[Cite as *Anderson v. Fleagane*, 2022-Ohio-1120.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

LOLA ANDERSON et al.,

Plaintiffs-Appellees,

v.

JAMES J. FLEAGANE et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 21 BE 0020

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 16 CV 464

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Adam L. Myser, Myser & Myser, 320 Howard Street, Bridgeport, Ohio 43912, for Plaintiffs-Appellees and

Atty. Charles L. Kidder, *Atty. Steven R. R. Anderson,* Kidder Law Firm, LLC, 131 West Market Street, Cadiz, Ohio 43907 for Defendants-Appellants.

Dated: March 28, 2022

Robb, J.

{¶1} Defendants-Appellants James and Norma Fleagane appeal the decision of the Belmont County Common Pleas Court which granted summary judgment in favor of Plaintiffs-Appellees Lola and Kerry Anderson on their claim for a driveway easement and which denied Appellant's cross-motion for summary judgment and motion for contempt. Appellants argue the court erred in granting the Appellees an easement through their property in order for Appellees to reach landlocked property they purchased at a sheriff's sale. However, we conclude Appellees had an implied easement to access their property.

{¶2} Appellants also contend the trial court was required to hold a hearing on their contempt motion. However, a hearing is not automatically required before *denying* a motion for contempt. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶3} In 1974, Appellants purchased land near State Route 214 in Belmont County. One tract contained over 55 acres. (Vol. 553, P. 144, Tract II). They started building a house on this tract in 1976 and began residing in the house in 1977. (7/30/18 Tr. 27-28).

{¶4} In 1978, Appellants recorded a deed conveying 13.350 acres of this tract (hereinafter referred to as the "House Lot") to themselves as co-trustees for two trusts they created, JNJ Trust No. 1 and JNJ Trust No. 2. (Executed 10/25/77, Recorded 2/22/78 at Vol. 575, P. 130). Their remaining property from the 55-acre tract was thereby reduced to approximately 41 acres and located to the south and east of the House Lot.

{¶5} In 1981, an appropriation case was filed by the State of Ohio against Appellants as co-trustees to take approximately two acres from the House Lot in order to build an exit ramp for I-470, which was north of the property, and re-route Route 214, which was east of the property (and was converted to a county road). As the state sought all 91 feet of frontage along Route 214, the House Lot would not only decrease in size to approximately eleven acres but would also become landlocked. The recorded judgment entry on the jury verdict said the parties stipulated the date of taking was October 21,

1981. (12/15/82 J.E. in 81-CIV-17); (Vol. 610, P. 214). (Other property owned by Appellants was also appropriated.)

{¶6} Appellants authorized the State of Ohio to build a new driveway to the House Lot from Appellants' individual property starting at Route 214. (Apt. Br. at 2, stating they did this as individuals and co-trustees). The 25-foot wide concrete driveway runs 200 feet through Appellants' 41-acre tract. Upon reaching the House Lot, the main drive continues straight to what is now Appellees' house. A left fork runs on Appellants' land along the property line towards Appellants' barn but then turns right into Appellees' property and eventually joins the other fork, making a loop in the front of Appellees' house. A county water line runs along the main drive to the house.

{¶7} On February 20, 2002, Appellants as co-trustees conveyed the House Lot to the Michaels. (Vol. 774, P. 897). The deed reserved mineral rights with the right to mine and provided "the Sellers" a right to repurchase the property (for $275,000 plus improvements), a right of first refusal, a 40-foot right-of-way over the House Lot to reach the "Sellers' adjacent property," and a right to establish rights-of-way or easements for utilities and development of that adjacent property.[1]

{¶8} The parties agree this deed did not provide the Michaels with an express easement to access the property via the driveway on Appellants' property. Mr. Fleagane attested he gave the Michaels verbal permission to use the driveway through his property to reach the landlocked house.

{¶9} In 2010, a foreclosure action was filed against the Michaels by their lender. Appellants were involved in that lawsuit where they raised their right to repurchase and right of first refusal. (Ex. J to Def. S.J. Mot.).[2] This exhibit from the foreclosure action showed: Appellants informed the lender the property was landlocked; the lender obtained an opinion from a surveyor; and the surveyor's attached 2015 affidavit opined the property

[1] In 1996, Appellants purchased additional acreage to the north and west of the House Lot from the same people who sold them the 55 acres (which became 41 acres upon the creation of the House Lot). We note the 2002 deed from the trusts to the Michaels spoke of the "Sellers' adjacent property" even though it appears the two adjacent properties were owned by Appellants as individuals, not by the trusts.

[2] When the foreclosure case was on appeal, this court held the repurchase option did not run with the land or survive foreclosure (but the Fleaganes could exercise this option prior to foreclosure if they satisfied the Michaels' mortgage) and the foreclosure was not a triggering event for the right of first refusal. *Wells Fargo Bank, N.A. v. Michael,* 7th Dist. Belmont No. 12 BE 26, 2013-Ohio-2545, 993 N.E.2d 786, ¶ 50.

was not landlocked as there was an easement for the driveway and waterlines. It also showed Appellants placed the highest bid for the House Lot at a 2014 sheriff's sale but then forfeited their deposit and released their bid.

{¶10} Lola Anderson was interested in purchasing the House Lot for her daughter in 2013. She used the drive to reach the house (in an attempt to speak to the Michaels). (L.A. Depo. at 122). She believed the first sheriff's sale was then canceled. (L.A. Depo. at 20). When the House Lot was being auctioned again, Mrs. Anderson was the highest bidder at the August 31, 2016 sheriff's sale. She acknowledged she did not perform due diligence or research the property immediately before attending the latest sale and indicated her daughter asked her to place the bid. Mrs. Anderson said Mr. Fleagane approached her before she paid the deposit to say the property was landlocked, indicating she could not use the driveway on his property. She said she asked the attending sheriff if she could be released from the purchase and he opined such act would be contempt and the property was not landlocked. (L.A. Depo. at 50-51). She then paid the deposit.

{¶11} Her daughter thereafter received a certified title opinion from an attorney; he said he reviewed the deed and communicated with the Belmont County Engineer who concluded the property was landlocked. This title opinion also acknowledged the affidavit in the foreclosure proceedings, wherein the surveyor opined the property was not landlocked due to an easement. Mrs. Anderson then paid the remaining balance and received a sheriff's deed for the House Lot. (Executed 10/25/16, Recorded 10/31/16 at Vol. 647, P. 338). She said she was bound to make the final payment. (L.A. Dep. 74). She thereafter contacted the State of Ohio to inquire about accessing the road across the appropriated property.

{¶12} On December 29, 2016, an attorney for the Ohio Department of Transportation (ODOT) responded. Initially, he noted the surveyor's affidavit in the foreclosure action was based on the recorded judgment entry in the appropriation case but that entry merely gave *the state* a "temporary right to construct a drive and water line." ODOT's attorney pointed out the state's driveway easement expired. He also said Appellees could not be granted access to Route 214 through the appropriated property as it would violate state and federal engineering safety standards concerning an exit ramp.

{¶13} On December 9, 2016, Appellees (Mrs. Anderson and her husband, based on his dower interest) filed a complaint against Appellants (the Fleaganes). They asserted claims for prescriptive easement, easement by necessity, and easement by estoppel. They also sought quiet title and injunctive relief, stating Appellants blocked the driveway with a fence.

{¶14} Appellants filed a counterclaim seeking a declaratory judgment that there was no easement or right-of-way and asserting claims for quiet title and trespass (based on the entry and removal of a gate which blocked access to the driveway). They confirmed the lender's surveyor failed to realize the driveway and water lines discussed in the appropriation entry was a temporary right of way in favor of the State.

{¶15} A temporary restraining order was issued which prevented Appellants from obstructing access to the House Lot. The parties then agreed to the terms of the preliminary injunction in an agreed judgment entry which granted Appellees vehicular and pedestrian ingress and egress over the driveway and access for purposes of water or other utility lines along the driveway for the duration of the lawsuit. Appellees were ordered to confine their use of Appellants' property to the existing driveway corridor and make no alterations to the driveway. (1/4/17 Agreed J.E.).

{¶16} On April, 6, 2018, Appellants filed a motion for summary judgment. First, they argued there was no express easement (although the complaint did not allege an express easement). Mr. Fleagane's affidavit said his verbal authorization for use of the driveway was exclusive to the Michaels and was to terminate at the time of any subsequent conveyance of the House Lot. They argued this permission negated an easement by prescription.

{¶17} In contesting the existence of an implied easement, Appellants argued, in pertinent part: the unity of title was severed in 1978, at a time when there was no necessity for an easement for access because the House Lot had 91 feet of frontage. They concluded the trusts had no easement to convey to the Michaels who had no easement to convey to Appellees. Mr. Fleagane's affidavit said they conveyed the House Lot to the trusts due to a concern with outstanding coal rights and a desire to conserve some land that could not be mined.

{¶18} Regarding an easement by estoppel, Appellants urged they did not mislead or cause a change of position to another's prejudice but attempted to enlighten any buyer. Noting Mrs. Anderson's deposition testimony that she saw a "no trespassing sign" on the gate when she attempted to view the property before the sheriff's sale, Mr. Fleagane said he also posted a sign saying the property subject to the sheriff's sale was landlocked with no right-of-way in the deed. They emphasized Mrs. Anderson's admission that she conducted no research on the property prior to the sheriff's sale (contrary to the advisement on the sheriff's website for potential buyers).

{¶19} Appellees' cross-motion for summary judgment argued a prescriptive easement is not defeated by permission. They also argued an easement implied by necessity existed because the severance of unity of ownership did not truly occur until Appellants as co-trustees sold the House Lot to the Michaels in 2002. They argued Appellants owned the dominant and servient properties in "one way or another" at the appropriation and after access became a necessity. Finally, Appellees argued the claim of permissive use supported their request for an easement by estoppel.

{¶20} The trial court held oral arguments on the motions, took the matter under advisement, and subsequently asked the parties to address certain factual matters. The July 30, 2018 hearing provided some clarification on: the date of construction of the house; the pre-appropriation means of access; the state's construction of the driveway; and the transfer to the trusts being labeled by the county as a fee-exempt, non-gift transfer without consideration.

{¶21} On March 25, 2019, Appellants filed a motion for contempt asking the trial court to order Appellees to appear and show cause why they should not be held in contempt for violating the agreed judgment entry setting the terms of the preliminary injunction. They said a hearing was required under R.C. 2705.05 and sought a maximum daily fine and damages for civil contempt. Mr. Fleagane listed his accusations in an affidavit. Appellees' response argued the accusations were unrelated to the driveway and provided explanations related to some of the allegations.

{¶22} On May 6, 2021, the court granted Appellees' motion for summary judgment, finding they had an easement to use the driveway and its corridor for ingress and egress and utility lines. The court denied Appellants' motion for summary judgment

and motion for contempt. The court cited Seventh District law on the three easements at issue, such as permissive use defeats a prescriptive easement. The court then observed Appellant could not simultaneously "have it both ways" by arguing their 1978 transfer of the House Lot to the trusts was a severance of the unity of title while arguing they created no easement for the trusts.

{¶23} Opining no particular argument resolved the case, the court found: Appellants granted an easement to the trusts when they allowed the state to construct a drive and water line on their property to reach the House Lot which became landlocked upon the state's appropriation of its frontage; Appellants should be estopped from denying the existence of this easement; and verbal permission to the Michaels upon the 2002 conveyance would thus be irrelevant because the Michaels already received the easement from the trusts. The court alternatively found Appellees would have possessed an implied easement (both by strict necessity and by prior use) under their argument that severance occurred in 2002 and the 1978 conveyance was not an actual severance of unity of ownership. Appellants filed the within timely appeal.

ASSIGNMENTS OF ERROR ONE & TWO: EASEMENTS

{¶24} Appellants' first two assignments of error, which are both related to the court's decision on the cross-motions for summary judgment and addressed together by the parties, contend:

"The trial court erred by granting the Plaintiffs-Appellees' Motion for Summary Judgment."

"The trial court erred by failing to grant the Defendants-Appellants' Motion for Summary Judgment."

{¶25} Pursuant to Civ.R. 56(C), summary judgment shall be granted when the evidence shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Summary judgment is appropriate if reasonable minds can only find in favor of movant after considering the evidence in the light most favorable to the non-movant. Civ.R. 56(C). The summary judgment movant has the initial burden of stating why the movant is entitled to judgment as a matter of law and showing there is no genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-294, 662 N.E.2d 264

(1996). The non-movant then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue of material fact for trial and may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E).

{¶26} The material issues in a case depend on the applicable substantive law. *Byrd*, 110 Ohio St.3d 24 at ¶ 12. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id. See also Peters v. Tipton*, 7th Dist. Harrison No. 07 HA 3, 2008-Ohio-1524, ¶ 8 (if issues of fact are “not dispositive due to the lack of a genuine issue on a threshold legal matter, [then] summary judgment is still appropriate”). We review the granting of summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. We therefore apply the same standard as the trial court to ascertain if summary judgment was warranted.

{¶27} Easements may be created by express grant, prescription, implication, or estoppel. *Tower 10, LLC v. 10 W Broad Owner, LLC*, 10th Dist. No. 18AP-998, 2020-Ohio-3554, 154 N.E.3d 1060, ¶ 28. The parties agree the case does not involve an easement by express grant as there was no grant in the relevant deed and Appellees asked for an easement by prescription, implication, or estoppel.

Prescriptive Easement

{¶28} Before granting an easement to Appellees, the trial court essentially rejected Appellees’ prescriptive easement argument by citing law which held that permission defeats a claim of easement by prescription. Still, Appellees argue they demonstrated the elements of a prescriptive easement. *See* App.R. 3(C)(2) (“A person who intends to defend an order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the order is not required to file a notice of cross-appeal or to raise a cross-assignment of error.”). While acknowledging permission defeats an adverse possession claim, they contend the adverse element for a prescriptive easement claim is not defeated by permission.

{¶29} They claim the verbal permission Appellants granted to the Michaels does not defeat a claim for easement by prescription because the use was still adverse to Appellants’ property rights as it adversely affected their right to quiet enjoyment and

exclusivity. To reach 21 years for a prescriptive easement, Appellees need some of the time during which the House Lot was owned by Appellants as co-trustees for the trusts; this was during the same time the allegedly servient estate was owned by Appellants as individuals. Appellees suggest the trusts (created and controlled by Appellants) adversely used the Appellants' driveway because, although permissive, this deprived Appellants of quiet enjoyment and exclusivity.

