

[Cite as *Kiko v. King Mountain, L.L.C.*, 2015-Ohio-2688.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

RONALD KIKO, et al.	)	CASE NO. 14 MO 9
	)	
PLAINTIFFS-APPELLEES	)	
	)	
VS.	)	OPINION
	)	
KING MOUNTAIN LLC	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. 2013-018
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiffs-Appellees:	Atty. Thomas White Atty. Kristy N. Rothenbuhler White Law Office Co. 107 West Court Street Woodsfield, Ohio 43793
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For Defendant-Appellant:	Atty. John R. Estadt Atty. Kyle W. Bickford Hanlon, Estadt, McCormick & Schramm Co., LPA 46457 National Road West St. Clairsville, Ohio 43950
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JUDGES:

Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: June 29, 2015

[Cite as *Kiko v. King Mountain, L.L.C.*, 2015-Ohio-2688.]  
WAITE, J.

{¶1} Appellant King Mountain, LLC, appeals a decision of the Monroe County Court of Common Pleas ruling that Appellees Ronald Kiko, Edward Block, Jeff Strasser, Warren Menefee, Jerry Crim, Edward Monnot, and James Kiko retained a right to continue using a vacated township road that crossed Appellant's property. The court held that Appellees' continuing right to use this vacated road is based on a "reasonable need" standard. Appellant argues on appeal that there can be no right to use a vacated road unless all of the elements for an easement by necessity are established, and one of those elements is that the use must be strictly necessary. Appellees argue, instead, that the standard is reasonable necessity. Appellees and the trial court are correct that, based on over one hundred years of caselaw, the standard to grant continued use of a vacated or abandoned road is reasonable necessity. Since reasonableness is determined by the trier of fact, the Appellant's only remaining argument is whether the trial court's determination that there was a reasonable necessity for Appellees to continue using the abandoned road was against the manifest weight of the evidence. The record fully supports the trial court's conclusion that Appellees reasonably needed to use the abandoned road that crossed Appellant's property, and the judgment is affirmed.

#### Case History

{¶2} Appellees are the current owners of a 158.29 acre tract in Lee Township, Monroe County, designated as Tract 5, Section 24, Township 2, Range 4 of Lee Township on the current Monroe County plat map. Appellant owns a 98.729 acre tract to the east of and abutting Appellees' property. This is designated as Tract

8 on the plat map. Appellees also own a smaller tract, 40.028 acres, to the east of Appellant's property. Township Road 481 ("T.R. 481") passes through that smaller tract. The smaller parcel is designated as Tract 5.

**{¶3}** For many years, Lee Township Road 476 ("T.R. 476") passed through Appellees' Tract 5, continued east through Appellant's Tract 8, and continued further east through Appellees' Tract 7, finally connecting with T.R. 481. The Monroe County Commissioners vacated T.R. 476 in 1974. Since T.R. 476 was vacated, Appellees' Tract 5 does not currently abut or connect to any public road. Appellant's Tract 8 lies between Appellee's property and the nearest public road.

**{¶4}** Appellees purchased Tract 5 in 1995. Appellant acquired its interest in Tract 8 in 1990. The various Appellee owners have always used abandoned T.R. 476 to access their property, including the section of the abandoned road that crossed Appellant's property. In 2010, a dispute arose between the parties over the use of the abandoned road. A gate was put across the road. Negotiations between the parties failed, and Appellees filed a lawsuit in Monroe County on January 17, 2013. The complaint alleged that Appellees had a prescriptive easement, an easement by implication or necessity, or a retained right to use the abandoned township road across Appellant's property. Appellant filed an answer and counterclaim alleging trespass and damages. Appellees filed to amend the complaint on March 17, 2014 seeking to clarify the nature of the retained right to use the abandoned road and to present a claim for damages. The court accepted the

amended complaint on March 28, 2014. The case was heard in a bench trial on April 3, 2014.

{¶15} The evidence showed that Appellee Ronald Kiko accessed Tract 5 from 1978 through 1995 for hunting and recreation using abandoned T.R. 476 as the exclusive means of access to the property. He testified that any other access would be difficult and expensive to construct due to the hilly terrain. Appellee Ronald Kiko himself maintained the abandoned road over the years so that he could continue using it, cutting brush and even using a bulldozer to keep it clear. He used horses and many types of vehicles on the road, including four-wheelers, a land rover, a jeep, and a pickup truck. After purchasing the property in 1995, Appellee Ronald Kiko continued to maintain and make improvements to the road by fixing slips, installing a culvert, and putting in waterways to keep the road from washing out in the rain. He continued to use this access road until he was blocked by Appellant in 2010.

{¶16} Appellee Kiko testified that there had been another township road going north from the property, but that it had been vacated and covered with a lake many years ago. When he first saw the lake in 1978, it appeared to be well-established. This former road to the north was identified as T.R. 475. This road was vacated by the county in 1974 at the same time T.R. 476 was vacated.

{¶17} Appellee Kiko testified that if he could not use old T.R. 476 across Appellant's property, his parcel would be landlocked and unusable. He testified the terrain of the area is very steep and hilly. Any other means of access would be

extremely difficult and expensive to construct, and would result in forcing him to trespass on someone else's property.

**{¶8}** Mr. Glenn Bayes testified that his sister, Lucille Ruble, owned Tract 5 prior to Appellees, and that he had been on the property in the 1950s and 1960s to hunt and help his sister. He testified that the only means of access was T.R. 476. He testified that if T.R. 476 was not available, the only other access would have to be by helicopter.

**{¶9}** Appellant acquired Tract 8 from Frank J. and Susan Hollo in 2012. Appellant is a limited liability company formed by Mr. Hollo. The Hollos obtained the property from Jeffrey L. and Christine L. Buckey in 1990. Mr. Hollo testified that he permitted Appellee Ronald Kiko to use old T.R. 476 on his property so that he could have access to Tract 5.

**{¶10}** The trial court issued its ruling on May 21, 2014. The court determined that there was no easement by prescription because there was no adverse use for 21 years. The court held that there was no easement by implication because there was no unity of ownership that could be traced between Tract 5 and Tract 8. The court held that there was no easement by necessity because there was no unity of ownership and because there was no strict necessity proven for use of the easement. However, the court found that there was a retained right to continue using vacated T.R. 476 because Appellees had no other reasonable access to Tract 5, and because reasonable need rather than strict necessity governs whether such a right will be granted. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING PLAINTIFFS ESTABLISHED A “RETAINED RIGHT” OVER A TOWNSHIP ROAD WHICH WAS VACATED TWENTY-ONE (21) YEARS PRIOR TO PLAINTIFFS’ ACQUIRING OWNERSHIP OF THEIR PROPERTY.

{¶11} Appellant argues that the trial court misapplied the caselaw dealing with access rights over abandoned or vacated county and township roads. Appellant correctly states that he is challenging the trial court's interpretation of a question of law, and that questions of law are reviewed *de novo* on appeal. *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 64 Ohio St.3d 145, 147, 593 N.E.2d 286 (1992).

{¶12} Appellees rely primarily on *McQuigg v. Cullins*, 56 Ohio St. 649, 47 N.E. 595 (1897), for the principle that when a county or township road is closed, abandoned or vacated, abutting landowners may retain rights in the road easement. This is the same case relied on by the trial court. Under *McQuigg*, landowners who have no other reasonable access to their property may continue to use an abandoned or vacated road and no one, including the county, township or other abutting landowners, may block such use of the abandoned road. *McQuigg* held that the purpose of formally vacating a road was to relieve the county or township from having to maintain the road, but that vacating the road does not deprive abutting landowners of all their rights over the road when it is reasonably necessary for the landowner to use it to access their property.

{¶13} Appellant cites to *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N.E. 341, (1901), for the principle that there is no right of access to an abandoned road if there is another road available as an alternative route. Appellant contends that if there is any alternate route available, the *McQuigg* holding does not apply. This is an incorrect interpretation of *Kinnear Mfg. Co.*, which held that:

Abutting owners on a vacated portion of a street, would not have the right, by reason of the vacation, to isolate an owner of property on the unvacated portion. Such an owner would still have an easement, or right of way, over the vacated portion to a point where he could have reasonable access to other public ways. *McQuigg v. Cullins*, 56 Ohio St., 649, 654, 47 N. E. 595. In this case the vacated portion was the only reasonable means of access which the plaintiff had to his farm; and this fact constituted the ground of the relief granted.

*Id.* at 282-283.

{¶14} The Court in *Kinnear Mfg. Co.* applied the same “reasonable need” standard as in *McQuigg*. This is not a “strict necessity” standard, which applies in determining the existence of an implied easement of necessity. The trial court did not grant an easement of necessity in this case because it did not find there was a strict necessity for an easement, but did grant a retained right to use the vacated road due to reasonable necessity.

Easements implied of necessity are not favored because, like implied easements generally, they are “in derogation of the rule that written

instruments shall speak for themselves.” *Ciski v. Wentworth* (1930), 122 Ohio St. 487, 172 N.E. 276, paragraph one of the syllabus. Thus, to justify the implication of an easement by necessity, strict necessity is required. An easement of necessity will not be implied where there is an alternative outlet to a public way, even though it is less convenient or more expensive. *Trattar v. Rausch* (1950), 154 Ohio St. 286, 95 N.E.2d 685 [43 O.O. 186], paragraph eight of the syllabus.

*Tiller v. Hinton*, 19 Ohio St.3d 66, 69, 482 N.E.2d 946 (1985)

{¶15} It is worth noting that the concepts of strict necessity versus reasonable necessity both exist when dealing with implied easements, despite Appellant's insistence that only the strict necessity standard applies. There are two basic types of implied easements: easements implied from prior use, and easements of necessity. An easement implied by prior use has four elements: (1) a severance of the unity of ownership in an estate; (2) the use giving rise to the easement shall exist before severance takes place, and shall have continued and been obvious or manifest for so long as to show that it was meant to be permanent; (3) the easement shall be *reasonably* necessary to the beneficial enjoyment of the land granted or retained; (4) the servitude shall be continuous rather than temporary or occasional. *Ciski v. Wentworth*, 122 Ohio St. 487, 172 N.E. 276 (1930), paragraph one of the syllabus; see, also, *Trattar v. Rausch*, 154 Ohio St. 286, 95 N.E.2d 685 (1950), paragraph five of the syllabus; *Yowonske v. MDB Construction Co.*, 7th Dist. No. 09 BE 10, 2010-Ohio-4185, ¶19. On the other hand, an easement implied of necessity



requires slightly different proof, and will not be granted “where there is available another way of ingress and egress to and from the land involved, even though such other way is less convenient and would necessitate the expenditure of an appreciable amount of labor and money to render it serviceable.” *Trattar* at paragraph eight of the syllabus. This is the “strict necessity” standard.

{¶16} The reason for making these distinctions here is simply to show that Appellant is arguing for the adoption of a uniform “strict necessity” standard covering all implied easements. However there have always been at least two standards, a reasonable necessity and a strict necessity standard, when dealing with implied easements under Ohio law. *McQuigg* created yet a third type of implied easement when an abandoned roadway is involved. In determining this type of easement, we use the reasonable necessity standard.

{¶17} The *McQuigg* holding and analysis has stood the test of time. We have cited it as authority in 1979 in *Bucher v. Hubbard*, 7th Dist. No. 411, 1979 WL 207373. The *McQuigg* standard was applied as recently as 2003 in *J.J. Detweiler Enterprises, Inc. v. Washington Cty. Commrs.*, 4th Dist. No. 02CA44, 2003-Ohio-4258. Detweiler filed a lawsuit to reverse a 1975 decision of the Washington County Commissioners to vacate a township road that abutted his property. Detweiler argued that, regardless as to whether the vacation of the road was proper, he retained the right to use the abandoned road pursuant to *McQuigg*. The Fourth District Court of Appeals agreed that *McQuigg* was still good law, but determined that

Detweiler had actually lost his retained right by way of adverse possession over the ensuing years. However, in addressing *McQuigg*, the court held that:

Detweiler is correct in its assertion that upon vacation of a public road, an individual landowner may retain a private right of access as a result of reasonable necessity. In *McQuigg*, the Ohio Supreme Court addressed a similar situation, wherein the township trustees vacated a public road. Cullins, an abutting landowner, appeared at the hearing and entered no objection. Subsequently, Cullins, who had used the road to access his property for over 30 years, sought an injunction to prevent the trustees from closing the road. The Supreme Court held that '[t]he effect of the judgment of the trustees ordering the road vacated, is to relieve the public from any duty to keep it in repair, but it does not authorize the trustees, or anybody else, to close the road up, or obstruct it, and thus deprive Cullins of the right to travel it.' *McQuigg*, 56 Ohio St. at 654, 47 N.E. 595. The Court concluded that Cullins retained this private right of access despite the fact that another, less convenient, route was available to Cullins.

*Id.* at ¶43.

{¶18} The *McQuigg* holding has been applied to similar situations by other courts of appeal as well. *Butzer v. Johns*, 67 Ohio App.2d 41, 43, 425 N.E.2d 932, 934-935 (9th Dist.1979) ("Where, as here, the complainants' land abuts the vacated property, a reasonable need standard, not one of absolute necessity, dictates

whether the complainants merit an easement.”); *Paul v. Wissalohican Camp Co.*, 104 Ohio App. 253, 257, 148 N.E.2d 248, 251 (2d Dist.1957) (“Continuation of the abutting owner's easement after vacation does not depend upon absolute necessity. It is enough that no other road is reasonably suitable to meet the necessities of such owner. Hence the Camp Company is not to be limited to use of its partial access on the west if it is not convenient or practicable except by the expenditure of a large amount of money.”).

{¶19} The trial court in this case applied the correct law, including the reasonable necessity standard, in rendering its decision. There is no merit to Appellant’s argument, here. Appellant's first assignment of error is overruled.

#### ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT DECISION HEREIN IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶20} Appellant's second argument is that the trial court's decision was against the manifest weight of the evidence. In civil cases, a judgment that is supported by some competent, credible evidence will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. In reviewing a manifest weight argument, “[t]he determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal[.]” *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984). Thus, there is a

presumption that the findings of fact as determined by the trier of fact are correct. *State ex rel. Pizza v. Strope*, 54 Ohio St.3d 41, 46, 560 N.E.2d 765 (1990).

{¶21} Appellant presents two theories in this argument. The first is that the evidence did not show that there were no other reasonably available means of ingress and egress to Appellees' property. Reasonableness is determined by the trier of fact, in this case the trial judge, since this was a bench trial. "Whether a person's actions are reasonable or unreasonable is generally a question of fact to be determined by the trier of fact." *Hunker v. Whitacre-Greer Fireproofing Co.*, 155 Ohio App.3d 325, 2003-Ohio-6281, 801 N.E.2d 469, ¶34 (7th Dist.).

{¶22} Appellant cites a case from the Ninth District Court of Appeals for the proposition that any retained right to use an abandoned roadway must be determined as of the time the street was vacated. *Lord v. Wilson*, 9th Dist. No. C.A. NO. 1354, 1985 WL 10675, \*2. Assuming *arguendo* that this is a valid rule to apply to this type of easement, the record supports the trial court's judgment and not Appellant's argument. Mr. Glenn Bayes testified that he was familiar with and began visiting the property as early as the 1950s, and at that time the only access to it was by T.R. 476. Both Mr. Bayes and Appellee Ronald Kiko testified that the terrain is very steep and hilly and that any other means of access apart from T.R. 476 would be extremely difficult and expensive to construct, implying that no such roadway, driveway, path or trail exists. Appellee Kiko also testified that there is a lake blocking the other abandoned road, T.R. 475. It was his impression that in 1978, when he first saw the lake, it had been there a long time. There is nothing in the record to suggest any

other means of access to the property at or near the time T.R. 476 and T.R. 475 were abandoned, and since there is no proof that T.R. 475 was ever a viable alternative, the evidence weighs heavily in favor of the conclusion the former T.R. 476 provides the only reasonable means of access.

{¶23} Appellant argues that the mere existence of another abandoned road, T.R. 475, rebuts any possible need to use the former T.R. 476. In so doing, Appellant still relies on the “strict necessity” concept, which we have determined does not apply in this case. It is clear from the record that Appellees did not use, and more likely, could not use, the former T.R. 475, and there is evidence that a significant portion of the roadway now lies beneath a lake north of Appellees’ property. If Appellant desired to prove that this was a viable alternate route at trial, it was required to present evidence of this fact at trial. An important deficiency in Appellant’s argument is that none of the landowners to the north of Appellees’ property are involved in this case, and Appellant did not attempt to join those parties to the lawsuit. These parties were necessary to establish Appellant’s argument, since Appellant seeks to have an easement established on the parcels of these unnamed property owners. Appellant also relies on its exhibit G, the Monroe County Commissioners’ resolution from October 18, 1974, abandoning both Township Road 475 and 476. Other than evidencing the fact the roads were abandoned, the document does not support Appellant’s argument. Whether use of one abandoned road would have been more reasonable than another was a factual matter for the trial

court to decide. There are no facts in the record in favor of using the alternate route and considerable facts weighing against such use.

{¶24} Likewise, Appellant's reference to numerous logging roads in the area does not prove that any such roads were usable in 1974 or are usable now, or that they provide reasonable access from Tract 5 to a currently open public road. Appellant again seems to believe that the mere possibility that alternatives exist proves its case, but this stems from the continuing assumption that strict necessity governs this matter. Under *McQuigg*, reasonable necessity determines whether a landowner can continue to use an abandoned road, and Appellees established the reasonableness of their need. Even if Appellant rebutted this evidence and presented multiple alternative routes, it was still up to the trier of fact to weigh the evidence to determine reasonableness. Apparently, the trial judge believed Appellees' evidence of reasonable need in this case.

{¶25} Appellant's second argument is that the easement granted by the court was excessive. Appellant argues that there was no proof that the former road was eighteen-feet wide, and that the court should have granted only a six-foot easement. Determination of the width of an undefined easement is a matter left to the discretion of the trial court, and such a decision is reviewed only for abuse of discretion. *Gulas v. Tirone*, 184 Ohio App.3d 143, 2009-Ohio-5076, 919 N.E.2d 833, ¶33 (7th Dist.); *Dunn v. Ransom*, 4th Dist. No. 13CA837, 2013-Ohio-5116, ¶11. Abuse of discretion connotes more than an error of judgment; it implies that the court's attitude is

unreasonable, arbitrary, or unconscionable. *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, 152, 569 N.E.2d 875 (1991).

{¶26} During the testimony of Appellee Ronald Kiko, the court took judicial notice that county roads are a minimum of thirty feet wide. (Tr., p. 32.) Appellee Kiko testified that he needed eighteen feet of easement to continue using the roadway for the same purposes he has used the road in the past. (Tr., p. 31.) He testified that he drove a pickup truck, tractor, bulldozer, mowers, and small farm equipment on the road. (Tr., pp. 24, 31-32.) Some of these are fairly large vehicles. Appellant's counsel suggested to Appellee Kiko that the road was only twelve feet wide, but Appellee Kiko disagreed and testified that due to slippage the road was wider. (Tr., p. 58.) Numerous photos in the record show a road that is narrower than a two-lane road, but wide enough to accommodate a large vehicle. Nothing in the record indicates that the road was only six feet wide. Based on the evidence in the record, there was no abuse of discretion in the court's conclusion that the easement was eighteen feet wide.

{¶27} The record supports the judgment of the trial court, and Appellant's second assignment of error is overruled.

### ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT LACKED JURISDICTION TO GRANT THE PLAINTIFFS A "RETAINED RIGHT" OVER THE VACATED TOWNSHIP ROAD.

{¶28} Appellant argues that the trial court had no jurisdiction to rule on whether Appellees should have access to an abandoned road because that question was determined during the abandonment proceedings in the 1970s. We first point out that this argument was not raised in the trial court proceedings and is therefore waived for purposes of this appeal. Secondly, Appellant incorrectly assumes that Appellees are challenging the underlying vacation of T.R. 476, but that is not the basis of Appellees' claim nor is it their argument on appeal. They do not seek to have Township Road 476 reopened as a public road. They, instead, seek to retain their private right to use the former road so that they have reasonable access to their property and other publicly accessible roads. This is the right established in the *McQuigg* and related cases. The trial court did not deal with any matter involving the validity of the abandonment or vacation of Township Road 476. Therefore, this jurisdictional argument is without merit.

#### Conclusion

{¶29} Appellant raises three arguments challenging the decision of the trial court establishing an easement over its property at former T.R. 476. Appellant challenges the legal basis for granting such an easement and argues that a strict necessity standard applies to determine if an easement should be granted, but the trial court correctly relied on the reasonable necessity standard found in *McQuigg*. Appellant also challenges the manifest weight of the evidence, but the record shows that it was reasonably necessary for Appellees to use T.R. 476 to access their property, and that the easement was eighteen-feet wide. Finally, Appellant raises a



jurisdictional issue based on the 1974 decision to vacate T.R. 476. It is clear that the trial court was not asked to change or modify that decision in any way, and there is no jurisdictional conflict in this matter. Appellant's three assignments of error are overruled and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.