[Cite as *Collins v. Bergman*, 2010-Ohio-6213.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JASON COLLINS, et al.	:	
	:	Appellate Case No. 23961
Plaintiff-Appellants	:	
	:	Trial Court Case No. 06-CV-9975
v.	:	
	:	
JEFFREY BERGMAN, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellees	:	
	:	

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O P I N I O N

Rendered on the 17th day of December, 2010.

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BROGAN, J.

{¶ 1} Appellant Jason Collins appeals from the judgment of the trial court in favor of Jeffrey Bergman. Collins brought a lawsuit against Bergman contending that he had been injured after being chased by a dog on Bergman's property.

I

{¶ 2} Collins was employed by Nelson Tree Service, Inc. Nelson Tree

Service was under contract with DP&L to remove trees that were close to utility poles and lines. Collins' primary duties at Nelson were to go to houses and inspect all trees that were encroaching DP&L utility lines and poles so any trees too close could be trimmed back at a later time.

{¶ 3} Bergman lived in a home located on Reading Road in Dayton, Ohio. Bergman had a friend and house-mate, Joseph Holland, who owned a dog named Taz, a labrador/rottweiler mix. During the summer, Taz could exit the house to the back yard through a small dog door at the back of the house, which gave Taz access to the back yard, which had a six foot tall privacy fence.

{¶ 4} On June 2, 2005, Collins arrived at Bergman's home to inspect the utility lines and utility poles that ran between Bergman's property and his neighbor's property. Collins arrived at Berman's residence and knocked, but received no answer. Collins left a courtesy card on Bergman's door, notifying him that a tree trimming would occur in the future. Collins then went around the back of the house to count the trees. As Collins went around the side of the house, he could hear a dog barking.

{¶ 5} Although Collins did not know the specific location of the utility easement he could see the power line pole between Bergman's property and his neighbor's and at the rear of the property. He noticed that both Bergman and his neighbor had constructed six foot privacy fences separating their properties with only a one and one-half foot area between the fences. Evidence later established that the side yard privacy fences effectively blocked the utility company's five foot ingress and egress easement for inspection and removal of trees.

{¶ 6} Faced with the need to count the trees located between the side yard fences, Collins approached the fence that led to the backyard and garage area. When Collins shook the fence gate and whistled, the dog began barking louder. Thinking the dog was inside the garage, Collins walked through the gate and was approached by Taz who was now barking and growling at him. Collins ran toward the side yard privacy fence to avoid Taz but the dog bit his pant leg. In trying to kick the dog and scale the privacy fence, Collins fell back and injured his shoulder.

{¶ 7} On December 18, 2006, Collins and his wife filed a complaint asserting claims for personal injury under Ohio's dog bite statute, R.C. 955.28, as well as common law negligence and loss of consortium. On October 16, 2007, Bergman filed his Motion for Summary Judgment. In Collins' response to the motion for summary judgment, he withdrew the claim for common law negligence. On January 25, 2008, the magistrate recommended that the trial court grant summary judgment for Bergman, holding that Collins was a trespasser because he entered the back yard through a latched fence with a "no trespassing" sign posted on the fence. Furthermore, the magistrate stated that Collins did not have express or implied consent to enter Bergman's back yard because Collins did not know the extent of any easement granted to the power company. Collins filed an objection to the magistrate's decision. On March 1, 2010, the trial court adopted the magistrate's decision.

{¶ 8} The trial court determined that the issues in the litigation were whether Collins entered Bergman's property pursuant to the utility easement and whether Collins was a trespasser within the meaning of R.C. 955.28. The court determined

that Collins was injured within the easement. The court determined that the utility easement ran along the southern and eastern boundaries of Bergman's property and was five feet wide. The court also found that the recorded plot provided that the easements provided the electric utility services were to be provided ingress and egress to the property for the express privilege of removing any and all trees.

{¶ 9} The court noted, however, that the easement did not provide a specific place for the utility to enter the property and therefore Collins was required to make use of the easement in a reasonable manner. The court noted that the easement was blocked by Bergman's backyard fence and it was reasonable for Collins to seek an alternative access to the easement where he might "trespass" across the property to reach the five foot easement. The court found that Collins did not act reasonably in deciding to enter Bergman's property without notice and through a latched gate and a fence with a posted no trespassing sign. The court also noted that Collins failed to follow his own company's policy in entering a property when there is a dog barking in an enclosed area. The court found that Collins did not make reasonable use of the express easement granted the utility company and was therefore a trespasser within the terms of R.C. 955.28(B). The trial court granted Bergman's summary judgment motion finding no material facts in dispute and that Bergman was entitled to judgment as a matter of law.

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II

{¶ 10} Summary judgment is appropriate when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law;

and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.,* (1978), 54 Ohio St.2d 64, 66; citing Civ. R. 56(C).

{¶ 11} Upon a motion for summary judgment, the initial burden is on the moving party to show that there is genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Once a moving party satisfies its burden, "the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings." *Murphy v. McDonald's Restaurants of Ohio, Inc.,* Clark App. No. 2010-CA-4, 2010-Ohio-4761, at ¶ 13; citing *Dresher,* 75 Ohio St.3d at 292-93. "Rather, the burden then shifts to the non-moving party to respond, with affidavits or as otherwise permitted by Civ. R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial." *Id.* "Throughout, the evidence must be construed in favor of the non-moving party." *Id.*

III

{¶ 12} Collins sets forth two assignments of error. Since they are closely related, we will examine the assignments of error together. The first assignment of error is as follows:

{¶ 13} "THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION GRANTING THE DEFENDANTS-APPELLEES' MOTION FOR SUMMARY JUDGMENT AND OVERRULING PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF, JASON COLLINS, WAS

LAWFULLY WITHIN THE BOUNDARIES OF THE RECORDED UTILITY EASEMENT ON THE BERMAN PROPERTY AT THE TIME HE WAS INJURED BY DEFENDANT'S DOG, AND THEREFORE, WAS NOT A TRESPASSER AND DEFENDANT IS STRICTLY LIABLE TO PLAINTIFF PURSUANT TO R.C. 955.28."

{¶ 14} Collins second assignment of error is as follows:

{¶ 15} "THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF WAS REQUIRED TO MAKE 'REASONABLE USE' OF THE EASEMENT WHERE THE COURT HAD ALREADY DETERMINED THAT AN EXPRESS EASEMENT EXISTED AND THAT PLAINTIFF WAS WITHIN THE BOUNDARIES OF THE EASEMENT AT THE TIME OF HIS INJURY."

{¶ 16} Collins argues that the trial court erred in finding that he was a trespasser because the undisputed evidence established that he was within the five foot easement on the eastern boundary of Bergman's property when he was attacked by the dog Bergman harbored on his property. Collins argues that the trial court erred in granting summary judgment to Bergman and in failing to grant his motion for a partial summary judgment. Collins argues that since he was not a trespasser at the time he entered the easement, Bergman is strictly liable for the injuries he caused under R.C. 955.28. Collins also argues that it was irrelevant that the dog began chasing him while he was outside the five foot easement because he was attacked while inside the five foot easement. Collins argues that the trial court erred in finding that as a matter of law he did not make reasonable use of the easement provided the utility company.

{¶ 17} Bergman argues the trial court properly found that Collins had acted

unreasonably in attempting to access and use the utility easement. Bergman argues that he had no reason to anticipate that Collins would enter his property unannounced on the date of the incident giving rise to Collins' injury. Bergman also argues that he should not be considered a "harborer" of the dog under R.C. 955.28(B) because he was not in exclusive control of the premises where the dog lived at the time of the incident. Bergman argues that when Collins entered his property without first obtaining his permission or providing notice, he (Bergman) lost the ability to control his property at the time of the incident.

{¶ 18} R.C. 955.28(B) provides that:

{¶ 19} "(B) The owner, keeper, or harborer of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit a trespass or other criminal offense on the property of the owner, keeper, or harborer, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's or harborer's property."

{¶ 20} The easement granted the utility company recorded in the subdivision plot provides as follows:

{¶ 21} "Easements shown on the plat [sic] are for the construction, operation, maintenance, repair, replacement, or removal of water, gas, sewer, electric, telephone or other utility lines or services, and for *the express privilege of removing any and all trees*, or other obstructions to the free use of the said utilities; **and for providing ingress and egress to the property for said purposes and are to be**

maintained as such forever." Id. (emphasis added)

{¶ 22} In finding that Collins did not make reasonable use of the easement, the trial court cited *Bayes v. Toledo Edison Co.*, Lucas App. Nos. L-03-1177, L-03-1194, 2004-Ohio-5752.

{¶ 23} In *Bayes*, a landowner sued three energy companies for damage to his property caused when utility employees entered his property to repair electric poles and lines damaged by a storm. Id. at ¶ 2. In replacing the damaged poles, large utility trucks drove over the property causing ruts up to eighteen inches deep. Id. at ¶ 4. In addition, large trees were cut down unnecessarily. Id. When Toledo Edison refused to pay, the landowner sued, claiming breach of contract, trespass, unjust enrichment, promissory estoppel, and unauthorized use of the easement. Id.

{¶ 24} The Sixth District reversed summary judgment in favor of the utility company on the property owner's claim for damages, because the trial court did not determine the scope of the easement and its relevance to plaintiff's claims. Id. at ¶ 74. The court stated:

{¶ 25} " * * * when an easement is created by an express grant, the extent and limitations of the easement depend upon the language of the grant. (citations omitted). Where the dimensions of the easement are not expressed in the instrument granting the easement, the court determines the width, length, and depth from the language of the grant, the circumstances surrounding the transaction, and that which is reasonably necessary and convenient to serve the purpose for which the easement was granted. (citations omitted). Thus, when the specific dimensions or terms of an easement are not expressed in the grant itself,

determining the dimensions or reasonableness of use becomes a question of fact. (citations omitted).

{¶ 26} " * * *

{¶ 27} " * * * [A] lack of description constitutes a 'global easement' which requires the Utilities to use reasonableness in exercising any easement rights. Reasonableness of use is a question for the trier of fact * * * " Id. at ¶ 69, 72.

{¶ 28} Collins argues that the *Bayes* decision is factually distinguishable from the facts in his case because the easement in *Bayes* was not identified by measurement whereas the dimensions of the easement in his case are specific, to-wit, the five foot wide easement running along the southern and eastern boundaries of the property. Collins argues the trial court erred in concluding that since the easement did not specify a specific place for ingress and egress to the property for exercising the purposes of the easement, the "reasonable use" of the easement requirement noted in *Bayes* was appropriate. Collins argues that it is simply not appropriate to determine what he was doing before he entered the five foot easement and was there attacked.

{¶ 29} For his part, Bergman argues that the trial court correctly relied on *Bayes* because the general rule is that the owner of land burdened by an easement may use the land in any manner not inconsistent with the express terms of the easement. Conversely, Bergman argues the easement holder cannot act unreasonably in accessing or using the easement. Bergman argues that his privacy fence did not unreasonably interfere with the utility company's use of the easement and he had a legal right to own a dog. Bergman argues that if he had had notice

that Collins intended to access the rear of his property, he would have confined the dog. He notes that notice to the landowner is especially critical in light of the strict liability feature of R.C. 955.28(B).

{¶ 30} We agree with appellant that the *Bayes* decision is factually and legally distinguishable from the facts in this matter. The easement in *Bayes* was a global easement. In this case, Collins had a right to enter the five foot utility easement but it was blocked. Needing to count the trees, Collins chose the only reasonable avenue open to him through the backyard fence. The trial court found he was attacked inside the five foot utility easement.

{¶ 31} Collins abandoned his negligence cause of action and pursued only the strict liability claim under R.C. 955.28. In determining whether a person is a "harborer" under the statute the focus shifts from possession or control over the dog to possession and control of the premises where the dog lives. *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25. The hallmark of control is the ability to both prevent and exclude others from coming onto the property. *Hill v. Hughes*, Ross App. No. 06CA2917, 2007-Ohio-3885. The issue then is whether the defendant had exclusive control over the property at the time of the dog attack. *Akron v. Marstellar* (2003), 155 Ohio App.3d 132. When Collins entered the property without first obtaining permission or giving advance notice, Bergman lost the ability to control his property at the time of the incident. The trial court properly denied Collins' motion for partial summary judgment and properly granted summary judgment to Bergman on Collins' claim under R.C. 955.28. Collins' two assignments of error are Overruled.

{¶ 32} The judgment of the trial court is Affirmed.

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DONOVAN, P.J., and FAIN, J., concur.

Copies mailed to:

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