{¶30} However, as recognized by the trial court, permission was fatal to the claim of easement by prescription. A party claiming an easement by prescription must show, by clear and convincing evidence, a use of the property that is (1) open, (2) notorious, (3) adverse to the neighbor's property rights, (4) continuous, and (5) lasting at least 21 years. *Andrews v. Passmore*, 2015-Ohio-2681, 38 N.E.3d 450, ¶ 9 (7th Dist.). Unlike adverse possession, a prescriptive easement does not require exclusive use; the adversity involves use of an easement, not the possession of land. *Gulas v. Tirone*, 184 Ohio App.3d 143, 2009-Ohio-5076, 919 N.E.2d 833, ¶ 24, 28 (7th Dist.). As in an adverse possession case, it "is proof that actual permission was granted that is determinative" and the conduct "is not adverse if the landowner gave permission as a neighborly accommodation." *Id.* at ¶ 25, citing *Smith v. Sebastiani*, 7th Dist. Mahoning No. 05 MA 57, 2006-Ohio-2189, ¶ 24.

{¶31} "When the use is permissive, it is not adverse." *Andrews*, 2015-Ohio-2681 at ¶ 11. In other words, "permission will negate any claim that the use or possession of property is adverse." *Gulas*, 184 Ohio App.3d 143 at ¶ 29. Therefore, there was no prescriptive easement, and Appellees' first alternative contention in support of the trial court's judgment granting them an easement is without merit.

Implied Easements

{¶32} There is more than one type of implied easement, including: easement implied by (strict) necessity; easement implied by prior use; and easement implied to use an abandoned road. *Kiko v. King Mountain LLC*, 7th Dist. Monroe No. 14 MO 9, 2015-Ohio-2688, ¶ 15-16. *See also Trattar v. Rausch*, 154 Ohio St. 286, 291-292, 95 N.E.2d 685 (1950) ("Easements may be implied in several ways-from an existing use at the time of the severance of ownership in land, from a conveyance describing the premises as

bounded upon a way, from a conveyance with reference to a plat or map or from necessity alone, as in the case of ways of necessity.”).

{¶33} “A prior use easement looks retrospectively at how the land was used before it was severed in order to ascertain what beneficial use the grantor truly intended to convey.” *Arkes v. Gregg*, 10th Dist. Franklin No. 05AP-202, 2005-Ohio-6369, ¶ 14. “An easement implied by prior use has four elements: (1) a severance of the unity of ownership in an estate; (2) the use giving rise to the easement shall exist before severance takes place, and shall have continued and been obvious or manifest for so long as to show that it was meant to be permanent; (3) the easement shall be reasonably necessary to the beneficial enjoyment of the land granted or retained; (4) the servitude shall be continuous rather than temporary or occasional.” *Kiko*, 7th Dist. No. 14 MO 9 at ¶ 15, originating from *Ciski v. Wentworth*, 122 Ohio St. 487, 495, 172 N.E. 276 (1930), syllabus. The “use must be continuous, apparent, permanent, and necessary to be the basis of an implied easement upon the severance of the ownership of an estate.” *Trattar*, 154 Ohio St. at 292. Reasonable necessity is sufficient for this type of implied easement. *Id.* (convenience is not sufficient but strict necessity is not required).

{¶34} Distinctly, an easement implied by necessity is not reliant on prior use and “looks at how the land was configured immediately after its severance to ascertain whether the granted land was useable or accessible without a right understood to be necessary.” *Arkes*, 10th Dist. No. 05AP-202 at ¶ 14. An easement implied by necessity requires clear and convincing proof that it is a “strict necessity” and will not be implied where the claimant has other means of ingress or egress, even if expensive. *Trattar*, 154 Ohio St. at 293-295. “An implied easement or way of necessity is based upon the theory that without it the grantor or grantee, as the case may be, can not make use of his land.” *Id.* at 293. It will be implied that a grantor conveyed an easement to a grantee if it was a strict necessity to the land granted (creating an implied grant), and it will be implied that a grantor reserved an easement if it was a strict necessity to his remaining lands (creating an implied reservation). *Szaraz v. Consolidated R.R. Corp.*, 10 Ohio App.3d 89, 92, 460 N.E.2d 1133 (9th Dist.1983). Notably: “The necessity that serves as the basis for an implied easement must exist upon the severance of ownership.” *Arkes*, 10th Dist. No. 05AP-202 at ¶ 13.

{¶35} In arguing against both of these types of implied easements, Appellants urge the severance of the unity of ownership over the two parts of the 55-acre tract occurred before any need arose for an easement. They point out the use giving rise to the alleged easement did not exist when they conveyed the property to the trusts in 1978 but occurred after this conveyance, when the state's appropriation eliminated the House Lot's access to a road (after which the state constructed the subject driveway through Appellants' individual property to the House Lot). Although the driveway to the House Lot existed when the trusts conveyed the property to the Michaels in 2002, the trusts did not own the servient estate in order to grant an easement across it. *See Dunn v. Ransom*, 4th Dist. Pike No. 10CA806, 2011-Ohio-4253, ¶ 35 ("if there is no unity of title, there is no grantor who may give an easement to the grantee. It does not matter whether a reasonable grantor would have conveyed an easement or a reasonable grantee would have expected to receive an easement. A grantor simply cannot convey what is not possessed"). In other words, Appellants urge an implied easement did not arise by prior use or by strict necessity as the severance of the unity of ownership occurred in 1978, which was before the House Lot used or needed to use Appellants' property for access. (The House Lot had access on the northeast side of the property until sometime after the 1981 appropriation.)

{¶36} Appellees do not dispute the law requiring the necessity to exist at the time of severance of unity of ownership. *See Arkes*, 10th Dist. No. 05AP-202 at ¶ 13. Nor do they dispute that the test would not be satisfied by a state appropriation occurring *after* severance. *See Blanton v. Eskridge*, 4th Dist. Scioto No. 16CA3783, 2017-Ohio-9366. However, the *Blanton* case did not involve a transfer of the allegedly dominant estate to a trust where the grantors are also the grantees as co-trustees (who then after the estate became landlocked via appropriation, granted the dominant estate to buyers and verbally allowed them to use a driveway on the servient estate owned by the co-trustees as individuals).

{¶37} In support of their implied easement claims, Appellees argue the severance of unity of ownership did not occur until 2002 when Appellants as co-trustees conveyed the House Lot to the Michaels. They say Appellants owned both the dominant estate and the servient estate in "one way or another" when the need to use the driveway as access

arose. They suggest the conveyance to the trusts constituted a mere change in form or name and not a true severance. Before reaching this issue, we outline Appellants' alternative argument.

{¶38} Appellants alternatively claim: if the unity of title was not destroyed by a "severance" in 1978, then the property was "divided" at that time (a time when no easement was necessary). They make the distinction based on the following emphasized language on a prior use easement:

> Easements by implication arise where property has been held in a unified title, and during such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved *by a division of the property or a severance of the title*, has been in use and is reasonably necessary for the fair enjoyment of the portion benefited by such use.

(Emphasis added.) *Ciski*, 122 Ohio St. at 495, quoting *Bailey v. Hennessey*, 112 Wash. 45, 48-49, 191 P. 863 (1920).

{¶39} However, the language is in the alternative and does not suggest a prior use easement cannot be implied if the condition arose after division of an owner's property into parts but before ownership changed. Appellants cite no case holding an owner who divides land into two parts through a survey but continues to hold title to both adjacent parts will not grant an implied easement due to a qualifying use with reasonable necessity or due to strict necessity arising on a later sale. And, historical case law on implied easements speaks of an "owner of an entire tract *or* of two or more adjoining parcels" when viewing the conditions at the time of sale. (Emphasis added.) *See, e.g., Freiden v. Western Bank & Tr. Co.*, 72 Ohio App. 471, 474-475, 50 N.E.2d 369 (1st Dist.1943).

{¶40} We note the *Ciski* syllabus did not mention the "division" of property. The Supreme Court's wording of the elements within the opinion suggests "separation" is synonymous with severance of unity of ownership. *See Ciski*, 122 Ohio St. at syllabus; *Trattar*, 154 Ohio St. at 292. *See also Kiko v. King Mountain LLC*, 7th Dist. Monroe No. 14 MO 9, 2015-Ohio-2688, ¶ 15 ("the use giving rise to the easement shall exist before

severance"); *Cadwallader v. Scovanner*, 178 Ohio App.3d 26, 2008-Ohio-4166, 896 N.E.2d 748, ¶ 21, 24, 29 (12th Dist.) (emphasizing the severance of ownership when the owner sold the lot, not when he subdivided his property). In other words, a transfer to oneself upon a division of land would not destroy the unity of ownership in two parcels. In any event, Appellants did not raise this division of property argument below where they agreed the test was whether the implied intent to grant the easement existed on *severance* of unity of ownership.

{¶41} Accordingly, we return to the original question on the timing of the severance of unity of ownership. The question is whether the transfer to the trusts severed the unity of ownership (at a time when there was not qualifying use and the easement was not necessary) or whether there was still unity of ownership after the transfer to the trusts and thus the severance of unity of ownership did not occur until the Michaels purchased the House Lot in 2002 (at a time when there was prior use and the easement was necessary in any case).

{¶42} In answering the question, it must be recognized: "An individual cannot grant someone else an easement across a third-party's land without knowledge, consent or authority from the third-party." *Kennedy v. Green*, 5th Dist. Muskingum No. CT2018-0033, 2019-Ohio-854, ¶ 25. As Appellants point out, a trust is a separate legal entity. Yet, a corporation is a separation legal entity and there is case law finding unity of ownership notwithstanding a transfer to a corporation. Various "jurisdictions have applied a control test to establish unity of ownership" which considers whether the same party had "the power to arrange and adapt the properties" so as to create an implied easement. *Dabrowski v. Bartlett*, 246 Ariz. 504, 515, 442 P.3d 811, 822 (2019), citing *Houston Bellaire Ltd. v. TCP LB Portfolio I LP*, 981 S.W.2d 916, 920-921 (Tex.App.1998) ("Clearly, the underpinning of the unity of ownership requirement is the concept of authority: the ability to impress or reserve an encumbrance on property without which an easement cannot be created.").

{¶43} "[W]here an individual has had common ownership of certain parcels, but was not technically the owner at all, a dominant interest or influence in a corporation(s) owning those parcels can satisfy the necessary unity of title requirement." *M.C. Headrick & Son Ents. Inc. v. Preston*, Bradley Cir. No. 124 (Tenn.App.1989) (B individually acquired

Lot 1 and built a house; a driveway was built on a 50-foot strip to serve the structure; B was the sole stockholder of a company which acquired the strip; and B "had the power to, and did, deal freely with both Lot 1 and the strip and treat them as though he personally owned them").

{¶44} As another example: two people jointly owned two parcels; each parcel was transferred to a separate corporation; the two people owned all of the shares in both corporations; and a dispute arose over the use of a driveway. The Illinois Supreme Court found unity of title when one of the parcels was then conveyed to a stranger. The Court reasoned that while there was technically a division of ownership when the property was transferred to separate corporate entities, "there was, in effect, common ownership of both properties sufficient to indicate the ability to arrange and adapt the property in a manner sufficient to satisfy rules of property in the establishment of easements by implication." *Cosmopolitan Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 7 Ill.2d 471, 475-476, 131 N.E.2d 4, 7 (1955).

{¶45} In a New York case: two lots were separately owned by sisters when a utility pole was erected on one lot which would service the other lot; the lots had been conveyed to them by their parents who continued to exercise dominion and control; in fact, the parents authorized the pole's installation by the power company. The New York court found evidence of unity of ownership because, despite the conveyances to their children, the parents treated the lots as their own until the conveyance to the plaintiffs who sought an implied easement. *Malerba v. Warren*, 96 A.D.2d 529, 530, 464 N.Y.S.2d 835, 837 (1983).

{¶46} We adopt the control test reviewed supra. Unity of ownership is not necessarily severed upon the married owners' division of their property by survey and transfer of the newly divided parcel to their trusts of which they are beneficiaries and the sole co-trustees. We note Appellants contest the application of a control test by arguing a transfer to a trust severs the title, but they do not argue the evidence was in dispute as to their domination and control of the trust property. We find that after the transfer to their trusts, Appellants continued to dominate and control the House Lot so as to adapt it to coordinate with their own adjacent lot. After the appropriation, Appellants authorized the state to construct a wide concrete driveway through their individual property to the

residence on the House Lot as the state had appropriated all 91 feet of the House Lot's frontage and caused it to be landlocked. They also authorized the water line to the residence to be construed along this driveway.

{¶47} Prior to the transfer of the House Lot to the Michaels, this permanent driveway prominently led to the residence, fusing with the House Lot's drive at the property line at two places. As part of the 2002 conveyance from the trusts to the Michaels, Appellants admit they verbally authorized the Michaels to use the driveway over their *individual* property. There is no dispute the Michaels relied upon this individual authorization when purchasing the House Lot from Appellants as co-trustees for the trusts. (A dispute under the equitable easement section is whether they relied on *non-revocable* permission.)

{¶48} Moreover, although Appellants as co-trustees owned the House Lot for the trusts and Appellant as individuals granted permission to use the drive, the deed they granted to the Michaels intermingled the two concepts they now raise. The deed granted "the Sellers" a right to repurchase the House Lot which "the Sellers, or their direct descendants" could enforce. It also granted the "Sellers" a right of first refusal. In addition, the "Sellers reserve[d]" a 40-foot right-of-way over the House Lot to reach the "Sellers' adjacent property" and a right to establish rights-of-way or easements for utilities and development of that adjacent property. The evidence showed the adjacent property belonged to Appellants as individuals.

{¶49} Likewise, Appellants participated in the Michaels' foreclosure case as individuals where they sought to enforce the right to repurchase and right of first refusal which were granted to the "Sellers" in the deed from the trusts to the Michaels. Appellants as individuals also appealed the trial court's denial of their request in the foreclosure action, and this court held Appellants could exercise the right to repurchase if they satisfied the Michaels' mortgage before the foreclosure sale. *Wells Fargo Bank, N.A. v. Michael*, 7th Dist. Belmont No. 12 BE 26, 2013-Ohio-2545, 993 N.E.2d 786, ¶ 50 (repurchase option would not run with the land or survive foreclosure, and right of first refusal was not triggered by foreclosure).

{¶50} From the facts and arguments presented to the trial court, we conclude reasonable minds could only find that severance of unity of ownership did not occur on

Appellants' transfer to their trusts but actually occurred in 2002 when the House Lot was conveyed to the Michaels. It is undisputed that an easement was strictly necessary to the House Lot in 2002, as it was landlocked by Appellants' property on multiple borders and by state-appropriated property at the other borders (and the state determined it could not lawfully provide access through such property). Appellees thus also satisfied the lesser reasonably necessary test for an alternative implied easement of prior use (and the other elements of a prior use easement are not disputed on appeal[3]). Accordingly, the trial court's decision granting an easement over the driveway is affirmed on implied easement grounds.

{¶51} Lastly, we note Appellants set forth some additional arguments which they believe constitute reasons for rejecting an implied easement but which were not raised below. Appellants say they demonstrated the grantor did not intend to convey an easement to the Michaels, citing Mr. Fleagane's claim that he gave the Michaels verbal permission to use the drive and citing the list of covenants in the 2002 deed (e.g., granting an easement to Appellants over Appellees land). They believe the law provides them an opportunity to overcome an inference that an easement was implied by prior use or by necessity, relying on the following holding: "necessity does not of itself create a right of way, but is said to furnish evidence of the grantor's intention to convey a right of way and, therefore, raises an implication of grant." *Trattar*, 154 Ohio St. at 293, quoting 17 American Jurisprudence 961, Section 48.

{¶52} However, the Supreme Court was not saying the grantor can defeat an implied easement by factually claiming he did not intend to convey an easement even if all of the elements are established. In other words, the elements of an implied easement do not merely give rise to a rebuttable presumption of an easement. When the Court recited the quoted statement, it was in the process of evaluating whether there was strict necessity while also referring to the principle regarding a stranger to the property. *See*

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[3] Appellees say the use of the drive was long-continued, obvious, and meant to be permanent rather than temporary, pointing out it led directly from the road to the house; was 25-foot wide and 200-foot long; was made of concrete, and was constructed by the state in conjunction with the appropriation of the House Lot's frontage in the 1980's; it was obvious and permanent rather than temporary.

id. at 293-294 (first explaining the implied easement of necessity exists so "the grantor or grantee, as the case may be" is not prevented from using his land). Also, necessity itself does not create the easement because the claimant must "show a necessity at the time the unity of ownership was severed" (as Appellants specifically point out supra). *Arkes*, 10th Dist. No. 05AP-202 at ¶ 21, 24 ("Were a court to find necessity from circumstances that arose after the grantor severed the land, a landowner's property may become subject to an easement by necessity at any time and not as the result of the landowner's actions.").

{¶53} We note this is not a situation where the deed expressly states there is no easement or defines the driveway easement in a lesser manner than now claimed; as Appellants insist, there was no express easement. *See Tiller v. Hinton*, 19 Ohio St.3d 66, 69 (1985) ("one may not simultaneously have an easement over another's land by both express grant and an implied easement of necessity"). And, although Appellants recited the above quote in their response/reply in the trial court, they did so in the context we reviewed above; they did not specify an argument that an assertion of lacking intent to grant an easement can defeat an implied easement *even if all the elements of an implied easement were satisfied*.

{¶54} Appellants also invoke principles of equity claiming an easement should not be implied when the claimant had actual or constructive knowledge the property was landlocked with no easement when they purchased the property. However, a plaintiff's knowledge is not part of the test for granting an implied easement. Contrary to Appellants' contention, the *Renner* case (rejecting an attempt to enforce a septic easement against a bona fide purchaser) is not akin to attempting to enforce a driveway easement against the common source owner who still owns the allegedly servient estate. *See Renner v. Johnson*, 2 Ohio St.2d 195, 197, 207 N.E.2d 751 (1965). That case involved the attempted enforcement of a hidden easement against a purchaser. Here, the alleged easement was not hidden, and an easement was being sought by a purchaser, not against a purchaser. Likewise, this is not a case were a purchaser had knowledge of an easement over his newly purchased land; rather, Appellants are saying the purchaser had knowledge that Appellants *claimed* there was *no* easement.

{¶55} Appellants' arguments against an implied easement are overruled. As we find an easement was implied by law, the last type of easement alternatively sought by Appellee (an easement by estoppel) need not be addressed by this court. The trial court's judgment granting an easement in favor of Appellees' is affirmed.

ASSIGNMENT OF ERROR TWO: CONTEMPT MOTION

{¶56} Appellants' second assignment of error contends:

"The trial court erred by overruling the Defendants-Appellants' Motion for Contempt without holding a hearing in accordance with O.R.C. 2705.05(A)."

{¶57} Appellants filed a motion for contempt asking the court to order Appellees to appear and show cause why they should not be held in contempt for violating the agreed judgment entry setting forth the preliminary injunction. The memorandum in support quoted R.C. 2705.02(A) regarding the acts constituting contempt and R.C. 2705.05 regarding a hearing and punishment. (Mot. at 6). The court denied the contempt motion without a hearing when granting summary judgment for Appellees. Appellants contend the trial court erred by failing to hold a hearing and claim a hearing is always required before denying a motion for contempt. They rely on the two statutes cited in their motion without citing case law on the topic.

{¶58} "A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court * * *." R.C. 2705.02(A). "In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given *to the accused* to be heard, by himself or counsel." (Emphasis added.) R.C. 2705.03(A). Another statute provides: "In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge." R.C. 2705.05(A).

{¶59} "The purpose of a contempt hearing is to provide the accused with the opportunity to explain his actions. In contempt proceedings, the statutory provisions and due process require that the accused be provided an opportunity to be heard, but it is within the trial court's discretion whether to give the complainant a hearing." (Citations

omitted.) *State ex rel. DeWine v. C & D Disposal Techs., LLC*, 7th Dist. Jefferson No. 11 JE 19, 2012-Ohio-3005, ¶ 28, quoting *Hillman v. Edwards*, 10th Dist. Franklin No. 10AP-950, 2011-Ohio-2677, ¶ 29. *See also Pulled from the Pits Rescue & Sanctuary v. Dabernig*, 9th Dist. Wayne No. 15AP0061, 2016-Ohio-7255, ¶ 9 (interpreting R.C. 2705.05(A) to afford *the accused, not the accuser*, the opportunity to be heard). "[S]ince the primary interest involved in a contempt proceeding is the authority and proper functioning of the court, great reliance should be placed upon the discretion of the trial judge." *Denovchek v. Board of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 16, 520 N.E.2d 1362 (1988).

{¶60} A court abuses its discretion if the decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). We do not substitute our judgment for that of the trial judge. *Id.* Notably, the movant's burden of proof upon a civil contempt motion is clear and convincing evidence. *Facemyer v. Facemyer*, 7th Dist. Mahoning No. 2019 MA 109, 2021-Ohio-48, ¶ 1, citing *Ferguson v. Boron*, 7th Dist. Columbiana No. 15 CO 0030, 2018-Ohio-69, ¶ 14. It has additionally been observed that the movant cannot merely appeal on the grounds of failure to hold a hearing but must show prejudice by arguing the allegations would have constituted contempt if true. *See Malone v. Bd. of Zoning Appeals of Xenia Twp.*, 2d Dist. Greene No. 06-CA-62, 2007-Ohio-3812, ¶ 47.

{¶61} Here, Appellants' brief relies solely on the lack of a hearing without discussing their contempt allegations, citing the relevant provision in the preliminary injunction, or analyzing its application. In any event, the trial court did not commit a legal error or abuse its discretion in finding a hearing was not warranted before denying the motion.

{¶62} The preliminary injunction, granted via an agreed judgment entry, provided Appellees vehicular and pedestrian ingress and egress and access for purposes of water or other utility line along the existing driveway for the duration of the lawsuit. Appellants were prohibited from obstructing the path. Appellees were prohibited from expanding, altering, or improving the drive. They were also ordered to confine their use of Appellants' property to the existing driveway and driveway corridor. (1/4/17 Agreed J.E.). It was the latter sentence in the order which Appellants' motion cited. They argued Appellees

violated this provision by: (1) placing items on Appellees' own land which blocked Appellants' access across Appellees' land; (2) operating a machine on Appellants' land to pull vines off Appellants' barn which sits near the property line; and (3) storing belongings in the barn. Appellees' response to the contempt motion provided explanations for some of the alleged conduct, claiming a misunderstanding and saying they removed the items constituting the alleged barricade and the items in the barn. Appellees also urged the allegations were unrelated to the driveway or its corridor.

{¶63} The first allegation appeared to be unrelated to the agreed entry as Appellants' seemed to be invoking their own right to enter Appellees' property under the easement and right-of-way provisions in the 2002 deed from Appellants to the Michaels. The agreed entry prohibited *Appellants* from blocking Appellees' access, but Appellees were not instructed similarly. In other words, *Appellants'* access rights over Appellees' property under the 2002 deed were not at issue in this suit. We note Appellants' reply in the trial court claimed their motion alleged Appellees made a barricade on Appellants' property. However, this did not appear to be the argument in their contempt motion (which emphasized their recorded easement and their corresponding right to enter Appellees' property). And, this contention did not appear supported by the photograph of the "barricade" attached to their motion when viewed in conjunction with maps attached to submissions they filed in support of their summary judgment motion.

{¶64} Regardless, as to this barricade allegation and as to the two allegations about Appellees' entry onto Appellants' property around or inside the barn, there was no indication this conduct related to the driveway which was the subject of the preliminary injunction issued two years earlier. Appellees' property touches Appellants' property at more locations than at the driveway. The evidence before the court on the summary judgment motions showed the relative locations of the properties, the drive, and the barn. The order relied upon in the contempt motion was prompted by Appellees' complaint seeking driveway access. They received a temporary restraining order, and the agreed entry granted their request for a preliminary injunction. Appellants' counterclaim also related to the driveway; for instance, the trespass claim complained about Appellees' removal of the gate blocking the driveway. Considering the pleadings and construing the

preliminary injunction as a whole, an error is not apparent as the alleged conduct did not appear related to the driveway corridor, access to the House Lot, or utilities.

{¶65} "The court that issued the order sought to be enforced is in the best position to determine if that order has been disobeyed." *Denovchek*, 36 Ohio St.3d at 16. Furthermore, it would not constitute a legal error to find the allegations were not encompassed by the cited provision in the agreed entry on confining the use of Appellants' property to the driveway and its corridor. The provision need not be read as applying to any future event where Appellee may cross one of the adjacent property lines. This court concludes Appellants failed to show a hearing was required before *denying* their motion for contempt. This assignment of error is overruled.

{¶66} For the foregoing reasons, the trial court's judgment granting summary judgment on Appellees' claim for an easement and denying Appellants' motion for contempt is affirmed.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.