fifteen feet from either side, from the center line or either side.

Q. What's the basis, particularly with this township road, and what you've seen. It may be applied generally, too, but why you needed the ten feet on either in addition to the roadway itself?

A. Well, in general if you are going to have a ditch that is a couple of feet deep to drain the roadway you would, with a one to one slope you would [need] another six feet just for the ditch itself, not including any shoulder. So if you include any shoulder at all, for two vehicles to pass you need probably sixteen feet. An automobile is about six feet wide or a little wider.

Q. Even though the ten feet is the width of the actual roadway, is it your testimony that you need a shoulder so that if two cars are meeting each other, going opposite directions, there has to be a place that one can get over safely and out of the way of the other one, and that would be the purpose of the shoulder?

A. Yes, and also if you run off of the traveled surface so you don't go immediately into the ditch, *if there needs to be a ditch*."[7]

Lynd further testified upon cross examination as follows:

"Q. You say that it's necessary to have ten feet to provide ditching?

A. Yes.

Q. What else?

A. Basically a shoulder from one to two feet from the traveled edge beyond where you actually drive, in other words you might have a grass shoulder on some roads. On some asphalt paved roads you would have a gravel shoulder so that if you run off the actual traveled portion of the road you don't run immediately into whatever drainage ditch there may be.

Q. Do you know when, are there any drainage ditches on this road now?

A. I don't know precisely what's there. There are, I don't know.

Q. You would agree with me, wouldn't you Mr. Lynd that whatever is out there. Whatever maintenance has been preformed (sic) on this road it is sufficient to allow people to get in and out of the road, is it not?

A. The road is not impassable but it might not be in the best condition.

Q. Because it needs to be grated (sic) and it probably needs to be graveled?

A. And perhaps drained also.

[7] Appellants seem to place much emphasis on comments by Lynd which seem to suggest, but yet do not unequivocally state, that the roadway at issue requires ditching, claiming that his testimony is speculative in nature. However, as further set forth, Lynd goes on to testify that the presence of potholes on the road suggest water and wetness problems which lead to a conclusion that ditching is necessary, at least on parts of the roadway. He further testifies, infra, that ditching is needed on "certain areas of the road" but "[p]erhaps not along the whole distance of the road," leaving additional ditching as an option in the future if the need arises.

Q. Perhaps what?

A. Perhaps drained also. If there is water standing. I don't know that I am only speculating.

* * *

Q. When you were out there, and I think you indicated about a year ago, were you able to go and travel on the road?

A. Yes.

Q. What condition was the road in?

A. I believe that there were some problems in the road that needed to be grated (sic) and taken care of.

Q. Besides that. Anything else that you saw the road needed in order [for] the public to travel on the roadway?

A. In general if there are pot holes in the road those are probably caused by wet conditions. So there might have needed to be some drainage in certain areas of the road. Perhaps not along the whole distance of the road.

Q. Your (sic) talking about in general. I'm talking about township road 248.

A. No I mean on that particular road. There were some potholes that needed to be grated (sic) and filled. Generally potholes are caused by excessive water.

Q. Do you know whether that's the case with township road 248?

A. I would have to say I would assume that it is if there are potholes there.

Q. Potholes can also be caused by just traffic.

A. It's generally a combination of traffic with the wet conditions underneath with inadequate base.

Q. Okay, so as I understand it is what we need to have is enough space on this road to allow for grating (sic), is that correct?

A. Yes.

Q. And to allow, as you've indicated, ditching of some kind.

A. Yes."

{¶18} John Collier, township trustee, also testified. He testified that while the township had not been able to grade the road since the litigation initially began, potholes had been filled in and gravel had been put down. He agreed with Lynd's recommendation that the road and right-of-way should be thirty feet wide. He further testified that the road has been in poor condition because the township had been unable to ditch it, partly due to the fact that they have never known how far they could go, and also because of the pending litigation. Thus, Collier's testimony confirmed Lynd's testimony regarding the presence of potholes on the road and the need for ditching.

{¶19} We reject Appellants' contention that the trial court, on remand, was limited to deciding the necessary width of the roadway based only upon historical use and maintenance. Instead, the function of the trial court on remand was to determine "the width of the right-of-way necessary to

maintain Township Road 248." That is, what is presently needed to maintain the roadway, in its current condition, not what the township had been limited to after its resolution and the onset of this initial litigation.

{¶20} Further, although Appellants argue that David Lynd's testimony should have been afforded less weight by the trial court, as set forth above, "in determining whether a judgment is against the manifest weight of the evidence, the credibility of witnesses and the weight given to the evidence are issues for the trier of fact." *Cole*, supra. Further, "the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it." *Rogers*, supra.

{¶21} In light of the testimony by both David Lynd and John Collier, we conclude that the trial court's decision was supported by ample, competent and credible evidence, which was essentially unrefuted, with the exception of Appellant's personal opinions that the total right-of-way, including the improved portion of the road, need not exceed ten feet. Clearly Appellants' opinions were in direct contradiction with our prior determination of this matter, which reasoned that the township must be permitted a right-of-way beyond the ten foot width of the actual roadway in order to properly maintain it and also to protect itself from liability.

{¶22} Accordingly, we overrule Appellant's sole assignment of error and affirm the decision of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellees recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.