

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM ROUBANES

Plaintiff-Appellee

-vs-

NILO BROWN, INDIVIDUALLY AND
AS TRUSTEE OF THE BROWN
SHAFFER LIVING TRUST

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 15CA05

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Holmes County Court
of Common Pleas, Case No. 10CV152

JUDGMENT:

Affirmed in part; Reversed and Remanded
in part

DATE OF JUDGMENT ENTRY:

November 30, 2015

APPEARANCES:

For: Plaintiff-Appellee

SARAH BAKER
225 N. Market Street
Box 599
Wooster, OH 44691

For: Defendant-Appellant

GRANT MASON
88 S. Monroe Street
Millersburg, OH 44654

Gwin, P.J.

{¶1} Appellant appeals the January 29, 2015 and March 10, 2015 judgment entries of the Holmes County Court of Common Pleas.

Facts & Procedural History

{¶2} In June of 1981, Richard and Fay Porter granted an easement to Roberta Long so she could access her seventy-five acre parcel over their property. The easement was granted over the existing “Old Cabin Road.” On February 14, 1984, the Porters sold their property to appellant, Nilo Brown. Appellant construed a driveway on the property. The driveway crossed the easement, and then joined the easement for a short distance before diverting away.

{¶3} In January of 1991, the Estate of Roberta Long sold her seventy-five parcel to Roman Miller. On April 19, 1991, Roman Miller acquired a 1.5 acre tract adjacent to the seventy-five acre parcel. This acquisition gave Mr. Miller roadway access to his property. However, appellant gave Mr. Miller permission to traverse the driveway on a limited basis after notifying appellant of the intended use. In 1993, Mr. Miller sold his entire parcel to appellee, William Roubanes. Appellee used the driveway for approximately fifteen years. After June 1, 2009, appellant notified appellee orally and via two letters to stop traversing the driveway. Appellee continued to use the driveway.

{¶4} On November 5, 2010, appellee filed a complaint against appellant, claiming easement by estoppel and easement by necessity. Appellee sought a declaration that the easement followed “Old Cabin Road.” On January 10, 2011, appellant filed an answer and a counterclaim, alleging appellee trespassed on his

property. At the conclusion of a bench trial, appellee dismissed his claim for easement by necessity. By decision and judgment entry filed September 6, 2011, the trial court found in favor of appellee on his claim for easement by estoppel and permanently enjoined appellant from interfering with appellee's use of the easement.

{¶5} Appellant filed an appeal of the trial court's decision, arguing the trial court erred in determining there existed an easement by estoppel. In *Roubanes v. Brown*, 5th Dist. Holmes No. 11CA019, 2012-Ohio-1933, this Court found that appellee "clearly had a prescriptive easement by deed via Old Cabin Road." However, we reversed and remanded the judgment entry of the trial court, finding that the trial court erred in finding an easement by estoppel.

{¶6} Upon remand, the parties filed briefs with regards to the remaining issues before the trial court. In his brief, appellant argued the trial court should enter final judgment stating that appellee has an easement across appellant's property that follows the path established by Holmes County Official Record Volume 20, pages 653-658 and later more accurately set forth in the Don Baker Survey that was introduced as evidence at the bench trial. Appellee argued that the 1986 survey submitted at the bench trial was a survey of the driveway, not of the easement, and such an interpretation runs contrary to the opinion of a professional surveyor, strays from the existing road bed, and would require appellee to place his access drive through a stream and along a steep bank not suitable for a road. On July 2, 2013, the trial court entered a judgment entry stating that the injunction and easement by estoppel are vacated and held for naught. Further, that "there exists an easement on the subject premises as found at Volume 200, pages 653-658 of the Official Holmes County records."

{¶7} On August 30, 2013, appellee filed a motion for contempt against appellant. The motion stated that appellant placed a cable across the easement preventing appellee from accessing his property via the easement. Appellant filed a motion to dismiss the motion for contempt on December 5, 2013. The trial court held an evidentiary hearing on the motion to contempt on December 11, 2013.

{¶8} Wade Johnson from the Holmes County Sheriff's Office testified that appellant showed him where Old Cabin Road ran and it is located where the cable was across the road. Further, that there is no distinct path where appellant argues the easement is and there is a clear path where appellee contends the easement is.

{¶9} Don Baker, a professional land surveyor, testified that the previous survey did not survey the easement at issue here, but was a survey of the driveway. Baker stated that they did not do any measuring with regarding to the easement at issue. Baker completed a retracement survey in order to retrace Old Cabin Road by physical evidence. Baker testified that the retracement survey contains the correct information as to where the easement is located and it is the path appellee claims is the easement. Appellee introduced the retracement survey into evidence at the contempt hearing. Bob Kasner testified that he did not recall why he was asked to the original survey in 1986.

{¶10} Appellee testified that appellant had shown him the existing path between the parties and stated it was Old Cabin Road.

{¶11} Appellant testified that he did put a cable across the middle path. Further, that, during the judicial view in the trial in this case, he walked up the mowed path and told the Court that it was the Old Cabin Road.

{¶12} The trial court issued an order on January 29, 2015. The trial court granted appellee's motion for contempt and found appellant violated the July 2, 2013 judgment entry by bolting a cable across Old Cabin Road. Further, that a "metes and bounds description of the Cabin Road, as it is discussed in Volume 220, P. 653-658 of the Official Holmes County Records, is provided in the Baker Retracement Survey that Plaintiff Roubanes introduced into evidence during the contempt hearing." The trial court stated that appellant is prohibited from interfering with appellee's use and development of the Old Cabin Road, as defined by Volume 220, p. 653-658 of the Official Holmes County Records and the Baker Retracement Survey. The trial court scheduled a further hearing on attorney fees for March of 2015.

{¶13} The trial court issued a judgment entry on March 10, 2015. The trial court sentenced appellant to thirty (30) days in the Holmes County Jail and imposed a fine of \$250 plus court costs related to the contempt. The trial court further provided that, should appellant seek to purge his contempt he should: pay the court costs in the action, pay attorney fees in the amount of \$21,000, pay expert fees of \$750 to Attorney Reynolds, and request a modification/purge order from the trial court.

{¶14} Appellant appeals the January 29, 2015 and March 10, 2015 judgment entries of the Holmes County Common Pleas Court and assigns the following as error:

{¶15} "I. THE TRIAL COURT ERRED BY HOLDING APPELLANT IN CONTEMPT AS IT DID NOT HAVE JURISDICTION TO CHANGE THE LOCATION OF THE "CABIN ROAD" EASEMENT THAT WAS PREVIOUSLY DETERMINED IN THE DECLARATORY JUDGMENT ACTION.

{¶16} “II. THE TRIAL COURT ERRED BY HEARING NEW EVIDENCE AS TO THE LOCATION OF THE CABIN ROAD EASEMENT AND THEN USING THE NEW EVIDENCE AS THE BASIS FOR A CONTEMPT FINDING.

{¶17} “III. THE DOCTRINE OF RES JUDICATA PROHIBITED THE TRIAL COURT FROM ALLOWING THE APPELLEE TO RE-LITIGATE THE LOCATION OF THE OLD CABIN ROAD EASEMENT.

{¶18} “IV. THE TRIAL COURT ERRED IN FINDING THAT A “CLEAR AND DEFINITE” ORDER WAS VIOLATED AS EVIDENCED BY THE NEED FOR TESTIMONY TO DETERMINE THE LOCATION OF THE EASEMENT THAT WAS THE SUBJECT OF THE CONTEMPT ACTION.

{¶19} “V. THE TRIAL COURT ERRED IN RELOCATING THE LOCATION OF THE CABIN ROAD DESPITE SUBSTANTIAL EVIDENCE THAT THE ORIGINAL 1986 SURVEY WAS ACCURATE.

{¶20} “VI. THE TRIAL COURT ERRED IN PROCEEDING WITH A CONTEMPT ACTION AS NO COURT ORDER WAS IN PLACE THAT COULD BE VIOLATED.”

Civil Contempt

{¶21} The standard of proof in a civil contempt proceeding is by clear and convincing evidence. *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 416 N.E.2d 610 (1980). The determination of “clear and convincing evidence” is within the discretion of the trier of fact. *Id.* We will not disturb a trial court’s decision as against the manifest weight of the evidence if the decision is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Construction Co.* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶22} Our standard of reviewing a court's judgment in a contempt proceeding is the abuse of discretion standard. *State ex rel. Celebreeze v. Gibbs*, 60 Ohio St.3d 69, 573 N.E.2d 62 (1991).

{¶23} For ease of discussion, we will discuss appellant's assignments of error out of order.

IV. & VI.

{¶24} Appellant argues in his fourth and sixth assignments of error that the trial court erred in finding him in contempt because he did not violate a "clear and definite" order of the court. We agree.

{¶25} A party "cannot be found in contempt if the contempt charge is premised on a party's failure to obey an order of the court and the order is not clear, definite, and unambiguous and is subject to dual interpretations." *Woodie v. Patterson*, 5th Dist. Coshocton No. 2013CA0022, 2014-Ohio-3017. It is not a defense for the alleged contemnor to claim there was no intent to violate the court's order; rather, state of mind is irrelevant. *Pugh v. Pugh*, 15 Ohio St. 3d 136 (1984). However, although "general arguments that the alleged contemnor lacked intent or misunderstood the trial court's order are invalid defenses, where the trial court's order is subject to more than one reasonable interpretation, contempt is not the proper remedy." *Rohr v. Williams*, 7th Dist. Mahoning No. 06 MA 171, 2007-Ohio-7207.

{¶26} The trial court's July 2, 2013 judgment entry stated that an easement exists "on the subject premises as found at Volume 200, pages 653-658 of the Official Holmes County records." A metes and bounds description of the easement was not contained in the judgment entry or in the official records. At the hearing on the motion

for contempt, there was testimony regarding the location of the easement. Appellee argued and presented testimony that the easement is the existing path on the property as surveyed by Baker in his Retracement Survey. Appellant argued and presented testimony that Old Cabin Road follows a line placed on the survey done by Kasner, which goes into the creek and up the side of an embankment. The Baker Retracement Survey was introduced into evidence at the contempt hearing.

{¶27} In this case, as evidenced by the need for testimony to determine the exact location of the easement at the December 11th contempt hearing, the trial court's July 2, 2013 judgment entry was subject to dual interpretations and was not definite. In the January 29, 2015 judgment entry, the trial court definitively established the location of the easement as that provided in the Baker Retracement Survey, including a metes and bounds description of the easement. Further, the judgment entry provides that appellant is prohibited from interfering with appellee's use and development of the Old Cabin Road. Thus, it is clear that appellant could be held in contempt for disobeying the January 29, 2015 judgment entry by placing the cable across the road. However, appellant's act of placing the cable across the road occurred in August of 2013, prior to the January 29, 2015 judgment entry that definitively established the location of the easement. Accordingly, we find there is not competent and credible evidence to support the trial court's decision that appellant was in contempt because the July 2013 judgment entry is ambiguous and subject to dual interpretations.

{¶28} Appellant's fourth and sixth assignments of error are sustained.

III.

{¶29} Appellant argues that the doctrine of res judicata prohibited the trial court from allowing appellee to re-litigate the location of the Old Cabin Road easement. We disagree.

{¶30} The doctrine of res judicata precludes “relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.” *State ex rel. Kroger Co. v. Indus. Comm.*, 80 Ohio St.3d 649, 1998-Ohio-174, 687 N.E.2d 768. In order to apply the doctrine of res judicata, we must conclude the following: “(1) there was a prior valid judgment on the merits; (2) the second action involved the same parties as the first action; (3) the present action raises claims that were or could have been litigated in the prior action; and (4) both actions arise out of the same transaction or occurrence. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995).

{¶31} In this case, at the initial trial, the issue was whether appellee was entitled to an easement by estoppel over appellant’s driveway. The specific location of the Old Cabin Road easement was not “actually and necessarily litigated.” The findings of fact appellant cites do not contain a conclusive determination that the Old Cabin Road follows any particular path. Res judicata does not “apply if the issue at stake was not specifically decided in the prior proceeding.” *State ex rel. Kroger Co. v. Indus. Comm.*, 80 Ohio St.3d 649, 1998-Ohio-174, 687 N.E.2d 768.

{¶32} Appellant’s third assignment of error is overruled.

I. & II.

{¶33} In contrast to his assertions in Assignments of Error IV and VI that the judgment entries of the trial court were vague and ambiguous, appellant argues in his first and second assignments of error that the trial court did not retain jurisdiction to expand on its clearly defined easement and erred in hearing new evidence as to the location of the Old Cabin Road easement because its previous entries were definite as to the location of the easement. We disagree. On remand, the route of the Old Cabin Road easement became an issue for the first time in the case. Based upon our discussion in Assignments of Error IV and VI, we overrule appellant's first and second assignments of error.

V.

{¶34} Appellant argues that appellee failed to present sufficient evidence to show that the original survey of the Old Cabin Road was incorrect. Appellee argued at the contempt hearing that the easement is the existing path on the property as surveyed by Baker in the Retracement Survey. Appellant argued at the contempt hearing that Cabin Road follows a line placed on a survey done by Bob Kanser in 1986, which goes into the creek and up the side of an embankment.

{¶35} "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." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). We are not fact finders; we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base his or her

judgment. *Peterson v. Peterson*, 5th Dist. Muskingum No. CT2003-0049, 2004-Ohio-4714.

{¶36} We disagree with appellant. The Retracement Survey, introduced into evidence at the contempt hearing by appellee, indicates that physical evidence was used to determine where the old road was located and where it could not have been. The Retracement Survey also contains a metes and bounds description of the easement. Johnson testified that appellant showed him where the Old Cabin Road ran and it is where the cable was across the road. Baker testified that the first survey that appellant relies on was not a survey of the easement at issue here, but was an easement of the driveway. Further, that his Retracement Survey correctly states where the easement at issue is located. Appellee testified that appellant showed him the existing pathway between the parties and it was the Old Cabin Road easement. Bob Kasner stated that he did not recall why he was asked to do the original survey in 1986. Appellant testified that he did put a cable across the middle path. Further, that, during the judicial view in the trial in this case, he walked up the mowed path and told the Court that it was the Old Cabin Road.

{¶37} Based upon the evidence presented, we find that the trial court did not err in finding in its January 29, 2015 order that a “metes and bounds description of the Cabin Road, as it is discussed in Volume 220, P. 653-658 of the Official Holmes County Records, is provided in the Baker Retracement Survey that Plaintiff Roubanes introduced into evidence during the contempt hearing” and that “appellant is prohibited from interfering with appellee’s use and development of the Cabin Road, as defined by

Volume 220, p. 653-658 of the Official Holmes County Records and the Baker Retracement Survey.”

{¶38} As detailed above, the judgment entries previous to the January 29, 2015 judgment entry were ambiguous as to the exact location of the easement and thus the trial court could not properly find appellant in contempt of those orders. However, at the contempt hearing, appellee provided clear and convincing evidence as to the precise, unambiguous location of the Old Cabin Road easement, which the trial court entered in its January 29th judgment entry.

{¶39} We note that our ruling as to Assignments of Error IV and VI does not relieve appellant from complying with the January 29, 2015 order with regards to the exact location of the Old Cabin Road easement and the order that appellant is prohibited from interfering with appellee’s use and development of the Old Cabin Road, as defined by Volume 220, p. 653-658 of the Official Holmes County Records and the Baker Retracement Survey. Appellant cannot rely on the specific ambiguities resolved herein to avoid contempt in the future.

{¶40} Based on the foregoing, we overrule appellant's first, second, third, and fifth assignments of error and sustain appellant's fourth and sixth assignments of error. The January 29, 2015 and March 10, 2015 judgment entries are affirmed in part and reversed and remanded in part for further proceedings in accordance with this opinion.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur