[Cite as *Rottman v. Knerr*, 2005-Ohio-6464.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BENJAMIN R. ROTTMAN

Plaintiff-Appellant

-vs-

JERRY KNERR, et al.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2005 CA 00020

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 03461
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 5, 2005

APPEARANCES:

For Plaintiff-Appellant

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AND

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For Defendant-Appellee

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Wise, J.

{¶1} Appellant Benjamin Rottman appeals the decision of the Court of Common Pleas, Stark County, which granted judgment in favor of Appellees Jerry and Sharon Knerr, adjoining landowners, in appellant's action to declare the existence of a driveway easement along the edge of appellees' property. The relevant facts leading to this appeal are as follows.

{¶2} Appellant is the fee owner of a 67.6 acre tract of land and a .72 acre, thirty-foot wide strip of land located in Tuscarawas Township, Stark County, Ohio. He has lived at this location since 1954. A map of the area indicates that appellant's .72 acre strip juts out like a long peninsula, in a roughly perpendicular north-to-south fashion, from a connecting spot on the southern boundary line of appellant's larger 67.6 acre tract. This long strip, which is undisputedly owned by appellant (i.e., is not a mere easement), is used as his gravel driveway to access nearby Barrs Street.

{¶3} Appellees, the Knerrs, have since May 1992 owned a 4.0 acre tract of land which abuts appellant's aforesaid .72 acre strip along the entire eastern edge of the strip. The western edge of appellees' 4.0 acre tract and the eastern edge of appellant's .72 acre strip has become the source of the present dispute between these neighbors. This is based on appellant's claim of a fifteen-foot wide easement adjoining and running parallel with the eastern edge of his .72 acre, thirty-foot wide driveway strip. This claim stemmed from appellant's interpretation of the final paragraph of a 1954 deed in appellees' chain of title. In that deed, dated May 18, 1954, predecessor owners of the Knerr property, Harry and Irene Genet, conveyed the land to Nora Timney, and included the following language: "Subject to the use in common with others of a right of

way over and across 15 feet off the entire west side of said premises." Appellant's Appendix D.

{¶4} Subsequent deeds in appellees' chain of title, as well as the land contract by which appellees purchased their current 4.0 acre tract, all provide "subject to all easements or reservations of record" or similar language.

{¶5} On October 17, 2003, appellant filed an action for declaratory judgment against Appellees Knerrs as to the alleged right of way, running alongside his driveway strip, on appellees' land. Appellees filed an answer claiming that no right of way existed at the western edge of their property based on the language of the 1954 Genet-to-Timney deed, and that even if it did, appellant had abandoned it.

{¶6} On October 12 and 13, 2004, the issue of the existence of appellant's claimed right of way was tried to the court, while the issue of abandonment of the alleged right of way by appellant was tried to a jury. On November 27, 2004, the trial court issued a judgment entry finding no existence of a right of way over appellees' land, and incorporating a jury's verdict finding abandonment of the purported right of way by appellant. Appellant thereafter filed a motion for judgment notwithstanding the verdict, which the trial court denied on December 14, 2004.

{¶7} Appellant filed a notice of appeal on January 12, 2005. He herein raises the following three Assignments of Error:

{¶8} "I. THE DECISION OF THE TRIAL COURT THAT A 15' RIGHT OF WAY DOES NOT EXIST ON APPELLEE'S PROPERTY IN FAVOR OF APPELLANT IS CONTRARY TO LAW, IS AN ABUSE OF JUDICIAL DISCRETION AND IS NOT SUPPORTED BY THE EVIDENCE.

{¶9} "II. THE COURT ERRED IN NOT SUSTAINING THE PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING [THE] VERDICT FOR THE REASON THAT THE JURY'S ANSWERS TO INTERROGATORIES WERE NOT CONSISTENT WITH THE JURY'S VERDICT AND DID NOT FOLLOW THE JUDGE'S CHARGE.

{¶10} "III. THE COURT ERRED IN NOT SUSTAINING THE PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING [THE] VERDICT FOR THE REASON THAT PLAINTIFF'S NONUSE OF THE RIGHT OF WAY WAS AS A MATTER OF LAW FOR AN INSUFFICIENT PERIOD TO BE CONSTRUED AS AN ABANDONMENT."

I.

{¶11} In his First Assignment of Error, appellant challenges the trial court's conclusion that a fifteen-foot right of way to the benefit of appellant does not exist on appellees' land.

{¶12} Appellate review of a trial court's interpretation of an easement agreement is conducted under a de novo standard of review, but we defer to the court's factual findings, including findings about the parties' intent, if there is any competent, credible evidence that supports the trial court's decision. *Kuhn v. Ferrante*, Stark App.No.2001CA00115, 2002-Ohio-358, citing *Fitzgerald v. Keller* (June 12, 1996), Lorain App.No. 95CA006107. Where an enforceable easement exists, its scope will generally be defined by the language of the granting instrument. See *Lowe v. Redgate* (1884), 42 Ohio St. 329, 339. Nonetheless, " * * * the fact that an easement clause is vague, indefinite, or uncertain will not necessarily authorize the court to completely ignore the valuable property right thereby granted if the clause is susceptible of a reasonable construction as to the true intent of the parties. * * * " *Papesh v. Gem Boat*

Service, Inc. (Nov. 27, 1987), Ottawa No. OT-87-16, citing *Elliott v. Elliott* (C.A.Texas 1980), 597 S.W.2d 795, 802.

{¶13} At trial in the matter sub judice, appellees called Attorney Robert Daane as their expert witness. Daane opined that "the confusion of the lawyers who drafted all the deeds to [the Knerr property] have somewhat contributed to this." Tr. at 443-444. Upon reviewing the various deeds which resulted from a 1926 parceling of the overall area by original owner Jacob Shilling, Daane essentially theorized that the confusion stemmed from mistaken assumptions by past deed drafters that appellant's 30-foot drive tract was an easement, rather than property owned by appellant in fee. Thus, references to a 15-foot strip actually represented a drafter's assumption that an "easement" existed on either side of appellant's 30-foot-wide driveway parcel's "centerline," with the centerline being an assumed border created as a result of Shilling's parceling actions in 1926. Daane noted the following in reference to the critical 1954 Genet-to-Timney deed conveying what is now the Knerrs' property:

{¶14} "Well, the way that I read this was that the attorney - - I don't have the page which shows who prepared this - - he thought the west end of the [Knerrs'] property was still the centerline.

{¶15} "So he was just repeating the fact that there existed a right-of-way of what he thought was a right-of-way over the west end of the property.

{¶16} "But again I think this is just duplicate of the reference to the 30 foot right-of-way, and it just refers to 15 feet that is on the Knerr's side of the property. It doesn't refer to a new 15 foot easement." Tr. at 433.

{¶17} In order to create an express easement, the owner of the servient property must grant or convey to the owner of the dominant property a right to use or benefit from his estate. *Pence v. Darst* (1989), 62 Ohio App.3d 32, 37, 574 N.E.2d 548, citing *Yaeger v. Tuning* (1908), 79 Ohio St. 121, 124, 86 N.E. 657. Upon review of the record, even though the lack of a specific grantee of the alleged 15-foot easement is not necessarily fatal per se to appellant's claim, we find the only reasonable construction of the 1954 deed is as articulated above by appellees' expert. Accordingly, we hold appellant failed as a matter of law to demonstrate the existence of an easement to his benefit alongside the eastern edge of his driveway.

{¶18} Appellant's First Assignment of Error is therefore overruled.

II., III.

{¶19} In his Second and Third Assignments of Error, appellant challenges the court's denial of his motion for JNOV regarding the jury's verdict as to appellant's abandonment of the property area in question. However, an appellate court is not required to render an advisory opinion on a moot question or to rule on a question of law that cannot affect matters at issue in a case. *State v. Bistricky* (1990), 66 Ohio App.3d 395, 397, 584 N.E.2d 75. Based on our holding in regard to appellant's First Assignment of Error, the issue of abandonment of the asserted easement does not affect the outcome of the case.

{¶20} Appellant's Second and Third Assignments of Error are therefore overruled as moot.

{¶21} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

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JUDGES

JWW/d 1117

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BENJAMIN R. ROTTMAN	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JERRY KNERR, et al.	:	
Defendants-Appellees	:	Case No. 2005 CA 00020

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs to appellant.

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JUDGES