**[Cite as *Ohio Turnpike Comm. v. Spellman Outdoor Advertising Services, LLC.*, 2010-Ohio-1705.]**

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

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| Ohio Turnpike Commission | Court of Appeals No. E-09-038 |
| Appellant | Trial Court No. 2009-CV-0198 |
| v. | |
| Spellman Outdoor Advertising Services, LLC, et al. | **DECISION AND JUDGMENT** |
| Appellees | Decided: April 16, 2010 |

* * * * *

Bruce G. Rinker, Anthony J. Coyne, John W. Monroe and Noelle Tsevdos, for appellant.

Mary Jane S. Hill and John A. Coppeler, for appellees Dorsey and Zere Salmons.

Michael J. Sikora III, Ann M. Johnson, David J. Sipusic, Anthony R. Modd and Lee R. Schroeder, for appellee Spellman Outdoor Advertising.

* * * * *

COSME, J.

**{¶ 1}** Appellant, Ohio Turnpike Commission ("OTC") brought a verified complaint for temporary restraining order, preliminary injunction, and permanent injunction against appellee owners of land abutting the turnpike, Dorsey R. Salmons and

Zere P. Salmons ("Salmons"), and lessee, Spellman Outdoor Advertising Services, LLC ("Spellman"), to enforce the restrictions against placing billboards or advertising devices on the Salmons' property. Both properties were once parcels of a larger property that also included an additional parcel to the north of the OTC parcel. The Court of Common Pleas, Erie County, granted summary judgment in favor of the Salmons and Spellman. The OTC appealed. We affirm, holding that: (1) the Marketable Title Act had no impact upon the OTC's claim that the Salmons' property was subject to the restrictive covenants; (2) the restrictive covenant was outside the chain of title of the servient estate, and (3) the owners and advertising agency could not be charged with constructive notice of the restrictive covenant because said burden was recorded outside of the purchaser's chain of title.

**{¶ 2}** The OTC sets forth the following three assignments of error:

**{¶ 3}** "I. The trial Court erred as a matter of law in its contradictory application of Ohio's Marketable Title Act by imposing its general limitations, on the one hand, yet ignoring its express limitations, on the other hand.

**{¶ 4}** "II. In reviewing the trial court's record de novo and so construing the evidence most favorably for appellant Ohio Turnpike Commission, this court must conclude that the trial court's disregard of the expert opinion of Robert Greggo constitutes reversible error, insofar as no competent, unrefuted evidence exists exclusively to support the trial court's determination that, as a matter of law, reasonable minds could only conclude in favor of Appellees to the exclusion of Appellant Ohio Turnpike Commission's evidence.

**{¶ 5}** "III. Insofar as the Marketable Title Act expressly exempts governmental entities such as the OTC from the limitations of its other provisions, and because Mr. Greggo's expert opinion reflects a correct interpretation of both the relevant law and evidence which Appellees have not refuted, the OTC is entitled to summary judgment."

## I. BACKGROUND

**{¶ 6}** This appeal concerns two adjacent parcels of real estate located in Erie County which were at one time owned by Milo J. Weaver ("Weaver"), who acquired the original parcel from Myrtle V. Speery and M.D. Speery ("Speery") in 1914. In 1953, Weaver executed a warranty deed conveying to the OTC a portion of the real estate he had acquired from Speery. The OTC constructed a turnpike upon this land. The remainder of the property that Weaver did not sell to OTC abuts the turnpike to the north and south.

**{¶ 7}** The deed conveying the property to the OTC contains the following restrictive covenant: "Grantor(s) for his heirs, administrators, executors, and assigns, hereby covenant(s) with the State of Ohio and the Ohio Turnpike Commission and their successors and assigns that the Grantor(s), his heirs, administrators, executors, and assigns shall not establish or maintain or permit any natural or legal person to establish or maintain on any of the aforesaid remaining lands any billboard, sign, notice, poster, advertising device, or other display which is visible from the travelway of Ohio Turnpike Project No. 1, which is not at the date hereof in existence. This covenant shall run with the land." The deed conveying the property to the OTC was recorded on November 16, 1953.

**{¶ 8}** In 1962, Weaver and his wife executed a warranty deed conveying the southern parcel to Clyde and Lutie May Salmons. The deed containing the specific metes and bounds was recorded on January 4, 1963. This deed, however, made no reference to the restrictive covenant on the adjoining property owned by the OTC or to any restrictive covenant burdening the deeded property. In 1992, Clyde and Lutie Salmons conveyed the property to themselves by survivorship deed. Again, no reference was made to the restrictive covenant on either property. In 2000, Clyde Salmons executed a quitclaim deed conveying the property to Lutie. This deed was recorded on March 9, 2003, without reference to the restrictive covenant. In 2003, following her death, the property was conveyed by fiduciary deed to Dorsey and Zere Salmons again without reference to any restrictive covenant.

**{¶ 9}** On March 27, 2008, the Salmons entered into a lease with Spellman for the property, and on June 19, 2008, the lease memorandum allowing for the erection of an advertising device visible from the turnpike, was recorded.

**{¶ 10}** The OTC subsequently brought this action against the Salmons and Spellman to enforce the restrictive covenant – claiming that the restrictions attached to the Salmons' property at the time OTC purchased the turnpike property in 1953. The trial court granted summary judgment in favor of the Salmons and Spellman. The trial court ruled that they did not have actual or constructive notice of the restriction. The trial court also held that because the restrictive covenant was outside the chain of title for the Salmons' property, the Ohio Marketable Title Act, R.C. 5301.47 et. seq., did not apply.

## II. STANDARD OF REVIEW

**{¶ 11}** A trial court's decision to grant summary judgment is reviewed on a de novo basis. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Appellate courts apply the same criteria as the trial court, which is the standard contained in Civ.R. 56. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Under Civ.R. 56(C), summary judgment is proper if (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to only one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. See *Grafton*, supra, at 105.

**{¶ 12}** The party moving for summary judgment has the initial burden of informing the trial court of the basis of the motion and identifying those portions of the record that demonstrate the absence of a material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. To meet its burden, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, * * * written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher*, supra, at 293.

**{¶ 13}** If the moving party satisfies its burden, then the burden shifts to the nonmoving party to offer specific facts showing a genuine issue for trial. Civ.R. 56(E); *Dresher*, supra, at 293. The nonmoving party must come forward with documentary evidence rather than resting on unsupported allegations in the pleadings. *Kascak v.*

*Diemer* (1996), 112 Ohio App.3d 635, 638. A trial court may grant a properly supported motion for summary judgment if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing the existence of a genuine issue for trial. *State ex rel. Mayes v. Holman* (1996), 76 Ohio St.3d 147, 148.

**{¶ 14}** Expert affidavits offered in support of or in opposition to summary judgment must comply with Civ.R. 56(E) as well as with Evid.R. 702 through 705 in order for a court to consider them in a summary judgment motion. *Miltenberger v. Exco Co.* (Nov. 23, 1998), 12th Dist. No. CA98-04-087. See *Lawson v. Song* (Sept. 23, 1997), 4th Dist. No. 97 CA 2480. Civ.R. 56(E) requires affidavits to be based upon personal knowledge, set forth facts that would be admissible into evidence, and the affiant must be competent. Further, "the affidavit must set forth the expert's credentials and the facts or data he considered in rendering his opinion." *Miltenberger*, supra, citing *Evanoff v. Ohio Edison Co.* (Nov. 10, 1994), 11th Dist. No. 93-P-0015. The expert's affidavit may not merely set forth the expert's opinion; it must also state the facts upon which the expert's opinion relies. See *Ambulatory Health Care Corp. v. Schulz* (May 30, 1991), 8th Dist. No. 58595. Finally, an affidavit cannot state legal conclusions. *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, citing *State v. Licsak* (1974), 41 Ohio App.2d 165, 169. A genuine issue of material fact exists when the relevant factual allegations contained in the documentary evidence attached to a summary judgment motion and opposition brief are in conflict. *Duke v. Sanymetal Products Co.* (1972), 31 Ohio App.2d 78, 81.

## III. ANALYSIS

**{¶ 15}** The determinative issue presented by this appeal is whether the Salmons' property is subject to a restrictive covenant that was recorded outside the chain of title of the servient estate. We hold that the Salmons' property is not subject to the restrictive covenant in question. See *Spring Lakes, Ltd. v. O.F.M. Co.* (1984), 12 Ohio St.3d 333.

**{¶ 16}** The OTC argues that the Marketable Title Act, R.C. 5301.47 through 5301.56, and the decisions of the Ninth District Court of Appeals in *Ohio Turnpike Comm. v. Goodnight Inn, Inc.* (1990), 69 Ohio App.3d 361, and *Ohio Turnpike Comm. v. T.T.R. Media LLC* (Nov. 22, 2000), 9th Dist. No. 99CA007470, are dispositive.

**{¶ 17}** As stated in *Toth v. Berks Title Ins. Co.* (1983), 6 Ohio St.3d 338, 342, "[i]n general, the Marketable Title Act operates to extinguish interests and claims in existence prior to the effective date of the root of title." See R.C. 5301.47(A) and 5301.50. However, R.C. 5301.49 and 5301.51 provide for the preservation of certain interests in existence prior to the root of title if properly noted subsequent to the root of title. Thus, the Marketable Title Act does not bear upon interests which are created after the date of the root of title.

**{¶ 18}** "'Root of title' means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined.

The effective date of the 'root of title' is the date on which it is recorded." R.C. 5301.47(E). See *Toth*, supra, at 338. In the present case the date of root of title for the OTC parcel is 1953, and the root of title for the Salmons parcel is 1962.

**{¶ 19}** The OTC claims that the Marketable Title Act may not be applied to bar or extinguish any right, title, or interest of the United States, or of the state of Ohio, or any political subdivision, body politic, or agency. R.C. 5301.49 states, "Such marketable title shall be subject to: * * * (E) The exceptions stated in section 5301.53 of the Revised Code." R.C. 5301.53 states: "The provisions of sections 5301.47 to 5301.56 of the Revised Code shall not be applied to bar or extinguish any of the following: * * * (G) Any right, title, or interest of the United States, of this state, or of any political subdivision, body politic, or agency of the United States or this state."

**{¶ 20}** The Salmons and Spellman claim the Marketable Title Act, R.C. 5301.49(D), prevents the OTC from claiming an interest that was recorded at the time of root of title. The Marketable Title Act contains *exceptions* to its application in R.C. 5301.49. R.C. 5301.49 provides: "Such record marketable title shall be subject to: * * * (D) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or [sic] record is started; provided that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by operation of section 5301.50 of the Revised Code."

**{¶ 21}** The Salmons and Spellman's argument is faulty for two reasons. First, the restrictive covenant was recorded prior to, not subsequent to, the date of root of title. Second, the Marketable Title Act includes a governmental exception to all valid limitations under the Marketable Title Act. There is no dispute that the OTC is a state agency. Had the restrictive covenant been recorded in the initial or subsequent deeds on the Salmons' property, OTC would be correct in arguing that its prior interests, as a state agency, could not be extinguished.

**{¶ 22}** However, the OTC has also misapplied the Marketable Title Act in the present case. At issue is not whether the restrictions and interests continue for the land deeded to the OTC. Instead, the issue is whether the aforementioned restrictions apply to the parcel of land deeded to Clyde and Lutie Salmons.

**{¶ 23}** The question remains whether the Salmons purchased the property with either actual or constructive notice of the easement. The trial court determined that the Salmons did not have actual or constructive notice. The OTC contends that the Salmons had constructive notice of the easement since the easement was recorded in the deed for the OTC parcel from the same grantor as the Salmons' parcel. We reject the OTC's argument and hold that the Salmons may not be charged with constructive notice of the easement.

**{¶ 24}** In *Sternberger v. Ragland* (1897), 57 Ohio St. 148, 156, the Ohio Supreme Court adopted the view that, in order for a purchaser of real property to be charged with constructive notice of an encumbrance contained in a prior recorded instrument, the prior

instrument must be recorded in the purchaser's chain of title. Explained and affirmed in *Wayne Bldg. & Loan Co. v. Yarborough* (1967), 11 Ohio St.2d 195, 211.

**{¶ 25}** In *Spring Lakes, Ltd. v. O.F.M. Co.* (1984), 12 Ohio St.3d 333, 336, the Ohio Supreme Court observed, "The rationale for this rule is apparent. It was stated in the syllabus in *Glorieux v. Lighthipe* (1915), 88 N.J.Law 199, 96 A. 94: 'A purchaser of other land from the same grantor is not charged with notice of building restrictions contained in an earlier deed not in his chain of title.'"

**{¶ 26}** Furthermore, "'it would impose an intolerable burden to compel him to examine all conveyances made by every one in his chain of title.'" *Spring Lakes, Ltd.*, supra, at 336, quoting *Glorieux*, supra, at 203. See *Hancock v. Gumm* (1921), 151 Ga. 667, 107 S.E. 872, 877; *Sabo v. Horvath* (Alaska 1976), 559 P.2d 1038, 1044. The court also observed, "* * * [W]here a recorded deed to a lot forming part of a larger tract contains restrictive covenants, which by the terms of the deed are not only to apply to the lot conveyed, but, as in this case, to other lands of the grantor, a purchaser of one of the lots is not charged with notice of the covenant contained in a prior deed from the common grantor to another lot or parcel of the general tract." *Spring Lakes, Ltd.*, supra, at 336, quoting *Hancock v. Gumm*, supra, 107 S.E. at 877.

**{¶ 27}** The OTC suggests that we instead apply *Ohio Turnpike Comm. v. Goodnight Inn, Inc.* (1990), 69 Ohio App.3d 361, and *Ohio Turnpike Comm. v. T.T.R. Media LLC* (Nov. 22, 2000), 9th Dist. No. 99CA007470, which concluded that restrictive covenants prohibiting the erection of billboards and advertising devices could be enforced. For the reasons that follow, we decline to do so.

**{¶ 28}** In *Goodnight Inn, Inc.*, that court addressed whether a restrictive covenant already in the motel's deed could continue to be enforced. But here, the restrictive covenant the OTC seeks to enforce is not in the Salmons' deed. As such, *Goodnight Inn, Inc.*, is inapplicable here.

**{¶ 29}** Next, the OTC asks that this court follow *T.T.R. Media LLC*. The situation in *T.T.R. Media LLC* bears more similarity with the present case. TTR constructed advertising devices on lands deeded to Pikewood. The Pikewood property abutted the OTC property purchased from the same grantor, Louise Couture. The court in *T.T.R. Media LLC* observed, "However, it is clear that both the Couture/ABS deed and the ABS/Pikewood deed note that there may be restrictions of record. The Couture/ABS deed says that the conveyance is subject to 'any' conveyances to OTC, one of which, containing the subject restrictions, is listed by volume and page. The ABS/Pikewood deed mentions that part of the original property was deeded out to OTC at the very same volume and page noted above, and then states that the instant conveyance was subject to 'restrictions * * * of record.' Pikewood was obliged to examine the deed from Couture to ABS, to determine what property interest ABS had to convey to Pikewood. If Pikewood had examined the deed granting the subject property to ABS, Pikewood would have discovered the restrictive covenant against billboards." *T.T.R. Media LLC*, supra. Thus Pikewood clearly had constructive notice of the existence of possible OTC restrictions within its own chain of title. In the instant case, the Salmons' property does not contain any similar restriction of record in the chain of title.

**{¶ 30}** The Salmons' property is not subject to the OTC's restrictive covenants because the restrictions were not recorded in the chain of title for the Salmons' property. More importantly, the Salmons and Spellman did not have any constructive notice of the restrictions.

**{¶ 31}** The OTC has also claimed that the trial court disregarded the opinion of its expert and that the Salmons and Spellman have failed to come forward with documentary evidence demonstrating a genuine issue for trial. The affidavits of the parties' experts do not differ in the facts, only in their interpretation of their legal opinion. The fact that the experts' legal opinions are diametrically opposed does not mean that an issue of material fact exists. As such, the OTC's claim that its expert's opinion raises a genuine issue of material fact is disingenuous.

**{¶ 32}** In this case, there is no recorded instrument in the Salmons' chain of title restricting the erection of billboards or other advertising devices. Applying the foregoing principles, the trial court correctly ruled that the Salmons did not have constructive notice of a possible easement and properly ruled in favor of the Salmons' and Spellman's motions for summary judgment.

## IV. CONCLUSION

**{¶ 33}** This court concludes that the OTC failed to establish that genuine issues of material fact exist. Even though the governmental exception under the Marketable Title Act would apply to preserve an otherwise validly recorded restriction, the Salmons did not have constructive notice of the restrictions; nor were the restrictions recorded in the

chain of title for the Salmons' property. Finally, the competing affidavits of the parties' experts is insufficient to raise a genuine issue of material fact because they differ not on the facts, but on the interpretation and application of the Marketable Title Act and Ohio caselaw concerning notice and the application of a restrictive covenant that is outside the chain of title.

**{¶ 34}** Accordingly, we find appellant's first, second, and third assignments of error not well-taken.

**{¶ 35}** On consideration whereof, this court finds that substantial justice has been done the parties complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE