

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

John and Jean Kuyoth, et al.

Court of Appeals No. E-13-039

Appellants

Trial Court No. 2011-CV-0456

v.

Village of Kelleys Island, Ohio, et al.

DECISION AND JUDGMENT

Appellees

Decided: May 9, 2014

* * * * *

Stephen H. Dodd, for appellants.

D. Jeffery Rengel and Thomas R. Lucas, for appellees Kyle Yoest,
Jeri Yoest, and Fred Stueber.

David Lambros, for appellee Village of Kelleys Island, Ohio

* * * * *

JENSEN, J.

{¶ 1} Appellants, John and Jean Kuyoth, Douglass and Sally Kitchen, Glen and Michele Holzhauser, Gary and Lanetter Muzie, and World Business Services, Inc., own

properties abutting Dwelle Lane in the Village of Kelleys Island, Erie County, Ohio. On June 27, 2011, appellants filed a complaint for declaratory judgment against appellee, the Village of Kellys Island in the Erie County Court of Common Pleas.

{¶ 2} In their two-count complaint, appellants sought a declaration from the court that Dwelle Lane is a public street and that the village has an obligation to maintain it. Alternatively, appellants petitioned the court, pursuant to R.C. 723.09, to declare Dwelle Lane a public street conducive to the general interests of appellee the Village of Kelleys Island.

{¶ 3} Appellees Kyle and Jeri Yost and Frederick Stueber also own properties that abut Dwelle Lane. They successfully intervened in the action. Then, on February 14, 2013, the Yosts and Stueber filed a motion for summary judgment asserting, in part, that appellants had no evidence to support their claims that the village had ever recognized Dwelle Lane as a public road. The Yousts and Stuber further asserted that Dwelle Lane was a private road and that they were entitled to judgment as a matter of law. The Village of Kelleys Island also filed a motion for summary judgment. In its motion, the village asserted that the historical document and background evidence they produced supported a determination that Dwelle Lane was intended as a private right-of-way. The motions were fully briefed by the parties.

{¶ 4} On June 18, 2013, after analyzing the elements set forth in *Vermilion v. Dickason*, 53 Ohio App.2d 138, 141, 372 N.E.2d 608 (6th Dist.1976) for a common law

dedication of land for street purposes, the trial court entered summary judgment in favor of the Yousts, Stuber, and the Village of Kelleys Island. In its opinion and judgment entry, the trial court concluded,

Defendants have sufficiently demonstrated that there are no genuine issues of material fact and that reasonable minds, in viewing the evidence most favorable to the Plaintiff, can only come to the conclusion that Plaintiffs cannot prove the required elements establishing a common law dedication of Dwelle Lane as a public road. Plaintiffs have failed to satisfy their reciprocal burden pursuant to Civ.R. 56(E) to bring forth specific facts showing that there are genuine issues of fact in regards to any of the elements of a common law dedication of real property. Plaintiffs cannot meet their burden of proof on the common law dedication requirement of dedication or acceptance by the Village of Kelleys Island. In sum, no evidence has been presented nor can be presented pursuant to R.C. 2721.01 or R.C. 723.09. Thus, while Dwelle Lane is a road, it is not a public road.

{¶ 5} The trial court dismissed the entire action, with prejudice, and appellants instituted this appeal which was placed on the accelerated calendar. In their assignment of error, appellants assert not that the trial court erred in its determination that the *Vermillion* elements could not be met under Count 1 of their complaint, but argue that the trial court erred in dismissing, with prejudice, the petition to establish a street or alley pursuant R.C. 723.09 under Count 2 of their complaint.

{¶ 6} R.C. 723.09 provides, in pertinent part:

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 * * * 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 interest of such municipal corporation, declare such street or alley established * * *.

{¶ 7} In turn, R.C. 723.10 sets forth the due process requirements particularly attendant to a petition for the establishment of a street or ally. Specifically, R.C. 723.10 provides:

Notice of the pendency, object, and prayer of a petition for the * * * establishment of a street or alley under section 723.09 of the Revised Code shall be served upon the municipal corporation in the manner provided by law for the service of summons and shall be given by publication in a newspaper of general circulation in the county in which such street or ally is located, for four consecutive weeks, on the same day of the week. The cause may be heard and determined at any time after the expiration of ten days from the date of last publication.

{¶ 8} Here, it is clear that the appellants served the Village of Kelleys Island pursuant to R.C. 723.10. Yet, in our review of the docket, we find no evidence that

appellants prepared a notice by publication as required by that section of Chapter 723. See *Duggan v. Village of Put-In-Bay*, 6th Dist. Ottawa No. OT-00-044, 2001 WL 477168, * 1, fn. 1 (May 4, 2001).

{¶ 9} “An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *J.J. v. J.A.*, 9th Dist. Summit No. 26909, 2013-Ohio-5729, ¶ 8, quoting *Cleveland Bd. of Edn v. Loudermill*, 470 U.S. 532, 542, 150 S.Ct. 1487 (1985). A judgment is a nullity and void “where the court lacks jurisdiction of the subject matter or of the parties or where the court acts in a manner contrary to due process.” *Stringfellow v. Stringfellow*, 2d Dist. Clark No. 2970, 1993 WL 55960, *2 (March 1, 1993). “The rules clearly declare that an action is commenced when service is perfected.” *Gliozzo v. Univ. Urologists of Cleveland*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 16, citing Civ.R. 3(A).

{¶ 10} Because the identity and residence of all parties impacted by a petition to establish a street are unknown by the petitioner, the general assembly determined that notice of the pendency, object, and prayer of a petition must be given by publication. See R.C. 723.10. We acknowledge the unique nature of the instant proceeding. We note that notice by publication is necessary as it directly affects the due process rights of unknown parties impacted by the petition. The notice affords those parties an opportunity to enter an appearance and/or otherwise participate in the R.C. 723.09 hearing to determine whether the establishment of a public street would “conduce to the general interests of

[the] municipal corporation.” It is within the peculiar providence of the trial court to act at all times in a manner consistent with due process. Here, appellants acted in a manner contrary to due process when they failed to comply with the mandatory notice by publication requirement. Therefore, an action on appellants’ R.C. 723.09 petition did not properly commence.

{¶ 11} For the forgoing reasons, we find that the trial court was without jurisdiction to consider and issue a decision on the merits of appellants’ R.C. 723.09 petition and the judgment issued on Count 2 of appellants’ complaint is void. Appellants’ assignment of error is well-taken to the extent the trial court erred in dismissing appellants’ R.C. 723.09 petition with prejudice.

{¶ 12} The judgment of the Erie County Court of Common Pleas is affirmed as to Count 1 of appellants’ complaint. The judgment of the Erie County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision as to Count 2 of appellants’ complaint. Costs of this appeal are assessed equally between the parties pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

John and Jean Kuyoth, et al.
v. Village of Kelleys Island,
Ohio, et al.
E-13-039

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

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.