[Cite as *Fiore v. Larger*, 2009-Ohio-5408.]

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

CHARLES FIORE, et al.	:	
	:	Appellate Case No. 22949
Plaintiff-Appellants	:	
	:	Trial Court Case Nos. 05-CV-6054
v.	:	07-CV-8371
	:	
ALOYS LARGER, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellees	:	
	:	

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O P I N I O N

Rendered on the 9th day of October, 2009.

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FRENCH, J. (by assignment)

{¶ 1} Appellants, Charles Fiore and Michelle Fiore-King (collectively, "the

Fiores"), appeal the judgment of the Montgomery County Court of Common Pleas dismissing their claim, pursuant to R.C. 519.24, for an order compelling appellees, Aloys Larger and Marcella Larger (collectively, "the Largers"), to comply with applicable provisions of the Butler Township Zoning Code. For the following reasons, we affirm.

{¶ 2} The Fiores are co-owners of real property located at 8748 Haloran Lane, Dayton, Ohio, and the Largers are co-owners of adjacent real property located at 8712 North Dixie Drive, Dayton, Ohio. Both properties are located in Butler Township and are subject to the Butler Township Board of Township Trustees' zoning authority. As applicable to this appeal, Butler Township Zoning Code section 4303.02(C) states that "[w]hen any open off-street parking area containing more than five (5) parking spaces is adjacent to a Residential District, an effective buffer or screen, consisting of a solid wall, fence, or dense living hedge, shall be provided at the lot line to protect the privacy of the adjoining residential uses. Such wall, fence, or hedge shall be not less than six (6) feet in height."

{¶ 3} The Largers' property, located within a commercial district established by Butler Township, contains a building used as a barber shop and an open parking lot to the east of the barber shop. The Largers' property has ingress and egress to Dixie Drive, a north-south public roadway located adjacent to the western edge of the Largers' property. The Fiores' property is located within a residential district established by Butler Township and contains a building used as a personal residence. The Fiores' property has ingress and egress to Haloran Lane, a north-south, private, non-dedicated roadway, essentially parallel to Dixie Drive, that

runs within the western portion of the Fiores' property and adjacent to the eastern edge of the Largers' property. Because Haloran Lane runs within the Fiores' property, the Largers' property does not share a common boundary line with Haloran Lane.

{¶ 4} In or around 1984, a brick wall, less than six feet in height, was constructed near the eastern boundary of the Largers' property. The wall inhibited ingress and egress between the Largers' property and Haloran Lane and acted as a buffer or screen between the Largers' property and the Fiores' property.

{¶ 5} In 1999, the owners of real property adjacent to and/or abutting Haloran Lane, including the Fiores and the Largers, signed an "Access Agreement," which was recorded in the title records for the Fiores' and the Largers' properties. The access agreement states that the signatories desire to insure "a clear right of access to and from their property from * * * Haloran Lane" and provides that "the undersigned * * * covenant and agree that none of the undersigned shall take any action which in any way affects, infringes upon, or restricts the right of any other party to this Agreement * * * to the free and open access, including the right of ingress and egress, to said other party's property from Haloran Lane."

{¶ 6} In 2005, the Largers arranged for the destruction of a portion of the brick wall along the eastern boundary of their property and created a break wide enough for vehicles to pass through. The Largers thereafter arranged for the construction of a paved driveway from the parking lot on their property to Haloran Lane, a three-foot portion of which was constructed atop the Fiores' property. The Largers did not obtain a zoning permit or certificate for either the partial destruction of

the brick wall or the construction of the driveway. Neither did the Largers obtain the Fiores' permission to construct the driveway, which altered the southward drainage pattern of water along the western edge of Haloran Lane.

{¶ 7} In 2007, without official permit or authorization, the Fiores arranged for the destruction of the section of the Largers' driveway that was atop the Fiores' property and for the restoration of the surface grade to its original state. In April or May 2008, Stuart Vaughn, who allegedly had a tenancy interest in the Largers' property, placed gravel-like materials in the area where the paved driveway had been removed and raised the surface grade to the level of the adjacent surfaces of Haloran Lane and the Largers' property. This facilitated the ingress and egress of vehicles between the Largers' property and Haloran Lane without inhibiting drainage along Haloran Lane.

{¶ 8} Although this appeal stems from consolidated cases involving claims by both the Fiores and the Largers, the only claim relevant to this appeal is the Fiores' claim for relief, pursuant to R.C. 519.24, which provides, in part, as follows:

{¶ 9} "In case * * * any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, such board, the prosecuting attorney of the county, the township zoning inspector, or any adjacent or neighboring property owner who would be especially damaged by such violation, in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful * * * use. * * * "

{¶ 10} The Fiores claim they are entitled to relief, pursuant to that statute, as a result of the Largers' violation of Butler Township Zoning Code section 4303.02(C). Accordingly, they pray for an order compelling the Largers' compliance with that section.

{¶ 11} At the bench trial conducted on September 3, 2008, the parties submitted a joint stipulation of facts and presented no testimony or additional evidence, leaving essentially legal questions for the court to resolve. The court therefore heard legal arguments from counsel and, after a brief recess, issued a ruling from the bench. The court stated that the Fiores had standing to bring an action under R.C. 519.24 and that it had jurisdiction to issue an injunction ordering compliance with the zoning code. The court went on, however, to state that this is essentially an equitable action, subject to equitable principles. The court found that, by signing the 1999 access agreement, the Fiores agreed that all parties to that agreement, including the Largers, should have ingress and egress from their respective properties to Haloran Lane and that, by enforcing the zoning code, the Fiores would be limiting, if not eliminating, the Largers' ingress and egress. The court concluded that the Fiores were equitably estopped from limiting ingress and egress from the Largers' property to Haloran Lane through this action. Accordingly, the court held that the Largers were entitled to dismissal of the Fiores' claim.

{¶ 12} The following day, before the trial court journalized a dismissal entry, the Fiores filed a motion for reconsideration, urging the court to consider the equitable doctrine of unclean hands and its effect on the Largers' estoppel defense. Specifically, the Fiores argued that the trial court failed to consider their argument

that the Largers' violation of the zoning code demonstrates "unclean hands" and bars the Largers' reliance on the access agreement as a basis for estoppel. On September 5, 2008, the trial court entered final judgment, consistent with its bench ruling, without expressly ruling on the motion for reconsideration. The parties also filed stipulated dismissals of their remaining claims on September 5, 2008.

{¶ 13} On September 10, 2008, the trial court issued a decision and entry denying the Fiores' motion for reconsideration. The trial court stated that its oral pronouncement of judgment was not an interlocutory order, subject to a motion for reconsideration. The court also rejected the Fiores' argument on the merits, stating that it considered the doctrine of unclean hands before concluding that the Fiores were equitably estopped from pursuing their claim.

{¶ 14} The Fiores filed a timely notice of appeal and presently assert the following assignments of error:

ASSIGNMENT OF ERROR 1:

{¶ 15} "THE TRIAL COURT PREJUDICIALLY ERRED AS A MATTER OF LAW BY GRANTING JUDGMENT IN FAVOR OF THE LARGERS AND DISMISSING THE FIORES' STATUTORY ZONING VIOLATIONS ABATEMENT CLAIM."

ASSIGNMENT OF ERROR 2:

{¶ 16} "THE TRIAL COURT PREJUDICIALLY ERRED AS A MATTER OF LAW BY OVERRULING THE FIORES' *MOTION FOR RECONSIDERATION.*"

{¶ 17} By their first assignment of error, the Fiores maintain that the trial court erred by granting judgment in favor of the Largers and dismissing their claim for relief

pursuant to R.C. 519.24. We review a denial of injunctive relief under an abuse of discretion standard. See *Perkins v. Village of Quaker City* (1956), 165 Ohio St. 120, 125. The Fiores' arguments under this assignment of error, however, also raise questions of law, which we review de novo. See *Peoples v. Holley*, 181 Ohio App.3d 203, 2009-Ohio-897, ¶20, citing *Avent v. Avent*, 166 Ohio App.3d 104, 2006-Ohio-1861, ¶16.

{¶ 18} The Fiores primarily argue that, because their claim for injunctive relief based on the Largers' zoning violations is statutory, equitable doctrines like estoppel are inapplicable. To the contrary, the Largers respond that equitable principles apply to R.C. 519.24 claims, especially those brought by private citizens, and that the trial court's application of estoppel was proper.

