[Cite as *Franks v. Sagaria,* 2010-Ohio-3586.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BARBARA L. FRANKS, ET AL.	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
SABATO D. SAGARIA, II	:	Case No. 2009CA00130
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 08CV00717
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 3, 2010

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee
DONALD S. ANDREWS 250 Civic Center Drive Suite 500 Columbus, OH 43215	W. PRENTICE SNOW 10 West Locust Street P.O. Box 487 Newark, OH 43058-0487

Farmer, P.J.

{¶1} Appellants, Barbara Franks and Daniel Rogers, and appellee, Sabato Sagaria, II, own adjoining property in Granville, Ohio. Appellants own Lot Nos. 181 and 182. Lot No. 181 is behind Lot No. 182. Appellee owns Lot Nos. 187 and 188. Lot No. 187 is behind Lot No. 188. Lot Nos. 181 and 187 are known as the "back lots."

{¶2} On June 28, 1894, the prior owners of the properties entered into a right-of-way agreement wherein four feet on either side of the boundary line was conveyed for ingress and egress between Lot Nos. 182 and 188, the "front lots." Between these lots is now a concrete driveway which includes the 1894 right-of-way. Appellants' back Lot No. 181 contains a barn/garage and appellee's back Lot No. 187 contains a garage.

{¶3} After appellee purchased his property, a disagreement arose as to the use of the right-of-way. On April 4, 2008, appellee filed a complaint against appellants for preliminary and permanent injunction and money damages, claiming trespass by operation of motor vehicles, trespass by building, and abuse of right-of-way.

{¶4} On May 1, 2008, the trial court issued a preliminary injunction preventing the blocking of the shared driveway.

{¶5} A bench trial commenced on July 7, 2009. By judgment entry filed October 8, 2009, the trial court determined the right-of-way between the two front lots remained in full force and effect and could be used for commercial purposes, and neither party had the right to go onto the property of the other outside the right-of-way without the other's permission.

{¶6} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER ANY OF THE HISTORICAL USE OF APPELLANT'S PREDECESSOR IN TITLE TO DETERMINE IF A PRESCRIPTIVE EASEMENT WAS CREATED."

II

{¶8} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER THE HISTORICAL USE AND ACQUIESCENCE OF THE PROPERTY AND THAT LACHES PROHIBITED APPELLEE FROM LIMITING THE AMOUNT OF ROOM HISTORICALLY USED TO ACCESS APPELLANT'S PROPERTY."

III

{¶9} "THE COURT ERRED IN BY FAILING TO PROVIDE A METHOD TO DETERMINE THE EXACT LOCATION WHERE THE APPELLANTS' AND APPELLEE'S PROPERTY LINES MEET."

I

{¶10} Appellants claim the trial court erred in not permitting evidence of the historical use of the property by their predecessor in title. We disagree.

{¶11} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶12} Appellants argue they were prohibited from producing evidence from the previous landowner, Judy LaVoie, as to the ingress and egress by her customers over

the subject right-of-way in order to establish the elements of a prescriptive easement. Appellants' Brief at 5. The trial court found previous use was not relevant. T. at 171-172.

{¶13} As a general rule, all relevant evidence is admissible. Evid.R. 402. However, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶14} Despite appellants' argument, there was considerable testimony by Ms. LaVoie as to the commercial use of the property and the number of vehicles per day that traversed the right-of-way and used the back property, Lot No. 181. T. at 161-167, 170-172. As appellee points out, appellants did not offer a proffer relative to what other testimony they wished to present.

{¶15} It is basic to appellate practice that error in the form of excluded testimony is not reviewable unless there has been a proffer of the excluded testimony or the content of the testimony is apparent from the circumstances. Evid.R. 103. Because a proffer was not made, we are unable to determine whether appellants suffered any undue prejudice from any alleged error.

{¶16} Further, in its judgment entry filed October 8, 2009, the trial court addressed the historical use of the property as follows:

{¶17} "3. That this right-of-way has been used in the past in connection with commercial activities on Lots 182 and 188;

{¶18} "1. That the right-of-way over Lots 182 and 188 remains in full force and effect and may be used for ingress and egress to said Lots, including access to said

Lots for commercial purposes consistent with prior use, by the plaintiff, defendant Franks, their agents, employees, guests, tenants, and business invitees.

{¶19} "7. That the right-of-way has been used commercially.

{¶20} "8. That the right-of-way can be utilized for commercial purposes as it has in the past, which use included a funeral home, beauty salon and tanning salon."

{¶21} Appellants' answer and counterclaim aver that appellee blocked the joint driveway which was an abuse of the historical right-of-way. The trial court specifically addressed this issue and resolved it in appellants' favor.

{¶22} Assignment of Error I is denied.

II

{¶23} Appellants claim the trial court erred in not prohibiting appellee from placing objects or vehicles on his back lot in a manner to impede safe access to their property. We disagree.

{¶24} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson,* 66 Ohio St.3d 610, 1993-Ohio-9.

{¶25} Appellants argue equity and historical use require the trial court to expand the right-of-way to include a turning radius and therefore prohibit appellee from placing his vehicle or objects on his back lot in a manner that impedes safe access to their

property. We glean from this assignment that appellants are challenging the following specific findings and conclusions of the trial court:

{¶26} "4. That this right-of-way does not extend onto Lots 181 and 187 of the Village of Granville, Ohio;

{¶27} "2. That the right-of-way is limited to Lots 182 and 188 only and no one may go onto other property of a party, particularly Lots 181 and 187 of the Village of Granville, without the permission of the owner thereof.

{¶28} "3. That the permanent injunction against blocking the right-of-way previously ordered by the Court be, and hereby is, made permanent and is also extended to apply to the plaintiff, with the added proviso that short-term, temporary blocking of the right-of-way by the plaintiff, defendant Franks, their agents, employees, guests, tenants, and business invitees for such purposes as business deliveries, property maintenance, and customer drop-off to Lots 182 and 188 is permitted.

{¶29} "9. No party shall go onto the property of the other to work on their own property without the prior written consent of the other, which shall not be unreasonably withheld."

{¶30} Appellants essentially are attempting to add to the right-of-way a prescriptive easement. "A prescriptive easement occurs when one can prove that he has used the land of another (a) openly, (b) notoriously, (c) adversely to the property owner's rights, (d) continuously, and (e) for at least 21 years." *Wood v. Village of Kipton,* 160 Ohio App. 3d 591, 2005-Ohio-1816, ¶13. One of the elements is that appellants' use of the property was adverse to the rights of appellee. However, all of the evidence established that as a result of the right-of-way, the parties had at times

encroached on the back lots in order to maneuver vehicles. Such use was a result of mutual amity and not an open and adverse use of another's land.

{¶31} The current dispute between the parties has established the harsh reality that there is no right-of-way over the back lots. The right-of-way is limited to the front lots. Courts have acknowledged that a prescriptive easement does not arise from mere permissive use. *Pennsylvania Railroad Company v. Donovan* (1924), 111 Ohio St. 341. There is ample evidence that the use of the back lots was permissive only, and the climate or atmosphere between the property owners has changed. T. at 162-163, 166, 179-181, 186, 191-192, 229-231, 249. As a result, the back lots do not have a right-of-way for ingress and egress as the front lots do.

{¶32} Faced with the evidence presented, we cannot find the trial court abused its discretion in its final order. We acknowledge the trial court has successfully attempted to satisfy the various issues vis-à-vis the parties' property rights.

{¶33} Assignment of Error II is denied.

III

{¶34} Appellants claim the trial court erred in not determining a method to locate the parties' property lines. We disagree.

{¶35} In its October 8, 2009 judgment entry, the trial court specifically adopted the survey conclusions of Meyers Surveying Company:

{¶36} "4. That with regard to the location of the boundary lines between Lots 181, 182, 187, and 188 of the Village of Granville, Ohio, as well as the location of the right-of-way over Lots 182 and 188, the conclusions of Meyers Surveying Company, set

forth in Plaintiff's Exhibit 6, are adopted by the Court as its own and shall govern all questions on such matters that may arise in the future."

{¶37} Plaintiff's Exhibit 6 is in the record. T. at 158-159.

{¶38} Assignment of Error III is denied.

{¶39} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BARBARA L. FRANKS, ET AL.	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
SABATO D. SAGARIA, II	:	
Defendant-Appellee	:	CASE NO. 2009CA00130

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

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES