[Cite as *Emerald Estates Homeowners Assn., Inc. v. Albert,* 2009-Ohio-6627.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

EMERALD ESTATES HOMEOWNERS ASSOCIATION, INC.

Plaintiff-Appellee

-vs-

MARC A. ALBERT

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 2009 CA 00072

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 04020
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 14, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
LARRY A. ZINK 3711 Whipple Avenue, NW Canton, Ohio 44718	JAMES R. RECUPERO 4033 Whipple Avenue, NW, Suite C Canton, Ohio 44718

Wise, J.

{¶1} Defendant-Appellant Marc A. Albert appeals the February 24, 2009, Judgment Entry of the Stark County Court of Common Pleas granting judgment in favor of Plaintiff-Appellee Emerald Estates Homeowners Association, Inc.

STATEMENT OF THE FACTS AND THE CASE

{¶2} In April, 2007, Appellant Marc A. Albert erected a fence on his property, which is located in the Emerald Estates Subdivision, Phase 6C, in Canal Fulton, Stark County, Ohio. (T. Vol. II, at 113). This fence was made of wood, ran the entire length of Appellant's backyard and was approximately 120 feet long, 6 feet high and was not connected to or attached to Appellant's house.

{¶3} Prior to erecting such fence, Appellant did not submit any drawings to the Architectural Review Board.

{¶4} On, June 29, 2007, Appellant Albert received a letter concerning the fence from Appellee Emerald Estates Homeowner's Association informing Appellant that he was in violation of the homeowners association's covenants and restrictions. (T. Vol. II, at 133). A second letter, similar in content was sent on July 12, 2007. (T. Vol. II, at 134). On August 30, 2007, a third letter from Appellee's counsel was sent to the Appellant. (T. Vol. II, at 135). This correspondence stated that Appellant was in violation of the restrictions governing Emerald Estates because he failed to submit an application for approval of his fence. The letter demanded immediate removal of the offending fence.

{¶5} On October 2, 2007, Appellee Emerald Estates Homeowners Association, Inc. filed its Complaint against Appellant Marc. A. Albert seeking the removal of the fence erected on Appellant Albert's property.

{¶6} On November 29, 2007, Appellee Emerald Estates filed a Motion for Default Judgment.

{¶7} On November 30, 2007, Appellant Albert filed his Answer.

{¶8} On December 24, 2007, Appellee Emerald Estates filed a Motion for Summary Judgment.

{¶9} On December 31, 2007, the trial court granted a default judgment, but vacated same on January 11, 2008.

{¶10} On January 25, 2008, Appellant Albert filed his Response to Plaintiff's Motion for Summary Judgment, to which Appellee responded on February 6, 2008.

{¶11} By Judgment Entry filed May 30, 2008, the trial court overruled Appellee's Motion for Summary Judgment.

{¶12} On June 10, 2008, this matter proceeded to trial before Magistrate Hamilton.

{¶13} On September 18, 2008, the magistrate issued her decision.

{¶14} Appellant Albert submitted his Objections to the Magistrate's Decision on October 1, 2008.

{¶15} Appellant supplemented his objections on October 30, 2008.

{¶16} After being granted an extension of time, Appellee Emerald Estates submitted its Response to Appellant's Supplemental Objections on November 19, 2008.

{¶17} After also being granted an extension, Appellant Albert submitted his Reply to Appellee's Response on December 9, 2008.

{¶18} By Judgment Entry filed February 24, 2009, the trial court issued its decision adopting the Magistrate's Decision and overruling Appellant's objections.

{¶19} It is from this decision Appellant now appeals, assigning the following errors for review.

ASSIGNMENTS OF ERROR

{¶20} "I. THE TRIAL COURT'S JUDGMENT ENTRY IN THIS MATTER GOES AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE GIVEN THAT APPELLEE HAD ACQUIESCED TO PREVIOUS VIOLATIONS OF THE RESTRICTIVE COVENANTS AND WAIVED ENFORCEMENT OF THE SAME, WHICH RESULTED IN THE RESTRICTIONS AND COVENANTS HOLDING LITTLE VALUE.

{¶21} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN ALLOWING APPELLEE EMERALD ESTATES TO ADMIT EVIDENCE WHICH WAS NOT EXCHANGED IN DISCOVERY.

{¶22} "III. THE TRIAL COURT'S JUDGMENT ENTRY IN THIS MATTER GOES AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS ERR [SIC] AS A MATTER OF LAW IN THAT A DECORATIVE FENCE IS PERMITTED AND IS NOT PREDISPOSED TO NOT BE APPROVED BY THE EMERALD ESTATES HOMEOWNERS ASSOCIATION ARCHITECTURAL REVIEW BOARD.

{¶23} "IV. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN NOT PERMITTING APPELLANT'S COUNSEL TO RE-CROSS EXAMINE APPELLEE EMERALD ESTATES' WITNESSES."

I.

{¶24} In his first assignment of error, Appellant argues that the trial court's decision was against the manifest weight of the evidence. We disagree.

{¶25} Specifically, Appellant argues that the trial court erred in not finding that Appellee had waived enforcement of, and/or acquiesced in violations of its restrictive covenants as to fences.

{¶26} In civil cases, if some competent, credible evidence supports all the essential elements of the case, a reviewing court will not reverse the judgment as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. In determining whether a civil judgment is against the manifest weight of the evidence, a presumption that the findings of the trial court are correct guides an appellate court. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id. This Court may not substitute our judgment for that of the trier of fact. *Pons v. Ohio State Medical Board* (1993), 66 Ohio St.3d 619, 621.

{¶27} The restrictive covenant at issue in this case is contained in Article V, Section 21 of the Master Documents of Emerald Estates and reads as follows:

{¶28} "Fences. No fences shall be approved for installation unless a detailed drawing of type and location of proposed fence is submitted to the Architectural Review Board and a written consent for such fence is given. No fence or wall of any kind or for

any purpose shall be erected, placed or suffered to remain on any Lot nearer to the street or highway upon which the Lot faces or abuts than the front building line of the residence, unless approved by the Architectural Review Board. The Architectural Review Board shall be predisposed toward not approving fences; unless said fence is enclosing a swimming pool, is for decorative purposes, or any portion of the rear Lot line is within seventy-five feet of the High Mill Ave. N.W. right of way and said fence meets specified standards as set forth by the Architectural Review Board. Absolutely no barbed wire, chain link or cyclone fences shall be permitted on any lot."

{¶29} In the case sub judice, the restriction on fences represents an attempt to preserve the open, green space design on which the development was built. As there is no issue before this Court that Appellant did not have notice of these restrictions, absent proof of abandonment and/or waiver, we must find that the trial court did not err in enforcing the restrictive covenant at issue.

{¶30} Appellant argues that Appellee had actual and/or constructive knowledge of numerous violations of its restrictive covenants, including the existence of other fences and that Appellee did not enforce the conditions and restrictions, therein waiving enforcement of same.

{¶31} With respect to an assertion of waiver or abandonment, "the test is whether, under the circumstances, there is still a substantial value in such restriction, which is to be protected; and where there is a substantial value to the dominant estate remaining to be protected, equity will enforce a restrictive covenant * * *." *Romig v. Modest* (1956), 102 Ohio App. 225, paragraph three of the syllabus; see, also, *Landen Farm Community Services Ass'n, Inc. v. Schube* (1992), 78 Ohio App.3d 231, 235. A

party alleging a waiver and/or abandonment has the burden of proving his or her allegations. Id. at paragraph four of the syllabus.

{¶32} This Court has previously held that when there has been a general acquiescence in the violation of the restriction, the restriction is rendered unenforceable. *Colonial Estates Home Owners Ass'n, Inc. v. Burkey* (Oct. 7, 1997), 5th Dist. No. 97AP020013.

{¶33} Upon review, we find that none of the other fence "violations" claimed by Appellant were similar in nature to his 120 foot long, six foot high wooden fence. Instead, the majority of these fences appeared to be decorative in nature, white, picket-style, and made of PVC or resin. Fences for decorative purposes are an exception to the restrictive covenant.

{¶34} Furthermore, Appellee provided evidence to the trial court that it had sent out violation notices to enforce the fence restrictions once it had become aware of such.

{¶35} In further support of its active enforcement of the fence restrictions, was a lawsuit brought against other homeowners for violating this restriction, seeking removal of a fence.

{¶36} Additionally, Appellees provided evidence of enforcement of other restrictive conditions in the form of letters from the Homeowners Association seeking removal of offending fences, pets using neighbor's yards, parked vehicles left in a state of disrepair, the placement of a swingset in the common, open-space area, the removal or re-location of lawn ornaments, grass clippings being dumped in the common area, etc.

{¶37} Based on the foregoing, we find that there was competent, credible evidence presented at trial in support of Appellee's enforcement of the restrictive covenant in this case.

{¶38} We further find that restrictive covenant in this case still has substantial value worth protecting in that it preserves the aesthetic design of the Emerald Estates development, allowing common access to open areas of green space.

{¶39} Accordingly, we overrule Appellant's first Assignment of Error.

II.

{¶40} In his second assignment of error, Appellant argues that the trial court erred in allowing Appellee to admit Exhibit 18, which included letters sent by the Homeowners Association to residents concerning violations, into evidence. We disagree.

{¶41} Initially, we note that the admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶42} Exhibit 18 contained copies of the letters which were sent by the Homeowners Association to the homeowners with the fences depicted in the photographs provided in discovery by Appellant.

{¶43} Upon review, we find that these letters and the fences which were the subject of same, had been the topic of direct and cross-examination prior to the

introduction of such exhibit. (T. at 106-1010). We therefore find that it was not an abuse of discretion for the trial court to allow the admission of such exhibit into evidence.

{¶44} Based on the foregoing, we overrule Appellant's second Assignment of Error.

III.

{¶45} In his third assignment of error, Appellant argues that the trial court's determination that his fence was not "decorative" and therefore not a violation of the restrictive covenants and conditions, was against the manifest weight of the evidence. We disagree.

{¶46} While Article V, Section 21 of the Master Documents, which contains the restriction at issue in this case, does not define "decorative purposes", we find that the trial court did not err in finding that the fence in this case was not decorative.

{¶47} As set forth above, the fence at issue in this case was 120 feet long, six feet high and made of wood, and was located along the back of Appellant's property. It was not attached to Appellant's house, and prior to the lawsuit, remained unstained.

{¶48} Appellant, in his affidavit, stated that he constructed the fence for security and safety purposes. He stated that the fence was erected to prevent people from crossing onto his property and for the protection of himself and his daughter.

{¶49} Furthermore, Appellant never submitted a drawing of this fence for approval to the Architectural Review Board.

{¶50} Based on the foregoing, and the record in this matter, we do not find that the trial court erred in upholding the enforcement of the restrictive covenant herein.

{¶51} Appellant's third Assignment of Error is overruled.

IV.

{¶52} In his fourth assignment of error, Appellant argues the trial court erred in not allowing Appellant's counsel to re-cross-examine Appellee's witnesses at trial. We disagree.

{¶53} Appellant cites this Court to no authority or any supporting case law upon which it bases this assignment of error. Appellant instead cites this Court to page 128 of the trial transcript. Upon review of same, we were unable to locate any references to recross-examination on page 128, Volume I of the record. However, upon further review, this Court found the following dialogue on Page 150 of the transcript:

{¶54} Mr. Warner: "Just a few questions. Your Honor.

{¶55} Mr. Zink: "There's no further examination

{¶56} The Court: "There is not a recross. Direct, cross, and redirect."

{¶57} The scope of cross-examination is governed by Evid.R. 611(A), which provides:

{¶58} "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

{¶59} The opportunity to recross-examine a witness is within the discretion of the trial court. *Liberty Mutual Ins. Co. v. Gould* (1976), 266 S.C. 521, 224 S.E.2d 715; *United States v. Morris* (C.A.5, 1973), 485 F.2d 1385. Only where the prosecution inquires into new areas during redirect examination must the trial court allow defense the opportunity to recross-examine. See (1931), 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed.

624.“ ‘Generally, the recross-examination of a witness cannot exceed the scope of redirect examination.’ *State v. Savage* (Feb. 9, 1989), 8th Dist. No. 55046. (Internal citations omitted.)

{¶60} We review the trial court's limitation of cross-examination under an abuse of discretion standard. *State v. Gresham,* 8th Dist. No. 81250, 2003-Ohio744.

{¶61} We find no citations in the record to any area of re-direct that exceeded the scope of cross-examination. We therefore find no basis to find an abuse of discretion by the trial court for denying recross-examination of the witness.

{¶62} Further, Ohio Rule of Appellate Procedure 16 requires:

{¶63} “The appellant shall include in its brief, under the headings and in the order indicated, all of the following:

{¶64} “***

{¶65} “(7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.

{¶66} Ohio Appellate Rule 12 reads:

{¶67} “(A) Determination

{¶68} “ * * *

{¶69} “(2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).”

{¶70} Appellant fails to provide this Court with any argument as to why he should have been allowed to recross-examine this witness or why such denial of recross-examination in this case was error.

{¶71} It is not a function of this Court to construct arguments in support of Appellant's claims. Accordingly, we overrule Appellant's fourth Assignment of Error.

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

By: Wise, J.

Farmer, P. J., and

Gwin, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ W. SCOTT GWIN_____

JUDGES

JWW/d 1207

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

EMERALD ESTATES HOMEOWNERS ASSOCIATION, INC.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MARC A. ALBERT	:	
Defendant-Appellant	:	Case No. 2009 CA 00072

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

Costs assessed to Appellant.

/S/ JOHN W. WISE

/S/ SHEILA G. FARMER

/S/ W. SCOTT GWIN

JUDGES