**[Cite as *Wilhelm v. Shope*, 2010-Ohio-3481.]**

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| SAUNDRA WILHELM<br><br>Plaintiff-Appellant<br><br>-vs-<br><br>LARRY SHOPE, ET AL.<br><br>Defendant-Appellees | JUDGES:<br>Hon. Julie A. Edwards, P.J.<br>Hon. William B. Hoffman, J.<br>Hon. Patricia A. Delaney, J.<br><br>Case No. 09CA000042<br><br>O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Knox County Common Pleas Court, Case No. 09OT04-0205 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | July 23, 2010 |

APPEARANCES:

| For Plaintiff-Appellant | For Defendant-Appellees |
|---|---|
| SCOTT A. PULLINS<br>Scott A. Pullins Ltd. LPA<br>110 East Gambier Street, Suite 5<br>Mount Vernon, Ohio 43050-1186 | NOEL B. ALDEN<br>Zelkowitz, Barry & Cullers, Ltd.<br>121 East High Street<br>Mount Vernon, Ohio 43050-3401 |

*Hoffman, J.*

**{¶1}** Plaintiff-appellant Saundra Wilhelm appeals the December 4, 2009 Nunc Pro Tunc Journal Entry entered by the Knox County Court of Common Pleas, which ordered her to remove gates across an easement on her property, which easement ran to the benefit of defendants-appellees Larry Shope, et al.

STATEMENT OF THE FACTS AND CASE

**{¶2}** Appellant is the sole owner of approximately 73 ½ acres of real property located on the north and south sides of Paige Road in Knox County, Ohio. Appellees are the sole owners of 100 acres of real property located south of Paige Road in Knox County, Ohio. Appellees' property is landlocked by Appellant's property. In 1941, the then-owner of Appellant's property executed an easement to the then-owner of Appellees' property. The easement was properly recorded.

**{¶3}** The easement roughly parallels the driveway which connects Appellees' land with Paige Road. The written easement required the installation of a fence along the east and west borders of the easement, and gates on each side at the north end of the easement. The gates were to be closed when not in use. In 1991, when Appellant obtained the property, the original gates installed by her grandfather still stood, but were no longer operational. Appellant stated she installed metal gates on both the north and south ends of the easement in 1999, thereby restricting north-south transverse on the easement, after a trespasser was killed on or about the easement. She did this on the advice of counsel and her insurance company. Appellees dispute the date on which Appellant installed the gate on the south end of the easement, asserting such occurred in 2009.

**{¶4}** Appellees use their land for agricultural and recreational purposes. Zoning regulations prohibit the construction of a residence on Appellees' property. According to Appellant, between 1999, and 2008, Appellees always closed the gates, and never objected to having to do so.

**{¶5}** On May 12, 2009, Appellant filed a Complaint in the Knox County Court of Common Pleas, seeking declaratory and injunctive relief to require Appellees to close the two unlocked gates located across the easement when not traversing through said gates. In the alternative, Appellant requested the easement be dissolved as a result of Appellees' failure to maintain the easement. Appelles filed an Answer and Counterclaim for declaratory and injunctive relief to require Appellant to remove the gates. The parties filed cross-motions for summary judgment. Via Nunc Pro Tunc Journal Entry filed December 4, 2009, the trial court ordered Appellant to remove any gates traversing the easement east-west [thereby impairing north-south passage].

**{¶6}** It is from this journal entry, Appellant appeals. In her Brief to this Court Appellant included a Statement of the Assignment of Error, which provides:

**{¶7}** "I. THE TRIAL COURT ERRED WHEN IT HELD THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING THE HISTORY OF PLACEMENT OF THE GATES ACROSS THIS EASEMENT.

**{¶8}** "II. THE TRIAL COURT ERRED BY ADDING LANGUAGE TO THE AGREEMENT WHEN IT HELD THAT THE EASEMENT ENVISIONED GATES TO PERMIT EAST WEST TRANSVERSE OF THE EASEMENT.

**{¶9}** "III. THE TRIAL COURT ERRED BY ADDING LANGUAGE TO THE AGREEMENT WHEN IT HELD THAT THE EASEMENT PROHIBITED PLACEMENT OF GATES AT BOTH ENDS OF THE EASEMENT.

**{¶10}** "IV. THE TRIAL COURT ERRED WHEN IT HELD THAT PLACING UNLOCKED GATES ACROSS THE EASEMENT WOULD BLOCK DEFENDANTS' ACCESS TO THE EASEMENT.

**{¶11}** "V. THE TRIAL COURT ERRED WHEN IT HELD THAT THE DEFENDANTS DO NOT HAVE TO KEEP THE GATES CLOSED EVEN THOUGH IT WAS EXPRESSLY ORDERED BY THE TERMS OF THE EASEMENT.

**{¶12}** "VI. THE TRIAL COURT ERRED WHEN IT ORDERED PLAINTIFFS TO REMOVE THE GATES THAT WERE PLACED AT EACH END OF THE EASEMENT.

**{¶13}** "VII. THE TRIAL COURT ERRED WHEN IT FOUND THAT DEFENDANT HAD NOT ABANDONED THEIR RIGHT TO REQUIRE THE REMOVAL OF THE GATES."

SUMMARY JUDGMENT STANDARD

**{¶14}** Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

**{¶15}** " * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * ”

**{¶16}** Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, 1997-Ohio-259, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-207.

**{¶17}** It is based upon this standard we review Appellant’s assignment of error.

**{¶18}** Although Appellant raises seven points of argument in her “Statement of the Assignment of Error”, she did not separately address each one in her Brief to this Court. Appellant essentially argues the trial court erred in granting summary judgment in favor of Appellees. She sets forth four grounds upon which she predicates this argument.

**{¶19}** First, Appellant maintains the trial court erred in granting summary judgment in favor of Appellees as a genuine and material dispute of fact remains concerning when gates were installed at the north and south ends of the easement. Second, Appellant asserts the trial court went beyond the four corners of the document in its interpretation of the parties' intent. Next, Appellant submits, as the owner of the servient estate, she is entitled to place gates across the easement as the written easement does not specifically prohibited such, and any question as to the reasonableness of the placement of the gates was a question of fact for the jury. Finally, Appellant contends Appellees abandoned any right they had to require the removal of the gates as a result of their failing to object or question Appellant when she installed the metal gate at the north end of the easement in 1999.

**{¶20}** The written easement provides:

**{¶21}** "* * * bounded and described as follows: Commencing on the south side of the said Dowds Road[1] 24 feet east of the east side of the bridge on said road and running thence in a southerly direction to the north line of the land of said party of the second party [Appellees' predecessor in interest]; thence east 18 feet; thence in a northerly direction parallel with the line above described to the south side of the Dowds Road; thence west along the south side of said road 18 feet to the place of the beginning. The strip herein intended to be described is on the present right of way.

**{¶22}** "The said above described tract is for the use of said party of the second part, his heirs and assigns, and his and their agents, servants * * *, at all times, to freely

[1] Paige Road and Dowds Road is the same roadway.

pass and repass, on foot, or with animals and vehicles, to and fro, from said highway to the land of said party of the second part.

**{¶23}** "* * *

**{¶24}** "And the said party of the second part, in consideration whereof, hereby agree that said party of the first part [Appellant's predecessor in interest] * * * may use said way to pass and repass between said highway and other portions of said land of said party of the first part.

**{¶25}** "It is understood and agreed that said Right of Way is to be fenced on each side with a ten wire fence forty-seven inches in height with barbed wire on the top, and there is to be a gate on each side of the Right of Way at the north end thereof. The fence and the gate on the east side of said Right of Way is to be furnished and built by said party of the second part, and the said party of the first part is to furnish the wire and posts and gate for the fence on the west side and the said party of the second part is to do the work in building said fence, free of charge to the party of the first part. After said fences are built, the said party of the first part * * * is to maintain and keep in repair the fence and gate on the west side * * * and the said party of the second part * * * is to maintain and keep in repair the fence and gate on the east side thereof. Said gates shall be kept closed except while persons entitled thereto are passing through the same."

**{¶26}** In its December 4, 2009 Nunc Pro Tunc Journal Entry, the trial court found: "The easement envisions fences running north-south on either side of the easement with gates at the north end of the easement in the fences to allow east-west traverse of the easement." The trial court concluded Appellant blocked Appellees'

access to the easement by placing gates across the north and south ends of the easement. We agree with the trial court.

**{¶27}** We find the written easement is not ambiguous. We also find the trial court's ruling does not go beyond the four corners of the document. The document provides for a fence to run north-south along the east and west sides of the easement as well as "a gate on each side of said Right of Way at the north end thereof." These gates are to be located closer to Paige Road, and are to allow Appellant to pass between her two portions of land located on each side of the easement. The document does not prescribe, as Appellant suggests, gates at the ends of the easement as gates across the north and south ends of the easement would not "allow east-west traverse of the easement". The document also indicates which party is responsible for materials for the construction and subsequent maintenance of "the fence and the gate *on the east side*" and which party is responsible for "the fence and the gate *on the west side*". (Emphasis added). The document does not reference the north end or the south end. Because we find the trial court properly interpreted and applied the unambiguous language of the easement, any alleged dispute as to when Appellant erected the gates restricting north-south transverse of the easement is immaterial.[2] We find the trial court did not go beyond the four corners of the document.

**{¶28}** Based upon the foregoing, we find the trial court properly granted summary judgment in favor of Appellees. Appellant's assignment of error is overruled.

[2] Appellant's use was not of sufficient duration to establish adverse possession.

**{¶29}** The judgment of the Knox County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

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

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

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

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

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| SAUNDRA WILHELM | : | |
| | : | |
| Plaintiff-Appellant | : | |
| | : | |
| -vs- | : | JUDGMENT ENTRY |
| | : | |
| LARRY SHOPE, ET AL. | : | |
| | : | |
| Defendant-Appellees | : | Case No. 09CA000042 |

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

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

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

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