[Cite as *Scarberry v. Lawless* , 2010-Ohio-3395.]

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

IRENE SCARBERRY,	:	
	:	
Plaintiff-Appellee/Cross-Appellant,	:	Case No. 09CA18
	:	
vs.	:	**Released: July 15, 2010**
	:	
THOMAS E. LAWLESS AND SUE LAWLESS,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendants-Appellants/Cross-Appellees.	:	
	:	

APPEARANCES:

Richard F. Bentley, Ironton, Ohio, for Appellants.

Mark K. McCown, Ironton, Ohio, for Appellee.

McFarland, P.J.:

{¶1} Defendants-Appellants, Thomas E. Lawless and Sue Lawless, appeal the trial court's decision that quieted title to a sixty acre tract of land in rural Lawrence County to Plaintiff-Appellee, Irene Scarberry. Appellants essentially argue that the trial court's judgment voiding their deed and quieting title to appellee is against the manifest weight of the evidence. Because some competent and credible evidence supports the court's judgment, we disagree with appellants.

{¶2} Appellee cross-appeals the trial court's judgment. She contends that the trial court's decision relating to appellants' claim under the occupying claimant law is against the manifest weight of the evidence. Some competent and credible evidence supports the trial court's judgment. Therefore, we overrule all of the assignments and cross-assignments of error and affirm the trial court's judgment.

I. FACTS

{¶3} In 1998, appellants acquired a sixty-acre tract of land pursuant to a tax sale. The legal description of the land contained in their deed originates from a 1922 deed and states as follows:

> **{¶4}** "[L]ying in Lot 1283 section 21 Range 15 and starting at a corner between Shannon [W]hite and Henon Scarbery [sic] lands near two mile creek same being the north east corner between said land and running in a westerly direction to a corner between said Henon Scarbery [sic] land and Brood [sic] Capper and Shanon [sic] White thence along line between Brook Capper and Henon Scarbery [sic] line to a corner to be established by Henon Scarbery [sic] and Mary Scarbery [sic] and Banks Scarbery [sic] also following a line across said Henon Scarberry land to a corner on the line between said shanon [sic] White land and Henon Scarbery [sic] land and following said line to place of beginning and containing (60) sixty acres more or less[. I]t is mutely [sic] understood that their [sic] will be a surveye [sic] of their land later and a more definant [sic] discuption [sic] be attached here two; this being a part of land deeded to Henon Scarbery [sic] by Wm Thacker July 19, 1920."

{¶5} After appellants acquired the property, they hired a surveyor to ascertain the boundaries. They also constructed a pond and began building a cabin. During the course of construction, a dispute arose as to the exact location of the sixty acres. Appellee, an adjoining landowner, claimed that appellants were building on the wrong tract of land. She subsequently filed a complaint for quiet title to the property. Appellee asserted that the language used in the deed was void because it did not contain a sufficient legal description. Appellants counterclaimed for damages under the occupying claimant law.

{¶6} On September 13, 20, and 21, 2007, the court held a bench trial. Appellee's surveyor, Jeffrey Stephens, testified that he was unable to identify the boundaries based upon the legal description in the deed. He stated that he was able to determine the first call of the deed, i.e., "Starting at a corner between Shannon White and Henon Scarberry lands near two mile creek. The same being the northeast corner between said land and running * * * in a westerly direction to a corner between said Henon Scarberry land and Brook Capper and Shannon White." However, Stephens stated that he was unable to determine the second call of the deed, i.e., "Thence along line between Brook Capper and Henon Scarberry line to a corner to be established by Henon Scarberry, Mary Scarberry and Banks Scarberry."

Stephens explained that he could not determine where the line existed between Capper and Henon because Capper never owned any property adjacent to Henon, but instead owned property north of Shannon White's property. Stephens further stated that he could not determine the second call because the deed stated that the corner would be established and he found nothing to indicate that the parties ever established the corner. Stephens also testified that he could not determine the third call of the deed, i.e., "Also following a line across said Henon Scarberry land to a corner on the line between Shannon White and Henon Scarberry land." He stated that he could not establish this call because "[i]t simply says 'across.' Not knowing the point of origin nor direction or directions, nor distances."

{¶7} Stephens additionally explained that the deed description does not use any fence lines or natural boundaries, such as a rock cliff, a creek, or a ridge, to describe the property. He stated that he looked to other ways to try to determine the boundaries, but could not. He opined that the 1922 deed was insufficient to convey property because the boundaries were never defined. Stephens also testified that he did not find appellant's surveyor's (Nate Dickerson) report accurate, explaining:

> **{¶8}** "[I]t was to be determined by Henon and Banks and Mary, and they never said. If they would've said, if the description were in fact complete, the only thing I can do is tell you where I think it is not, because we really can't say where it

> is. If they intended for it to be at line of 1283, they certainly could have said so. If it were to have followed the rock cliff which was the easterly boundary of Henon's property in 1283, they certainly could have said so. If it were to follow along a north line of Lot 1283 back to Shannon White, they certainly could have and would've said so, because that language, which is already provided for them in prior documents."

Stephens further discounted Dickerson's reliance upon certain fences, stating "[t]here are fences everywhere out through there." Stephens stated that he could not determine whether the fences were meant to be boundary fences or if they were pasture fences. Stephens additionally stated that if Dickerson's survey is correct, then it would mean that in 1922, Henon conveyed the property upon which his house sat.

{¶9} Nate Dickerson, appellants' surveyor, testified that he used extrinsic evidence to ascertain the boundaries of the property conveyed in the 1922 deed. He prepared a report, which his trial testimony mirrors, that states:

> **{¶10}** "The Lawless 60 acre tract came out of a 72-acre tract in 1922. Henon Scarberry conveys to Banks and Mary Scarberry a 60-acre tract. The legal description is unclear as to the exact location. It is clear that the intent was to convey a 60-acre tract out of lot 1283. The beginning point of the legal description is locatable and these lines were monumented the third call states: 'Thence along the line between Brook Capper and Henon Scarberry line to a corner to be established by Henon Scarberry also following a line across said Henon Scarberry land to a corner on the line between said Shannon White land and Henon Scarberry land and following said line to the place of beginning, and containing 60 acres, more or less.'

> The description also mentioned that a survey will be performed and a more definite description will be attached. It doesn't appear this survey ever happened because it doesn't show on the records. Since the description calls for leaving the west line of the 72-acre tract to sever out a 60-acre tract in lot 1283, a thorough investigation was performed to find any extrinsic evidence that may prove the intent of the description. An ancient fence line was located in the field[;] this would be a common way to mark boundaries at the time, and was consistent with the age of the 1922 deed. The fence went from the south line of lot 1283 thence went northerly crossing a branch to a rock ledge. It appears the rock ledge may have been used as the natural boundary upon calculation a course from the rock cliff to intersect the west line of the 72-acre tract, as it follows the general direction of the cliff. Not finding other evidence we held the calculated line and monumented it. This made the acreages on the legal description match. Also, hearsay from adjoiners and residents in the area all agree with the location found in the field and every tax map since 1926 show the 12 acre remnant located on the west side of lot 1283."

{¶11} To refute appellee's assertion that Mr. Lawless should have stopped building on the property once he received notice of appellee's claim to the land, Mr. Lawless stated that when appellee filed her complaint, three-fourths of the walls of the cabin had been completed but the roof had not been built. He explained that he finished construction so that weather would not damage the interior.

{¶12} On September 28, 2007, the court quieted title to appellee. The court determined that the legal description contained in the 1998 Sheriff's deed, the 1939 deed from Banks to Mary, and the 1922 deed from Henon to Banks and Mary failed to describe an identifiable parcel of land and that the

deeds were void. The court further found that the Lawlesses were innocent purchasers of the property and are entitled to damages in the amount of $37,000 for the value of lasting improvements they made to the property. The court also awarded appellants the amount for which they purchased the property, $8,258. However, the court set-off the amount of money the Lawlesses received for selling timber off the property, $22,358. The court thus ordered appellee to pay appellants $22,900 as damages.

{¶13} Appellants appealed and appellee cross-appealed. We remanded the matter to the trial court so that it could enter appropriate findings of fact and conclusions of law to enable us to conduct an adequate appellate review.

{¶14} On June 16, 2009, the court entered amended findings of fact and conclusions of law. The court specifically determined that appellee's surveyor's testimony was more credible than appellants' surveyor's testimony. Appellee's surveyor stated "that it was not possible to plot the second or third calls of the description to the real property in question since that legal description did not establish the corner to be established between Henon Scarberry, Mary Scarberry and Bank Scarberry; and further, that the deed to the sixty acre[s] seemed to rely upon a survey to be computed [sic] in the future (which was never done)." The court did not find appellants'

surveyor's testimony credible. Appellants' surveyor "indicated that he could have established all four calls, either by deed or by extrinsic evidence and testimony." The court again found that the legal description used in the 1922, 1939, and 1998 deeds fails to describe an identifiable parcel of land and set aside those deeds. Both parties timely appealed the trial court's judgment.

II. ASSIGNMENTS OF ERROR

{¶15} Appellants raise five assignments of error:

> "I. The trial court erred in finding that appellants' deed failed to describe an identifiable parcel of land thus holding the deed void and quieting the title to appellee."
>
> "II. The trial court erred in finding that the testimony of plaintiff's surveyor carried the greater weight of evidence over the appellant's [sic] surveyor."
>
> "III. The trial court erred in establishing damages under Ohio's occupying claimant act by offsetting value of all timber removed and failing to account for additional real estate taxes paid by appellants."
>
> "IV. The trial court erred in voiding appellants' deed from a delinquent tax sale in violation of R.C. 5721.19."
>
> "V. The trial court erred in finding that appellee was entitled to pay appellants to establish a better title without having complied with R.C. 5303.08 allowing appellants to pay appellee the value of the land."

Appellee/Cross-appellant raises five cross-assignments of error:

> "I. The trial court erred in finding Appellant had not engaged in fraud or collusion, and in granting post-litigation improvement expenses under the Occupying Claimant Law when the Appellant was aware of his claim of title was contested prior to the expenditures."
>
> "II. The trial court erred in finding damages due Appellant pursuant to the Occupying Claimant Law when Appellant failed to introduce appropriate evidence as to damages Appellant claimed."
>
> "III. The trial court erred in failing to reduce any award due Appellant under the Occupying Claimant Law by the fair rental value of said property."
>
> "IV. The trial court erred in admitting hearsay evidence claimed to be 'community reputation.'"
>
> "V. The trial court erred in admitting evidence and the opinion of the surveyor of the Defendant-Appellant when the same were purportedly based upon scientific evidence not set forth in accordance with *Daubert v. Merrell Dow Pharmaceuticals*."

III. STANDARD OF REVIEW

{¶16} Both appellants and cross-appellant appeal various aspects of the trial court's judgment, but our general standard of review remains essentially the same. We will not reverse a trial court's judgment in a civil action unless it is against the manifest weight of the evidence. A trial court's judgment is not against the manifest weight of the evidence so long as some competent and credible evidence supports it. See, e.g., *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. In determining whether a trial court's judgment is against the

manifest weight of the evidence, a reviewing court must not re-weigh the evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273. Under this highly deferential standard of review, we do not decide whether we would have come to the same conclusion as the trial court. *Amsbary v. Brumfield*, 177 Ohio App.3d 121, 2008-Ohio-3183, 894 N.E.2d 71, at ¶11. Instead, we must uphold the judgment so long as the record contains "some evidence from which the trier of fact could have reached its ultimate factual conclusions." Id., quoting *Bugg v. Fancher*, Highland App. No. 06CA12, 2007-Ohio-2019, 2007 WL 1225734, at ¶9. Moreover, we presume the trial court's findings are correct because the trial court is best able to view the witnesses and observe their demeanor, gestures, and voice inflections and to use those observations in weighing the credibility of the testimony." See, e.g., *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *Jones v. Jones*, Athens App. 07CA25, 2008-Ohio-2476, at ¶18. This means that the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it. *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591. Furthermore, an appellate court should not substitute its judgment for

that of the trial court when the record contains competent, credible evidence going to all of the essential elements of the case. *Seasons Coal*, supra.

IV. APPELLANTS' APPEAL

A. QUIET TITLE

{¶17} In their first assignment of error, appellants argue that the trial court erred by quieting title to appellee. Specifically, they assert that the court wrongly concluded that the deed failed to contain a sufficient legal description of the property conveyed. Appellants contend that while the deed itself leaves the property conveyed uncertain, parol evidence renders the property certain.

{¶18} An action to quiet title is a statutory cause of action under R.C. 5303.01. See *Holstein v. Crescent Communities, Inc.*, Franklin App. No. 02AP-1241, 2003-Ohio-4760, at ¶26. R.C. 5303.01 states:

> **{¶19}** An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein.

The purpose of any quiet-title action is to conclusively determine the allocation of property interests. *Lincoln Health Care, Inc. v. Keck*, Lake

App. No. 2002-L-006, 2003-Ohio-4864, at ¶23. "The burden of proof in a quiet title action rests with the complainant as to all issues which arise upon essential allegations of his complaint. He must prove title in himself if the answer denies his title or if the defendant claims title adversely." *Duramax, Inc. v. Geauga Cty. Bd. of Commrs.* (1995), 106 Ohio App.3d 795, 798, 667 N.E.2d 420.

{¶20} Furthermore, when a party requests the court to quiet title based upon rescission or cancellation of deed, a court must presume that a deed executed in the correct form is valid and must not set it aside except upon clear and convincing evidence. See Henkle v. Henkle (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791, citing Weaver v. Crommes (1959), 109 Ohio App. 470, 474-75, 167 N.E.2d 661. "Clear and convincing evidence" is "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *In re Haynes* (1986), 25 Ohio St.3d 101, 103-04, 495 N.E.2d 23; see, also, *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. In reviewing whether the lower court's decision was based upon clear and convincing

evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Schiebel*, 55 Ohio St.3d at 74.

{¶21} With the foregoing principles in mind, we examine appellants' argument that the trial court's decision voiding the deed due to an insufficient legal description and thus quieting title to appellee is against the manifest weight of the evidence. This first requires us to review whether the trial court properly interpreted the deed.

1. CONSTRUCTION OF DEEDS

{¶22} The construction of a plain, unambiguous written instrument, including a deed, is a matter of law that we review without deference to the trial court. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus; see, also, *Esteph v. Grumm*, 175 Ohio App.3d 516, 2008-Ohio-1121, 887 N.E.2d 1248, at ¶8. The primary objective when construing any written instrument, including a deed, is to give effect to the parties' intent. See *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 678 N.E.2d 519; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920; see, also, *Skirvin v. Kidd*, 174 Ohio App.3d 273, 2007-Ohio-7179, 881 N.E.2d 914. "The intent of the parties to

a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411 of the syllabus.

{¶23} "When a deed is worded in clear and precise terms and its meaning is evident upon its face, there is no need to go beyond the four corners of the document." *Esteph*, at ¶9, citing *Hinman v. Barnes* (1946), 146 Ohio St. 497, 508, 66 N.E.2d 911 ("if the intention of the parties is apparent from an examination of the deed 'from its four corners,' it will be given effect regardless of technical rules of construction"). However, when a deed is ambiguous, unclear, or uncertain, a court may consider extrinsic (or parol) evidence to ascertain the parties' intent. See, e.g., *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499.

{¶24} The initial determination of whether a written instrument is clear or ambiguous is a question of law that an appellate court reviews independently. See *Skirvin*, at ¶14; see, also, *Westfield Ins. Co. v. HULS Am., Inc.* (1998) 128 Ohio App.3d 270, 291, 714 N.E.2d 934. Contract language is ambiguous "if it is unclear, indefinite, and reasonably subject to dual interpretations * * *." *Beverly v. Parilla*, 165 Ohio App.3d 802, 848 N.E.2d 881, 2006-Ohio-1286, at ¶24.

{¶25} In the case at bar, the trial court appropriately determined that the deed is ambiguous. Although the deed is clear that the intent was to convey sixty acres, the deed leaves the exact location of the sixty acres uncertain. Thus, the legal description of the land is ambiguous as a matter of law.

{¶26} We next review the trial court's resolution of the ambiguity. The interpretation of an ambiguity in a written instrument is a question of fact. See *Inland Refuse Transfer Co. v. Browning-Ferris Indus. Of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271; see, also, *Kellie Auto Sales, Inc. v. Rahbars & Ritters Ents., L.L.C.* 172 Ohio App.3d 675, 2007-Ohio-4312, 876 N.E.2d 1014; *Maverick Oil & Gas, Inc. v. Barberton City School Dist. Bd. of Edn.*, 171 Ohio App.3d 605, 2007-Ohio-1682, 872 N.E.2d 322; *Ohio Historical Soc. v. Gen. Maint. & Eng. Co.* (1989), 65 Ohio App.3d 139, 146, 583 N.E.2d 340; *Cleveland Co-Op. Stove Co. v. Cleveland & P. Ry.* (1912), 34 Ohio C.D. 236, 44 Ohio C.C. 236. Thus, when parties present competing evidence to explain or clarify an ambiguity in a written instrument, the resolution of that evidence is a matter reserved to the trial court. As such, an appellate court will uphold a trial court's interpretation of an ambiguous term so long as some competent, credible evidence supports it. See *Skirvin*, at ¶14.

{¶27} "'Every conveyance of real property must contain such a convenient and definite description that, by its terms, the land can be located.'" *Griffin v. Griffin*, Butler App. Nos. CA2003-03-076 and CA2003-04-081, 2004-Ohio-698, at ¶11, quoting 35 Ohio Jurisprudence 3d (2002) 264, Deeds, Section 42; see, also, *Roebuck v. Columbia Gas Transmission Corp.* (1977), 57 Ohio App.2d 217, 219, 386 N.E.2d 1363. "This description must be in writing; however, it need not be perfect; it is sufficient if it is such as will afford reasonable certainty as to the land's identity and location." 35 Ohio Jurisprudence 3d (2002) 264, Deeds, Section 42 (footnotes omitted). When the land cannot be located from the description or when the description is so uncertain that it cannot be known what land was intended to be conveyed, the deed is void. Id.

{¶28} In the case at bar, the trial court found that the property description contained in the deed is so uncertain that not even extrinsic evidence could clarify what land the parties intended to convey. In doing so, it relied upon appellee's surveyor's testimony and discounted appellants' surveyors' testimony. Because this is completely a factual determination, our review is limited to ascertaining whether some evidence exists in the record to support the trial court's finding. Although appellants' surveyor presented exhaustive testimony and evidence as to how he reached his

conclusion, the trial court nonetheless discredited his testimony. The court instead chose to believe appellee's surveyor's testimony that the location of the property intended to be conveyed simply could not be determined from any extrinsic evidence. Appellee's surveyor's testimony constitutes some competent and credible evidence to support the trial court's decision. Consequently, the trial court's judgment voiding the three deeds and quieting title to appellee is not against the manifest weight of the evidence.

{¶29} Accordingly, based upon the foregoing reasons, we overrule appellants' first assignment of error.

2. CREDIBILITY

{¶30} In their second assignment of error, appellants assert that the trial court erred by concluding that appellee's surveyor's testimony was more credible than appellants' surveyor's testimony. However, as an appellate court, we are not well-equipped to assess the credibility of a witness's testimony. In the case at bar, the trial court found appellee's surveyor to be more credible than appellant's surveyor. Based upon the record before us, we are unable to state that the trial court's credibility determination requires us to reverse its judgment.

{¶31} Moreover, appellants' assertion that we must conduct a de novo review of the trial court's decision is incorrect. We review the trial court's

interpretation of the deed as clear or ambiguous on an independent basis, but then, the interpretation of the ambiguity is a matter reserved to the trial court. The trial court did not believe appellants' surveyor's testimony regarding the extrinsic evidence he used to ascertain the boundaries. Instead, it believed appellee's surveyor's testimony that he looked for evidence to help ascertain the boundaries but still could not ascertain them. This factual finding is not subject to de novo review.

{¶32} Accordingly, based upon the foregoing reasons, we overrule appellants' second assignment of error.

3. R.C. 5721.19

{¶33} For ease of analysis, we address appellants' fourth assignment of error out of order. In their fourth assignment of error, appellants argue that the trial court's decision quieting title to appellee violates R.C. 5721.19. Appellants contend that the title they received pursuant to the sheriff's sale is "incontestable."

{¶34} R.C. 5721.19(F) states:

> **{¶35}** (1) Upon confirmation of a sale, a spouse of the party charged with the delinquent taxes or assessments shall thereby be barred of the right of dower in the property sold, though such spouse was not a party to the action. No statute of limitations shall apply to such action. When the land or lots stand charged on the tax duplicate as certified delinquent, it is not necessary to make the state a party to the foreclosure

proceeding, but the state shall be deemed a party to such action through and be represented by the county treasurer.

{¶36} (2) Except as otherwise provided in divisions (F)(3) and (G) of this section, unless such land or lots were previously redeemed pursuant to section 5721.25 of the Revised Code, upon the filing of the entry of confirmation of any sale or the expiration of the alternative redemption period as defined in section 323.65 of the Revised Code, if applicable, the title to such land or lots shall be incontestable in the purchaser and shall be free and clear of all liens and encumbrances, except a federal tax lien notice of which is properly filed in accordance with section 317.09 of the Revised Code prior to the date that a foreclosure proceeding is instituted pursuant to division (B) of section 5721.18 of the Revised Code and the easements and covenants of record running with the land or lots that were created prior to the time the taxes or assessments, for the nonpayment of which the land or lots are sold at foreclosure, became due and payable.

{¶37} (3) When proceedings for foreclosure are instituted under division (C) of section 5721.18 of the Revised Code, unless the land or lots were previously redeemed pursuant to section 5721.25 of the Revised Code or before the expiration of the alternative redemption period, upon the filing of the entry of confirmation of sale or after the expiration of the alternative redemption period, as may apply to the case, the title to such land or lots shall be incontestable in the purchaser and shall be free of any receiver's lien as defined in division (C)(4) of section 5721.18 of the Revised Code and, except as otherwise provided in division (G) of this section, the liens for land taxes, assessments, charges, interest, and penalties for which the lien was foreclosed and in satisfaction of which the property was sold. All other liens and encumbrances with respect to the land or lots shall survive the sale.

{¶38} (4) The title shall not be invalid because of any irregularity, informality, or omission of any proceedings under this chapter, or in any processes of taxation, if such irregularity, informality, or omission does not abrogate the provision for notice to holders of title, lien, or mortgage to, or other interests in, such foreclosed lands or lots, as prescribed in this chapter.

{¶39} "Where a tax deed is void on its face for uncertainty, because the property cannot be identified from the description, no title passes. The deed is required to contain such a description of the land as will afford reasonable certainty as to its identity and location. The deed cannot be reformed nor aided by intendments, presumptions, parol evidence, or reference to the advertisement or the tax duplicate, where the uncertainty is patent, not latent. If it is impossible to locate the land from the deed, it cannot be aided by an auditor's plat to which no reference is made in the deed." 87 Ohio Jurisprudence 3d Taxation, 829 (footnotes omitted).[1]

{¶40} In the instant case, because the deed is void, the deed failed to pass title to appellants. Thus, the trial court's decision voiding the deed does not violate the statute.

{¶41} Accordingly, based upon the foregoing reasons, we overrule appellants' fourth assignment of error.

B. OCCUPYING CLAIMANT LAW

1. DAMAGES

{¶42} In their third assignment of error, appellants argue that the trial court's damage award under the occupying claimant law is against the

[1] Although we would ordinarily also include the cases to which Ohio Jurisprudence cites and find additional cases standing for this same proposition, in the case at bar, the applicable law is not cited in any recent cases, and the cases cited in Ohio Jurisprudence

manifest weight of the evidence. They assert that the trial court should not have offset the entire amount appellants received for the timber removed from the real estate, $22,158. Appellants contend that the occupying claimant law does not allow for such an offset. They further argue that even if the court could set off the amount they received for the timber, the court should not have set off the entire amount, but instead, should have only set off one-half the amount. Appellants assert that they paid the logger one-half the amount for labor and expenses. Appellants additionally contend that the trial court should have offset or ordered appellee to pay the real estate taxes that were due during appellants' occupation.

{¶43} We review a trial court's damage award under a manifest weight of the evidence standard. This means that we will not overturn a trial court's damage award so long as it is supported by some competent, credible evidence. See *Arrow Concrete Co. v. Sheppard* (1994), 96 Ohio App.3d 747, 750, 645 N.E.2d 1310.

{¶44} R.C. 5303.08 sets forth the occupying claimant law as follows:

> **{¶45}** A person who, without fraud or collusion on his part, obtained title to and is in the quiet possession of lands or tenements, claiming to own them, shall not be evicted or turned out of possession by any person who sets up and proves an adverse and better title, until the occupying claimant, or his

---

are not of recent origin. Instead, the applicable law is archaic and, apparently, not of great dispute in recent cases.

> heirs, is paid the value of lasting improvements made by the occupying claimant on the land, or by the person under whom he holds, before the commencement of suit on the adverse claim by which such eviction may be effected, unless the occupying claimant refuses to pay to the party establishing a better title the value of the lands without such improvements, on demand by him or his heirs, when such occupying claimant holds:
>
> **{¶46}** (A) Under a plain and connected title, in law or equity, derived from the records of a public office;
>
> **{¶47}** (B) By deed, devise, descent, contract, bond, or agreement, from and under a person claiming a plain and connected title, in law or equity, derived from the records of a public office, or by deed authenticated and recorded;
>
> **{¶48}** (C) Under sale on execution against a person claiming a plain and connected title, in law or equity, derived from the records of a public office, or by deed authenticated and recorded;
>
> **{¶49}** (D) Under a sale for taxes authorized by the laws of this state;
>
> **{¶50}** (E) Under a sale and conveyance made by executors, administrators, or guardians, or by any other person, in pursuance of an order or decree of court, where lands are directed to be sold.

{¶51} R.C. 5303.11 sets forth the damages that the fact-finder may award to an occupying claimant and states:

> **{¶52}** * * * [T]he jury shall ascertain and find in its verdict the reasonable value of permanent and valuable improvements made on the land previous to the occupying claimant's receipt of actual notice of the adverse claim of the plaintiff, the damages the land has sustained by waste, including the value of timber or other valuable material removed or destroyed, and the net annual value, rents, and profits of the land accruing after the occupying claimant received notice of claim by service of summons. The jury shall find the value of the land at the time the judgment was rendered with the improvements thereon, and its value without the

> improvements or damages sustained by waste, including the removal or destruction of the timber or other valuable material, and return its verdict in open court.

R.C. 5303.14 sets forth the remedy available under the occupying claimant law and states:

> **{¶53}** If, under section 5303.11 of the Revised Code, the jury reports a sum in favor of the occupying claimant, on the assessment and valuation of the valuable and lasting improvements, deducting therefrom the damages, sustained by waste, together with the net annual value of the rents and profits which the defendant received after commencement of the action, the successful claimant, or his heirs, or, if they are minors, their guardians, may demand of the occupying claimant the value of the land without the improvements so assessed and tender a deed of it to him, or pay him the sum so allowed by the jury in his favor, within such reasonable time as the court allows.

{¶54} The statute thus requires the fact-finder or jury to determine the reasonable value of permanent and valuable improvements made on the land before the occupying claimant's notice of the plaintiff's adverse claim, the damages the land has sustained by waste, including the value of timber or other valuable material removed or destroyed, and the land's net annual value, rents, and profits accruing after the occupying claimant received notice of the adverse claim.

{¶55} In the case at bar, appellants have not established that the trial court's damage award under the occupying claimant law is against the manifest weight of the evidence. The trial court determined the value of the

lasting improvements pursuant to the statute. The statute permitted the trial court to deduct the amount of waste that resulted from the timber removal. The statute did not require the trial court to deduct only the amount of profit appellants realized upon the sale of the timber, but instead authorized the court to deduct the amount of waste. Some evidence supports the trial court's finding that the amount of waste resulting from the timber removal was $22,158.

{¶56} Moreover, assuming for the sake of argument that R.C. 5723.17[2] required the trial court to award appellants the property taxes they paid during their period of occupation, appellants never specifically requested the trial court to award them such damages. It is well-established that a party may not raise new arguments for the first time on appeal. See *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, at ¶34. "A party who fails to raise an argument in the court

[2] The statute reads:

> When the claimant of any lands sold for the nonpayment of taxes, assessments, penalties, interest, and costs, or his heirs or assigns, recovers the land sold, by reason of the invalidity of such sale, such claimant, or his heirs or assigns, shall refund to the purchaser, or his heirs or assigns, the amount of the purchase price, with all other taxes, assessments, penalties, interest, and costs paid by such purchaser, or his heirs or assigns to the time of such recovery. Such sum shall be paid to such purchaser entitled thereto, before he is evicted by any claimant so recovering such land. This section does not prevent a purchaser from obtaining the value of any improvements made upon said land under sections 5303.07 to 5303.17 of the Revised Code.

below waives his or her right to raise it [on appeal]." Id., quoting *State ex rel Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278, 611 N.E.2d 830. Thus, appellants waived this argument for appellate review.

{¶57} Accordingly, based upon the foregoing reasons, we overrule appellants' third assignment of error.

2. R.C. 5303.08

{¶58} In their fifth assignment of error, appellants argue that the trial court erred by finding that appellee was entitled to pay appellants to establish a better title when she failed to comply with R.C. 5303.08. Appellants assert that R.C. 5303.08 required appellee to offer to pay appellants the value of the lasting improvements or to offer to sell the land to appellants before she could file her complaint for quiet title.

{¶59} Appellants never raised this argument during the trial court proceedings. Thus, appellants waived this argument for appellate review. See *Niskanen*, supra.

{¶60} Accordingly, based upon the foregoing reasons, we overrule appellants' fifth assignment of error.

V. CROSS-APPEAL

A. FRAUD OR COLLUSION

{¶61} In her first cross-assignment of error, appellee argues that the trial court erred by failing to find that appellants engaged in fraud or collusion and by awarding appellants damages under the occupying claimant law. Appellee contends that the trial court should not have awarded appellants any damages for any improvements they made to the property after she notified them that she disputed their right to the land and after she filed the complaint in the instant matter.

{¶62} As we stated earlier in this opinion, R.C. 5303.08 allows the occupying claimant to recover the value of lasting improvements as long as the occupying claimant did not engage in fraud or collusion.

{¶63} "Bad faith may be imputed against the occupant where the occupant knew an adverse claim existed, that it was just, and that it would prevail when asserted. However, the mere fact of notice of the claim that is afterward successfully asserted does not conclusively establish the purchaser's fraud and collusion. Despite the notice, an occupant may make the purchase in good faith and make improvements in the honest belief that the occupant owned the land. The inference that improvements were made in bad faith does not necessarily follow from an occupying claimant's

knowledge of an adverse or better claim or title, where the occupant had strong and reasonable grounds to believe the claim was meritless." 72 Ohio Jurisprudence 3d Occupying Claimants, Section 12 (footnotes omitted).

{¶64} Here, the trial court's decision awarding appellants damages under the occupying claimant law is not against the manifest weight of the evidence. The trial court was well-within its authority to award appellants damages and had no obligation to find that appellants engaged in fraud or collusion. Although some evidence shows that appellants completed building the cabin after appellee filed her complaint, the evidence also shows that appellants found it necessary to complete the building so as to avoid weather-related damage to the building. Mr. Lawless stated that he did not believe he could leave the building without a roof or else the building would suffer damage. Furthermore, even though appellee claimed that she informed appellants of her claim to the land before they began construction, they denied this conversation occurred. This is a credibility determination reserved to the trial court, and we have no reason to second-guess its determination. Moreover, appellants had a reasonable basis to believe that appellee's claim to the land lacked merit. Thus, the trial court had some evidence from which it could conclude that appellants acted

reasonably and did not engage in fraud or collusion so as to prohibit them from recovering under the occupying claimant law.

{¶65} Accordingly, based upon the foregoing reasons, we overrule appellee's first cross-assignment of error.

B. APPRAISAL

{¶66} In her second cross-assignment of error, appellee contends that the trial court erred by awarding appellants damages under the occupying claimant law because they failed to produce competent evidence to prove their damages. She contends that the appraisal they submitted did not constitute competent evidence because the appraisal occurred before appellants finished constructing the cabin and was based upon the cabin in its completed state.

{¶67} Again, we are unable to state that the trial court's decision is against the manifest weight of the evidence. The weight to be given the appraisal was a matter reserved to the trial court. The appraisal provided the trial court with some evidence from which to ascertain the value of lasting improvements to the property. Consequently, we defer to the trial court's decision.

{¶68} Accordingly, based upon the foregoing reasons, we overrule appellee's second cross-assignment of error.

C. RENTAL VALUE

{¶69} In her third cross-assignment of error, appellee argues that the trial court erred by failing to comply with R.C. 5303.11, which required the court to reduce the amount awarded to appellants under the occupying claimant law by the fair rental value of the property.

{¶70} R.C. 5303.11 states that the fact-finder shall determine the amount of damages under the occupying claimant law and directs it to determine "the net annual value, rents, and profits of the land accruing after the occupying claimant received notice of claim by service of summons."

{¶71} Appellee presented testimony that the fair market rental value of the property was $250 per month. She asserts that the trial court should have deducted this amount for every month between the date she filed her complaint and the date appellants surrender the property. We do not believe that the trial court's decision declining to award appellee monthly rent is against the manifest weight of the evidence. The trial court was free to disbelieve appellee's testimony concerning the monthly rental amount. Furthermore, nothing within R.C. 5303.11 indicates that an award of the monthly rental value of the real estate is mandatory and appellee has not cited any case law indicating that it is.

{¶72} Accordingly, based upon the foregoing reasons, we overrule appellee's third cross-assignment of error.

D. EVIDENTIARY ISSUES

{¶73} In her fourth cross-assignment of error, appellee contends that the trial court erred by admitting testimony from surrounding landowners as to the community reputation of the boundaries.

{¶74} In her fifth cross-assignment of error, appellee argues that the trial court erred by permitting appellants' surveyor to testify as an expert when his testimony was not sufficiently reliable.

{¶75} Our resolution of appellants' first assignment of error renders these two cross-assignments of error moot. Therefore, we need not address them. See App.R. 12(A)(1)(c).

VI. CONCLUSION

{¶76} Having overruled all of the assignments of error and cross-assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds there were reasonable grounds for this appeal.

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

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

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

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

For the Court,

BY: _____
Judge Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

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