IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NANCY E. JOHNSON, TRUSTEE OF THE NANCY ELLEN JOHNSON REVOCABLE LIVING TRUST DATED FEBRUARY 24, 2003, Plaintiff,	:	Case No. 3:12-cv-241
v.	:	JUDGE WALTER H. RICE
EMILY SHANK, et al., Defendants.		

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DOC. #21), WITHOUT PREJUDICE TO A MOTION FOR RECONSIDERATION OF A CERTAIN JURISDICTIONAL FACT TAKEN BY JUDICIAL NOTICE; SCHEDULING CONFERENCE CALL SET

Nancy E. Johnson ("Plaintiff"), Trustee of the Nancy Ellen Johnson Revocable Living Trust dated February 24, 2003 ("Trust"), has brought suit against Emily Shank and James Shank (the "Shanks"), and unnamed tenants of 1112 North Barron Street, Eaton, Ohio 45320 (collectively, "Defendants"), alleging that their ongoing trespass on Trust property to access Barron St. has placed a cloud on the property's title and prevented its sale. Plaintiff's Complaint states a claim to quiet title under Ohio Revised Code § 5303.01 (Count One), a common law trespass claim (Count Two), and claim for declaratory judgment (Count Three).

Plaintiff seeks a declaratory judgment quieting title in her favor, recognizing that all previous easements were extinguished, and declaring that Defendants have no right-of-way over the property. She also seeks compensatory and punitive damages, costs, expenses, and attorneys' fees. According to Plaintiff, the Court's subject matter jurisdiction arises under the diversity of citizenship statute, 28 U.S.C. § 1332(a), based on the parties' diverse citizenship and her allegation that the amount in controversy exceeds $75,000.

Pending before the Court is Plaintiff's Motion for Summary Judgment (Doc. #21). For the reasons set forth below, the Court OVERRULES Plaintiff's Motion.

I. BACKGROUND AND PROCEDURAL HISTORY

Unless otherwise noted, the following facts are undisputed by the parties. This case involves several parcels of land located on the east side of Barron Street in Eaton, Preble County, Ohio. On August 7, 2008, the Trust purchased a lot of land at 1116 North Barron Street ("Parcel 16"). Johnson Aff. ¶ 4 (Doc. #21-1 at 1). A Dairy Queen sits on Parcel 16, facing Barron Street. *Id.* Exs. B-1, B-2 & B-3 (Doc. #21-1 at 6-8); Shank Aff. ¶ 4 (Doc. #23-1 at 2). Parcel 16 is the only lot owned by the Trust relevant to the present dispute.

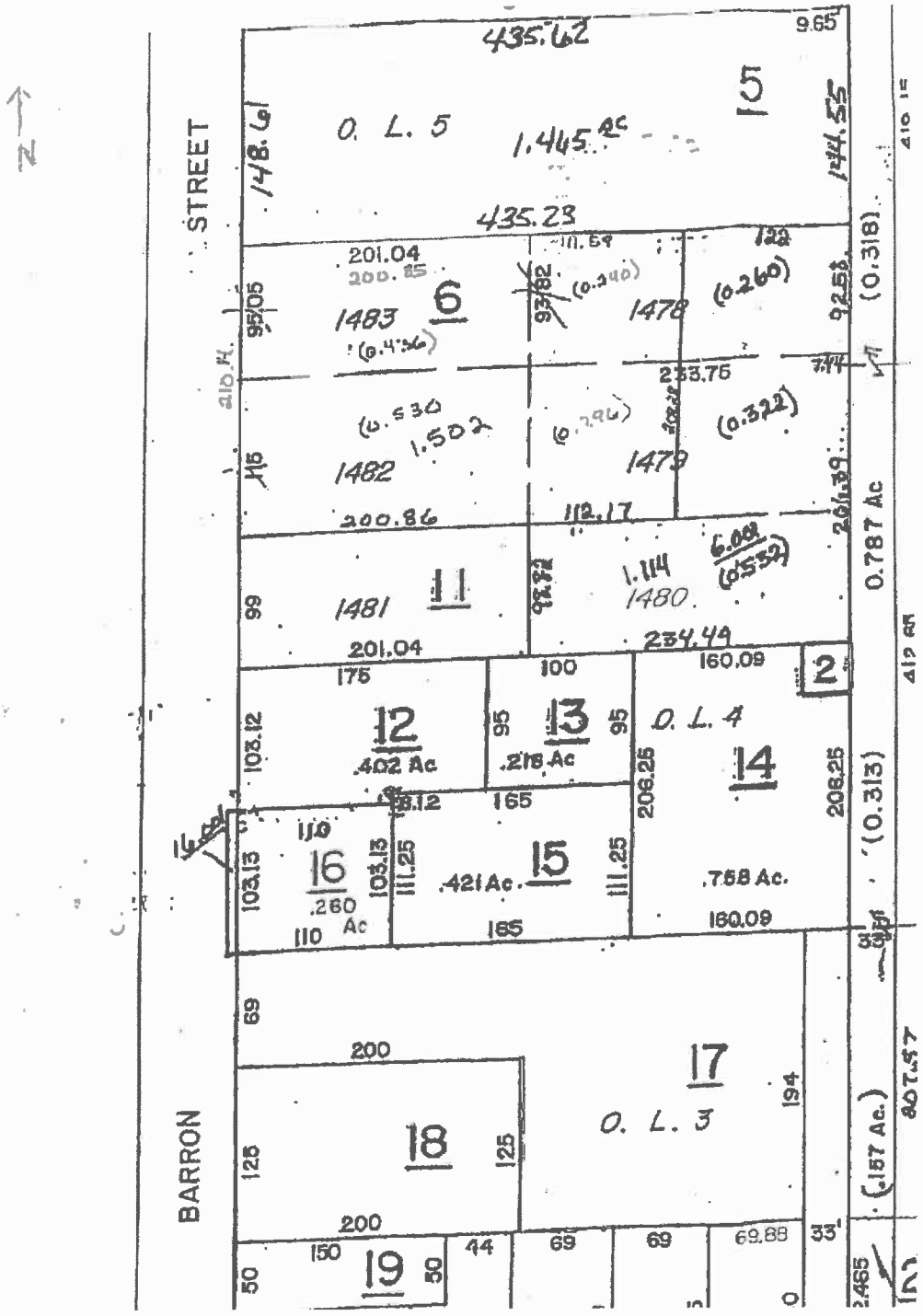
The Shanks own the remainder of the lots in question. Parcel 15 is landlocked, contains two residential houses, and is located immediately to the east of Parcel 16. Johnson Aff. ¶¶ 7-8 & Ex A (Doc. #21-1 at 2 & 5); Shank Aff. ¶ 7 (Doc. #23-1 at 2). Parcel 12 contains parking spaces, is located immediately to

the north of Parcel 15 and Parcel 16, and borders Barron Street on its western edge. Johnson Aff. ¶ 9 & Ex. A (Doc. #21-1 at 2 & 5). The southern border of Parcel 12 is coterminous with the entire 110 feet of the north side of the Trust's Parcel 16 and 65 feet of the north side of Parcel 15. Johnson Aff. Ex. A (Doc. #21-1 at 5). The eastern boundary of Parcel 12 and the western boundary of Parcel 13 are coterminous, and the southern boundary of Parcel 13 extends 100 feet along the northern boundary of Parcel 15, ending at the western edge of both parcels. *Id.* The eastern boundaries of Parcel 13 and Parcel 15 are coterminous with the western boundary of Parcel 14. *Id.* Parcel 13, Parcel 14, and Parcel 15 are landlocked, with no direct ingress or egress to or from Barron Street. *Id.*

Parcel 11 sits on Barron Street to the immediate north of Parcel 12. *Id.* The southern boundary of Parcel 11 encompasses the entire 175 feet of the northern boundary of Parcel 12, and 26.04 feet of the northern boundary of Parcel 13. *Id.* A Kentucky Fried Chicken restaurant currently occupies Parcel 11, facing Barron Street. Johnson Aff. ¶ 9 & Ex. D-1 (Doc. #21-1 at 2 & 11).

Thus, the Shanks' Parcel 11 and Parcel 12, and the Trust's Parcel 16, all abut Barron Street, and it is undisputed that the Shanks' Parcel 11 and Trust's Parcel 16 have direct access to Barron Street. The parties dispute whether the Shank's Parcel 12 has direct access to Barron Street. *Compare* Johnson Aff. ¶ 10 & Miller Aff. ¶ 6 (Doc. #21-1 at 2 & 14) *with* Shank Resp. Req. Admis. #3 (Doc. #21-1 at 44).

The parties have submitted a map of the aforementioned parcels to the Court, and the relevant portion is reproduced below. Johnson Aff. Ex. A; Miller Aff. Ex. A (Doc. #21-1 at 5, 16); Shank Aff. Exs. 2 & 9 (Doc. #23-2 at 3, 14).



A. Summary of the Conveyances

On July 19, 1969, Robert Brierly conveyed several tracts of land on Barron Street to Vergene Brierly ("Brierly"), including two parcels that today encompass Parcels 12 and 16. Miller Aff. Ex C-1 (Doc. #21-1 at 17). The deed also conveyed a narrow tract of 16.25 feet in width and 110 feet in length that stood between Parcel 12 and Parcel 16. *Id.* The northern 11.25 feet of that tract contained an alleyway that was subject to an easement benefitting Parcel 13, Parcel 14, and Parcel 15, allowing ingress and egress to and from Barron Street ("Alleyway Easement"). *Id.* The deed expressly acknowledged that the tract containing the alleyway was subject to the Alleyway Easement. *Id.*

On May 10, 1973, Brierly and the owners of Parcel 13, Parcel 14, and Parcel 15 signed a Contract and Mutual Deed that extinguished the Alleyway Easement and created a new, general easement benefitting those parcels ("Access Easement") to allow them access to Barron Street. Miller Aff. Ex. C-2 (Doc. #21-1 at 19-20). In contrast to the Alleyway Easement, the new Access Easement was not contained in or defined by the then-existing alleyway. *Id.* Specifically, the owners of Parcel 13, Parcel 14, and Parcel 15 conveyed to Brierly any "claim, right-of-way, easement, or other interest" in the area of land defined by a metes and bounds description that encompassed Parcel 12, Parcel 16, and the tract including the alleyway. *Id.* In exchange, Brierly granted them "a right-of-way and easement for access, by foot or vehicular traffic, over and above" over the same area, stating:

> The course and location of such right-of-way to be as determined by Vergene Brierly, and may be changed by her, from time to time, at her d[i]scretion; it being the intention of the parties that Mayme Robinson, Robert E. Fowler, Kelly Doran and their agents and licensees shall have the right to drive motor vehicles or walk across the Brierly property above described for purposes of access to their property, but that the course and location of such driveway or driving area shall be as specified by Vergene Brierly; the said Vergene Brierly covenanting and agreeing that the space and course so allocated by her shall be adequate for such purposes.

Id.

The deed also provided that the Access Easement "shall be binding upon and inure to the benefit of the heirs and assigns of Mayme Robinson, Robert E. Fowler, and Kelly Doran, and shall be binding upon the heirs and assigns of Vergene Brierly . . . . " *Id.* at 20. The deed was recorded by the Preble County Recorder at No. 280, Page 547. *Id.*

On May 11, 1973, Brierly conveyed the land encompassing Parcel 12, Parcel 16, and the alleyway tract to J-Sue, Inc. Miller Aff. Ex. C-3 (Doc. #21-1 at 21). The May 11, 1973, deed utilized the legal description from the May 10, 1973, deed that combined Parcel 12, Parcel 16, and the alleyway tract into one unit. *Id.* The conveyance acknowledged that the property was subject to the Access Easement recorded in Volume 280, Page 547 of the Preble County Deed records. *Id.*

On April 7, 1976, J-Sue, Inc., conveyed the property in the May 11, 1973, deed to Levi and Ann Wethington, splitting it into two tracts that take the current form of Parcel 12 and Parcel 16. Miller Aff. Ex. C-4 (Doc. #21-1 at 23). Thus, each parcel incorporated a portion of the previous alleyway tract, which was no

longer separately described. *Id.* The separate legal descriptions of both Parcel 12 and Parcel 16 acknowledged that each tract was subject to the Access Easement recorded in Volume 280, Page 547 of the Preble County Deed records. *Id.* at 23-24.

Mayme Robinson conveyed Parcel 15 to Emily Shank on May 21, 1982. Shank Aff. Ex. 1 (Doc. #23-2 at 1). In addition to the parcel itself, the deed purported to convey both the Alleyway Easement and the Access Easement. *Id.* The deed specifically referred to the recording of the Access Easement in Volume 280, Page 547 of the Preble County Deed records. *Id.*

On April 30, 1992, the Shanks acquired Parcel 11, which sits immediately to the north of Parcel 12 on Barron Street. Shank Aff. ¶ 15 (Doc. #23-1 at 3 at 1); Miller Aff. Ex. C-9 (Doc. #21-1 at 37). A Kentucky Fried Chicken restaurant currently sits on Parcel 11, and is served by the parking spaces located to the south in Parcel 12. Johnson Aff. ¶ 9 & Ex. D-1 (Doc. #21-1 at 2 & 11).

Parcel 13 and Parcel 14 were conveyed to the Shanks on June 27, 2001. Shank Aff. Ex. 6 (Doc. #23-2 at 8). The deed specifically referenced the Access Easement, stating that "[i]ngress and egress privileges . . . [have] been granted by the property owners between these properties and North Barron Street, and [were] recorded in Deed Record Volume 280 Page 547." *Id.*

Parcel 12 was conveyed from Lee-Ann, Inc., to the Shanks on May 6, 2002. Shank Aff. Ex. 7 (Doc. #23-2 at 10); Miller Aff. Ex. C-8 (Doc. #21-1 at 38). The

deed stated that Parcel 12 was subject to the "easement recorded in Vol. 280, Page 547, Preble County Deed Records."[1] *Id.*

On August 7, 2008, Plaintiff acquired Parcel 16, where a Dairy Queen restaurant is currently located. Johnson Aff. ¶ 4 & Miller Aff. Ex. C-10 (Doc. #21-1 at 1 & 39). The legal description of the property was attached to the deed as an exhibit, and it acknowledged that Parcel 16 was "[s]ubject to an easement recorded in Volume 280, Page 547 Preble County Deed Records." Miller Aff. Ex. C-10 (Doc. #21-1 at 41).

B. Access to Barron Street from Parcel 15

The Shanks and their tenants cross Parcel 16 to access Barron Street, for purposes of ingress and egress to and from Parcel 15. Johnson Aff. ¶ 11 (Doc. #21-1 at 2); Shank Aff. ¶ 12 (Doc. #23-1 at 2). It is undisputed that they have done so at least since Plaintiff acquired Parcel 16 in 2008. *Id.* According to Emily Shank, both the Shanks and the tenant residents of Parcel 15 have used Parcel 16 for access to Barron Street since their acquisition of the property in 1982. Shank Aff. ¶ 12 (Doc. #23-1 at 2-3).

The parties dispute whether Parcel 12, the lot containing parking spaces that is immediately to the north of Parcel 16, has direct access to Barron Street. Johnson Aff. ¶ 10 (Doc. #21-1 at 2); Shank Aff. ¶ 12 (Doc. #23-1 at 2-3). According to Defendants, the only way to access Barron Street from Parcel 15 is

[1] The conveyance of Parcel 12 from J-Sue, Inc., to Lee-Ann, Inc., is not in the record before the Court.

by entering and exiting Plaintiff's Parcel 16, the Dairy Queen property. Shank Aff. ¶ 9 (Doc. #23-1 at 2).

After demanding that the Shanks and their tenants cease using Parcel 16 to access Barron Street, Plaintiff filed suit in this Court on July 24, 2012. Doc. #1; Johnson Aff. ¶ 12 (Doc. #21-1 at 2-3). Plaintiff alleges that that all easements benefitting Parcel 15 have been extinguished, either through express termination or the doctrine of merger, and that Defendants' continued use of Parcel 16 constitutes a trespass that has placed a cloud on her title and prevents her from selling the property. Doc. #1 at 4-8. Defendants filed an Answer on October 10, 2012, in which they present a number of affirmative defenses, including a challenge to this Court's subject matter jurisdiction. Doc. #7. Defendants counter Plaintiff's allegations by asserting that the easement benefitting Parcel 15 was not extinguished, and that even if it was extinguished, Parcel 15 benefits from an easement by prescription. *Id.* at 2-4.

Pending before the Court is Plaintiff's Motion for Summary Judgment, filed on August 2, 2013. Doc. #21. Defendants filed a Response to Plaintiff's Motion for Summary Judgment on September 16, 2013. Doc. #8. On September 19, 2013, Defendant filed a Supplemental Affidavit in Support of their Response. Doc. #24. Plaintiff filed a Reply Memorandum in Support of Summary Judgment on October 14, 2013. Doc. #28.

II. SUBJECT MATTER JURISDICTION

According to Plaintiff, the Court has subject matter jurisdiction over this matter arising under the diversity of citizenship statute, which grants jurisdiction to a federal district court "where the matter in controversy exceeds the sum or value of $75,000" in actions between citizens of different states. 28 U.S.C. § 1332(a). Defendants' Answer raises the defense of subject matter jurisdiction, asserting that the amount in controversy does not exceed $75,000. Doc. #7 at 2. Apart from Defendants' challenge, "it is beyond question that federal courts have a continuing obligation to inquire into the basis of subject matter jurisdiction to satisfy themselves that jurisdiction to entertain an action exists." *Campanella v. Commerce Exch. Bank,* 137 F.3d 885, 890 (6th Cir. 1998). The Court must, therefore, examine the basis for its jurisdiction over this action as a necessary prerequisite to its consideration of Plaintiff's Motion for Summary Judgment.

Diversity of citizenship jurisdiction exists "only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State." *Wisconsin Dept. of Corr. v. Schacht*, 524 U.S. 381, 388 (1998). "State citizenship for the purpose of the diversity requirement is equated with domicile." *Von Dunser v. Aronoff*, 915 F.2d 1071 (6th Cir. 1990) (citations omitted). Apart from mere residence, "domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 48 (1989) (citing *Texas v. Florida*, 306 U.S.

398, 424 (1939)). Here, Plaintiff alleges that she is a resident of Oregon, and the Defendants are residents of Ohio. No party has indicated an intention to depart from his or her place of residence. Thus, Plaintiff and Defendants are domiciled in different states. They are, therefore, citizens of different states, and there is complete diversity of citizenship among the parties.

As noted above, Defendants have specifically challenged Plaintiff's assertion that the amount in controversy exceeds the jurisdictional threshold of $75,000. "The general rule is that the amount claimed in good faith by the plaintiff controls unless it appears to a legal certainty that the claim is for less than the jurisdictional amount or unless the amount claimed is merely colorable." *Sellers v. O'Connell*, 701 F.2d 575, 578 (6th Cir. 1983) (citing *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938)). Here, Plaintiff alleges that Defendants' "continuing trespass" has created a cloud on the title to Parcel 16 and "adversely affected" her ability to sell the property. Doc. #1 at 7. Plaintiff asserts that she is entitled to compensatory damages in excess of $76,000 on her trespass claim. She apparently derives that figure from her inability to sell Parcel 16 due to the alleged cloud on her title, for which she seeks a declaratory judgment to quiet title. In other words, Plaintiff alleges that she is entitled to damages that correspond to the fair market value of Parcel 16, as Defendants' continuing alleged trespass prevents her from selling the property. Thus, the foundation for the relief she seeks is the declaratory judgment to quiet title, which would allow her to sell the property free of the cloud created by Defendants' alleged trespass.

The Sixth Circuit has stated that it is "well-settled" that "for actions seeking a declaratory judgment, we measure the amount in controversy by "the value of the object of the litigation." *Northup Props, Inc. v. Chesapeake Appalachia, L.L.C.*, 567 F.3d 767, 770 (6th Cir. 2009)) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977)). When construing the amount in controversy requirement of a federal statute limiting the appellate jurisdiction of the federal courts, the Supreme Court once stated that "a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected." *Smith v. Adams*, 130 U.S. 167, 175 (1889) (construing Act of March 3, 1885, ch. 355, 23 Stat. 443). Thus, the fair market value of Parcel 16 speaks to the amount in controversy, not the damages that Plaintiff has alleged.

Here, the Court takes judicial notice of the fact that the Preble County Auditor has appraised the market value of Plaintiff's Parcel 16 at $139,870, which is in excess of the $75,000 required by the statute. *See* Fed. R. Evid. 201(b)(2) (allowing a court to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Thus, the Court is satisfied that the amount in controversy requirement of the statute has been met, as well as the complete diversity of the parties' citizenship.

The Court recognizes that, typically, when a defendant challenges the amount in controversy, the plaintiff bears the burden of proving that the requirement has been met. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189-90 (1936); *Sellers v. O'Connell*, 701 F.2d 575 (6th Cir. 1983). Nevertheless, because facts in the public record satisfactorily demonstrate that an amount in excess of $75,000 is in controversy, it would ill-serve the goal of judicial efficiency if the Court now ordered the parties to brief the issue. However, Fed. R. Evid. 201(e) states that upon "timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed," namely, the county auditor's assessed fair market value of Plaintiff's property as a means to establish the amount in controversy. The rule further states that "[i]f the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard." *Id.* Thus, if Defendants have a basis for challenging the propriety of the fact judicially noticed by the Court, they may move the Court for reconsideration. For now, however, the Court concludes that the amount in controversy requirement of the diversity of citizenship statute is met, and that the Court has subject matter jurisdiction over this matter.

III. STANDARD OF REVIEW

Under Rule 56 of the Federal Rules of Civil Procedure, upon motion by either party, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party demonstrates that a fact is or is not genuinely disputed by "citing to particular parts of materials in the record, including depositions, documents . . . affidavits or declarations . . . admissions, interrogatory answers," as well as other relevant materials. Fed. R. Civ. P. 56(c)(1)(A). Generalized assertions do not suffice, as a court has no "obligation to 'wade through' the record for specific facts" in support of a party's arguments. *United States v. WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993) (citing *InterRoyal Corp. v. Sponseller*, 889 F.2d 108 (6th Cir. 1989)).

The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant's burden is to demonstrate "the absence of a genuine issue of material fact as to at least one essential element on each of the Plaintiff's claims." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000) (citing *Celotex*, 477 U.S. at 322).

Once the moving party has demonstrated that no disputed issue of material fact exists, the burden shifts to the nonmoving party. *Celotex*, 477 U.S. at 324. The nonmovant must then present evidence of a genuine dispute of a material fact

that is resolvable only by a jury. *Id.* At this stage, it is not sufficient for the nonmoving party to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party must "go beyond the pleadings" and present some type of evidentiary material that demonstrates the existence of a genuine dispute. *Celotex*, 477 U.S. at 324. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Conversely, material facts in genuine dispute that "may reasonably be resolved in favor of either party" must be resolved by a jury, requiring denial of summary judgment. *Anderson*, 477 U.S. at 250. The court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in that party's favor. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Furthermore, the court must avoid "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts," which are "jury functions" that are inappropriate to apply at the summary judgment stage. *Anderson*, 477 U.S. at 255.

IV. ANALYSIS

According to Plaintiff, all easements creating a right-of-way across Parcel 16 have been extinguished. Doc. #21 at 8-9. She argues that the original Alleyway Easement that was recognized in the 1969 conveyance to Brierly was extinguished by the 1973 deed that created the Access Easement. *Id.* at 8. Plaintiff also argues that the doctrine of merger extinguishes the Access Easement over Parcel 16. *Id.* at 9. She asserts that that the "purpose" of the Access Easement is "moot" because two of the contiguous parcels owned by the Shanks, Parcel 11 and Parcel 12, have direct access to Barron Street. *Id.* Based on the assumption that the easements terminated, Plaintiff reasons that Defendants' admission that they continuously use Parcel 16 to access Barron Street amounts to an admission of "continuing trespass" under Ohio law, and that she is therefore entitled to judgment as a matter of law. *Id.* at 9-10.

Defendants respond by arguing that because the doctrine of merger requires the acquisition of all the servient and dominant estates by one owner, and they have never owned Parcel 16, merger could not have extinguished the Access Easement. Doc. #23 at 5-6. They also argue that an easement by implication exists, based on the landlocked status of Parcel 15 and the continuous use of Parcel 16 over many years to access Barron Street. *Id.* at 6.

An easement is "the grant of a use on the land of another." *Alban v. R.K. Co.*, 239 N.E.2d 22, 24 (Ohio 1968). An easement, which is created by grant or by prescription, gives the owner of one estate, the dominant state, an exercisable

right over the estate of another, the servient estate, that benefits the dominant estate. *Trattar v. Rausch*, 95 N.E.2d 685, 688 (Ohio 1950) (citing *Yeager v. Tuning*, 86 N.E. 657, 658 (Ohio 1908)). The grant of an easement exists in perpetuity, unless terminated by express release or abandonment. *Junction R. Co. v. Ruggles*, 7 Ohio St. 1, 6 (Ohio 1857). An easement may also be terminated by merger, which requires common ownership of the dominant and servient estates. *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Ryska*, 2005-Ohio-3398 ¶ 52, 2005 WL 1538259 (Ohio Ct. App. 2005) (citing *State ex rel. Synod of Ohio of United Lutheran Church in Am. v. Joseph*, 39 N.E.2d 515 (Ohio 1942)).

The Court agrees with Plaintiff that the May 10, 1973, agreement between Brierly and the then-owners of Parcel 13, Parcel 14, and Parcel 15 extinguished the Alleyway Easement. Those owners conveyed to Brierly any "claim, right-of-way, easement, or other interest" in an area of land defined by a metes and bounds description that encompassed Parcel 12, Parcel 16, and the tract including the alleyway. The Alleyway Easement fell squarely within that area of land, as had been acknowledged in the July 19, 1969, conveyance of the land to Brierly. Doc. #21-1 at 18. In exchange for termination of the Alleyway Easement, the May 10, 1973, agreement gave the owners of the landlocked parcels something in return: the Access Easement, "a right-of-way and easement for access" over the same land, "for the benefit of" their landlocked properties. *Id.* at 19. Thus, the May 21, 1982, conveyance from Robinson to Emily Shank of Parcel 15, which purported to convey *both* the Alleyway Easement and the Access Easement, could only have

conveyed the Access Easement, due to the express extinguishment of Alleyway Easement in 1973. Shank Aff. Ex. 1 (Doc. #23-2 at 1).

The Court does not, however, agree with Plaintiff's contention that the doctrine of merger extinguished the Access Easement. The doctrine of merger "rests upon the principle that a servitude may not be impressed upon an estate of another estate when both estates are owned by the same person." *Hiener v. Kelley*, No. 98CA7, 1999 WL 595363 at *10 (Ohio Ct. App. July 23, 1999). As Plaintiff acknowledges, the doctrine of merger requires that one party own *both* the dominant *and* the servient estates. *Shah v. Smith*, 908 N.E.2d 983, 986 (Ohio Ct. App. 2009) (citing *Joseph*, 39 N.E.2d 515 (Ohio 1942)). "To effectively terminate the easement, the fee title with the right of possession of both tenements must vest in the same party, 'coextensively, and equal in validity, quality, and all other circumstances of right.'" *Lone Star Steakhouse*, 2005-Ohio-3398 ¶ 52 (quoting *Hiener*, 1999 WL 595363)). As the April 7, 1976 conveyance from J-Sue, Inc., to the Wethingtons acknowledged, the Access Easement burdens both Parcel 12 and Parcel 16. However, Defendants have never owned Parcel 16, one of the servient estates subject to the Access Easement. Fee title with right of possession of every dominant and servient estate has, therefore, never vested in Defendants. The doctrine of merger cannot extinguish an easement burdening property that Defendants have never owned.

There is also no evidence of the easement's express termination in the chain of title. To the contrary, in fact, as a review of the deeds demonstrates that every

grantor since Brierly has conveyed Parcel 16 with explicit reference to the Access Easement. Brierly's May 11, 1973, conveyance to J. Sue, Inc., contained a legal description that described Parcel 12 and Parcel 16 as one unit, and acknowledged that the land was subject to the Access Easement. Doc. #21-1 at 21. J-Sue, Inc.'s later conveyance to the Wethingtons, which divided Parcel 12 and Parcel 16 into separate tracts, acknowledged that each parcel was individually subject to the Access Easement. *Id.* at 23. Furthermore, Plaintiff's own deed states that Parcel 16 is subject to the Access Easement, with specific reference to the recording that created the easement. *Id.* at 41. Plaintiff clearly took title to the land with notice that the property was encumbered by the Access Easement.

The situation here is similar to *Mosher v. Hibbs*, 1 Ohio C.C. 49 (Ohio Cir. Ct. 1902), where, on appeal, an Ohio court held that a landowner's purchase of property that provided his other landlocked tract with an alternate route to a public highway could not extinguish an existing right-of-way over another party's adjacent land. In *Mosher*, the defendant purchased a twenty-two acre tract of land that was accessible only by a private road and surrounded on three sides by the plaintiff's land. *Id.* at 50. After the defendant purchased an eleven acre tract of land that provided an alternate access to the public highway, the plaintiff sought an injunction to prevent the defendant from using the private road as a right-of-way. *Id.* at 49-50. The court held that the alternate route provided by the subsequently purchased tract did "not divest [the defendant] of the rights secured to him from conditions and circumstances as they existed at the time the purchase

and the conveyance was made to him. Although he may have since acquired another outlet, this will not deprive him of the rights that vested in him when he purchased the twenty-two acre tract." *Id.* at 52. Here, as in *Mosher*, Defendants have a landlocked lot, Parcel 15, which benefits from an easement over Plaintiff's Parcel 16, and the easement existed at the time they purchased Parcel 15. Their right in Parcel 16, the right to the Access Easement thereon, vested when they purchased Parcel 15. Under *Mosher*, the fact that Defendants now own other parcels to the north of Parcel 16 with separate access to Barron Street does not deprive them of the right to use the Access Easement.

Because Plaintiff has not demonstrated that the Access Easement was terminated, she is not entitled to judgment as a matter of law quieting title in her favor. There is no indication that the Access Easement over Parcel 16 was ever extinguished, either by the doctrine of merger or by express termination. Thus, Plaintiff is not entitled, on summary judgment, to the declaratory judgment prayed for in her Complaint.

For the same reason, Plaintiff is not entitled to judgment as a matter of law on her trespass claim. Defendants' admission that they continuously use Parcel 16 in order to access Barron Street cannot support Plaintiff's trespass claim if the Access Easement gives Defendants a right-of-way across Parcel 16. The Access Easement is valid. Thus, Defendants' admission does nothing more than describe an action that they have a right to take. Plaintiff's own deed to Parcel 16 acknowledges as much.

Furthermore, the parties genuinely dispute whether or not Parcel 12, which Defendants also own and is partially coterminous with Parcel 15, has direct access to Barron Street. Plaintiff asserts that Parcel 12 has such access to Barron Street. Johnson Aff. ¶ 10 (Doc. #21-1 at 2). Defendants deny that Parcel 12 has such access, and contend that Parcel 15 can only access Barron Street via the Access Easement over Parcel 16. Answer ¶ 6 (denying ¶ 24 of Complaint) (Doc. #7 at 2); Shank Aff. ¶ 23 (Doc. #23-1 at 4). It is not clear from the photographs attached to Plaintiff's affidavit that Parcel 12 could provide a vehicle with direct access to Barron Street, as a raised curb appears to separate the parking area from the grass along the street with no defined entrance or exit. *See* Johnson Aff. Exs. B-2, D-1, & D-2 (Doc. #21-1 at 7, 11, &12). There is a visible entrance/exit to the north of the Kentucky Fried Chicken sign, but it is unclear whether it is located on Parcel 11 or Parcel 12. Whether Defendants *must* traverse Parcel 16 is, therefore, a fact that remains genuinely in dispute. Thus, even if Plaintiff had prevailed in arguing that all express easements burdening Parcel 16 had terminated, it would have been impossible to resolve, on summary judgment, the question of whether an easement by necessity exists, which Defendants raised as a defense to trespass.

Finally, the Court notes that Plaintiff, in her Reply Brief, objected to several of Defendants' Exhibits, describing them as unsworn "expert testimony" that may not be considered on summary judgment, as well as the untimely filed affidavit of Kelly Doran, an undisclosed witness. Doc. #28. The "expert testimony" consists of legal analysis and conclusions set forth by attorneys in several opinion letters.

Apart from the fact that the letters are unsworn hearsay, "it is impermissible for a trial judge to delegate his duty to determine the law of a case to an expert." *Molecular Tech. Corp. v. Valentine*, 925 F.2d 910, 919 (6th Cir. 1991). *See also Chavez v. Carranza*, 559 F.3d 486, 498 (6th Cir. 2009) (upholding exclusion of expert's testimony opining on subject matter jurisdiction, as "[a]n "expert opinion on a question of law is inadmissible"). The Court, therefore, disregarded the contents of the attorneys' letters. Doran's affidavit describes decades of continuous use of Parcel 16 by tenants of Parcel 15 to access Barron Street, and would only have been relevant if it had been necessary to consider Defendants' arguments in support of an easement by implication. Because the Court did not need to consider those arguments in order to overrule Plaintiff's Motion for Summary Judgment, it also disregarded Doran's affidavit.

V. CONCLUSION

The Court has determined it has subject matter jurisdiction over this matter pursuant to the diversity of citizenship statute, 28 U.S.C. § 1332(a), having taken judicial notice, under Fed. R. Evid. 201(b)(2), of the fact that the market value of Plaintiff's property exceeds $75,000. Defendants are advised that, under Fed. R. Evid. 201(e), they are, "on request, [] still entitled to be heard" by the Court "on the propriety of taking judicial notice and the nature of the fact to be noticed."

To summarize, the undisputed facts show only that the Alleyway Easement was extinguished. Plaintiff has set forth no undisputed facts showing that the Access Easement was ever expressly terminated or extinguished by merger, or that Defendants do not have a right-of-way across Parcel 16 to access Barron Street from Parcel 15. Thus, Plaintiff is not entitled to judgment as a matter of law on her quiet title, trespass, or declaratory judgment claims. Accordingly, the Court OVERRULES Plaintiff's Motion for Summary Judgment (Doc. #21).

Counsel of Record will take note that a scheduling conference call will be convened by the Court, to set a new trial date and other relevant dates, at 8:45 am on March 10, 2014.

Date: February 27, 2014

WALTER H. RICE
UNITED STATES DISTRICT JUDGE