[Cite as *Jeffries Bros. Excavating & Paving, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010-Ohio-4057.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
JEFFRIES BROS. EXCAVATING AND PAVING, INC.	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
	:	Patricia A. Delaney, J.
Plaintiff-Appellant	:	
	:	Case No. 2009 CA 00252
-vs-	:	
	:	
	:	O P I N I O N
WHEELING & LAKE ERIE RAILWAY COMPANY		
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2008 CV 03505
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 23, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
TIMOTHY J. JEFFRIES 437 Market Ave., North Canton, Ohio 44702	ROBERT DAANE 200 Market Ave., North, Ste. #300 Canton, Ohio 44702

Edwards, P.J.

{¶1} Plaintiff-appellant, Jeffries Bros. Excavating and Paving, Inc., appeals from the September 8, 2009, Judgment Entry of the Stark County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee Wheeling & Lake Erie Railway Company.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 4, 2003, appellant purchased property from Republic Technologies International. Appellee is the owner of a railroad line that runs through such property. There existed two (2) grade crossings over the portion of appellee's railroad line that ran through appellant's property. These two crossings were known as the "Trump Crossing" and the "Heckett Crossing." The Trump Crossing was located where the railroad line intersected old Trump Road while the Heckett Crossing was located a third of a mile southeast of the Trump Crossing.

{¶3} Prior to appellant's purchase of the property, a private license agreement between appellee's predecessor and Republic Steel Corporation, which led to the creation of the Heckett Crossing in 1955, had been canceled in 1994.

{¶4} On October 21, 1939, appellee had granted an easement for highway purposes to the Stark County Board of Commissioners. At the time the easement was executed, an "at-grade crossing (referred to as "the Trump Road Crossing") was created. The easement stated as follows:

{¶5} "TO HAVE AND TO HOLD the easement aforesaid, with the appurtenances thereunto belonging to the Grantee, its successors and assigns forever, for HIGHWAY PURPOSES ONLY, but excepting and reserving to the Grantor, its

successors and assigns, the right to maintain and operate on, over and across the premises above described, such railroad tracks and such telephone, telegraph and signal lines as are at present located thereon and from time to time hereafter to construct, maintain and operate additional railroad tracks (not exceeding the number permitted by law) and additional telephone, telegraph and signal lines on, over and across said premises; provided, however, that if the Grantee, successors or assigns, shall at any time cease to use said premises for HIGHWAY PURPOSES ONLY, or shall occupy or use or permit the same to be occupied or used for any other purposes, then the easement herein granted shall forthwith cease and determine." (Emphasis added.)

{¶6} At the time of the easement was executed, old Trump Road intersected appellee's railroad line at grade.

{¶7} In 1999, the Board of Commissioners relocated Trump Road. Pursuant to a Resolution dated December 6, 1999, and recorded on January 4, 2000, the Board of Commissioners vacated a portion of Trump Avenue, N.E. in order to relocate Trump Avenue. The Resolution stated in relevant part, as follows:

{¶8} "3) As now configured, the portions of Trump Avenue NE located in part of the Northwest quarter of Section 01, Canton Township serves no public purpose.

{¶9} "4) Upon the completion of vacation proceedings and as a result thereof, no parcel of land abutting the portions of Trump Avenue NE located in part of the Northwest quarter of Section 01, Canton Township will be denied access to a public road.

{¶10} "5) It will be for the public convenience and welfare for the portions of Trump Avenue NE located in part of the northwest Quarter of Section 01, Canton Township to be vacated.

{¶11} "6) This Board finds that it is of the opinion that the vacation is not of sufficient importance to cause compensation to be paid from the treasure therefore.

{¶12} "7) Any owner of abutting property as a result of the vacation incurs no damages and therefore no compensation is due any abutting owner.

{¶13} "BE IT FURTHER RESOLVED:

{¶14} "8) That the portions of Trump Avenue NE located in part of the Northwest Quarter Section 01, Canton Township as described in Exhibit 'A' and as further shown in the vacation plat marked as Exhibit 'B' shall cease to exist as a public roadway but shall be subject to all existing utility easements." (Emphasis added.)

{¶15} On August 12, 2008, appellant filed a verified complaint for injunctive and declaratory relief against appellee. Appellant, in its complaint, alleged that at the time it purchased its property, there were two grade crossings (the Trump Crossing and the Heckett Crossing) over the portion of appellee's railroad line that ran through the same. Appellant, in its complaint, also alleged that the Heckett Crossing was not closed and removed until after appellant purchased its property and that such crossing was used by appellant as its only means of access to approximately six acres of its property. The six acres are bounded on the east side by appellee's railroad line and a ditch line, on the south by a neighboring property owner and on the north and west side by a creek. Appellant, in its complaint, alleged that "without access to said 6 acres over the Hecket[1] Crossing the Plaintiff is unable to make any use of said land." Appellant also alleged

[1] Hecket is also spelled Heckett throughout the record.

that, on August 15, 2008, appellee planned to remove and close the Trump Crossing and that without access over such crossing, appellant would not be able to access approximately 50 acres of its property without construction of an alternate drive off of Trump Road.

{¶16} Appellant, in its complaint, asserted that it had the right to use the two crossings over appellee's railroad because one of the crossings was a former public road that had not been vacated. Appellant also asserted, in part, that it had an easement to use the Trump Road crossing "as a necessary means of access to its property", and that it had a right to a private crossing over the Trump Road and Hecket Road crossings pursuant to R.C. 4955.27 through 4955.29.

{¶17} On August 12, 2008, appellant filed a Motion for a Temporary Restraining Order and Preliminary Injunction restraining appellee from removing the grade crossing located adjacent to appellant's property at what was formerly Trump Road. Pursuant to a Judgment Entry filed on September 3, 2008, the trial court denied appellant's Motion for Temporary Restraining Order following an evidentiary hearing. On October 1, 2008, appellant withdrew its Motion for a Preliminary Injunction.

{¶18} Thereafter, on June 1, 2009, appellee filed a Motion for Summary Judgment. As memorialized in a Judgment Entry filed on September 8, 2009, the trial court granted such motion.

{¶19} Appellant now raises the following assignments of error on appeal:

{¶20} "I. THE TRIAL COURT ERRED IN DETERMINING THAT THE PROVISIONS OF ORC §§ 4955.27 TO 4955.29 PROVIDE A RIGHT TO PRIVATE

CROSSINGS FOR FARMING PURPOSES ONLY AND NOT INDUSTRIAL PURPOSES.

{¶21} "II. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF'S COMPLAINT WAS MOOT DUE TO THE INSTALLATION OF [AN] ALTERNATE DRIVE.

{¶22} "III. THE TRIAL COURT ERRED IN FINDING THAT THE TRUMP CROSSING WAS VACATED BY THE DECEMBER 6, 1999 RESOLUTION OF THE STARK COUNTY COMMISSIONERS."

I

{¶23} Appellant, in its first assignment of error, argues that the trial court erred in holding that the provisions of R.C. 4955.27 through 4955.29 are limited to private crossings for agricultural use and do not apply to a private crossing for industrial purposes. We disagree.

{¶24} R.C. 4955.27 states as follows: "When a person owns fifteen or more acres of land in one body through which a railroad passes, which land is so situated that he cannot use a crossing in a public street, lane, road, or other highway in going from his land on one side of the railroad to that on the other side without great inconvenience, at his request the company or person operating such railroad, at the expense of such company or person shall, within four months after such request, construct a good and sufficient private crossing across such railroad and the lands occupied by the company, between the two pieces of land to enable such landowner to pass with a loaded team and over which he may go at all times when such railroad is

not being used at the crossing, or so near to it as to render passing thereat dangerous." (Emphasis added).

{¶25} In the case sub judice, appellant argues that it has established its right to a private crossing under R.C. 4955.27. Appellant notes that its property is well over fifteen acres and that the Heckett Parcel cannot be accessed except by crossing appellant's rail line.

{¶26} The Eighth District Court of Appeals addressed whether or not General Code Section 8858, which is now R.C. 4955.27, compelled railways to construct crossings for industrial purposes in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Bradford* (1919), 30 OCA 40, 45 OCC 638. In such case, a landowner sought to use a railway crossing for industrial purposes. In its analysis, the court noted that in 1859, when it was first passed, General Code Section 8858 stated, in relevant part, as follows: "…Any person or persons desiring a private crossing or crossings and cattle guards,…shall be responsible for one-half the expense of constructing and maintaining same." The court further noted that in 1874, General Code Section 8858 was amended to the following preamble form of recitation:

{¶27} "'Any farmer or person owning fifteen or more acres of land in one body, through which such railroad may or does pass, and which is so situated that the owner thereof can not (sic) use one of said crossings in a public street, road, lane or highway, over said railroad in passing from his land on one side of said railroad to that on the other without great inconvenience,'..."

{¶28} The court also noted that in 1880, the word "farmer" was omitted "probably in the interest of brevity and word-compression." Id at 639. The General Code Section, as it existed at the time the case was decided, stated as follows:

{¶29} "When a person owns fifteen or more acres of land in one body, through which a railroad passes, and which is so situated that he can not (sic) use a crossing in a public street, lane, road or other highway, in going from his land on one side of the railroad to that on the other side without great inconvenience, at his request, and within four months thereafter, the company or person operating it, at the expense of such company or person shall construct a good and sufficient private crossing across such railroad and the lands occupied by the company, between the two pieces of land to enable such landowner to pass with a loaded team, and over which he may go at all times when such railroad is not being used at the crossing, or so near to it as to render passing thereat dangerous. Section 8858. G.C."

{¶30} In holding that General Code Section 8858 did not apply to tracts of land for industrial use, the court, in the *Bradford* case, stated, in relevant part, as follows:

{¶31} "Upon a full consideration of the language of this enactment, in the successive stages of its development, the purposes we think it was intended to subserve, (sic) and the public policy underlying it, we have reached a substantial agreement with the plaintiff's contention that the legislative end in view was a farm crossing. The amount of land designated as the least that could be serviced by the crossing would, it appears to us, be quite irrational if an industrial use was contemplated by it. Service tributary to a tract as small as fifteen acres would take care of the gardener or trucker, while the large farmer of course would share in it, and the well-

known policy of the state to encourage agriculture would be promoted by the legislation." Id at 640.

{¶32} We concur with the decision reached in such case. As is stated above, R.C. 4955.27 refers to a "loaded team." Such phrase clearly refers to an agricultural usage rather than an industrial one.

{¶33} We note that appellant, in its brief, cites to *The Mitchell & Bowland Lumber Co. v. The Wabash R.R. Co.* (1897), 6 Ohio Dec. 135, 3 Ohio N.P. 231, 1897 WL 1478. In such case, a judge from the Lucas County Court of Common Pleas stated that he saw "no support" for the position that what is now R.C. 4955.27 was intended only to apply to farm crossings. We note that such case was affirmed by the Ohio Supreme Court in 1898 without opinion. See *Railroad Co. v. Mitchell & Rowland Lumber Co.*, 59 Ohio St. 607, 54 N. E. 1107. Thus, it is unclear what was the basis for the court's decision. Moreover, the headnote in the *Mitchell* case states as follows:

{¶34} "A landowner has a right to a private crossing where his land lies on both sides of the railroad, and he has no practicable access from one side to the other over any public crossing, and he has not been compensated for the loss of such access."

{¶35} The implication is that the landowner in such case had access and then lost the same. In contrast, in the case sub judice, the record reveals that the Heckett Crossing was cancelled in 1994 and the Trump Crossing ceased to exist in 1999. Thus, at the time appellant purchased its property, it did not have access via either of the same.

{¶36} Finally, we note that the Ohio Supreme Court, in G*ratz v. Lake Erie & W.R. Co.* (1907), 76 Ohio St. 230, 81 N.E.2d 239 stated in the syllabus that "Sections

3327 and 3328, Rev. St.1892, requiring the railroad company to construct a farm crossing for the convenience of an owner whose land lies on both sides of its road, apply to cases where lands are in one ownership…." (Emphasis added). We further note that the court, in *S & S Drive In & Carry Out, Inc. v. Norfolk* (March 31, 1986), Lawrence App. No. 1775, 1986 WL 4216, noted that R.C. Section 4955.27 provided a private crossing for the use of farmers. Id. at 3.

{¶37} Based on the foregoing, we find that the trial court did not err in holding that the provisions of R.C. 4955.27 through R.C. Section 4955.29 are limited to private crossings for agricultural use and do not apply to a private crossing for industrial purposes.

{¶38} Appellant's first assignment of error is, therefore, overruled.

II

{¶39} Appellant, in its second assignment of error, argues that the trial court erred in holding that appellant's complaint was moot.

{¶40} The trial court, in its September 8, 2009 Judgment Entry, found that appellant's arguments were moot "as a new access point or alternate route to the subject property has already been constructed by Plaintiff while the matter was pending." Appellant now argues that the new access point does not afford appellant access to the Heckett parcel and that, therefore, appellant can still meet the requirements of R.C. 4955.27.

{¶41} Based on our disposition of appellant's first assignment of error, appellant's second assignment of error is moot.

III

{¶42} Appellant, in its third assignment of error, maintains that the trial court erred in finding that the Trump Crossing was vacated by the December 6, 1999, Resolution of the Stark County Commissioners. We disagree.

{¶43} As is stated above, the easement granted to the Stark County Commissioners in 1939 stated that the easement was for highway purposes only and that "if the Grantee, successors, or assigns, shall at any time cease to use said premises for HIGHWAY PURPOSES ONLY, or shall occupy or use or permit the same to be occupied or used for any other purposes, then the easement herein granted shall forthwith cease and determine." Pursuant to a Resolution dated December 6, 1999, old Trump Avenue was vacated as a public highway. Because the Board of Commissioners vacated the same, the easement ceased to exist. We find, therefore, that the trial court did not err in finding that the Trump Crossing was vacated by the December 6, 1999 Resolution of the Stark County Commissioners.

{¶44} Appellant's third assignment of error is, therefore, overruled.

{¶45} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/d0517

[Cite as *Jeffries Bros. Excavating & Paving, Inc. v. Wheeling & Lake Erie Ry. Co.*, 2010-Ohio-4057.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JEFFRIES BROS. EXCAVATING AND PAVING, INC.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
WHEELING & LAKE ERIE RAILWAY COMPANY	:	
Defendant-Appellee	:	CASE NO. 2009 CA 00252

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES