[Cite as *Bank of Am. v. Stevens,* 2017-Ohio-9040.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

Bank of America,	:	Case No. 16CA24
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Gerald D. Stevens, et al.,	:	
Defendants-Appellants.	:	**RELEASED: 11/27/2017**

APPEARANCES:

Alisa Turner, Logan, Ohio for appellants.

Amelia A. Bower, Plunkett Cooney, Columbus, Ohio for appellee.

Harsha, J.

{¶1} Gerald D. Stevens ("Dean") and Gerald A. Stevens ("Gerald") appeal the trial court's entry finding that an implied easement exists from Dean's 2.0467-acre property ("Property") across his father Gerald's land for access to Goose Creek Road. The Stevenses contend that because Bank of America ("bank") is not in possession of the property, it does not have standing to bring a declaratory judgment action to determine whether an easement exists. Thus, they argue the trial court erred in denying their motion to dismiss for lack of standing. However, Dean Stevens conveyed a mortgage to Countrywide Home Loans that included "all easements" that are "now or hereafter a part of the property." Bank of America is the successor by assignment to Countrywide Home Loans. Because the bank has an interest in all easements under the mortgage, it has standing to bring a declaratory judgment to determine the existence

and extent of any easements. The trial court did not err in denying the motion to dismiss.

{¶2} The Stevenses also contend that the trial court erred in denying their motion to dismiss on procedural grounds as untimely. Because the trial court properly denied the motion on substantive grounds, the Stevenses' argument that it was improperly denied on procedural grounds is moot.

{¶3} Next, the Stevenses contend that the trial court erred in finding an easement by implication based on both prior use and strict necessity because the Property was undeveloped at the time it was severed from Gerald's property and conveyed to his son Dean. Developed or not, the Property has no direct access to Goose Creek Road – it is landlocked by other tracts. At trial the bank established by clear and convincing evidence the existence of an easement by implication based on prior use: (1) Gerald severed the 2.0467-acre rectangular Property from his land and conveyed it to Dean; (2) before Gerald severed the 2.0467-acre Property, Gerald used the contested permanent driveway to access it; (3) the driveway easement is reasonably necessary to Dean's beneficial enjoyment of the Property because it provides the only access to Goose Creek Road; and (4) the use of the driveway was continuous because it was used to access the Property by the Stevenses and their guests for 50 years. The trial court did not err in finding an implied easement by prior use. And because the trial court properly found an implied easement by prior use, the Stevenses argument that the court erred in finding an implied easement by necessity is moot.

{¶4} Finally, the Stevenses contend that the trial court's finding that an easement exists on the basis that Dean had a license coupled with an interest is erroneous. Because the record contains competent and credible evidence supporting an implied easement by prior use, the Stevenses' argument that the trial court erred on this alternative ground is also moot.

{¶5} We affirm the trial court's judgment.

I. FACTS AND PROCEDURAL BACKGROUND

{¶6} In 2005, Dean Stevens granted a mortgage in his 2.0467-acre property to Countrywide Home Loans, which subsequently assigned it to Bank of America. The terms of the mortgage provided that Dean Stevens "does hereby mortgage, grant and convey" to the mortgagee his 2.0467-acre Property "together with * * * all easements * * * now or hereafter a part of the property." In 2014, Bank of America filed a complaint seeking a judgment declaring that Dean's 2.0467-acre Property includes an easement by implication by prior use and an easement by necessity over the driveway on Gerald Stevens's property. The bank alleged that Dean Stevens's 2.0467-acre Property is landlocked and that access to the Property prior to the severance was over land owned by Gerald Stevens. The bank alleged that declaratory judgment relief was necessary so that the bank can complete a foreclosure action then pending in Case No. 13CV0043.

{¶7} Gerald and Dean Stevens denied that the Property was landlocked and asserted the affirmative defense of failure to state a claim for which relief may be granted. Nonetheless, the matter proceeded to a trial before the court.

{¶8} The record indicates Gerald Stevens owned approximately 34 acres along Goose Creek Road, Hocking County, Ohio. Gerald uses a driveway on his property as

access to Goose Creek Road. On July 10, 1999, Gerald severed a 2.0467-acre rectangular Property from his 34-acre tract and conveyed it to his son Dean Stevens. The deed conveyed the Property and "all privileges and appurtenances belonging thereto", but did not include a specific easement to use the driveway across Gerald's land.

{¶9} Dean uses the driveway on Gerald's property for access to Goose Creek Road. At the time of the severance and conveyance, the 2.0467-acre rectangular parcel was bordered on the east, south, and west sides by Gerald Stevens's remaining 32 acres. The north side of the Property was bordered by land owned by Harry and Stella Howard, whose property had frontage to Goose Creek Road. At the time Gerald conveyed the 2.0467-acre Property, Dean Stevens did not own any adjoining land. Therefore in July 1999 – the time of the severance – Dean's 2.0467-acre Property had no frontage to Goose Creek Road or access to any other public road. In 2000, Dean Stevens acquired the Howard property, which has frontage to Goose Creek Road, and borders the north boundary of his Property. Dean placed a manufactured home on the Property in 2001.

{¶10} The Stevenses asserted the affirmative defense that the bank failed to state a claim for which relief may be granted, but they did not file a Civ.R. 12(B)(6) motion arguing that the bank lacked standing. Instead, they included a discussion of the standing issue in their pretrial brief. At the close of the bank's opening statement, the Stevenses' attorney orally sought dismissal on the ground that the bank lacked standing. The bank's counsel responded that the motion to dismiss was untimely, and that it had standing by virtue of the mortgage interest, which included all easements.

The trial court took the motion under advisement and ordered the parties to file post-trial briefs on the issue.

{¶11} During the bank's case in chief Gerald Franklin Hinkle II, a real estate appraiser, testified that he inspected the 2.0467-acre Property and surrounding land prior to preparing a written report. Hinkle testified that the Property and adjacent tracts slope to Goose Creek Road and that the adjacent 15.996-acre northern tract, which Dean acquired from the Howards in 2000, had very steep slopes and cliffs near Goose Creek Road. Hinkle concluded that due to the topography, it would not be feasible to extend a drive from Goose Creek Road across the former Howard tract to gain access to Dean's 2.0467-acre Property. Hinkle testified that the existing access to Dean's 2.0467-acre Property from Goose Creek Road was by a 10-foot wide gravel and chip-n-seal driveway shown in a survey map of the properties. There was no other driveway anywhere on Dean's Property that would connect it to Goose Creek Road, or to Brown Road, a road farther to the west of the Property. Through his research and inquiries to the Hocking County Planning Department, Hinkle learned that due to its lack of public road frontage, the Property is considered a "conditional transfer property" that could only be conveyed to a non-contiguous owner upon obtaining an easement to access Goose Creek Road. Hinkle's report gave an appraised value of the Property with the easement and without it. Without an easement the appraised property value declined by about 45%.

{¶12} Audie L. Wykle, the Director of Hocking County Regional Planning Office, testified that his office reviews and authorizes land splits. Wykle testified that the 2.0467-acre Property is a "conditional tract" that cannot transfer as an independent

parcel. The Property does not meet all the criteria for a stand-alone tract because it has no public road frontage. Wykle testified that he reviewed a topographical map of the surrounding property and he believed that it would not be practical to enter the Property in any other location other than the driveway across Gerald Stevens's property. Wykle also testified that Dean Stevens would not be able to access Brown Road from the Property. Wykle testified that he reviewed the topographical map of the area west of the Property to Brown Road and found that the area is very steep with potential cliffs. According to Wykle, Brown Road is a "Class X" road meaning that the road exists from a public right-of-way standpoint but it is not a road that the county maintains. Wykle testified that in this area Goose Creek Road has very steep hills that abut up to the road on either side.

{¶13} Gerald Stevens testified that his property has frontage on Goose Creek Road. He built the existing driveway approximately 50 years ago and it has been in continuous use during the 50 years he has owned the property. Gerald testified that his son Dean uses the driveway to access the 2.0467-acre Property and that Dean's guests also use the driveway for access. Gerald testified that he has never blocked Dean's access to the driveway and that he does not want Dean to build a separate driveway to the Property or stop using the existing driveway. Gerald also testified that part of the driveway and a culvert that crosses Goose Creek closest to Goose Creek Road is actually on the 15.996 acres Dean acquired from the Howards in 2000.

{¶14} Gerald testified that to his knowledge, there is no recorded easement for the driveway; likewise, Dean has not given him an easement for that portion of the driveway that crosses a section of the 15.996 acres formerly owned by the Howards;

nor did he record or create an easement to the driveway when he transferred the 2.0467-acre Property to Dean. Gerald testified that when he conveyed the Property to Dean, he intended the Property to stay in Dean's ownership and to be accessed by the driveway on his property. Gerald testified that Dean has never blocked Gerald's access to the portion of the driveway that crosses a portion of the land Dean acquired from the Howards. Gerald indicated that there are no other driveways from Goose Creek Road to the 2.0467-acre Property.

{¶15} Dean Stevens testified that he has lived at the Goose Creek Road property for 52 years – his entire life. He testified that a second driveway exists from the Property and connects to Brown Road through a western parcel Gerald owns, but he could not explain why the driveway to Brown Road was not depicted on the survey map. Dean did not provide any documentation to support the existence of this driveway. Dean also testified that he has not constructed any other driveways either to Brown Road or to Goose Creek Road from his Property. However, contrary to Hinkle and Wykle's testimony, Dean stated that he believed it was possible to create a driveway in a northeasterly direction across the steep and cliff-like terrain to Goose Creek Road and he had planned to do so eventually. Dean testified that when he mortgaged the Property he gave Countrywide Home Loans a right-of-way to his Property but he was unsure what happened to it or whether it was recorded. The record contains no recorded right-of-way or easement from Dean Stevens to Countrywide Home Loans. Dean testified that when his father transferred the Property to him, he intended to use the existing driveway on his father's property to access his Property.

{¶16} The court's subsequent ruling on the motion to dismiss for lack of standing found that it was untimely because it was not made until after trial commenced. But the trial court also denied the motion on substantive grounds, finding that the bank had a personal stake in the matter as the bank held a mortgage on the Property, and its mortgage interest would be substantially impaired if there was no easement due to the large reduction in the value of the Property without it.

{¶17} In reaching the merits the trial court found that the Property was landlocked when it was severed in July 1999, and that the driveway to the Property across Gerald's property was the only access. The court found that although Dean Stevens testified that an alternative driveway existed to Brown Road, the maps, aerial photographs, surveys, or other witnesses' testimony supported a finding that no driveway to Brown Road exists. The trial also found that constructing a driveway on the property Dean acquired in 2000 from the Howards would be very difficult and expensive because the very steep terrain is not conducive to the construction of such an access.

{¶18} The trial court ruled that the bank had established an implied easement by prior use by clear and convincing evidence. The court found that: (1) the parties had stipulated that there was a severance of the unity of ownership in a parcel of real estate – Gerald had severed the Property from a parcel of land he owned; (2) before the severance, the driveway existed on the property for approximately 50 years; and Gerald and Dean used it to access Gerald's property, including the 2.0467-acre Property he later conveyed to Dean; and the driveway was permanent; (3) the easement is reasonably necessary to the beneficial enjoyment of the Property because in July 1999, the Property was landlocked – Dean Stevens did not own the Howard property located to the north, so

he could not have built a driveway from the Property to Goose Creek Road on it; and (4) the servitude is continuous as distinguished from temporary or occasional because the evidence showed that Dean has been using the driveway as his only access since at least 1999. The trial court found that the implied easement ran from Dean's property, across Gerald's property and to Goose Creek Road. In describing the implied easement, the trial court did not address the segment of driveway that crosses over the property formerly owned by the Howards. Likewise, our decision does not address that segment of property.

{¶19} The trial court alternatively found that the bank had established an implied easement by necessity and an easement by license coupled with an interest.

{¶20} The Stevenses appealed.

II. ASSIGNMENTS OF ERROR

{¶21} The Stevenses designate four assignments of error for review:

> I. THE TRIAL COURT ERRED WHEN IT FAILED TO DECIDE DEFENDANTS' MOTION TO DISMISS PRIOR TO TRIAL AND IN RULING THAT DEFENDANTS' MOTION WAS UNTIMELY.
>
> II. THE TRIAL COURT ERRED IN DETERMINING THAT THE PROPERTY WOULD BE WORTH CONSIDERABLY LESS WITHOUT ACCESS AND THAT THE DIFFERENCE IN VALUE WAS "SUFFICIENT TO PROVIDE STANDING TO THE BANK." TRIAL COURT ENTRY, NOVEMBER 21, 2016. PAGE 4, LINE ONE AND TWO.
>
> III. THE TRIAL COURT ERRED IN ITS APPLICATION OF *ARKES* TO THE FACTS IN THIS CASE.
>
> IV. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT GERALD DEAN HAD A LICENSE COUPLED WITH AN INTEREST.

{¶22} Because the trial court made a substantive ruling on the motion to dismiss despite finding it procedurally untimely, we address Stevenses' second assignment of error first.

III. STANDING

A. Standard of Review

{¶23} "Standing determines whether a litigant is entitled to have a court determine the merits of the issues presented." (Internal quotations and citations omitted.) *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶20. "Whether a party has established standing to bring an action before the court is a question of law, which we review de novo." *Id.* citing *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 23.

B. Analysis

{¶24} " 'Standing' is defined at its most basic as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.' " *Moore,* at ¶ 21 quoting *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15. To have standing a party must allege "such a 'personal stake in the outcome of the controversy * * * ' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' " (Internal quotations and citations omitted) *Id.* Lack of standing is "a fundamental flaw that would require a court to dismiss the action* * *. But a particular party's standing, or lack thereof, does not affect the subject matter jurisdiction of the court in which the party is attempting to obtain relief." *Bank of America, N.A., v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 23.

{¶25} "[S]tanding turns on the nature and source of the claim asserted by the plaintiffs." *Id*. at ¶23, citing *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The Stevenses argue that the nature of the claim is an action to

quiet title under R.C. 5303.01 and the source of the claim is the mortgage interest. The relevant portion of Ohio's quiet title statute reads:

> An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein.

R.C. 5303.01.

{¶26} The Stevenses contend that because the bank's mortgage interest is not possessory, the bank does not have standing to bring a declaratory judgment action to determine the existence and scope of the easement Dean granted to the bank, i.e. that R.C. 5303.01 requires a possessory interest before a party can bring an action to quiet title. However, Dean Stevens conveyed a mortgage to Countrywide Home Loans that included "all easements" that are "now or hereafter a part of the property." The bank is the successor by assignment to Countrywide Home Loans.

{¶27} The bank argues that it is not seeking to divest title from Dean Stevens, nor is it claiming an interest in the land superior to his ownership. Thus the bank contends there is no basis to characterize the nature of the action as one to quiet title. The bank argues that the nature of its claim sounds in contract and the source is the mortgage interest in the Property, which by its terms include "all easements * * * now or hereafter a part of the property." The bank contends that it has standing as a party to the contract to seek a declaratory judgment under R.C. 2721.03 and R.C. 2721.04 to determine whether an easement exists.

{¶28} The relevant portion of Ohio's declaratory judgment statute reads:

> Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

R.C. 2721.03.

> Subject to division (B) of section 2721.02 of the Revised Code, a contract may be construed by a declaratory judgment or decree either before or after there has been a breach of the contract.

R.C. 2721.04.

{¶29} A party seeking a declaratory judgment must have sufficient standing to bring the action:

> * * * Ohio Rev.Code § 2721.03 does not by itself provide a plaintiff with the standing to sue, but rather serves as the legal basis for obtaining declaratory judgment by a plaintiff who already has standing. *See Aarti [Hospitality v. City of Grove City, Ohio*, 486 F.Supp.2d 696 (S.D.Ohio 2007)], 486 U.S. at 700 (The statute itself is simply a mechanism through which an appropriate plaintiff may proceed, but the statute does not create the appropriate plaintiff.); *see also Walgash v. Bd. Of Trs. of Monclova Twp. Lucas County*, No. L–80–105, 1981 WL 5518, at *4 (Ohio App. 6th Dist. Mar. 20, 1981) ("While R.C. 2721.03 creates the right to bring a declaratory judgment action to determine the validity of an ordinance, the requirements of justiciability, including standing and ripeness, must still be met before a court can entertain the action.").

Autumn Care Center, Inc. v. Todd, 2014-Ohio-5235, 22 N.E.3d 1105, ¶17 (5th Dist.), quoting *Bridge v. Aames Capital Corp.*, N.D.Ohio No. 1:09 CV 2947, 2010 WL 3834059, *5 (Sept. 29, 2010).

{¶30} Whether a mortgagee has standing to bring a declaratory judgment action to determine if an easement exists and, thus is part of the collateral included in the mortgage contract, appears to be a question of first impression in Ohio.

{¶31} The relevant portion of the mortgage states:

> Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in HOCKING County, Ohio. SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF. * * * TOGETHER WITH all the Improvements now or hereafter erected on the property and all easements, appurtenances and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred in this Security Instrument as the "Property."
>
> * * *
>
> **5. Occupancy, Preservation, Maintenance and Protection of Property** * * * Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or abandoned Property.

{¶32} The Stevens argue that the mortgage merely gives the bank a lienholder interest, which is insufficient to give the bank standing to determine the existence of an easement. However, as the mortgagee, the bank has an interest in the Property and "all easements" in existence when Dean granted the mortgage and arising thereafter. The terms of the mortgage state that easements are included in the definition of the "Property" as the term is used throughout the mortgage. And the property protection provision in Section 5 of the mortgage requires the borrower to preserve, maintain and protect the "Property" and allows the bank to "take reasonable action to protect and preserve * * * vacant or abandoned Property." Thus, contrary to Stevenses' contention, the mortgage gives the bank the right to step in and protect and preserve the Property, which includes easements, when abandoned by the borrower. *See generally First Union-Lehman Bros. Bank of Am. Commercial Mtge. Trust, Commercial Mtge.-Pass Through Certificates v. Imperial Plaza, Ltd*., 2d Dist. Montgomery No. 23686, 2010-

Ohio-2009, ¶23 (security agreement gave lender interest in easement such that "amendment of the preexisting parking easement changed the interest in the property. As such, the lender should have been contacted prior to entering into a new easement").

{¶33} A Texas court of appeals affirmed a trial court's decision not to proceed without the presence of mortgagees in a declaratory judgment action to determine whether an easement existed. *Allegro Isle Condominium Assn. v. Casa Allegro Corp.*, 28 S.W.3d 676, 680 (Ct. App. Tex. 2000). The court determined that the mortgagees' security interest in the easement was sufficient to require their participation because whether the easement existed could affect property values and the mortgagees' security interest. The court noted that its decision was consistent with other jurisdictions:

> Courts in other jurisdictions have upheld trial court decisions requiring the presence of mortgagees in disputes over the rights of the mortgaged properties. In *Hafner v. Freeman*, 285 N.Y. 831, 35 N.E.2d 501 (1941), the Appellate Division of the New York Supreme Court had reversed the trial court in an easement dispute on the ground that mortgagees of a parcel of property with an interest in the dispute were necessary parties. *Id.* The New York Court of Appeals affirmed. *Id.* In *Carter v. Sullivan*, 281 Mass. 217, 183 N.E. 343, 348 (1932), a second mortgagee was held to be "at least a proper party" to the dispute because the judgment "would affect his property rights and possibly diminish the value of his security."

Id. at 679.

{¶34} A Maryland appellate court held that a developer who had entered into a contract with the county to develop a surface parking lot had standing to bring a declaratory judgment action to construe the terms of an easement that existed between the county as the servient estate owner and a company that owned the dominant estate. The company sought dismissal arguing that the developer lacked standing to construe the easement because it was not the owner of either the servient or the

dominant estate. The court held that the developer's contract rights to develop the property gave it a sufficient "legal interest" in the easement to provide standing to bring the action. *Michael, LLC v. 8204 Assoc. LLC,* 207 Md.App. 666, 53 A.3d 509 (Md. Ct. Spec. App. 2012).

{¶35} Here the trial court used the same rationale as the Texas court in *Allegro Isle Condominium Assn., supra,* and found that the bank's mortgage interest in the Property would be considerably impaired if there was no easement. This impairment of the bank's collateral was sufficient to give the bank a "personal stake" in the matter and confer standing. We agree. Under the circumstances present here and the terms of the mortgage, the bank's interest in easements is sufficient to give it "such a 'personal stake in the outcome of the controversy * * * ' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Clifton*, 131 Ohio St.3d 287, at ¶ 15. The 2.0467-acre Property is landlocked – without an easement it cannot be accessed. This substantially impairs the bank's mortgage interest not only in its monetary value but also, for example, in the bank's ability to exercise its rights under the property protection provision. It may also have negative implications on the bank's default remedies: according to Hinkle and Wykle, the marketability and transferability of the property is substantially impacted because it cannot be transferred to a non-contiguous property owner without an easement.

{¶36} Our holding comports with the admonition from the Supreme Court of Ohio that "[J]udges are cautioned to remember, standing is not a technical rule intended to keep aggrieved parties out of court. 'Rather, it is a practical concept designed to insure

that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented.' " *Moore,* 133 Ohio St.3d 55, at ¶ 47.

{¶37} The trial court correctly found that the bank had standing and properly denied the motion to dismiss on substantive grounds. We overrule the second assignment of error.

{¶38} Because the trial court properly denied the motion on substantive grounds, the Stevenses' argument that the court erred when it dismissed the motion as untimely is moot. We do not address the merits of the first assignment of error. *See* App.R. 12(A)(c).

IV. IMPLIED EASEMENTS

A. Standard of Review

{¶39} The Stevenses also challenge the trial court's finding that the bank established an implied easement by prior use and necessity by the requisite clear and convincing evidence. Their argument specifically challenges the third element of an implied easement: that at the time of severance the easement was reasonably necessary (or strictly necessary, in the easement by necessity analysis) for the beneficial enjoyment of the land. They contend that because the Property did not have a house, Dean did not need access to the Property.

{¶40} The Stevenses question the trial court's application of *Arkes v. Gregg,* 10th Dist. Franklin No. 05AP-202, 2005-Ohio-6369, under a manifest weight of the evidence challenge. In the absence of a granting instrument, a trial court must

determine whether the parties intended to create an easement from the historical facts, rather than a document. Thus, we apply a manifest-weight standard to determine whether the easement exists. *Dunn v. Ransom,* 4th Dist. Pike No. 13CA837, 2013–Ohio–5116, ¶ 9. But because an easement created by implication is an equitable remedy, the trial court's determination of the limits of the easement is vested within its considerable discretion, and we will not reverse that determination absent an abuse of that discretion. *Id*. at ¶ 10–11, citing *Keish v. Russell*, 4th Dist. Athens No. 98CA01, 1998 WL 574369, *1 (Sept. 10, 1998); *see generally Cadwallader v. Scovanner*, 178 Ohio App.3d 26, 2008–Ohio–4166, 896 N.E.2d 748, ¶ 39, fn. 5 (12th Dist.) (stating implied easements are equitable remedies). Accordingly we must afford the trial court broad discretion in fashioning its remedy. Where one or more ways are available, the trial court is entitled to use its discretion and select the most reasonable route under the circumstances.

{¶41} The party claiming an easement must establish its creation by clear and convincing evidence. *Fitzpatrick* at ¶ 23, 25–26. Clear and convincing evidence is "that measure of degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009–Ohio–5327, 915 N.E.2d 1215, ¶ 18. In determining whether a trial court's decision is supported by clear and convincing evidence, "a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Pinkerton v. Salyers,* 4th Dist. Ross No.

13CA3388, 2015-Ohio-337, ¶18 quoting *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990). In this context even some competent credible evidence may be sufficient to bring about the required degree of certainty. *See State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990).

{¶42} The Stevenses also challenge the trial court's legal application of *Arkes*; a de novo standard of review applies to our review of that issue. *Id.*

B. Implied Easement by Prior Use

{¶43} "An easement is 'the grant of a use on the land of another.' " *State ex rel. Wasserman v. Fremont*, 140 Ohio St.3d 471, 2014–Ohio–2962, 20 N.E.2d 664, ¶ 28, quoting *Alban v. R.K. Co*., 15 Ohio St.2d 229, 231–232, 239 N.E.2d 22 (1968). This appeal involves "easements appurtenant," which are "easements that typically benefit and/or burden two separate parcels of land, i.e., the dominant tenement (the land benefited) and the servient tenement (the land encumbered by the easement)." *Dunn v. Ransom*, 4th Dist. Pike No. 10CA806, 2011–Ohio–4253, ¶ 29. "An easement may be created by specific grant, prescription, or implication that may arise from the particular set of facts and circumstances." *Fitzpatrick v. Palmer*, 186 Ohio App.3d 80, 2009–Ohio–6008, 926 N.E.2d 651, ¶ 22 (4th Dist.). "Implied easements are not favored because they are in derogation of the rule that written instruments speak for themselves." *Trattar v. Rausch,* 154 Ohio St. 286, 291, 95 N.E.2d 685 (1950) citing *Ciski v. Wentworth*, 122 Ohio St. 487, 172 N.E. 276 (1930).

{¶44} Courts may recognize an unrecorded easement or one for which there was no written agreement via the theory of an "implied" easement, e.g., an easement implied from prior use. "An implied easement is based upon the theory that whenever

one conveys property he includes in the conveyance whatever is necessary for its beneficial use and enjoyment and retains whatever is necessary for the use and enjoyment of the land retained." *Trattar* at 291, 95 N.E.2d 685. In other words a court that implies an easement is merely recognizing what the original property owner, who split up his land, intended to do, i.e., grant an easement in favor of the dominant tenement.

{¶45} The Supreme Court of Ohio has established the following four elements of an easement implied by prior use:

> (1) A severance of the unity of ownership in an estate;
>
> (2) that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent;
>
> (3) that the easement shall be reasonably necessary to the beneficial enjoyment of the land granted or retained;
>
> (4) that the servitude shall be continuous as distinguished from a temporary or occasional use only.

Ciski v. Wentworth, 122 Ohio St. 487, 172 N.E. 276 (1930) syllabus; *Dunn* at ¶ 34.

{¶46} To establish an implied easement by necessity, the party must present evidence on the same four elements of an implied easement by prior use, except that for the third element, the party must show "strict necessity" rather than "reasonable necessity." *Fitzpatrick v. Palmer,* 186 Ohio App.3d 80, 2009-Ohio-6008, ¶ 35-36 (4th Dist.). "An easement by prior use and an easement by necessity are not mutually exclusive; rather, they are alternative means of achieving the same end." *Arkes*, 2005-Ohio-6369, ¶14. The trial court determined that the bank had an implied easement by prior use. Like the parties, we limit our review of the trial court's analysis to the third

element of implied easement by prior use. Our determination of this issue renders moot Stevenses' contention that the easement was not "strictly necessary."

{¶47} The Stevenses argue that the easement was not reasonably necessary for the beneficial enjoyment of the Dean's Property at the time of the conveyance. They contend that *Arkes* supports their argument because there, like here, the property was undeveloped at the time of the conveyance. Stevenses argue that because Dean had no house on the Property in 1999, he did not need to reach the Property by car, he would have enjoyment of the Property by reaching it by foot or by all-terrain vehicle across the steep ravines and cliffs on the Howard's property. The Stevenses misconstrue both the trial court's decision and the *Arkes* holding.

{¶48} The bank presented clear and convincing evidence that when Gerald severed the Property and conveyed it to Dean in 1999, the new tract was landlocked, i.e. it was bordered on three sides by Gerald's property and the fourth side by the Howard's property. Dean had no access to his property from a public road. Dean could access his property only by crossing property owned by others (whether that crossing was by foot, horse, or car). To avoid trespassing Dean needed an authorized means to access his land for its beneficial use and enjoyment. Gerald gave him permission to use the driveway – the same prior use Gerald made of it to reach the Property before the severance. The record contains competent and credible evidence supporting the trial court's firm belief that an easement was and is reasonably necessary to the beneficial enjoyment of the Property.

{¶49} In a well-written opinion, the trial court correctly distinguished *Arkes* on the basis that it involved a maintenance easement. Gregg and Arkes were next-door

neighbors. Arkes's house was less than 18 inches from Gregg's lot line and privacy fence, making maintenance of the north exterior wall of Arkes's house severely challenging. To be able to go onto Gregg's property to maintain the north exterior wall, Arkes argued for an implied easement by prior use. However, the court found that when the two properties were severed in 1905, there was no prior use or necessity to use Gregg's property for maintenance of the north exterior wall of Arkes's house because the house did not exist in 1905. *Arkes*, at ¶16-20.

{¶50} Here, regardless of whether the Property was undeveloped, there was a prior use – the use of the driveway to access Gerald's land, which included the subsequently severed Property conveyed to Dean. And, use of the driveway was reasonably necessary to the beneficial enjoyment of the land. *See Gillum v. Ragland*, 4th Dist. Jackson No. 567, 1989 WL100107 (Aug. 25, 1989) (Mother severed property and gave daughter portion that was accessible by a lane through mother's remaining property, intending to have only the daughter use the lane. After daughter sold her property to appellee, mother blocked appellee from lane. Court found implied easement by prior use where use of a lane through appellant's property was reasonably necessary for the beneficial enjoyment of appellee's property).

{¶51} The trial court's finding that the easement was reasonably necessary was supported by clear and convincing evidence and the court correctly distinguished *Arkes*. We overrule the Stevenses' third assignment of error.

{¶52} Because the trial court properly determined that an implied easement exists, the Stevenses' argument that there was no easement by a license coupled with an interest is moot. We do not decide the fourth assignment of error. App.R. 12.

V. CONCLUSION

{¶53} The bank as mortgagee of the dominant estate has standing to bring an action to determine the existence and scope of an easement. The record contains competent and credible evidence from which the trial court could form a firm belief that an implied easement exists by prior use. We affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.