{¶ 19} In Ohio, "when a statute grants a specific injunctive remedy to an individual or to the state, the party requesting the injunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law.' " *Ackerman v. Tri-City Geriatric & Health Care, Inc.* (1978), 55 Ohio St.2d 51, 56, quoting *Stephan v. Daniels* (1875), 27 Ohio St. 527, 536. Subsequent to *Ackerman*, various Ohio courts have held that, because R.C. 519.24 grants a specific injunctive remedy, the requesting party need not establish an irreparable injury or lack of an adequate remedy at law. See, e.g., *Baker v. Blevins*, 162 Ohio App.3d 258, 2005-Ohio-3664; *Union Twp. Bd. of Trustees v. Old 74 Corp.* (2000), 137 Ohio App.3d 289, 294; *Ameigh v. Baycliffs Corp.* (1998), 127 Ohio App.3d 254, 260; *Miller v. Byler* (Mar. 11, 1991), 5th Dist. No. CA-8262, citing *Ackerman*; *Kroeger v. Std. Oil Co. of Ohio, Inc.* (Aug. 7, 1989), 12th Dist. No.

CA88-11-086.

{¶ 20} In *Baker*, this court reviewed an injunction issued pursuant to R.C. 519.24 upon a complaint by the Pike Township Zoning Inspector. Because R.C. 519.24 grants an injunctive remedy, we stated that the township was not required to prove an irreparable injury or the lack of an adequate remedy at law, as required for other types of injunctive relief, but was required only to demonstrate, by clear and convincing evidence, that the defendants' property was being used in violation of a zoning ordinance. *Baker* at ¶12, citing *Old 74 Corp.* at 294. The record in *Baker* included conflicting testimony as to whether there had been a zoning violation, but the trial court chose to believe the testimony supporting a violation, and this court deferred to that finding. Because the record contained evidence to support the trial court's decision, we concluded that the trial court did not abuse its discretion in granting the zoning inspector's request for injunctive relief. Although *Baker* held that a plaintiff need not prove an irreparable injury or lack of an adequate remedy at law, it did not address whether a trial court may, nevertheless, consider equitable principles when deciding whether to grant the requested injunction, especially where the claim is brought, not by a governmental agent, but by a private citizen.

{¶ 21} In *Ackerman*, the Supreme Court of Ohio suggested a distinction between claims brought by a governmental agent and a private citizen. The Supreme Court noted the majority rule in federal jurisdictions and in a growing number of states that, "where an injunction is authorized by a statute designed to provide a governmental agent with the means to enforce public policy, 'no balancing of equities is necessary,' * * * and '(i)t is enough if the statutory conditions are made

to appear.' " Id. at 56-57, quoting *Brown v. Hecht Co.* (1943), 78 App.D.C. 98, 101, and *State v. O.K. Transfer Co.* (1958), 215 Ore. 8, 15-16. The Supreme Court explained that "statutory actions granting governmental agents the right to sue for injunctive relief have a history and purpose different from equitable actions for injunctive relief" and concluded that statutory injunctions in favor of the government should issue if the statutory requirements are fulfilled. *Ackerman* at 57. The court stated that it would be inappropriate to balance the equities under statutes that "authorize a governmental agent to sue to enjoin activities deemed harmful by the General Assembly [because such injunctions] are not designed primarily to do justice to the parties but to prevent harm to the general public." Id. Some Ohio courts have applied the *Ackerman* rationale to claims by governmental agents under R.C. 519.24 and similar statutes involving county or municipal zoning. See, e.g., *Baker*; *Wooster v. Entertainment One, Inc.*, 158 Ohio App.3d 161, 2004-Ohio-3846, ¶68-69 (balancing of equities is unnecessary where injunctive relief is sought pursuant to a statute that provides a governmental agent with the means to enforce public policy; equitable defenses are generally inapplicable to bar a claim by the government); *State ex rel. Scadden v. Willhite*, 10th Dist. No. 01AP-800, 2002-Ohio-1352.

{¶ 22} This court has not addressed the applicability of equitable principles and defenses in an R.C. 519.24 claim by a private citizen. However, this court has addressed the applicability of equitable principles under R.C. 713.13, a similar statute dealing with municipal, rather than township, zoning. See *Miller v. W. Carrollton* (1993), 91 Ohio App.3d 291. R.C. 713.13, provides, in part, as follows:

{¶ 23} “No person shall * * * use any land in violation of any zoning ordinance

or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, * * * the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation."

{¶ 24} In *Miller*, the trial court granted an injunction, requiring the removal of those portions of the defendants' carwash in violation of municipal zoning requirements. On appeal, this court determined that at least one plaintiff had standing to request injunctive relief under R.C. 713.13, as a result of being "especially damaged," but went on to note that that determination did not resolve the question of whether the trial court should have actually issued an injunction.

{¶ 25} Despite the *Miller* plaintiffs' standing and a clear zoning violation, this court balanced the equities and, ultimately, concluded that the plaintiffs were not entitled to an injunction against the defendants' zoning violations. Instead, we ordered the municipality to regulate traffic on the adjacent roadway to resolve the inconvenience or injury to the plaintiffs rather than requiring the defendants to comply with the zoning requirements. Regarding the equitable principles that a court must consider in granting injunctive relief under R.C. 713.13, we stated as follows:

{¶ 26} "The extraordinary nature of the remedy by injunction calls for a particular application of equitable principles, and it may be said to be the duty of the court to consider and weigh the relative conveniences and comparative injuries to the parties which would result from the granting or refusal of injunctive relief. Because

of the drastic character of mandatory injunctions, such rules apply with special force to them.

{¶ 27} "When the court is thus asked to undo something that has been done, it must, for obvious reasons, act in a careful and conservative manner and grant the relief only in situations which so clearly call for it as to make its refusal work a real and serious hardship and injustice.

{¶ 28} " * * * As in other cases of injunction, the court will balance the equities between the parties and consider the benefit to the plaintiff of a mandatory writ as against the inconvenience and damage to the defendant, and award relief accordingly." *Miller* at 296-97.

{¶ 29} Other Ohio appellate courts have similarly considered equitable principles when examining claims by private citizens for injunctive relief under R.C. 713.13. See, e.g., *Camp Washington Community Bd., Inc. v. Rece* (1995), 104 Ohio App.3d 750 (although R.C. 713.13 provides a remedy to any person within its terms, the court weighed the conveniences and injuries of the parties resulting from injunctive relief before concluding that the trial court erred in denying an injunction); *Kroeger* (although landowners within the terms of R.C. 519.24 may request an injunction, the trial court erred, albeit harmlessly, in failing to consider equitable estoppel arguments).

{¶ 30} We discern no basis for applying a different analysis to a private citizen's claim under R.C. 519.24 than this court applied in *Miller* with respect to a claim under R.C. 713.13. While the Fiores had standing to bring a claim pursuant to R.C. 519.24, as a result of the Largers' zoning violations, they were not necessarily

and automatically entitled to an injunction. See *Swan Creek Twp. v. Wylie & Sons Landscaping*, 168 Ohio App.3d 206, 2006-Ohio-584, ¶23 ("[o]nce a violation is established, the decision of whether to grant or deny injunctive relief rests in the sound discretion of the court"). As in *Miller*, the trial court was not prohibited from considering equitable principles, including estoppel, in determining whether to grant the requested injunction.

{¶ 31} In their second argument under the first assignment of error, the Fiores contend that, even if the court was entitled to consider equitable principles in determining whether to issue injunctive relief, the court erred in applying estoppel here because the Largers did not come to the court with clean hands. Estoppel may be nullified if the party asserting it has "unclean hands." *Collins v. Moran*, 7th Dist. No. 02 CA 218, 2004-Ohio-1381, ¶21. "The maxim, 'he who comes into equity must come with clean hands,' requires only that the [party invoking equity] must not be guilty of reprehensible conduct with respect to the subject matter of [the] suit." *Marinaro v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45, citing *Kinner v. Lake Shore & M. S. Ry. Co.* (1904), 69 Ohio St. 339, paragraph one of the syllabus. For the doctrine of unclean hands to apply, the party against whom it is asserted must be at fault in relation to the other party and in relation to the transaction upon which the claims are based. *Trott v. Trott*, 10th Dist. No. 01AP-852, 2002-Ohio-1077. Here, the Fiores maintain that the Largers' zoning violations, including the construction of the brick wall less than six feet high, the partial removal of the brick wall, and the construction of a driveway onto Haloran Lane, demonstrate blatant misconduct that precludes them from relying on estoppel

in defense of the Fiores' R.C. 519.24 claim. The Fiores also argue that the Largers were not entitled to rely upon the access agreement as the basis for estoppel because the wall, which pre-dated the access agreement, was itself in breach of the agreement because it barricaded ingress and egress from the Largers' property to and from Haloran Lane.

{¶ 32} On appeal, the Fiores maintain that the trial court erred by not addressing their unclean hands argument, despite its discussion of other arguments raised at trial. We disagree. First, the trial court specifically rejected, on the record, the Fiores' assertion that the wall on the Largers' property violated the access agreement. Secondly, even if this statement did not suggest the trial court's rejection of the Fiores' unclean hands argument, the trial court's judgment in favor of the Largers constitutes a presumptive rejection of that argument. See *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, ¶77. Therefore, we reject the Fiores' contention that the trial court erred by not addressing its unclean hands argument.

{¶ 33} We additionally conclude that the Fiores' unclean hands argument fails on its merits. By signing the access agreement, the Fiores agreed to take no action to restrict another party's right of ingress and egress from that party's property to Haloran Lane. The trial court aptly stated that the Fiores' action to enforce the zoning code constituted an action to infringe upon and restrict the Largers' ingress and egress between their property and Haloran Lane, in direct contravention of the access agreement. Although the Fiores correctly state that the access agreement is irrelevant to whether the Largers were in compliance with the zoning code, the

access agreement does act as an equitable bar to the Fiores' maintenance of an action to preclude the Largers' access to and from Haloran Lane. The stated purpose of the access agreement was for the parties to insure a right of access to and from their own property and Haloran Lane. In light of the parties' consent to the access agreement, there is no evidence to suggest that the Largers acted reprehensibly or were at fault in relation to the Fiores. That the Largers did not take advantage of their right of access to and from Haloran Lane prior to 2005 does not constitute a breach of the access agreement by the Largers, nor does it preclude the Largers' reliance on an estoppel argument in defense of the Fiores' R.C. 519.24 claim. For these reasons, we conclude that the trial court did not abuse its discretion by entering judgment in favor of the Largers on the R.C. 519.24 claim. Accordingly, we overrule the Fiores' first assignment of error.

{¶ 34} In their second assignment of error, the Fiores maintain that the trial court erred by overruling their motion for reconsideration. The Fiores argue that the trial court erred in its analysis of the motion for reconsideration by mischaracterizing its oral decision as a final judgment, but they also concede that the court was divested of subject-matter jurisdiction upon entering final judgment, prior to ruling on the motion for reconsideration. In that regard, they argue that, because the final judgment entry divested the trial court of subject-matter jurisdiction, the court erred by deciding the motion for reconsideration.

{¶ 35} It is undisputed that interlocutory orders are subject to motions for reconsideration, but final judgments and orders are not. See *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379, fn. 1. We agree with the Fiores that the

trial court's oral pronouncement on September 3, 2008, did not constitute a final order. "The Civil Rules distinguish [a] 'decision,' which is the court's oral or written ruling on the issues before it, from [a] 'judgment,' which is the written final determination of those issues signed by the court and entered upon its journal." *Shah v. Cardiology South, Inc.*, 2d Dist. No. 20440, 2005-Ohio-211, ¶12. It is well established that a court speaks only through its journal and not by oral pronouncement. *Schenley v. Kauth* (1953), 160 Ohio St. 109, 111. In this case, the court's oral pronouncement represented a decision that was not journalized as a judgment until September 5, 2008. Moreover, as of September 3, 2008, the parties' other claims remained pending, even after the court orally announced its decision on the R.C. 519.24 claim, and the court made no express determination that there was no just reason for delay prior to its entry of final judgment. See Civ.R. 54(B). Thus, even if the court's oral pronouncement constituted a judgment, it was not a final judgment. Accordingly, the Fiores were entitled to move for reconsideration prior to the court's entry of final judgment.

{¶ 36} We also agree with the Fiores' contention that the trial court was divested of subject-matter jurisdiction over this matter upon the filing of its final judgment entry on September 5, 2008, and, therefore, lacked jurisdiction when it issued its decision denying the motion for reconsideration. The trial court's entry of final judgment rendered the previously filed motion for reconsideration a nullity, and, therefore, the trial court's subsequent denial of that motion was also a nullity. See *Perritt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 03AP-1008, 2004-Ohio-4706, ¶12. This court accordingly lacks jurisdiction to consider the Fiores' second assignment of

error, and, for this reason, we overrule it. See *Vinylux Prod., Inc. v. Commercial Financial Group*, 9th Dist. No. 22553, 2005-Ohio-4801, ¶18-19; *State v. Leach*, 12th Dist. No. CA2004-02-011, 2005-Ohio-2370, ¶7; *Saker v. Barton* (May 20, 1999), 10th Dist. No. 98AP-1142, quoting *Saker v. Barton* (Sept. 23, 1997), 10th Dist. No. 97APE03-388 (memorandum decision).

{¶ 37} Having overruled the Fiores' assignments of error, we affirm the judgment of the Montgomery County Court of Common Pleas.

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GRADY and FROELICH, JJ., concur.

(Hon. Judith L. French, judge from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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