

[Cite as *G & M Smith Family Ltd. Partnership v. Mingo Junction*, 2014-Ohio-5857.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

G & M SMITH FAMILY LIMITED
PARTNERSHIP,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF MINGO JUNCTION, OH,

DEFENDANT-APPELLEE.

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CASE NO. 14 JE 11

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common Pleas of Jefferson County, Ohio
Case No. 13MI12

JUDGMENT:

Affirmed in Part, Reversed in Part, and Remanded.

APPEARANCES:

For Plaintiff-Appellant

Attorney John J. Mascio
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For Defendant-Appellee

Attorney W. Ernest Wilson
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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 29, 2014

[Cite as *G & M Smith Family Ltd. Partnership v. Mingo Junction*, 2014-Ohio-5857.]
DONOFRIO, J.

{¶1} Plaintiff-appellant G&M Smith Family Limited Partnership (G&M) appeals a decision of the Jefferson County Common Pleas Court denying its petition to vacate certain portions of Elizabeth Street and all of Susanna Street located in the village of Mingo Junction and its alternative claim to have them declared abandoned.

{¶2} Plaintiff-appellant G&M Smith Family Limited Partnership is a limited partnership comprised of Gary Smith and his wife, and which owns all of the property that abuts the portions of the streets it was seeking to vacate. On July 16, 2013, G&M, through its attorney, filed a petition with the clerk of defendant-appellee village of Mingo Junction (the village) requesting to vacate certain portions of Elizabeth Street and all of Susanna Street located within the village of Mingo Junction, Ohio. (Complaint, ¶ 5, Exhibit D.)

{¶3} G&M's attorney later appeared before the village council on July 23, 2013, to present its request for vacating the streets. Following the meeting, council took no action. On August 12, 2013, G&M filed an amended petition for vacating the streets in question. Again, on August 24, 2013, G&M's attorney appeared before council. Council agreed to meet on site to view the area in question. The viewing took place on September 9, 2013, and council later voted to deny G&M's request to vacate the streets.

{¶4} On October 15, 2013, G&M filed a petition in the Jefferson County Common Pleas Court seeking to have the trial court vacate the streets pursuant to R.C. 723.09. R.C. 723.09 allows a common pleas court, upon petition, to vacate a street if it is "satisfied that it will conduce to the general interests" of the municipal corporation where it is located. The court held a hearing on G&M's vacation petition on February 18, 2014.

{¶5} Gary Smith appeared and testified on behalf of G&M. Smith maintained that if the streets were vacated, it would be easier for him to put together a package of his land for development, because he owns the surrounding and abutting real estate. (Tr. 79-80.) However, he acknowledged that he has no specific or proposed plans for any development for the site in question. (Tr. 83.)

{¶6} G&M also called as a witness John Fabian. Fabian is the mayor of the village and a former 2013 council member. Mayor Fabian conceded that at the present time the site in question is a vacant piece of property. (Tr. 17.) Further, he admitted that the village does not really need those streets at the moment and was not aware of any plans the village had to use those streets. (Tr. 23.) Further, he testified that before voting to vacate the streets, he would want to know what the plans for development would be. (Tr. 25.)

{¶7} G&M then called Michael Herrick, a 2013 council member. Herrick described the property as abandoned. (Tr. 41.) However, he testified that he thought Smith should have personally appeared before council, rather than through his attorney representative, with a plan for development. (Tr. 40-41.) Herrick also expressed concern stemming from another property in the village which had been transformed from a restaurant into a strip club. (Tr. 39.) He further testified that a current benefit Elizabeth Street is providing to the village is that he was informed by a police officer that the street is often used as a turnaround for trucks. (Tr. 43.) When G&M's attorney pointed out to Herrick that the portion of Elizabeth Street used for a truck turnaround was not the portion that it had petitioned to vacate, Herrick responded that he understood G&M's request to include all of Elizabeth Street. (Tr. 43.) Further, Herrick acknowledged that the village would have difficulty finding money to improve Elizabeth Street were something established on the property; however, he was not made aware of any benefit that would come to the village if the streets were abandoned. (Tr. 45, 47-48.)

{¶8} Another member of council to testify on behalf of G&M was John Brettell. Brettell is a council member and the former fire chief of the village. (Tr. 51.) Brettell testified that in his 19 years as fire chief he never responded to anything down on Elizabeth Street or Susanna Street. (Tr. 52.) Brettell also conceded that the village received no benefit from these streets right now. (Tr. 53.) Additionally, Brettell claimed that no harm would come to the village if the streets were vacated. (Tr. 53.) Further questioning revealed that Brettell believed that if the streets were abandoned,

the village would not experience increased employment or any other benefit to the village. (Tr. 54-55.)

{¶9} Next to testify for G&M was John Bracone, also a former council member. Bracone had made a motion before council to vacate the streets. (Tr. 63.) Bracone also found no benefit to the village in retaining those streets. (Tr. 65.) Bracone went on to state that the village would benefit by being able to collect some additional property tax for the vacated streets. (Tr. 67.)

{¶10} Next to testify was Steve Maguschak, chief of police and village administrator. When asked what the area in question was like he stated “[b]asically some gravel roads and some overgrown properties.” (Tr. 69.) Additionally, he stated that the village had on occasion investigated criminal activity in the area. (Tr. 70.) Further, he conceded that at least a portion of Elizabeth Street that is being requested to be vacated is necessary for a turnaround area for tractor trailer traffic. (Tr. 74.)

{¶11} The village presented testimony from council members Adam Peeler and George Irvin Jr. Both council members testified that they would be in favor of vacating the requested portions of the streets if they were made aware of the benefit the village would receive from any development, such as employment. (Tr. 99, 106.) Further, Peeler expressed that if the village were to maintain ownership of the streets, then the village would be able to exercise options. (Tr. 104.) Moreover, Irvin testified that “giving up easements is something you just can’t take back.” (Tr. 106.)

{¶12} There was testimony presented that at one point in time, the village planned to place a trash compactor on the streets in question. (Tr. 30.) After approximately 50 percent of the compactor was built, Smith objected to the trash compactor being placed there and requested that the village move it. In response, the village removed the trash compactor from the site. (Tr. 30.)

{¶13} At the conclusion of the presentation of evidence, G&M moved to amend its pleadings by adding the additional claim of abandonment. (Tr. 117.) The trial judge permitted the abandonment claim to be amended to the complaint, but

deferred a decision on the claim until the village was given an opportunity to file a response. (Tr. 123.)

{¶14} On the issue of vacating the streets, the trial court found that, after being presented with all the evidence, G&M did not satisfy by a preponderance of the evidence that the vacation of the streets would conduce to the general interests of the village. Accordingly, the trial judge denied the petition to vacate. Further, the trial court found that the plaintiff did not establish by a preponderance of the evidence its claim for abandonment. This appeal followed.

{¶15} G&M raises three assignments of error. G&M's first assignment of error states:

THE TRIAL COURT ERRED IN NOT FINDING VACATION OF THE STREETS IN QUESTION TO CONDUCE TO THE GENERAL INTERESTS OF THE VILLAGE OF MINGO JUNCTION, APPELLEE HEREIN.

{¶16} Under its first assignment of error, G&M argues that its petition for the vacation of Susanna Street and a portion of Elizabeth Street should have been granted. G&M presents the following testimony in favor of vacating the streets: (1) the vacation of the street would relieve the village of the duty of maintaining the streets; and (2) the village, by vacating the street, would be relieved of any liability imposed by statute or law that could arise from danger of the unmaintained streets. In response, the village argues that G&M did not prove by a preponderance of the evidence that the vacation of the streets would be of a substantial benefit to the municipality.

{¶17} The civil manifest weight of the evidence standard provides that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. The reviewing court is obliged to presume that

the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273 (1984). This presumption arises in part because the fact-finder occupies the best position to watch the witnesses and observe their demeanor, gestures and voice inflections and to utilize these observations in weighing credibility. *Id.* at 80. “A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.” *Id.* at 81.

{¶18} Individuals owning land in the vicinity of a street or alley may seek vacation of the street or alley either by petition to the legislative authority of the municipal corporation in which the land is situated, R.C. 723.04, or by petition to the court of common pleas, R.C. 723.09. Upon vacation, title to the land passes to the abutting landowners, subject to the rights of any property owners whose rights of access are thereby obstructed. *Barbin v. Ashland*, 160 Ohio St. 328, 340, 116 N.E.2d 580 (1953).

{¶19} The standard for the granting of the requested vacation of streets or alleys is set forth in R.C. 723.09 which states:

The court of common pleas may, upon petition filed in such court by any person owning a lot in a municipal corporation, for the establishment or vacation of a street or alley in the immediate vicinity of such lot, upon hearing, and upon being satisfied that it will conduce to the general interests of such municipal corporation, declare such street or alley established or vacated, but this method shall be in addition to those prescribed in sections 723.04 to 723.08, inclusive, and section 723.02 of the Revised Code.

{¶20} From the plain language of R.C. 723.09, it is clear that, before granting a petition to vacate a street, the court must hold a hearing and consider evidence on

the issue of whether the vacation will promote the general interest of the municipality. *Brettell v. City of Steubenville*, 7th Dist. No. 89-J-44, 1990 WL 162694 (Oct. 25, 1990). Landowners are not entitled to a judgment vacating an unimproved dedicated street abutting their property when there has been no showing, pursuant to R.C. 723.09, that such a vacation is in the general interest of the municipality. *Bayer v. City of North College Hill*, 31 Ohio App.3d 208, 510 N.E.2d 400 (1st Dist.1986); *Anderson v. Village of Alger*, 3d Dist. No. 6-98-10, 1999 WL 378377 (May 14, 1999). As such, the burden of proof is on the petitioner to demonstrate the statutory prerequisites. See *Anderson, supra*. Further, a “preponderance of the evidence” standard applies in determining whether vacation is beneficial to the municipality. *Brettell, supra*; *Duggan v. Village of Put-In-Bay*, 6th Dist. No. OT-00-044, 2001 WL 477168 (May 4, 2001).

{¶21} Here, in attempting to establish its burden of proof, G&M presented the testimony of Gary Smith, a member of G&M’s partnership. When questioned on cross-examination concerning development of the property abutting the portions of the streets G&M was seeking to vacate, Smith testified as follows:

Q Do you have any plans to develop the property at this time?

A That was my plans when I bought the property, to develop it.

Q All right. As what?

A Whatever you can do. You can’t do a lot down there. It can be used as storage. You can’t -- if that it’s -- it’s -- that’s a floodplain down there. So, in order to -- you can’t build a building down there if you want to finance it because nobody is going to loan you any money to finance a building down there in the floodplain. So, it has to be something that you’re either going to have storage that you can move in and move out and that’s about all you can do with it.

Now, you can put a railroad siding in down there but if you -- if you -- if you ever checked the price on a railroad siding, then you would know what -- you're not going to really do anything with a railroad siding unless you really have something concrete and it's going to be good.

Q Again, you have no plans right now to develop anything. That's my question.

A No, no. My plans are to develop it. I do not know what I am going to do with it.

Q And I'm asking -- and I'm asking -- and I'm just asking do you have any specific plans.

A No.

(Tr. 88-89.)

{¶122} Smith's testimony suggests that G&M would benefit if the streets were vacated. Smith testified as to some speculative use, but he failed to propose any particular plans for the development of the property that demonstrated that granting the petition to vacate the portions of those streets would conduce to the general interests to the village. The standard set forth in R.C. 723.09 is whether vacating the streets "will conduce to the general interests of such municipal corporation," not whether there exists some remote possibility of some type of future development. Thus, G&M failed to show by a preponderance of the evidence that vacating the streets would benefit the village as a whole.

{¶123} G&M relies on this court's decision in *Bretell v. City of Steubenville*, 7th Dist. No. 89-J-44, 1990 WL 162694 (Oct. 25, 1990). In *Bretell*, this court found that being relieved of the expenses of maintaining streets such as paving, filling potholes, salting, and snow removal as well as being relieved of liability for injuries suffered by the use of the street would "promote the general interests of the municipality as a whole." *Id.* Here, G&M proposes that its request to vacate the streets would relieve the village of the responsibility to maintain the streets, as well as any possible liability for incidents occurring on those streets.

{¶24} We agree with the trial court's conclusion that G&M's reliance of *Bretell* is not persuasive to vacate the streets in question. The trial court reasoned that this argument alone could be made in general for the vacation of any street within any municipal corporation. Additionally, the present case is distinguishable from *Bretell* because the city of Steubenville barricaded the streets thereby denying access to the public. Additionally, the *Bretell* court found that vacating the streets would avoid a potentially dangerous situation because a U-turning situation had been created on a state route. Here, the streets have never been barricaded or blocked by the village.

{¶25} Another case relied upon by G&M is likewise distinguishable. In *Duggan*, a trial court found that vacating an alley was beneficial to a village where the alley was impassable by motor traffic and could be made passable only at considerable expense to the village. *Duggan v. Village of Put-In-Bay*, 6th Dist. No. OT-00-044, 2001 WL 477168 (May 4, 2001). Moreover, the "alley" had been treated by the adjoining owners as part of their respective properties. *Id.* Further, the village never marked, maintained, or used that portion of the alley crossing their properties, and it was deemed unneeded for use for utility or police purposes. *Id.* Finally, the village was unaware of its property interest in the disputed portion of the alley for over 70 years, and decided, by a vote of the village council, not to defend that interest. *Id.*

{¶26} In sum, vacating the streets would benefit G&M solely by making it easier for him to sell or develop his abutting properties. Council members testified that if they could see some type of benefit or a more specific plan, they would be willing to vote to vacate the streets. However, G&M failed to show this. Thus, G&M had failed to show by a preponderance of the evidence that vacating the streets is conducive to the general interest of the village.

{¶27} Accordingly, G&M's first assignment of error is without merit.

{¶28} G&M's second assignment of error states:

THE TRIAL COURT ERRED IN NOT FINDING AN
ABANDONMENT OF THE STREETS IN QUESTION.

{¶29} G&M argues that the village abandoned the streets in question when it failed to use or maintain the streets. In response, the village contends that it did not abandon the streets because it has used the streets within the last 21 years.

{¶30} “A municipality holds only a determinable fee for land used as streets or alleys. *Callen v. Columbus Edison Elec. Light Co.* (1902), 66 Ohio St. 166, 64 N.E. 141. The adjacent landowners retain the reversionary interest in the land when the city abandons its use. R.C. 723.08.” *State ex rel. Bedard v. Lockbourne*, 69 Ohio App.3d 452, 457, 590 N.E.2d 1327 (10th Dist.1990). That interest may revert back to the adjacent landowners if the municipality has abandoned the street or alley.

{¶31} There are essentially two principal elements to prove abandonment of a street. The first is 21 years of nonuse. *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 68, 765 N.E.2d 345 (2002). Nonuse means ceasing all acts of enjoyment on the property. *Id.* The second is an intent to abandon on the part of the municipality. *Wyatt v. Ohio Dept. of Transp.*, 87 Ohio App.3d 1, 3-4, 621 N.E.2d 822 (11th Dist.1993).

{¶32} In this case, the trial court erred in concluding that the village had not abandoned the streets in question. G&M proved both elements of abandonment. The village’s mayor, John Fabian, testified that the streets in question and the property adjacent to them had been vacant for probably more than 30 years. (Tr. 17-19.) When asked how long the streets had been abandoned, John Bracone, a former council member for the village, testified that he had lived in the village his entire life and did not know that the streets even existed. (Tr. 64-65.) The streets in question were variously described as gravel roads overgrown with shrubs and trees. (Tr. 12, 69.)

{¶33} Even the trial court acknowledged that the village had failed to maintain the streets for many years. However, the trial court noted two instances when the streets had been used in recent years. The first concerned the partial installation of a trash compactor on Susanna Street in 2013 and the second was the use of Elizabeth

Street as a tractor trailer turnaround in 2013 and prior years. We disagree with the trial court's conclusions in this regard.

{¶34} In light of the mayor's testimony, the 21 year period had run before 2013. Installation of the trash compactor was never completed. It was only about 50 percent built when the village moved it to another location. (Tr. 30.) Since installation of the trash compactor was never completed on Susanna Street, the village never had the opportunity to use it at that location. Therefore, it cannot be said that the partial construction of the trash compactor constituted an act of enjoyment of the street by the village in that regard. In fact, the village moved the trash compactor after it was only partially constructed at the request of G&M's representative, Gary Smith. (Tr. 30.)

{¶35} Additionally, only a portion of the portion of Elizabeth Street that G&M is seeking to have declared abandoned is being used as a tractor trailer turnaround. Significantly, the portion used by the police to turn tractor trailers around is used only to turn the tractor trailers around in a lot owned by G&M. Without access to G&M's private property, the tractor trailers would be unable to use that portion of Elizabeth Street as a turnaround. (Tr. 75.)

{¶36} In sum, the trial court's finding that the streets had not been abandoned by the village was not supported by competent, credible evidence. For a period of over 21 years, the village had failed to use and maintain the streets in question.

{¶37} Accordingly, G&M's second assignment of error has merit.

{¶38} G&M's third assignment of error states:

THE TRIAL COURT ERRED IN NOT APPLYING THE LAW OF
OHIO TO THE FACTS OF THIS CASE.

{¶39} Under this assignment of error, G&M remakes the same arguments it did under its first and second assignments of error. G&M's arguments under this assignment of error are two-part; bifurcated between the trial court's two respective

conclusions denying its petition to vacate the streets and then denying its claim that the village had abandoned the streets.

{¶40} We will first briefly readdress G&M's arguments concerning the trial court's denial of its petition to vacate the streets. G&M has contended that vacation of the streets would allow it to consolidate its property in the area and, thus, provide it with additional options or a better opportunity to commercially develop the property. Depending on how the property is to be developed, the trial court found that it could possibly be conducive or detrimental to the general interest of the village. In other words, the court reasoned that G&M's failure to propose particular plans for the property left such a determination speculative.

{¶41} G&M argues that this is not the test that applies in evaluating a petition to vacate a street. G&M argues that any development of the property done in accordance with the zoning laws would be conducive or beneficial to the village. Lastly, G&M argues that the trial court disregarded the *Duggan* and *Brettel* cases and erred in not finding persuasive its argument that vacation of the streets would relieve the village of responsibility for maintaining the streets and from potential liability concerning the streets.

{¶42} G&M's arguments concerning the trial court's denial of its petition to vacate are not supported by the record. In its decision on the matter, the court specifically cited to and quoted from R.C. 723.09 the correct standard for reviewing such a petition. As for *Duggan* and *Brettel*, those decisions are distinguishable for the reasons already stated under G&M's first assignment of error.

{¶43} Concerning the trial court's denial of its claim of abandonment, G&M refers to testimony concerning the trash compactor and the tractor trailer turnaround. It argues that if the construction of the trash compactor had been completed it would have blocked the streets in question thereby reflecting the village's intention to abandon them. Additionally, G&M argues that there remains 115 feet from Commercial Street to where it seeks to have Elizabeth Street abandoned for a tractor

trailer turnaround. For the reasons stated under G&M's second assignment of error, its arguments herein regarding abandonment have merit.

{¶44} Accordingly, G&M's third assignment of error is partially with merit.

{¶45} The judgment of the trial court is affirmed in part and reversed in part. The court's denial of G&M's petition to vacate the streets is affirmed. The court's denial of G&M's claim of abandonment is reversed and the matter is remanded to the court with instructions to enter judgment declaring all of Susanna Street and the portions of Elizabeth Street in question abandoned.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.