**[Cite as *Dalton v. Smith*, 2009-Ohio-2906.]**

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| MICHAEL A. DALTON, ET AL.<br><br>Plaintiffs/Appellants<br><br>-vs-<br><br>RANDY SMITH, ET AL.<br><br>Appellees/Cross-Appellants<br><br>and<br><br>THE MARTHA M. TAWSE LIVING TRUST<br><br>Appellant | JUDGES:<br>Hon. Sheila G. Farmer, P.J.<br>Hon. Julie A. Edwards, J.<br>Hon. Patricia A. Delaney, J.<br><br>Case No. 2008CA0072<br><br><u>O P I N I O N</u> |
| CHARACTER OF PROCEEDING: | Appeal from the Court of Common Pleas, Case No. 2007CV1212H |
| JUDGMENT: | Affirmed/Reversed in Part & Remanded |
| DATE OF JUDGMENT ENTRY: | June 1, 2009 |

APPEARANCES:

| | |
|---|---|
| For Plaintiffs-Appellants<br><br>JEFFREY N. KRAMER<br>24 West Third Street<br>Suite 300<br>Mansfield, OH 44902 | For Defendant-Appellees/Cross Appellants<br><br>DAVID N. HARING<br>70 Park Avenue West<br>Mansfield, OH 44902<br><br>For The Martha M. Tawse Living Trust<br><br>REESE F. MILLS<br>24 West Third Street<br>Suite 300<br>Mansfield, OH 44902 |

*Farmer, P.J.*

**{¶1}** On August 20, 1999, David and Peggy Wagenblatt, owners of property located at 720 Betner Drive in Mansfield, Ohio, and Martha Tawse, owner of the adjacent property located at 734 Betner Drive, entered into an agreement wherein Ms. Tawse agreed to the vacation of an unopened fifty foot wide street right-of-way located between the two properties. If the petition to vacate was granted, Ms. Tawse would convey her twenty-five feet to the Wagenblatts. Thereafter, on November 16, 1999, the Mansfield City Council passed an ordinance vacating the street right-of-way.

**{¶2}** In mid-2003, the Wagenblatts sold their property to appellants, Michael and Lori Dalton. The survey of the property conducted by John Napier, Jr. included the entire fifty foot vacated street. However, the deed conveyed only twenty-five feet of the vacated street to the Daltons, despite Mr. Napier's survey.

**{¶3}** On January 14, 2004, Ms. Tawse passed away, and her property was transferred by her estate to appellant, the Martha Tawse Living Trust. The Certificate of Transfer did not refer to the vacated street.

**{¶4}** On May 2, 2007, the Tawse Trust entered into a real estate purchase agreement with appellees, Randy and Victoria Smith, to purchase the property. The agreement did not refer to the vacated street. The sales transaction closed on May 30, 2007. The deed transferring the property used the language “general warranty covenants” as opposed to “fiduciary covenants.” The deed also conveyed the Tawse Trust property and one-half of the vacated street. This deed was signed by the trustee of the Tawse Trust, Steven Fine.

**{¶5}** On July 3, 2007, appellees had their property surveyed. The survey included one-half of the vacated street.

**{¶6}** On August 24, 2007, the Daltons filed a complaint against appellees and the Tawse Trust to quiet title real property and/or ejectment from real property. On October 10, 2007, appellees filed an answer and a cross-claim against the Tawse Trust. On January 15, 2008, the Tawse Trust filed an answer to the cross-claim and a cross-claim against appellees seeking to reform the deed.

**{¶7}** Thereafter, the Tawse Trust filed a motion for summary judgment in favor of its cross-claim and against appellees' cross-claim, and the Daltons filed a motion for summary judgment on their complaint. By orders filed July 25, 2008, the trial court denied the Dalton's motion for summary judgment and granted summary judgment to appellees on the Dalton's complaint, finding appellees were the rightful owners of one-half of the vacated street, granted summary judgment to appellees on the Tawse Trust's cross-claim because the deed could not be reformed as a matter of law, and granted the Tawse Trust's motion on appellees' cross-claim because the deed conveyed one-half of the vacated street to appellees and therefore the general warranty covenants of the deed were not breached.

**{¶8}** On August 21, 2008, the Daltons filed an appeal and assigned the following errors for review:

I

**{¶9}** "THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF APPELLEES RANDY SMITH AND VICTORIA L. SMITH AGAINST APPELLANTS MICHAEL L. DALTON AND LORI A. DALTON."

II

**{¶10}** "THE TRIAL COURT ERRED IN NOT ENTERING SUMMARY JUDGMENT IN FAVOR OF APPELLANTS MICHAEL L. DALTON AND LORI A. DALTON."

**{¶11}** Also on August 21, 2008, the Tawse Trust filed an appeal and assigned the following errors for review:

I

**{¶12}** "THE TRIAL COURT ERRED BY FAILING TO FIND A MUTUAL MISTAKE WHICH JUSTIFIED REFORMATION OF THE DEED AS TO THE LEGAL DESCRIPTION AND THE COVENANT PROVISION."

II

**{¶13}** "THE TRIAL COURT ERRED BY FAILING TO FIND A UNILATERAL MISTAKE WHICH JUSTIFIED REFORMATION OF THE DEED AS TO THE LEGAL DESCRIPTION AND THE COVENANT PROVISION."

III

**{¶14}** "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS-CROSS CLAIMANTS SMITH WHEN THEY FAILED TO FILE A MOTION FOR SUMMARY JUDGMENT."

**{¶15}** On August 25, 2008, appellees filed a cross-appeal and assigned the following error for review:

CROSS-ASSIGNMENT OF ERROR I

**{¶16}** "THE COURT ERRED IN FINDING THAT THE MARTHA M. TAWSE TRUST DID NOT BREACH ITS WARRANTY COVENANTS TO APPELLEES/CROSS-APPELLANTS RANDY AND VICTORIA SMITH."

THE DALTONS ASSIGNMENTS OF ERROR I AND II

**{¶17}** The Daltons claim the trial court erred in granting summary judgment to appellees and in not granting summary judgment in their favor.

**{¶18}** Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

**{¶19}** "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (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 but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

**{¶20}** As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

**{¶21}** In its orders filed July 25, 2008, the trial court stated the following:

**{¶22}** "A. Plaintiffs Motion for Summary Judgment is hereby denied.

**{¶23}** "B. The Court enters Summary Judgment in favor of the Defendants Randy and Victoria Smith as to Plaintiffs' claims alleged against them and hereby finds, based upon the undisputed material facts, that they are the rightful owners of the twenty-five (25) foot portion of the vacated alley purchased by them from the Martha M. Tawse Revocable Living Trust and described in the Deed received from the Trust."

**{¶24}** At the outset, it is important to note that at no time in the proceedings before the trial court did appellees file a motion for summary judgment.

**{¶25}** In its March 31, 2008 motion for summary judgment, the main issue of fact raised by the Daltons was whether appellees had actual or constructive notice of the August 20, 1999 agreement between the Daltons' predecessors in title, the Wagenblatts, and Ms. Tawse, to relinquish Ms. Tawse's rights to twenty-five feet of the vacated street. The agreement was recorded with the Richland County Recorder's Office on August 24, 1999.

**{¶26}** Appellees claim no actual or constructive knowledge of the agreement. R. Smith aff. at ¶5; V. Smith aff. at ¶5. The Daltons claim they informed appellees of the agreement, and showed them the survey conducted by John Napier, Jr. purporting to give them fifty feet of the vacated street. M. Dalton aff. at ¶25-28. The Daltons also argue it was clear from the landscaping that they owned this entire parcel, as a stone wall had been placed between the properties in accordance with the August 20, 1999 agreement and Mr. Napier's survey. M. Dalton aff. at ¶20.

**{¶27}** In actual fact, the deed transferring the property from the Wagenblatts to the Daltons did not conform to the August 20, 1999 agreement, as it conveyed only twenty-five feet of the vacated street to the Daltons, despite Mr. Napier's survey. See, M. Dalton aff. at ¶12 and 21; Exhibits E and F. Also, the Tawse Trust deed to appellees conveyed the other twenty-five feet of the vacated street to appellees. See, Tawse Trust Motion for Summary Judgment at Exhibit 7.

