[Cite as *Montgomery v. Island Creek Twp.*, 2022-Ohio-4757.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

CAROL H. MONTGOMERY ET AL.,

Plaintiffs-Appellants,

v.

ISLAND CREEK TOWNSHIP ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 22 JE 0005

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 21-CV-86

BEFORE:
Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Edward L. Littlejohn, Jr. and *Atty. Jeffrey D. Menoski*, Littlejohn Law LLC., 352 Frank P. Layman Boulevard, Wintersville, Ohio 43953, for Plaintiffs-Appellants and

Atty. Gregory A. Beck and *Atty. Tonya J. Rogers*, Baker I Dublikar, 400 South Main Street, Canton, Ohio 44720, for Defendants-Appellees.

Dated:
December 21, 2022

Donofrio, P. J.

{¶1} Plaintiffs-appellants, Carol Montgomery, William G. Montgomery Jr., Tracy Montgomery, Debra Payne, Robert Payne, Michael L. Montgomery, Paula Montgomery, Ronald P. Montgomery, and Deanna Montgomery, appeal from a Jefferson County Common Pleas Court judgment granting summary judgment in favor of defendants-appellees, Island Creek Township and Island Creek Township Board of Trustees, on appellants' declaratory judgment action asking the court to determine whether approximately 20 feet at the end of Island Creek Township Road 613 is private property or is part of the public road.

{¶2} Island Creek Township Road 613 (TR 613) runs southbound to a dead-end. Appellants own property along both sides of TR 613. The road dead-ends either at or near the property line of 71.266 acres of land owned by intervenor, Countryside Stone, LLC (Countryside). The disputed portion of the road provides Countryside access to its property. The issue in this case is where TR 613 officially ends - either at Countryside's property line or 20 feet before the property line.

{¶3} In 2015, appellants' property and Countryside's property were all one parcel owned by appellants. Appellants then divided the property to convey one acre to Lori Montgomery (referred to by the parties as the "flag lot") and 71.266 acres to Siltstone Resources. Siltstone later conveyed its 71.266 acres to Countryside. Appellants retained the remaining 72.268 acres.

{¶4} The dispute arose in this case when appellees received complaints of junk vehicles on the disputed portion of the road and demanded that appellants remove the vehicles. Appellants, however, claimed that the vehicles were on their private property.

{¶5} Appellants initially filed a petition for a writ of mandamus on March 23, 2021, alleging they were entitled to a writ commanding appellees to adopt a resolution to vacate the portion of TR 613 identified in the complaint. The petition also requested a declaratory judgment confirming that the portion of TR 613 was abandoned and not used by appellees for a period of 21 years and, consequently, appellees lost all rights to the property. Appellees filed a motion to dismiss for failure to state a claim upon which relief

could be granted. The trial court held a hearing on the motion, which resulted in the court granting appellants leave to amend their complaint.

{¶6} Appellants filed their first amended complaint on May 25, 2021. The complaint requested a declaratory judgment declaring that the property at issue is not, and never was, established as part of TR 613 or any other public road. Appellants also sought a temporary restraining order, a preliminary injunction, and a permanent injunction. Appellants filed a second amended complaint on June 8, 2021, to include exhibits not attached to the first amended complaint.

{¶7} Countryside then filed a motion to intervene. The trial court granted this motion. Countryside filed a counterclaim asserting that in the event the trial court found the disputed roadway to not be a public roadway, the court should grant it an implied easement over and across the disputed roadway so that it could access its property.

{¶8} Appellees filed a motion for summary judgment on January 10, 2022. They asserted appellants were estopped from denying that TR 613 is 0.6 miles long due to certain 2016 deeds. They also asserted TR 613 was established through common law dedication and/or prescription. Appellants filed a memorandum in opposition asserting appellees failed to provide clear evidence of appellants' intention to dedicate 0.6 miles of TR 613.

{¶9} The trial court granted appellees' motion for summary judgment. It observed that in 2015, appellants carved out two parcels from their land. They conveyed a one-acre parcel to Lori Montgomery and a 71.266-acre parcel to Siltstone, who later conveyed that property to Countryside. The court found significant that when appellants did this they used the center line of TR 613 in the metes and bounds description of both severed parcels. It noted that in each deed, appellants referred to the center line of the disputed portion of TR 613 as the center line of TR 613. It further pointed out that the northernmost point of what is now the Countryside property is described in the deed as a point on the center line of TR 613. The court found compelling the fact that appellants did not refer to that point as the center line of a drive or lane. Instead, they referred to that point as the center line of TR 613. The court concluded that because appellants severed the Countryside parcel using the center line of TR 613 as a border survey point, they cannot now deny that the center line point is the center line of TR 613 as their deed

says it is. Moreover, the trial court found that every public record the parties identified establishes that TR 613 is 0.6 miles long, which would end into Countryside's property. And it noted that the township had recently done ditch work on the disputed portion of TR 613, without objection from appellants. Finally, as to dedication, the court found that evidence of dedication was irrelevant because all parties concede that TR 613 is a public road. It stated that the issue was not whether TR 613 is a public road but instead where that road ends.

{¶10} Appellants filed a timely notice of appeal on March 7, 2022. They now raise two assignments of error.

{¶11} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp*., 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶12} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C).

{¶13} If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful

to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos*., 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶14} Appellants' first assignment of error states:

> THE TRIAL COURT ERRED BY FINDING THAT THE DISPUTED PROPERTY IS A PUBLIC ROAD WITHOUT FINDING THAT ALL ELEMENTS OF COMMON LAW DEDICATION WERE ESTABLISHED.

{¶15} Appellants argue that appellees failed to establish a common law dedication. They first assert appellees did not offer any evidence to prove an actual offer was made or any evidence of an unequivocal act by appellants that show they intended to dedicate the property. They argue the mere mention of "TR 613" in their legal deeds does not rise to the level of an actual offer.

{¶16} Alternatively, appellants contend that if we find that they did make an offer to dedicate the property, appellees never accepted any such dedication. They acknowledge that acceptance may be implied; however, in order to imply acceptance by the public, a public authority must take a positive action to demonstrate it has taken control of the property. In this case, appellants argue, appellees have not offered any evidence to show that they expressly accepted any offer to dedicate and have not taken any action to take control of the disputed property.

{¶17} Finally, appellants assert a genuine issue of material fact exists as to how and when TR 613 was established. They argue this is evident from the trial court's judgment, stating "[w]hen Township Road 613 was created, however it was created, it had a location and length."

{¶18} Appellants base a significant part of their time arguing that appellees failed to establish a common law dedication. To prove common law dedication the evidence must show: (1) the owner's intention to dedicate the street; (2) the owner's actual offer to dedicate evidenced by an affirmative act of dedication; and (3) acceptance of the offer by or on behalf of the general public. *Bachman v. Shreve*, 7th Dist. Monroe No. 547, 1982 WL 6111, *2 (March 24, 1982), citing *Vermillion v. Dickason*, 53 Ohio App.2d 138, 372 N.E.2d 608 (6th Dist.1976). An owner's silent acquiescence in the street's use by the public for a sufficient length of time gives rise to an inference of the owner's intention to

dedicate the street to public use. *Id*., citing *Doud v. Cincinnati*, 152 Ohio St. 132, 87 N.E.2d 243 (1949).

{¶19} The trial court found that evidence of dedication in this case was irrelevant. It correctly noted that here all parties concede that TR 613 is a public road. The only issue is where TR 613 ends. Thus, appellants' arguments regarding dedication are misguided.

{¶20} The court considered several depositions with multiple exhibits in reaching its judgment in this case.

{¶21} According to appellant Carol Montgomery, in 2015 and 2016 appellants conveyed approximately one-half of their 144-acre property to Siltstone. (Montgomery Dep. 8). Before they conveyed the property, it was surveyed. (Montgomery Dep. 8). On May 18, 2015, appellants conveyed part of their property by general warranty deed to Siltstone. (Montgomery Dep. 10; Ex. G). In describing the property to be conveyed, that deed used a reference point, "North 87° 36' 56" West a distance of 208.00 feet to an iron pin set in Township Road #613[.]" (Montgomery Dep. Ex. G). Apparently, there was some issue with exactly which property was being conveyed to Siltstone and a new deed and new survey was required. (Montgomery Dep.8). Consequently, in another general warranty deed from appellants to Siltstone, in describing the property to be conveyed, the deed again used as a reference point, "North 83° 24' 43" East a distance of 118.47 feet to survey angle point in the center of Township Road # 613[.]" (Montgomery Dep. Ex. J).

{¶22} These deeds conveying approximately half of appellants' property to Siltstone (who eventually conveyed the property to appellees), specifically referred to a point in the now-disputed portion of TR 613 as the trial court found. The deeds were signed by and relied upon by appellants. Thus, it is unreasonable for appellants to now argue that the property descriptions in their general warranty deeds are incorrect.

{¶23} Additionally, the trial court relied on Gary Saling's and Phillip Lawrence's depositions.

{¶24} Saling was the professional surveyor hired by Siltstone to survey appellants' property before Siltstone purchased a portion of it. In surveying the property, Saling considered tax maps, old deed records, and road records. (Saling Dep. 10). In particular, he relied on the township trustees' road records, which stated that TR 613 was

0.6 miles long. (Saling Dep. 16). Saling stated that he considered a 1975 state inspection report for TR 613. (Saling Dep. 19-20; Ex. O). This report indicated that in 1975, TR 613 came to a dead-end at 0.6 miles. (Saling Dep. 20; Ex. O). Saling also pointed to state inventory reports indicating that in 2003, in 2014, and finally in 2020, TR 613 was 0.6 miles in length. (Saling Dep 20-23; Exs. O-2, O-3, O-14).

{¶25} Phillip Lawrence is a surveyor for the Jefferson County Engineer's Office. He corroborated Saling's deposition testimony as to the state inspection reports setting out that TR 613 is 0.6 miles long. (Lawrence Dep. 7-12). Lawrence also identified the county's geographic information system (GIS) aerial imagery of the property taken in 2001, 2007, and 2020. (Lawrence Dep. 27-29; Ex. S-8, S-9, S-10). Based off of the GIS maps, Lawrence stated that TR 613 extends south of the flag lot, which would take it into Countryside's property. (Lawrence Dep. 28-29). Lawrence further stated that based on the maps and state road inventories, TR 613 has been 0.6 miles long since at least 1975. (Lawrence Dep. 29). He elaborated that TR 613 is listed in the county records as 0.6 miles long because it has been on the ODOT (Ohio Department of Transportation) inventory since at least 1975 and it has been listed on maps that way since at least 1955. (Lawrence Dep. 29).

{¶26} Thus, in addition to the fact that appellants' deeds actually identify TR 613 as extending up to what is now Countryside's property, the professional surveyors agree with this conclusion. Based on ODOT reports dating back at least to 1975, TR 613 has been 0.6 miles long. This 0.6-mile length takes TR 613 up to Countryside's property. Appellants did not submit a single map, report, record, or survey to the contrary. Thus, there is no genuine issue of material fact that would preclude summary judgment in appellees' favor.

{¶27} Accordingly, appellants' first assignment of error is without merit and is overruled.

{¶28} Appellants' second assignment of error states:

> THE TRIAL COURT ERRED BY APPLYING THE DOCTRINE OF ESTOPPEL BY DEED AGAINST PLAINTIFFS IN DEROGATION OF THEIR PROPERTY RIGHTS.

{¶29} Here appellants contend the doctrine of estoppel by deed does not establish the intentional and voluntary offer to dedicate. They argue their act of having the property surveyed for a new legal description should not be used to entrap them into an involuntary dedication of their property.

{¶30} Estoppel by deed "'precludes a party from denying a certain fact recited in a deed executed by or accepted by him in an action brought upon the instrument.'" *Miller v. Cloud*, 7th Dist. Columbiana No. 15 CO 0018, 2016-Ohio-5390, 76 N.E.3d 297, ¶ 80, quoting *37 Robinwood Assoc. v. Health Industries, Inc*., 47 Ohio App.3d 156, 158, 547 N.E.2d 1019 (10th Dist.1988).

{¶31} As discussed above, and relied on by the trial court, appellants' own general warranty deeds conveying a portion of their property to Siltstone particularly references a point in the middle of TR 613 in describing the property boundaries. Appellants did not refer to a point on their own property, as they now allege a portion of TR 613 to be. Instead, they referred to a point on the Township Road. They cannot now deny the existence of that same Township Road.

{¶32} Accordingly, appellants' second assignment of error is without merit and is overruled

{¶33} For the reasons stated above, the trial court's judgment is hereby 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 Jefferson 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.