[Cite as *Tivenan v. Lons*, 2004-Ohio-4975.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

CATHY R. TIVENAN, et al. Appellees v. CHARLES LONS, et al. Appellants	C.A. No. 03CA0147-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 01CIV0284

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BOYLE, Judge.

{¶1} Appellants, Charles and June Lons, appeal from the judgment of the Medina County Court of Common Pleas finding that Appellees, Cathy and Thomas Tivenan, have a valid easement permitting them to use a three-foot strip of Appellants' property. We affirm.

I.

{¶2} On May 22, 2001, Appellees filed an amended complaint in the Medina County Court of Common Pleas seeking to quiet title to a three-foot wide

parcel of land owned by Appellants. Appellants filed a counterclaim asserting that if an easement did exist, it had been extinguished by Appellants' adverse possession of that parcel of land or by abandonment.

{¶3} The above action stems from the following facts. Appellants and Appellees own adjoining parcels of real estate in Lodi, Ohio. A dispute arose as to whether Appellees had the right to use a driveway located between the two parcels. The parties presented evidence to a magistrate on February 27, 2002. The magistrate found in favor of Appellees. Appellants objected to the magistrate's decision on several grounds. Originally, the magistrate's decision granted a fee simple interest in the land to Appellees and stated that Appellees had a valid easement. Upon objection, the trial court sustained Appellants' objections to the extent that the magistrate granted a fee simple interest to Appellees. However, Appellants' additional objections were overruled and the trial court entered judgment in favor of the Appellees on their easement claim and in Appellees' favor with regard to Appellants' counterclaim. Appellants timely appealed. This Court reversed and remanded the case because the trial court failed to consider the transcript of the magistrate's proceedings in ruling on the objections. On remand, the trial court once again entered judgment in favor of Appellees on their easement claim and in favor of Appellees on Appellants' counterclaim. Appellants timely appealed, raising two assignments of error.

II.

ASSIGNMENT OF ERROR I

> "THE COURT ERRED IN FINDING THAT AN EASEMENT EXISTED THAT ENCUMBERED THE DEFENDANTS' PROPERTY. THE JUDGMENT OF THE TRIAL COURT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶4} In their first assignment of error, Appellants contend the judgment of the trial court was against the manifest weight of the evidence. We disagree.

{¶5} When determining whether a judgment in a civil case is against the manifest weight of the evidence, we utilize the same standard of review as in a criminal context. *Frederick v. Born* (Aug. 21, 1996), 9th Dist. No. 95CA006286. In determining whether the judgment of the trial court is against the manifest weight of the evidence,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶6} This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the Appellant. Id. Further, in a civil context, this Court will not reverse if the judgment of the trial court is based upon some competent, credible evidence that speaks to all the essential elements of Appellees' claim. *Morris v. Andros*, 9th Dist. Nos. 21861, 21867, 2004-Ohio-4446, at ¶18.

{¶7} Appellants first argue that if an easement was properly created, it was extinguished by Ohio's Marketable Title Act. However, Appellants never raised this argument at the trial level. Defenses that are not raised in the trial court are normally treated as waived on appeal. *Prudential Property & Casualty Ins. Co. v. Unitary Products Group*, 9th Dist. No. 03CA008244, 2003-Ohio-6585, at ¶23. Appellants contend that this issue is not waived because the lower court must have considered Ohio's Marketable Title Act in order to determine whether an easement existed. In support, Appellants cite *Belvedere Condominium v. R.E. Roark Companies* (1993), 67 Ohio St.3d 274. However, the court in *Belvedere* found that the lower court had to have found that a duty existed in order to conclude that a breach of duty had occurred. Id. Here, that direct line of reasoning was not required by the trial court. At trial, Appellants never presented the argument that any easement that was created was extinguished by the Marketable Title Act. Appellants never asserted before this appeal that the evidence presented by Appellees even raised the issue of extinguishment by statute. As such, we cannot say that a finding by the trial court implicitly contains a finding regarding the applicability of the Marketable Title Act. As such, Appellants' argument that the Ohio Marketable Title Act provides a defense to Appellees' easement has been waived by their failure to raise it at the trial court level. See *Collins v. Moran*, 7th Dist. No. 02CA218, 2004-Ohio-1381, at ¶20.

{¶8} Additionally, Appellants argue that the trial court's judgment is against the manifest weight of the evidence because Appellees did not present evidence that the 1928 deed properly created an easement. Further, Appellants assert that the deeds Appellees submitted to the court were never shown to be in Appellants' chain of title. We disagree with Appellants' contentions.

{¶9} With regard to the chain of title of the deeds, Appellants argue that no evidence was presented that the three deeds presented to the trial court were in Appellants' chain of title. Upon reviewing the record, we note that Appellants raised the issue of chain of title in one sentence in their closing argument to the magistrate. "There was no evidence as to the chain of title." However, Appellants never raised this issue in their objections to the magistrate's decision. As such, Appellant's cannot assign as error the issue of lack of notice on appeal. Civ. R. 53(E)(3)(d).

{¶10} Finally, Appellants claim that Appellees never established that the 1928 deed validly created an easement. That deed reads in pertinent part as follows:

> "It is hereby understood that the above mentioned Grantors does (sic) hereby agree, and does (sic) grant the use for a driveway along the west side of the east part of lot no. 20, said grant not to include over three feet of land on said lot, or not to interfear (sic) with the dwelling on said east part of said lot no. 20."

{¶11} Additionally, Appellees presented a deed from 1939 and their deed from 1999, all of which contain substantially the same easement language.

Appellants presented no evidence to suggest that these deeds were in any way inaccurate. Further, the deeds were admitted into evidence without objection. Therefore, competent, credible evidence was introduced to the trial court that an easement was created. As such, we cannot say that the trial court lost its way in finding that Appellee had a valid easement.

{¶12} Accordingly, Appellants' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE COURT ERRED IN FINDING THAT IF A VALID EASEMENT EXIST[ED] THAT IT HAD BEEN TERMINATED BY THE OPERATION OF LAW."

{¶13} In their second assignment of error, Appellants assert that if a valid easement was previously created, it was terminated by either adverse possession or by operation of law. Appellants assert that the easement was either abandoned by its former holder or in the alternative has been adversely possessed by them and their predecessors for the statutory period required. However, we observe that Appellants have failed to cite any applicable legal authorities to support their contentions.

{¶14} An appellant bears the burden of affirmatively demonstrating error on appeal, and substantiating his or her arguments in support. *Angle v. W. Res. Mut. Ins. Co.* (Sept. 16, 1998), 9th Dist. No. 2729-M; *Frecska v. Frecska* (Oct. 1, 1997), 9th Dist. No. 96CA0086. See, also, App.R. 16(A)(7). Moreover, "[i]f an argument exists that can support this assignment of error, it is not this [C]ourt's

duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. Nos. 18349 and 18673.

{¶15} App.R. 16 provides in pertinent part the following:

> "(A) Brief of the appellant. The appellant shall include in its brief *** all of the following:
>
> "***
>
> "(7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. ***" App.R. 16(A)(7).

{¶16} As such, Appellants have not met their burden to demonstrate error by the trial court with respect to their second assignment of error.

{¶17} Accordingly, Appellants' second assignment of error is overruled.

III.

{¶18} Appellants 'assignments of error are overruled, and the judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

Exceptions.

EDNA J. BOYLE
FOR THE COURT

CARR, P.J.
SLABY, J.
CONCUR

APPEARANCES:

LEE T. SKIDMORE, Attorney at Law, 748 N. Court Street, Medina, Ohio 44256, for Appellants.

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