**{¶28}** In its orders filed July 25, 2008, the trial court found the August 20, 1999 agreement was not enforceable by subsequent landowners because it did not meet the definition of a covenant running with the land:

**{¶29}** "Moreover, the Agreement the Plaintiffs are attempting to enforce against the Smiths is not an agreement running with the land and therefore subject to enforcement by subsequent owners of the property. In order for a covenant to run with the land there must be evidence that: (1) the restrictive covenant was intended to run with the land; (2) the restrictive covenant touches and concerns the land; and (3) privity exists. *Kiel v. Thompson*, 2004 WL 2940800 (Ohio App. 5 Dist.). Here, the Agreement contains no indication that the original contracting parties intended it to run with the land. Proof of intent can be determined from the language of the agreement read as a whole. *Id.* Ohio courts look for terms such as 'successors' and 'assigns' as evidence of the intent for the covenant to run with the land. *Id.* The Agreement the Plaintiffs seek to enforce does not contain any such language nor any indication that the original contracting Parties intended it to run with the land. Therefore the first element of intent has not been met as a matter of law. Furthermore, as noted above, neither the Plaintiffs nor the Smiths are in privity of contract regarding this Agreement nor was there any

evidence of the Agreement being assigned by the original contracting Parties to either the Plaintiffs or the Smiths. As a result, the element of privity has also not been met as a matter of law."

**{¶30}** This issue was properly before the trial court as the Daltons argued the enforceability of the August 20, 1999 agreement via their summary judgment motion. Appellees and the Daltons were not in privity of the August 20, 1999 agreement between the Wagenblatts and Ms. Tawse therefore, the agreement was unenforceable between appellees and the Daltons. The trial court was correct in denying the Daltons' motion for summary judgment on this issue.

**{¶31}** The trial court also found appellees were bona fide purchasers, finding they did not have actual notice of the August 20, 1999 agreement as claimed by the Daltons:

**{¶32}** "Furthermore, even if the Daltons had a valid claim to the whole vacated alley, the Smiths are protected as bonafide purchasers. Under Ohio law, it is a general rule that a purchaser takes title free of equitable claims when he provides valuable consideration in good faith without notice of the adverse claim. *Shaker Corlett Land Co. v. City of Cleveland,* 139 O. St. 536, 541. In the present case, there is no dispute that the Smiths paid valuable consideration for the property and that they acted in good faith. As to notice, the Smiths did not have actual notice of the Agreement upon which the Daltons rely. Even constructive notice cannot be applied in this case, as the Agreement on record did not purport to transfer any property. Rather, it was a plan for property to be transferred at some point in the future. That transfer never occurred. Therefore, the

Smiths are bonafide purchasers who took title free from any equity claims of the Plaintiffs."

**{¶33}** The issue of notice also was properly before the trial court via the Daltons' motion for summary judgment. We find genuine issues of material fact exist on the issue of notice. The trial court was correct in denying the Daltons' motion on this issue, but erred in determining appellees did not have actual or constructive notice.

**{¶34}** The trial court also addressed the issue of laches as follows:

**{¶35}** "The Smiths also raised in their Answer and in their Memorandum Contra the affirmative defense of laches. Laches is an equitable defense which requires: (1) unreasonable delay or lack or time in serving a right; (2) absence of an excuse for such a delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party. *State, ExRel. Carter v. City of North Olmstead* (1994) 69 O.St.3d 515, 325.

**{¶36}** "In this case, the undisputed evidence is that the Plaintiffs purchased their property in August of 2003. The Deed they received as part of their purchase clearly and unambiguously indicated that they did not own the entire fifty (50) foot vacated alley. Furthermore, the bi-annual Real Estate Tax Statements they received from the Richland County Treasurer included a legal description reflecting ownership of a twenty-five (25) foot portion of the vacated alley and not the entire fifty (50) foot portion. As a result, Plaintiffs were put on actual and constructive notice of their claims approximately four (4) years before they asserted the claim against the Smiths. The delay on the part of Plaintiffs in asserting this claim is unreasonable and prejudicial to the Smiths and constitutes laches as a matter of law."

**{¶37}** Laches is a defense to a claim and was not addressed by the Daltons or the Tawse Trust. The trial court erred in addressing laches as the issue was not properly before it as appellees had not filed a motion for summary judgment.

**{¶38}** We find the trial court did not err in denying the Daltons' motion for summary judgment. However, the trial court erred in granting summary judgment to appellees, as they never filed such a motion. While granting summary judgment to appellees may be the logical conclusion based upon the ruling on the restrictive covenant, it was procedurally premature.

**{¶39}** The Daltons' Assignment of Error I is granted and Assignment of Error II is denied.

THE TAWSE TRUST I and III

**{¶40}** The Tawse Trust claims the trial court erred in failing to find a mutual mistake in order to reform the general warranty deed to a fiduciary deed, failing to delete the reference to the twenty-five foot vacated street, and granting summary judgment to appellees on its cross-claim when they did not file a motion for summary judgment.

**{¶41}** In its orders filed July 25, 2008, the trial court stated the following:

**{¶42}** "C. The Motion for Summary Judgment of the Martha M. Tawse Revocable Living Trust is hereby denied in part and granted in part. The Court grants Summary Judgment to the Defendants Randy and Victoria Smith on the cross-claim against them brought by the Martha M. Tawse Revocable Living Trust and finds that the Deed may not be reformed as a matter of law and that the Trust is subject to the warranty covenants set forth in the Deed. The Court further grants Summary Judgment

to the Martha M. Tawse Revocable Trust on the cross-claim brought against it by the Smiths and find as a matter of law that, because the Deed properly conveyed the property it described, the Trust did not breach any covenants."

**{¶43}** As noted supra, appellees never filed a motion for summary judgment. In "granting" summary judgment to appellees on the Tawse Trust cross-claim, we can infer that the trial court denied the Tawse Trust's motion for summary judgment on its cross-claim.

**{¶44}** In its April 10, 2008 motion for summary judgment at 13, the Tawse Trust asked the trial court to reform the deed between the Tawse Trust and appellees by deleting the term "general warranty covenants" and inserting "fiduciary covenants" and deleting "inclusion of the one half of vacated street from the legal description contained therein." The Tawse Trust also asked the trial court to dismiss appellees' cross-claim filed against it. The Tawse Trust based its arguments for reformation on mutual mistake. "Reformation of a contract based on mutual mistake is proper when the parties made the same mistake and understood the contract as the party seeking reformation alleges." *Hastings Mutual Insurance Co., v. Warnimont,* Hancock App. No. 5-2000-22, 2001-Ohio-2148. A party seeking reformation on the basis of mutual mistake must establish the existence of the mistake by clear and convincing evidence. *Justarr Corp. v. Buckeye Union Ins. Co.* (1995), 102 Ohio App.3d 222. Clear and convincing evidence is that proof which establishes in the mind of the trier of fact a firm conviction as to the allegations sought to be proved. *Cross v. Ledford* (1954), 161 Ohio St. 469.

**{¶45}** In support of its motion, the Tawse Trust submitted the affidavit of James Neumann, Esq. wherein he stated the following in pertinent part:

**{¶46}** "15. That I prepared a Fiduciary Deed at the request of Chicago Title for signature by Steven E. Fine, Successor Trustee of The Martha M Tawse Living Trust to convey the 734 Betner Drive property to Randy and Victoria L. Smith, but inadvertently or otherwise erred by including 'general warranty covenants' in the language of that Deed instead of 'fiduciary covenants.' A true and accurate copy of said Deed is attached hereto as Exhibit 7 and is made a part hereof.

**{¶47}** "16. That before sending this Fiduciary Deed to Steven E. Fine in Illinois, Chicago Title failed to notice that the Deed contained 'general warranty covenants' instead of 'fiduciary covenants.' "

**{¶48}** The Tawse Trust argues a fiduciary deed was bargained for in the real estate purchase agreement as follows:

**{¶49}** "8. Conveyance and Closing: Seller(s) shall be responsible for transfer taxes, Seller's settlement fee, all lien release filing fees, deed preparation, and shall convey marketable title, by a transferable and recordable Warranty Deed or Fiduciary Deed, as applicable, to real estate in fee simple absolute with release of dower. Closing shall be on or before May 15 07."

**{¶50}** We disagree with the Tawse Trust's position that it was the intent of the parties to have only a fiduciary deed. First, the above cited language is basically boilerplate language in a standard real estate transaction form. Secondly, the Tawse Trust admits it can give either a general warranty deed or a fiduciary deed. There is no impediment to a trust executing a general warranty deed.

**{¶51}** The Tawse Trust bore the responsibility of preparing the deed to convey the property to appellees. A party bears the risk of the mistake if "the risk is allocated to him by agreement of the parties***." *Southern Medical Center v. Trinidad M.D.,* Scioto App. No. 03CA2870, 2003-Ohio-4416, ¶26. The provision from the real estate purchase agreement cited supra clearly indicates the Tawse Trust was responsible for deed preparation.

**{¶52}** The trial court did not err in failing to find a mutual mistake in order to reform the general warranty deed to a fiduciary deed.

**{¶53}** The Tawse Trust also argues mutual mistake based on the inclusion in the deed of one-half of the vacated street. The Tawse Trust argues appellees had actual and constructive knowledge that the entire vacated street belonged to the Daltons. The Tawse Trust argues the issues of notice and enforceability of the August 20, 1999 agreement. Consistent with our opinion in the Dalton assignments of error regarding these issues, we find the trial court did not err in failing to delete the reference to the twenty-five foot vacated street in the deed.

**{¶54}** We find the trial court did not err in "denying" the Tawse Trust motion for summary judgment. However, the trial court erred in granting summary judgment to appellees on the Tawse Trust cross-claim when appellees never filed such a motion. While granting summary judgment to appellees may be the logical conclusion, it was procedurally premature.

**{¶55}** The Tawse Trust Assignment of Error I is denied, and Assignment of Error III is granted.

THE TAWSE TRUST II

**{¶56}** The Tawse Trust claims the trial court erred in failing to reform the deed based upon a unilateral mistake by its agent, Chicago Title.

**{¶57}** In *Galehouse Construction Co., Inc. v. Winkler* (1998), 128 Ohio App.3d 300, 303, our brethren from the Ninth District explained the following:

**{¶58}** "Generally, a contract may not be reformed in the case of a unilateral mistake. *General Tire, Inc. v. Mehlfeldt* (1997), 118 Ohio App.3d 109, 691 N.E.2d 1132. However, where the mistake occurred due to a drafting error by one party and the other party knew of the error and took advantage of it, the trial court may reform the contract. See *Liezert v. Liezert* (Oct. 2, 1991), Summit App. No. 15031, unreported, at 4, 1991 WL 199912. Reformation is appropriate if one party believes that a contract correctly integrates the agreement and the other party is aware that it does not, even though the mistake was not mutual. *Snedegar v. Midwestern Indemn. Co.* (1988), 44 Ohio App.3d 64, 70, 541 N.E.2d 90, 96-97."

**{¶59}** The Tawse Trust argues its agent, Chicago Title, erred in drafting the deed as to the "general warranty covenants" language and the inclusion of one-half of the vacated street, and appellees were aware of the error via the August 20, 1999 agreement. The Tawse Trust argues the issues of notice and enforceability of the August 20, 1999 agreement. Consistent with our opinion in the Dalton assignments of error regarding these issues, we find the trial court did not err in failing to reform the deed based upon a unilateral mistake.

**{¶60}** The Tawse Trust Assignment of Error II is denied.

CROSS-ASSIGNMENT OF ERROR I

**{¶61}** Appellees claim the trial court erred in granting summary judgment to the Tawse Trust on their cross-claim for breach of warranty covenants.

**{¶62}** In its orders filed July 25, 2008, the trial court granted summary judgment to the Tawse Trust on appellees' cross-claim, finding, "as a matter of law that, because the Deed properly conveyed the property it described, the Trust did not breach any covenants."

**{¶63}** Consistent with our decision in the assignments of error supra, we find this determination was also premature.

**{¶64}** Cross-Assignment of Error I is reversed.

**{¶65}** The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed in part and reversed in part.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

s/SHEILA G. FARMER__

s/JULIE A. EDWARDS__

s/PATRICIA A. DELANEY

JUDGES

SGF/sg 0226

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
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| MICHAEL A. DALTON, ET AL. | : | |
| Plaintiffs/Appellants | : | |
| -vs- | : | |
| RANDY SMITH, ET AL. | : | |
| | : | JUDGMENT ENTRY |
| Appellees/Cross-Appellants | : | |
| and | : | |
| THE MARTHA M. TAWSE LIVING TRUST | : | |
| Appellant | : | CASE NO. 2008CA0072 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed in part and reversed in part, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to be divided equally between the parties.

s/SHEILA G. FARMER__

s/JULIE A. EDWARDS__

s/PATRICIA A. DELANEY

JUDGES