[Cite as *DeMoss v. Smailes*, 2010-Ohio-1910.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NOBLE E. DEMOSS, ET AL. Plaintiffs-Appellees -vs- JOYCE E. SMAILES NKA DECKROSH AND TODD A. DECKROSH Defendants-Appellants	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Willilam B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2009CA00015 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Coshocton County Common Pleas Court, Case No. 07CI0532
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 28, 2010

APPEARANCES:

For Plaintiffs-Appellees	For Defendants-Appellants
JENNIFER DEBOER P.O. Box 148 Newcomerstown, Ohio 43832	JOYCE SMAILES DECKROSH TODD A. DECKROSH 45975 County Road 58 Coshocton, Ohio 43812

Hoffman, J.

{¶1} Defendants-appellants Joyce E. Smailes, AKA Joyce E. Deckrosh, and Todd A. Deckrosh appeal the April 23, 2009 Judgment Entry entered by the Coshocton County Court of Common Pleas, which ordered them to pay out-of-pocket expenses for the abatement of the nuisance created by sewage draining from their property onto the land of plaintiffs-appellees Noble E. Demoss, et al., following a bench trial.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellants and Appellee are neighbors, both parties owning property on County Road 58, in Coshocton, Ohio. Appellee originally owned Appellants' property, but sold it to Mary Smailes, Appellant Joyce Deckrosh's mother, in November, 1976. A water system and waste drainage system had been constructed for the mutual benefit of Appellee's property and Appellants' property. The sole source of water for Appellants' property is a spring outlet with a spring house and delivery system constructed by Appellee. Appellants' deed does not contain an easement or right of use for the spring, spring house, or delivery system. Appellants' property is, however, subject to an easement for the right of ingress and egress to Appellee. Appellant Joyce Deckrosh inherited one-half of Mary Smailes' property upon Smailes' death. Appellant Joyce Deckrosh's sister inherited the other one-half, but ultimately quit-claimed her half interest to Appellants.

{¶3} On August 8, 2007, Appellee filed a Complaint against Appellants, alleging encroachment of the easement, trespass, nuisance, assault, and intentional and/or negligent infliction of emotional distress. Appellee sought specific performance, injunctive relief, and money damages. Appellants filed a timely Answer and Counter-

claim. Following discovery, Appellants were granted leave to amend their counterclaim, which they filed on April 11, 2008. Therein, Appellants sought, inter alia, an injunction preventing Appellee from interfering with Appellants' usage of the spring water delivery system and waste disposal system. Appellant also sought an order enjoining Appellee from misusing his easement over their property. Appellee filed an Amended Complaint on April 23, 2008, adding claims of private nuisance and trespassing to his original Complaint. The parties filed their respective answers to the Amended Complaint and Amended Counterclaim. The trial court scheduled a bench trial for August 22, 2008.

{¶4} Steve Lonsinger, a Sanitarian and Director of Environmental Health with the Coshocton County Health Department, testified he was contacted by Appellants with concerns regarding their water source, and for a determination as to whether there was room on the property to drill a well. Lonsinger visited the property and determined there was sufficient space upon which to drill a well. Subsequently, issues arose with Appellants' septic system discharging sewage onto Appellee's property. Lonsinger again visited Appellants' property and found the status of the sewage system to constitute a nuisance. Lonsinger explained he has been working with Appellants to abate the situation. Lonsinger further testified, although Appellants' property only measured .2244 acres, it was possible to have both a well and a septic system on the property.

{¶5} Appellee, who was 92 years old at the time of the trial, testified he has arthritis and cannot walk without a walker. Appellee explained he gets around his property using a golf cart which he had purchased years before. Appellee stated he purchased the properties upon which his home and Appellants' home sit from his father-

in-law, who had built five houses along the road. Two of the houses, including the home now owned by Appellants, used spring water and ran septic into a nearby creek. Appellants' home was built sometime around 1957. In 1976, Appellee sold the home and property currently owned by Appellants to Smailes, Appellant Joyce Deckrosh's mother. Appellee explained he had an easement over Appellants' property in order to access other parts of his property. Sometime in 2007, Appellant Todd Deckrosh parked on the right-of-way, preventing Appellee from access to his property. Subsequently, Appellants placed cinderblocks on the easement.

{¶6} Marc DeLuca, Appellee's grandson, testified the water pump at Appellee's house stopped working sometime around July 4, 2008. DeLuca explained the water pump is located at the bottom of Appellee's reservoir, which required all of the water in the reservoir to be pumped out in order to repair the problem. After replacing the pump, DeLuca pumped water from a second reservoir into Appellee's reservoir, so Appellee would immediately have water. DeLuca explained it takes time for the spring to refill the reservoir. DeLuca stated he thought Appellants could fix their water system by cleaning out the pipes. Although DeLuca had agreed to help Appellant Todd Deckrosh clean out the water delivery pipes, Appellant Todd Deckrosh had called him and stated he had cleared out some blockage and the water was flowing at least somewhat at that point. DeLuca acknowledged Appellee could access his other land without using the easement, however, recent trouble with water running over the field made the area swampy and Appellee's tractor could not traverse the land.

{¶7} After hearing the evidence, the trial court ordered the parties to submit post-hearing briefs. Via Judgment Entry filed April 23, 2009, the trial court denied

Appellee's request for monetary damages. The trial court directed the parties to cooperate with the county health officials in the abatement in the nuisance created by the drainage of sewage from Appellants' house onto Appellee's land. The trial court ordered Appellants pay all out-of-pocket costs. The trial court instructed Appellee to cooperate in the process and make his land available for access to perform the necessary work.

{¶8} The trial court also found no actionable abuse of easement committed by either party. The trial court found Appellee failed to establish a cause of action for slander, and dismissed that portion of Appellee's Complaint. The trial court further determined Appellee remained obligated to provide excess spring water to Appellants' household for an indefinite period. Although the trial court urged Appellants to drill an appropriate well on their own property, the trial court did not order them to do so. The trial court granted Appellants' request for injunctive relief, ordering Appellee not to interfere with Appellants' use of excess spring water, and authorizing Appellants to enter Appellee's property to inspect, maintain and repair their spring water delivery system. The trial court denied Appellants' request for injunctive relief in all other respects. The trial court found the evidence failed to establish Appellants had committed either intentional or negligent infliction of emotional distress; therefore, dismissed any claim for damages as to either tort. The trial court also dismissed Appellee's claims relating to any assault committed by Appellants. The trial court denied Appellants' request for an order directing Appellee to trim trees and bushes on his property, as well as Appellants' claim for reimbursement for laundry costs. The trial court ordered each party be responsible for the payment of his own attorney fees.

{¶9} It is from this judgment entry Appellants appeal, raising the following assignments of error:

{¶10} "I. THE APPELLEE'S PARTY COMMITTED MISCONDUCT WHEN APPELLEE NOBLE E. DEMOSS COMMITTED PERJURY ON THE STAND DURING THIS TRIAL.

{¶11} "II. THE TRIAL COURT ERRED BY ACCEPTING APPELLEE NOBLE DEMOSS' STATEMENT THAT HE WAS UNAWARE OF THE REGULATIONS IN EFFECT AT THE TIME OF THE SALE. THE LEGAL DOCTRINE OF *IGNORANTIA JURIS NON EXCUSAT* STATES THAT NO ONE MAY ESCAPE LIABILITY BY CLAIMING IGNORANCE OF THE LAW.

{¶12} "III. THE TRIAL COURT HAS ERRED BY FAILING TO RECOGNIZE THAT THE TITLE TO THE APPELLANTS' PROPERTY IS ENCUMBERED BY THE FACT THAT NOBLE E. DEMOSS DID NOT HAVE THE LEGAL RIGHT TO SELL THE PROPERTY AND COMMITTED FRAUD DURING THE SALE.

{¶13} "IV. THE TRIAL COURT HAS ERRED BY ORDERING THE APPELLANTS TO INSTALL A LEGAL SEPTIC SYSTEM ON THEIR PROPERTY AT THEIR OWN EXPENSE.

{¶14} "V. THE TRIAL COURT ERRED BY ISSUING NO RESPONSE TO THE APPELLANT'S MOTION FOR JUDICIAL VIEW OF PREMISES FILED WITH THE CLERK OF COURTS ON AUGUST 15TH OF 2007 [SIC], AND HAS DEMONSTRATED A FAILURE TO UNDERSTAND THE COMPLEXITIES OF THE WATER AND SEWAGE SYSTEMS WHICH WOULD HAVE BEEN CLEARER FROM FIRST HAND OBSERVATION.

{¶15} "VI. THE TRIAL COURT HAS ERRED BY ISSUING NO RULING TO THE APPELLANT'S CLAIM OF TRESPASS, NUISANCE AND INTENTIONAL/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS INCLUDED AS CLAIM NUMBER 10 ON PAGE 8 OF THE DEFENDANT'S AMENDED COUNTERCLAIM FILED WITH THE PRIOR APPROVAL OF THE COURT ON APRIL 11TH OF 2007 [SIC].

{¶16} "VII. THE TRIAL COURT HAS ERRED BY FAILING TO EXTINGUISH THE RIGHT OF WAY EASEMENT WHEN THE MANIFEST WEIGHT OF THE EVIDENCE SHOWS THAT IT WAS UTILIZED BY THE APPELLEE TO VICTIMIZE THE APPELLANTS IN A CRIMINAL MANNER."

I

{¶17} In their first assignment of error, Appellants assert Appellee committed perjury during his testimony at trial.

{¶18} We note Appellants have not alleged any error on the part of the trial court in regard to this assignment of error. However, in the interest of fairness to Appellants, we will treat this assignment of error as challenging the manifest of the evidence.

{¶19} We have reviewed the record of the proceedings before the trial court, and find the court did not abuse its discretion in the conduct of the proceedings. A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. As the trier of fact, the judge is in the best position to view the witnesses and their demeanor in making a determination of the credibility of the testimony. "[A]n appellate court may not simply substitute its judgment for that of the trial court so long

as there is some competent, credible evidence to support the lower court's findings." *State ex rel. Celebrezze v. Environmental Enterprises, Inc.* (1990), 53 Ohio St.3d 147, 154, 559 N.E.2d 1335. As trier of fact, the trial court is free to believe all, part or none of a witness' testimony.

{¶20} As stated, supra, we have reviewed the entire record in this matter and find any discrepancies in Appellee's testimony goes to the credibility of the witness, which the trial court was in the best position to assess, and does not necessarily result in the trial court discrediting any, let alone all, of the witness's testimony.

{¶21} Appellants' first assignment of error is overruled.

II

{¶22} In their second assignment of error, Appellants maintain the trial court erred in accepting Appellee's testimony he was unaware of the regulations in effect at the time of the sale of the property to Mary Smailes.

{¶23} On cross-examination, Appellee was asked why he did not fix the septic system prior to selling the land to Mary Smailes. Appellee replied he did not fix the situation because, "There wasn't no restrictions". Appellee added he was unaware the septic system would be considered a nuisance, even in 1976.

{¶24} The trial court admitted the statements without objection. As such, any asserted error is waived. Furthermore, the fact the testimony was admitted does not establish the trial court relied upon Appellee's statements in concluding Appellee was not liable for the repairs to the septic system.

{¶25} Appellants' second assignment of error is overruled.

III

{¶26} In their third assignment of error, Appellants submit the trial court erred in failing to find their property was encumbered as Appellee did not have the legal right to sell the property, and erred in failing to find Appellee committed fraud during such sale.

{¶27} Herein, Appellants rely upon a survey which was not part of the record before the trial court. Because Appellants rely upon evidence not before the trial court, such cannot be considered on appeal. See, App. R. 9(A).

{¶28} Appellants' third assignment of error is overruled.

IV

{¶29} In their fourth assignment of error, Appellants contend the trial court erred in ordering them to install a legal septic system on their property at their own expense. Appellants submit Appellee entered into a contract with Mary Smailes to provide water and waste drainage to Appellants' home.

{¶30} We find, in essence, Appellants are asserting a breach of contract claim. Mary Smailes purchased the home in 1976. Any claim against Appellee regarding the septic system could have brought by Mary Smailes or her heirs. Mary Smailes and/or her heirs had fifteen years in which to bring a breach of contract claim. Because Appellants have failed to file a claim within the statute of limitations, we find they are responsible for any required repairs to the septic system.

{¶31} Appellants' fourth assignment of error is overruled.

V

{¶32} In their fifth assignment of error, Appellants maintain the trial court erred in failing to rule upon their Motion for Judicial View of Premises, filed August 15, 2008.

Appellants submit the trial court needed to observe the water and septic systems firsthand in order to understand the complexities of the systems. By failing to view the property, the trial court could not comprehend the entire case.

{¶33} The trial court overruled Appellant's motion sub silencio. The decision to conduct a view of the property is a matter within the trial court's discretion. *Woloszczuk v. Estate of Geehm* (Feb. 14, 1996), Summit App. No. 17318, unreported. We find no abuse of discretion in the trial court's decision not to physically view the property.

{¶34} Appellants' fifth assignment of error is overruled.

VI

{¶35} In their sixth assignment of error, Appellants allege the trial court erred in failing to rule on their claims of trespass, nuisance, intentional and/or negligent affliction of emotional distress.

{¶36} Although the trial court's April 23, 2009 Judgment Entry does not expressly dispose of these three claims, we find by the language of the judgment entry, the trial court implicitly overruled those claims.

{¶37} The trial court found, "There has been no actionable abuse of easement committed by either party", effectively dismissing any claim by Appellants for trespass. The trial court also found Appellee remained indefinitely obligated to provide spring water to Appellants. The trial court ordered Appellee not to interfere with Appellants' use of the spring water, thereby ruling on Appellants' nuisance claim. The trial court found Appellants' remark Appellee was "creepy" did not constitute slander, and did not rise to the level of tortious conduct. The trial court accepted as true Appellants' complaint Appellee stared at them. We believe the trial court would not find such

behavior on part of Appellee to constitute negligent and/or intentional infliction of emotional distress.

{¶38} Appellants' sixth assignment of error is overruled.

VII

{¶39} In their final assignment of error, Appellants maintain the trial court erred in failing to extinguish Appellee's right-of-way easement as Appellants established by the manifest weight of the evidence Appellee utilized the easement to victimize them.

{¶40} Having found, supra, the trial court's finding neither party had committed actionable abuse of easement, was supported by the evidence we likewise, find the trial court's failure to extinguish the easement was not against the manifest weight of the evidence.

{¶41} Appellant's seventh assignment of error is overruled.

{¶42} The judgment of the Coshocton County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

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

NOBLE E. DEMOSS, ET AL.	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
JOYCE E. SMAILES NKA DECKROSH AND TODD A. DECKROSH	:	
Defendants-Appellants	:	Case No. 2009CA00015

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Coshocton County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY