[Cite as *Johnston v. Waterville Gas & Oil Co.*, 2009-Ohio-4061.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark A. Johnston, et al.	Court of Appeals No. L-08-1143
Appellees	Trial Court No. CI06-4683
v.	
Waterville Gas & Oil Company	**DECISION AND JUDGMENT**
Appellant	Decided: August 14, 2009

* * * * *

George J. Conklin, for appellees.

Matthew D. Harper, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Waterville Gas & Oil Company ("Waterville"), appeals the judgment of the Lucas County Court of Common Pleas, which granted summary judgment to appellees, Mark A. Johnston and Lori A. Johnston. The trial court found that Waterville committed trespass due to a gas line it had installed on the Johnstons property before they purchased it. The trial court found that the Johnstons were bona fide purchasers for value and had no notice of Waterville's unrecorded easement. Waterville was ordered to pay the Johnstons $5,000 for an eight-foot easement, punitive damages for

the "blatant disregard" of appellees' property rights, the Johnstons' legal fees and court costs.

{¶ 2} From that judgment, Waterville assigns the following four errors for review:

{¶ 3} "The trial court erred in denying Waterville Gas' motion for summary judgment.

{¶ 4} "The trial court erred in awarding punitive damages against Waterville Gas.

{¶ 5} "The trial court erred in awarding attorney's fees against Waterville Gas.

{¶ 6} "The trial court erred in requiring Waterville Gas to pay $5,000 for a 'judicial easement.'"

{¶ 7} For the following reasons, we find the second and third assignments of error well-taken, but affirm the remainder of the trial court's judgment.

I.

{¶ 8} In its first assigned error, Waterville argues that summary judgment for appellees on their trespass claim was improper. We disagree.

{¶ 9} Appellate courts review judgments granting summary judgment de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is proper 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 only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C).

{¶ 10} The moving party bears the initial burden of demonstrating that there are no genuine issues of material facts regarding an essential element of the nonmoving party's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. This burden must be met by specifically referring to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that no material questions of fact remain. Civ.R. 56(C). Once the moving party has met its burden, the nonmoving party then has a corresponding burden to show that genuine issues of material fact remain. *Dresher,* 75 Ohio St.3d at 293; Civ.R. 56(E).

{¶ 11} In 1996, the Johnstons purchased the property at issue from Ruth Klopfenstein, who had purchased the property from Adelaide Farnsworth. In 2006, while preparing the property for development, the Johnstons discovered that a gas line ran underneath the property. The gas line was installed by Waterville with permission from Farnsworth. The right of way agreement between Farnsworth and Waterville was not recorded.

{¶ 12} The Johnstons' complaint requested ejectment, injunctive relief, and damages for trespass. On both parties' motions for summary judgment, the trial court disagreed with Waterville's argument that an easement by estoppel was created. Instead,

the trial court applied *Renner v. Johnson* (1965), 2 Ohio St.3d 195, and *Tiller v. Hinton* (1985), 19 Ohio St.3d 66, to find that the Johnstons, as bona fide purchasers without notice, were damaged by the trespass of Waterville's gas line.

{¶ 13} "'A common-law tort in trespass upon real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue * * *.' *Linley v. DeMoss* (1992), 83 Ohio App.3d 594, 598. See, also, *Chance v. BP Chemicals, Inc*. (1996), 77 Ohio St.3d 17, 24." *Apel v. Katz* (1998), 83 Ohio St.3d 11, 19.

{¶ 14} On appeal, Waterville argues that an easement by estoppel should arise because "an easement by estoppel may be found when an owner of property misleads or causes another in any way to change the other's position to his or her prejudice." *Schmiehausen v. Zimmerman*, 6th Dist. No. OT-03-027, 2004-Ohio-3148. Likewise, this court followed *Schmiehausen* in *Kienzle v. Myers*, 167 Ohio App.3d 78, 2006-Ohio-2765, to find an easement by estoppel.

{¶ 15} The trial court correctly determined that neither *Schmiehausen* nor *Kienzle* applies here. Neither *Schmiehausen* nor *Kienzle* applied the rule of *Renner* and *Tiller*, because their facts did not include an injured bona fide purchaser for value without notice.

{¶ 16} "Pursuant to R.C. 5301.25, an unrecorded easement is not enforceable against a bona fide purchaser for value who has no actual or constructive notice of such

easement." *Tiller v. Hinton* (1985), 19 Ohio St.3d 66, syllabus. In *Kienzle*, the property owner claimed an easement against a neighboring owner whose offer of an easement had induced the property owner's predecessor to change position in reliance on the easement. In contrast, here, Waterville seeks an easement against an owner who was a bona fide purchaser for value and whose predecessor (Farnsworth) had granted Waterville an easement. While Farnsworth's action may have caused Waterville to change position in reliance on the easement, Farnsworth's action may not be imputed to the Johnstons where they had no actual or constructive notice.

{¶ 17} Easements are encumbrances. *Schmiehausen*, 2004-Ohio-3148, ¶ 19, citing *Ohio Edison v. Dessecker* (1993), 89 Ohio App.3d 164, 168. As such, they are subject to the recording requirements of R.C. 5301.25, which provides that all instruments of writing encumbering land shall be recorded, and "until so recorded or filed for record, they are fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such * * * instrument." To allow Waterville's unrecorded "right of way agreement" to become an easement by estoppel against the Johnstons – bona fide purchasers for value – would undermine the intent of the recording statute and favor unrecorded easements.

{¶ 18} As in *Tiller*, therefore, the Johnstons' property was unencumbered and the presence of Waterville's pipe constituted a trespass. *Tiller*, 19 Ohio St.3d at 70. While Waterville may have had a privilege to enter Farnsworth's property by virtue of

Farnsworth executing a right of way agreement, the privilege granted by Farnsworth did not extend to or obligate the Johnstons. *Linley v. DeMoss*, 83 Ohio App.3d at 598. As the trial court correctly granted the Johnstons' motion for summary judgment on their trespass action, Waterville's first assignment of error is not well-taken.

II.

{¶ 19} Waterville's last three assignments of error all relate to damages. After granting the Johnstons' motion for summary judgment, the trial court held a hearing to assess damages and determine whether injunctive relief was appropriate. The trial court denied injunctive relief, finding that "it is in the best interest of the public to keep the pipeline in use." However, it found that the Johnstons were "entitled to be compensated for the easement and the damages relating to this intrusion * * *." It ordered Waterville to pay $5,000 for the easement. It also ordered punitive damages in the sum of $5,000, for Waterville's "cavalier attitude" and "blatant disregard" for the Johnstons' property rights. Waterville was also ordered to pay court costs, the sum of $225 for "title work," and the Johnstons' attorney fees.

{¶ 20} Appellate courts review a fact finder's award of damages to determine whether the award is supported by competent, credible evidence. "Judgments supported by competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. If the evidence is susceptible to more than one interpretation, we must give it the interpretation consistent

with the trial court's judgment." *Apling v. Lamberjack* (Sept. 20, 1996), 6th Dist. No. OT-95-048, citing *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, syllabus, and *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80

{¶ 21} We begin with Waterville's fourth assigned error, in which Waterville argues that the order to pay $5,000 could not be compensatory or actual damages. Waterville contends that the trial court found that the Johnstons had not proved any actual damages at the hearing.

{¶ 22} At the damages hearing, Mr. Johnston testified to his inability to notice the gas pipe before purchasing the property and how he discovered it upon commencing development of the property. He also testified to his difficulty in communicating with Waterville about the gas pipe. He presented evidence of adjustments which he made to his building plans, the loss of rent he incurrent because the rental units had to be downsized from his original building plans, and the loss of use of his property due to the easement. However, he presented no evidence of an objective valuation of the property or objective evidence of his loss of rental income due to the adjustments. He acknowledged that he was not a professional appraiser. He claimed a total loss of over $72,000. The trial court found that any adjustments he made to his building plans were voluntary, undertaken before summary judgment in his favor was rendered, and that damages to the fair market value or rental value of the property was "speculative."

{¶ 23} Given the evidence, the trial court's award of $5,000 in compensatory damages is not against the manifest weight of the evidence. Although the trial court found that Mr. Johnston's claimed damages for market value and loss of rent due to downsized building plans were speculative, the award is reasonable given the figure of $72,000 claimed by Mr. Johnston. It is also supported by Mr. Johnston's testimony regarding the loss of use of the easement area and his time, frustration, and effort expended in pursuing resolution of this matter. Contrary to Waterville's contentions, the trial court plainly intended the award of $5,000 to be in compensation for the Johnstons' loss and was not intended to be payment for the creation of a "judicial easement." As the Ohio Supreme Court has noted, in a trespass action, "some flexibility is permissible in the ascertainment of damages suffered in the appropriate situation." *Apel v. Katz* (1998), 83 Ohio St.3d 11, 20, citing *Thatcher v. Lane Const. Co.* (1970), 21 Ohio App. 2d 41, 48-49. Therefore, the fourth assignment of error is not well-taken.

{¶ 24} In its second assigned error, Waterville disputes the award of punitive damages. Pursuant to R.C. 2315.21(C), punitive damages cannot be awarded unless actual damages are awarded first. *Caserta v. Connelly*, 6th Dist. No. OT-03-004, 2004-Ohio-6001, ¶ 13-14. See, also, *Capital Control, Inc. v. Sunrise Point, Ltd.,* 6th Dist. Nos. E-03-046, E-04-008. 2004-Ohio-6309, ¶ 40.

{¶ 25} "Punitive damages in this state are available upon a finding of actual malice. 'Actual malice' for these purposes is "(1) that state of mind under which a

person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.' (Emphasis sic.) *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus." *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473.

{¶ 26} "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct. The amount of punitive damages awarded may be excessive when it is determined to have been the product of passion and prejudice. If the punitive damages award is not the result of passion and prejudice, and not the result of legal error, it is generally not within the province of a reviewing court to substitute its view for that of the jury." *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 480 (internal citations omitted).

{¶ 27} The trial court ordered Waterville to pay $5,000 in punitive damages for the "intentional nature" of the trespass and for Waterville's "cavalier attitude" and "blatant disregard" for the Johnstons' property rights. No evidence, however, shows that Waterville acted with the "actual malice" necessary to support an award of punitive damages. Waterville's second assigned error is well-taken.

{¶ 28} "Attorney fees are recoverable as compensatory damages in an action where punitive damages are properly awarded. *Langhorst v. Riethmiller* (1977), 52 Ohio App.2d 137, 142. * * * Thus, in a tort action, an award of attorney fees is inextricably

intertwined with an award of punitive damages." *Griffin v. Lamberjack* (1994), 96 Ohio App.3d 257, 266. See, also, R.C. 2315.21.

{¶ 29} Since the award of punitive damages was unwarranted, the award of attorney fees must also be reversed. *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 35; *Russell v. Smith* (1992), 81 Ohio App.3d 784, 787, citing *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178. Waterville's third assignment of error is also well-taken.

{¶ 30} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed as to the grant of summary judgment and the award of compensatory damages. The judgment is reversed as to punitive damages and the award of attorney fees. This matter is remanded to the trial court to enter the appropriate judgment according to this decision and the applicable law. Appellant and appellees are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____

JUDGE

Mark L. Pietrykowski, J. _____

Thomas J. Osowik, J. _____ JUDGE

CONCUR.

JUDGE